Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime

Jennifer M. Pacella
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Abstract

Attorneys, especially in-house counsel, are subject to retaliation by employers in much the same way as traditional whistleblowers, often experiencing retaliation and loss of livelihood for reporting instances of wrongdoing about their clients. Although attorney-whistleblowing undoubtedly invokes ethical concerns, attorneys who “appear and practice” before the Securities and Exchange Commission (“SEC”) are required by federal law to act as internal whistleblowers under the Sarbanes-Oxley Act (“SOX”) and report evidence of material violations of the law within the organizations that they represent. An attorney’s failure to comply with these obligations will result in SEC-imposed civil penalties and disciplinary action. Recent federal case law, however, holds that whistleblowers who report violations internally within their organizations are not eligible for the robust retaliation protections available under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”) and must report to the SEC to be protected. Given that external reporting by attorneys would run contrary to professional ethical rules in a number of states, lawyers currently find themselves caught in a “catch-22” making it exceedingly difficult to comply with the conflicting regulatory regimes to which they are held. This Article will address this emerging problem by considering a question that no court has yet addressed—whether the SOX attorney-reporting rules preempt conflicting state law—and will propose amendments to such rules to clarify when external reporting is appropriate. This Article will also consider a state-based solution to this conflict adopting a modified version of Model Rule 1.13, the ethical rule governing the behavior of attorneys when they represent organizations and are called to act as whistleblowers. This Article will also contribute to the ongoing scholarly discussion of “new governance” approaches to regulation by placing attorney-whistleblowers in this context and considering how their gatekeeping role ensures regulatory compliance within the organizations that they represent.

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INTRODUCTION

The year 2014 was tagged, “The Year of the Whistleblower,” representing an era in which whistleblowers privy to inside information about their employers’ misconduct have become empowered to remedy violations of the law.¹ Despite recent trends heralding whistleblowers as essential players in effective compliance and moving away from negative connotations like “snitch” and “traitor,”² whistleblowers are still

² See id.; see Jonathan Macey, Getting the Word Out About Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading, 105 MICH. L. REV. 1899, 1940 n. 53 (2007) (describing the negative images typically used to describe whistleblowers); see also Yuval Feldman & Orly Lobel, The Incentives
commonly the victims of retaliation for their reporting. Recently, it has been said that “retaliation against whistleblowers [is at an] all-time high,” both on the rise nationally and a problem at companies that outwardly appear committed to ethics and integrity. Retaliation against whistleblowers commonly emerges as loss of employment, ostracism, alienation, or blacklisting from one’s industry and results in both devastating financial and psychological effects for the whistleblower. Such retaliation occurs despite research showing that most whistleblowers report only internally to their employers and superiors, never venturing from the four walls of their places of employment to reveal information.

Attorney-whistleblowers, especially in-house counsel, are no strangers to such negative reactions when they themselves report internally on their clients’ misconduct. Although attorneys tend not to fit the mold of the typical whistleblower, this group of professionals is required by federal law to blow the whistle internally, or “up-the-ladder,” on organizational clients. In 2002, Congress mandated the Securities and Exchange Commission (“SEC”) under Section 307 of the Sarbanes-Oxley Act (“SOX”) to issue rules establishing “minimum standards of professional conduct” for lawyers who “appear and practice” before the SEC, requiring attorneys to report evidence of material violations of securities law, breaches of fiduciary duty, or other violations by their corporate clients to the chief legal counsel or chief executive officer, and, if no

Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality, 88 Tex. L. Rev. 1151, 1159 (2010) (describing how the media has reshaped its view of whistleblowers as “heroic,” signifying a move away from the traditional view in popular culture portraying whistleblowers as “lowlife[s] who betray[ ] a sacred trust largely for personal gain.”).

3 National Business Ethics Survey of the U.S. Workforce, ETHICS RESOURCE CENTER, 13 (2013), available at http://www.ethics.org/downloads/2013NBESFinalWeb.pdf. A recent study by the Ethics Resource Center polled and reported thousands of employees, noting that retaliation against whistleblowers is a “widespread problem” and that about 22% (or one in five) of those who report misconduct experience retaliation.


5 Geoffrey Christopher Rapp, Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers, 87 B.U. L. Rev. 91, 118-25 (2007) (describing the many disincentives to blowing the whistle); James Fanto, Whistleblowing and the Public Director: Countering Corporate Inner Circles, 83 Or. L. Rev. 435, 438, 444-47, 460 (2004) (describing the common “inner circle” or group rejection of the whistleblower, who threatens “groupthink” mentalities, causing retaliation).

appropriate response is taken, up-the-ladder to the board of directors. 7 Congress was prompted to enact this mandate in the wake of scandals like Enron and WorldCom that begged the question of “where were the lawyers?” 8 as clients committed devastating levels of fraud. The SEC issued these “Part 205 Rules,” as they will be named herein, in 2003, imposing civil penalties and disciplinary authority on attorneys who fail to adhere to the reporting rules. 9 Junior attorneys appearing and practicing before the SEC are also subject to the rules and fulfill their duties by reporting material violations to their supervisory attorneys, who must then comply with the up-the-ladder reporting requirements. 10

The Part 205 Rules also allow permissive disclosures under which attorneys may reveal to the SEC, without the issuer-client’s consent, confidential information pertaining to the attorney’s representation of the client in certain instances. 11 As such, attorneys may provide the SEC with information about their clients “to the extent [they] reasonably believe necessary” to prevent an issuer from committing a material violation of the law likely to cause substantial financial injury to investors, committing perjury,

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7 15 U.S.C. § 7245. Alternatively, an attorney may report such information to a “qualified legal compliance committee” if present, a board committee consisting of at least one member of the issuer’s audit committee and has adopted written procedures to receive and consider reports of evidence of material violations. See 17 C.F.R. §§ 205.2(k), 205.3(c).

8 Stephen M. Bainbridge, Whistleblowers, Lawyers, and the Costs of Misconduct, in COMPLETE GUIDE TO SARBANES-OXLEY: UNDERSTANDING HOW SARBANES-OXLEY AFFECTS YOUR BUSINESS 109 (2007). The legislative history of Section 307 of SOX acknowledges the fault of lawyers in such scandals:

[E]xecutives and accountants do not work alone. Anybody who works in corporate America knows that wherever you see corporate executives and accountants working, lawyers are virtually always there looking over their shoulder. If executives and/or accountants are breaking the law, you can be sure that part of the problem is that the lawyers who are there and involved are not doing their job. 148 CONG. REC. S6524-02 (July 10, 2002) (statement of Sen. John Edwards). See also Sara B. Smith, Sarbanes-Oxley, Section 307 – The Price of Accountability: How Will Section 307 Affect the Role of the Corporate Attorney? 107 W. Va. L. Rev. 901, 915 (2005) (noting that Section 307 of SOX “holds lawyers accountable” for reporting violations in the hope that a future Enron will not occur). See also Thomas G. Bost, Corporate Lawyers After the Big Quake: The Conceptual Fault Line in the Professional Duty of Confidentiality, J. BUS. ENTREPRENEURSHIP & L. 335, 388 (2008) (Bost notes that the Part 205 Rules are based on “the implicit premise that even though the lawyer’s primary allegiance is to his client, he is accountable to a significant degree to those third parties who have legitimate interests in being protected against the client’s misdeeds.”) Bost takes the view that the SEC may have disregarded the “optimum vision of lawyering” in adopting these rules, which is to allow the lawyer to establish the necessary degree of trust to serve as a counselor or advisor for the client.

9 17 C.F.R. § 205.6. Disciplinary action by the SEC may include an attorney being censured or the denial, either temporarily or permanently, of the privilege of appearing or practicing before the SEC. See Richard M. Humes, Remarks of an SEC Associate General Counsel, 57 CASE W. RES. L. REV. 341 (2007) (discussing the types of disciplinary proceedings that the SEC has brought against attorneys).

10 Id. § 205.5. The junior, or “subordinate” attorney, is deemed to have complied with the rules by reporting to the supervisory attorney. If the subordinate attorney reasonably believes that the supervisory attorney to whom he/she has reported has failed to comply with the rules’ up-the-ladder reporting requirements, then the subordinate attorney may do so himself/herself. See id. § 205.5(c),(d).

11 Id. § 205.3(d).
or to rectify the consequences of a material violation for which the attorney’s services were used.\textsuperscript{12}

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), which, in addition to implementing extensive financial regulatory reform measures, introduced a robust whistleblower program providing stronger protections from retaliation than are available under SOX’s earlier whistleblower program.\textsuperscript{13} Unlike the weaker retaliation protections and administrative remedies available under Section 806 of SOX, Dodd-Frank allows for a direct private right of action in federal district court for whistleblowers alleging retaliation by their employers and a lengthy statute of limitations to do so, as well as reinstatement of employment, compensation for litigation costs, and double back pay.\textsuperscript{14} However, due to recent federal appellate case law, specifically the Fifth Circuit’s decision in \textit{Asadi v. G.E. Energy},\textsuperscript{15} whistleblowers who report only internally within their organizations may not be protected from these generous retaliation protections and must report to the SEC to be entitled to relief under Dodd-Frank.\textsuperscript{16} Therefore, as the law currently stands, attorney-whistleblowers who experience retaliation for making the internal reports that are required under the Part 205 Rules are currently left unprotected under Dodd-Frank and, as will be discussed herein, subject to insufficient protections under SOX and state anti-retaliation laws. As might be expected, if such attorneys were to make external reports to the SEC under the permissive disclosures of the Part 205 Rules, they risk disciplinary action from state bar(s) that have differing rules and to which they are admitted—thereby prompting a “catch-22” scenario for attorneys subject to conflicting regulatory regimes.

This Article will examine this growing dilemma, specifically while focusing on attorneys working in-house who are obligated to act as internal whistleblowers under SOX, face retaliation for doing so, and are barred from redress under Dodd-Frank.\textsuperscript{17} Part I will discuss the nature of retaliation that attorney-whistleblowers experience and will examine the evolution of legal developments allowing attorneys to avail themselves of remedies under state law for retaliatory discharge and other forms of retaliation. Part II will examine the whistleblowing duties of attorneys appearing and practicing before the SEC and their protection from retaliation, or lack thereof, under the federal laws of SOX and Dodd-Frank.

Part III will examine the American Bar Association’s reaction to the Part 205 Rules in 2003 and the amendments of its own Model Rules of Professional Conduct

\textsuperscript{12} \textit{Id.}


\textsuperscript{14} \textit{Compare id.} § 78u-6(h) with 18 U.S.C. § 1514A.

\textsuperscript{15} 720 F.3d 620 (5th Cir. 2013).

\textsuperscript{16} \textit{See id.; see also} Jennifer M. Pacella, \textit{Inside or Out? The Dodd-Frank Whistleblower Program’s Antiretaliation Protections for Internal Reporting}, 86 TEMPLE L. REV. 721 (2014).

\textsuperscript{17} 17 C.F.R. § 205.3. In a separate article, I examined the eligibility of attorney-whistleblowers under Dodd-Frank to collect bounty rewards and noted that a related issue pertains to whether retaliation protections are available under the statute for whistleblowing lawyers, which I will address herein. \textit{See} Jennifer M. Pacella, \textit{Advocate or Adversary? When Attorneys Act as Whistleblowers}, 28 GEO. J. LEGAL ETHICS \textit{__} (forthcoming, 2015).
to conform to the SEC’s mandate under SOX. This section will analyze the ways in which the legal obligations of attorneys subject to the Part 205 Rules leave open the possibility of conflict with the ethical rules of the various states that either do not allow the same disclosures that are permitted under the Part 205 Rules or have not adopted the ABA’s Model Rules, specifically Model Rule 1.13 (Organization as Client), governing the behavior of lawyers employed or retained by organizations, including corporations. Although no court has yet determined the issue of whether the Part 205 Rules preempt conflicting state ethical rules, this section will offer predictions as to how future courts might decide this question by considering “obstacle preemption” as a possible theory, which applies when conflicting state law hinders the accomplishment of the goals of federal law.

Although the preemption question has yet to be judicially resolved, this Article finds that preemption of the Part 205 Rules over conflicting state law is the most likely outcome, thereby requiring state bars to yield to the federal standards governing attorneys who appear and practice before the SEC. Given the fiduciary nature of the attorney-client relationship, Part IV will suggest amendments to improve the Part 205 Rules to qualify the “reasonable belief” standard and reporting trigger that permits an attorney to reveal externally so that all internal reporting mechanisms must be exhausted prior to doing so. Part IV will also explore a state-based solution through the adoption of a modified version of Model Rule 1.13 by the states whose ethical rules present direct conflicts with the Part 205 Rules in an effort to achieve uniformity in this context. Finally, this Article will consider the role of today’s corporate attorney in the context of larger “new governance” regulatory regimes and will argue that the proposals set forth herein are on par with enforcing the collaboration, early fraud detection, and problem-solving features that are descriptive of modern-day governance and compliance structures.

I. ATTORNEY-WHISTLEBLOWERS

A. Lawyers as Targets of Retaliation

It should come as no surprise that the attorney-client relationship is not intended to be antagonistic. This relationship of trust, specifically between an individual client and a lawyer, is long-heralded as sacrosanct. The Model Rules of Professional

18 See MODEL RULES OF PROF’L CONDUCT R. 1.13.
19 Columbia Venture, LLC v. Dewberry & Davis, LLC, 604 F.3d 824, 829 (4th Cir. 2010) (describing obstacle preemption as “a type of conflict preemption authorized by the Supremacy Clause”); see also Arizona v. United States, 132 S. Ct. 2492, 2495 (2012) (“[S]tate laws are preempted when they conflict with federal law, including when they stand ‘as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”) (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
20 Sung Hui Kim, Lawyer Exceptionalism in the Gatekeeping Wars, 63 SMU L. REV. 73, 115 (2010) (discussing the differences between a lawyer’s duty to keep secrets in the “individual human client” context and that involving corporate clients, as the duty under the latter is “severely qualified.”).
21 “There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honorably and faithfully discharged . . . .” Stockton v.
Conduct of the American Bar Association ("ABA") highlight these principles, noting that one of the most fundamental aspects of the attorney/client relationship is the lawyer’s duty of confidentiality.\(^{22}\) Under Model Rule 1.6, lawyers may not reveal information “relating to the representation of a client” unless the client consents or in the event of other limited circumstances, including, for example, to prevent reasonably certain death or substantial bodily harm or a crime or fraud reasonably certain to create substantial, financial or proprietary injury to another.\(^{23}\) Beyond the exceptions set forth in Rule 1.6, Model Rule 1.13 allows the attorney who represents an organization to reveal confidential client information in certain instances that are discussed below.\(^{24}\)

The ABA amended Model Rule 1.13 in 2003 to follow the SEC’s Part 205 Rules in an effort, as some believed, to retain control over the regulation of attorneys at a time when the federal government seemed to encroach on this area.\(^{25}\) The current Rule 1.13 requires an attorney to report up-the-ladder to the “highest authority” of the organization—usually, the board of directors, any knowledge he/she has that an officer, employee, or other person within the organization is violating the law or a legal obligation to the organization and that is likely to result in substantial injury to it.\(^{26}\) Model Rule 1.13 also allows an attorney to reveal confidential information externally, whether or not Rule 1.6 would so allow, if the highest authority “insists upon” or “fails to address in a timely and appropriate manner” the violation of the law and the attorney “reasonably believes that the violation is reasonably certain to result in substantial injury to the organization.”\(^{27}\)

Given the possible sanctions that attorneys risk for failing to act as up-the-ladder whistleblowers under the Part 205 Rules,\(^ {28}\) the importance of protecting them from retaliation for doing so becomes apparent. There have been many instances of attorneys, especially in-house counsel, experiencing or fearing retaliation and one source has noted that whistleblower claims brought by in-house counsel have drastically increased in recent years.\(^ {29}\) Alex Long has provided an extensive study of the numerous cases that

\(^{22}\) See Model Rules of Prof’l Conduct R. 1.6 and cmt. See also David B. Wilkins, Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars, 11 Geo. J. Legal Ethics 855, 889 (1998) (discussing the lawyer’s most important ethical duties as the duties of confidentiality and loyalty, which “are justified on the ground that they are essential for fostering the level of trust necessary for clients to allow lawyers access to sensitive information and control over a client's legal affairs.”).

\(^{23}\) Model Rules of Prof’l Conduct R. 1.6.

\(^{24}\) Id. R. 1.13.

\(^{25}\) Id. R. 1.13; 2003 amendments available at http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/2003journal.authcheckdam.pdf [hereinafter ABA Amendments]; see Symposium, John S. Dzienkowski, Ethical Decisionmaking and the Design of Rules of Ethics, 42 Hofstra L. Rev. 55, 92 (2013) (noting that the ABA made its 2003 amendments after being “faced with losing complete control over regulating the disclosure duties of corporate lawyers, chose to make changes that were likely to forestall more aggressive SEC action.”).

\(^{26}\) Model Rules of Prof’l Conduct R. 1.13(b).

\(^{27}\) Id. R. 1.13(c).

\(^{28}\) 17 C.F.R. § 205.6.

\(^{29}\) See, e.g., Alex B. Long, Retaliatory Discharge and the Ethical Rules Governing Attorneys, 79 U.
attorneys have brought in past years for experiencing retaliation after adhering to their professional ethics duties. Inside counsel, as employees of the business organizations for which they work, are especially vulnerable to the devastating effects of whistleblower retaliation in ways that external counsel who rely on a variety of clients are not. In-house attorneys tend to be much more intimately involved with the client, as they have close access to information, strive to maintain personal and professional ties to the client (their sole employer), and possess a greater ability to promote constructive corporate activity that protects the organization’s long-term best interests. An in-house counsel’s relationship with his/her organization as client is much the same as other employees, visible through the lawyer’s dependence on the company for income and benefits, and subject to the control of the employer with respect to hours, salary, promotion, and personnel procedures.

As Sung Hui Kim has discussed, inside counsel depend financially on one client—“[i]f they get fired, they lose their entire income, insurance, and basic livelihood. If pensions or stock options have not vested, then enormous sums of money can be forfeited as well. Even worse, if they get fired for whistle-blowing, they may get blacklisted . . .” Given what is at stake, the need for robust retaliation protections for

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30 See Long, supra note 29, at 1049-66 (examining the various categories of attorney-whistleblowing situations and finding the “basic theme” in nearly all cases is that attorneys are forced to decide between retaining their employment and ethically engaging in law practice).


32 Corello, supra note 31, at 409.

33 Id. at 405-06 (arguing that in-house counsel should be considered to fit the definition of “employee” for the purpose of statutory and common law protections from retaliatory discharge). See also Orly Lobel, Lawyering Loyalties: Speech Rights and Duties Within Twenty-First Century New Governance, 77 FORDHAM L. REV. 1245, 1249 (2009) (noting the complete economic dependence of in-house counsel on their employers). But see Balla v. Gambro 145 Ill. 2d, 492, 501-03 (Ill. 1991) (taking the view that attorneys are not subject to retaliation protections given the relationship of trust and confidence that they maintain as part of the attorney-client relationship).

34 Sung Hui Kim, The Banality of Fraud: Resituating the Inside Counsel as Gatekeeper, 74 FORDHAM L. REV. 983, 1005-06 (2005); see also Vu, supra note 29, at 236 (noting the importance of retaliation protections for attorneys, especially in light of their reporting duties under SOX).
in-house attorneys is crucial—such protections also ensure that attorneys will raise concerns or voice oppositions to protect the organizational client without fear of reprimand from corporate officers or directors who may wish to persist with misconduct.\textsuperscript{35} Beyond the threat of retaliatory discharge, other common forms of retaliation include pressure to facilitate, rather than thwart, corporate transactions, the desire to please management in an effort to ensure performance-based bonuses, and pressure to conform to the values of the organization and to be a “team player.”\textsuperscript{36} As Eric Alden has expressed, “[t]he CEO and, in other cases, the CFO have the practical ability to cost the GC his or her job.”\textsuperscript{37} Given that most general counsel of public companies are subordinate to a company’s chief executive officer, chief financial officer, or other senior officer, the risk of retaliation in the form of termination is very real when senior officers insist upon illegal activity while general counsel unwillingly agree to the action.\textsuperscript{38} Such officers may outright fire the general counsel for failing to facilitate transactions “or, in the more subtle but equally effective manner of those sophisticated in the fine art of retaliation, verbally, or otherwise, signal that the [general counsel’s] continued employment in that position is no longer desired.”\textsuperscript{39}

The common law and statutory retaliation protections available to attorney-whistleblowers have evolved over time. Prior to the advent of SOX and other statutory protections for whistleblowers, attorneys, like other employees, had to rely on the common law tort claim of retaliatory discharge. Under this legal theory, an employee who was terminated for engaging in certain actions protected by public policy, such as complaining about an employer’s unlawful behavior or blowing the whistle, is eligible for relief.\textsuperscript{40} This right to sue is considered an exception to the common law employment-at-will doctrine and although may differ depending on the jurisdiction, generally protects employees for being fired for exercising statutory or constitutional

\textsuperscript{35} See id; Corello, supra note 31, at 409.
\textsuperscript{36} Kim, supra note 34, at 1006-08, 1026 (discussing the conformity pressures that may prompt inside lawyers to remain silent in the face of misconduct, including “the desire to avoid stigma ad maintain social capital.”). See also David B. Greenberger, Marcia P. Miceli, and Debra J. Cohen, Oppositionists and Group Norms: The Reciprocal Influence of Whistleblowers and Co-workers, 6 J. BUSINESS ETHICS 527, 531-33 (1987) (noting that whistleblowing itself will be less likely to occur in “highly cohesive groups,” which exert pressure on individuals to conform, especially when the potential whistleblower highly depends on the group). In this way, in-house lawyers may be expected to act in accordance with the expectations of the officers that oversee them. See also Mark A. Sargent, Lawyers in the Moral Maze, 49 VILL. L. REV. 867, 879 (2004) (discussing the in-house counsel’s vulnerability to “adopting the same occupational morality as the managers with whom they work, because they are subject to the same social exigencies, power struggles, personal uncertainties and demands of expediency that characterize the corporate bureaucratic organization.”).
\textsuperscript{37} Eric Alden, Blocking the Ax: Shielding Corporate Counsel from Retaliation as an Alternative to White Collar Hypercriminalization, 36 U. HAW. L. REV. 95, 102 (2014).
\textsuperscript{38} Id; see also Robert T. Begg, Whistleblower Law and Ethics, in ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS, AND PUBLIC OFFICIALS 210-11 (Patricia Salkin, ed., American Bar Association, 2008) (discussing the ethical dilemmas that in-house counsel face as internal whistleblowers).
\textsuperscript{39} Id.
\textsuperscript{40} Brandon v. Anesthesia & Pain Mgmt. Associates, Ltd., 277 F.3d 936, 940-41 (7th Cir. 2002).
rights, for refusing to violate the law, or for reporting on their employer’s wrongdoing.  

This doctrine is not a perfect remedy for attorney-whistleblowers given that it creates a tension between “the conception of inside counsel primarily as an employee, deserving some judicial protection from retaliation, and as a lawyer-advocate, whose client has an unfettered right to terminate [their lawyer].”

Early courts typically denied inside counsel the right to sue. Perhaps one of the best-known cases denying counsel this right is Balla v. Gambro, which barred an in-house attorney from bringing a retaliatory discharge claim against his former employer after he was fired for refusing to support his employer’s decision to sell “misbranded and/or adulterated” kidney dialyzers. The court acknowledged that although the attorney had a mandatory ethical duty to reveal information to the extent necessary to prevent a client from committing an act likely to result in serious bodily injury or death, he could not then avail himself of relief under the tort of retaliatory discharge due to the “chilling effect” such an action would have on the attorney/client relationship and the possibility of thwarting a client’s willingness “to be forthright and candid with their in-house counsel.”

Decisions like Balla were based on the notion that attorneys must sometimes “sacrifice” their livelihood and employement for the purpose of “protecting the ‘integrity of the legal profession.’”

Other courts have since relaxed the rigidity of Balla by recognizing that lawyers should be entitled to the same rights as other employees, giving rise to the right to sue for retaliatory discharge in instances where no confidentiality concerns would be at play, or, if they are, by allowing the attorney to proceed with the claim by safeguarding the information through procedural methods. These courts have acknowledged professional codes of ethics as a source of public policy worthy of supporting a retaliatory discharge claim, thereby protecting in-house lawyers from pressure by their employers to violate the rules of professional conduct by furthering a client’s intent to commit a crime or fraud.

In General Dynamics Corporation v. Superior Court, the Supreme Court of California noted the vulnerability of in-house counsel in being completely dependent “on the good will and confidence of a single employer to provide livelihood and career success,” thereby justifying the attorney’s need for retaliation.

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42 Kim, supra note 34, at 1064.

43 145 Ill. 2d. 492, 496-97 (Ill. 1991).

44 Id. at 503-04. “Employers might be hesitant to turn to their in-house counsel for advice regarding potentially questionable corporate conduct knowing that their in-house counsel could use this information in a retaliatory discharge suit.”

45 Kim, supra note 34, at 1065 (citing Balla, 145 Ill. 2d. at 505).

46 Id. (citing General Dynamics Corp. v. Superior Ct., 876 P.2d 487, 503-04 (1994)).

47 Corello, supra note 31 at 397-98 (citing Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505, 512 (1980)). “Employees who are professionals owe a special duty to abide not only by federal and state law, but also by the recognized codes of ethics of their professions. That duty may oblige them to decline to perform acts required by their employers.” Id. See also Petermann, 344 P.2d. at 27; In re Meeker, 414 P.2d 862, 864 (N.M. 1996)); see also Begg, supra note 38, at 209 (discussing professional ethics codes as sources of public policy).
protections when representing corporations, whose essential goal is to maximize profits.48 The court held that in-house lawyers have a well-justified right to redress and that courts handling these matters can institute measures to ensure client confidences are left intact when lawyers bring retaliation claims, including the use of sealing and protective orders, limiting admissible evidence, or in camera proceedings—“by taking an aggressive managerial role, judges can minimize the dangers to the legitimate privilege interests” of these cases.49

Despite making progress towards allowing in-house lawyers to pursue retaliation claims, the court in General Dynamics clearly expressed that when claims for retaliatory discharge cannot be established without breaching the attorney-client privilege, then the case must be dismissed to preserve that privilege.50 As courts and scholars have noted, it may prove to be exceedingly difficult for an in-house attorney to establish claims for retaliatory discharge without disclosing some aspect of a confidential attorney/client communication.51 Further, it is likely to be difficult to predict the precise approach the court will take in such cases, as well as the expected outcome, given the lack of consistency among the states in such decisions.52 This difficulty, along with the fact that many courts have simply not recognized the retaliatory discharge claim as being available to lawyers,53 has given rise to an increasing need for statutory whistleblower protections for attorney-whistleblowers.

**B. Statutory Protections for Attorney-Whistleblowers**

The 2005 decision in Willy v. Administrative Review Board was the first to directly address the issue of confidentiality concerns in instances of lawyer-whistleblowers bringing claims under a federal whistleblowing statute that provides retaliation protections.54 In this decision, the Fifth Circuit allowed an in-house attorney

48 General Dynamics, 876 P.2d at 499.
49 Id. at 876 P.2d at 504.
50 Id. In litigation involving disputes over attorneys’ fees, courts have tended to find that the attorney-client privilege is waived by the client for placing the matter in dispute or that the Model Rules offer an exception to the lawyer’s duty of confidentiality to resolve a dispute between the lawyer and client. See, e.g., Ideal Elec. Sec. Co. v. Int'l Fid. Ins. Co., 129 F.3d 143, 146 (D.C. Cir. 1997); United States v. Ballard, 779 F.2d 287, 292 (5th Cir. 1986); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5); TRIAL OBJECTIONS HANDBOOK 2d § 5:8.
51 Kim, supra note 34, at 1066 (noting that such difficulties are likely to arise given “the role that inside lawyers play and the nature of the allegations inherent in a retaliatory discharge claim by employed lawyers.”).
52 See Long, supra note 29, at 1076-77.
53 Kim, supra note 34, at 1066. Kim also notes that among the courts that have recognized such a cause of action, many have failed to address the issue of whether inside counsel may use privileged or confidential material in pursuing their claim. See also Raymis H.C. Kim, In-House Counsel's Wrongful Discharge Action Under the Public Policy Exception and Retaliatory Discharge Doctrine, 67 WASH. L. REV. 893, 894 (1992) (noting that most courts have refused to apply these protections to in-house attorneys due to “the traditional at-will nature of attorney-client employment and the possible adverse effect such causes of action may have on the attorney-client relationship.”).
54 423 F.3d 483; see also Kim, supra note 34, at 1066-67.
to pursue a retaliation claim under several environmental statutes after being fired for concluding in a report that a subsidiary of his employer was exposed to liability for federal environmental violations.\textsuperscript{55} The court found that the confidential information in question was admissible under the “breach of duty” exception to the general non-disclosure rule of client confidences, allowing an attorney to reveal confidences to bring an offensive claim against a client, rather than only as a defense against charges brought by the client against the lawyer.\textsuperscript{56} The Fifth Circuit relied on its precedent in \textit{Doe v. A. Corp}. in coming to this conclusion, which held that an attorney is not barred from pursuing his/her rights against a former client or employer just because proving these rights may involve the use of confidential information.\textsuperscript{57} The decision in \textit{Willy} is on par with the position of the American Bar Association as expressed in a formal opinion in 2001, which acknowledged that the Model Rules do not prohibit a lawyer from suing former clients when the lawyer was terminated for complying with his/her ethical obligations.\textsuperscript{58}

Other courts to address these issues have recognized the right of a lawyer to pursue retaliation protection under SOX’s whistleblower provisions. Under Section 806 of SOX, enacted in 2002, employees of publicly-traded companies who blow the whistle on reasonably believed violations of the federal securities laws by their employers are protected from retaliation if they report such information either externally to a federal regulatory or law enforcement agency, member or committee of Congress, or internally to anyone with supervisory authority over the employee.\textsuperscript{59} A whistleblower alleging retaliation under this statute may seek relief against the employer by undergoing the administrative remedy of filing a complaint with the Secretary of Labor no more than 180 days after the date of the violation or the date of the whistleblower’s awareness of it, and is eligible for compensatory damages in the

\textsuperscript{55} \textit{Willy}, 423 F.3d at 486.

\textsuperscript{56} \textit{Id.} at 495-96. In so deciding, the Fifth Circuit rejected the DOL Administrative Review Board’s reliance on the First Circuit’s decision in \textit{Siedle v. Putnam Investments, Inc.} that an attorney may use privileged information only defensively “as a shield and never as a sword.” \textit{Id.} at 496 (citing \textit{Siedle}, 147 F.3d 7, 11 (1st Cir. 1998)). The breach of duty exception of Supreme Court Standard 503(d) states that there is no attorney/client privilege as it pertains to “a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to the lawyer…” \textit{Id.} at 496. Model Rule of Professional Conduct 1.6 (b)(5) similarly allows a lawyer to reveal confidential information relating to his/her representation of the client to the extent reasonably necessary to “establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.” MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(5) (emphasis added).

\textsuperscript{57} \textit{Id.} at 498-99 (citing \textit{Doe v. A. Corp.}, 709 F.2d 1043, 1050 (1983).

\textsuperscript{58} ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 01-424 (2001). The ABA also noted that in-house lawyers pursuing such claims must comply with the duty of confidentiality to former clients and may reveal information only to the extent necessary to establish his/her claim against the employer.

\textsuperscript{59} 18 U.S.C. § 1514A(a).
form of reinstatement of employment, back pay with interest, and litigation and attorney’s fees.\textsuperscript{60}

Cases brought in the years since Section 806’s enactment reveal that attorney-whistleblowers may avail themselves of SOX’s protections. One of the most notable of such cases is Van Asdale v. International Game Technology, which allowed two former general counsels to proceed with a retaliation claim after alleging that they were terminated for reporting possible fraud in connection with a merger that their employer/client was undergoing.\textsuperscript{61} When the former employer claimed that the attorneys were barred from bringing forth such claims due to their ethical obligations under the Illinois rules of professional conduct (the jurisdiction in which they were admitted), the Ninth Circuit held that confidentiality concerns alone would not merit a dismissal of the case.\textsuperscript{62} Further, the court noted that the “text and structure” of SOX add strength to the ability of the case to proceed, as SOX expressly allows for any “person” alleging retaliation to file a complaint before the Secretary of Labor and that nothing in the statute’s language reveals that an in-house lawyer is not also protected from retaliation thereunder.\textsuperscript{63}

Although attorneys are able to seek relief under SOX for acting as whistleblowers, empirical studies conducted on the success of SOX retaliation claims would suggest that the actual probability of success thereunder is not likely.\textsuperscript{64} As will be discussed in the next section, very few internal and external whistleblowers have actually obtained relief under SOX. As the law currently stands, attorneys who internally blow the whistle cannot seek protection under the Dodd-Frank whistleblower program, which protects only external disclosures,\textsuperscript{65} despite the fact that it was intended to improve the retaliation protections available under SOX.\textsuperscript{66}

\textsuperscript{60} Id. § 1514A(b), (c). If the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint and there is no evidence that the delay is due to bad faith of the whistleblower, then the whistleblower may bring an action in federal district court.

\textsuperscript{61} 577 F.3d 989 (2009). See also Jordan v. Sprint Nextel Corp., ARB No. 06-105 (ARB Sept. 30, 2009) (ruling that an in-house attorney may utilize statements covered by the attorney-client privilege in support of a SOX Section 806 whistleblower claim).

\textsuperscript{62} Id. at 995-96.

\textsuperscript{63} Id. at 996. In so deciding, the Ninth Circuit also noted that Congress had “plainly considered the role attorneys might play in reporting possible securities fraud” in calling for the Part 205 Rules.


\textsuperscript{65} See infra Part IIB.

\textsuperscript{66} See infra note 66.
II. INADEQUACIES OF RETALIATION PROTECTIONS FOR ATTORNEY-WHISTLEBLOWERS UNDER FEDERAL WHISTLEBLOWING PROGRAMS

A. The SOX Whistleblower Program and Attorney-Reporting Rules

When Congress enacted the SOX whistleblower program in 2002 in the wake of Enron’s collapse, hopes for its success were high.67 As discussed, prior to SOX, corporate whistleblowers reporting fraud and thereafter experiencing retaliation could turn only to a “patchwork” of various state laws, resulting in dramatic variations among states and a difficulty for employees to predict the scope of their protection given the judge-made nature of the law.68 SOX relies on two models to encourage whistleblowing—an “antiretaliation” provision providing redress to employees of publicly traded companies who experience retaliation after blowing the whistle and a “structural model” to change the then-prevailing corporate culture of staying silent when would-be whistleblowers witnessed misconduct.69 Whistleblowers need not report externally to be protected under SOX.70 As Terry Dworkin has noted, the SOX whistleblower program is thus distinguishable from other state and federal statutes in that it “spec[i]fies internal whistleblowing as an appropriate channel”, thereby “following common whistleblower practice” given that most whistleblowers tend to initially report internally.71

In order to file a claim under SOX, the whistleblower must undergo several cumbersome administrative hurdles. The procedural requirements of SOX require an aggrieved whistleblower to file a complaint with the Secretary of Labor (OSHA), which investigates the claim.72 If OSHA substantiates the claim, the whistleblower is entitled to remedies that include reinstatement of employment, back pay with interest, and litigation and attorney’s fees.73 Each party may appeal OSHA’s decision to an

68 Id. at 7 (noting that no statute prior to SOX addressed “far-reaching misconduct such as the fraud that led to Enron-like scandals,” thereby excluding employee-whistleblowers from retaliation protections under federal law if they had reported corporate wrongdoing that was not “the right type . . . covered by a particular statute with a whistleblower provision.”); see also S. REP. NO. 107-146, at 10 (2002) (discussing SOX’s need to address the problem that whistleblowers were “left unprotected under current law.”).
69 Id. at 10; see also Richard Moberly, Sarbanes-Oxley’s Structural Model to Encourage Corporate Whistleblowers, 2006 BYU L. REV. 1107, 1131 (2006).
70 18 U.S.C. § 1514A.
71 Terry Morehead Dworkin, SOX and Whistleblowing, 105 MICH. L. REV. 1757, 1760 (2007) (noting that most state and federal whistleblower statutes only designate external reporting as eligible for protection).
72 18 U.S.C. § 1514A. OSHA will investigate the claim if the employee has presented a prima facie case showing that the protected activity was “a contributing factor” in the employer’s adverse action that they have alleged. 29 C.F.R. § 1980.104(d).
73 Id.
Administrative Law Judge ("ALJ") with a chance for further appeal to the Administrative Review Board and then ultimately to federal court.\footnote{Id.; Moberly, supra note 67, at 9.}

Scholars have widely acknowledged the weaknesses in SOX’s retaliation protections.\footnote{See, e.g., Moberly, supra notes 64 and 67; Earle & Madek, supra note 64; Dworkin, supra note 71, at 1764-66.} Richard Moberly, who conducted an extensive empirical study of all decisions issued by OSHA and ALJs under SOX, revealed in 2007 that a mere 3.6% of SOX whistleblowers have obtained relief under the statute and that only 6.5% won on appeal.\footnote{Moberly, supra note 64, at 66-67; see also Moberly, supra note 67, at 29 (noting that by July 13, 2005, OSHA had issued 361 SOX decisions and only 13 claimants won).} Moberly did a follow-up study in 2012 affirming SOX’s weaknesses and finding that the success rate for whistleblowers has been even worse since his first study.\footnote{Moberly, supra note 67, at 28-35.} The numbers appear to be so low, in part, due to the various procedural hurdles and “rigorous filtering systems” necessary to prevail in an OSHA investigation or ALJ hearing, including the relatively short statute of limitations of 180 days, the necessity of proving that the whistleblower meets certain statutory definitions, and a consideration of the case’s merits only after satisfaction of all procedural obstacles.\footnote{Moberly, supra note 64, at 100-06. Once the whistleblower has demonstrated that his/her case falls within the boundaries of SOX, he/she must then “overcome causation hurdles” by proving that the protected activity was a contributing factor in the adverse action, at which point the employer has the opportunity to demonstrate by “clear and convincing evidence” that it would have arrived at the same decision without the existence of the protected activity. Id.; 29 C.F.R. § 1980.104(e). Prior to amendments made to SOX by Dodd-Frank in 2010, SOX’s statute of limitations was even shorter, at a mere 90 days. See Moberly, supra note 67, at 16.}

In approximately 34\% of the ALJ cases and 19\% of the OSHA cases finding in favor of the employer, the reason was due to failure to meet the statute of limitations.\footnote{Id., at 107-09.} When it came to statute of limitation issues, administrators portrayed “little or no discretion” regarding enforcement of these limits and generally refused to excuse an employee’s equitable tolling, despite due diligence to obtain the information that is needed for a timely complaint.\footnote{Id. at 107. Moberly’s study reveals that OSHA and ALJs both regularly “rebuffed” whistleblower claims that the statute of limitations should be tolled for equitable reasons, deciding to toll the statute of limitations in only one case in which the whistleblower missed the deadline by two days.} Beverley Earle and Gerald Madek, who also found several “holes” in SOX’s whistleblower protections, suggested several reforms to protect whistleblowers, such as extending the statute of limitations to 300 days and transferring enforcement of SOX’s whistleblower provisions from OSHA to the SEC, which is specialized in the underlying substance.\footnote{Earle & Madek, supra note 64, at 3, 51-54.}

One of the most significant findings of Moberly’s study is that many whistleblowers were excluded from SOX’s protections because the type of fraud or misconduct that they reported was not one of the categories of “protected activity” listed in the statute. Along with the other weaknesses of SOX, it is this very likelihood
of statutory exclusion that places attorney-whistleblowers who experience retaliation in a position in which they will be unlikely to avail themselves of the statute’s protections. SOX only protects whistleblowers who disclose conduct that they reasonably believe would be a violation of one or more six specific categories—i.) mail fraud, ii.) wire fraud, iii.) banking fraud, iv.) securities fraud, v.) any SEC rule or regulation, or vi.) any provision of federal law that relates to fraud against shareholders.82

As Moberly’s study reveals, employees blew the whistle on “general fraud” or accounting irregularities at a much higher rate than those types enumerated in the statute, revealing that at least 48% of whistleblowers bringing claims before OSHA and 52.7% before ALJs asserted the disclosure of “other” fraud activity that was not specifically listed in any of the six categories under SOX.83 In cases where OSHA and ALJs did not decide in favor of the employee-whistleblower based on the rationale that their disclosure constituted “no protected activity,” employees had alleged protected activity in the “other” category in 78.9% and 75% of the cases decided by OSHA and ALJs, respectively.84 A qualitative examination of such cases reveals that ALJs tended to interpret the language of SOX “narrowly,” requiring whistleblowers to directly connect their disclosures of misconduct to the misconduct’s relationship to shareholder fraud—a line that was mostly quite difficult to draw.85

Attorneys appearing and practicing before the SEC who are mandated to be internal whistleblowers are likely to have similar difficulty arguing that their disclosures fall within one of the specific categories of protected activity under SOX given the very broad nature of those reporting requirements. Under the mandatory reporting obligations of the Part 205 Rules, attorneys are required to report “evidence of material violations” of which they become aware by the issuer-client or any of its constituents (officers, directors, employees or agents).86 The Part 205 rules define the attorney’s reporting trigger, “material violation,” as “an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or

82 Id. at 113; 18 U.S.C. § 1514A (the language of SOX references the various statutory citations of these types of fraud, which, for i, ii, iii, and iv. listed above are 18 U.S.C. §§ 1341, 1343, 1344, or 1348, respectively.).
83 Moberly, supra note 64, at 116. In cases involving “accounting fraud,” employees were found not to have engaged in “protected activity” due to an inability to tie accounting irregularities “directly to active fraud on the shareholders” or a “broader scheme of intentional corporate fraud.” See id. at 117-18.
84 Id. at 116-17. “[E]mployee[s] alleged blowing the whistle on illegal activity falling within the “other” category and the “fraud” category more frequently in cases in which the decision maker utilized the “no protected activity” rationale than in the overall pool of cases.”
85 Moberly, supra note 64, at 117-18. Moberly offers the examples of Grant v. Dominion E. Ohio Gas, 2004-SOX-63, at 33 (ALJ Mar. 10, 2005), in which the ALJ found that an employee who reported accounting errors had not engaged in “protected activity” because of the employee’s inability to “tie these irregularities directly to active fraud on the shareholders” and Allen v. Stewart Enterprises, Inc. 2004-SOX-60, at 83-84 (ALJ Feb. 15, 2005), in which employees internally reported instances of erroneous interest calculations, untimely refunds, and improper accounting practices but could not demonstrate that such errors were related to a broader scheme of fraud, thereby resulting in the ALJ’s refusal to find that “protected activity” had occurred.
86 17 C.F.R. § 205.3(b).
state law, or a similar material violation of any United States federal or state law.”

As might be surprising, attorneys are also required to report on breaches of fiduciary duties, which are defined as breaches of fiduciary or similar duties recognized under federal, state or common law, “including but not limited to misfeasance, nonfeasance, abdication of duty, abuse of trust, and approval of unlawful transactions.”

These reporting requirements are noticeably broad, mandating attorneys to report up-the-ladder on a vast array of possible instances of misconduct by their organizational clients that are likely to far exceed the six categories of the SOX whistleblower program’s protected activity. In fact, even before the finalization of the Part 205 Rules, public comments during the SEC’s rulemaking process voiced these concerns. One group of attorneys expressed that the Part 205 Rules were both “unworkable and inappropriate” creating an “extraordinary level of ambiguity” for lawyers.

By encompassing various violations of both federal and state law not limited to securities law, one scholar noted that “Congress and the SEC appear to have meant to paint with a broad brush.” Given the limitations of SOX’s whistleblowing program, Congress enacted the Dodd-Frank whistleblower program in 2010 in an effort to more strongly incentivize whistleblowers to report and to remedy the inadequacies of SOX.

B. The Whistleblower Program of Dodd-Frank and Judicial Interpretations

Dodd-Frank was enacted in 2010 not only to implement sweeping reforms in financial regulation but to introduce a comprehensive whistleblower program to motivate insiders to help the government identify wrongdoers. The whistleblower provisions of Dodd-Frank, codified in 15 U.S.C. § 78u-6, were aimed at eliminating

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87 Id. § 205.2(i). The SEC defines “evidence of a material violation” as follows: “credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.” Id. § 205.2(e).

88 Id. § 205.2(d).


91 See, e.g., Gregory C. Keating et al., Responding to and Preventing Whistleblower and Retaliation Claims, SW 030 AM. LAW INST. 1, (Dec. 3, 2014) (noting that Dodd Frank expanded the protections of SOX to cover a public company’s subsidiaries or affiliates whether or not such entities are publicly traded, thereby improving SOX’s limitations, which extended protections to employees of subsidiaries of publicly traded companies only when the officers of the parent company were authorized to affect their employment); Norman D. Bishara, Elletta Sangrey Callahan & Terry Morehead Dworkin, The Mouth of Truth, 10 N.Y.U. J. L. & BUS 37, 49 (2013) (noting that the “perceived inadequacies” of SOC “contributed to the passage of the Dodd-Frank Act in 2010”); Pauline T. Kim, Electronic Privacy and Employee Speech, 87 CHI.-KENT L. REV. 901, 925 (2012) (noting that the Dodd Frank whistleblower program strengthens and expands the coverage of SOX’s anti-retaliation provisions by “addressing some of its perceived shortcomings.”).

the administrative hurdles of employee-whistleblowers by offering a direct cause of action in federal court for retaliation.\footnote{15 U.S.C. § 78u-6; 17 C.F.R. § 240.21F-1.} Subsection (h) of 15 U.S.C. § 78u-6 protects whistleblowers who experience retaliation for (i) providing information to the SEC, (ii) testifying or assisting in SEC investigations or related actions, or (iii) “in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002,” specified federal laws, and any law, rule or regulation subject to the SEC’s jurisdiction.\footnote{15 U.S.C. § 78u-6(h).} The enforcement provisions of Dodd-Frank are noticeably stronger than those of SOX. Whistleblowers under the former may directly sue in federal court without a need to exhaust administrative remedies, and are subject to a statute of limitations of a lengthy six years after the date on which the retaliation occurred (compared to SOX’s 180 days).\footnote{Id.} In addition, relief under the statute is much more generous than SOX, offering double back pay with interest (whereas SOX offers one-time back pay).\footnote{Id. § 78u-6(h)(1)(C).}

One of the most notable features of Dodd-Frank is its bounty model, which provides monetary rewards to whistleblowers as an incentive to report.\footnote{Id. § 78u-6(b).} Under the statute, the SEC is required to pay whistleblowers a minimum of 10% and a maximum of 30% of the total monetary sanctions collected in a successful enforcement action resulting from the information that they provided, using its discretion to determine an appropriate reward.\footnote{Id. § 78u-6(b), (c).} To qualify for an award, the judicial or administrative action brought on the basis of the whistleblower’s information must exceed $1,000,000 and consist of “original” information.\footnote{Id. § 78u-6(a), (b).} Dodd-Frank defines “original information” as that which is (i) derived from independent knowledge or independent analysis; (ii) not already known to the SEC from another source; and (iii) not exclusively derived from an allegation made in a judicial or administrative hearing or governmental report or investigation.

Although there is debate as to whether attorney-whistleblowers may receive a bounty under Dodd-Frank given exceptions in the statute that would appear to make such rewards available in limited circumstances,\footnote{See, e.g. Pacella, supra note 17; Kathleen Clark & Nancy J. Moore, Buying Voice: Financial Rewards for Whistleblowing Lawyers, 56 B.C. L. REV. (forthcoming Nov. 2015); Barry R. Temkin & Ben Moskovits, Lawyers as Whistleblowers under the Dodd-Frank Wall Street Reform Act, N.Y. ST. B.A. J. 11 (2012).} nothing on the face on the statute bars attorneys from bringing retaliation claims thereunder.\footnote{See 15 U.S.C. § 78u-6(a)(6), (h); Greg Keating \textit{et al.}, Retaliation and Whistleblower Claims by In-House Counsel, THE LITTLER REPORT (Mar. 2013), at 2, available at https://www.littler.com/files/press/pdf/LittlerReportRetaliationAndWhistleblowerClaimsByIn-HouseCounsel.pdf.} As whistleblowers have started to avail themselves of these robust protections in federal court, case law has revealed that internal whistleblowers appear to be excluded from Dodd-Frank’s protections. The sole federal appellate court to rule on this issue
has been the Fifth Circuit in Asadi v. G.E. Energy, which held that whistleblowers must report externally to the SEC in order to be protected from retaliation under Dodd-Frank. 102 This ruling results from a perceived ambiguity in the statute that the Fifth Circuit found to be clear on its face. 103 The dispute arose from the fact that Asadi, the plaintiff, was an internal whistleblower who reported to his supervisors concerns that G.E. Energy, his employer, was violating the Foreign Corrupt Practices Act. 104 After his report, Asadi experienced unexpected negative performance reviews and was eventually terminated, prompting him to sue G.E. Energy under Dodd-Frank. 105 G.E. Energy moved to dismiss on the basis that Asadi did not fit the statutory definition of a “whistleblower”—defined as “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [SEC], in a manner established, by rule or regulation, by the [SEC].” 106 Asadi argued that this language is in conflict with the third prong of 15 U.S.C. § 78u-6(h)(1)(A) of Dodd-Frank, which protects disclosures “that are required or protected under the Sarbanes-Oxley Act of 2002.” 107

Given that SOX explicitly protects internal reporting, one would have expected the Fifth Circuit to have found Dodd-Frank ambiguous, thereby prompting the need for Chevron deference to the SEC’s reasonable interpretation of the statute. 108 The SEC had provided a reasonable interpretation of the statute in its final rules implementing the Dodd-Frank whistleblower program, which noted that the third category of whistleblowers protected in subsection (h) of Dodd-Frank “includes individuals who report to persons or governmental authorities other than the Commission” by incorporating by reference the anti-retaliation protections specified in Section 806 of SOX. 109 Instead, the Fifth Circuit held that the language of the statute was unambiguous on its face because a whistleblower is defined as someone who reports to the SEC, thereby barring the internal whistleblower from relief. 110

102 720 F.3d 620 (5th Cir. 2013). For a discussion of the implications of this case on whistleblowers and internal compliance programs, see Pacella, supra note 16.
103 Asadi, 720 F.3d at 625-27.
104 Id. at 621.
105 Id.
107 Asadi, 720 F.3d at 624.
108 Pacella, supra note 16, at 747. Chevron deference is necessary in questions of statutory interpretation and involves two steps. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). First, the court must ask whether Congress has directly spoken to the precise question at issue. If so, it must give effect to the “unambiguously expressed intent of Congress.” If, instead, the court determines that the language of the statute is ambiguous, then it must give deference to the administrative agency’s permissible construction of the statute. Chevron, 467 U.S. at 842–43.
109 Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300–01, 34,304 (June 13, 2011) (codified at 17 C.F.R. pts. 240–249)). SOX protects whistleblowers who report information to “A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).” 18 U.S.C. § 1514A.
110 Asadi, 720 F.3d at 625-27.
Some commentators and courts have reacted with opposition to the Fifth Circuit’s decision in *Asadi*, which strayed from a string of pro-internal whistleblower cases that had preceded it.\(^{111}\) To date, no other federal appellate court has weighed in on this issue, leaving *Asadi* v. *G.E. Energy* as the highest judicial authority on the matter.\(^{112}\) If the decision in *Asadi* holds, attorney-whistleblowers, mandated by the Part 205 Rules to report internally, will not be able to avail themselves of the robust retaliation protections of Dodd-Frank. The only way attorneys could do so is if they report externally—an action giving rise to an ethical dilemma depending on the jurisdiction in which the attorney is admitted to practice.

III. **CONFLICTING REGULATORY REGIMES**

A. **Conflicts Among Attorney Ethical Requirements**

The ABA’s 2003 amendments to the Model Rules recognized that “a prudent corporate governance program should call upon lawyers—notably the corporation’s general counsel—to assist in the design and maintenance of the corporations’ procedures for promoting legal compliance.”\(^{113}\) As such, the ABA amended the exceptions to the duty of confidentiality and the duties of lawyers when they represent corporate organizations as clients. The ABA amended Model Rule 1.6(b) to adopt the current language of allowing lawyers to reveal confidential information “to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another.”\(^{114}\) In addition, the ABA adopted modern-day Rule 1.13 to both follow the mandatory disclosures of SEC’s Part 205

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\(^{111}\) See Pacella, *supra* note 16, at 733–41. Each of these cases involved whistleblowers, none of which were attorneys, who reported internally.


Rules by requiring lawyers to report up-the-ladder when they know that an officer or employee intends to violate the law that is likely to result in substantial injury for the organization and to permissively allow lawyers to report out if they “reasonably believe necessary to prevent substantial injury to the organization.” The amendments to Rule 1.6 brought the ABA Model Rules in line with what was already adopted by 42 states, while the changes to Rule 1.13 were intended to mimic the Part 205 Rules.

Given the fact that a lawyer employed or retained by an organization represents the organization itself, “acting through its duly authorized constituents,” the mandatory up-the-ladder reporting requirements should be non-controversial, as all confidential information remains within the confines of the organization itself. As discussed, attorneys are subject to civil penalties, censure, or temporary or permanent denial of the ability to appear or practice before the SEC if they violate these rules “regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices.” Attorneys appearing and practicing before the SEC may reveal confidential information related to their representation of an issuer to the SEC to the extent they reasonably believe necessary to prevent substantial financial injury to the issuer or investors, to present the issuer from committing perjury, or to rectify the consequences of material violations by the issuer in furtherance of which the lawyer’s services were used. Such external reporting would ensure that attorneys are protected from retaliation under Dodd-Frank but may violate their ethical rules in their jurisdiction of admission. It is this inconsistency between the permissive “reporting out” option of the Part 205 Rules and conflicting state ethical rules that give rise to the inconsistent regulatory regime to which attorneys are currently subject.

Although all state bars have adopted the mandatory up-the-ladder reporting requirements, not all have adopted the Part 205 Rules/Model Rule 1.13’s permissive disclosure option. Today, thirty-two states have adopted the ABA’s Model Rule 1.13,

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115 MODEL RULES OF PROF’L CONDUCT R. 1.13; see Barnes, supra note 114.
117 MODEL RULES OF PROF’L CONDUCT R. 1.13(a).
118 This notion is consistent with the beliefs of the SEC and of Congress in enacting Section 307 of SOX. See 17 C.F.R. § 205.3(b)(1) (noting that the Part 205 Rules do “not reveal client confidences or secrets or privileged or otherwise protected information related to the attorney’s representation of an issuer” because the information remains within the organization); see also 148 CONG. REC. S6524-02 (July 10, 2002) (statement of Sen. John Edwards) (dispelling the notion that the mandatory disclosure rules would breach a lawyer’s duty of confidentiality as “ludicrous” because the attorney’s duty is owed to its client, the corporation and the shareholders—“[b]y reporting a legal violation to management and then the board of directors, no breach of privilege occurs, because it is all internal—within the corporation and not to an outside party, such as the SEC.”).
119 17 C.F.R. § 205.6(a), (b).
120 Id. § 205.6(b), (c).
121 Id. § 205.3(d).
122 See infra notes 113-16.
allowing a lawyer to report client confidences externally whether or not Rule 1.6 would so allow if the lawyer reasonably believes such disclosure is necessary to prevent substantial injury to the organization.\textsuperscript{123} Therefore, lawyers admitted in one of these jurisdictions do not face a conflict. This section will focus on the ethical rules in the other eighteen states and in Washington, D.C. that have not adopted ABA’s Model Rule 1.13, referred to herein as the “Non-Adopting States.”\textsuperscript{124} In the state bars of Alabama, California, Delaware, Florida, Kansas, Mississippi, Missouri, Montana, Pennsylvania, South Dakota, Texas, and Virginia, an attorney representing an organization who has reported violations up-the-ladder to the board of directors only to find that the board insists upon the violation or refuses to remediate it has jurisdictions substantial injury to the organization.

\textsuperscript{125} In Maine, Minnesota, New York, North Carolina, Ohio, Tennessee, and Washington, D.C., an attorney in this same circumstance has the option of either resigning or reporting externally only if permitted by that state’s Rule 1.6 (duty of

\textsuperscript{123} The following 32 state bars have adopted this rule: Alaska, Arizona, Arkansas, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. See ALASKA RULES OF PROF’L CONDUCT R. 1.13(c), ARIZ. RULES OF PROF’L CONDUCT ER. 1.13(c), ARK. RULES OF PROF’L CONDUCT R. 1.13(c), COLO. RULES OF PROF’L CONDUCT R. 1.13(c), CONN. RULES OF PROF’L CONDUCT R. 1.13(c), GA. RULES OF PROF’L CONDUCT R. 1.13(c), HAW. RULES OF PROF’L CONDUCT R. 1.13(c), IDAHO RULES OF PROF’L CONDUCT R. 1.13(c), ILL. RULES OF PROF’L CONDUCT R. 1.13(c), IND. RULES OF PROF’L CONDUCT R. 1.13(c), IOWA RULES OF PROF’L CONDUCT R. 32:113(c), KY. RULES OF PROF’L CONDUCT SCR. 3.130(c), LA. RULES OF PROF’L CONDUCT R. 1.13(c), MD. RULES OF PROF’L CONDUCT R. 1.13(c), MASS. RULES OF PROF’L CONDUCT R. 1.13(c), MICH. RULES OF PROF’L CONDUCT R. 1.13(c), N.H. RULES OF PROF’L CONDUCT R. 1.13(c), N.J. RULES OF PROF’L CONDUCT R. 1.13(c), N.M. RULES OF PROF’L CONDUCT R. 16-113(c), N.D. RULES OF PROF’L CONDUCT R. 1.13(c), OKLA. RULES OF PROF’L CONDUCT R. 1.13(c), OR. RULES OF PROF’L CONDUCT R. 1.13(c), R.I. RULES OF PROF’L CONDUCT R. 1.13(c), S.C. RULES OF PROF’L CONDUCT R. 1.13(c), UTAH RULES OF PROF’L CONDUCT R. 1.13(c), VT. RULES OF PROF’L CONDUCT R. 1.13(c), WASH. RULES OF PROF’L CONDUCT R. 1.13(c), W. VA. RULES OF PROF’L CONDUCT R. 1.13(b), WIS. RULES OF PROF’L CONDUCT R. 20:1.13(c), and WYO. RULES OF PROF’L CONDUCT R. 1.13(c) [hereinafter Adopting States].

\textsuperscript{124} See ALA. RULES OF PROF’L CONDUCT R. 1.13(c), CAL. RULES OF PROF’L CONDUCT R. 3-600(c), D.C. RULES OF PROF’L CONDUCT R. 1.13(B), DEL. RULES OF PROF’L CONDUCT R. 1.13(c), FLA. RULES OF PROF’L CONDUCT R. 4-1.13(c), KAN. RULES OF PROF’L CONDUCT R. 1.13(c), ME. RULES OF PROF’L CONDUCT R. 1.13(c), MICH. RULES OF PROF’L CONDUCT R. 1.13(c), MISS. RULES OF PROF’L CONDUCT R. 1.13(c), MO. RULES OF PROF’L CONDUCT R. 4-1.13(c), MONT. RULES OF PROF’L CONDUCT R. 1.13(c), N.Y. RULES OF PROF’L CONDUCT R. 1.13(c), N.C. RULES OF PROF’L CONDUCT R. 1.13(c), OHIO RULES OF PROF’L CONDUCT R. 1.13(c), PA. RULES OF PROF’L CONDUCT R. 1.13(c), S.D. RULES OF PROF’L CONDUCT R. 1.13(c), TENN. RULES OF PROF’L CONDUCT R. 1.13(c), TEX. RULES OF PROF’L CONDUCT R. 1.12(c), and VA. RULES OF PROF’L CONDUCT R. 1.13(c) [hereinafter Non-Adopting States].

\textsuperscript{125} See ALA. RULES OF PROF’L CONDUCT R. 1.13(c), CAL. RULES OF PROF’L CONDUCT R. 3-600(c), DEL. RULES OF PROF’L CONDUCT R. 1.13(c), FLA. RULES OF PROF’L CONDUCT R. 4-1.13(c), KAN. RULES OF PROF’L CONDUCT R. 1.13(c), ME. RULES OF PROF’L CONDUCT R. 1.13(c), MICH. RULES OF PROF’L CONDUCT R. 1.13(c), MISS. RULES OF PROF’L CONDUCT R. 1.13(c), MO. RULES OF PROF’L CONDUCT R. 4-1.13(c), MONT. RULES OF PROF’L CONDUCT R. 1.13(c), PA. RULES OF PROF’L CONDUCT R. 1.13(c), S.D. RULES OF PROF’L CONDUCT R. 1.13(c), TENN. RULES OF PROF’L CONDUCT R. 1.13(c), TEX. RULES OF PROF’L CONDUCT R. 1.12(c), and VA. RULES OF PROF’L CONDUCT R. 1.13(c).
confidentiality). As the chart reveals below, there are numerous nuances as to whether attorneys may permissively disclose through reliance on Rule 1.6 and several inconsistencies among the states in this regard.

Table 1: Permissive Disclosure Rules of the Non-Adopting States

<table>
<thead>
<tr>
<th>State</th>
<th>Rule 1.13 (or equivalent of Organization as Client rule): Is resignation the only option after lawyer exhausts internal reporting?</th>
<th>Rule 1.6 (or equivalent of Duty of Confidentiality rule and exceptions): Is there an exception to duty of confidentiality allowing lawyer to reveal confidential information to prevent client from committing a fraud?</th>
<th>Rule 1.6 (or equivalent of Duty of Confidentiality rule and exceptions): Is there an exception to duty of confidentiality allowing lawyer to reveal confidential information to prevent client from committing a crime likely to result in substantial financial injury to the organization or another?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Yes</td>
<td>No</td>
<td>No (only to prevent imminent death or substantial bodily harm)</td>
</tr>
<tr>
<td>California</td>
<td>Yes</td>
<td>No</td>
<td>No (only to prevent imminent death or substantial bodily harm)</td>
</tr>
<tr>
<td>Delaware</td>
<td>Yes</td>
<td>Yes (but only when lawyer’s services are being used to commit the fraud)</td>
<td>Yes (but only when lawyer’s services are being used to commit the crime)</td>
</tr>
<tr>
<td>Florida</td>
<td>Yes</td>
<td>No</td>
<td>Yes (lawyer must reveal to prevent a general “crime” or death or substantial bodily harm)</td>
</tr>
<tr>
<td>Kansas</td>
<td>Yes</td>
<td>No</td>
<td>Yes (generally to prevent a “crime”)</td>
</tr>
<tr>
<td>Maine</td>
<td>No (lawyer can reveal if Rule 1.6 or other)</td>
<td>Yes (but only when lawyer’s services are being used to commit)</td>
<td>Yes (but only when lawyer’s services are being used to commit)</td>
</tr>
</tbody>
</table>

126 See D.C. RULES OF PROF’L CONDUCT R. 1.13(B), ME. RULES OF PROF’L CONDUCT R. 1.13(C), MINN. RULES OF PROF’L CONDUCT R. 1.13(C), N.Y. RULES OF PROF’L CONDUCT R. 1.13(C), N.C. RULES OF PROF’L CONDUCT R. 1.13(C), OHIO. RULES OF PROF’L CONDUCT R. 1.13(C), and TENN. RULES OF PROF’L CONDUCT R. 1.13(C).

127 See supra notes 123-26 for Organization as Client ethical rules; see also, for Duty of Confidentiality ethical rules and exceptions thereto, ALA. RULES OF PROF’L CONDUCT R. 1.6(B), CAL. RULES OF PROF’L CONDUCT R. 3-100(B), D.C. RULES OF PROF’L CONDUCT R. 1.6(C)(D)(E), DEL. RULES OF PROF’L CONDUCT R. 1.6(B), FLA. RULES OF PROF’L CONDUCT R. 4-1.6(C), KAN. RULES OF PROF’L CONDUCT R. 1.6(B), ME. RULES OF PROF’L CONDUCT R. 1.6(B), MINN. RULES OF PROF’L CONDUCT R. 1.6(B), MISS. RULES OF PROF’L CONDUCT R. 1.6(B), MO. RULES OF PROF’L CONDUCT R. 1.6(B), MONT. RULES OF PROF’L CONDUCT R. 1.6(B), N.Y. RULES OF PROF’L CONDUCT R. 1.6(B), N.C. RULES OF PROF’L CONDUCT R. 1.6(B), OHIO RULES OF PROF’L CONDUCT R. 1.6(B), PA. RULES OF PROF’L CONDUCT R. 1.6(C), S.D. RULES OF PROF’L CONDUCT R. 1.6(B), TENN. RULES OF PROF’L CONDUCT R. 1.6(B), TEX. RULES OF PROF’L CONDUCT R. 1.05(C), and VA. RULES OF PROF’L CONDUCT R. 1.6(B)(C).
<table>
<thead>
<tr>
<th>State</th>
<th>Applicable Rules Would Allow</th>
<th>The Fraud</th>
<th>The Crime</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minnesota</td>
<td>No (Lawyer can reveal if Rule 1.6 would allow)</td>
<td>Yes (but only when lawyer’s services are being used to commit the fraud)</td>
<td>Yes (generally to prevent a “crime”)</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Yes</td>
<td>Yes (but only when lawyer’s services are being used to commit the fraud)</td>
<td>Yes (but only when lawyer’s services are being used to commit the crime)</td>
</tr>
<tr>
<td>Missouri</td>
<td>Yes</td>
<td>No</td>
<td>No (only to prevent death or substantial bodily harm)</td>
</tr>
<tr>
<td>Montana</td>
<td>Yes</td>
<td>No</td>
<td>No (only to prevent reasonably certain death or substantial bodily harm)</td>
</tr>
<tr>
<td>New York</td>
<td>No (Lawyer can reveal if Rule 1.6 would allow)</td>
<td>No</td>
<td>Yes (generally to prevent a “crime”)</td>
</tr>
<tr>
<td>North Carolina</td>
<td>No (Lawyer can reveal if Rule 1.6 would allow)</td>
<td>Yes (but to prevent, mitigate or rectify the consequences of client’s fraud for which the lawyer’s services were used)</td>
<td>Yes (generally to prevent a “crime”)</td>
</tr>
<tr>
<td>Ohio</td>
<td>No (Lawyer can reveal if Rule 1.6 would allow)</td>
<td>No</td>
<td>Yes (generally to prevent a “crime”)</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Yes</td>
<td>Yes (but to prevent, mitigate or rectify the consequences of client’s fraud for which the lawyer’s services were used)</td>
<td>Yes</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Yes</td>
<td>No</td>
<td>No (only to prevent imminent death or substantial bodily harm)</td>
</tr>
<tr>
<td>Tennessee</td>
<td>No (Lawyer can reveal if Rule 1.6 would allow)</td>
<td>Yes (but only when lawyer’s services are being used to commit the fraud)</td>
<td>Yes</td>
</tr>
<tr>
<td>Texas</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes (generally to prevent a “crime”)</td>
</tr>
<tr>
<td>Virginia</td>
<td>Yes</td>
<td>No (Lawyer may reveal only after client has perpetrated a fraud related to the subject matter of the representation)</td>
<td>Yes (lawyer must reveal to prevent a general “crime”)</td>
</tr>
<tr>
<td>Washington, D.C.</td>
<td>No (Lawyer can reveal if Rule 1.6 would allow)</td>
<td>Yes (but only when lawyer’s services are being used to commit the fraud)</td>
<td>Yes (but only when lawyer’s services are being used to commit the crime)</td>
</tr>
</tbody>
</table>
This information reveals that, in a majority of the states indicated above, an attorney who has exhausted internal reporting options under Rule 1.13 would have to rely on a separate rule to find a way to report the information externally. In at least five states, it would never be possible for attorneys, whether under Rule 1.13 or Rule 1.6, to ethically report to the SEC violations likely to result in substantial financial injury, as these states allow disclosures only to prevent imminent death or substantial bodily harm—concerns that are usually not relevant to a corporate entity.\textsuperscript{128} Another common qualifier existent in nearly half of the states in Table 1 is that which requires that the lawyer’s services are being used to further the crime or fraud before the lawyer can reveal information to prevent such crime or fraud.\textsuperscript{129} These types of disclosures are more restrictive than the Part 205 Rules and Model Rule 1.13, which allow an attorney to reveal information whether or not his/her services are being used to perpetrate the crime or the fraud.\textsuperscript{130} Such disclosures would allow an in-house attorney who discovers that the organization or its constituents are engaging in fraudulent or criminal activity despite his/her own involvement to take action to remediate the misconduct, such as self-reporting to the SEC, in an effort to mitigate harm to the organization.

Another problematic result stemming from the inconsistency among state rules is the lack of a uniform civil fraud exception to the duty of confidentiality. In several of the states in Table 1, attorneys are barred from making disclosures to prevent civil frauds likely to result in substantial financial injury—activity that is clearly protected under the Part 205 Rules and fits comfortably within Model Rule 1.13.\textsuperscript{131} To illustrate the point, a lawyer admitted in New York is permitted under Rule 1.6 to reveal confidential information to the extent he/she reasonably believes necessary (i) to prevent death or bodily harm; (ii) to prevent the client’s commission of a crime; (iii) to withdraw an opinion or representation previously given by the lawyer based on materially inaccurate information or that is being used to further a crime or fraud; (iv) to

\textsuperscript{128} See supra note 127 for Rule.16 or the equivalent thereof in these states. Thus, attorneys admitted in Alabama, California, Missouri, Montana, and South Dakota who appear and practice before the SEC would never be able to ethically rely on the Part 205 Rules’ permissive disclosures.

\textsuperscript{129} Such is the case in Delaware, Maine, Minnesota, Mississippi, North Carolina, Pennsylvania, Tennessee, and Washington, D.C., as it pertains to a permissive crime or fraud disclosure, respectively. Each of these states, excluding Minnesota, also allows a lawyer to so disclose if necessary not just to “prevent” substantial financial injury but also to “mitigate” or “rectify” it when the client uses the lawyer’s services in furtherance of the wrongdoing. See supra note 127 for Rule.16 or the equivalent thereof in these states. In Minnesota, South Dakota, and Texas, this type of disclosure is limited to disclosures that “rectify” the consequences of a client’s criminal or fraudulent conduct in furtherance of which the lawyer’s services are being used, and, in Ohio, it is only available to “mitigate” such consequences. See id.

\textsuperscript{130} 17 C.F.R. § 205.3(d)(2)(i), (ii). Prong (iii) of 17 C.F.R. § 205.3(d)(2) contains a qualifier requiring that the attorney’s services be used prior to disclosure but only as the attorney reasonably believes necessary to rectify the consequences of a material violation resulting in substantial financial injury to the issuer or investors.

\textsuperscript{131} See 17 C.F.R. § 205.3(d)(2)(i). Such is the case in Alabama, California, Florida, Kansas, Missouri, Montana, New York, Ohio, South Dakota, and Virginia. See supra note 127 for Rule.16 or the equivalent thereof in these states.
secure legal advice about compliance with ethical rules; (v) to defend the lawyer against an accusation of wrongful conduct or to establish or collect a fee; or (vi) when permitted or required under the rules of professional conduct or to comply with another law or court order. If an attorney admitted in New York has reported up-the-ladder only to be faced with an unresponsive board or one insistent on carrying out the civil violation, it would be very difficult for that attorney to argue that he/she could then externally report this information. Under New York’s Rule 1.6, the second exception listed above that one might normally expect to apply, “to prevent the client’s commission of a crime,” would not cover the prevention of the client committing a civil fraud, which could potentially be just as damaging as a criminal act to the organization. In addition, absolutely none of the Non-Adopting States, as well as no other state for that matter, permits a lawyer to disclose client information in order to prevent the client from committing a “material violation” of a civil statute that would invoke non-fraudulent conduct likely to cause substantial financial injury despite inclusion of this type of reporting in the Part 205 Rules.

Given the apparent maze of regulatory regimes within which attorneys must find their way and the risk that attorneys following the Part 205 Rules might violate conflicting state law, it is natural to consider questions of preemption and whether the Part 205 Rules are intended to trump conflicting state ethical rules for attorneys who practice before the SEC. Although no court has yet determined this issue, the next section offers a framework as to how that question might be resolved.

B. The Question of Preemption

132 N.Y. RULES OF PROF’L CONDUCT R. 1.6(b).
133 See, e.g., Temkin & Moskovits, supra note 100, at 19-21 (comparing the discrepancies between ABA, state ethics rules, and the Part 205 Rules).
135 McLucas et al., supra note 134, at 5. See also 17 C.F.R. § 205.3(d)(i).
137 Temkin & Moskovits, supra note 100, at 19; Clark & Moore, supra note 100, at 47 (noting that the question of whether the attorney reporting rules under SOX preempt conflicting state law has never been resolved). Clark and Moore also note that this question may be unanswered perhaps because no lawyers have decided to make a permissive disclosure that was prohibited under the applicable state ethical rule (citing Roger C. Cramton, George M. Cohen, Susan P. Konik, Legal and Ethical Duties of Lawyers after Sarbanes-Oxley, 49 VILL. L. REV. 725, 808 (2004)). Clark and Moore note that lawyers may now start to make such disclosures given the possibility that they may receive a bounty for doing so under Dodd-Frank. See id.; see also Bruce Green & Jordan Thomas, Approaching Attorney Whistleblowing Post Dodd-Frank, LAW 360, available at http://www.law360.com/articles/325874/approaching-attorney-whistleblowing-post-dodd-frank (discussing that the possibility of financial rewards under Dodd-Frank could prompt attorneys to become whistleblowers).
1.) Statutory Preemption

As those trained in the law well know, the regulation of attorneys has long been an area designated to the states.\(^{138}\) Therefore, it should come as no surprise that members of the bar reacted with hostility to the promulgation of the Part 205 Rules.\(^{139}\) Despite the sense that the federal government had encroached on an area long reserved to states, the question of whether the Part 205 Rules actually preempt conflicting state rules has been subject to much controversy. Some scholars and commentators to examine this issue have taken the position that the Part 205 Rules preempt any conflicting state rules as a lawful act by the SEC to implement the mandate of Congress in enacting SOX’s Section 307.\(^{140}\) Others have argued that the Part 205 Rules extend beyond the requirements of the SOX itself.\(^{141}\) Thus, the issue is far from resolved.\(^{142}\)

Given that the author finds no conflict between the mandatory disclosure requirements of the Part 205 Rules and state ethical rules because all of the reports would remain within the confines of the client itself, this discussion will consider only whether the permissive disclosure rules preempt conflicting state law, which is

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\(^{139}\) Panel, The Evolving Legal and Ethical Role of the Corporate Attorney after the Sarbanes-Oxley Act of 2002, 52 AM. U. L. REV. 613, 614-27 (2002) [hereinafter Panel] (statement of Professor Roberta Karmel of Brooklyn Law School); John C. Coffee, Jr., The Attorney as Gatekeeper: An Agenda for the SEC, 103 COLUM. L. REV. 1293, 1294 (2003) (describing the reaction of bar associations to the Part 205 Rules as “locked in denial,” which “[r]eact[ed] with the same shocked alacrity of a patient in the dental chair when the drill hits an exposed nerve, they have answered: ‘You don't understand; lawyers can’t undertake the obligations that you are proposing because they conflict with our duties to our clients.’”); see also Keith Paul Bishop, James F. Fotenos, Steven K. Hazen, James R. Walther & Nancy H. Wojtas, Conflicting Currents: The Obligation to Maintain Inviolate Client Confidences and the New SEC Attorney Conduct Rules, 32 PEPPERDINE L. REV. 89 (2004) (expressing the legal conflicts between the California Bar’s statutory mandates to maintain client confidences and the SEC’s Part 205 Rules and advising lawyers admitted in California that “prudence dictates” that they follow the California’s prohibition on reporting externally “unless and until the validity of the SEC’s permissive disclosure rule is resolved by an appellate court in the SEC’s favor.”).


\(^{141}\) See, e.g., Temkin & Moskovits, supra note 100, at 19-21 (finding it unlikely that a court would find that the SEC regulations under Dodd-Frank would preempt state rules); Panel, supra note 139, at 614-27 (2002) (statement of Professor Roberta Karmel of Brooklyn Law School); Darlene M. Robertson & Anthony A. Tortora, Reporting Requirements for Lawyers under Sarbanes-Oxley: Has Congress Really Changed Anything? 16 GEO. J. LEGAL ETHICS 785, 787-88 (2003); Matthew Eslick, Tension Among Section 307 of the Sarbanes-Oxley Act of 2002, 17 C.F.R. § 205.3(D)(2), and State Rules Governing Disclosure of Confidential Client Information, 53 Drake L. Rev. 133, 157-59 (2004).

\(^{142}\) See, e.g., Bishop et al., supra note 139; supra notes 140-42 (discussing differences of opinion among scholars who have addressed the issue).
inevitably the more controversial of the two types of attorney-whistleblowing. The permissive disclosure rules emphasize that attorneys may use their discretion to reveal confidential information to the SEC if they reasonably believe necessary to prevent or mitigate substantial financial harm to the organization. Opting to make such a disclosure would subject an attorney admitted in a jurisdiction where such reporting is restricted to disciplinary proceedings for breach of the duty of confidentiality. As an alternative to reporting, an attorney facing this predicament may opt to remain silent, thereby allowing the organization’s misconduct to endure and advance to possibly more egregious levels. Both of these options are unsettling.

The premise that federal law trumps state law is embodied in the Supremacy Clause of the U.S. Constitution, which declares that the Constitution, treaties, and valid federal statutes are the “supreme Law of the Land.” Courts consider questions of preemption as either express (set forth in the language of the statute) or implied (contained within the statute’s “structure and purpose”). On the face of Section 307 of SOX, which mandated the SEC to promulgate the Part 205 Rules, Congress included no language evidencing an express intent to preempt conflicting state law.

Given the lack of express preemption due to any explicit language in the statute itself, the inquiry turns on whether there is implied preemption.

The “frustration of federal purpose,” also known as the “obstacle preemption” doctrine is applied in cases of implied preemption, which holds that a state law is preempted when it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” Obstacle preemption occurs when a state law “interferes with the methods by which a federal statute was intended to reach [its] goal.” The goal of Section 307, as evidenced by its legislative history, was to impose

\[143\] Cramton, Cohen & Koniak, supra note 137, at 788 (noting that the first public challenges to the SEC Part 205 Rules addressed the “validity and preemptive effect” of the permissive disclosure rules).

\[144\] U.S. Const. art. VI, cl. 2; Caleb Nelson, Preemption, 86 VA. L. REV. 225, 245 (2000).


\[146\] 15 U.S.C. § 7245. The language of the statute calls upon the SEC to “issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission.” No reference to preemption is made.

\[147\] Hines v. Davidowitz, 312 U.S. 52, 67 (1941); see also Donald Rothschild, A Proposed “Tonic” with Florida Lime to Celebrate our New Federalism: How to Deal with the “Headache” of Preemption, 38 U. MIAMI L. REV. 829, 852-53 (1983) (noting that this doctrine originated in 1912 in the decision of Savage v. Jones, 225 U.S. 501 (1912)). Implied preemption occurs when a federal law and a state law conflict, through obstacle preemption, discussed herein, or “impossibility preemption,” when it would be impossible for a party to comply with both federal and state law. See Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963). Given that an attorney could always make the choice not to disclose under the permissive reporting rules if admitted in a jurisdiction not allowing such disclosures, it is not “impossible” for the attorney to comply with both federal and state law. Cramton, Cohen & Koniak, supra note 137, at 788-89 (noting that the SEC rules do not require lawyers to report anything that a state ethical rule would prohibit but “do two other things: require something (i.e., reporting up) that some state rules may merely permit; and permit something (i.e. reporting out) that some state rules prohibit or restrict.”).

some level of accountability on attorneys representing corporate entities that engaged in fraudulent misconduct leading to scandals like Enron and WorldCom,\textsuperscript{149} where executives and accountants who played a key role in such scandals “[did] not work alone . . . [as] lawyers are virtually always there looking over their shoulders.”\textsuperscript{150} SOX’s legislative history notes that lawyers had “forg[otten] who their client is” and that their fiduciary duties are owed to the organization as a whole, including its investors and shareholders rather than merely to executives with whom attorneys may have the most daily contact.\textsuperscript{151} The goal of Section 307 was to prompt lawyers to take action to thwart unlawful behavior when a violation of the law is imminent or has occurred.\textsuperscript{152} As such, Congress granted broad authority to the SEC to “issue rules in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the [SEC] . . . ‘including a rule’” requiring an attorney to report to the chief legal officer or chief executive officer and up-the-ladder to the board if such officers do not appropriately respond.\textsuperscript{153}

Given this language, the SEC had broad authority to promulgate ethical rules for the attorneys practicing before it that, at a minimum, had to include the two prongs noted above. A comprehensive analysis of the duties of lawyers post-SOX by Roger Cramton, George Cohen, and Susan Koniak concludes that the permissive disclosure rules “fit comfortably” within this broad mandate of Congress due, in part, to use of the word “including,” which strengthens the notion that Congress granted the SEC wide discretion to implement a general set of rules going beyond the two explicitly mentioned given the absence of any limiting language to do so.\textsuperscript{154} Further, Section 307 had the goal of replacing the former Model Rule 1.13(b), which required a lawyer who knew of a violation likely to result in substantial injury to the organization to “proceed as is reasonably necessary in the best interest of the organization, which may include ‘reporting up the board.’”\textsuperscript{155} In this way, preemptive intent is further evident as Congress enacted a statute requiring the SEC to adopt ethical rules different from state

\textsuperscript{149}148 CONG. REC. S6524-02, S6552 (July 10, 2002); see also Fanto, supra note 5, at 477, 491 (discussing the role of corporate advisors like bankers, lawyers, and accountants in notable financial scandals).

\textsuperscript{150}Id. (statement of Sen. Jon Corzine).

\textsuperscript{151}Id. “When they go to lunch with their client, the corporation, they are usually going to lunch with the CEO or the chief financial officer. When they get phone calls, they are usually returning calls to the CEO or the chief financial officer. The problem is that the CEO and the chief financial officer are not the client.”

\textsuperscript{152}Id.

\textsuperscript{153}15 U.S.C. § 7245 (emphasis added).

\textsuperscript{154}Cramton, Cohen & Koniak, supra note 137, at 789-91; see also Clark & Moore, supra note 100, at 47 (finding the SEC’s arguments that it was granted authority by Congress to carry out SOX’s purpose persuasive but finding the preemptive status of the Part 205 Rules “at least questionable” given that SOX focused on up-the-ladder reporting).

\textsuperscript{155}Id. (citing former MODEL RULES OF PROF’L CONDUCT R. 1.13(b)).
ethical rules then in place “because the state standards were not sufficiently encouraging of reporting up.”\textsuperscript{156}

It can, therefore, be said that the Part 205 Rules were promulgated to carry out the particular objective of Congress in SOX to “reconsider the incentive system . . . encouraging accountants and lawyers who come across fraud in their work to remain silent”\textsuperscript{157} by allowing attorneys a mechanism to self-report evidence of misconduct to the governing agency to mitigate damage to the issuer. State law that penalizes lawyers for making such reports in this fairly limited context could be said to thwart the full purposes of SOX to “prevent and punish corporate fraud, protect the victims of such fraud, preserve evidence of such fraud and crime, and hold wrongdoers accountable for their actions” by imposing affirmative duties on lawyers to prevent Enron-like fraud.\textsuperscript{158}

2.) \textbf{Administrative Preemption}

Even if a court were not to find preemption based on the statutory language of Section 307, it would be likely to find that preemption is supported by the Part 205 Rules themselves as a valid exercise of the SEC’s authority to promulgate these regulations. The Supreme Court has emphasized its “well-entrenched doctrine”\textsuperscript{159} that administrative agencies have just as much power as Congress to preempt conflicting state law through duly authorized regulations, which also preempt state law frustrating the purpose or posing an obstacle to the goal of the regulations.\textsuperscript{160} As such, the agency’s power to preempt is “impliedly transmitted alongside” its general rule-making authority.\textsuperscript{161} To preempt state law, the agency regulation need not rely upon an express authorization by Congress to do so but turns on whether 1.) the agency intends to preempt state law and 2.) whether such action is within the scope of the agency’s delegated authority.\textsuperscript{162}

The first prong is easily supported. The Part 205 Rules include express preemption language on their face, stating “[w]here the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with [the Part 205 Rules], [such rules] shall govern.”\textsuperscript{163} Thus, the SEC has clearly demonstrated its intent to preempt conflicting state law on the face of the regulations. Further, shortly after the Part 205 Rules became final and in response to concerns from the Washington State Bar regarding preemption, the SEC, through its then-general counsel, Giovanni P. Prezioso, expressed the intent of the rules to preempt conflicting state law, citing

\begin{enumerate}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} S. REP. NO. 107-146, at 21 (2002).
\item \textsuperscript{158} \textit{Id.} at 20-21.
\item \textsuperscript{159} David S. Rubenstein, \textit{Delegating Supremacy?} 65 VAND. L. REV. 1125, 1149 (2012).
\item \textsuperscript{160} City of New York v. F.C.C., 486 U.S. 57, 63-64 (1988).
\item \textsuperscript{161} Rubenstein, supra note 159, at 1150.
\item \textsuperscript{162} Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 154 (1982).
\item \textsuperscript{163} 17 C.F.R. § 205.1. The Part 205 Rules state that they “supplement” the applicable standards in any jurisdiction in which an attorney is admitted to practice and do not “limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of [these rules].”
\end{enumerate}
relevant Supreme Court authority to do so, and noted that the purpose of the SEC’s rules would be “thwart[ed]” if any state bar were to institute disciplinary proceedings against a lawyer who complied, in good faith, with the rules.  

As discussed in the preceding section, the Part 205 Rules, as enacted, are within the scope of the agency’s delegated authority. The congressional mandate was broad enough to grant the SEC considerable discretion in promulgating rules governing the conduct of lawyers who appear or practice before it while representing issuers. Supreme Court precedent has also held that federal agencies are authorized to implement rules of conduct governing professionals that may be divergent from or supersede state law. In the case of the SEC, the Securities Exchange Act of 1934 grants the SEC broad rulemaking authority to implement the federal securities laws, including authority to establish its own rules governing the conduct of the professionals who practice before the agency.

The congressional mandate to the SEC to establish “minimum standards of professional conduct for attorneys appearing and practicing before the [SEC] in any way in the representation of issuers” is consistent with this authority and contains no limits on the SEC’s authority to regulate attorneys in this manner. This congressional language, specifically capturing lawyers who “in any way” represent issuers, evidences broad authority for the SEC to have defined which lawyers are subject to the rules. The SEC mitigated concerns during the rulemaking process that the rules cast too wide of a net over lawyers who may only tangentially be involved in SEC filing work by limiting the definition of “appearing and practicing.”

“Appearing and practicing” is defined in the rules as transacting any business with the SEC; representing an issuer in an SEC proceeding or investigation; providing advice with respect to federal securities laws or SEC rules or regulations; or advising issuers as to required SEC disclosures or filings. In an effort to limit the scope of the targeted audience of the Part 205 Rules, the SEC clarified that attorneys are deemed to “appear and practice” before the SEC only if they have notice that the document that

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165 See supra Part III.B.1.

166 Sperry v. State of Fla. ex rel. Florida Bar, 373 U.S. 379, 384-86 (1963) (holding that Florida could not prevent a non-lawyer who was registered to practice before the Patent and Trademark Office from prosecuting patent applications in Florida, even though such actions would constitute unauthorized practice of law in Florida).


168 17 C.F.R. § 201.102(e)(1)(2010); see also Levy supra note 140, at 1688-89 (citing Touche Ross & Co. v. SEC, 609 F.2d 570 (2d Cir. 1979), Davy v. SEC, 792 F.2d 1418, 1422 (9th Cir. 1986)).


170 See Fidelity, 458 U.S. at 161-62 (upholding the authority of an agency to regulate lending practices of federal savings and loans due to no limits on its authority to do so in the governing statute’s language).


172 17 C.F.R. § 205.2(a).
they are preparing or assisting to prepare will be filed with the SEC.\textsuperscript{173} For example, if an attorney prepares a document that he/she never intended or had notice would be filed with the SEC or would be incorporated into an SEC filing, but that, ultimately, is so filed or is made part of a filing as an exhibit, then such lawyer is not deemed to have “appeared or practiced” before the SEC.\textsuperscript{174} Other limitations include the exclusion of individuals, who although licensed to practice law, are not in the legal departments of issuers and are not providing legal services “within the context of an attorney-client relationship” and the exclusion of “non-appearing foreign attorneys” who are admitted in non-U.S. jurisdictions and only incidentally to, or in consultation with U.S. attorneys, conduct activities that would otherwise qualify as appearing and practicing before the SEC.\textsuperscript{175} These clarifications reveal actions on the part of the SEC to remain well within the scope of its delegated authority and to best achieve Section 307’s objectives.\textsuperscript{176} As such, it can reasonably be interpreted that the SEC’s adoption of permissive disclosure rules is a valid exercise of the agency’s authority and that the Part 205 Rules would trump conflicting state law.

IV. PROPOSED SOLUTIONS AND CONSIDERATIONS

A. Clarity to External Reporting Trigger

Although the preemption question has yet to be resolved, this Article finds that preemption of the Part 205 Rules over conflicting state law is the most likely outcome, which would require the Non-Adopting States to yield to the standards of professional conduct set forth in the Part 205 Rules. Such a result is likely to prompt resistance not only by the Non-Adopting States but by corporate clients that lawyers may prematurely report sensitive information externally without taking all internal efforts to remedy the problem. Concerns to this effect may be mitigated by ensuring with absolute clarity that an attorney’s permissive disclosure option in the Part 205 Rules is only available after internal reporting mechanisms have been fully exhausted, thereby allowing a disclosure to the SEC only as a last resort.\textsuperscript{177} As the Part 205 Rules stand, this requirement is not entirely clear on its face. The triggering mechanism allowing an attorney to reveal confidential information to the SEC to prevent substantial financial injury or other specified unlawful conduct is the “reasonable belief” standard.\textsuperscript{178} The definitions of “reasonably believes” and “reasonable” in the Part 205 Rules and the ABA Model Rules are nearly identical in that they are defined as an attorney who

\textsuperscript{173} Final SOX Rules, \textit{supra} note 171, at 6298.

\textsuperscript{174} \textit{Id}.

\textsuperscript{175} \textit{Id.}; see also 17 C.F.R. §§ 205.2(a),(j).

\textsuperscript{176} Final SOX Rules, \textit{supra} note 171, at 6303.

\textsuperscript{177} Naseem Faqihi proposed that in-house attorneys, who may be subject to more than one governing law or ethical rule, should be uniformly subject to a “two-tiered reporting standard,” requiring them to report internally first and then externally if the violation has not been resolved, which would allow such attorneys to expose misconduct without the risk of violating conflicting laws. \textit{See} Faqihi, \textit{supra} note 136, at 3390-94.

\textsuperscript{178} 17 C.F.R. § 205.3(d).
“believes the matter in question and that the circumstances are such that the belief is not unreasonable,” and “reasonable,” as applied to an attorney, “denotes conduct that would not be unreasonable for a prudent and competent attorney.”

Despite these similarities, the language of the Part 205 Rules and ABA’s Model 1.13 differ in one important respect.

ABA’s Model Rule 1.13 makes clear that a permissive disclosure requiring a reasonable belief on the part of the attorney is only available if “the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law.”

Thus, an exhaustion of internal reporting channels is necessary before an attorney may report externally. Although the up-the-ladder reporting requirements are mandatory in the Part 205 Rules and may be implied as prerequisites to reporting externally, neither 17 C.F.R. § 205.3(d), which codifies the permissive disclosure option, nor the final SEC rules implementing these requirements, is so explicit as to mandate this exhaustion of internal reporting before externally disclosing confidential information.

This absence leaves open the possibility that an attorney appearing and practicing before the SEC may opt to report information to the SEC without having first exhausted internal reporting requirements to the specified chief officers or a qualified legal compliance committee and, ultimately, the board. To avoid this possibility, the language in 17 C.F.R. § 205.3(d) should be amended to include language similar to that found in Model Rule 1.13 clarifying that an external disclosure to the SEC is permitted if the mandatory up-the-ladder reporting requirements have been exhausted and the board of directors or qualified legal compliance committee “insists upon” or “fails” to adopt an “appropriate response” to the violation.

“Appropriate response” or lack thereof is used elsewhere in the Part 205 Rules as the prompt for which the attorney must report up-the-ladder to the board and would be fitting for inclusion in the permissive disclosure section as well. It is defined to include the issuer’s efforts to address unlawful conduct such as 1.) a finding that no actual material violation has occurred or will occur; 2.) adoption by the issuer of remedial measures, including “appropriate steps or sanctions” to stop ongoing material violations, to prevent those that may yet occur, or to minimize the likelihood of recurrence of those that have occurred, or 3.) the retention of an attorney to review the reported evidence of a material violation, who has reasonably investigated such information and remediated it, or advised that a colorable defense on behalf of the issuer may be asserted by the attorney in any investigation, judicial, or administrative proceeding.

The measures enumerated above, or some variation of them, evidence a good faith effort on the part of the issuer to address the violation that the attorney has reported. While the need for an internal report prior to permissively disclosing may not be ideal or necessary for typical employee-whistleblowers who often face

179 17 C.F.R. § 205.2(l),(m) and MODEL RULES OF PROF’L CONDUCT R. 1.0(h)(i).
180 MODEL RULES OF PROF’L CONDUCT R. 1.13 (c).
181 See 17 C.F.R. § 205.3(d); Final SOX Rules, supra note 171.
182 17 C.F.R. § 205.2(b).
organizational pressures to avoid dissent,\textsuperscript{183} such a requirement is justified for attorney-whistleblowers who are subject to other ethical duties requiring them to act in the best interests of the organization. For example, Model Rule 1.2 bars a lawyer from counseling or assisting a client to engage in conduct that the lawyer knows to be criminal or fraudulent, thereby barring an attorney from sitting idle when he/she becomes aware of unlawful behavior.\textsuperscript{184} Model Rule 2.1 requires a lawyer acting in an advisory role to “exercise independent professional judgment and render candid advice” that may extend beyond the law to cover moral, economic, social and political considerations that “may be relevant to the client’s situation.”\textsuperscript{185} As Alex Long noted, this rule exemplifies a policy of “encouraging clients to do more than simply the minimum that would be necessary to avoid legal liability, but further to do what is right because it is the right thing to do.”\textsuperscript{186} In such instances, internal whistleblowing, which emphasizes the “primary goals of whistleblowing” to “expose and curtail wrongdoing,” creates much less harm to the interests of the organization.\textsuperscript{187} Corporations relying on internal whistleblowing by attorneys are able to avoid excessive or damaging penalties, bad publicity, and losses for shareholders that often result from reporting to the government.\textsuperscript{188}

If, however, the attorney’s report is ignored, an external report to the SEC is justified to protect the best interests of the organization.\textsuperscript{189} Self-reporting to the SEC at this particular juncture is beneficial to the organization in that it serves to mitigate penalties and losses of potentially enormous degrees. In the SEC’s 2001 “Seaboard Report,” the SEC provided an analytical framework guiding its decision of whether to bring an enforcement action against a corporation that has committed wrongdoing.\textsuperscript{190} The Seaboard Report highlights the importance of self-policing, self-reporting, and remediation as key factors that the SEC will consider in granting leniency to companies or deciding not to proceed with enforcement actions, as such measures by a company avoid the need for large government and shareholder resources.\textsuperscript{191} The SEC makes clear that it values the existence of effective compliance procedures and “appropriate

\begin{footnotesize}
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\item[183] See, e.g., Fanto, supra note 5, at 467; Faqhi, supra note 136, at 3382;
\item[184] MODEL RULES OF PROF’L CONDUCT R. 1.2(d).
\item[185] MODEL RULES OF PROF’L CONDUCT R. 2.1.
\item[186] Long, supra note 29, at 1095.
\item[187] Bishara, Callahan & Dworkin, supra note 91, at 76.
\item[188] See id.; see also Corporate Law - Securities Regulation - Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC, 124 HARV. L. REV. 1829, 1835-36 (2011).
\item[189] See Orly Lobel, Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations, 97 CAL. L. REV. 433, 492 (2009) (noting that it “becomes reasonable” for an employee to report externally when attempts to address problems from the inside have been futile).
\item[191] See id.
\end{enumerate}
\end{footnotesize}
tone at the top” even prior to the discovery of misconduct; the “prompt[ ], “complete[ ], and “effective[ ]” self-reporting of misconduct as soon as it is discovered; remedial efforts such as dismissing or disciplining wrongdoers or improving internal controls, and cooperation with the SEC.192 Other factors consider the length of the misconduct, including whether “senior personnel . . . participat[ed] in, or turn[ed] a blind eye toward” it, the length of time after discovery of the misconduct to implement an effective response, and the sufficiency of the documentation provided to the SEC surrounding the misconduct.193 If a corporation has utilized these measures, it may avoid an enforcement action altogether or be able to avail itself of a cooperation agreement with the SEC that it receive either credit for cooperating in related enforcement actions or investigations, a deferred prosecution agreement, or a non-prosecution agreement.194 Thus, in the likely event that preemption of the Part 205 Rules over conflicting state law would prevail, these amendments would ensure that lawyers are best able to balance their various ethical duties while acting in the best interests of the client.

1. **Scope of Covered Attorneys**

If the permissive disclosure option of the Part 205 Rules prevails over conflicting state law, concerns over breaching the duty of confidentiality may be mitigated by acknowledging that attorneys in the corporate securities practice balance competing interests that affect the feasibility of maintaining the duty in all circumstances. When attorneys are representing the organization as client, many competing factors are at play given the “wide variety of constituencies [that] comprise the corporate entity.”195 As discussed, the Part 205 Rules apply only to attorneys “appearing and practicing before the [SEC] in the representation of an issuer.”196 An “issuer” is defined as any person (including a company) “who issues or proposes to issue” securities that are registered under the federal securities laws or required to file reports or registration statements thereunder.197 Thus, the attorney-reporting rules apply only to lawyers representing companies in which the investing public plays a significant role in ownership.

Attorneys who appear and practice before the SEC and represent issuers can be distinguished from other roles in which they may represent individual clients given that they represent the organization as a whole, which includes not just individual officers and directors but also shareholders and the investing public with no other advocates.

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194 See Enforcement Cooperation Program, *supra* note 190.
196 17 C.F.R. § 205.3 (emphasis added).
acting on their behalf. The nature of the securities laws, which are built on the premise of protecting investors through full disclosure, mandate that an organization engaging in securities transactions, which may include public offerings or private placement of securities, disclose all material information and act in ways that are nondetrimental to the investing public. Some of the lawyer’s duties in this context may involve structuring and drafting documents to be filed with the SEC as annual or quarterly filings, proxy statements, prospectuses, or press releases. The role that the attorney plays in this sector is thus uniquely targeted to shareholders and other investors as the main audience of public filings.

Attorneys in this capacity can be held civilly or criminally liable if they assist clients with fraudulent schemes as primary violators of the federal securities laws, which has been visible through the many actions that have been brought by third-party investors and the SEC against lawyers. In recent years, the SEC has aggressively targeted in-house counsel for securities violations, holding some liable for primary violations of the securities laws. In addition to direct SEC enforcement measures, the SEC has the authority to discipline lawyers appearing before it pursuant to SEC Rule 102(e) for lacking the requisite qualifications to represent others, lacking “character or integrity or to have engaged in unethical or improper professional conduct,” or “hav[ing] willfully violated, or willfully aided and abetted the violation of any provision of the Federal securities laws or the rules and regulations thereunder.”

Securities lawyers are not always successful in dissuading clients from misconduct, giving rise to a situation in which lawyers may be “unwittingly co-opted

198 Desilets, supra note 195, at 624-25 (noting that in such circumstances the securities attorney may be aware of the corporation’s fraud and may protect the investing public by disclosing the fraud); Christin M. Stephens, Sarbanes-Oxley and Regulations of Lawyers’ Conduct: Pushing the Boundaries of the Duty of Confidentiality, 24 ST. LOUIS U. PUB. L. REV. 271, 298 (2005) (noting the importance of the corporate attorney’s obligation to the “public at large, as well as to his or her client.”).

199 Id.; see also James Fanto, Paternalistic Regulation of Public Company Management: Lessons from Bank Regulation, 58 FLA. L. REV. 859, 901 (2006) (noting that the SEC’s “the basic jurisdiction” is company disclosure); see Robert C. Koch, Attorney’s Liability: The Securities Bar and the Impact of National Student Marketing, 14 WM. & MARY L. REV. 883 (1973) (discussing attorney liability in the securities arena as a “reasonable means to implement a primary purpose of the securities laws—protection of the individual investor through full disclosure.”).


201 Id.

202 Id. at 102-03 and n. 54; 15 U.S.C.A. § 77t (authorizing the SEC to bring actions in federal district court against any person for violations of the federal securities laws); 15 U.S.C.A. § 78u(d)(1) (authorizing the SEC to implement injunction proceedings or monetary penalties in civil actions). See SEC v. Nat’l Student Marketing Corp., 457 F. Supp. 682 (D.D.C. 1978) (in this seminal case, the SEC attempted to seek civil injunctive relief against attorneys who allowed a merger involving their clients to proceed with materially misleading information).


204 Id.; 17 C.F.R. § 201.102(e)(1)(2010).
into the clients’ criminal or fraudulent schemes—either by being cajoled into believing that compliance is occurring or, by allowing too much time to pass between their discovery and any ensuing actions undertaken on the part of lawyers.” Due to the lawyer’s ethical duty not to assist clients to commit crime or fraud, securities lawyers must take steps to proactively dissuade clients from committing wrongdoing lest they be perceived as corroborators and subject themselves to SEC discipline.

In addition, when the board allows for unlawfulness to continue, arguably it is no longer speaking on behalf of the corporation based on the principle that only authorized conduct can be attributed to the corporation. In such instances, the lawyer must ensure the corporation is protected. Resignation from representation would seem futile, as the wrongdoing could become more and more egregious to cause even further harm to the corporation and its constituents. In addition, resignation as the sole option for an in-house attorney would force lawyers to essentially quit their full-time jobs and sacrifice their livelihood. As an alternative, the lawyer may deem it necessary to protect the corporation by informing the governing agency, the SEC, at a time when the misconduct is in earlier stages and can be feasibly remediated. Such actions reinforce the central tenet of the ethical rule that the organization as a whole is the lawyer’s client.

Therefore, a one-size-fits-all approach to the regulation of lawyers representing issuers before the SEC is not appropriate given the unique advisory context in which they operate. The nature of the attorney/client relationship when the organization is the client is fundamentally different from the type of relationship addressed by the ABA’s Model Rules, which are highly focused on litigators and interactions with

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205 See Nicholson, supra note 200, at 129.

206 MODEL RULES OF PROF’L CONDUCT R. 1.2(d).

207 See Nicholson, supra note 200, at 129-30 (noting that lawyers who “stubbornly continue to counsel a client against the misconduct, knowing that such advice is ‘falling upon deaf ears’” are likely to face liability).


209 See supra Part IA.

210 Simon, supra note 208, at 1465.


Wide disparities exist between the working conditions, experiences, professional status, and economic rewards enjoyed by different lawyers. Lawyers who represent large corporations are different from those who represent individuals. As legal practice becomes more specialized and complex, these divisions are likely to increase rather than decrease. Given these differences, the idea that all 800,000 American lawyers share a common professional culture capable of producing uniform answers to ethical problems strains credibility.

Id.; Stephen B. Burbank, State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform, 19 FORDHAM URB. L.J. 969, 975 (1992) (noting an emerging acknowledgment that “norms of professional conduct may vary depending on an attorney’s role”); Fred C. Zacharias, The Restatement and Confidentiality, 46 OKLA. L. REV. 73, 85 (1993) (“[I]t is not gospel that lawyers should act identically when serving in different capacities. . . . because perspectives on confidentiality may vary among subgroups of lawyers, a single set of confidentiality rules may be applied unevenly”).
The nature of the securities lawyer’s work is not typically adversarial or subject to a litigation-setting in which interactions with adversaries must be properly governed. Attorneys subject to the Part 205 Rules are not dealing with clients who have been charged with alleged law violations, thus meriting defense advocacy. Rather, “the lawyer and client are entirely on their own” with no adversary to challenge the lawyer’s presentation of the facts, “no referee to police parties’ self-interested behavior,” and no impartial decision-maker to reach an outcome.

Permissive disclosure rules themselves apply only to attorneys who are acting not as litigators but as advisors to organizational clients by independently deciding whether conduct is unlawful, advising the client about such determinations, and taking action to prevent harm to the organization itself by disclosing the illegal conduct. In contrast, advocacy in the litigation setting involves an expectation that the lawyer will “make all non-frivolous arguments available to prove the client’s claims or to defend claims against the client.” The attorney representing an organization before the SEC would have as his/her main goal compliance with the law, preventing wrongful conduct, and mitigating damage through self-reporting to the SEC or other remedial efforts, as opposed to advocating to “find a way” to argue that questionable behavior somehow fits within the confines of the law.

B. State-Based Solution to Inconsistent Reporting Requirements

Although this Article takes the position that preemption would indeed prevail, no judicial determination to this effect has yet been made. Some public opposition to the Part 205 Rules has expressed that, in the absence of case law confirming preemption of conflicting state law, attorneys admitted in jurisdictions with differing rules cannot be said to be abiding by those rules in good faith. This section will explore an alternative state-based solution aimed at achieving uniformity in the reporting obligations of attorneys.

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212 Desilets, supra note 195, at 632-34 (given this difference, “new standards must be formulated to enumerate those ethical criteria to which the securities attorney is bound.”).
214 Kim, supra note 20, at 120-21.
215 Id.
217 Id.
218 Id.
219 At the time that the Part 205 Rules were promulgated, some states publicly reacted with opposition to the preemption of the rules over conflicting state law, advising attorneys admitted in their jurisdictions not to make permissive disclosures. See, e.g., Ethics 2003 Committee of Wash. State Bar Ass’n. Internal Formal Ethics Opinion 2003, available at http://www.wsba.org/lawyers/groups/ethics2003/formalopinion.doc; Bishop et al., supra note 139 (discussing opposition by the California Bar).
Various scholars have previously called for the federalization of legal ethics either generally or for uniformity among specific law practice contexts. The history of state ethical rules as they pertain to corporate attorneys representing organizations is telling in that more recent decades have revealed an increased lack of uniformity in this arena. Prior to the ABA’s adoption of the Model Rules in 1983, attorneys who practiced corporate law were subject to a relatively uniform set of ethical obligations, as forty-nine states had adopted the ABA’s original Model Code (the precursor of the Model Rules) of Professional Responsibility (the “Code”) “with little debate and minor revisions.” Although the original rules under the Code did not allow a lawyer to permissively disclose information about a client corporation’s misconduct, lawyers had much more discretion under “Preservation of Confidences and Secrets of a Client” Disciplinary Rule (“DR”) 4-101(C)(3), which would today be Rule 1.6, to reveal an intent of the client “to commit a crime and the information necessary to


222 Len Biernat, Corporate Practice: From the Model Code to the Model Rules to the States, 34 SAINT LOUIS UNIV. L. REV. 27, 27 (1989) (discussing the ABA’s replacement of the Model Code with the Model Rules of Professional Conduct); see Zacharias, supra note 220, at 339 (noting that the “initial favorable response to the Model Code was overwhelming,” as 49 states adopted “with virtually no changes” the ABA’s Model Code of Professional Responsibility, an attempt to adopt a self-regulatory scheme to govern attorney behavior).
prevent the crime.”223 Such discretion was also visible in DR 7-102(B), which forbade a lawyer to counsel or assist the client in conduct the lawyer knows is illegal or fraudulent and to externally reveal the fraud to “the affected person or tribunal” if the client insisted on its commission, except when privileged.224 In addition, Ethical Canon 41 called upon a lawyer who discovered a client’s fraud to first “rectify” it by advising the client and then “promptly inform[ing] the injured person or his counsel, so that they may take appropriate steps” if the client “refuses to forego the advantage [ ] unjustly gained.”225

When Model Rule 1.6 was adopted in 1983, it only allowed a lawyer to permissively disclose confidential information to “prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.”226 By not allowing disclosure to prevent substantial financial injury or to rectify the consequences of crimes or frauds for which the lawyer’s services were used, the rule “limit[ed] considerably the discretion and influence that the lawyer once had to prevent” wrongdoing and “significantly chang[ed] the role of the lawyer for the organization” given that most organizational fraud or crime relates to finance and property instead of physical harm.227

It is interesting to note that the Model Rules of 1983 were not accepted by the states in the same uniform manner as was the earlier Code, primarily due to resistance by states to limit a lawyer’s possible disclosure of client wrongdoing.228 Although some states, mainly California, had never followed the older Model Code and have not since adopted the ABA’s Model Rules,229 many of the states that adopted the Model Rules in 1983 made amendments to them allowing attorneys to disclose client information to

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223 See id. at 40-41; MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(C)(3).
224 Biernat, supra note 222, at 47 n. 96. The early version of this provision, contained in ABA Canon of Professional Ethics 41 of 1967, did not include this “except” clause, “which effectively vitiates the disclosure requirements.” Thus, lawyers had even more discretion prior to 1983.
225 See id. at 46-7; MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(C), 7-102(B); ABA CANONS OF PROF’L ETHICS, CANON 41 (1908); see also Hinds v. State Bar, 19 Cal.2d 87, 92-93, 119 P.2d 134, 137 (1941).
227 Biernat, supra note 222, at 46.
228 Id. at 49 (noting that the first states to review the Model Rules of Professional Conduct “rejected many significant recommendations” as the Rules moved from “being mere models to binding rules.”).
229 Id. at 50-51; see also State Adoption of the ABA Model Rules of Professional Conduct, ABA CENTER FOR PROF’L RESPONSIBILITY, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (listing the states that have adopted the Model Rules, among which California is not listed). See Nicholson, supra note 200, at 94 (noting that not every state has adopted the Model Rules).
prevent a crime likely to result in substantial injury to the property or financial interests of another—the rule most likely to apply to wrongdoing by corporate organizations.\textsuperscript{230}

As discussed, all of the states have adopted some version of Model Rule 1.13, which imposes responsibilities on lawyers who represent organizations as clients.\textsuperscript{231} As it stands, the permissive disclosure aspect of ABA’s Model Rule 1.13(c) reads as follows:

“[I]f (1) despite the lawyer’s [up-the-ladder reporting] efforts . . . the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.\textsuperscript{232}

As is evident through this language, the ABA has taken the position that efforts to thwart wrongdoing through disclosure when reasonably believed necessary to prevent substantial financial injury should trump concerns over breaching the duty of confidentiality.\textsuperscript{233} Interestingly, “organization” is not explicitly defined in the Model Rules, as the comments thereto describe it simply as a “legal entity,”\textsuperscript{234} utilizing the “entity theory” to make clear that the organization itself is the client as opposed to its individual constituents, which may constitute officers, directors, shareholders, or other stakeholders.\textsuperscript{235} The comments to Model Rule 1.13 also state that these rules “apply equally to unincorporated associations.”\textsuperscript{236} Thus, the language of Model Rule 1.13 leaves considerable leeway for lawyers to make a permissive disclosure no matter what type of entity they represent, whether large or small, public or private, incorporated or not, and across any industry. Although the ABA was mostly concerned with lawyers representing public companies when it amended the rules in 2003, inclusion of the term “organization” ensured that the ability to permissively disclose would be available to lawyers representing “a wide variety of entities, including non-public companies, labor unions, charities, and other nonprofit organizations, governmental agencies, and unincorporated entities.”\textsuperscript{237}

In addition, Model Rule 1.13 does not make any limitation on the person or entity to whom the lawyer may permissively disclose the information, as the rule

\textsuperscript{230} See Biernat, supra note 222, at 50-69; see Nicholson, supra note 200, at 94.

\textsuperscript{231} See Part III.A.

\textsuperscript{232} MODEL RULES OF PROF’L CONDUCT R. 1.13(c).

\textsuperscript{233} Id.

\textsuperscript{234} MODEL RULES OF PROF’L CONDUCT R. 1.13, CMT. 1.

\textsuperscript{235} Id.; Bost, supra note 8, at 1115.

\textsuperscript{236} MODEL RULES OF PROF’L CONDUCT R. 1.13, CMT. 1.

\textsuperscript{237} Bost, supra note 8, at 1115.
includes general language stating that “the lawyer may reveal information relating to the representation . . .”238 This implies that the lawyer using his/her discretion to externally report would be permitted to disclose to any person or entity, whether it is a third party that might suffer financial injury from the client’s misconduct, a court, an administrative agency, or any other person. In stark contrast, the Part 205 Rules allow a similarly situated attorney to reveal confidential information only to the SEC itself.239

Given the breadth of Model Rule 1.13’s coverage, it is perhaps understandable that the rule has not been adopted by all fifty states. Each of the Non-Adopting States, however, have included language in their versions of Rule 1.13 instructing lawyers of their options in the event that the highest authority within the organization insists upon or ignores the misconduct after the attorney’s internal report to that authority—whether such actions include resignation or reporting if permitted under Rule 1.6.240 This language tends to take the following form:

If, despite the lawyer’s [up-the-ladder reporting] efforts, the highest authority that can act on behalf of the organization insists upon action, [or fails to address in a timely and appropriate manner an action] or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign [in accordance with the applicable resignation rule] [and/or] reveal confidential information if permitted by [only to the extent permitted to do so by] Rule 1.6 [or its equivalent thereof].241

As a reasonable middle ground, the following language or some variation thereof could be appended to the end of this clause in the equivalent of Model Rule 1.13 in the Non-Adopting States: “or, if the lawyer is appearing and practicing before the Securities and Exchange Commission in the representation of an issuer (as defined in 17 C.F.R. § 205.2) and is obligated to adhere to the attorney-reporting requirements of 17

239 17 C.F.R. § 205.3(d).
240 See supra Part III.A.
241 See supra note 123-26 (Rule 1.13 (Organization as Client) or the equivalent thereof in the Non-Adopting States). This is not a direct quote of the applicable rule in any one state but combines the various language of the same rule in each of the Non-Adopting States. Although the equivalents of Rule 1.13 in Ohio, Texas, and Washington, D.C. stray from the language above, the same conclusion (allowing resignation and/or referral to Rule 1.6 or the equivalent thereof) is reached by reading the comments thereto. In Ohio, the applicable version of this rule states that “[t]he discretion or duty of a lawyer for an organization to reveal information relating to the representation outside the organization is governed by Rule 1.6(b) and (c).” See Ohio Rules of Prof’l Conduct R. 1.13(c). In Texas, Rule 1.13 is silent on its face as to the lawyer’s options after referring the matter to the organization’s higher authority but comment 7 thereto indicates that the lawyer may reveal externally after exhausting internal options if permitted by Rule 1.6 (the duty of confidentiality and its exceptions). See Tex. Rules of Prof’l Conduct R. 1.12 cmt. 7. In Washington, D.C., Rule 1.13 is also silent on its face as to the lawyer’s options after referring the matter to the organization’s higher authority but the comments thereto indicate that confidential information relating to a lawyer’s representation of the organization may be revealed only if permitted by Rule 1.6 (the duty of confidentiality and its exceptions). See D.C. Rules of Prof’l Conduct R. 1.13 cmt. 2.
C.F.R. § 205.3, the lawyer may reveal confidential information to the Securities and Exchange Commission only as prescribed in such regulations."

This approach leaves full discretion with the attorney as to whether a report to the SEC is warranted. Given that the possible disclosure would by no means be mandatory, the lawyer can undergo the personal decision of deciding to proceed as such. Whether to reveal such information is likely to depend on a normative judgment decided by the lawyer on a case-by-case basis that considers several factors, including the importance of preserving the confidentiality in the particular scenario, the level of risk to third parties, or other moral considerations. Permissive disclosure rules themselves, as Bruce Green and Fred Zacharias have found, may in fact be more limited than anticipated, as the extent of discretion afforded by them is narrower than would appear given the ability of separate mandatory rules or legal processes to curtail them. Further, from a reputational standpoint, it is perhaps also likely that, ultimately, in-house counsel would decide not to blow the whistle on the client given the potentially negative social consequences for doing so and the effect this could have on the lawyer’s career. State adoption of uniform reporting standards, however, would ensure that attorneys who experience retaliation for making external disclosures would be protected under Dodd-Frank. The final section will explore the larger role of today’s corporate attorney in the context of “new governance” regulatory regimes that emphasize the self-regulatory features of modern governance and compliance structures.

C. New Governance Framework

The arguments set forth in this Article, as they pertain to attorneys who practice and appear before the SEC, also support a consideration of the proper place of the lawyer in today’s “new governance” regulatory regime. As a number of scholars have noted, “new governance” is a term that does not fit squarely within one definition but encompasses a range of modern-day developments in the world of corporate governance, regulatory reform, and compliance. While “traditional” or “old” governance is

243 See id. at 292-97. Green and Zacharias examine several factors that may limit a lawyer’s discretion to permissively disclose, including limits imposed by mandatory ethics provisions and the power of courts of other lawmakers to curtail discretion.
244 See Lobel, supra note 33, at 1262; see also Cramton, Cohen & Koniak, supra note 137, at 808.
described as “top-down, rule-bound, centralized, [and] government-run,” new governance theory is built on a notion of self-regulation and administrative governance in which various stakeholders, both private and public, collaborate to implement and ensure effective compliance with the law.246

One area in which scholarly attention devoted to new governance theory has been lacking is the role of the lawyer in this paradigm.247 New governance scholars have, however, noted the importance of a movement away from “traditional” legal methods like “litigation, arbitration, or hard bargaining” in the regulatory setting, as such means are limited in their ability to foster a collaborative governance model.248 In the same vein, lawyers in the new governance model, especially those subject to the Part 205 Rules, are well-positioned to take on new roles that are substantially divergent from “the traditional adversarial model of litigation that is so prevalent in legal education and in cultural representations of the law.”249

Self-regulation is an important aspect of new governance. In recent years, many administrative agencies have attempted to implement new modes of regulation that encourage collaboration with the entities they regulate through transparency, increased dialogue between players in the industry, and processes focused on inclusive decision-making.250 The SEC has also been active in this model. For example, the SEC has a long history of promoting self-regulation and self-policing, as it visible through its delegation of responsibility for regulation of national securities exchanges and broker-dealers to private self-regulatory organizations, or SROs, like FINRA.251 In addition,


See Jennifer M. Pacella, _If the Shoe of the SEC Doesn’t Fit: Self-Regulatory Organizations and Absolute Immunity_, 58 WAYNE L. REV. 201, 205-07 (2012) (noting that prior to the enactment of the
SOX implemented many measures in the securities context that are built on self-regulation through internal controls, such as the requirement for public companies to establish internal reporting channels to catch instances of wrongdoing and the Section 301 requirement for the audit committee of boards of directors to establish procedures for receiving and managing complaints about accounting and auditing controls, and for allowing anonymous concerns to be raised. The SEC also emphasizes self-regulation as it pertains to compliance with the Foreign Corrupt Practices Act, which imposes accounting and internal control provisions for enforcement on audit committees and emphasizes voluntary disclosures by companies to compensate for the agency’s staff and budgetary restrictions.

252 Protections against retaliation for self-reporting are especially crucial. As Orly Lobel has discussed, “[i]ndividual internal dissent is necessary to complement requirements of systematic self-monitoring,” thereby emphasizing the importance of the whistleblower to speak within the organization or externally in the face of illegality or organizational wrongdoing and their need for retaliation protections for doing so.253 The permissive nature of the Part 205 Rules represents an increasing trend of lawyers, especially those who represent corporate organizations, to move away from “the traditionally rigid notion of attorney-client confidentiality to a new conception of professional loyalty,” which recognizes that client loyalty in this arena should be viewed as “substantive compliance for the corporation at large.”254 Attorneys working in-house for a corporation are uniquely positioned to gain knowledge of wrongdoing given their “intimate exposure” to the organization’s operations and professional expertise,255 to promote self-regulation, and ensure compliance by encouraging their clients to address

Securities Exchange Act of 1934, securities exchanges were completely self-governing for nearly 140 years; see also 15 U.S.C.A. §§ 78a-78b.  
252 See 15 U.S.C. § 78j-1(m)(4) (2012) (requiring corporations to establish procedures for employees to report confidential and anonymous information relating to accounting or auditing misconduct to the audit committee); 15 U.S.C.A. § 7262 (governing the management assessment of internal controls); see also Diane Ambler et. al., Fund Governance Going Forward, 1 J. BUS. & TECH. L. 23, 32 (2006) (statement of panelist Earl Weiner) (discussing the SEC’s requirement for participants in the fund industry to hire compliance officers or increase the responsibilities of current internal compliance officers, “so as to provide compliance personnel whose loyalties are to the independent directors.”).  
254 Lobel, supra note 250, at 472; see also Lobel, supra note 33, at 1249 (“Even more than in the past, protections for employee whistleblowing are necessary to complement programs of systematic self-reporting.”).  
255 Id. at 483.  
256 Lobel, supra note 33, at 1264-65; see also Elizabeth C. Tippett, The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law, 11 EMPLOYEE RTS. & EMP. POL’Y J. 1, 37-38 (2007)(noting that attorneys are “accustomed to navigating grey areas of fact and law” to discern what is legal unlike managers, directors, or auditors).
wrongdoing internally, which is the underlying basis of the Part 205 Rules.\textsuperscript{257} When the organization insists on wrongdoing, in-house attorneys, whose central role is to maintain the core values of the organization,\textsuperscript{258} are called to take action to thwart the unlawful behavior and risk facing personal liability for unwillingly assisting the client to continue with the misconduct.\textsuperscript{259} Given the in-house counsel’s vulnerability to personal liability and mandate from federal regulations that characterize attorneys as “accountable actors,” their need for protection from acting as whistleblowers is pressing.\textsuperscript{260} In the current regulatory landscape, such protections are neither assumed nor guaranteed.

CONCLUSION

Despite advances in society that place a newfound respect on whistleblowers, retaliation against such persons remains prevalent.\textsuperscript{261} In-house attorneys who are required by the Part 205 Rules to internally blow the whistle on corporate client wrongdoing have been the victims of retaliation in much the same way as regular employees.\textsuperscript{262} Not only do such lawyers face possible disciplinary action by the SEC for failing to adhere to these rules, they experience unique challenges when seeking retaliation protections as whistleblowers. Although attorneys in this context may be eligible for relief under SOX, they are unlikely to be successful thereunder given the general weaknesses of the statute’s whistleblower program.\textsuperscript{263} Relief under Dodd-Frank, while much more robust, may not be available for internal whistleblowers given the decision in\textit{Asadi v. G.E. Energy},\textsuperscript{264} thereby causing conflict for lawyers who blow the whistle externally if admitted in a state that would not allow the Part 205 Rules’ permissive disclosures.

This Article has explored these controversial issues, as well as the question of whether the Part 205 Rules are intended to preempt conflicting state law. Given that conflicting state law appears to pose an obstacle to achieving the federal purpose set forth in SOX, it is likely that a court would decide in favor of preemption.\textsuperscript{265} Until a court determines this issue, however, the dilemma remains, creating an unwieldy web of

\textsuperscript{258} David B. Wilkins,\textit{ Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship}, 78 FORDHAM L. REV. 2067, 2117 (2010) (noting that many general counsels have “assert[ed] that this is at the core of what they do.”)
\textsuperscript{259} See supra Part IV.A.1. See also Lobel, supra note 33, at 1267 (the Part 205 Rules strengthen the notion of “in-house attorneys as gatekeepers of organizational ethical behavior”).
\textsuperscript{260} See Lobel, supra note 33, at 1267 (citing\textit{JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE} 195 (2006)).
\textsuperscript{261} See supra Part I.A.
\textsuperscript{262} See supra Part I.A.
\textsuperscript{263} See supra Part II.
\textsuperscript{264} 720 F.3d 620.
\textsuperscript{265} See supra Part III.B.
inconsistent regulations and expectations for corporate or organizational attorneys. Clarity to the reporting triggers in the Part 205 Rules would ensure that lawyers have taken all efforts to remedy problems internally before reporting out, and other alternatives, like the adoption of a modified Model Rule 1.13, would ensure that attorneys subject to conflicting rules are protected from retaliation. Given the increased focus on whistleblowing generally and the unique role of attorneys who practice before the SEC in their representation of issuer-clients, such persons are uniquely poised to play an essential role in modern corporate governance and compliance efforts.

\[266\text{ See supra Part IV.}\]