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## Blowing the Whistle on Environmental Law: How Congress Can Help the EPA Enlist Private Resources in the Fight to Save the Planet

Christopher K. Warren

*Boston College Law School*, [christopher.warren.2@bc.edu](mailto:christopher.warren.2@bc.edu)

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# BLOWING THE WHISTLE ON ENVIRONMENTAL LAW: HOW CONGRESS CAN HELP THE EPA ENLIST PRIVATE RESOURCES IN THE FIGHT TO SAVE THE PLANET

CHRISTOPHER K. WARREN\*

**Abstract:** Following the 2008 financial crisis, regulators faced the task of returning the country to financial stability and protecting consumers. Given the challenges involved, Congress empowered the SEC and the CFTC, through the Dodd-Frank Act, to encourage whistleblowers to come forward through programs that provide significant financial rewards and protection. These programs are part of the evolving field of whistleblower law that has been tremendously successful at uncovering wrongdoing while rewarding whistleblowers. Given the success of these programs and recognition by Congress that they can be useful tools to combat threats to the government, Congress should consider whether a similar system would be beneficial in the environmental arena. Threats to the environment may pose a bigger, more tangible danger to the United States than threats to the economy. This Note argues that current environmental whistleblower laws are too uncertain and lack adequate financial incentives and protections to attract meaningful participation. It advocates for a uniform whistleblower program established under the EPA, similar to those established by the Dodd-Frank Act under the SEC and the CFTC.

## INTRODUCTION

There is an old saying about child rearing that “it takes a village,” which can be broadly applied in many instances throughout the human experience.<sup>1</sup> This mentality is especially pertinent when it comes to the environment, where a truly all-inclusive effort is needed to preserve our planet and our way of life.<sup>2</sup>

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<sup>1</sup> See Fred Shapiro, *It Takes a Village*, FREAKONOMICS (Jun. 23, 2011, 12:31 PM), <http://freakonomics.com/2011/06/23/it-takes-a-village>, archived at <http://perma.cc/K9DX-B79R> (noting that the saying urges “cooperation in child rearing and other enterprises”).

<sup>2</sup> See Steve Almasy, *John Kerry: Climate Change as Big a Threat as Terrorism, Poverty, WMDs*, CNN (Feb. 17, 2014), <http://www.cnn.com/2014/02/16/politics/kerry-climate>, archived at <http://perma.cc/US7Z-JCC4> (quoting Secretary of State, John Kerry, saying climate change is the “greatest challenge of our generation”); *Climate Impacts on Human Health*, ENVTL. PROT. AGENCY, <http://www.epa.gov/climatechange/impacts-adaptation/health.html> (last updated Sept. 9, 2013), archived at <http://perma.cc/6FS6-9NNF> (listing impacts of climate change such as effects on water, spread of toxic

The need to engage as many people as possible to combat climate change and to protect vitally important, but limited environmental resources, requires society to provide mechanisms and incentives for potential whistleblowers with knowledge of environmental violations to report them to authorities.<sup>3</sup>

During the past several years, the term whistleblower has been increasingly present in the news.<sup>4</sup> The launch and proliferation of the website Wikileaks.com and the acts of classified government information leakers Bradley Manning and Edward Snowden, have shrouded the term in controversy and sparked a serious public policy debate.<sup>5</sup> In the legal realm, however, whistleblower has a specific, less controversial meaning that relates to an individual's role in exposing wrongdoing to the government.<sup>6</sup>

Over the past several years, several substantial government settlements in whistleblower cases have led to whistleblower suits becoming increasingly mainstream and lucrative for whistleblowers and their attorneys.<sup>7</sup> Both positive and negative effects for the whistleblowers themselves have accompanied the growth of this area of the law.<sup>8</sup> Although there are major success stories, such as that of a former UBS AG executive recovering over \$100 million for reporting a tax evasion scheme, there are also chilling reports that highlight the risks of coming forward, such as financial ruin, loss of work, industry resentment and protracted litigation with varying degrees of success.<sup>9</sup> To ensure that whis-

material and the spread of disease); *The Collective Action Problem*, PA. STATE COLL. OF EARTH AND MINERAL SCI. DEP'T OF GEOGRAPHY JOHN A. DUTTON E-EDUC. INST., <https://www.e-education.psu.edu/geog030/node/342> (last visited Sept. 24, 2014), archived at <http://perma.cc/JR7H-VTZW> (discussing how groups and the environment benefit from working collectively rather than in their own self-interest).

<sup>3</sup> *Infra* notes 201–254 and accompanying text.

<sup>4</sup> See, e.g., Harrison Jacobs, *Famous Whistleblower Has Some Good Advice for Edward Snowden*, BUSINESS INSIDER AUSTRALIA (Jan. 17, 2014, 4:22 AM), <http://www.businessinsider.com.au/daniel-ellsberg-reddit-ama-2014-1>, archived at <http://perma.cc/7X7Y-FUWB> (discussing “whistleblowing” from Vietnam papers to National Security Agency); Gregory Korte, *FBI Director: Snowden Not a ‘Hero Whistle-Blower’*, USA TODAY (Jan. 9, 2014, 3:35 PM), <http://www.usatoday.com/story/news/politics/2014/01/09/fbi-director-snowden-hero-whistleblower/4393247>, archived at <http://perma.cc/M7V2-GM2V> (quoting FBI Director that Snowden not a whistleblower).

<sup>5</sup> See Jacobs, *supra* note 4; Korte, *supra* note 4.

<sup>6</sup> See *infra* notes 22–24 and accompanying text.

<sup>7</sup> See Nicolas Morgan et al., *Growing Whistleblower Activity Calls for Close Employer Attention to Retaliation Issues*, DLA PIPER PUBLICATIONS (May 7, 2013), <http://www.dlapiper.com/growing-whistleblower-activity-calls-for-closer-employer-attention-to-retaliation-issues/>, archived at <http://perma.cc/AX3S-CEJG> (discussing increasing number of whistleblowers); Gordon Schnell et al., *So You Think You Want to Be a Whistleblower—A Few Words for the Wise*, CONSTANTINE CANNON (Sept. 27, 2012), <http://www.whistleblower-insider.com/so-you-think-you-want-to-be-a-whistleblower-a-few-words-for-the-wise/#.UtQ2HpGpwpE>, archived at <http://perma.cc/V8Q5-KQLK> (citing the government recovered \$3 billion through the FCA in 2011 alone).

<sup>8</sup> See Schnell et al., *supra* note 7 (highlighting positive and negative effects of being a whistleblower).

<sup>9</sup> See Laura Saunders & Robin Sidel, *Whistleblower Gets \$104 Million*, WALL ST. J. (Sept. 11, 2012, 7:24 PM), <http://online.wsj.com/news/articles/SB10000872396390444017504577645412614237708> (this article has not been digitally archived) (describing whistleblower's \$104 million reward); Schnell et al.,

tleblowers continue to be willing to come forward, the government must ensure that they receive adequate financial incentives and protection against retaliation.<sup>10</sup>

At present, the state of environmental whistleblower law is fractured between various statutes that have differing levels of financial incentive and protection.<sup>11</sup> Recent legislative measures undertaken by Congress in other areas, however, may present the opportunity for wider reform to increase whistleblower engagement in the environmental law arena.<sup>12</sup> In 2010, Congress adopted agency-wide whistleblower programs for the Securities Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) to deal with the fallout from the 2008 financial crisis and to prevent financial fraud in the future.<sup>13</sup> The programs combine economic incentives for whistleblowers with measures to protect against retaliation, in an effort to compel whistleblowers with knowledge of financial fraud to come forward.<sup>14</sup> The purpose of the programs being to enlist private interests into the fight against serious threats to the U.S. economy.<sup>15</sup> Using this model, the Environmental Protection Agency (EPA) should consider a similar program to incentivize whistleblowers to take actions to protect the environment, thereby confronting a problem that not only threatens the U.S. economy, but every aspect of daily life.<sup>16</sup>

This Note explores the advantages of the EPA adopting such a program and considers potential challenges that must be overcome for such a program to be successful.<sup>17</sup> Part I provides a general overview of U.S. whistleblower laws, the various models of enforcement, and the incentives and risks faced by

*supra* note 7 (discussing how becoming a whistleblower can be an unpleasant ordeal that includes horror stories); *infra* notes 79–91 and accompanying text (discussing risks faced by whistleblowers).

<sup>10</sup> See Aaron S. Kesselheim et al., *Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies*, 362 NEW ENG. J. MED. 1832, 1836 (2010) (discussing the personal toll faced by whistleblowers and the benefits of financial reward); James D. Oesterle, "Citizen Rewards" to Promote Environmental Crimes Prosecutions, 23 A.B.A. NAT. RES. & ENV'T 46, 46–47 (2009) (noting the personal and professional cost of serving as a whistleblower and the need for reward programs).

<sup>11</sup> See *infra* notes 150–195 and accompanying text.

<sup>12</sup> See Commodity Exchange Act, 7 U.S.C. § 26 (2012) (laying out provisions of the CFTC whistleblower program); Securities Exchange Act of 1934, 15 U.S.C. § 78u-6 (2012) (laying out provisions of the SEC whistleblower program); see also Internal Revenue Code, 26 I.R.C. § 7623 (2012) (laying out provisions of the IRS whistleblower program); *infra* notes 255–277 and accompanying text.

<sup>13</sup> See 7 U.S.C. § 26 (CFTC whistleblower program); 15 U.S.C. § 78u-6 (SEC whistleblower program passed under Dodd-Frank).

<sup>14</sup> See 15 U.S.C. §§ 78u-6 to -7 (2012) (describing basis for awards to whistleblowers).

<sup>15</sup> See SEC. AND EXCH. COMM'N, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1 (2013), available at <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf>, archived at <http://perma.cc/QK22-B9WM>.

<sup>16</sup> See *infra* notes 255–277 and accompanying text.

<sup>17</sup> See *infra* notes 255–297 and accompanying text.

those who blow the whistle.<sup>18</sup> Part II discusses the expansion of agency-specific whistleblower programs and their recent emergence as a response to the 2008 financial crisis.<sup>19</sup> Part III then turns to the current private enforcement regime in environmental law, and further, explores the state of certain environmental whistleblower programs that are already in place.<sup>20</sup> Part IV concludes with an analysis of the effectiveness of the current environmental private enforcement regime, presents an argument in favor of adopting an agency-wide EPA whistleblower program, and responds to potential challenges of such a program.<sup>21</sup>

## I. BACKGROUND OF WHISTLEBLOWER LAW

### A. *Who Are Whistleblowers?*

A whistleblower is defined as “an employee who reports employer wrongdoing to a governmental or law-enforcement agency.”<sup>22</sup> In practice however, a whistleblower can be anyone who brings knowledge of a violation to the government.<sup>23</sup> As such, whistleblower incentives and protections are available not only to employees, but also to clients, investors, service providers, competitors and any other party with particularized knowledge of the legal violation being committed.<sup>24</sup> In many instances, reporting these violations can result in a financial reward for the whistleblower, protection from retaliation, and knowledge that an injustice is being uncovered and stopped.<sup>25</sup>

The most common areas for whistleblower lawsuits include government program fraud (i.e., Medicare or Medicaid fraud), securities fraud, and tax fraud.<sup>26</sup> Whistleblowers have also been used in other areas of the law, including

<sup>18</sup> See *infra* notes 22–91 and accompanying text.

<sup>19</sup> See *infra* notes 92–149 and accompanying text.

<sup>20</sup> See *infra* notes 150–195 and accompanying text.

<sup>21</sup> See *infra* notes 196–297 and accompanying text.

<sup>22</sup> BLACK’S LAW DICTIONARY 1734 (9th ed. 2009).

<sup>23</sup> See False Claims Act, 31 U.S.C. § 3730(b) (2012) (allowing “a person [to] bring a civil action for violation of [the False Claims Act]”); *Who Can Be a Whistleblower?*, GOVERNMENTFRAUD.US, <http://governmentfraud.us/whistleblowers> (last visited Sept. 26, 2014), archived at <http://perma.cc/F8CC-FPGE> (listing the types of persons who may be whistleblowers including employees, non-employees, competitors, corporations, and public interest groups, among others).

<sup>24</sup> See *Who Can Be a Whistleblower?*, *supra* note 23.

<sup>25</sup> See 15 U.S.C. § 78u-6(h) (2012) (describing the SEC’s whistleblower protection provision); *Why Whistleblower Laws Work*, TAXPAYERS AGAINST FRAUD EDUCATION FUND, <http://www.taf.org/why-whistleblower-laws-work> (last visited Sept. 26, 2014), archived at <http://perma.cc/4HUL-2W6F> (noting that because of whistleblower laws, companies must think twice before committing fraud); *infra* notes 58–78 and accompanying text.

<sup>26</sup> See Press Release, Dep’t of Justice, Justice Department Recovers \$3 Billion in False Claims Act Cases in Fiscal Year 2011, (Dec. 19, 2011) [hereinafter 2011 FCA Press Release], available at <http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html>, archived at <http://perma.cc/K38L-TRQK>; Press Release, Sec. and Exch. Comm’n, SEC Awards More Than \$14 Million to Whistleblower (Oct. 1,

by the EPA, to uncover, among other things, fraud, waste and abuse.<sup>27</sup> There are multiple avenues of government enforcement that a whistleblower may pursue when coming forward with a claim.<sup>28</sup> In certain circumstances, government prosecutors and agencies pursue the claims brought forward, and federal and state laws, in certain circumstances, allow the whistleblower to share in the government's financial recovery and to receive protection against retaliation.<sup>29</sup>

### *B. Types of Government-Private Actions and Incentive Programs*

The government has a history of fostering a private justice system by partnering with private interests to successfully prosecute both criminal and civil violations.<sup>30</sup> The justice system provides different procedures for plaintiffs to bring suits.<sup>31</sup> There is a victim-based system that allows for private causes of action brought by persons suffering injuries or damages from other parties, and a common-good system that allows plaintiffs who have not suffered a personal injury to bring an action on behalf of the community.<sup>32</sup> These efforts can also be combined in a hybrid form.<sup>33</sup> Elements that allow private parties to pursue justice in the common good provide additional resources to law enforcement efforts, which in turn benefit the community.<sup>34</sup> These common-good systems are the basis for actions by potential whistleblowers.<sup>35</sup>

#### 1. The “Common Good” Model of Enforcement

Private justice actions undertaken for the common good are unlike other aspects of our legal system because plaintiffs do not need to be directly, or even minimally, harmed by a defendant's conduct.<sup>36</sup> Through this model,

2013), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.Uw-hBHnggpE>, archived at <http://perma.cc/XBR2-6YmZ>; Saunders & Sidel, *supra* note 9.

<sup>27</sup> *Recognizing Fraud, Waste, and Abuse*, U.S. ENVTL. PROT. AGENCY OFFICE OF INSPECTOR GEN., <http://www.epa.gov/oig/hotline.html> (last visited Sept. 26, 2014), archived at <http://perma.cc/4HXW-GCRX>; *infra* notes 149–194 and accompanying text.

<sup>28</sup> *See infra* notes 36–78 and accompanying text.

<sup>29</sup> *E.g.*, 31 U.S.C. § 3729 (2012) (laying out provisions of the Federal False Claims Act (FCA)); 7 U.S.C. § 26 (2012) (laying out provisions of the CFTC whistleblower program); 15 U.S.C. § 78u-6 (2012) (laying out provisions of the SEC whistleblower program); MASS. GEN. LAWS ch. 12, §§ 5A–5B (2012) (laying out provisions of the Massachusetts False Claims Law).

<sup>30</sup> *See* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 12 (2002) (discussing different models of private justice and the goal of supplementing public resources to prevent public harms).

<sup>31</sup> *Id.* at 13.

<sup>32</sup> *See id.* (introducing the victim-based and “common good” private justice models).

<sup>33</sup> *Id.*

<sup>34</sup> *See infra* notes 201–211 and accompanying text.

<sup>35</sup> *See infra* notes 58–78 and accompanying text.

<sup>36</sup> *See, e.g.*, 31 U.S.C. § 3730(b)(2) (2012) (stating “a person” may bring a claim under the name of the government under the FCA); Clean Air Act, 42 U.S.C. § 7604 (2012) (stating “any person” may com-

plaintiffs may sue on behalf of the government or another party, simply because there is a public threat.<sup>37</sup> The most pertinent examples of common-good private actions include citizen suits and *qui tam* suits.<sup>38</sup>

### a. Citizen Suits

Congress has included citizen suit provisions in select environmental and consumer protection statutes since 1970.<sup>39</sup> Typically, these provisions allow a person to commence a civil action against any person alleged to have committed a violation of the statute.<sup>40</sup> Many advocates of these provisions argue they are necessary to promote the “public choice theory.”<sup>41</sup>

The public choice theory postulates that private initiatives are needed to supplement public enforcement by government agencies comprised of self-interested rational actors.<sup>42</sup> This need stems from government agencies lacking ability and resources, being subject to “agency-capture” by their respective industries, and lacking vigilance for proper monitoring.<sup>43</sup> Furthermore, encouraging participation of the people is inherently a worthy goal.<sup>44</sup>

Citizen suit provisions provide the legal system with important benefits and have had some success.<sup>45</sup> These benefits include “providing needed re-

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mence a civil action under the Clean Air Act (CAA)); *see also* Bucy, *supra* note 30 (stating plaintiffs to do not need to be minimally harmed in common good actions).

<sup>37</sup> *See, e.g.*, 31 U.S.C. § 3730(b) (stating “a person” may bring a claim under the name of the government under the FCA); 42 U.S.C. § 7604 (stating “any person” may commence a civil action under the CAA).

<sup>38</sup> *See infra* notes 39–78 and accompanying text.

<sup>39</sup> *See* Clean Water Act, 33 U.S.C. § 1365 (2012) (laying out the Clean Water Act (CWA) citizen suit provision); 42 U.S.C. § 7604 (containing the CAA citizen suit provision passed in 1970); Americans with Disabilities Act of 1990, 42 U.S.C. § 12117 (2012) (providing the Americans with Disabilities Act (ADA) citizen enforcement provision).

<sup>40</sup> *See* 33 U.S.C. § 1365; 42 U.S.C. § 7604; 42 U.S.C. § 12117.

<sup>41</sup> Bucy, *supra* note 30, at 32.

<sup>42</sup> *See* Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Environmental Laws*, 34 BUFF. L. REV. 833, 843 (1985) (discussing privatizing regulatory enforcement as a means of accounting for agency capture theories); Jane S. Shaw, *Public Choice Theory*, LIBRARY OF ECON. & LIBERTY, <http://www.econlib.org/library/Enc1/PublicChoiceTheory.html> (last visited Sept. 26, 2014), *archived at* <http://perma.cc/8UVZ-4D8R> (stating the public choice theory assumes that persons operating in the political marketplace are mainly motivated by self-interest and government alone may not be enough to correct deficiencies).

<sup>43</sup> *See* Bucy, *supra* note 30, at 33 (noting that private vigilance will be needed because public resources are often inadequate); Mary Graham, *Environmental Protection & the States: “Race to the Bottom” or “Race to the Bottom Line”?*, BROOKINGS INST. (Winter 1998), <http://www.brookings.edu/research/articles/1998/12/winter-environment-graham>, *archived at* <http://perma.cc/VR73-Z77M> (discussing how environmental incidents are symbolic of the race to the bottom in politics to cater to industry); Shaw, *supra* note 42 (describing agency capture as the problem that regulatory agencies appear to be “captured” by industry special interests that exert influence on Congress and control their budgets).

<sup>44</sup> *See generally* JOSEPH SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971) (discussing need for citizen participation in environmental law).

<sup>45</sup> Bucy, *supra* note 30, at 40–41.

sources [for government prosecutions], deterring future violations, bringing unknown violations to the government's attention, and encouraging dialogue among . . . organizations."<sup>46</sup>

Although most citizen suit provisions are found in environmental statutes, they have also been included in other statutes, such as the Fair Housing Act (the "FHA") and the Americans with Disability Act (ADA).<sup>47</sup> The ADA, for example, provides that the powers, remedies, and procedures set forth in the Act "shall be the same as those available to the government, the Attorney General, or to *any person* alleging discrimination, in violation of the statute."<sup>48</sup> Thus, because the statute offers any person the powers, remedies and procedures within, it allows for citizens alleging discrimination—and not just the Attorney General or some other sector of the government—to file suit to enforce the statute.<sup>49</sup>

The Supreme Court's decision in *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources* illustrates the use of the ADA citizen suit provision.<sup>50</sup> In *Buckhannon*, a private operator of assisted living care homes sued the state of West Virginia, claiming the state's statutory "self-preservation" requirement—that residents be capable of moving themselves from imminent harm—violated the FHA and the ADA.<sup>51</sup> The state agreed to stay its enforcement of the measure pending settlement, and in the interim, the West Virginia legislature acted to eliminate the requirement.<sup>52</sup> The statute allowed the operator to step into the shoes of the government and spearhead litigation to enforce the powers of the FHA and ADA.<sup>53</sup>

Although *Buckhannon* demonstrates the potential of citizen suit provisions, it also illustrates some of the weaknesses in them as well.<sup>54</sup> For example, commentators have argued that one weakness is the failure to effectively align public and private prosecutorial efforts through adequate incentives for potential plaintiffs and their attorneys.<sup>55</sup> This was evidenced in *Buckhannon*, where

<sup>46</sup> *Id.*

<sup>47</sup> See Fair Housing Act, 42 U.S.C. § 3613 (2012) (providing the FHA citizen enforcement provisions); 42 U.S.C. § 12117 (2012) (laying out the ADA citizen enforcement provision).

<sup>48</sup> 42 U.S.C. § 12117 (emphasis added).

<sup>49</sup> See *id.* (giving any person alleging discrimination in violation of the statute the power to bring an enforcement action).

<sup>50</sup> 532 U.S. 598, 600–01 (2001).

<sup>51</sup> See *id.* at 600 (defining the self-preservation requirement).

<sup>52</sup> *Id.* at 601.

<sup>53</sup> See *id.* (noting the plaintiffs requested attorney's fees as a "prevailing party").

<sup>54</sup> See *id.* at 605 (failing to award attorney's fees to a Plaintiff when suit led to action by legislature, but did not result in victory); *High Court Rejects 'Catalyst' Theory: Momentum Shifts to Citizen Suit Defendants*, LEVENFELD PEARLSTEIN, LLC (Nov. 23, 2012), <http://www.lplegal.com/publications/articles/high-court-rejects-catalyst-theory-momentum-shifts-citizen-suit-defendants>, archived at <http://perma.cc/QDG2-9V8R> (noting power of defendants in citizen suits).

<sup>55</sup> See Bucy, *supra* note 30, at 43 (describing weaknesses of citizen suits).



the Supreme Court limited the ability of the plaintiff's attorneys to recover fees.<sup>56</sup> Other major weaknesses of citizen suits identified by academics are that they are insufficient to detect violations or violators.<sup>57</sup>

### *b. Qui Tam Suits and the False Claims Act*

A second category of common-good actions is statutory *qui tam* provisions, which align private interests, such as those of whistleblowers, with government interests.<sup>58</sup> *Qui tam* actions are lawsuits brought under a statute that allows a private citizen to sue a party on behalf of the government or a public institution and to then receive a portion of any financial recovery.<sup>59</sup> *Qui tam* provisions are often responsible for providing the financial incentive and legal protection needed to incentivize whistleblowers to come forward.<sup>60</sup> These types of suits are commonly used to uncover government program fraud and financial fraud.<sup>61</sup>

The False Claims Act (FCA) contains the most notable example of an expansive, widely used *qui tam* provision.<sup>62</sup> It allows an individual with knowledge of fraud in government programs to sue on behalf of the United States and to then share in any financial recovery.<sup>63</sup> After the individual files suit, the Justice Department has an opportunity to intervene, in order to lead the prosecution of the alleged violators.<sup>64</sup> Even if the Justice Department decides not to intervene, however, the individual may still move forward with the suit, although the viability of a case is generally greater when the government

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<sup>56</sup> See 532 U.S. at 605 (holding attorney's fees will not be granted when the desired result was achieved by the defendant's voluntary conduct).

<sup>57</sup> Bucy, *supra* note 30, at 43.

<sup>58</sup> See CHARLES DOYLE, CONG. RESEARCH SERV., R40785, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES 1 (2009) (explaining the *qui tam* process).

<sup>59</sup> BLACK'S LAW DICTIONARY 1368 (9th ed. 2009) (explaining that "*qui tam*" is derived from the original Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," or "who as well for the king as for himself sues in this matter").

<sup>60</sup> See DOYLE, *supra* note 58, at 16–17 (stating that the FCA has encouraged insiders to come forward by offering protection against retaliation and outlining potential financial awards).

<sup>61</sup> See Stipulation and Order of Settlement at 2–3, *United States v. Citigroup, Inc.*, 11 Civ. 5473 (2012) (discussing charges and settlement from *qui tam* action brought by whistleblower and pursued by government under FCA and FIRREA); Press Release, Dep't of Justice, GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data (Jul. 2, 2012) [hereinafter DOJ GlaxoSmithKline Press Release], available at <http://www.justice.gov/opa/pr/2012/July/12-civ-842.html>, archived at <http://perma.cc/WJJ5-EBUT> (discussing use of FCA in landmark settlement); 2011 FCA Press Release, *supra* note 26 (discussing the success of FCA *qui tam* cases generally).

<sup>62</sup> 31 U.S.C. § 3729 (2012); see 2011 FCA Press Release, *supra* note 26 (discussing prevalence of FCA settlements).

<sup>63</sup> 31 U.S.C. § 3730(b) (2012); DOYLE, *supra* note 58, at 1.

<sup>64</sup> 31 U.S.C. § 3729(d)(2); DOYLE, *supra* note 58, at 19.

has joined because of its additional financial and investigative resources, power, and influence.<sup>65</sup>

Under the FCA, a party can be held liable for knowingly presenting a false claim for payment to the government, using a false record or statement in submitting a claim, or for other conduct to defraud the government of money or property.<sup>66</sup> Many of these claims involve payments under government contracts, submissions to programs such as Medicare or Medicaid, and other frauds perpetrated against the government.<sup>67</sup> If a fraud does not involve the submission of claims to the government, it does not qualify under the FCA.<sup>68</sup>

If an accused party is found liable, it is subject to significant damages and penalties for each false claim submitted to the government.<sup>69</sup> In such instances, the whistleblower is entitled to between 15% and 25% of any settlement.<sup>70</sup> The whistleblower is also entitled to certain protections against retaliation from employers.<sup>71</sup> Further, many states adopted their own versions of the FCA, which can tack on further violator liabilities and potential awards.<sup>72</sup>

An example of the incentives for whistleblowers filing suit under the FCA can be seen in *United States v. GlaxoSmithKline*.<sup>73</sup> In *GlaxoSmithKline*, two former executives of the pharmaceutical giant, Thomas Gerahty and Matthew Burke, brought the company's illegal practices to light by filing a *qui tam* suit under the FCA, which was later joined by the government.<sup>74</sup> Gerahty and Burke's case, along with contributions from another whistleblower, helped

<sup>65</sup> 31 U.S.C. § 3729(d)(2); DOYLE, *supra* note 58, at 17; see DEP'T OF JUSTICE, FALSE CLAIMS ACT CASES: GOVERNMENT INTERVENTION IN QUI TAM (WHISTLEBLOWER) SUITS (n.d.), available at <http://www.justice.gov/usao/pae/Documents/fcprocess2.pdf>, archived at <http://perma.cc/C2EF-36SU> (stating that only twenty five percent of all *qui tam* suits are joined by the government and that those cases are only undertaken after strict investigation and approval by the Justice Department in Washington).

<sup>66</sup> 31 U.S.C. § 3729.

<sup>67</sup> See 2011 FCA Press Release, *supra* note 26; SEC Awards More Than \$14 Million to Whistleblower, *supra* note 26 and accompanying text (noting common areas for whistleblower suits).

<sup>68</sup> See 31 U.S.C. § 3729(b)(2) (2012) (defining claim as "a request or demand for money or property . . . presented to an officer, employee, or agent of the United States . . . if the money is to be spent or used . . . to advance a government program").

<sup>69</sup> *Id.* § 3729(a)(1)(G) (stating a civil penalty of not less than \$5000 and not more than \$10,000 plus three times the amount of damages the government sustains).

<sup>70</sup> 31 U.S.C. § 3730(d) (2012). Note that such awards can reach thirty percent if a plaintiff carries forward with the litigation without the government taking steps to intervene. *Id.* § 3730(d)(2). Rewards also may be reduced or eliminated in certain circumstances. *Id.* § 3730(d)(3).

<sup>71</sup> *Id.* § 3730(h).

<sup>72</sup> *E.g.*, California False Claims Act, CAL. GOV'T CODE §§ 12650–12656 (West 2013); Massachusetts False Claims Law, MASS. GEN. LAWS ch.12 § 5B (2012).

<sup>73</sup> Fifth Amended Complaint at 162, *United States v. GlaxoSmithKline PLC*, C.A. No. 1:03-cv-10641 (2011) (demanding damages for pharmaceutical company's fraud and award for whistleblowers under FCA).

<sup>74</sup> *Id.* at 1–8; see DOJ GlaxoSmithKline Press Release, *supra* note 61 (discussing eventual government settlement).

produce over \$1 billion of a \$3 billion civil settlement, entitling them to between 15% and 25% of that recovery.<sup>75</sup>

As shown, the benefits of the FCA for the U.S. government are readily apparent.<sup>76</sup> In 2011 alone, the government recovered over \$3 billion from FCA cases, the vast majority of which were initiated by whistleblowers.<sup>77</sup> As a result, in recent years Congress has expanded whistleblower incentive programs beyond the scope of the FCA to combat financial fraud, tax fraud, and securities violations.<sup>78</sup>

### *c. Risks Faced by Whistleblowers*

Despite the potentially substantial recoveries available to whistleblowers through statutes like the FCA, the risks associated with coming forward remain numerous and severe.<sup>79</sup> There have been studies on the personal and emotional effects associated with whistleblowing.<sup>80</sup> One such study, done by the *New England Journal of Medicine*, took account of the personal toll on *qui tam* whistleblowers.<sup>81</sup> Of those surveyed, eighty-two percent reported career pressures, including threats to their job and several reported devastating financial consequences.<sup>82</sup> Studies also reveal extensive emotional tolls, such as divorce and stress-related illnesses.<sup>83</sup>

James Holzrichter provides a striking example of the risk-reward dichotomy faced by many whistleblowers.<sup>84</sup> Mr. Holzrichter won \$6.2 million for blowing the whistle on his employer, Northrup Grumman.<sup>85</sup> While the award seems appealing, it does not reflect many of the harsh realities that Mr.

<sup>75</sup> See 31 U.S.C. § 3730(d) (noting awards range from 15% to 25% of recovery); Press Release, Phillips & Cohen LLP, P&C's Glaxo Whistleblower Case Accounts for \$1.5 billion Out of Record \$3 Billion Settlement (July, 2012) (noting the firm's two clients accounted for a portion of the government's \$3 billion settlement).

<sup>76</sup> See 2011 FCA Press Release, *supra* note 61 (discussing success of FCA cases with the Justice Department recovering more than \$30 billion since 1986).

<sup>77</sup> *Id.* (noting \$2.8 billion of \$3 billion in recoveries was the result of FCA whistleblower provisions).

<sup>78</sup> See 7 U.S.C. § 26 (2012) (laying out the CFTC whistleblower program); Federal Deposit Insurance Reform Act of 2005, 12 U.S.C. § 1831k (2012) (describing the Financial Institutions Reform and Recovery Act rewards for information leading to recoveries or civil penalties); 15 U.S.C. § 78u-6 (2012) (containing the provisions for the SEC Whistleblower Program).

<sup>79</sup> See *infra* notes 80–91 and accompanying text.

<sup>80</sup> Kesselheim et al., *supra* note 10, at 1832.

<sup>81</sup> *Id.* at 1836.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Ben Hallman, *Whistleblower, Beware: Most Claims End in Disappointment, Despair*, HUFFINGTON POST (Jun. 4, 2012, 4:15pm), [http://www.huffingtonpost.com/2012/06/04/whistleblower-law-false-claims-act-awards-james-holzrichter\\_n\\_1563783.html](http://www.huffingtonpost.com/2012/06/04/whistleblower-law-false-claims-act-awards-james-holzrichter_n_1563783.html), archived at <http://perma.cc/GW9L-TLN7>.

<sup>85</sup> *Id.*

Holzrichter faced as a whistleblower.<sup>86</sup> His decision to file suit cost him his career and inflicted an extreme personal toll, which lasted the length of the suit—nearly two decades.<sup>87</sup> He was unable to find work in his field as an auditor—receiving 400 rejection letters—and was forced to resort to becoming a janitor.<sup>88</sup> Although Mr. Holzrichter’s case eventually landed him a substantial amount of money, he is now uncertain of whether it was worth the costs.<sup>89</sup> After paying his attorney fees and taxes, he took home approximately \$2.3 million, a sum he could have easily earned over the same period while working as an auditor.<sup>90</sup> As Mr. Holzrichter’s story demonstrates, all whistleblowers must consider the consequences, and as Patrick Burns, a spokesman for Taxpayers Against Fraud, notes, eighty percent of whistleblowers that file cases under the FCA end up with nothing.<sup>91</sup>

## II. GOVERNMENT AGENCY WHISTLEBLOWER PROGRAMS

In addition to statutory provisions for *qui tam* suits, Congress has created opportunities for whistleblowers to report knowledge of violations to government agencies.<sup>92</sup> As with *qui tam* suits, such as those brought under the False Claims Act (FCA), whistleblowers reporting violations to government agencies may be entitled to share in the recoveries.<sup>93</sup> The whistleblower’s percentage of recovery varies depending on the agency, but the Internal Revenue Service (IRS), the Securities and Exchange Commission (SEC), and the Commodity Futures Trading Commission (CFTC) have all implemented whistleblower programs.<sup>94</sup> Such programs offer whistleblowers a mechanism to report violations to the agency instead of filing a lawsuit in court as a *qui tam* plaintiff.<sup>95</sup>

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<sup>86</sup> See *id.* (noting that Mr. Holzrichter won \$6.2 million in a whistleblower action against his employer).

<sup>87</sup> See *id.* (stating that Mr. Holzrichter’s decision to blow the whistle on his employer cost him “his profession and nearly two decades of his life”).

<sup>88</sup> See *id.* (explaining that Mr. Holzrichter was employed “scrubbing toilets” and had to move his family into a homeless shelter).

<sup>89</sup> See *id.* (quoting Mr. Holzrichter as saying, “I don’t know if it was worth it.”).

<sup>90</sup> See *id.* (quoting Mr. Holzrichter as saying, “If I had worked until 55 in my profession, I would easily have earned twice that.”).

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., Commodity Exchange Act, 7 U.S.C. § 26 (2012) (CFTC whistleblower program); Securities Exchange Act of 1934, 15 U.S.C. § 78u-6 (2012) (laying out the provisions of the Securities Exchange Commission (SEC) Whistleblower Program).

<sup>93</sup> See 7 U.S.C. § 26(b) (discussing CFTC program awards); 15 U.S.C. § 78u-6(b) (discussing SEC program awards).

<sup>94</sup> See 7 U.S.C. § 26(b) (stating CFTC whistleblower awards shall range from 10% to 30% for information provided); 15 U.S.C. § 78u-6(b) (stating SEC whistleblower awards shall range from 10% to 30% for information provided); Internal Revenue Code, 26 I.R.C. § 7623 (2012) (stating IRS awards shall range from 15% to 30% for information provided).

<sup>95</sup> See Douglas W. Baruch & Nancy N. Barr, *The SEC’s Whistleblower Program: What the SEC Has Learned From the False Claims Act About Avoiding Whistleblower Abuses*, 2 HARV. BUS. L. REV.

### A. The IRS Whistleblower Program

The first notable agency program—the IRS Whistleblower Informant Program (the “WIP”)—enables the payment of awards to persons providing “specific and credible information to the IRS if the information results in the collection of taxes, penalties, interest or other amounts from the noncompliant taxpayer.”<sup>96</sup> Under the WIP, rewards for whistleblowers or “informants,” can range from 15% to 30% of the government’s recovery.<sup>97</sup>

The current WIP is actually a vestige of a program that dates back to 1867.<sup>98</sup> Prior to 2006, the Secretary of the Treasury was supposed to pay an amount deemed necessary “for detecting and bringing to trial and punishment persons guilty of violating internal revenue laws . . . .”<sup>99</sup> In 2006, the law was fundamentally changed through the Tax Relief and Health Care Act of 2006.<sup>100</sup> The key reform established that whistleblower rewards were no longer discretionary, thus requiring the government to pay whistleblowers between 15% and 30% of collected proceeds.<sup>101</sup>

The mandatory awards paid to whistleblowers afford significant financial incentive for coming forward with knowledge of potential tax fraud, while enhancing the government’s opportunity to uncover lost tax revenue.<sup>102</sup> From 2007, when the program went into effect, through 2012, there were 1967 whistleblower claims submitted identifying 11,372 taxpayers with potential tax liabilities.<sup>103</sup> In an extreme case, a whistleblower from the investment bank UBS reported a tax evasion scheme resulting in a \$780 million settlement.<sup>104</sup> The whistleblower himself received \$104 million as a reward for exposing the

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ONLINE 28, 29 (2011), available at <http://www.hblr.org/2011/07/the-secs-whistleblower-program-what-the-sec-has-learned-from-the-false-claims-act-about-avoiding-whistleblower-abuses>, archived at <http://perma.cc/K59P-ZVQH> (noting that the SEC program lacks a provision for qui tam enforcement).

<sup>96</sup> 26 U.S.C. § 7623; *Whistleblower—Informant Award*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/Whistleblower-Informant-Award> (last updated Sept. 19, 2014), archived at <http://perma.cc/8BRP-QSNW>.

<sup>97</sup> *Whistleblower—Informant Award*, *supra* note 96.

<sup>98</sup> *History of the Whistleblower/Informant Program*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/History-of-the-Whistleblower-Informant-Program> (last updated Feb. 21, 2014), archived at <http://perma.cc/3XZ6-9WEJ>.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See INTERNAL REVENUE SERV., FISCAL YEAR 2012 REPORT TO CONGRESS ON THE USE OF SECTION 7623, at 7 (2012), available at [http://www.irs.gov/pub/whistleblower/2012%20IRS%20Annual%20Whistleblower%20Report%20to%20Congress\\_mvwm.pdf](http://www.irs.gov/pub/whistleblower/2012%20IRS%20Annual%20Whistleblower%20Report%20to%20Congress_mvwm.pdf), archived at <http://perma.cc/QX-97KE> (outlining the number of whistleblower submissions from 2007–2012).

<sup>103</sup> *Id.*

<sup>104</sup> Saunders & Sidel, *supra* note 9.

fraud, which eventually led to at least 33,000 Americans voluntarily disclosing offshore accounts and garnering \$5 billion in tax revenue to the IRS.<sup>105</sup>

Notably, there is no protection for whistleblowers under the IRS program.<sup>106</sup> Unlike newly enacted agency programs, the IRS program does not prohibit retaliation against a whistleblower, including job-related retaliation against an employee for whistleblowing.<sup>107</sup> Though the IRS is committed to protecting a whistleblower's information in a particular case, it has noted that such protection may be limited by the circumstances that arise during the course of enforcement and litigation.<sup>108</sup>

### *B. The SEC Whistleblower Program*

The SEC Office of the Whistleblower was formed as part of the Dodd-Frank Act (the "Act").<sup>109</sup> The Act—a direct response to the 2008 financial crisis—was an effort to promote financial stability in the United States by, among other things, improving transparency and accountability in the financial system.<sup>110</sup> In trying to realize this goal, the Securities Whistleblower Incentive and Protection Program makes monetary awards available to individuals who voluntarily provide original information leading to successful SEC enforcement actions.<sup>111</sup> According to the legislative history of the Act, the whistleblower program is meant to provide the SEC with more help identifying securities law violations, and to motivate people with knowledge of securities violations to come forward.<sup>112</sup>

Similar to the IRS program, the Act's SEC whistleblower provision requires mandatory awards to whistleblowers, ranging from 10% to 30% of collected monetary sanctions.<sup>113</sup> Furthermore, a congressionally created Investor

<sup>105</sup> *Id.* This reward did not come without a price as the whistleblower spent thirty months in prison as a result of his actions while at UBS. *Id.*

<sup>106</sup> FISCAL YEAR 2012 REPORT TO CONGRESS ON THE USE OF SECTION 7623, *supra* note 102, at 14.

<sup>107</sup> *Id.*

<sup>108</sup> 26 U.S.C. § 6103 (2012); FISCAL YEAR 2012 REPORT TO CONGRESS ON THE USE OF SECTION 7623, *supra* note 102, at 14.

<sup>109</sup> 15 U.S.C. § 78u-6 (2012); *About Us*, SEC. AND EXCH. COMM'N OFFICE OF THE WHISTLEBLOWER, <http://www.sec.gov/about/offices/owb/owb-about.shtml> (last visited Sept. 26, 2014), *archived at* <http://perma.cc/M3BL-4J7R> (explaining origins of the SEC program under Dodd-Frank).

<sup>110</sup> *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (1st Sess. 2010) (stating it is an act to "promote financial stability of the United States . . . to protect consumers from abusive financial services practices . . ."); CHRISTOPHER J. DODD, THE RESTORING AMERICAN FINANCIAL STABILITY ACT OF 2010, S. REP. NO. 111-176, at 110–11 (2010) (noting in legislative history the program is intended to be used actively with ample rewards to promote the integrity of financial markets).

<sup>111</sup> 15 U.S.C. § 78u-6(b).

<sup>112</sup> S. REP. NO. 111-176, at 110–11 (noting that the whistleblower program can "motivate those with inside knowledge to come forward").

<sup>113</sup> 15 U.S.C. § 78u-6(b).

Protection Fund also protects these awards.<sup>114</sup> The fund provides for the payment of the awards and related actions, as well as funding for a suggestion program intended to solicit recommendations on SEC operations or allegations of waste, fraud, and mismanagement within the agency.<sup>115</sup>

The legislative history of the Act notes that the program is meant to “be used actively with ample rewards to promote integrity in the financial markets.”<sup>116</sup> As such, the enforceability and relative predictability of payouts are believed to be essential in motivating whistleblowers to come forward and assist in the identification and prosecution of violators.<sup>117</sup> During his testimony before the Senate Banking Committee, Harry Markopolos—the man responsible for exposing the fraud of Bernard Madoff—noted that whistleblower tips uncovered 54.1% of frauds in public companies, while external auditors and SEC teams uncovered a relatively paltry 4.1%.<sup>118</sup>

Noticeably distinct from the IRS program is an SEC mandate to protect whistleblowers that report possible wrongdoing from retaliation.<sup>119</sup> This protection is afforded when a whistleblower submits high quality information, “based on a reasonable belief that a possible securities violation has occurred, is in progress, or is about to occur.”<sup>120</sup> SEC whistleblower protections also preserve the confidentiality of parties who come forward with information.<sup>121</sup>

Since the inception of the whistleblower program in August 2011, the SEC has granted awards to six whistleblowers.<sup>122</sup> The awards are based upon such information protecting investors from further financial injury while conserving limited SEC resources.<sup>123</sup> The SEC received over 2810 calls from members of the public in 2013 alone, alerting it of possible harmful financial fraud.<sup>124</sup> Although the number of rewards paid out thus far remains small, the

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<sup>114</sup> *Id.* § 78u-6(g).

<sup>115</sup> *Id.*; 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, *supra* note 15, at 16.

<sup>116</sup> S. REP. NO. 111-176, at 112.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 110–11.

<sup>119</sup> Compare 15 U.S.C. § 78u-6(h) (2012) (outlining protections for whistleblowers under the SEC program), with FISCAL YEAR 2012 REPORT TO CONGRESS ON THE USE OF SECTION 7623, *supra* note 102, at 14 (stating the IRS program does not protect whistleblowers against retaliation).

<sup>120</sup> 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, *supra* note 15, at 3.

<sup>121</sup> 15 U.S.C. § 78u-6(h)(2).

<sup>122</sup> 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, *supra* note 15, at 14–15. The Commission paid a total of \$14,831,965.64 in whistleblower awards during the 2013 Fiscal Year. *Id.*

<sup>123</sup> *Id.* at 14.

<sup>124</sup> *Id.* at 5.

SEC has highlighted the potential for substantial growth as the program continues to progress and evolve.<sup>125</sup>

In October 2013, the SEC announced a \$14 million whistleblower award—its largest to date at that time—to an anonymous tipster.<sup>126</sup> Upon announcing the award, an official in charge of the whistleblower office indicated the agency was receiving a routine number of high-quality tips that could potentially manifest in big payouts.<sup>127</sup> The SEC's Chief of the Office of the Whistleblower, Sean McKessy, pointed out that although these significant award payouts are gratifying, ultimately the payouts are better news for the public and investors who are protected from continued illegal practices.<sup>128</sup>

There are, however, some limiting factors that dictate whether whistleblower information is worthy of an award.<sup>129</sup> For example, awards are payable only when an enforcement action results in monetary sanctions over \$1 million.<sup>130</sup> This is because the awards program was established to encourage the submission of high quality information that targets the most egregious activity.<sup>131</sup> The program is also meant to “complement, rather than replace, existing corporate compliance programs.”<sup>132</sup> The SEC program also excludes whistleblowers convicted of a criminal action related to the violation from receiving an award.<sup>133</sup> Finally, any culpability or involvement in the activity that the whistleblower is exposing may be taken into account in the payment of an award.<sup>134</sup>

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<sup>125</sup> Sarah N. Lynch, *Bigger Payouts Seen for U.S. Financial Market Whistleblowers*, REUTERS (Oct. 1, 2013), <http://www.reuters.com/article/2013/10/01/us-financial-regulation-whistleblowers-idUSBRE9901EY20131001>, archived at <http://perma.cc/NDU6-68ZX>.

<sup>126</sup> *Id.* This record was eclipsed on September 22, 2014, when the SEC announced a \$30 million award to an anonymous tipster. Press Release, Sec. & Exchange Comm'n, SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290#.VDFuvL60bwx>, archived at <http://perma.cc/ZV7U-3PL2>.

<sup>127</sup> Lynch, *supra* note 125.

<sup>128</sup> Press Release, Sec. and Exchange Comm'n, SEC Awards More Than \$14 Million to Whistleblower (Oct. 1, 2013), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.Uw-hBHnggpE>, archived at <http://perma.cc/QA3E-VWEU>.

<sup>129</sup> See 15 U.S.C. § 78u-6(c) (2012).

<sup>130</sup> *Id.* § 78u-6(a)(1).

<sup>131</sup> See Baruch & Barr, *supra* note 95, at 30–31 (noting the program only requires payment for successful actions).

<sup>132</sup> 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, *supra* note 15, at 3.

<sup>133</sup> 15 U.S.C. § 78u-6(c)(2)(B).

<sup>134</sup> *Id.* § 78u-6(b)–(c).



### C. CFTC Whistleblower Program

In addition to the SEC program, the Act also created a whistleblower program under the CFTC.<sup>135</sup> In the CFTC program, eligible whistleblowers that voluntarily provide original information about violations of the Commodity Exchange Act can receive monetary awards and anti-retaliation protections.<sup>136</sup> The program allows for awards between 10% and 30% of monetary sanctions collected in either a CFTC or related action pursued by other authorities.<sup>137</sup> The Act also provides for the same anti-retaliation protections in the CFTC program that it does in the SEC program.<sup>138</sup> The CFTC program also mirrors the SEC program by establishing the CFTC Customer Protection Fund, which is used to pay whistleblower awards and fund initiatives to help protect against fraud and violations of the rules.<sup>139</sup>

Although the CFTC program has brought forward multiple tipsters, it has only paid one award thus far.<sup>140</sup> Nevertheless, the program continues to successfully induce private parties to come forward with tips regarding illegal activities such as market manipulation, dissemination of false information, Ponzi schemes, and other frauds.<sup>141</sup> Although no whistleblower claims have satisfied the burden of the program's requirements to receive a guaranteed reward, the CFTC's Whistleblower Office continues to educate interested parties, including other agencies, attorneys, and industry professionals.<sup>142</sup>

### D. Differences from *Qui Tam* Litigation

The SEC and CFTC programs do not follow the *qui tam* enforcement model that Congress implemented in the FCA.<sup>143</sup> Enforcement actions can only be pursued under agency programs if the government agrees to undertake

<sup>135</sup> 7 U.S.C. § 26 (2012); *Whistleblower Program*, COMMODITY FUTURES TRADING COMM'N, <http://www.cftc.gov/ConsumerProtection/WhistleblowerProgram/index.htm> (last visited Sept. 26, 2014), archived at <http://perma.cc/QV5Z-ANS4>.

<sup>136</sup> 7 U.S.C. § 26. Similar to the SEC program, whistleblowers are only eligible to receive an award if they meet certain conditions, such as claiming violations worth over \$1 million. *Id.* § 26(a)(1).

<sup>137</sup> *Id.* § 26(b).

<sup>138</sup> *Id.* § 26(h).

<sup>139</sup> *Id.* § 26(g).

<sup>140</sup> COMMODITY FUTURES TRADING COMM'N, ANNUAL REPORT ON THE WHISTLEBLOWER PROGRAM AND CUSTOMER EDUCATION INITIATIVES 2 (2012), available at [http://www.cftc.gov/ucm/groups/public/@whistleblownotices/documents/file/wb\\_fy2012reporttocongress.pdf](http://www.cftc.gov/ucm/groups/public/@whistleblownotices/documents/file/wb_fy2012reporttocongress.pdf), archived at <http://perma.cc/TJ2K-NCCK>; COMMODITY FUTURES TRADING COMM'N, ANNUAL REPORT ON THE WHISTLEBLOWER INCENTIVES AND PROTECTION PROGRAM 4 (2011), available at [http://www.cftc.gov/ucm/groups/public/@whistleblownotices/documents/file/wb\\_fy2011reporttocongress.pdf](http://www.cftc.gov/ucm/groups/public/@whistleblownotices/documents/file/wb_fy2011reporttocongress.pdf), archived at <http://perma.cc/BRX2-D4DA>.

<sup>141</sup> ANNUAL REPORT ON THE WHISTLEBLOWER INCENTIVES AND PROTECTION PROGRAM, *supra* note 140, at 3.

<sup>142</sup> *Id.* at 2–3.

<sup>143</sup> Baruch & Barr, *supra* note 95, at 29.

the claim; plaintiffs have no independent, private recourse.<sup>144</sup> Thus, whistleblowers are limited to the administrative apparatus, and the agency has complete control over the enforcement of the laws and prosecutions.<sup>145</sup>

The Dodd-Frank programs contain only a limited role for the courts, instead opting to allow the agencies to determine when to pursue violators at their discretion.<sup>146</sup> This prevents whistleblowers from attempting to enforce claims that are unlikely to succeed or to interfere with agency enforcement measures.<sup>147</sup> The SEC also has the sole power to determine a whistleblower's eligibility to receive an award.<sup>148</sup> The Dodd-Frank programs have also taken steps to prevent awards to specific authorities that have a preexisting duty to report—such as certain government employees—an improvement from the FCA, which contains no such express prohibition.<sup>149</sup>

### III. ENVIRONMENTAL WHISTLEBLOWER LAW

Congress has undertaken some legal means to align the public interest in the environment with the private interests of individuals.<sup>150</sup> Environmental whistleblower law is primarily constructed through individual statutes.<sup>151</sup> Financial incentives and protections against retaliation for environmental whistleblowers however, vary widely and in some instances, are not present at all.<sup>152</sup> The following are representative examples of environmental statutes and provisions that incorporate whistleblower programs, including the financial incentives and protections afforded to whistleblowers.<sup>153</sup>

#### A. Citizen Suit Provisions

Citizen suit provisions originated within environmental law and have served as the model for similar provisions in other areas of law.<sup>154</sup> Many environmental statutes, such as the Clean Water Act (CWA) and the Clean Air Act

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<sup>144</sup> *Id.* at 30 (noting SEC whistleblowers are not permitted to bring judicial enforcement actions for violations).

<sup>145</sup> *Id.* (observing the program is an administrative enforcement process).

<sup>146</sup> *Id.* (stating the SEC program gives the SEC control over enforcement actions).

<sup>147</sup> *Id.* at 30–31 (noting whistleblowers have been successful in less than three percent of cases brought without intervention by the DOJ).

<sup>148</sup> *Id.* at 32 (noting SEC primary authority for enforcing eligibility requirements).

<sup>149</sup> *Id.* at 33 (explaining that the SEC does not allow awards for individuals who have a duty to report violations as government employees or in other capacities).

<sup>150</sup> See *infra* notes 154–195 and accompanying text.

<sup>151</sup> See, e.g., Clean Water Act, 33 U.S.C. § 1367 (2012) (Clean Water Act (CWA) whistleblower protection provision); Clean Air Act, 42 U.S.C. § 7413(f) (2012) (Clean Air Act (CAA) whistleblower provision); *infra* notes 154–195 and accompanying text.

<sup>152</sup> See *infra* notes 180–195 and accompanying text.

<sup>153</sup> See *infra* notes 154–195 and accompanying text.

<sup>154</sup> See, e.g., 33 U.S.C. § 1365 (CWA citizen suit provision); 42 U.S.C. § 7604 (CAA citizen suit provision). The CAA contained the first citizen suit provision. Bucy, *supra* note 30, at n.166.

(CAA), contain such provisions.<sup>155</sup> These provisions allow any citizen to file a civil action in order to compel the government to seek damages or enforce a statute against a violating party.<sup>156</sup> All such provisions contain common characteristics.<sup>157</sup> For example, they cover a broad spectrum of potential plaintiffs and defendants, targeted conduct, a requirement to provide notice to the government prior to filing suit, prohibitions against suits the government is “diligently pursuing,” rights for government intervention, and certain remedies.<sup>158</sup> Some statutes, such as the CWA, require that the plaintiff have a personal interest in the subject of the lawsuit, and that such interest is adversely affected by a current or potential violation.<sup>159</sup>

The primary goal of environmental citizen suits is to obtain greater protection for the environment.<sup>160</sup> Parties filing citizen suits are generally unable to seek monetary rewards and are limited to either compelling compliance with the respective statutes, the payment of civil penalties, or both.<sup>161</sup> Further, the costs of litigation are only awarded to a prevailing party when a court holds that it is warranted.<sup>162</sup> Therefore, on a practical level, many of these suits can only be brought by large, well-funded organizations.<sup>163</sup>

In addition to the potential costs, critics have also noted that citizen suit provisions in environmental statutes may be weak in their ability to overcome alliances between enforcement agencies and industry.<sup>164</sup> The notice requirement imbedded into most environmental statutes is intended to coordinate private and public resources, but also enables agencies to enter into less stringent compliance agreements with violators.<sup>165</sup> For example, a citizen suit is rendered moot if the enforcing agency can show it is “diligently prosecuting” an alleged violator.<sup>166</sup> Even if the agency can legitimately demonstrate that it is

<sup>155</sup> *E.g.*, 33 U.S.C. § 1365; 42 U.S.C. § 7604.

<sup>156</sup> *See* 42 U.S.C. § 7604(a) (stating any citizen may commence a civil action).

<sup>157</sup> Bucy, *supra* note 30, at 34.

<sup>158</sup> *Id.*

<sup>159</sup> *See* 33 U.S.C. § 1365(g) (noting a citizen for purposes of a suit is a person “having an interest which is adversely affected”).

<sup>160</sup> *See* ENVTL. LAW INST., A CITIZEN’S GUIDE TO USING FEDERAL ENVIRONMENTAL LAWS TO SECURE ENVIRONMENTAL JUSTICE 34 (2002) (noting citizen suits are one option to make sure environmental laws are obeyed).

<sup>161</sup> *See, e.g.*, 33 U.S.C. § 1365 (lacking civil award paid to plaintiff); 42 U.S.C. § 7604 (awarding litigation costs, but no damages in citizen suits).

<sup>162</sup> *See, e.g.*, 33 U.S.C. § 1365(d) (noting that courts may award costs); 42 U.S.C. § 7604(d) (noting that courts may award costs).

<sup>163</sup> Michael Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 351 (1990) (observing that most citizen suits are brought by environmental advocacy organizations).

<sup>164</sup> *See* Bucy, *supra* note 30, at 37 (noting these provisions have engendered extensive litigation and fostered collusion between regulators and industry).

<sup>165</sup> *See id.* at 37–38 (noting the requirements are meant to align private and public enforcement efforts, but often align the interest of agencies with those of industry); *infra* notes 167–168 and accompanying text.

<sup>166</sup> 33 U.S.C. § 1365(b)(1)(B); 42 U.S.C. § 7604(b)(1)(B).

diligently prosecuting the alleged violator, the actual beneficial effect of said prosecution may not always be as strong or as forceful as a public trial.<sup>167</sup> For example, an informal administrative enforcement agreement that does nothing more than stipulate to past violations can be enough to render a citizen suit moot, even if the agreement requires no remedial or corrective actions.<sup>168</sup>

### B. Whistleblower Protection in Environmental Statutes

The Occupational Safety & Health Administration (OSHA) is the primary administrator of protections for whistleblowers against employer retaliation in environmental lawsuits.<sup>169</sup> Procedurally, individual statutes—such as the CAA—grant the protections, and then OSHA enforces them by accepting complaint filings in the event that there is employer retaliation.<sup>170</sup>

There are numerous environmental statutes providing whistleblower protection against retaliation through OSHA.<sup>171</sup> These statutes protect employees from employer retaliation when exposing environmental concerns related to drinking water, water pollution, toxic substances, waste disposal, air quality, or other significant things or acts that pose health risks (such as asbestos).<sup>172</sup> Several notable statutes that contain such whistleblower protections are the CAA, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the Safe Drinking Water Act, the Solid Waste Disposal Act, and the Toxic Substances Control Act.<sup>173</sup>

Each statute requires that complaints alleging retaliation be filed within a certain number of days after the alleged event.<sup>174</sup> For example, the CAA and CERCLA require a complaint to be filed within thirty days, but the Asbestos Hazard Emergency Response Act allows a complaint to be filed within ninety days and the Energy Reorganization Act allows 180 days.<sup>175</sup>

<sup>167</sup> See *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998) (noting that an enforcement agreement that “contains no remedial or corrective action” meets the standard of diligent prosecution).

<sup>168</sup> See *id.* at 354, 357 (noting that an informal agency non-compliance letter meets the standard).

<sup>169</sup> See OCCUPATIONAL SAFETY AND HEALTH ADMIN., YOUR RIGHTS AS A WHISTLEBLOWER 1 (2013), available at [https://www.osha.gov/OshDoc/data\\_General\\_Facts/whistleblower\\_rights.pdf](https://www.osha.gov/OshDoc/data_General_Facts/whistleblower_rights.pdf), archived at <http://perma.cc/VBT5-SNE9> (listing statutes that grant environmental whistleblowers protection through OSHA).

<sup>170</sup> See *id.* (including environmental statutes such as the CAA as whistleblower laws enforced by OSHA).

<sup>171</sup> See *id.* (listing whistleblower laws enforced by OSHA).

<sup>172</sup> *Id.* at 3.

<sup>173</sup> *Id.* at 1. Additional statutes with environmental implications include the Asbestos Hazard Emergency Response Act, Energy Reorganization Act, Federal Water Pollution Control Act, and the Pipeline Safety Improvement Act. *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

In general, there are four things a plaintiff must demonstrate in order to prevail in a claim that there has been whistleblower retaliation.<sup>176</sup> Investigations into alleged retaliation must reveal that, “[t]he employee engaged in protected activity; [t]he employer knew about or suspected the protected activity; [t]he employer took an adverse action; and [t]he protected activity motivated or contributed to the adverse action.”<sup>177</sup>

Although environmental statutes generally contain whistleblower protections against retaliation, many of them do not provide for financial rewards or incentives.<sup>178</sup> For example, the CWA contains provisions to protect employees against retaliation if they report a violation of the statute, but does not contain a defined rewards program such as the one in the False Claims Act (FCA), or those provided for by the Securities and Exchange Commission (SEC) and the Internal Revenue Service (IRS) programs.<sup>179</sup>

### *C. Financial Incentives for Environmental Whistleblowers*

Some financial incentives do exist for select environmental whistleblowers under the current legal enforcement framework.<sup>180</sup> These financial incentives, however, are built into individual statutes.<sup>181</sup> In some instances whistleblowers can claim significant rewards, whereas in others, the whistleblowers claim no rewards other than the satisfaction of exposing a potential environmental disaster.<sup>182</sup>

For example, the Act to Prevent Pollution from Ships (the “APPS”) provides a significant financial incentive for whistleblowers to report environmental violations.<sup>183</sup> The APPS provides that, “[i]n the discretion of the court, an amount equal to not more than [one half] of such fine [for a violation of MARPOL Protocol] may be paid to the person giving information leading to

<sup>176</sup> *Id.* at 2.

<sup>177</sup> *Id.*

<sup>178</sup> *See, e.g.*, Clean Water Act, 33 U.S.C. § 1367 (2012) (granting whistleblowers protection against retaliation at section 1367 but declining to award them financial rewards).

<sup>179</sup> *Compare id.* § 1367 (declining to grant whistleblower awards), *with* False Claims Act, 31 U.S.C. § 3730(d) (2012) (granting whistleblowers financial awards under the FCA), *and* Securities Exchange Act of 1934, 15 U.S.C. § 78u-6(b) (2012) (granting whistleblowers financial rewards under the SEC program), *and* Internal Revenue Code, 26 I.R.C. § 7623(b) (2012) (granting whistleblowers financial rewards under the IRS program).

<sup>180</sup> *E.g.*, Act to Prevent Pollution from Ships, 33 U.S.C. § 1908(a) (2012) (containing the payment provision for information leading to conviction); 42 U.S.C. § 7413(f) (2012) (laying out the CAA awards).

<sup>181</sup> *See, e.g.*, 33 U.S.C. § 1908(a); 42 U.S.C. § 7413(f).

<sup>182</sup> *Compare* 33 U.S.C. § 1908(a) (stating an amount up to one half of any fine may be paid to a person giving information leading to conviction), *with* 33 U.S.C. § 1367 (declining to grant whistleblower awards).

<sup>183</sup> 33 U.S.C. § 1908(a).

conviction.”<sup>184</sup> Whistleblowers who have come forward to report violations of the APPS have been handsomely rewarded.<sup>185</sup> For example, in *U.S. v. OMI Corporation*, a whistleblower received \$2.1 million for reporting a motor tanker that was discharging waste oil mixtures directly into the high seas.<sup>186</sup> The government’s prosecution and settlement of this environmental crime resulted in a \$4.2 million penalty and it exposed destructive activity that may have otherwise gone unnoticed.<sup>187</sup>

Unfortunately, the financial incentives for whistleblowers present in the APPS are not found in all environmental statutes.<sup>188</sup> For example, the CAA allows the Environmental Protection Agency (EPA) to pay discretionary rewards to persons “furnish[ing] information or services leading to criminal conviction” or legal penalty, but the award is capped at \$10,000.<sup>189</sup> CERCLA similarly contains a provision that is limited to a \$10,000 award that may be paid out at the discretion of the President.<sup>190</sup>

Many citizen award programs for whistleblowers can be found in acts relating to fish and wildlife preservation, such as the Bald and Golden Eagle Protection Act (the “BGEPA”), the African Elephant Conservation Act (the “AECA”) and the Endangered Species Act (ESA).<sup>191</sup> Many of these awards are also capped at relatively low levels.<sup>192</sup> For example, the BGEPA caps rewards at \$2500 and the AECA caps awards at \$25,000.<sup>193</sup> Alternatively, the ESA is more generous, providing for a reward that is independent of any related fine,

<sup>184</sup> *Id.* (MARPOL, which is short for Maritime Pollution, stands for the International Convention for the Prevention of Pollution from Ships).

<sup>185</sup> *Rewards for Whistleblowers*, MARINE DEFENDERS, <http://www.marinedefenders.com/commercial/rewards.php> (last visited Sept. 26, 2014), archived at <http://perma.cc/C5DL-BLTS> (listing examples of significant APPS whistleblower awards).

<sup>186</sup> *United States v. OMI Corp.*, No. 2:04-CR-00060 (D. N.J. Aug. 6, 2004) (entering judgment of \$4.2 million); Press Release, Env’tl. Prot. Agency, Connecticut Shipping Corporation to Pay \$4.2 Million for Dumping Oil at Sea (Aug. 12, 2004), [hereinafter EPA APPS Press Release], available at <http://yosemite.epa.gov/opa/admpress.nsf/6427a6b7538955c585257359003f0230/ab5ade399806000b85257036004acf5f!OpenDocument&Start=12&Count=5&Expand=13.1>, archived at <http://perma.cc/F977-SX5X> (stating the second engineer was awarded \$2.1 million, the largest award ever paid to a whistleblower under the APPS).

<sup>187</sup> See EPA APPS Press Release (noting that OMI Corporation was ordered to pay a \$4.2 million fine for acts taken at sea).

<sup>188</sup> See 33 U.S.C. §§ 1361–1367 (2012) (granting CWA whistleblowers protection against retaliation, but declining to award them financial rewards); Oesterle, *supra* note 10, at 47.

<sup>189</sup> 42 U.S.C. § 7413(f) (2012).

<sup>190</sup> *Id.* § 9609(d).

<sup>191</sup> Bald and Golden Eagle Protection Act, 16 U.S.C. § 668(a) (2012) (containing the BGEPA portion of fines paid to persons providing information); Endangered Species Act of 1973, 16 U.S.C. § 1540(d) (2012) (describing the ESA rewards); African Elephant Conservation Act, 16 U.S.C. § 4225(b) (2012) (providing the AECA rewards).

<sup>192</sup> Oesterle, *supra* note 10, at 47.

<sup>193</sup> 16 U.S.C. § 668(a) (capping rewards from fines at \$2500); 16 U.S.C. § 4225 (capping rewards at \$25,000).

without any statutory limitation.<sup>194</sup> The statute simply authorizes a “reward to any person who furnishes information which leads to arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this [chapter or related regulations]”.<sup>195</sup>

#### IV. NECESSITY OF ENVIRONMENTAL WHISTLEBLOWER LAW REFORM

The changing environment may be one of the most pressing threats in all of human history.<sup>196</sup> Climate change, dwindling fresh drinking water supplies, and exposure to toxic elements pose serious health concerns to human beings, and have the potential to jeopardize the future of humanity.<sup>197</sup> Greater preventative, mitigating, and remedial actions are needed to prevent these threats from spiraling out of control and creating devastating effects, and it will take an effort—both public and private—of massive proportions to achieve such prevention.<sup>198</sup>

Given the scope of the problem, every effort should be made to incentivize widespread participation in the enforcement of environmental protection measures.<sup>199</sup> The government should not only devote public resources to this fight, but also actively recruit, promote, and support assistance from private citizens, and provide resources that will incentivize such a program.<sup>200</sup>

##### *A. Problems with the Current Enforcement Regime*

#### 1. Public Resources Alone Are Not Enough

Public resources alone will be insufficient to combat the environmental challenges that the United States now faces.<sup>201</sup> The federal and state governments and their agencies are simply ill equipped to effectively ascertain, address, and reverse the environmental problems now being confronted.<sup>202</sup>

<sup>194</sup> See 16 U.S.C. § 1540(d) (lacking any restriction on awards to persons furnishing information).

<sup>195</sup> *Id.* § 1540(d) (emphasis added).

<sup>196</sup> See Almasy, *supra* note 2 (quoting Secretary of State, John Kerry, saying climate change is the “greatest challenge of our generation”).

<sup>197</sup> See *Climate Impacts on Human Health*, *supra* note 2 (listing impacts of climate change such as effects on water, spread of toxic material, and the spread of disease).

<sup>198</sup> See Bucy, *supra* note 30, at 33 (stating private resources may be needed to protect the environment); Almasy, *supra* note 2 (discussing the threat posed by climate change).

<sup>199</sup> See Bucy, *supra* note 30, at 33.

<sup>200</sup> See *id.*; Oesterle, *supra* note 10, at 46 (arguing resource and regulatory agencies must maximize every available support mechanism); *infra* notes 201–211 and accompanying text.

<sup>201</sup> See Bucy, *supra* note 30, at 33 (discussing the widespread nature of environmental problems); Oesterle, *supra* note 10, at 46 (noting regulatory agencies face reduced enforcement budgets).

<sup>202</sup> See Bucy, *supra* note 30, at 58–59 (discussing need to utilize investigative talent and inside information in civil enforcement); Oesterle, *supra* note 10, at 46 (arguing resource and regulatory agencies must take measures to deal with declining budgets).

The government lacks sufficient financial resources to adequately address all of the threats to the environment, and even if it had adequate resources, its scope of expertise is inadequate.<sup>203</sup> In fact, the government's resources are so limited that it cannot even enforce the statutory regulations that it currently has in place by addressing every reported violation.<sup>204</sup> It is nearly impossible, for example, for the Environmental Protection Agency (EPA) to monitor every source of pollution or project that poses a threat to the environment.<sup>205</sup> Detecting such violations requires not only financial wherewithal, but also the technical expertise and understanding to clearly identify every breach of a statute or regulation.<sup>206</sup>

Further, private resources appear to be necessary to combat the alignment of the economic interests of the federal government, the states, and private industry.<sup>207</sup> Many states attempt to foster a favorable operating arena for industry by engaging in a race to the bottom for lax environmental regulations meant lure businesses into their economies.<sup>208</sup> In such instances, state and private economic interests run counter the overall public welfare that the federal government is trying to protect.<sup>209</sup> Further, government agencies responsible for enforcing environmental statutes may also have deep ties to industry as a result of agency-capture, which run counter to the government's own goals.<sup>210</sup> In order to account for these shortcomings, citizens must be given a more meaningful opportunity to assist in the enforcement of statutes that protect public welfare.<sup>211</sup>

## 2. The Inadequacy of Citizen Suit Provisions for Enforcement

The government's current efforts to enlist private resources into the fight to protect the environment have primarily been made through citizen suit provisions.<sup>212</sup> Citizen suit provisions, however, have many weaknesses that large-

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<sup>203</sup> Oesterle, *supra* note 10, at 46 (arguing that regulatory agencies lack sufficient resources for generating investigative leads to examine widespread illegal conduct).

<sup>204</sup> See ENVTL. LAW INST., *supra* note 160, at 35 (noting many agencies lack funding and resources to handle all environmental prosecution alone).

<sup>205</sup> See Bucy, *supra* note 30, at 33 (discussing the massive scope of pollution and environmental enforcement).

<sup>206</sup> See ENVTL. LAW INST., *supra* note 160, at 3, 35 (noting the technical nature of environmental laws and the government's dearth of resources).

<sup>207</sup> See Boyer & Meidinger, *supra* note 42, at 843 (discussing privatizing regulatory enforcement as a means of accounting for agency capture theories).

<sup>208</sup> See Graham, *supra* note 43 (discussing how environmental incidents are symbolic of the race to the bottom in politics to cater to industry).

<sup>209</sup> See *id.* (noting state and local governments face trade-offs when it comes to environmental rules).

<sup>210</sup> See Boyer & Meidinger, *supra* note 42, at 843 (discussing the capture theories with respect to agencies).

<sup>211</sup> See *infra* notes 227–277 and accompanying text.

<sup>212</sup> See *supra* notes 154–168 and accompanying text (discussing citizen suit provisions in environmental statutes).



ly render them ineffective at recruiting private resources that significantly aid in the protection of the environment.<sup>213</sup>

One of the major problems with citizen suits is that they fail to sufficiently improve the public's ability to detect violations.<sup>214</sup> The moving party in most citizen suits is most often a large, well-funded private group, and such parties generally lack specific knowledge of wrongdoing by a given violator.<sup>215</sup> They must work to uncover violations just as any public agency or government prosecutor would.<sup>216</sup> Further, although citizen suits may add more eyes to look for alleged violations, they do not achieve the necessary effect of incentivizing those with actual knowledge of specific violations to come forward.<sup>217</sup>

Citizen suits can also be ineffective because they have the potential to promote environmentally counterproductive cooperation between prosecutors, agencies and industry.<sup>218</sup> Hurdles contained in citizen suits, such as the requirement that a citizen suit be dropped if the government diligently prosecutes the matter, may foster lax enforcement.<sup>219</sup> This is because pro-industry governmental actors may simply pursue minimal corrective measures against an industry violator, inhibiting the full compliance generally sought in a successfully waged citizen suit.<sup>220</sup>

Perhaps most importantly from the perspective of potential whistleblowers, citizen suits also fail to adequately incentivize whistleblowers and their counsels to engage in these suits by aligning their interests with the government's.<sup>221</sup> Citizen suits do not provide any financial reward to plaintiffs and merely provide injunctive relief or damages paid to the government.<sup>222</sup> In some

<sup>213</sup> *Infra* notes 214–223 and accompanying text.

<sup>214</sup> See Bucy, *supra* note 30, at 60 (noting citizen suit actions are not designed to bring forward insiders).

<sup>215</sup> See Greve, *supra* note 163, at 351 (observing most citizen suits are not brought by private citizens, but instead by organizations).

<sup>216</sup> See S. REP. NO. 111-176, at 110–11 (quoting testimony of Harry Markopolos that whistleblowers are much more effective than external auditors or a government agency at exposing fraud); Bucy, *supra* note 30, at 42 (stating that a major deficiency in citizen suit provisions is they are not an effective mechanism to alert citizens or regulators of violations).

<sup>217</sup> See S. REP. NO. 111-176, at 110, 112 (noting whistleblowers have a unique ability to uncover crimes and predictability of payouts is essential to bringing them forward).

<sup>218</sup> See *Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357 (8th Cir. 1998) (allowing a citizen suit to be dismissed with only an informal action on the part of the agency); Bucy, *supra* note 30, at 43 (stating one reason citizen suits fail is complicity between regulators and industry).

<sup>219</sup> See *id.* at 357 (allowing citizen suit to be dismissed when only a informal administrative enforcement agreement has been reached).

<sup>220</sup> See Boyer & Meidinger, *supra* note 42, at 843 (discussing the problem of agency capture and the influence of industry).

<sup>221</sup> Bucy, *supra* note 30, at 56–57 (arguing the citizen suit model is not an effective way to recruit legal and investigative talent given minimal awards to plaintiffs).

<sup>222</sup> See, e.g., Clean Water Act, 33 U.S.C. §§ 1361–1367 (2012) (granting litigation costs for prevailing parties, but lacking any other financial awards to plaintiffs); Clean Air Act, 42 U.S.C. § 7601 (2012) (allowing for payment of costs, but granting no other awards).

cases, plaintiffs who bring these suits are even barred from even recovering attorney's fees, regardless of whether or not bringing the suit achieves the desired result.<sup>223</sup>

### B. Advantages of Whistleblower Programs

Whistleblower programs provide assistance to the U.S. government and regulatory agencies by aligning public and private interests.<sup>224</sup> When private instruments of justice are undertaken in the interest of the common good, they can produce beneficial tools, such as legal talent, investigative resources, and inside information.<sup>225</sup> Wrongdoing can often be difficult to detect, and therefore, an insider with intimate knowledge of a company or a potentially liable party's actions, can be invaluable in prosecuting enforcement actions without expending prohibitively large amounts of resources.<sup>226</sup>

#### 1. Aligning Public-Private Interests Through Monetary Awards

The fact that citizen suits and other enforcement mechanisms limit the alignment of interests between private parties and the government deters those private parties from coming forward to further litigation that could be beneficial to the public.<sup>227</sup> Although these suits may account for attorneys' fees, costs, and potentially punitive damages, their application may be limited to specific instances and their rewards too minimal to attract significant attention from the most sophisticated and knowledgeable legal organizations.<sup>228</sup> Furthermore, they provide little incentive for insiders to come forward with knowledge of violations, in light of the risks posed in doing so.<sup>229</sup>

By comparison, incentivizing potential whistleblowers through programs that allow them to share in government recoveries, such as *qui tam* actions and the Securities Exchange Commission (SEC) program, have proven extremely

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<sup>223</sup> See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605 (2001) (failing to award plaintiffs' attorney's fees even though the suit led to the legislature passing a law to enforce object of the suit).

<sup>224</sup> See Oesterle, *supra* note 10 (discussing how a well-funded whistleblower program can assist regulatory agencies).

<sup>225</sup> See Bucy, *supra* note 30, at 58–61 (discussing benefits of certain private justice models, including legal talent, investigative resources, and inside information).

<sup>226</sup> See S. REP. NO. 111-176, at 110, 112 (noting whistleblowers have a unique ability to uncover crimes and that predictability of payouts is essential to bringing them forward).

<sup>227</sup> See Bucy, *supra* note 30, at 60 (advocating citizen suit provisions do not alert outsiders of potential violations and are not designed to bring insiders with knowledge of violations forward).

<sup>228</sup> See *id.* (observing there is no financial incentive for whistleblowers to report environmental violations).

<sup>229</sup> See *supra* notes 79–91 and accompanying text (discussing risks faced by whistleblowers).

successful.<sup>230</sup> These types of suits attract skilled legal talent—driven by the incentive of large fees—to represent the whistleblower’s interests and to assist the government prosecution.<sup>231</sup> These large fees are the result of certain statutes that provide for potentially significant damages and penalties.<sup>232</sup> Legal talent—whatever its motivation—can provide expert analysis and careful research in assessing highly complex claims, which in turn, have the potential to be lucrative.<sup>233</sup> These whistleblower attorneys can also help analyze the merits of the claims and determine whether there are viable legal remedies and regulatory mechanisms in place.<sup>234</sup>

Whistleblowers also provide the government with a tremendous service throughout prosecutions because they often know important inside information.<sup>235</sup> Such information is extremely valuable because it is often intimate knowledge of complex and highly technical matters.<sup>236</sup> Insiders can also point to violations of the law that the government would have no other way of ascertaining, such as illegal dumping at sea.<sup>237</sup> Whistleblower programs recognize this inside information as a valuable asset.<sup>238</sup>

Whistleblower programs can also be of substantial value to the government by generating publicity for private enforcement programs.<sup>239</sup> Multiple news outlets have covered stories about the large payouts available to whistleblowers, which alerts people with knowledge of potential misconduct that they too can be rewarded if they come forward and expose crime.<sup>240</sup> Given the sub-

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<sup>230</sup> See DOJ GlaxoSmithKline Press Release, *supra* note 61 (discussing a whistleblower who brought knowledge of \$3 billion fraud); Lynch, *supra* note 125 (discussing recent successes of the SEC whistleblower program).

<sup>231</sup> See Bucy, *supra* note 30, at 58 (discussing the ability of financially incentivized whistleblower statutes to incentivize competent counsel); *Why Whistleblower Laws Work*, *supra* note 25 (noting that whistleblower cases require big investments from firms and discourage frivolous lawsuits).

<sup>232</sup> See, e.g., False Claims Act, 31 U.S.C. §§ 3729–3730 (2012) (requiring damages under the False Claims Act (FCA) and granting whistleblower awards); Securities Exchange Act of 1934, 15 U.S.C. § 78u-6 (2012) (granting mandatory awards for attorneys for cases with penalties in excess of \$1 million).

<sup>233</sup> See *Why Whistleblower Laws Work*, *supra* note 25.

<sup>234</sup> See *id.*

<sup>235</sup> See S. REP. NO. 111-176, at 110–11 (quoting testimony that whistleblowers are the most effective means of uncovering fraud); Lynch, *supra* note 125 (quoting SEC whistleblower head that they have received many credible reports).

<sup>236</sup> See Bucy, *supra* note 30, at 59 (noting whistleblowers can be effective at helping understand complex areas).

<sup>237</sup> See S. REP. NO. 111-176, at 110–11; EPA APPS Press Release, *supra* note 186 (discussing award for an engineer that come with information about illegal dumping at sea).

<sup>238</sup> See Bucy, *supra* note 30, at 61 (noting that the inside information whistleblowers bring should be adequately compensated, given its worth).

<sup>239</sup> See Lynch, *supra* note 125 (quoting Christopher Ehrman, head of the Commodity Futures Trading Commission’s (CFTC) whistleblower program, that marquis whistleblower cases have increased visibility).

<sup>240</sup> See, e.g., Lynch, *supra* note 125 (demonstrating whistleblower cases have increased visibility); Saunders & Sidel, *supra* note 9 (highlighting a whistleblower’s \$104 million award under IRS program).

stantial risks facing whistleblowers, knowledge that there are also financial incentives and programs that provide protection can be invaluable to bringing those with potential claims forward.<sup>241</sup>

While there is a significant public benefit that comes with environmental whistleblowing, whistleblowers put themselves at potentially serious risk.<sup>242</sup> Thus, the law should adequately reflect the cost-benefit analysis that each whistleblower must do by offsetting the risk with adequate awards.<sup>243</sup> Although there are currently whistleblower awards under select environmental statutes, they are wholly inadequate in light of the possible risks.<sup>244</sup> Some statutes, such as the Clean Air Act (CAA) provide only nominal awards when compared to the risks that whistleblowers would be taking, and others, such as the Clean Water Act (CWA) provide no financial incentive whatsoever.<sup>245</sup> Without significant changes to these statutory schemes—such as the proposed whistleblower programs—those with inside information about environmental crimes will be unlikely to come forward when facing the risks involved with doing so.<sup>246</sup>

## 2. Streamlining Whistleblower Protection

Although many environmental statutes provide whistleblowers with protection against retribution, there is room for improvement.<sup>247</sup> Currently, whistleblower protection in environmental statutes is only available to whistleblowers who file complaints with the Occupational Safety and Health Administration (OSHA).<sup>248</sup> While OSHA protects employee-whistleblowers against retaliation, it is required to conduct an investigation to satisfy a common law

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<sup>241</sup> See S. REP. NO. 111-176, at 112 (noting whistleblowers face a difficult choice between coming forward with information of wrongdoing and jeopardizing their career); Bucy, *supra* note 30, at 62 (noting considerable prodding is needed to bring whistleblowers forward); *supra* notes 79–91 and accompanying text (discussing risks faced by whistleblowers).

<sup>242</sup> See EPA APPS Press Release, *supra* note 186 (resulting in enforcement of fines against a vessel guilty of illegal dumping); *supra* notes 79–91 and accompanying text.

<sup>243</sup> See Bucy, *supra* note 30, at 62; *supra* notes 79–91.

<sup>244</sup> See Oesterle, *supra* note 10, at 47 (noting that with limited exceptions, existing environmental rewards programs are insufficient).

<sup>245</sup> Compare 33 U.S.C. § 1367 (2012) (lacking whistleblower awards in the CWA), with 42 U.S.C. § 7413(f) (2012) (granting \$10,000 awards for whistleblowers under the CAA).

<sup>246</sup> See Bucy, *supra* note 30, at 62 (noting substantial prodding is needed to bring whistleblowers forward); *supra* notes 79–91 (discussing risks faced by whistleblowers); *infra* notes 248–97 and accompanying text (proposing environmental statutory whistleblower programs).

<sup>247</sup> See *supra* notes 169–179 and accompanying text (discussing whistleblower protection under current environmental law); *infra* notes 248–54 and accompanying text (arguing for whistleblower protection improvements).

<sup>248</sup> YOUR RIGHTS AS A WHISTLEBLOWER, *supra* note 169.

framework before doing so.<sup>249</sup> Furthermore, individual statutes have varying procedural hurdles that must be met for a successful claim.<sup>250</sup>

A whistleblower program that is consolidated under the EPA could avoid the pitfalls of the current scheme by strengthening the language of a whistleblower provision, providing uniformity in enforcement, and extending to potential whistleblowers that are not employees.<sup>251</sup> All claims could be submitted under one organization, which would then handle enforcement of the alleged violation and protect the whistleblower against any potential retaliation.<sup>252</sup> Furthermore, a consolidated environmental whistleblower program could gain publicity through the payment of big awards, which in turn could make whistleblowers more aware that such incentives and protections are available.<sup>253</sup> Implementing a new statutory provision could also allow for the construction of more meaningful whistleblower awards when retaliatory measures can be shown.<sup>254</sup>

### *C. Models to Follow: The Dodd-Frank Whistleblower Programs*

The alignment of government and whistleblower interests can provide significant advantages for the enforcement of environmental statutes, but it must be achieved through an effective mechanism.<sup>255</sup> In light of the adoption of the SEC and Commodity Futures Trading Commission (CFTC) whistleblower programs under the Dodd-Frank Act (the “Act”), it appears Congress has recognized and embraced the agency-wide program model to monitor financial malfeasance.<sup>256</sup>

<sup>249</sup> *Id.*

<sup>250</sup> See *supra* notes 174–175 and accompanying text (discussing differences in retaliation reporting requirements).

<sup>251</sup> See DOYLE, *supra* note 58, at 16 (noting that the False Claims Act (FCA) grants contractors and agents whistleblower protection in addition to employees). Compare YOUR RIGHTS AS A WHISTLEBLOWER, *supra* note 169 (listing multiple environmental statutes with individual protection regimes), with 15 U.S.C. § 78u-6 (2012) (granting the SEC the power to enforce whistleblower protections for all securities whistleblowers under a single statute).

<sup>252</sup> See 15 U.S.C. § 78u-6(h)–(j) (granting SEC and CFTC power to enforce whistleblower protections for all whistleblowers that report information to the respective agency).

<sup>253</sup> Lynch, *supra* note 125 (citing Christopher Ehrman, head of the CFTC’s whistleblower program, who said marquis whistleblower cases have increased visibility within the program).

<sup>254</sup> See 15 U.S.C. § 78u-6 (j) (granting the SEC authority to issue rules and regulations to enforce whistleblower provisions, including whistleblower protection); Compare *id.* § 78u-6 (h)(C)(ii) (allowing whistleblowers two times the amount of back pay that would be owed to an individual if that person were improperly dismissed by their employer), with YOUR RIGHTS AS A WHISTLEBLOWER, *supra* note 169 (allowing only back pay to be recovered).

<sup>255</sup> See *supra* notes 224–254 and accompanying text.

<sup>256</sup> See Commodity Exchange Act, 7 U.S.C. § 26 (2012) (codifying the CFTC agency-wide whistleblower program implemented by Dodd-Frank); 15 U.S.C. § 78u-6 (containing the SEC agency-wide program implemented by Dodd-Frank); Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R.

Agency programs, such as those implemented by the Act, serve as an effective and useful alternative to successful litigation-based whistleblower statutes, such as the False Claims Act (FCA).<sup>257</sup> Most environmental crimes, like most financial crimes, generally do not involve claims submitted to the government for payment, which precludes them from falling under the *qui tam* provisions of the FCA.<sup>258</sup> Nevertheless, the government can, and has, pursued other avenues to provide the incentives needed for whistleblowers to spearhead enforcement actions, through agency-mandated programs.<sup>259</sup> In all likelihood, the government's willingness to create more whistleblower incentive programs has largely been spurred by the successful outcomes produced by the FCA *qui tam* provisions.<sup>260</sup>

Before the Act's programs, the prototype of the agency enforcement model was the Internal Revenue Service (IRS) whistleblower program.<sup>261</sup> The program was the first federal agency effort to incentivize whistleblowers to come forward, and it incentivized such action with a set financial award for any financial recovery.<sup>262</sup> As a result, both the government and the whistleblower had some incentive to pursue high quality claims and recover illegally held funds.<sup>263</sup> The value of this information can be seen in Congress' choice to strengthen the program so that the agency awards are now mandatory, not discretionary.<sup>264</sup> Although the IRS program has been the archetype for agency whistleblower enforcement, it lacks some key features that make other whistleblower programs successful.<sup>265</sup> Most notably, it fails to adequately protect

4173, 111th Cong. (1st Sess. 2010) (stating it is an act to "promote financial stability of the United States . . . to protect consumers from abusive financial services practices . . .").

<sup>257</sup> 31 U.S.C. § 3729 (2012) (stating the FCA applies to claims for payment submitted to the government); see Lynch, *supra* note 125 (observing that the SEC and CFTC programs have been effective); Saunders & Sidel, *supra* note 9 (highlighting a major Internal Revenue Service (IRS) whistleblower award and the government recovery).

<sup>258</sup> See 31 U.S.C. § 3729(a)(1) (outlining acts that produce liability under the FCA); Baruch & Barr, *supra* note 95, at 32 (noting possible violations under Rule 21F-2 of the SEC program are broadly construed).

<sup>259</sup> See 7 U.S.C. § 26 (laying out the CFTC agency-wide whistleblower program implemented by Dodd-Frank); 15 U.S.C. § 78u-6 (2012) (codifying SEC agency-wide program implemented by Dodd-Frank); Internal Revenue Code, 26 U.S.C. § 7623 (2012) (containing IRS agency-wide informant awards).

<sup>260</sup> See S. REP. NO. 111-176, at 110-12 (discussing the general merits of Department of Justice and other whistleblower programs); 2011 FCA Press Release, *supra* note 26 (discussing the successes of FCA whistleblower cases).

<sup>261</sup> 26 U.S.C. § 7623; see *History of the Whistleblower/Informant Program*, *supra* note 98 (discussing the history of the IRS agency awards program, which originated in 1867).

<sup>262</sup> See *History of the Whistleblower/Informant Program*, *supra* note 98 (discussing IRS agency awards becoming mandatory in 2006).

<sup>263</sup> See Saunders & Sidel, *supra* note 9 (noting that a single whistleblower case resulted in over \$100 million for the whistleblower, as well as \$5 billion in unclaimed revenue for the government).

<sup>264</sup> *History of the Whistleblower/Informant Program*, *supra* note 98 (stating that the key programmatic change was made in 2006, by removing IRS discretionary power to grant awards).

<sup>265</sup> See 26 U.S.C. § 7623 (2012).

whistleblower confidentiality and it does not have an expressly authorized whistleblower protection program.<sup>266</sup>

The Dodd-Frank programs however, improved upon the IRS whistleblower program.<sup>267</sup> As an initial matter, the programs emulated the IRS program by providing the set, mandatory financial awards that whistleblowers can expect for providing specific, previously unknown information that leads to a successful case.<sup>268</sup> The programs then went further by strengthening whistleblower protections by ensuring confidentiality and creating the possibility for greater financial awards in successful retaliation claims.<sup>269</sup>

Congress included whistleblower programs in the Act because it recognized the massive threat posed by financial crimes, and the valuable part that insiders could play in curbing it.<sup>270</sup> The programs seek to address the problem, using a combination of financial incentives and well-structured protection and confidentiality programs.<sup>271</sup> A similar approach in the environmental realm could be just as, if not more valuable to the public and the common good.<sup>272</sup> For that reason, Congress should adopt an agency-wide whistleblower program under the EPA, similar to those adopted under the SEC and the CFTC in the Act.<sup>273</sup>

Set financial awards can bring those with direct knowledge of environmental violations to the forefront.<sup>274</sup> Making such awards mandatory would

<sup>266</sup> See *id.* (the statute lacks whistleblower protections); FISCAL YEAR 2012 REPORT TO CONGRESS ON THE USE OF SECTION 7623, *supra* note 102, at 14 (stating that unlike other laws, the IRS program does not provide whistleblower protection).

<sup>267</sup> See 15 U.S.C. § 78u-6(b), (h) (2012).

<sup>268</sup> See *id.* § 78u-6(b) (requiring the SEC to grant whistleblower awards to whistleblowers that provide original information that leads to a successful outcome).

<sup>269</sup> See *id.* § 78u-6(h) (providing significant repayment for successful retaliation claims and protecting whistleblower confidentiality); *supra* note 254 and accompanying text (noting the SEC program may ensure higher compensation for whistleblower retaliation programs than OSHA). *But cf.* FISCAL YEAR 2012 REPORT TO CONGRESS ON THE USE OF SECTION 7623, *supra* note 93, at 14 (discussing the weaknesses of the IRS whistleblower program protections).

<sup>270</sup> See H.R. 4173 (stating it is an act to “promote financial stability of the United States . . . to protect consumers from abusive financial services practices . . .”).

<sup>271</sup> See *id.*; see also 7 U.S.C. § 26 (2012) (codifying the CFTC agency wide whistleblower program implemented by Dodd-Frank); 15 U.S.C. § 78u-6 (codifying the SEC agency-wide program implemented by Dodd-Frank).

<sup>272</sup> Compare H.R. 4173 (stating the purpose of the legislation is to promote financial stability by ending bailouts that further consumer victimization through abusive financial services practices), with Almasy, *supra* note 2 (quoting Secretary of State Kerry saying that climate change is the greatest challenge of our generation).

<sup>273</sup> See *supra* notes 201–254 and accompanying text (discussing the inadequacies of the current system and the advantages of the whistleblower programs).

<sup>274</sup> See ANNUAL REPORT ON THE WHISTLEBLOWER INCENTIVES AND PROTECTION PROGRAM, *supra* note 140, at 2 (discussing tips received under CFTC program); S. REP. NO. 111-176, at 112 (noting that the Senate Banking Committee found set, predictable payments could bring those with knowledge of financial misconduct forward); 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, *supra* note 15, at 5 (discussing the number of calls returned in 2013 from the SEC program); EPA APPS Press Release, *supra* note 186 (describing the award of \$2.1 million for an Act to Prevent

incentivize these parties to come forward and encourage competent legal representation to engage these claimants.<sup>275</sup> Furthermore, whistleblower protection under the umbrella of the EPA would ensure prospective whistleblowers know there is a single source for their protection that can instill uniform guidelines.<sup>276</sup> An EPA program could also help ensure anonymity for whistleblowers and ensure greater financial rewards against retaliators than those provided by OSHA.<sup>277</sup>

#### *D. Perceived Challenges That Must Be Overcome*

As with any major system overhaul, there are challenges that must be overcome in order to implement an EPA whistleblower program of this sort.<sup>278</sup> There will be fears and concerns about an overload of low-quality or vindictive whistleblower complaints, an inability to adequately provide financial incentives or overcome agency capture, and of giving monies paid by violators to private parties, rather than using the funds to help the public.<sup>279</sup> Nevertheless, most of these issues will not realistically materialize, and those that do can be overcome.<sup>280</sup>

For example, although there may be an influx of whistleblower claims to begin with, the EPA and other enforcing agencies should be able to readily distinguish between those that are viable and those that are frivolous.<sup>281</sup> Further, competent lawyers will likely only be willing to work with claimants they deem credible, which will serve as a signal to the agencies who will work

Pollution from Ships whistleblower); Lynch, *supra* note 125 (citing agencies expecting whistleblower payouts to increase); Saunders & Sidel, *supra* note 9 (noting that a single whistleblower case resulted in over \$100 million for whistleblower, as well as \$5 billion in unclaimed revenue for the government).

<sup>275</sup> See *supra* notes 79–91 (discussing risks faced by whistleblowers); *supra* note 274 and accompanying text (noting that mandatory agency program awards have brought whistleblowers forward and providing examples of whistleblowers coming forward to collect awards).

<sup>276</sup> See 15 U.S.C. § 78u-6(h)–(j) (2012) (granting SEC whistleblowers extensive protections and the SEC power to effectively enforce them); *supra* notes 174–175 (discussing the differences in retaliation reporting requirements).

<sup>277</sup> 15 U.S.C. § 78u-6(h) (providing significant repayment in retaliation claims and protecting whistleblower confidentiality); *supra* note 269 and accompanying text (showing how the SEC may ensure higher compensation for whistleblower retaliation programs than OSHA).

<sup>278</sup> See *infra* notes 279–297 and accompanying text.

<sup>279</sup> Oesterle, *supra* note 10, at 48–49 (citing concerns regarding an overload of complaints); Lisa Desjardins, *Winners and Losers in Congress' \$1 Trillion Spending Deal*, CNN (Jan. 14, 2014, 11:13 AM), <http://www.cnn.com/2014/01/14/politics/budget-winners-losers/>, archived at <http://perma.cc/FAP5-ASLL> (noting EPA funding has been cut by twenty percent since 2010); *Enforcement Basic Information*, ENVTL. PROT. AGENCY, <http://www2.epa.gov/enforcement/enforcement-basic-information> (last updated Sept. 9, 2014), archived at <http://perma.cc/6XNX-Z7HE> (noting enforcing environmental laws is essential to the EPA's strategic planning, which includes its budget).

<sup>280</sup> See *infra* notes 283–299 and accompanying text.

<sup>281</sup> See *Why Whistleblower Laws Work*, *supra* note 25 (discussing how whistleblower programs can be structured to discourage frivolous actions).



closely with these lawyers.<sup>282</sup> Although there may be a risk that extra staff will have to be devoted to investigating these claims, those resources would still be expended in furtherance of alerting the EPA of potential risks that threaten the environment and further, may uncover truly dire situations.<sup>283</sup>

Given the fact that many current environmental statutes provide such low rewards, or no rewards at all to whistleblowers, there may be a concern about the ability of the EPA to allocate funds to pay significant awards for successful claims.<sup>284</sup> This can be rectified by paying into a fund—similar to those employed by the SEC and the CFTC—that can ensure successful payments to worthy whistleblowers.<sup>285</sup> These funds can be bolstered by any recoveries from convicted environmental violators.<sup>286</sup> Furthermore, many statutes that do not have whistleblower awards, such as the CWA, actually have extremely significant monetary sanctions that can amount to millions of dollars over the course of only a few days.<sup>287</sup> For statutes such as these, a set percentage of the recovery would provide the funds needed to adequately reward whistleblowers.<sup>288</sup>

Some may also argue that these statutes will be ineffective at overcoming the problem of agency capture because there is no private recourse for citizens beyond the administrative apparatus.<sup>289</sup> Although these concerns are legitimate, there are reasons to believe that agency capture will not become a systemic issue.<sup>290</sup> Even though whistleblowers may not have private judicial recourse, they can pressure and embarrass agencies through the media.<sup>291</sup> Further, competent legal counsel will also likely advise their clients on how to press their cases with the agency.<sup>292</sup> Giving whistleblowers access to the en-

<sup>282</sup> See Bucy, *supra* note 30, at 58–59 (noting how whistleblower programs can draw competent legal resources).

<sup>283</sup> See *supra* notes 204–207 and accompanying text (noting it is impossible for the EPA to detect all environmental crimes).

<sup>284</sup> See Desjardins, *supra* note 279 (noting EPA budget cuts); *supra* notes 181–196 and accompanying text (discussing minimal awards for certain environmental statutes).

<sup>285</sup> See 7 U.S.C. § 26(g) (2012) (noting the CFTC Protection Fund will be made available for the payment of awards to whistleblowers); 15 U.S.C. § 78u-6(g) (2012) (noting the SEC Protection fund will be made available for payment of awards to whistleblowers).

<sup>286</sup> See 7 U.S.C. § 26(g)(3) (noting funds will be deposited into the CFTC Protection Fund); 15 U.S.C. § 78u-6(g)(3) (noting monetary sanctions collected by the SEC will be deposited into the SEC Protection Fund).

<sup>287</sup> See 33 U.S.C. § 1319 (instituting penalties of up to \$100,000 per day for knowing violations of the CWA).

<sup>288</sup> See *id.*

<sup>289</sup> See Baruch & Barr, *supra* note 95, at 29–30 (noting citizens do not have private recourse under the SEC program).

<sup>290</sup> See *infra* notes 291–294 and accompanying text.

<sup>291</sup> See Erik Larson, *Ex-Madoff Workers Seek to Embarrass SEC, Prosecutors Say*, BLOOMBERG (Nov. 6, 2013, 12:01 AM), <http://www.bloomberg.com/news/2013-11-05/ex-madoff-workers-seek-to-embarrass-sec-prosecutors-say.html>, archived at <http://perma.cc/RD9Q-9Y6S> (noting embarrassment faced by agency officials when failing to detect possible violations).

<sup>292</sup> See Bucy, *supra* note 30, at 58 (noting benefits of diligent counsel).

forcement apparatus is still better than the other option, which is to have the agencies act with nearly complete autonomy.<sup>293</sup> The same concern is applicable to the Dodd-Frank whistleblower programs, but the programs have still had success and been met with optimism.<sup>294</sup>

Lastly, there will be some who argue that any recovery received from environmental polluters should be reserved strictly for government cleanup efforts and preventative activities.<sup>295</sup> The government, however, may never obtain these recoveries in the first place if not for the prospective whistleblowers.<sup>296</sup> Therefore, despite merit of any concerns about giving private parties a portion of the recovery, the fact remains that it is more important to get the recovery in the first place, and thus rewarding whistleblowers with a portion of recoveries is warranted and encourages future whistleblowers to come forward, which must ultimately be the primary goal.<sup>297</sup>

### CONCLUSION

The threats posed by climate change and environmental degradation are real and can only be overcome with high level cooperation amongst those governments, institutions, and individuals with the power to incite change. In this respect, the enforcement mechanism for environmental statutory laws must exhaust all possible options and resources to ensure that the rules and regulations to protect environmental standards are upheld. It is highly doubtful that this can be done relying solely on public resources. Instead, significant contributions from private parties—such as whistleblowers—are likely required to ensure the environmental legal system is working properly, and thus protecting human health and the environment.

Congress has recognized the important role that the private parties play in combating fraud and financial calamity in their capacity as whistleblowers, and thus it should recognize the need for a similar approach to combat threats to the environment. The successes of Congress' efforts to implement whistleblower programs are readily apparent in the False Claims Act *qui tam* provisions and in the agency whistleblower programs, and thus programs such as those instituted by the Dodd-Frank Act should serve as a model for similar en-

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<sup>293</sup> See Saunders & Sidel, *supra* note 9 (noting it is impossible for the EPA to detect all environmental crimes); *supra* notes 42–43 and accompanying text (discussing the problem of agency capture).

<sup>294</sup> See Lynch, *supra* note 125 (quoting the SEC program head that they have made the largest payout yet and continue to receive tips that they are pursuing).

<sup>295</sup> See Oesterle, *supra* note 10, at 46, 48 (citing concerns about the ability to pay awards given declining enforcement budgets).

<sup>296</sup> See Saunders & Sidel, *supra* note 9 (quoting Senator Charles Grassley, who argued that a whistleblower award in excess of \$100 million is justified considering recovery of \$5 billion that could not have otherwise been achieved).

<sup>297</sup> See Lynch, *supra* note 125; Saunders & Sidel, *supra* note 9.

vironmental whistleblower programs. The success of these programs makes it reasonable to conclude that if Congress empowered the Environmental Protection Agency to implement a similar whistleblower program, it too would enjoy similar success, both in rewarding and protecting whistleblowers, and in protecting human health and the environment.