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De Facto Gag Clauses: The Legality of Employment Agreements That Undermine Dodd-Frank's Whistleblower Provisions

Richard Moberly,* Jordan A. Thomas,** & Jason Zuckerman***

I. Introduction

In 2010, in the wake of the financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act[1] (Dodd-Frank or Act), which established a new whistleblower program for the U.S. Securities and Exchange Commission (SEC or Commission) to more effectively detect, investigate, and prosecute the kind of financial misconduct that has caused repeated and substantial harm to investors.[2] Dodd-Frank's whistleblower provisions implement

* Richard Moberly is the Associate Dean for Faculty and Professor of Law at the University of Nebraska College of Law, where he teaches employment law. He has spoken extensively and published numerous articles on whistleblowing and retaliation. The Secretary of Labor appointed him to serve on OSHA's Whistleblower Protection Advisory Committee in 2012 and reappointed him in 2014.

** Jordan A. Thomas is Chair of the Whistleblower Representation Practice at Labaton Sucharow LLP, New York, NY. He represents federal securities laws whistleblowers internationally. Previously, he served as an Assistant Director in the Enforcement Division of the U.S. Securities and Exchange Commission, where he had a leadership role in the development of the SEC Whistleblower Program.

*** Jason Zuckerman is the founder of Zuckerman Law, where he represents employees and whistleblowers. Previously, he practiced employment law at a national law firm, served as Senior Legal Advisor to the Special Counsel at the U.S. Office of Special Counsel (the federal agency charged with protecting whistleblowers in the federal government) and was appointed by the Secretary of Labor to serve on OSHA's Whistleblower Protection Advisory Committee.

1. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, & 15 U.S.C.).

2. *See* 15 U.S.C. § 78u-6 (2012). Dodd-Frank created a similar program for the Commodity Futures Trading Commission (CFTC). *See* Commodity Whistleblower Incentives and Protection, 7 U.S.C. § 26 (2012). This Article focuses on the SEC Whistleblower Program because of its greater visibility and potential impact; however, the Article's conclusions can be applied equally to the CFTC whistleblower program given the similarity in the programs' statutory and regulatory authority. *Compare* 15 U.S.C. § 78u-6 (2012) *and* 17 C.F.R. § 240.21F.1 et seq. (2013) (SEC Program), *with* 7 U.S.C. § 26 (2012) *and* 17 C.F.R. § 165.1 et seq. *(2013)* (CFTC program).

three incentives to encourage whistleblowers to report securities fraud to the SEC: the availability of substantial monetary awards for reporting,[3] the ability to remain anonymous when reporting to the SEC,[4] and broad protection from employment retaliation.[5] The basic idea of this incentive structure is simple: rewarding and protecting whistleblowers will motivate more individuals to report potentially relevant information about securities violations.[6]

In response, some companies are now seeking to counteract Dodd-Frank by drafting and enforcing a variety of agreements with employees that significantly reduce or eliminate the congressional incentives promoting SEC whistleblowing. These agreements—which seek to alter the statutory risks and rewards of whistleblowing—may have profound consequences not only for current and prospective whistleblowers, but also for the success of the Dodd-Frank whistleblower program itself. The stakes are just as high for employers, who may find themselves facing civil—or, in extreme cases, criminal—liability if they are too aggressive in attempts to shield information from government authorities.

This Article discusses the enforceability of these increasingly prevalent contractual restrictions on whistleblowing, which fall into three broad categories.[7] First, some agreements require an employee to report possible misconduct internally *before* disclosing misconduct to the SEC.[8] Second, some agreements require an employee to waive any monetary award received from blowing the whistle under Dodd-Frank's whistleblower bounty provisions.[9] Both of these types of agreements could significantly limit employees' desire to communicate with the SEC regarding employer misconduct.

In a third type, employers impose general confidentiality provisions in agreements when employment commences or after receiving some benefit, such as a severance package. Although such confidenti-

3. *See* 15 U.S.C. § 78u-6(b) (2012).

4. *See* 15 U.S.C. § 78u-6(d)(2), (h)(2) (2012); 17 C.F.R. §§ 240.21F-7, -9(c) (2013).

5. *See* 15 U.S.C. § 78u-6(h)(1) (2012).

6. Sec. & Exch. Comm'n, Release No. 34-64545, Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, at 101 n.222 (2011) [hereinafter Adopting Release].

7. These examples summarize actual provisions several of the authors and other employment attorneys have frequently seen during the course of representing SEC whistleblowers. *See, e.g.*, Letter from Katz, Marshall & Banks, LLP to the U.S. Sec. & Exch. Comm'n, at 4–6, 8–10 (May 8, 2013), *available at* http://kmblegal.com/wordpress/wp-content/uploads/130508-Letter-to-SEC-Commissioners.pdf (provisions in employee severance and settlement agreements that impede reporting); *see also* Scott Higham & Kaley Belval, *Workplace Agreements Appear to Violate Federal Whistleblower Laws*, Wash. Post (June 29, 2014), http://m.washingtonpost.com/investigations/workplace-secrecy-agreements-appear-to-violate-federal-whistleblower-laws/2014/06/29/d22c8f02-f7ba-11e3-8aa9-dad2ec039789_story.html.

8. Higham & Belval, *supra* note 7.

9. *Id.*; *see also* Letter from Katz, Marshall & Banks, *supra* note 7, at 4–8.

ality agreements are usually not problematic and frequently serve legitimate corporate interests, the potential conflict with Dodd-Frank arises when companies use these types of agreements as the basis for a breach of contract claim against a whistleblower. Employers may argue that the whistleblower violated the confidentiality provision in the process of disclosing possible misconduct to the government. This use of a confidentiality agreement not only punishes an employee after the whistle is blown, but also chills the willingness of employees to blow the whistle in the future due to fear of being sued by a current or former employer.

We label these agreements "de facto gag clauses," and courts, the SEC, and counsel on both sides of the employment bar are grappling with the question of whether they are lawful and enforceable in the face of Dodd-Frank's statutory and regulatory requirements. This determination requires a careful balancing of public, personal, and business interests. While no court has ruled on the legality of de facto gag clauses in the Dodd-Frank whistleblower context, we argue that SEC rules and key principles of contract, qui tam, employment, and securities law strongly suggest that courts will, and should, refuse to enforce agreements that preclude voluntary cooperation with the SEC or materially diminish the whistleblower incentives created by Dodd-Frank.

Part II briefly explains the SEC's Dodd-Frank whistleblower program. Part III examines whether the use of the three categories of contractual restrictions on whistleblowing violate Dodd-Frank's public policy purpose. We conclude that courts would find many currently used provisions unenforceable as against public policy. Part IV proposes practical steps that both employers' and employees' attorneys can take to avoid the risks posed by these provisions and, even more importantly, the specific action that the SEC, as well as the Occupational Safety and Health Administration (OSHA), can take to ameliorate the problems these provisions pose to the effectiveness of the SEC's Dodd-Frank whistleblower program. Given the immediate threat that de facto gag clauses pose to the whistleblower program—even if ultimately found unenforceable by courts—we argue that government agencies should not wait for courts to act. Rather, the SEC and OSHA should immediately act to protect the whistleblower program by clarifying its regulations invaliding agreements that, even indirectly, undermine employees' willingness to disclose wrongdoing to the SEC.

II. The SEC Whistleblower Program

Section 922 of Dodd-Frank created the SEC's current whistleblower program (the SEC Whistleblower Program) as part of Congress's response to the sweeping financial crisis that came to the public's attention in 2008.[10] The SEC Whistleblower Program is a unique blend of approaches taken in previous laws to encourage corporate insiders to report misconduct and to protect them when they do. First, Dodd-Frank adopted a "bounty" model by creating a reward program to incentivize reporting wrongdoing to the SEC.[11] Whistleblowers are eligible to receive a monetary award when they "voluntarily" provide the SEC with "original information" that "leads to successful enforcement" by the Commission, resulting in the recovery of total sanctions in that enforcement action and any related actions that exceed $1 million.[12] If all eligibility criteria are met, the Commission awards the whistleblower an amount equal to ten to thirty percent of the total sanctions collected.[13]

Second, Dodd-Frank incorporates the more commonplace anti-retaliation model by providing a cause of action for corporate whistleblowers who suffer retaliation for disclosing securities violations.[14] The Commission itself may also bring a retaliation action against an employer,[15] a procedure that recently resulted in one company paying a settlement of more than $2.2 million.[16]

Finally, Dodd-Frank incorporated a "structural" model to encourage whistleblowers to report by providing a defined reporting channel.[17] To receive an award under the Act, employees must provide information directly to the SEC.[18] The Act required the SEC to estab-

10. *See* S. REP. NO. 111-176, at 2 (2010) (the bill that would become Dodd-Frank "is a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008").

11. *See* Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107, 1108–09 & n.5 (2006) (the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or SOX) utilizes several models to encourage whistleblowing, including a "bounty" model, an "anti-retaliation model," and a "structural" model). Prior to Dodd-Frank, the bounty model had been used only to reward whistleblowers who reported misconduct that affected the government. *See id.* at 1108 n.5. Dodd-Frank, by contrast, rewards whistleblowers who report wrongdoing directed at private corporations and shareholders.

12. 17 C.F.R. § 240.21F-3 (2013). "Voluntarily," "original information," and "leads to successful enforcement" are defined terms. *See id.* § 240.21F-4.

13. *Id.* § 240.21F-5.

14. *See* 15 U.S.C. § 78u-6(h) (2012).

15. 17 C.F.R. § 240.21F-2(b)(2) (2013).

16. Paradigm Capital Mgmt., Inc., Exch. Act Release No. 72,393, Inv. Advisers Act Release No. 3857 (June 16, 2014).

17. *See* Moberly, *supra* note 11, at 1131–41 (the structural model of many whistleblower laws requires the identification and provision of a specific disclosure channel for whistleblowers). Other laws use the structural model, including Sarbanes-Oxley, which requires corporations to implement a channel for whistleblowers to report misconduct directly to independent directors on the corporation's audit committee of the board of directors. *See* 15 U.S.C. § 78j-1(m)(4)(A) (2012). Also, the Civil Service Reform Act of 1978 created the Office of Special Counsel to receive whistleblower disclosures from federal employees. *See* 5 U.S.C. § 1101 (2012).

18. Dodd-Frank defines a "whistleblower" as one 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." 15 U.S.C. § 78u-6(a)(6) (2012). The SEC's

lish a new office to fulfill this obligation and to administer the reward program.[19] Subsequently, the SEC created the Office of the Whistleblower,[20] which receives whistleblower disclosures, works with the SEC's enforcement staff regarding those disclosures, and determines whether to make awards for eligible enforcement actions.[21] The Act and its regulations also explicitly provide for anonymous whistleblowing.[22]

The SEC promulgated extensive regulations to implement section 922.[23] In addition to detailing the three whistleblower models incorporated into Dodd-Frank, the regulations also expressly preclude parties, including employers, from interfering with those whistleblower programs. Specifically, Rule 21F-17(a) states:

> No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.[24]

While the SEC has not yet brought an enforcement action based on Rule 21F-17, the chief of the SEC's Office of the Whistleblower, Sean McKessy, publicly warned that "we are actively looking for examples of confidentiality agreements, separat[ion] agreements, employee 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.'"[25] McKessy further cautioned that "if we find that kind of language, not only are we going to go to the companies, we are going to go after the lawyers who drafted it," possibly by revoking those attorneys' right to practice before the Commission.[26]

McKessy's remarks and Rule 21F-17 make it clear that employers may not compel employees to waive their whistleblowing rights in exchange for a monetary payment or other benefit. Yet, despite Rule 21F-17, whistleblowers and their counsel continue frequently to

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regulations further acknowledge that a whistleblower who reports wrongdoing internally before reporting to the SEC may still be eligible for a reward, if the whistleblower ultimately discloses the misconduct to the SEC within 120 days of the whistleblower's initial internal report. *See* 17 C.F.R. § 240.21F-4(c)(3) (2013).

19. *See* 15 U.S.C. § 78u-7(d) (2012).

20. *See* 17 C.F.R. § 240.21F-1 (2013).

21. *See* U.S. SEC. & EXCH. COMM'N, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 5–7 (2013), *available at* http://www.sec.gov/about/offices/owb/annual-report-2013.pdf.

22. *See* 15 U.S.C. § 78u-6(d)(2), (h)(2) (2012); 17 C.F.R. §§ 240.21F-7, -9(c) (2013).

23. *See* ADOPTING RELEASE, *supra* note 6.

24. 17 C.F.R. § 240.21F-17(a) (2013).

25. Brian Mahoney, *SEC Warns In-House Attys Against Whistleblower Contracts*, LAW360 (Mar. 14, 2014), http://www.law360.com/articles/518815/sec-warns-in-house-attys-against-whistleblower-contracts.

26. *Id.*

encounter agreements limiting or discouraging whistleblowing in more subtle, yet often equally pernicious, ways, including the three types of de facto gag clauses identified above.[27]

These agreements raise the important question of how far Rule 21F-17 extends. Does it merely prohibit confidentiality agreements purporting to completely restrict all communications with the SEC, or does it also prohibit agreements technically allowing communications with the SEC, but indirectly *impeding* whistleblowing by making it harder, riskier, or otherwise less desirable?

Absent any SEC enforcement actions under Rule 21F-17, or private litigation directly addressing the enforceability of such clauses, courts are very likely to rely on existing contract law to balance the public and private interests that these agreements implicate. This reliance is particularly likely in private litigation between whistleblowers and their employers (as opposed to SEC enforcement actions brought under Rule 21F-17), because—although a court is very likely to find that any contract that violated Rule 21F-17 would be unenforceable—Rule 21F-17 does not supply employees with a private right of action.[28]

Accordingly, the next part of this Article examines whether the types of de facto gag clauses companies use would be enforceable under existing law. Specifically, we conclude that such agreements should not be enforced in the SEC whistleblower context because they violate Dodd-Frank's public policy. Additionally, while preexisting law does not define the limits of Rule 21F-17, a court could find a contract void based on the plain language of the Rule.

III. De Facto Gag Clauses Violate Dodd-Frank's Public Policy

A. *The Public Policy Limitation on Contractual Enforcement*

The most logical starting point for analyzing the enforceability of agreements affecting an employee's ability to participate in the SEC Whistleblower Program, or to obtain benefits for doing so, is the bedrock principle that contracts between private individuals may be void if they violate public policy.[29] In *Town of Newton v. Rumery*, the

27. *See* Letter from Katz, Marshall & Banks, *supra* note 7, at 4 ("While companies and their counsel are largely avoiding attempts to prohibit outright an individual's communicating with the SEC, our law firm and other [sic] that represent SEC whistleblowers are nonetheless seeing an increase in proposed settlement language that is intended to achieve the same result in a more roundabout and crafty manner.").

28. *See* 17 C.F.R. § 240.21F-17 (2013).

29. *See* Town of Newton v. Rumery, 480 U.S. 386, 392 (1987); RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981) ("A promise . . . is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed . . . by a public policy against the enforcement of such terms."); Alan Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 294–95 (1998) ("The power of courts to deny

Supreme Court provided a framework for applying this long-standing principle, concluding that contracts may not be enforceable under federal common law when the public policy considerations against enforcement outweigh any interests supporting enforcement.[30] Accordingly, it is not enough merely to establish that an agreement is contrary to *some* public policy; instead, *Town of Newton* requires identifying the public interests that militate both for and against enforcement, and comparing those interests to each other.[31]

Courts have applied *Town of Newton*—or the common law principles upon which *Town of Newton* is based—to numerous types of contracts purporting to prohibit individuals from communicating with government authorities about violations of law. They have repeatedly found such blanket bans unenforceable. Courts have rarely hesitated to strike down contracts that conceal crimes, which many SEC violations also are, or suppress evidence.[32] The normal justifications for contractual enforcement—facilitating economic activity and meeting party expectations by encouraging reliance on promises[33]—do not overcome the powerful public desire for law enforcement.[34] In fact, a contract that conceals a crime not only is unenforceable, but also may constitute the state law crime of "compounding"[35] or the federal crime of obstruction of justice.[36]

Even outside the criminal context, courts have often rejected agreements purporting to prohibit voluntarily reporting to the government possible civil violations. For example, in *EEOC v. Astra U.S.A., Inc.*,[37] the First Circuit invalidated provisions in settlement agreements prohibiting employees from communicating with the Equal Employment Opportunity Commission (EEOC).[38] The court explicitly

enforcement to a contract on public policy grounds is not only indisputable, but also open-ended.").

30. *See* 480 U.S. at 392 ("The relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."); Garfield, *supra* note 29, at 295; Restatement (Second) of Contracts § 178(1).

31. 480 U.S. at 392.

32. *See* Garfield, *supra* note 29, at 307–08.

33. *See* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Buying Silence*, 36 Am. Bus. L.J. 151, 174 (1998) (public policy benefits of enforcing contracts).

34. *Cf.* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 Case W. Res. L. Rev. 375, 378 (2010) (a common theme of the Supreme Court's retaliation jurisprudence is the principle that "protecting employees from retaliation will enhance the enforcement of the nation's laws").

35. Generally, "compounding" is defined as accepting consideration for a promise not to report a crime. *See* Garfield, *supra* note 29, at 307–08.

36. 18 U.S.C. § 1505 (2012); *see also* Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 Hofstra L. Rev. 1, 15 (2002).

37. 94 F.3d 738 (1st Cir. 1996). *See also* EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 1091 (5th Cir. 1987).

38. *See Astra*, 94 F.3d at 743.

balanced the impact of those agreements on the EEOC's ability to investigate systemic discrimination against the impact that invalidating the provisions would have on private dispute resolution,[39] concluding that limiting the ability of employees to communicate with the EEOC would "sow[] the seeds of harm to the public interest."[40] Similar decisions have been reached when employers use contractual promises of silence to impede government investigations of securities violations,[41] unfair labor practices,[42] and investment advisor misconduct.[43]

These cases confirm that there is a strong public policy in favor of reporting possible violations of the law to the government, which can outweigh competing interests in protecting confidential information and promoting private dispute resolution. Certainly, these cases indicate that any provision designed to prevent an employee from making "any complaint" about the company—as some general releases do—should not and would not be enforced to block communications about possible unlawful activity with the SEC or other law enforcement agencies. They also suggest that courts should give heightened scrutiny to provisions that make reporting to the SEC more onerous to ensure that they do not indirectly pursue a goal that could not be sought directly.[44]

But, as instructive as these cases are, they do not fully answer the question of whether, and to what extent, companies can use agreements that allow whistleblowing, but decrease or eliminate congressional incentives for doing so. To answer that question, it is necessary to look not only to the broad public policies animating *Astra* and its progeny, but also to the specific public policy underlying, and supported by, Dodd-Frank.

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39. *See id.* at 744.

40. *Id.*

41. *See* SEC v. Lipson, No. 97 C 2661, 1997 WL 801712, at *2 (N.D. Ill. Oct. 28, 1997) (agreement not to speak with SEC without a subpoena void as against public policy).

42. *See* D'Arrigo Bros. of Cal. v. United Farmworkers of Am., 169 Cal. Rptr. 3d 171, 181–83 (Cal. App. 2014) (contractual language purporting to prohibit union from cooperating with government investigation of unfair labor practices unenforceable).

43. *See* Cariveau v. Halferty, 99 Cal. Rptr. 2d 417, 423–24 (Cal. App. 2000) ("The use of confidentiality agreements that purport to restrict a registered member's customers from reporting improper conduct to the [National Association of Securities Dealers (NASD)] serves to perpetuate the improper conduct and is condemned by NASD policies.").

44. Courts have repeatedly rejected contract interpretations that allow parties to do indirectly what they could not do directly. *See, e.g.*, Century Marine Inc. v. United States, 153 F.3d 225, 230 (5th Cir. 1998) ("To allow such recovery would permit Century to do indirectly what it could not do directly."); Safran v. United Steel Workers of Am., AFL-CIO, 678 F. Supp. 1178, 1181 (W.D. Pa. 1988) ("We decline to permit the plaintiffs to do indirectly what they could not contractually do directly."); Ables v. United States, 2 Cl. Ct. 494, 501 (1983), *aff'd*, 732 F.2d 166 (Fed. Cir. 1984) ("What they could not do directly they certainly should not be allowed to do indirectly under the guise of an intended third party beneficiary.").

1. Identifying Dodd-Frank's Public Policy

Dodd-Frank's text and legislative history make clear that one of its primary public interests is better protection for investors and the financial markets themselves following the financial crisis in 2008.[45] In particular, the whistleblower provisions' purpose is to assist the SEC in detecting, investigating, and prosecuting serious securities violations to further the public policy goal of protecting investors and the markets.[46] In this respect, Dodd-Frank also evinces a strong public policy interest in whistleblowing and private cooperation with public law enforcement.

As the First Circuit's decision in *Astra* indicates, however, an analysis of a statute's public policy aims encompasses more than evaluating its general purpose; it also requires a court to assess the specific statutory scheme designed to further that purpose.[47] In *Astra*, the court examined not just the public policy behind Title VII but also *how* Congress intended to protect and advance that public interest by giving the EEOC the power to investigate both individual and systemic discrimination.[48]

Dodd-Frank's statutory scheme reflects an important public policy judgment: incentives are needed to promote whistleblowing because "whistleblowers often face the difficult choice between telling the truth and the risk of committing 'career suicide.'"[49] The SEC, too, recognized that incentives are an integral part of Dodd-Frank's investor-protection scheme:

> [T]he broad objective of the whistleblower program is to enhance the Commission's law enforcement operations by increasing the financial incentives for reporting and lowering the costs and barriers to potential whistleblowers, so that they are more inclined to provide the Commission with timely, useful information that the Commission might not otherwise have received.[50]

In particular, Congress developed three primary incentives to counterbalance the profound personal and professional risks that whistleblowers often face, and to support the public policy of encouraging whistleblower reports to the SEC.[51] First, of course, is the provision of financial awards to whistleblowers. As the Senate Committee

45. *See* S. Rep. No. 111-176, at 36 (2010) ("During the crisis, it became apparent that investors needed better protection . . . and the SEC need[ed] assistance.").

46. *Id.*

47. EEOC v. Astra U.S.A., Inc., 94 F.3d 738, 743–44 (1st Cir. 1996).

48. *Id.* at 744.

49. S. Rep. No. 111-176, at 111.

50. Adopting Release, *supra* note 6, at 105.

51. *See id.* at 197 ("The Congressional purpose underlying Section 21F of the Exchange Act is to encourage whistleblowers to report possible violations of the securities laws by providing financial incentives, prohibiting employment-related retaliation, and providing various confidentiality guarantees.").

on Banking, Housing and Urban Affairs noted in its report on Dodd-Frank, "the minimum payout that any individual could look towards in determining whether to take the enormous risk of blowing the whistle in calling attention to fraud" is "the critical component of the Whistleblower Program," particularly because it helps counter the economic harm that whistleblowers may face as a result of employment-related retaliation or blacklisting.[52]

Second, Dodd-Frank and the SEC Whistleblower Rules allow whistleblowers to report possible misconduct to the SEC anonymously.[53] The importance of anonymity can be seen throughout Dodd-Frank's statutory provisions and the implementing regulations. Both the statute and regulations prohibit the SEC from "disclos[ing] any information . . . which could reasonably be expected to reveal the identity of a whistleblower," except in narrow circumstances.[54] Whistleblowers also benefit from the fact that all SEC investigations remain confidential until the Commission files a complaint or begins an administrative proceeding.[55] The anonymity continues even after the SEC issues an award; none of the fourteen whistleblower awards issued as of December 2014 have identified the recipients or provided potentially identifying information.[56]

These anonymity safeguards are significant because they dramatically decrease the risk that whistleblowers will become known to others, in turn decreasing the risk that they will face retaliation or blacklisting. Moreover, the SEC has emphasized that the anonymity protection provides essential encouragement for a whistleblower to come forward, and that fewer people would blow the whistle without

52. S. Rep. No. 111-176, at 111. Indeed, although the Program's results still cannot fully be assessed because of the program's relative newness and the length of time before an award can be issued, it seems to be successfully encouraging whistleblowers to provide tips to the SEC. The SEC has received thousands of complaints under the program each year since it began in 2011. *See* U.S. Sec. & Exch. Comm'n, 2013 Annual Report, *supra* note 21. As of December 1, 2014, the Program has made awards to fourteen whistleblowers, including one award the SEC estimates will be between $30 and $35 million. *See Final Orders of the Commission*, U.S. Sec. & Exch. Comm'n, Off. of the Whistleblowers, http://www.sec.gov/about/offices/owb/owb-final-orders.shtml (last visited Dec. 1, 2014).

53. *See* 15 U.S.C. § 78u-6(d)(2), (h)(2) (2012); 17 C.F.R. §§ 240.21F-7, -9(c) (2013).

54. 15 U.S.C. § 78u–6(h)(2) (2012); 17 C.F.R. § 240.21F-7(a) (2013). Pursuant to 17 C.F.R. § 240.21F-7(b), whistleblowers reporting anonymously must file their complaint through an attorney, follow prescribed certification procedures, and disclose their identities to the Commission only for verification before receiving any award.

55. *See, e.g.*, Adopting Release, *supra* note 6, at 126 ("As a general matter, it is the Commission's policy and practice to treat all information obtained during its investigations as confidential and nonpublic."). The SEC is entitled to disclose nonpublic information in narrow circumstances, including to other government entities, self-regulatory organizations, and bankruptcy trustees. *See* 17 C.F.R. § 240.24c-1(b) (2013).

56. *See* Sec. & Exch. Comm'n, Office of the Whistleblower, Final Orders of the Commission, *available at* http://www.sec.gov/about/offices/owb/owb-final-orders.shtml (last visited Dec. 1, 2014) (whistleblower award notices).

it.[57] Common sense and social science research also support the conclusion that "individuals are more willing to state a dissenting viewpoint if they can do so anonymously."[58]

Third, Dodd-Frank provides robust remedies to whistleblowers who face retaliation for reporting suspected violations to the SEC.[59] In particular, the statute gives whistleblowers who experience retaliation the right to seek reinstatement, double back pay, and legal fees.[60] The Dodd-Frank protections have procedural advantages as well because a whistleblower can bring a retaliation claim directly to federal court for up to six years after retaliation occurs,[61] while many other federal anti-retaliation provisions require whistleblowers to bring an administrative claim before filing a court action, often within 180 days.[62] These enhanced remedies are particularly important because according to a recent survey, more than twenty percent of employees reporting workplace misconduct experience some form of retribution.[63]

In short, in Dodd-Frank Congress identified a strong public interest in protecting investors and determined that this interest is advanced by (a) protecting from retaliation whistleblowers who report securities violations, (b) allowing whistleblowers to report anonymously, and (c) giving whistleblowers the chance to obtain significant monetary awards. Thus, any balancing of public policy interests under *Town of Newton* must take into account the role that Dodd-Frank's incentives play in protecting investors and, conversely, the potential impact that removing or undercutting these incentives would have on investors.

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57. *See* Adopting Release, *supra* note 6, at 198 (whistleblowers would be "less inclined to report possible securities law violations" if they believed the SEC would disclose the whistleblower's identity to the corporation being investigated).

58. Moberly, *supra* note 11, at 1139, 1143 n.168; *see also* Ass'n Certified Fraud Examiners, Report to the Nation on Occupational Fraud and Abuse 17 (2010); Terance D. Miethe, Whistleblowing at Work: Tough Choices in Exposing Fraud, Waste, and Abuse on the Job 54–57 (1999); Cass R. Sunstein, Why Societies Need Dissent 20 (2003). *But see* Marcia P. Miceli, Whistle-Blowing in Organizations 158 (2008) ("[T]here is scant evidence that anonymity promotes whistle-blowing.").

59. *See* Richard Moberly, *Sarbanes-Oxley's Whistleblower Provisions: Ten Years Later*, 64 S.C. L. Rev. 1, 14–16 (2012) (Dodd-Frank was one of several new anti-retaliation provisions that "take Sarbanes-Oxley as a baseline and improve upon it").

60. 15 U.S.C. § 78u-6(h)(1)(C) (2012).

61. *See* 15 U.S.C. § 78u-6(h)(1)(B)(i) (2012) (whistleblowers may file claims in federal district court); 15 U.S.C. § 78u-6(h)(1)(B)(iii) (2012) (claims must be filed within six years after retaliation occurs or within three years of when the employee should have reasonably known about the facts material to the right of action, but not more than ten years after the date of the violation).

62. *See* Richard Moberly, *Protecting Whistleblowers by Contract*, 79 Univ. Colo. L. Rev. 975, 1004–05 (2008).

63. *See National Business Ethics Survey of the U.S. Workforce,* Ethics Res. Ctr. 1, 13 (2013), http://www.ethics.org/nbes.

2. Contracts That Undermine Dodd-Frank's Whistleblower Program

With this analytical framework in mind, we turn to the various contractual provisions companies use that may interfere with the SEC Whistleblower Program. As noted above, many of these provisions do not directly bar whistleblowing to the SEC—which would be a clear violation of *Astra* and Rule 21F-17—but instead alter the costs and benefits of whistleblowing, thus changing the likely behavior of prospective whistleblowers. In particular, we will analyze the competing public and private interests raised by three types of commonly observed clauses: (1) provisions that require employees to disclose their communications with the SEC to employers in some manner, (2) provisions waiving employees' ability to obtain an award under the SEC Whistleblower Program, and (3) general confidentiality provisions that may be used to bring a breach of contract claim should a whistleblower disclose confidential information or documents to the SEC.

A. Contracts Requiring Disclosure of SEC Communications

The first general category of contractual provision is designed to elicit information about whether employees have, or plan to, report possible wrongdoing to the SEC or other government authorities. One particularly common variant allows employees to blow the whistle to the SEC but provides that they must first report the wrongdoing internally, or otherwise alert the company that they have disclosed, or plan to disclose, information to the SEC. Applying *Town of Newton*,[64] it is clear that some legitimate interests weigh in favor of enforcing such provisions. Employers may contend that, because information derived through the course of a party's employment generally belongs to the employer, they should be able to control this information, provided they do not use a confidentiality agreement to conceal unlawful conduct from the government.[65] In particular, obtaining the relevant information before the whistleblower discloses it to the SEC allows the employer to self-report violations, which can minimize the sanctions it faces in any SEC enforcement action.[66] It also helps the company

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64. Town of Newton v. Rumery, 480 U.S. 386, 392 (1987).

65. *See* Diamond v. Oreamuno, 248 N.E. 2d 910, 912 (N.Y. 1969) ("As a general proposition, a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit, but must account to his principal for any profits derived therefrom."); *see also* Restatement (Second) of Agency § 388 (1958).

66. *See, e.g.*, Press Release, Sec. & Exch. Comm'n, SEC Announces Non-Prosecution Agreement with Ralph Lauren Corporation Involving FCPA Misconduct (Apr. 22, 2013) ("'When they found a problem, Ralph Lauren Corporation did the right thing by immediately reporting it to the SEC and providing exceptional assistance in our investigation,' said George S. Canellos, Acting Director of the SEC's Division of Enforcement. 'The NPA in this matter makes clear that we will confer substantial and

understand the problem, prepare for a possible SEC investigation, and take quicker remedial action. Indeed, because of these reasons, some commentators suggest that internal whistleblowing is preferable to external whistleblowing.[67]

Additionally, employers may argue that such provisions pose relatively few risks to whistleblowers in light of SEC Rule 21F-4(c)(3), which provides that a whistleblower may be considered the source of "original information," and therefore remain eligible for a monetary award, when that information is first reported internally by the whistleblower and then self-reported to the SEC by the company.[68] In other words, the whistleblower can still reap the monetary benefits of the SEC Whistleblower Program, even by reporting internally first.

Whistleblowers, on the other hand, are likely to argue that these provisions impede whistleblowing and, in so doing, undercut Dodd-Frank's public policy. Most significantly, these provisions take direct aim at the statutory anonymity protections.[69] Employees cannot remain anonymous if they have to inform the company of their plan to report, or that they have reported, to the SEC. Even if employees need only internally disclose the violation and not their intention of reporting to the SEC, the employer can easily trace any subsequent SEC inquiry back to the internal reporter, making Dodd-Frank's guarantee of anonymity an empty promise.

For this and other reasons, the SEC considered, but rejected, mandating internal reporting as a prerequisite for the recovery of a monetary award, concluding that any internal reporting requirement would undermine Dodd-Frank's anonymity mandates.[70] Likewise, the SEC found that "a general requirement that employees report internally . . . would impose a barrier that in some cases would dissuade potential

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tangible benefits on companies that respond appropriately to violations and cooperate fully with the SEC.'").

67. *See* Dworkin & Callahan, *supra* note 33, at 190. Dworkin and Callahan suggest that the law should enforce confidentiality agreements that require internal reporting first:

> The employer could fashion an agreement which requires that the employee first disclose any information internally. This gives it the advantage of correcting the situation without the confidence being breached. The company can also designate the appropriate recipient to ensure that the information is handled correctly. Since these measures do not thwart whistleblowing and have the advantage of allowing for earlier correction of any wrongdoing, the courts are likely to uphold these promises.

Id.

68. 17 C.F.R. § 240.21F-4(c)(3) (2013).

69. S. Rep. No. 111-176, at 111 (2010).

70. *See* Adopting Release, *supra* note 6, at 105–06 n.230 ("[I]n some cases an anonymous whistleblower's identity can be gleaned from the facts and circumstances surrounding the whistleblower's complaint. . . . [R]equiring the whistleblower to report internally would be in tension with . . . Section 21F that we protect information that could reasonably be expected to reveal the identity of a whistleblower.").

whistleblowers from providing information to the Commission, contrary to the purpose of the whistleblower provision."[71] Instead, the SEC included in the rules features designed to "incentivize whistleblowers to utilize their companies' internal compliance and reporting systems when appropriate,"[72] including expanding the definition of "original information" and treating internal reporting as a positive factor when determining monetary awards.[73] These provisions reflect the SEC's judgment that investor protection is best served by allowing, but not mandating, internal reporting.[74]

Section 301 of the Sarbanes-Oxley Act of 2002[75] (Sarbanes-Oxley or SOX) reflects a similar public policy judgment in favor of confidential reporting. That provision requires employers to implement channels for employees to report illegal conduct to a corporate board of directors anonymously, without the knowledge of their direct supervisors or managers.[76] In fact, the Department of Labor's (DOL) Administrative Review Board (ARB) has recognized that a company that publicly identifies a whistleblower may have committed an adverse action against the whistleblower and be liable under Sarbanes-Oxley's anti-retaliation provision.[77] In *Menendez v. Halliburton*, the ARB noted:

> The reason for requiring audit committees to create confidential and/or anonymous disclosure procedures is evident. Employee whistleblowers are one of the most effective sources of information concerning questionable accounting and auditing matters as well as fraud and corporate crime. Since employees are more willing to identify misconduct if they can do so anonymously, it stands to reason that anonymous and/or confidential reporting mechanisms encourage internal reporting of corporate misconduct. Furthermore, the confidentiality that Section 301 provides allows employees to report problems directly to the independent audit committee and thus effectively to their employer, while at the same time permitting the whistleblowing employee to avoid possible retaliation from supervisors or high-ranking company managers who may be defensive about wrongdoing

71. *Id.* at 105.

72. *Id*. at 5.

73. *See* 17 C.F.R. § 240.21F-6(4) (2013).

74. *See* Brief of the Sec. & Exch. Comm'n, Amicus Curiae in Support of the Appellant, Liu Meng-Ling v. Siemens AG, No. 13-4385, 2014 WL 663875, at *2 (2d Cir. Feb. 20, 2014). ("Throughout the rulemaking process, the Commission considered the 'significant issue' of how to ensure that the whistleblower program does not undermine the willingness of individuals to make whistleblower reports internally at their companies before they make reports to the Commission."); *see also* ADOPTING RELEASE, *supra* note 6, at 90–91 ("The objective of this provision is to support, not undermine, the effective functioning of company compliance and related systems by allowing employees to take their concerns about possible violations to appropriate company officials first while still preserving their rights under the Commission's whistleblower program.").

75. 15 U.S.C. § 78j-1(m)(1) (2012).

76. *See id.*

77. *See* Menendez v. Halliburton, Inc., ARB Nos. 09-002, 09-003, ALJ No. 2007-SOX-005, at 23-24 (ARB Sept. 13, 2011).

> in which they might be implicated. Congress well recognized the importance of encouraging the reporting of accounting irregularities and potential fraud by means of confidential disclosures.
>
> . . .
>
> Since the purpose of confidentiality is to encourage employees to come forward with information about SOX violations, permitting an employer to indiscriminately expose the identity of an employee who presents information concerning questionable accounting or auditing matters would most assuredly chill whistleblower-protected activity.[78]

In addition to implicating Dodd-Frank's anonymity provisions, agreements purporting to require internal reporting may also undercut the statute's anti-retaliation protections. Several courts, including the Fifth Circuit, have held that the Act does not protect internal whistleblowers because its statutory definition of "whistleblower" requires a report to the SEC.[79] This result is controversial, and several other courts have reached the opposite conclusion for a variety of reasons.[80] However, to the extent the Fifth Circuit's view prevails, it would be anomalous to permit an employer to require a whistleblower to report internally before reporting to the SEC because the employer would then have a defined window in which it could retaliate without facing any Dodd-Frank penalties.[81] This result seems likely to dissuade prospective whistleblowers from coming forward, particularly as reported retaliation rates remain strikingly high.[82]

The potentially profound effect of these "internal reporting" agreements on Dodd-Frank's anonymity and anti-retaliation protections—and the corresponding centrality of these dual protections to the statute's overall investor-protection scheme—indicates that they should, and very likely will, be found unenforceable under *Town of Newton*. An employer's desire to learn of potential problems cannot justify the risk that fewer whistleblowers will come forward if private con-

78. *See id.*

79. *See* Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 630 (5th Cir. 2013); *see also* Banko v. Apple Inc., No. 13–02977, 2013 WL 7394596, at *1 (N.D. Cal. Sept. 27, 2013); Wagner v. Bank of Am. Corp., No. 12-CV-00381, 2013 WL 3786643, at *1 (D. Colo. July 19, 2013).

80. *See, e.g.*, Bussing v. COR Clearing, LLC., No. 8:12-CV-238, 2014 WL 2111207, at *12 (D. Neb. May 21, 2014); Rosenblum v. Thomson Reuters (Markets) LLC, No. 13 Civ. 2219, 2013 WL 5780775, at *3–5 (S.D.N.Y. Oct. 25, 2013); Ellington v. Giacoumakis, No. 13-11791, 2013 WL 5631046, at *2–3 (D. Mass. Oct. 16, 2013); Murray v. UBS Sec., LLC, No. 12 Civ. 5914, 2013 WL 2190084, at *3–7 (S.D.N.Y. May 21, 2013); Genberg v. Porter, 935 F. Supp. 2d 1094, 1106–07 (D. Colo. 2013); Kramer v. Trans-Lux Corp., No. 11 Civ. 1424, 2012 WL 4444820, at *3–5 (D. Conn. Sept. 25, 2012); Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 993–95 (M.D. Tenn. 2012); Egan v. TradingScreen, Inc., No. 10 Civ. 8202, 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011).

81. Sarbanes-Oxley clearly would protect this internal whistleblower from retaliation, but as mentioned above, its procedures and remedies are not as favorable to whistleblowers as Dodd-Frank's provisions.

82. *See* Ethics Res. Ctr., *supra* note 63, at 9.

tracts can dismantle these two pillars of Dodd-Frank's statutory scheme. Instead, public policy favors preserving the delicate balance that the SEC, after public comments and deliberation, struck with respect to internal reporting.[83]

This result would be consistent not only with congressional and administrative intent, but also with prior case law recognizing as unenforceable contractual provisions that burden, but do not completely bar, communications with the SEC.[84] For example, in *SEC v. Lipson*, an Illinois district court refused to enforce a provision that would have limited the extent to which employees could communicate with the SEC without a subpoena, reasoning that

> Neither the fact that [the] SEC remains free to subpoena the signatories to the agreement with Mr. Lipson, nor the possibility that the language of the agreement might be construed narrowly by the signatories to permit informal discussions with SEC personnel on certain topics, satisfies this court that the challenged provisions are harmless.[85]

As in *Lipson*, the question is not whether employees might still be able to communicate with the SEC despite their contractual restrictions, but instead whether those restrictions threaten material harm to the SEC's investigative abilities. Here, as in *Lipson*, the answer is that they do, and therefore should not be enforceable.

B. CONTRACTS REQUIRING RELINQUISHMENT OF A DODD-FRANK REWARD

Equally common, and equally troubling, are contractual provisions that preserve employees' right to report possible securities violations to the SEC, but mandate that the employee waive, decline, or agree not to seek a monetary award. Such a provision might state, for example, "[n]othing in this agreement is intended to prevent Employee from communicating or cooperating with a government agency, except Employee agrees that Employee will not be entitled to any individual monetary payment or relief resulting from any administrative claim or investigative proceeding."

Some employers may argue that such provisions are voluntary waivers of a statutory right, which courts typically permit unless expressly prohibited by statute. Thus, these employers would contend, the provision is exempt from analysis under *Town of Newton*.[86] Employers are likely to point to the fact that, while Dodd-Frank amended SOX to include such an express prohibition on statutory waivers, it

83. *See generally* ADOPTING RELEASE, *supra* note 6.
84. *See* SEC v. Lipson, No. 97 C 2661, 1997 WL 801712, at *2 (N.D. Ill. Oct. 28, 1997).
85. *Id.*
86. *See* United States v. Mezzanatto, 513 U.S. 196, 201 (1995) ("[A]bsent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties.").

included no such prohibition with respect to Dodd-Frank's own whistleblower provisions.[87] In the face of the Sarbanes-Oxley amendment, employers may argue that congressional silence about waiver in Dodd-Frank whistleblower provisions implies that Congress intentionally permitted employees to waive their bounty right.

However, the Supreme Court has noted that the absence of an anti-waiver provision is not dispositive when "legislative policy would be thwarted by permitting" contractual waivers of statutory rights.[88] The Court has applied a similar public policy test as described in Part III.A, *supra*, by voiding a contractual waiver provision when it was "inconsistent with the provision creating the right sought to be secured."[89] Thus, whether an agreement to relinquish a Dodd-Frank award is viewed as a waiver of a statutory right or a standard contract under *Town of Newton*, the relevant question remains the same: would enforcement of the agreement impermissibly undercut the public policy goals of the relevant statute?

Employers are likely to contend that the answer is no because such provisions allow whistleblowers to communicate with the SEC on a voluntary and anonymous basis. The employee does not face any punishment or penalty for whistleblowing; the employee simply cannot receive an award for doing so. Employers are also likely to argue that the potential harm to the SEC is low because the Commission retains its traditional investigative tools, including the ability to speak to witnesses without a subpoena.

In support of this argument, employers may analogize agreements waiving Dodd-Frank awards to similar provisions used in employment severance or settlement agreements. These typically permit an employee to file a discrimination claim with the EEOC but not to obtain personal damages or other monetary relief. In other words, employees could notify the EEOC of possible discrimination, allowing the EEOC to investigate potentially systemic or continuing discrimination, but would release individual claims to relief.

Although certain EEOC offices are beginning to challenge such provisions,[90] they have so far been routinely enforced by

87. *See* 18 U.S.C. § 1514A(e)(1) (2012) ("The rights and remedies provided for in [SOX] may not be waived by any agreement, policy form, or condition of employment.").

88. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 713 (1945).

89. New York v. Hill, 528 U.S. 110, 116 (2000); *see also Brooklyn Sav. Bank*, 324 U.S. at 704 (in determining that the right to liquidated damages under the Fair Labor Standards Act is not waivable, the Court noted: "Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.").

90. *See, e.g.*, Complaint, EEOC v. CVS Pharmacy, Inc., No. 14-cv-863, 2014 WL 540344 (N.D. Ill. Feb. 7, 2014); Complaint, EEOC v. Baker & Taylor, Inc., No. 13-cv-03729 (N.D. Ill. May 20, 2013).

courts.[91] The Supreme Court considered a similar issue in *EEOC v. Waffle House*[92]—whether an arbitration agreement can prevent the EEOC from litigating on an employee's behalf in court—and concluded that the EEOC could bring claims in court despite the employee's arbitration agreement, but that "[the employee's] conduct may have the effect of limiting the relief that the EEOC may obtain."[93] Employers are likely to argue that the same rule should apply in the Dodd-Frank context; that is, that agreements may not validly waive employees' rights to make a Dodd-Frank disclosure, but they may waive employees' rights to benefit personally from that disclosure.

This comparison, while superficially appealing, ignores the substantial differences between the public policy goals of Title VII and Dodd-Frank, and the two statutes' enforcement schemes. The EEOC enforces antidiscrimination laws by investigating claims of alleged discrimination victims, who may prosecute their claims directly by intervening in an EEOC action or, when the EEOC declines to bring an action, by filing their own private lawsuits.[94] Damages obtained by an employee in an EEOC action are based primarily on the EEOC's vindication of the employee's own rights.[95] Therefore, failing to enforce the waiver in an EEOC action would typically result in a double recovery for the employee, who would receive both the consideration given for the waiver and the damages from the EEOC action.[96] As the Supreme Court has made clear, "courts can and should preclude double recovery by an individual."[97]

The same logic does not apply to Dodd-Frank's unique statutory scheme, in which the SEC is not seeking to vindicate the personal rights of a whistleblower—who may not have suffered any injury as a result of the reported securities violations—but is instead bringing

91. *See, e.g.*, EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 1091 (5th Cir. 1987) ("[A]lthough an employee cannot waive the right to file a charge with the EEOC, the employee can waive not only the right to recover in his or her own lawsuit but also the right to recover in a suit brought by the EEOC on the employee's behalf."); EEOC v. Goodyear Aerospace Corp., 813 F.2d 1539, 1543 (9th Cir. 1987); EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON NON-WAIVABLE EMPLOYEE RIGHTS UNDER EQUAL EMPLOYMENT OPPORTUNITY COMM'N (EEOC) ENFORCED STATUTES (Apr. 10, 1997), *available at* http://www.eeoc.gov/policy/docs/waiver.html ("[T]he Commission notes that even though an individual who has signed a waiver agreement or otherwise settled a claim subsequently files a charge with the Commission based on the same claim, the employer will be shielded against any further recovery by the charging party . . . .").

92. 534 U.S. 279 (2002).

93. *Id.* at 296 (citations omitted).

94. *See generally* 42 U.S.C. § 2000e et al. (2012).

95. *Id.*

96. *See Waffle House*, 534 U.S. at 297; *Goodyear Aerospace Corp.*, 813 F.2d at 1543 (while injunctive relief against employer would serve the public good, any back pay awarded to EEOC would "go directly to [the employee]" and is therefore not recoverable if previously waived).

97. *Waffle House*, 534 U.S. at 297.

claims on behalf of the government, for the ultimate benefit of investors. Typically, the whistleblower only has the right to seek a Dodd-Frank award, which compensates the whistleblower for information, not injury. Therefore, a whistleblower award cannot be duplicative of the consideration that an employee may have received from the employer in exchange for a release of the claims that the employee could have brought directly against the employer.[98]

Given these distinctions, the enforceability of Dodd-Frank award waivers should not rest on EEOC precedent. Instead, a more apt, though still imperfect, analogy for the SEC whistleblower program is the *qui tam* regime of the False Claims Act[99] (FCA). The FCA resembles Dodd-Frank by providing a reward for whistleblowers who report employer misconduct[100] and by involving claims in which the injury being vindicated also belongs to the government rather than the whistleblower.[101] Unlike Dodd-Frank, though, FCA whistleblowers, or "relators," bring these claims by filing their own lawsuit against the company, in which the government may or may not intervene.[102] FCA waiver cases typically arise when an employee signs an agreement releasing all claims against an employer, and then subsequently files an FCA complaint.[103]

Consistent with *Town of Newton*[104] and *Lipson*,[105] courts assessing the enforceability of FCA waivers have sought to balance the "public interest in having information brought forward that the government could not otherwise obtain" with the public interest in "encouraging parties to settle disputes."[106] Significantly, courts have recognized

98. This rationale would also prevent an employer from suing a whistleblower under a more general release of claims against the employer. Because the SEC award is not based on any whistleblower claim against the employer, it should not be included in a general release.

99. 31 U.S.C. §§ 3729–3733 (2012).

100. *See id.* § 3730(d).

101. *See id.* §§ 3729–3733. *See also* Geoffrey Christopher Rapp, *Mutiny on the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. Rev. 73, 76–77 (2012) ("Dodd-Frank drew some of its inspiration from the False Claims Act," but Dodd-Frank is inferior because it does not adopt the *qui tam* aspect of the FCA that allows "whistleblowers to *litigate cases independently* from federal action") (emphasis added); *id.* at 132–43 (differences between the reward programs of the False Claims Act and Dodd-Frank).

102. 31 U.S.C. § 3730(b) (2012).

103. *See, e.g.*, United States *ex rel.* Radcliffe v. Purdue Pharma L.P., 600 F.3d 319, 329 (4th Cir. 2010); United States *ex rel.* Ritchie v. Lockheed Martin Corp., 558 F.3d 1161, 1168–69 (10th Cir. 2009); United States *ex rel.* Gebert v. Transp. Admin. Servs., 260 F.3d 909, 916 (8th Cir. 2001); United States *ex rel.* Hall v. Teledyne Wah Chang Albany, 104 F.3d 230, 231–33 (9th Cir. 1997); United States *ex rel.* Green v. Northrop Corp., 59 F.3d 953, 966 (9th Cir. 1995); United States *ex rel.* Nowak v. Medtronic, Inc., 806 F. Supp. 2d 310, 336–37 (D. Mass. 2011).

104. 480 U.S. 386 (1987).

105. No. 97 C 2661, 1997 WL 801712 (N.D. Ill. Oct. 28, 1997).

106. *Hall*, 104 F.3d at 233.

that the dispositive question here is not whether an employee could still have the right to blow the whistle if the damage waiver or release were enforced, but whether enforcement of the waiver would substantially reduce the efficacy of the statute's incentive structure.[107] As the Ninth Circuit noted in *United States ex rel. Green v. Northrop Corp.*:

> [A]lthough, as Appellees maintain, enforcing the Release at issue in this case would not *prohibit* a relator from coming forward with information concerning Appellees' alleged misconduct, our analysis of the structure and purposes of the Act demonstrates that this consideration is not dispositive. If the *qui tam* provisions *never* had been enacted, presumably whistleblowers still *could* come forward. The Act reflects Congress's judgment that *incentives to file suit* were necessary for the government to learn of the fraud or to spur government authorities into action; permitting a prefiling release when the government has neither been informed of, nor consented to, the release would undermine this incentive, and therefore, frustrate one of the central objectives of the Act.[108]

Under *Green* and its progeny, a waiver of an incentive award would be invalid if it frustrated a statute's central objectives.

As *Green* reflects, courts applying this reasoning in FCA waiver cases have typically refused to enforce prefiling releases when the government was unaware of the alleged misconduct until the relator filed the claim, on the theory that enforcing such releases would limit the government's ability to detect wrongdoing. On the other hand, some courts have agreed to enforce FCA waivers when the government was already aware of the alleged misconduct before the filing of the complaint because "the public interest in having information brought forward that the government could not otherwise obtain [was] not implicated."[109]

Applying this rationale to the Dodd-Frank context suggests that a similar, but not identical, outcome should prevail. First, given the centrality of monetary awards to the SEC Whistleblower Program, it seems clear that the "central objectives" of Dodd-Frank's whistleblower provisions would be substantially frustrated if courts enforced award waivers executed when the SEC did not already know the underlying information. As in the FCA context, enforcement of such waivers would decrease willingness to report misconduct and decrease the flow of potentially valuable information to the SEC. Indeed, one of the key concerns behind the statute was that the SEC was not receiving or generating sufficient information about possible securities viola-

107. *See* United States *ex rel*. Head v. Kane Co., 668 F. Supp. 2d 146, 152 (D.D.C. 2009); United States *ex rel*. Grandeau v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004); X Corp. v. Doe, 805 F. Supp. 1298, 1310 n.24 (E.D. Va. 1992).

108. *Green*, 59 F.3d at 965.

109. United States *ex rel*. Radcliffe v. Purdue Pharma, L.P., 600 F.3d 319, 332 (4th Cir. 2010) (citing *Hall*, 104 F.3d at 233).

tions prior to Dodd-Frank.[110] Significantly, allowing the waiver of Dodd-Frank awards would not only dissuade employees subject to the waiver from coming forward, but also decrease the SEC's ability to use awards to build program awareness, encourage others to come forward,[111] and deter future securities violations,[112] all of which are crucial programmatic interests of Dodd-Frank and the SEC whistleblower rules.

Unlike the prevailing FCA rule, however, applying this rationale to the SEC Whistleblower Program suggests that Dodd-Frank waivers should not be enforced even if they are executed *after* the SEC has learned of the potential misconduct. First, there is a basic distinction between the mechanics of Dodd-Frank and the FCA. In an FCA case, the whistleblower brings a claim against the company in court and has an opportunity to receive a share of any resulting settlement or judgment. Thus, it makes more sense to allow for the private resolution of claims between the relator and the company, provided that it does not result in violations of law being concealed from the government. The SEC whistleblower, on the other hand, has no direct claim against the company and is not a party to enforcement actions. Likewise, the SEC whistleblower award is not paid by the company in any way, but instead is paid from a separate fund established by Congress.[113] Therefore, there is no actual dispute or claim between the employee and the employer with respect to the award, and the public interest in promoting settlement of disputes is simply not implicated. It makes little public policy sense to allow employers to insert themselves into this award scheme, regardless of whether the SEC is aware of the misconduct.

Moreover, a rule allowing the enforcement of waivers when the SEC has independently learned of the misconduct rests on the incorrect assumption that subsequent whistleblower assistance will not have significant investigative value to the SEC. In practice the SEC

110. *See* Sec. & Exch. Comm'n, Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-63237 (Nov. 17, 2010) ("More frequent reporting of high-quality information promotes greater deterrence by enhancing the efficiency and effectiveness of the Commission's enforcement program.").

111. *See* 17 C.F.R. § 240.21F-6(a)(3)(ii) (2013) (a factor in any award amount determination is "[t]he degree to which an award encourages the submission of high quality information from whistleblowers by appropriately rewarding whistleblowers' submission of significant information and assistance").

112. *See* 15 U.S.C. § 78u-6(c)(1)(B)(III) (2012) (a factor in any award amount determination is "the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead[s] to the successful enforcement of such laws"); 17 C.F.R. § 240.21F-6(a)(3) ("The Commission will assess its programmatic interest in deterring violations of the securities laws by making awards to whistleblowers who provide information that leads to the successful enforcement of such laws.").

113. *See* U.S. Sec. & Exch. Comm'n, 2013 Annual Report, *supra* note 21, at 16.

often obtains valuable information and assistance from whistleblowers even after it has begun to investigate an alleged violation and the SEC actively solicits follow-up complaints from whistleblowers who have already filed complaints.[114] In fact, an important factor that may increase the amount of a whistleblower's award is the level of "[a]ssistance provided by the whistleblower."[115] Enforcing waivers when the SEC has already learned of the general misconduct would limit this flow of potentially useful information and assistance, impeding a federal interest. Accordingly, a balancing of public policy interests dictates that waivers of a Dodd-Frank whistleblower award should not be enforced, regardless of when and how the SEC learns of the underlying securities violation.

C. USING CONFIDENTIALITY AGREEMENTS TO IMPEDE DODD-FRANK WHISTLEBLOWING

In addition to contractual provisions that directly limit or condition an individual's ability to report misconduct to government agencies, or to receive personal benefits for doing so, many whistleblowers also face more general confidentiality agreements, which could arguably prohibit some communication with the SEC.[116] Employment, compliance, and separation agreements frequently include terms providing, for example, that "Employee shall not disclose, and represents that Employee has not disclosed, any confidential company information to any third party." These agreements often define confidential information broadly to encompass any information that employees learned during the course of their employment at the company. These provisions are particularly significant because they can be used by an employer to bring, or threaten to bring, a breach of contract claim against a whistleblower seeking damages beyond the compensation that the employee received in connection with the contract, a tactic now being used against FCA whistleblowers with increasing frequency.[117]

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114. As chief of the SEC's Office of the Whistleblower, McKessy noted in an SEC video for prospective whistleblowers, "People often call us to ask if they should submit something, or submit an update, and we will almost always suggest that you submit it. As I often tell people, you never know what information may be the last piece of a puzzle for an investigation." SEC Office of the Whistleblower, *What Happens to Tips* (Transcript), *available at* http://www.sec.gov/about/offices/owb/owb-what-happens-to-tips.shtml (last visited Sept. 28, 2014).

115. *See* 15 U.S.C. § 78u-6(c)(1)(B)(i)(II) (2012); 17 C.F.R. § 240-21F-6(a)(2) (2013).

116. Another similar and troubling practice, beyond the scope of this Article, is the use of a broad confidentiality agreement that prevents employees from consulting independent legal counsel, effectively eliminating their ability to file whistleblower complaints anonymously in accordance with SEC rules.

117. *See, e.g.*, Walsh v. Amerisource Bergen Corp., Civ. No. 11-7548, slip op. at 13 (E.D. Pa. June 16, 2014); *see also* Marissel Descalzo, *Employers Fight Back Against Whistleblowers*, INSIDE COUNSEL (June 24, 2014), http://www.insidecounsel.com/2014/06/24/employers-fight-back-against-whistleblowers; Ben James, *5 Questions to Ask Before Suing over Whistleblower Theft*, LAW360 (May 21, 2014), https://www.law360.com/articles/533633/5-questions-to-ask-before-suing-over-whistleblower-theft; Jean F. Kuei & Michael

These commonplace confidentiality provisions implicate important interests on both sides. Employers have a strong interest in obtaining such agreements for legitimate employer concerns, such as promoting research and innovation, protecting trade secrets and corporate reputation, and facilitating communication between a principal and its agents.[118] For this reason, confidentiality agreements tailored to protect legitimate interests are enforceable when they are not contrary to public policy.[119]

It is equally clear that strictly enforcing such confidentiality agreements to prevent whistleblowers from reporting misconduct to the SEC would abridge important law enforcement interests. This would contravene Rule 21F-17, which expressly states that confidentiality agreements may not be used to impede individuals from communicating with SEC staff.[120] It would also be inconsistent with a long line of cases prohibiting secrecy agreements purporting to restrict individuals from reporting violations of law.[121] Courts have also held that information about wrongdoing cannot be a trade secret warranting confidentiality protection.[122]

A more difficult question arises when an employer accepts the whistleblower's right to report misconduct but argues that the whistle-

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R. Kleinmann, *Health Care Employers Take Note: New Weapons Are Available When Defending False Claims Act Suits*, Forbes (June 20, 2014), *available at* http://www.forbes.com/sites/theemploymentbeat/2014/06/20/health-care-employers-take-note-new-weapons-are-available-when-defending-false-claims-act-suits/.

118. *See* O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 763 (9th Cir. 1996) (employer had "strong interest" in preventing employees from improperly taking and disclosing to other co-workers confidential documents); Dworkin & Callahan, *supra* note 33, at 174.

119. *See, e.g.*, McGrane v. Reader's Digest Ass'n, Inc., 822 F. Supp. 1044, 1046 (S.D.N.Y. 1993) (confidentiality agreements involving "matters of substantial concern to the public" are distinct from "trade secrets or other legitimately confidential information").

120. Similarly, the Commission has stated "we wish to clarify that confidentiality agreements or protective orders entered into in [Self-Regulatory Organization] arbitration or adjudicatory proceedings may not be used to prevent a party from reporting a possible securities law violation." Adopting Release, *supra* note 6, at 201 n.407.

121. *See* Chambers v. Capital Cities/ABC, 159 F.R.D. 441, 444 (S.D.N.Y. 1995) ("Absent possible extraordinary circumstances . . . , it is against public policy for parties to agree not to reveal, at least in the limited contexts of depositions or pre-deposition interviews concerning litigation arising under federal law, facts relating to alleged or potential violations of . . . law."); EEOC v. U.S. Steel Corp., 671 F. Supp. 351, 357 (E.D. Pa. 1987) (agreements restricting former employees revealing violations of law to EEOC will "hinder[]" implementation of the "Congressionally mandated duty to enforce the provisions" of federal statutes), *overturned on other grounds*, 921 F.2d 489 (3d Cir. 1990).

122. *McGrane*, 822 F. Supp. at 1051–52; *id.* at 1046 ("Courts are increasingly reluctant to enforce secrecy arrangements where matters of substantial concern to the public—as distinct from trade secrets or other legitimately confidential information—may be involved."); *id.* at 1052 ("Disclosures of wrongdoing do not constitute revelations of trade secrets which can be prohibited by agreements binding on former employees.").

blower cannot take or use company documents that might support the claim. In this situation, does the employee's right to communicate with the government justify the taking and sharing of these confidential documents, or does the employer have a superior interest in maintaining the confidentiality of its proprietary information? Courts have long grappled with these questions in the FCA context,[123] and are now beginning to face them in the SEC whistleblower context.

Employers are likely to argue that the federal interest in SEC whistleblowing cannot outweigh traditionally recognized property and intellectual property rights, and are likely to characterize employees' taking of documents for whistleblowing purposes as theft or conversion.[124] Employers may also note that, once the SEC is alerted to wrongdoing, it can request or subpoena documents, reducing the need for employees to take confidential documents.[125] This argument finds at least some support in existing case law, as some courts have taken an anti-whistleblower stance even when employees took documents to support a disclosure of illegality to the government. A prominent example is *JDS Uniphase Corp. v. Jennings*,[126] in which an employee defended his former employer's claim for a breach of a confidentiality agreement by claiming that the agreement was unenforceable in violation of the public policy in favor of whistleblowing.[127]

123. *See* Zahodnick v. Int'l Bus. Mach. Corp., 135 F.3d 911, 914–15 (4th Cir. 1997); Siebert v. Gene Sec. Network, No. 11-cv-01987-JST, slip op. at 11–13 (N.D. Cal. Oct. 16, 2013); United States *ex rel*. Wildhirt v. AARS Forever, Inc., No. 1:09-cv-01215, slip op. at 9 (N.D. Ill. Sept. 19, 2013); United States *ex rel*. Ruhe v. Masimo Corp., 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012); Glynn v. Impact Sci. & Tech., Inc., 807 F. Supp. 2d 391, 423–24 (D. Md. 2011), *aff'd*, 710 F.3d 209, 214–18 (4th Cir. 2013); United States *ex rel*. Head v. Kane Co., 668 F. Supp. 2d 146, 152 (D.D.C. 2009); United States *ex rel*. Grandeau v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004); X Corp. v. Doe, 805 F. Supp. 1298 n.24 (E.D. Va. 1992). For a good discussion of FCA case law examining the enforceability of confidentiality agreements, see Joel D. Hesch, *The False Claims Act Creates a "Zone of Protection" That Bars Suits Against Employees Who Report Fraud Against the Government*, 62 DRAKE L. REV. 361, 395–404 (2014).

124. *See, e.g.*, *Ruhe*, 929 F. Supp. 2d at 1038 (company claimed that the relator copied confidential documents and transmitted them to the government in violation of relator's nondisclosure agreement); *Head*, 668 F. Supp. 2d at 150 (D.D.C. 2009) (suit by former employer against a False Claims Act relator for fraud, libel, tortious interference with contract, and other associated claims arising from relator's disclosure of confidential employer documents to the government, in violation of the relator's nondisclosure agreement).

125. *See, e.g.*, Securities and Exchange Act of 1934, § 17(b), 15 U.S.C. § 78q-1(b) (2012).

126. 473 F. Supp. 2d 697 (E.D. Va. 2007).

127. *See id.* at 701–02. Pursuant to the agreement's choice of law provision, the court analyzed this claim under California law, which has a provision that asserts a "generalized declaration of public policy in favor of whistle-blowing." *Id.* at 701. However, the court also noted that "Sarbanes-Oxley is itself an embodiment of a federal policy encouraging whistleblowers to come forward, and the effect of the California declaration, if any, is to encourage liberal construction of whistleblower statutes by California courts or other courts applying California law." *Id.* at 701 n.5.

Specifically, the employee argued that he needed to take proprietary documents "to function as an effective Sarbanes-Oxley whistle-blower."[128] In rejecting this argument, the court concluded that a pro-whistleblower public policy cannot "authorize disgruntled employees to pilfer a wheelbarrow full of an employer's proprietary documents in violation of their contract merely because it might help them blow the whistle on an employer's violations of law, real or imagined."[129] The court pointedly concluded that "Sarbanes-Oxley is not a license to steal documents and break contracts."[130]

Many other courts, however, take a more nuanced approach, focusing on the nexus between the confidential documents in question and the misconduct alleged by the whistleblower. These courts have often found that an employer can bring a breach-of-contract claim against the employee, or successfully repel a retaliation claim by the employee, based on a confidentiality agreement if the purportedly confidential documents or materials taken by the employee bear little relationship to the reported violation. For example, in *Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc.*,[131] an FCA relator argued that the court should adopt a public policy exception to enforcement of her confidentiality agreement.[132] The court determined that, even if it adopted such an exception, the exception would not protect the relator because of her "vast and indiscriminate appropriation" of the employer's files.[133] The relator had copied approximately "eleven gigabytes of data—tens of thousands of pages," with little understanding or limitation on her choice of documents to take:

> She decided which [employer] documents to copy by browsing through folders related to technology and technology development, and, she testified, "if I saw something that I thought actually could apply and should be investigated, *I just grabbed the whole folder*" (emphasis added). Further, she scanned only file names and "did not look at any individual documents at all." Swept up in this unselective taking of documents were attorney-client privileged communications, trade secrets belonging to [her employer] and other contractors, internal research and development information, sensitive government information, and at least one patent application that the Patent Office had placed under a secrecy order.[134]

The Ninth Circuit concluded that any employee asserting a public policy exception to a breach of confidentiality agreement claim must

128. *Id.* at 702.
129. *Id.*
130. *Id.* at 703.
131. 637 F.3d 1047 (9th Cir. 2011).
132. *See id.* at 1061–62.
133. *See id.* at 1062.
134. *Id.*

make a "particularized showing" that the "removal of the documents was reasonably necessary to pursue an FCA claim."[135]

When the relationship between the documents in dispute and the reported wrongdoing is close, courts typically will refuse to enforce the confidentiality provisions on public policy grounds.[136] For example, courts have repeatedly found that an FCA relator's taking of documents is not actionable if those documents could be used as evidence at trial or are "relevant to the alleged fraud" because the FCA reflects a "strong public policy in favor of protecting whistleblowers who report fraud against the government."[137] Otherwise, "[e]nforcing a private

135. *Id.* The Ninth Circuit did not rule out such an exception, but clearly limited its use:

> The need to facilitate valid claims does not justify the wholesale stripping of a company's confidential documents. Although courts perhaps should consider in particular instances for particular documents whether confidentiality policies must give way to the needs of FCA litigation for the public's interest, Cafasso's grabbing of tens of thousands of documents here is overbroad and unreasonable, and cannot be sustained by reference to a public policy exception.

Id.; *see also* Walsh v. Amerisource Bergen Corp., Civ. No. 11-7548, slip op. at 13 (E.D. Pa. June 16, 2014) (refusing to dismiss a counterclaim for breach of confidentiality agreement because it was too early to tell whether "the entirety" of the documents taken by the whistleblower were necessary for his FCA claim); Siebert v. Gene Sec. Network, Inc., 11-CV-01987-JST, slip op. at 13 (N.D. Cal. Oct. 16, 2013) ("The Court agrees that any alleged obligation by Siebert not to retain or disclose the confidential documents that form the basis of this action is unenforceable as a matter of public policy because it would frustrate Congress' purpose in enacting the False Claims Act. . . . But the Court cannot now conclude that the counterclaim in its entirety should be dismissed, because it is possible that Siebert also took confidential documents that bore no relation to his False Claims Act claim."); United States *ex rel.* Wildhirt v. AARS Forever, Inc., No. 1:09-cv-01215, slip op. at 6 (N.D. Ill. Sept. 19, 2013) (refusing to dismiss a counterclaim based on a confidentiality agreement when it was alleged that the relator took documents "with no intention of using" them in the qui tam suit and when the relator's disclosure went beyond what was necessary for the suit).

136. *See, e.g.*, *Siebert*, 2013 WL 5645309, slip op. at 13 ("[A]ny alleged obligation by Siebert not to retain or disclose the confidential documents that form the basis of this action is unenforceable as a matter of public policy because it would frustrate Congress' purpose in enacting the False Claims Act—namely, the public policy in favor of providing incentives for whistleblowers to come forward, file FCA suits, and aid the government in its investigation efforts," but holding that a breach of contract claim may still be appropriate if the relator took confidential documents that "bore no relation" to his FCA claim); United States *ex rel.* Ruhe v. Masimo Corp., 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012) ("Relators sought to expose a fraud against the government and limited their taking to documents relevant to the alleged fraud. Thus, this taking and publication was not wrongful, even in light of nondisclosure agreements, given 'the strong public policy in favor of protecting whistleblowers who report fraud against the government.'") (quoting United States *ex rel.* Grandeau v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004) (relator exempt from liability for breach of confidentiality agreement for disclosure to government of documents showing employer engaged in fraudulent healthcare billing)); United States *ex rel.* Head v. Kane Co., 668 F. Supp. 2d 146, 152 (D.D.C. 2009); X Corp. v. Doe, 805 F. Supp. 1298, 1310 n.24 (E.D. Va. 1992) (a confidentiality agreement would be void as against public policy if, when enforced, it would prevent "disclosure of evidence of a fraud on the government").

137. *Siebert*, 11-CV-01987-JST, slip op. at 12; *see also Ruhe*, 929 F. Supp. 2d at 1039; *Grandeau*, 350 F. Supp. 2d at 773.

agreement that requires a *qui tam* plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose" of the FCA.[138]

A similar rule prevails in the Sarbanes-Oxley context, in which courts also recognize that the federal interest in whistleblowing can trump employers' otherwise legitimate desire to protect confidential documents when there is a reasonable connection between the documents and the alleged securities violation.[139] For example, one court stated: "[T]he statute demonstrates the public policy in favor of allowing even current employees to assist in securities fraud investigations. It certainly does not establish a public policy in favor of allowing employers to muzzle their employees with overbroad confidentiality agreements."[140]

Even more specifically, the DOL's ARB, which hears appeals of Sarbanes-Oxley whistleblower retaliation claims, has indicated that employees should be able to take and share documents related to potential misconduct, despite the existence of a confidentiality agreement, if those documents represent "the kind of 'original information' that Congress intended be protected under either the Internal Revenue Service [(IRS)] or SEC whistleblower programs."[141] In *Vannoy v. Celanese Corp.*, an employee complained internally about his employer's financial practices, and then reported the practices to the IRS under the Agency's whistleblower reward program.[142] As part of the IRS complaint, the employee attached numerous proprietary and confidential company documents in violation of the company's general confidentiality agreement.[143] The employee filed a Sarbanes-Oxley retaliation claim after the employer terminated his employment.[144]

Initially, a DOL administrative law judge (ALJ) rejected the employee's claim, finding that the company properly discharged the employee for, among other things, copying confidential documents in violation of his confidentiality agreement.[145] The ALJ also rejected the employee's argument that he had an "informer's privilege" to use the company's confidential documents when reporting wrongdoing, asserting that "SOX allows for the reporting of violations but not for illegally obtaining documents."[146] On appeal, however, the ARB concluded

138. *Head*, 668 F. Supp. 2d at 152.
139. *In re* JDS Uniphase Corp. Secs. Litig., 238 F. Supp. 2d 1127, 1136 (N.D. Cal. 2002).
140. *Id.*
141. Vannoy v. Celanese Corp., ARB No. 09-118, slip op. at 17 (Sept. 28, 2011).
142. *See id.* at 4, 6.
143. *Id.* at 6.
144. *Id.* at 2.
145. *Id.* at 20–21.
146. *Id.* at 22 (citing JDS Uniphase Corp. v. Jennings, 473 F. Supp. 2d 697 (D. Va. 2007)).

that the confidentiality agreement did not necessarily prohibit the employee from providing documents to the government, even though they contained sensitive data such as social security numbers.[147]

The ARB noted the difficulty of resolving the "clear tension between a company's legitimate business policies protecting confidential information and the whistleblower bounty programs" and looked to the public policy supporting the bounty programs to resolve the tension.[148] The ARB asserted that Congress created the IRS and Dodd-Frank programs:

> to encourage whistleblowers to disclose confidential company information in furtherance of enforcement of tax and securities laws. Passage of these bounty provisions demonstrate that Congress intended to encourage federal agencies to seek out and investigate independently procured, non-public information from whistleblowers such as Vannoy to eliminate abuses in the tax realm under the IRS Whistleblower program and now in the securities realm with the SEC Whistleblower program . . . . [T]he Dodd-Frank Act established the SEC Investor Protection Fund, which is to be used to pay whistleblower claims and is funded with monetary sanctions that the SEC collects in a judicial or administrative action, or through certain disgorgements under the Sarbanes-Oxley Act of 2002. Similar to the IRS Whistleblower bounty program that Vannoy pursued, Section 21F(b) of the Dodd-Frank Act provides that the SEC "shall pay" a whistleblower who voluntarily provides original information to the SEC that leads to the successful enforcement of a covered judicial or administrative action and results in certain monetary sanctions.
>
> . . .
>
> . . . Under the terms of the SEC whistleblower bounty program, Congress anticipated that the whistleblower would provide independently garnered, insider information that would be valuable to the SEC in its investigation.[149]

Ultimately, the ARB remanded the case to the ALJ, noting that, in light of these public policy interests, "the crucial question for the ALJ to resolve . . . is whether the information [the employee] procured from the company is the kind of 'original information' that Congress intended be protected under either the IRS or SEC whistleblower programs, and whether . . . the transfer of information was protected activity."[150]

Vannoy offers a guiding principle that documents may be lawfully taken by an employee, notwithstanding a confidentiality agreement, if those documents reasonably support or relate to a whistleblower complaint that is required, protected, or encouraged by federal or state law because the government has a compelling interest in receiving the doc-

147. *See id*. at 8.
148. *Id.* at 16.
149. *Id.*
150. *Id.* at 17.

uments. Conversely, documents with no reasonably ascertainable relevance to a possible securities violation would be subject to the applicable confidentiality agreement.

As the ARB's discussion of Dodd-Frank in *Vannoy* suggests, there is good reason to extend this guiding principle to the SEC Whistleblower Program because it comports fully with the public policy aims of the statute. Relevant documents taken from an employer not only can provide potentially valuable evidence of a possible securities violation, but also can help the SEC confirm the veracity of the whistleblower's information and better distinguish between tips that warrant significant attention and those that do not. This is a critical function because the SEC received over 3,200 tips through the SEC Whistleblower Program in fiscal year 2013 alone,[151] and receives tens of thousands of other tips and referrals through other means, such as investor complaints.[152] Similarly, background documents such as organizational charts, compliance policies, and descriptions of relevant internal systems can save investigative time and resources by helping the SEC understand the facts of a case more quickly.[153] Indeed, the SEC expects whistleblowers to provide documentary support. The SEC's "Tips, Complaints and Referrals" form (Form TCR) specifically asks the whistleblower to "[d]escribe all supporting materials in the complainant's possession . . ." and to "[i]dentify with particularity any documents or other information in your submission that you believe could reasonably be expected to reveal your identity."[154] These questions would make little sense if the SEC did not expect whistleblowers to include relevant documents in their submissions.

Finally, while employers would obviously like to avoid SEC scrutiny, the disclosure of documents to the SEC poses relatively little risk of harm to employers who have not engaged in wrongdoing. SEC policy mandates that all investigations—and all documents produced therein—must be kept confidential and nonpublic until the filing of a complaint or administrative order, giving employers a high level of assurance that any confidential documents will not be leaked

151. U.S. Sec. & Exch. Comm'n., 2013 Annual Report, *supra* note 21.

152. As the SEC's Enforcement Manual indicates, the SEC cannot allocate the same level of resources to each tip and investigation, and instead must rank investigations based on a number of factors, including the scope of the misconduct and investor harm. U.S. Sec. & Exch. Comm'n., Enforcement Manual § 2.1.1 (2013) ("Devoting appropriate resources to investigations that are more significant will help ensure high quality investigations and maximize desired program outcomes.").

153. The ability to gain early access to documents is particularly significant because the SEC cannot subpoena documents without a formal order of investigation, which itself typically requires investigating attorneys to have some evidence that a securities violation is occurring or has occurred. *See id.* § 2.3.4.

154. U.S. Sec. & Exch. Comm'n, Form TCR, *available at* http://www.sec.gov/about/forms/formtcr.pdf.

to the public or third parties.[155] In this way, SEC investigations offer greater confidentiality protections to employers than an FCA suit, in which relators may choose to attach supporting documents to public filings.[156]

A rule that allows whistleblowers to provide the SEC with documents relevant to understanding and investigating a possible securities violation strikes an appropriate balance between employers' legitimate interests in confidentiality and data security, while ensuring that the SEC retains access to potentially valuable sources of evidence and supporting background information. While employers and employees may disagree about whether certain documents are relevant to a possible securities violation, this rule also has the benefit of being relatively easy to understand and intuitive, reducing the risk that whistleblowers will inadvertently expose themselves to personal liability while making a good-faith effort to report possible misconduct.

IV. Practical Steps to Reduce the Risks Posed by Agreements Restricting Whistleblowing

This analysis of the three types of de facto gag clauses indicates that courts will, and should, refuse to enforce agreements that would significantly threaten the flow of potentially actionable information and documents about possible securities violations from whistleblowers to the SEC. If our prediction is correct, and courts do strike down such contractual clauses, they will become less common over time. In the meantime, even if courts refuse to enforce de facto gag clauses, the inclusion of such provisions in agreements continues to pose a danger to the SEC Whistleblower Program. Many individuals, particularly those who are unrepresented, may not understand that such provisions could be challenged, and may decide to forgo reporting as a result. Other potential whistleblowers may recognize that such provisions are likely unenforceable but decide that staying silent is preferable to acting as a "test case" and risking personal liability by blowing the whistle. Employees may also reasonably fear that challenging such provisions will flag them as a potential whistleblower, leading to retaliation. The widespread use of such agreements poses risks for employers, too, who may reflexively seek the broadest confidentiality and release provisions possible without recognizing the law's substantial limitations.

155. ADOPTING RELEASE, *supra* note 6, at 126. Additionally, employers producing documents to the SEC can request confidentiality for those documents under the SEC's Freedom of Information Act procedures. *See* 17 C.F.R. § 200.83 (2014).

156. The FCA provides that relators must first file their complaints under seal to give the government an opportunity to investigate. *See* 31 U.S.C. § 3730(b)(2) (2012). Unless the government seeks an extension, however, the complaint may be unsealed after sixty days. *Id.*

Accordingly, our analysis suggests that the key stakeholders—employers, employees, and the SEC—should each take steps now to reduce the risks associated with these agreements. First, employers and their counsel should be aware that agreements that impede employees from reporting misconduct to the SEC or other government authorities may backfire. Although such agreements may dissuade some employees from reporting misconduct, other employees may challenge these provisions, resulting in uncertainty and added employer litigation costs. In such cases, employers may find that bargained-for contractual provisions are unenforceable, upsetting settled expectations.[157]

In addition to losing the benefit of their bargain, employers and their counsel may face substantial liability or sanctions for drafting agreements that purport to limit or condition communications with the SEC. Such agreements may put employers and their counsel in the SEC's crosshairs for violating Rule 21F-17 or federal and state statutes prohibiting compounding and obstruction of justice.[158] Such agreements also may subject employers' counsel to professional sanctions under Rule 3.4(f) of the Model Rules of Professional Conduct, which, with limited exceptions, states that attorneys shall not "request a person other than a client to refrain from voluntarily giving relevant information to another party."[159]

Even if the SEC does not act, employees may be able to bring Sarbanes-Oxley or Dodd-Frank retaliation claims against employers based upon an employment-related agreement that purports to limit or condition their ability to communicate with the SEC, on the theory that they have suffered an adverse employment action as a result of trying to exercise or preserve statutory rights.[160] Courts have previously allowed similar retaliation claims under other statutes where (1) the employee engaged in protected whistleblowing conduct prior to receiving the problematic agreement[161] or (2) the employee did not engage in prior protected conduct, but the employer either "(i) attempt[ed] to

157. Employers should also be aware that anonymity provisions discussed above make it possible that employers may never learn when and if an employee has breached an agreement by, for example, accepting a whistleblower award.

158. As Professor Bauer points out in an article exploring the ethical implications of evidence-suppressing settlements, it is unlikely that a settlement prohibiting voluntary disclosures would be deemed criminal conduct, especially if it includes a carve-out for disclosures pursuant to subpoena or court order. *See* Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 Or. L. Rev. 481, 506 (2008). Nevertheless, there is a risk that the SEC or a federal prosecutor might draw inferences from an agreement that aims to deter whistleblowing to the SEC. *See id.*

159. Model Rules of Prof'l Conduct R. 3.4(f) (1983). For a detailed discussion of Model Rule 3.4(f), see Bauer, *supra* note 158, at 506.

160. *See* 18 U.S.C. § 1514A (2012) (Sarbanes-Oxley); 15 U.S.C. § 78u-6(h) (2012) (Dodd-Frank).

161. Conn. Light & Power Co. v. Sec'y of U.S. Dep't of Labor, 85 F.3d 89 (2d Cir. 1996).

enforce the agreement against an employee who signed the agreement but nevertheless files or participates in an EEOC charge, or (ii) with[e]ld benefits already promised or owed from an employee who refuses to sign the agreement."[162] An agreement that the employer intended to use as a shield from liability may become a sword in the hands of a sophisticated employee-side attorney. Thus, employers and their counsel should take proactive steps to ensure that their agreements do not directly or indirectly impede their employees' ability to report misconduct to the government.

For their part, employees and their counsel should educate themselves about the legal ramifications of these provisions and take a firm stand against their enforceability and legality. In particular, employee-side counsel should understand both the relevant law, including SEC rules, ethical rules, and case law, and the available legal tools at their disposal, including public policy arguments to defend a breach-of-contract claim or bring a retaliation claim against the employer. Counsel can then argue against the inclusion of such provisions during negotiations or, if necessary, challenge their enforceability later. Likewise, employees and their counsel should seriously consider advising the SEC if a company is using agreements to block individuals from reporting possible securities violations, especially if the company is under investigation by the SEC for other possible misconduct. The SEC has expressed interest in receiving such information,[163] and reports can be made anonymously. Employees' attorneys also should inform clients about the potential risks of taking and disclosing documents—including the risk of a claim against the employee—to ensure that employees do not expose themselves to personal liability by indiscriminately taking documents that bear no reasonable relationship to a possible securities violation.

Finally, and perhaps most importantly, we believe that government agencies should take meaningful action to counter the chilling effect of de facto gag clauses on whistleblowing. First, the SEC should use its enforcement authority to sanction companies that run afoul of Rule 21F-17, as Sean McKessy has already warned.[164] In addition, the

162. EEOC v. Nucletron Corp., 563 F. Supp. 2d 592, 594 (D. Md. 2008).

163. Mahoney, *supra* note 25 (quoting McKessy as stating that "we are actively looking for examples of confidentiality agreements, separat[ion] agreements, employee agreements that . . . in substance say 'as a prerequisite to get this benefit you agree you're not going to come to the Commission . . . .'").

164. John A. Goldmark, *SEC Warns In-House Counsel Against Using Incentives to Deter External Whistleblowing*, DAVIS WRIGHT TREMAINE LLP (Apr. 14, 2014), *available at* http://www.dwt.com/SEC-Warns-In-House-Counsel-Against-Using-Incentives-to-Deter-External-Whistleblowing-04-14-2014 (quoting McKessy as stating that companies should "[b]e aware that this is something we are very concerned about. If you're spending a lot of your time trying to come up with creative ways to get people out of our programs, I think you're spending a lot of wasted time and you run the risk of running afoul of our regulations.").

SEC could bring administrative actions against attorneys who require employees to enter into impermissibly restrictive agreements and could potentially suspend such attorneys from practicing before the SEC.[165]

Moreover, we believe the SEC should amend Rule 21F-17 to provide additional guidance on the type of contractual provisions that impede an individual from communicating with the SEC. Such guidance should clarify that an attempt to condition payment of severance or any other benefit on any limitation to an employee participating in the SEC's whistleblower reward program (such as losing the ability to make an anonymous report or receive an award) violates Rule 21F-17.[166] In addition, an amended Rule 21F-17 could provide examples of prohibited provisions, while also clarifying that the examples are not exclusive.[167] Likewise, OSHA, which already reviews certain settlement agreements in Sarbanes-Oxley cases to ensure that they do not contain explicit gag clauses,[168] should also modify its existing settlement review policies to clarify that any provision that bars or impedes participation in the SEC Whistleblower Program is invalid.[169]

165. Under Rule 102(e)(1)(iii) of the SEC's Rules of Practice, the SEC "may censure a person or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found . . . to have willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder." SEC Rules of Practice, Rule 102(e)(1)(iii), 17 C.F.R. § 201.102(e)(1)(iii) (2013).

166. While this Article is focused on contractual provisions that deter SEC whistleblowing, such provisions also undermine the effectiveness of similar whistleblower reward programs. Accordingly, the CFTC and IRS should consider issuing guidance barring these types of provisions. Furthermore, the General Services Administration should consider amending the Federal Acquisition Regulations to bar these types of provisions in any agreement between a government contractor and an employee of the contractor.

167. For this reason, one of the authors of this Article, Jordan Thomas, along with the nonprofit whistleblower advocacy organization Government Accountability Project, has submitted a rule-making petition to the SEC seeking such an amendment to Rule 21F-17(a). *See* SEC File No. 4-676; SEC File No. 4-677 (July 18, 2014).

168. *See* Occupational Safety & Health Admin., Whistleblower Investigations Manual 6–11 (2011) ("OSHA will not approve a 'gag' provision that restricts the complainant's ability to participate in investigations or testify in proceedings relating to matters that arose during his or her employment. When such a provision is encountered, the parties should be asked to remove it or to replace it with the following: 'Nothing in this Agreement is intended to or must prevent, impede or interfere with Complainant's providing truthful testimony and information in the course of an investigation or proceeding authorized by law and conducted by a government agency.'").

169. For this reason, one of the authors of this Article, Jason Zuckerman, along with the Government Accountability Project, has submitted a rule-making petition to OSHA seeking such an amendment.

Such guidance from the SEC and OSHA would provide additional clarity for both employers and employees, and help protect the efficacy of the SEC Whistleblower Program. If the SEC Whistleblower Program is to fulfill its goal of better protecting investors, it must be allowed to function as Congress intended, without being constrained by private agreements. The public policy behind Dodd-Frank is too significant to allow for any other result.