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## Cash for Your Conscience: Do Whistleblower Incentives Improve Enforcement of the Foreign Corrupt Practices Act?

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# Cash for Your Conscience: Do Whistleblower Incentives Improve Enforcement of the Foreign Corrupt Practices Act?

Amy Deen Westbrook\*

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### *I. Introduction*

Imagine you work for a big company that has operations in many foreign countries and stock traded on the New York Stock Exchange. While reviewing expense reports as part of your job, you notice that company employees in Nigeria are submitting reimbursement requests for large amounts of cash that they identify as “miscellaneous.” You email several of those employees,

who all explain that the funds are needed to pay regulatory approval and contract award “facilitators” who use their government connections on behalf of the company. The employees in Nigeria also explain that they have been told by the U.S. home office to record the payments as “miscellaneous.”

You raise the question of the reimbursements with your supervisor, who shrugs off your concerns, saying, “We have to grease a few government palms over there. Everybody does it. Just process it as ‘miscellaneous’ so the bean counters don’t come after us.” The payments prey on your conscience, and so you call the company’s compliance department and leave a message with the administrative assistant, outlining your concerns and providing your contact information. Weeks pass, and no one ever calls you back from the compliance department. You email the company’s compliance officer about your concerns, but again receive no response. The requests for reimbursement of the large “miscellaneous” cash expenses continue to come across your desk and they are approved without questions. After a few more weeks, you hear that the company’s division in Nigeria has just begun a new, very profitable, venture. By then, you are convinced that employees in the company’s Nigerian division bribed government officials to get the new venture off the ground.

You know that bribery of foreign officials, as well as misleading accounting of those payments, can violate U.S. law. What should you do? Try to go above your supervisor’s head? Call the compliance department again? Tell the government or someone else outside the company? Nothing?

Would it change your decision if you might be paid for reporting the bribery to the government? Not just a token payment, but hundreds of thousands or even millions of dollars depending on the circumstances? Would the possibility of the bounty change whether, or how, you blow the whistle?

In July 2010, President Barack Obama signed the Dodd–Frank Wall Street Reform and Consumer Protection Act<sup>1</sup> into law. The statute, known as “Dodd–Frank” after its prominent sponsors, former Senator Christopher Dodd (D-Conn.) and former

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1. Pub. L. No. 111-203, 124 Stat. 1376, 1841 (2010) [hereinafter “Dodd–Frank”].

Congressman Barney Frank (D-Mass.), imposes detailed regulation on the financial services industries.<sup>2</sup> Over 2,300 pages long, Dodd–Frank includes numerous provisions to help prevent and expose fraud and corruption, including measures to encourage employees and others to report violations of U.S. securities laws, i.e., whistleblowing.<sup>3</sup> Accordingly, Dodd–Frank encourages the reporting of violations of the U.S. Foreign Corrupt Practices Act (FCPA),<sup>4</sup> which prohibits giving or offering to give anything of value to a foreign official in order to influence his or her actions, and which requires public companies to keep accurate books and records.

Dodd–Frank both increased protections for whistleblowers from retaliation by their employers, and created an incentive system through which whistleblowers may receive between 10% and 30% of the amounts recovered by the Securities and Exchange Commission (SEC) based on the whistleblower’s tip.<sup>5</sup> Pursuant to Dodd–Frank, the SEC established an “Office of the Whistleblower” to administer the tip system.<sup>6</sup>

Dodd–Frank’s anti-retaliation provisions were designed to prevent retaliation against whistleblowers by their employers.<sup>7</sup>

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2. *See id.* (describing the bill’s objective of regulating the financial industry).

3. *Id.*

4. *See* 15 U.S.C. §§ 78dd-1–78dd-3 (2012) (prohibiting securities issuers, domestic corporations and individuals, and any other person within United States territory from corruptly bribing foreign government officials).

5. *See id.* § 78u-6 (adding Section 21F, “Securities Whistleblower Incentives and Protection” to the Securities Exchange Act of 1934).

6. *See id.* § 78u-7(d) (directing the SEC to establish a separate office to administer the whistleblower program); *see also* 17 C.F.R. §§ 165.1–165.20 (2018) (establishing a similar system for the Commodity Futures Trading Commission).

7. *See* JILL L. ROSENBERG & RENEE B. PHILLIPS, WHISTLEBLOWER CLAIMS UNDER THE DODD–FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: THE NEW LANDSCAPE 1, 2 [https://www.nysba.org/Sections/Labor\\_and\\_Employment/Labor\\_PDFs/LaborMeetingsAssets/Whistleblower\\_Claims\\_Under\\_Dodd\\_Frank.html](https://www.nysba.org/Sections/Labor_and_Employment/Labor_PDFs/LaborMeetingsAssets/Whistleblower_Claims_Under_Dodd_Frank.html) (discussing the objective of the whistleblower provisions).

The new rules provide additional remedies<sup>8</sup> for employees who suffer for reporting violations of the law to the SEC.<sup>9</sup>

Although anti-retaliation measures may keep people from being intimidated into silence, legal protections from retribution may not suffice to motivate people to become whistleblowers. Simply protecting whistleblowers from, or compensating them for, the harms they suffer in the workplace may not be enough to encourage whistleblowing.<sup>10</sup> Sometimes material incentives may be necessary. As one money manager who claimed to have been aware of the Madoff fraud back in the 1990s commented, “[p]eople on Wall Street are not Mother Teresas. They are not going to the S.E.C. unless there is something in it for them.”<sup>11</sup> And the federal government has had success with incentives in similar contexts.<sup>12</sup> For example, as discussed in Part V.B, the False Claims Act<sup>13</sup> pays whistleblower bounties, and the number of whistleblower reports

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8. As discussed below in Part III.A, both federal and state laws, in particular the Sarbanes–Oxley Act of 2002, also provide important anti-retaliation protection to whistleblowers. *See generally* Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

9. In February 2018, the Supreme Court clarified that the protections of the Dodd–Frank anti-retaliation provisions apply only to whistleblowers who bring their allegations to the SEC. *See* Dig. Realty Tr., Inc. v Somers, 138 S. Ct. 767 (2018) (holding that an employee who did not report a possible violation of the Federal securities laws to the SEC did not qualify as a “whistleblower” for purposes of the Dodd–Frank anti-retaliation provisions).

10. *See* Norman D. Bishara, Elletta Sangrey Callahan & Terry Morehead Dworkin, *The Mouth of Truth*, 10 N.Y.U. J. L. & BUS. 37, 59–60 (2013) (noting research indicating that organizational characteristics and the relative significance of the alleged wrongdoing, rather than protection from retaliation, inform the decision to report); Miriam H. Baer, *Reconceptualizing the Whistleblower’s Dilemma*, 50 U.C. DAVIS L. REV. 2215, 2226 (2017) (discussing the intersection between whistleblowing and potential self-incrimination as a disincentive to report).

11. *See* Stephen Dugner, *Would a Fraud Bounty Have Exposed Madoff Years Ago?*, FREAKONOMICS BLOG (Feb. 26, 2009, 10:30 AM), <http://freakonomics.com/2009/02/26/would-a-fraud-bounty-have-exposed-madoff-years-ago/> (last visited Aug. 13, 2017) (noting the reality of being hesitant to report without incentives) (on file with the Washington and Lee Law Review).

12. *See infra* Part V.B (discussing other federal corporate incentive programs for whistleblowers).

13. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (as codified in 31 U.S.C. §§ 3729–3733 (2012)); *Infra* Part V.B.

under the act increased substantially after a 1986 amendment made financial awards more likely.<sup>14</sup>

Despite its superficially obvious logic, however, the impact of the Dodd–Frank whistleblower incentive system implemented in 2011<sup>15</sup> is still unclear. Does the Dodd–Frank whistleblower incentive system increase the quality or quantity of tips received by the SEC? Do those tips improve enforcement of the FCPA, thereby decreasing overall levels of corruption?

Lack of data is a problem for answering such questions. Allegations of FCPA violations account for about 5% of whistleblower tips under the Dodd–Frank system.<sup>16</sup> The SEC carefully protects the anonymity of whistleblowers who provide tips and receive awards under the program.<sup>17</sup> Although at least one award payment has been widely reported as resulting from an FCPA tip,<sup>18</sup> it is impossible to confirm the precise circumstances or recipients of this or other awards.

Moreover, the Dodd–Frank whistleblower bounty program fits somewhat awkwardly with other FCPA enforcement mechanisms. Because the program is based on informing the SEC of violations

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14. See James B. Helmer, Jr., *False Claims Act: Incentivizing Integrity for 150 Years for Rogues, Privateers, Parasites and Patriots*, 81 U. CIN. L. REV. 1261, 1275–76 (2013) (explaining how the amendments revitalized *qui tam* cases, with “smashing recoveries” for whistleblowers). The 1986 amendments significantly increased the whistleblower’s role, as well as the whistleblower’s share of the proceeds recovered. 31 U.S.C. § 3730 (2012).

15. The SEC implemented the whistleblower program by issuing final rules on May 25, 2011. The final rules became effective as of August 12, 2011. 17 C.F.R. §§ 240.21F-1–240.21F-17 (2018).

16. See, e.g., U.S. SEC. & EXCH. COMM’N, 2017 ANNUAL REPORT TO CONGRESS ON THE DODD–FRANK WHISTLEBLOWER PROGRAM 1, 31 (2017) [hereinafter SEC, 2017 ANNUAL REPORT] (reporting the number of whistleblower tips between fiscal years 2014 and 2017 by allegation type).

17. See *id.* at 17–18 (explaining the SEC’s whistleblower protection practices).

18. See Nick McKenzie, Michael Bachelard & Richard Baker, *US Awards \$5 Million to BHP Billiton Whistleblower*, FIN. REV. (Aug. 28, 2016, 8:43 PM), <http://www.afr.com/news/us-awards-5-million-to-bhp-billiton-whistleblower-20160828-gr35vl> (last updated Aug. 28, 2016, 7:35 PM) (last visited Apr. 14, 2018) (citing legal sources confirming that the SEC paid U.S. \$3.75 million to an Australian FCPA whistleblower and contrasting that with the treatment of whistleblowers under Australian laws) (on file with the Washington and Lee Law Review).

of the securities laws and the SEC's subsequent enforcement of those laws, the scope of the incentive program is limited to the SEC's jurisdiction.<sup>19</sup> Thus, whistleblower incentives are available for persons identifying FCPA violations resulting in civil actions against publicly traded companies,<sup>20</sup> which is narrower than the scope of the FCPA. In addition, there has been debate surrounding whether and how whistleblowers who are company attorneys and compliance personnel can report to the SEC and apply for awards. At a deeper level, the program raises questions about the practical and ethical complexities of rewarding employees for exposing workplace corruption externally to federal agencies. In short, it is not entirely clear what constitute "improvements" of FCPA enforcement, much less whether the Dodd–Frank whistleblower incentive program is making such improvements.

This Article will look at the whistleblower incentive program together with the FCPA. Part II will look at the FCPA itself, and how it is applied.<sup>21</sup> In particular, it will discuss the importance of whistleblower tips in enforcement of the FCPA. Part III will look more closely at whistleblower law, including provisions of the Sarbanes–Oxley Act of 2002,<sup>22</sup> Dodd–Frank, and the related SEC rules and guidance.<sup>23</sup> It will focus on several issues that arise in the intersection of the Dodd–Frank incentive program and the FCPA. Part IV will discuss moral and ethical aspects of incentivizing whistleblowing.<sup>24</sup> It will consider whether incentives decrease altruistic behavior, and whether they are appropriate when the whistleblower's motivation is suspect. Part V will examine other examples of U.S. whistleblower award systems, and

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19. See *Office of the Whistleblower*, U.S. SEC. & EXCH. COMM'N, <https://www.sec.gov/whistleblower/frequently-asked-questions> (last updated Aug. 29, 2017) (last visited Apr. 14, 2018) (noting the limits of the SEC's jurisdiction) (on file with the Washington and Lee Law Review).

20. 15 U.S.C. § 78(u)(d) (2012). For an excellent discussion of the SEC's jurisdiction in FCPA anti-bribery matters, see generally Barbara Black, *The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is Not Part of the SEC's Mission*, 73 OHIO ST. L.J. 1093 (2012).

21. *Infra* Part II.

22. Pub. L. No. 107-204, 116 Stat. 745.

23. *Infra* Part III.

24. *Infra* Part IV.



compare U.S. approaches to international attitudes.<sup>25</sup> Part VI will conclude by discussing whether the Dodd–Frank whistleblower incentives increase the quality or quantity of tips received by the SEC and, as a result, whether the incentives improve enforcement of the FCPA.<sup>26</sup>

## II. *The FCPA and Whistleblower Tips*

### A. *The FCPA*

In 1977, Congress enacted the FCPA,<sup>27</sup> which amended the Securities Exchange Act of 1934 in response to public outrage over corruption following both the Watergate scandal and the following reports that hundreds of large companies made substantial improper or illegal payments overseas.<sup>28</sup> The FCPA applies to a wide variety of actors including: U.S. domestic concerns, such as natural persons and companies incorporated in the United States; U.S. or non-U.S. companies with publicly traded securities on U.S. exchanges (known as issuers); and persons who are in U.S. territory when they commit a violation of the statute.<sup>29</sup>

The FCPA has two substantive foci. First, the law prohibits domestic concerns, issuers, and persons in U.S. territory from bribing or offering to bribe foreign officials in order to obtain or retain business.<sup>30</sup> Specifically, the FCPA prohibits the use of the mails or any means or instrumentality of interstate commerce, corruptly, in furtherance of an offer, payment, gift, or promise to pay or give money or anything of value, to any foreign official for purposes of influencing any act or decision of such foreign official

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25. *Infra* Part V.

26. *Infra* Part VI.

27. 15 U.S.C. § 78dd-1 (2012).

28. *See, e.g.*, Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 499–501 (2011) [hereinafter Westbrook, *Enthusiastic Enforcement*] (discussing the background of the FCPA as well as subsequent amendments to the Act).

29. *See* 15 U.S.C. §§ 78dd-1–78dd-3 (establishing the FCPA’s applicability to each classification).

30. *See id.* (prohibiting the corrupt bribery of foreign government officials).

in his official capacity, or inducing such foreign official to do or omit to do any act in violation of his lawful duty, or securing any improper advantage, in order to obtain or retain business.<sup>31</sup> The Department of Justice (DOJ) is tasked with all criminal enforcement of the anti-bribery provisions, as well as civil enforcement of the anti-bribery provisions against domestic concerns and persons who violate the FCPA while within U.S. territory.<sup>32</sup> The SEC is in charge of civil enforcement of the anti-bribery provisions against issuers.<sup>33</sup>

Second, the FCPA requires issuers to keep accurate books and records, and to devise and maintain systems of internal accounting controls that provide reasonable assurances that their transactions and assets are properly maintained.<sup>34</sup> These “accounting provisions” apply only to issuers, i.e., companies with securities publicly traded in the U.S.<sup>35</sup> The accounting provisions work in tandem with the anti-bribery provisions to prevent the kinds of “slush” funds that enable improper foreign payments of the sort discussed in Part I’s hypothetical.<sup>36</sup> The SEC is in charge of civil enforcement of the accounting provisions against issuers, and the DOJ handles criminal enforcement of the accounting provisions against issuers.<sup>37</sup>

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31. *See id.* (same).

32. *See* U.S. DOJ CRIM. DIV. & U.S. SECS. & EXCH. COMM’N ENF. DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 4 (2012) [hereinafter FCPA GUIDE] (discussing the FCPA enforcement landscape).

33. *See id.* (same).

34. *See* 15 U.S.C. § 78(m)(b)(2) (2012) (establishing the internal accounting requirements).

35. *See id.* (applying these requirements to “[e]very issuer which has a class of securities registered pursuant to section 78l of [Title 15] and every issuer which is required to file reports pursuant to section 78o(d) of [Title 15]”).

36. *Infra* Part I.

37. *See* FCPA GUIDE, *supra* note 32, at 4–5 (noting the different enforcement responsibilities of the DOJ and SEC).

## *B. Tips Are Critical to FCPA Enforcement*

### *1. How Violations Come to Light*

Whistleblowers are critical to compliance with and enforcement of the FCPA.<sup>38</sup> In general, the specter of a whistleblower may encourage legal compliance and deter illegal activity.<sup>39</sup> Whistleblowers who report externally to the SEC also serve to expose violations that might not otherwise be detected.<sup>40</sup> In fact, the threat of whistleblowers reporting externally may increase the quality of self-reporting by companies themselves. Companies may endeavor to provide information to regulators before their employee whistleblowers report to the government, engaging in a kind of race to report before the window for voluntary self-disclosure closes.<sup>41</sup> Whistleblowers are often credited with reducing regulatory costs,<sup>42</sup> as agencies effectively deputize the public to investigate company practices.

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38. See Gerard Sinzdek, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1635–36 (2008) (arguing that employees are often in a unique position to detect and report wrongdoing).

39. See Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 108 (2000) (showing that most state legislatures regard whistleblowing as a mechanism for deterring and uncovering wrongful conduct).

40. See, e.g., Stefan Rutzel, *Snitching for the Common Good: In Search of a Response to the Legal Problems Posed by Environmental Whistleblowing*, 14 TEMP. ENVTL. L. & TECH. J. 1, 2 (1995) (explaining how employees can provide the information necessary for management and government to improve compliance with environmental laws).

41. See Baer, *supra* note 10, at 2240 (discussing the positive effects of external reporting). Companies' incentives to self-report potential FCPA violations before whistleblowers contact the SEC are likely to increase now that the Department of Justice has made its program of credit for voluntary self-disclosure, cooperation and remediation in FCPA matters permanent. See *Press Release, Deputy Attorney General Rosenstein Delivers Remarks at the 34th International Conference on the Foreign Corrupt Practices Act*, U.S. DEPT' JUST. (Nov. 29, 2017), <https://www.justice.gov/opa/speech/deputy-attorney-general-rostenstein-delivers-remarks-34th-international-conference-foreign> (last visited Apr. 14, 2018) (explaining the FCPA Corporate Enforcement Policy to be inserted into the U.S. Attorneys' Manual) (on file with the Washington and Lee Law Review).

42. See Laura Simoff, *Confusion and Deterrence: The Problems that Arise from a Deficiency in Uniform Laws and Procedures for Environmental*

Whistleblowers are particularly important in the FCPA context. The FCPA prohibits offers or payments of anything of value to foreign officials to obtain or retain business, and can lead to substantial civil and criminal sanctions.<sup>43</sup> Given the FCPA prohibitions and potential sanctions, to say nothing of national anti-bribery laws in the foreign countries themselves, companies usually keep illicit payments secret.<sup>44</sup> Nor is the foreign official likely to report that he or she has been offered, much less received, such a payment. In most circumstances, the prohibited payment or offer is not going to be made in a way that is easily visible to the general public or to regulators.

Consequently, it is unsurprising that FCPA investigations by both the DOJ and the SEC are often triggered by information from employees of a company offering the bribe.<sup>45</sup> For example, SEC charges against Anheuser-Busch InBev, which were settled in September 2016 for \$6 million, arose from misconduct reported by a company employee to the SEC.<sup>46</sup> For another example, in

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“Whistleblowers”, 8 DICK. J. ENVTL. L. & POL’Y 325, 326 (1999) (noting that whistleblowing increases compliance without expending additional public funds for supervision or detection); Shawn Marie Boyne, *Financial Incentives and Truth-Telling: The Growth of Whistle-Blowing Legislation in the United States*, in WHISTLEBLOWING—A COMPARATIVE STUDY 279, 283 (Gregor Thüsing & Gerrit Forst eds., 2016) (noting that government auditors cannot ferret out all fraud); Baer, *supra* note 10, at 2235 (discussing whistleblowing’s deterrent effect on criminal activity due to the increased likelihood of detection).

43. See 15 U.S.C. §§ 78dd-1–78dd-3 (2012) (outlining the prohibited foreign trade practices by issuers, domestic concerns, and other persons).

44. See generally Miriam F. Weismann, *The Foreign Corrupt Practices Act: The Failure of the Self-Regulatory Model of Corporate Governance in the Global Business Environment*, 88 J. BUS. ETHICS 615 (2009) (using empirical evidence to show that the FCPA has not significantly reduced actual instances of corporate wrongdoing).

45. See Phyllis Diamond, *More FCPA Cases in Pipeline, Brockmeyer Says; Some Administrative*, 12 CORP. L. & ACCOUNTABILITY REP. (BNA) 851 (Jul. 25, 2014) (detailing the statement of Kara Brockmeyer, former chief of the SEC Enforcement Division’s FCPA Unit, that the unit routinely gets “great leads” from whistleblower complaints and other tips).

46. *Press Release, SEC Charges Anheuser-Busch InBev with Violating FCPA and Whistleblower Protection Laws*, U.S. SEC. & EXCHANGE COMMISSION (Sept. 28, 2016), <https://www.sec.gov/news/pressrelease/2016-196.html> (last visited Apr. 14, 2018) (noting that the company was also charged with imposing a financial penalty on the whistleblowing employee with a separation agreement that included strict non-disclosure terms) (on file with the Washington and Lee Law

December 2014, Avon reached an understanding with the DOJ and the SEC for settlement of FCPA charges which included a total of \$135 million in payments as well as other remedial measures.<sup>47</sup> The Avon charges stemmed from handling of prohibited payments in China which were not addressed by the company until the CEO received a letter from a whistleblower in China.<sup>48</sup> In yet another case, in March 2013, the *Wall Street Journal* reported that the DOJ and SEC were investigating a whistleblower complaint of possible FCPA violations by Microsoft Corporation in connection with business in Italy, Romania and China.<sup>49</sup>

FCPA whistleblowers may report suspected violations either by contacting the SEC or the DOJ, or through internal company processes, which in turn may lead the company to report to

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Review).

47. See *Litigation Release, SEC Charges Avon Products, Inc. with FCPA Violations*, U.S. SEC. & EXCHANGE COMMISSION (Dec. 17, 2014), <https://www.sec.gov/litigation/litreleases/2014/lr23159.htm> (last visited Apr. 14, 2018) (announcing the settlement) (on file with the Washington and Lee Law Review).

48. *Id.*

49. See Christopher Matthews, *U.S. Probes Microsoft, Partners on FCPA Allegations*, WALL ST. J. (Mar. 19, 2013), <http://blogs.wsj.com/corruption-currents/2013/03/19/u-s-probes-microsoft-partners-on-fcpa-allegations/?mod=WSJBlog> (last visited Jan. 11, 2018) (reporting kickback allegations) (on file with the Washington and Lee Law Review). There are many other such complaints. For example, Qualcomm Incorporated disclosed in its quarterly filing with the SEC in February 2012 that it was under investigation by the SEC and DOJ for FCPA compliance issues arising from a whistleblower's allegations made in December 2009 to the audit committee of the Company's Board of Directors and to the SEC. See Qualcomm Inc., Quarterly Report (Form 10-Q) (Dec. 25, 2011) (providing consolidated financial statements); see also Richard L. Cassin, *Qualcomm's Whistleblower Woes*, FCPA BLOG (Feb. 2, 2012), <http://www.fcpablog.com/blog/2012/2/2/qualcomms-whistleblower-woes.html> (last visited Jan. 11, 2018) (providing a brief synopsis of the SEC and DOJ investigation initiated in September 2010) (on file with the Washington and Lee Law Review).

In October 2012, the Times of India announced that U.S. spirits company Beam Inc. was investigating possible FCPA violations in India in response to whistleblower complaints. See Boby Kurian, *Beam Probes India Unit for Fin Lapses*, TIMES INDIA (Oct. 22, 2012), <http://timesofindia.indiatimes.com/business/india-business/Beam-probes-India-unit-for-fin-lapses/articleshow/16762442.cms> (last visited Jan. 11, 2018) (discussing whistleblower allegations of wrongdoing) (on file with the Washington and Lee Law Review).

regulators.<sup>50</sup> Studies have shown that whistleblowers generally prefer to report potential violations internally, to their supervisors.<sup>51</sup> As discussed below, outside reporting presents the employee with a moral conflict.<sup>52</sup> In many cases, internal reports lead to internal investigations that result in resolution of the issue and/or self-reporting by the company to regulators.<sup>53</sup> On the other hand, lack of a satisfactory internal response may lead to outside reporting.<sup>54</sup>

Of course, FCPA investigations may be initiated on grounds besides an employee whistleblower's report.<sup>55</sup> Competitors of the company making the prohibited payment may be a source of information for regulators.<sup>56</sup> Alternatively, routine company

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50. The question of internal or external reporting by whistleblowers has been a source of controversy surrounding the Dodd–Frank measures.

51. See Yuval Feldman & Orly Lobel, *Decentralized Enforcement in Organizations: An Experimental Approach*, 2 REG. & GOVERNANCE 165, 175 (2008) (“[T]here are empirical findings that most whistle-blowers turn to external channels only after first reporting internally.”); see also Tim Barney, *A Preliminary Investigation of the Relationship Between Selected Organizational Characteristics and External Whistleblowing by Employees*, 11 J. BUS. ETHICS 949, 956 (1992) (detailing the implications of correlations between organization size and external whistleblowing); Elletta S. Callahan & Terry M. Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 170–79 (1994) (positing that internal whistleblowers are more likely to report to a media outlet after failing to achieve a constructive resolution). See generally ALBERT U. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (theorizing that when members of an organization perceive adverse conditions within the organization, they will either exit the organization or voice their grievance).

52. See Orly Lobel, *Citizenship, Organizational Citizenship and the Laws of Overlapping Obligations*, 97 CALIF. L. REV. 433, 462 (2009) (“From the individual’s perspective, external whistleblowing inherently encompasses moral conflict.”).

53. See *id.* (praising organizational models that prioritize reporting sequences).

54. See *id.* at 461 (“[E]xternal reporting is incentivized only when the internal reporting channel fails.”).

55. See CONVERCENT, THE 7 COMMON CAUSES OF FCPA ENFORCEMENT 4–9 (2015), <http://www.convercent.com/resource/convercent-white-paper-the-common-causes-of-fcpa-enforcement.pdf> (discussing FCPA enforcement and best practices).

56. See Mark A. Srere & Kristin Robinson, *FCPA Investigations: Competitors Dropping the Dime*, BRYAN CAVE LLP, <https://www.bryancave.com/en/thought-leadership/fcpa-investigations-competitors-dropping-the-dime.html> (last visited Feb. 6, 2018) (discussing a case where a company that lost a foreign government

audits may uncover the prohibited payments.<sup>57</sup> Nevertheless, company insiders remain a key source of information about potential FCPA violations.<sup>58</sup> For example, the ongoing investigation of possible FCPA violations in Mexico by Wal-Mart was triggered by disclosures by one of the company's real estate executives, first internally through the company channels, and then, when that did not work, externally, to a reporter from *The New York Times*.<sup>59</sup>

FCPA violations such as bribery and accounting irregularities are typical types of occupational fraud,<sup>60</sup> which in general are likely to be detected through whistleblower tips.<sup>61</sup> According to an Association of Certified Fraud Examiners' 2016 report, tips are the most common method for detecting occupational fraud, accounting for 39.1% of cases.<sup>62</sup> The percentages are even higher in cases of

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contract bid reported a competitor for violating the FCPA) (on file with the Washington and Lee Law Review).

57. See FCPA GUIDE, *supra* note 32, at 53 (stating that "self-reports [and] public disclosures by companies" can influence SEC enforcement decisions).

58. See *id.* (stating that "tips from informants or whistleblowers" are a primary source of information about corporate wrongdoing).

59. See David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES (Apr. 21, 2012), <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all> (last visited Mar. 5, 2018) (discussing a failure of disclosure procedures) (on file with the Washington and Lee Law Review); Amy Deen Westbrook, *Does the Buck Stop Here? Board Responsibility for FCPA Compliance*, 48 U. TOL. L. REV. 493, 511 (2017) (outlining the efforts of Sergio Cicero Zapata to draw Wal-Mart's attention to the alleged bribery by its Mexican subsidiary).

60. See ASS'N OF CERTIFIED FRAUD EXAMINERS, 2016 REPORT TO THE NATION ON OCCUPATIONAL FRAUD AND ABUSE 11 (2016) (depicting a "Fraud Tree" with the different categories of Corruption, Asset Misappropriation, and Financial Statement Fraud).

61. See Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 756 (2014) (positing that whistleblowing is the most effective way to detect fraud).

62. See ASS'N OF CERTIFIED FRAUD EXAMINERS, *supra* note 60, at 20 (discussing the detection of fraud schemes). This percentage is down slightly from 2014 (42.2%) and 2012 (43.3%). *Id.* Detection through internal audits and management review accounted for only 16.5% and 13.4% of cases, respectively. *Id.*

public companies, in which 43.5% of cases of occupational fraud are uncovered in response to tips.<sup>63</sup>

So far there has been no official confirmation that a Dodd–Frank whistleblower award has been paid to a person providing information on an FCPA violation. When making an award, the SEC does not disclose the name of the whistleblower or the company involved in order to protect whistleblower anonymity.<sup>64</sup> However, in a majority of FCPA corporate resolutions since the passage of Dodd–Frank, the government’s recovery has been sufficiently large that a tip that led to the recovery would have been eligible for an award under the Dodd–Frank program.<sup>65</sup> In 2017, for example, all eleven of the SEC or DOJ corporate resolutions involved fines of \$1,000,000 or more.<sup>66</sup> As a result, notices of all seven of the resolutions in which the SEC (as opposed to the DOJ) collected penalties were posted by the SEC’s Office of the Whistleblower website as “covered actions” in connection with which whistleblowers could apply for awards.<sup>67</sup>

In addition, the *Financial Review (Australia)* reported in 2016 that the SEC paid a whistleblower bounty of AUS\$5 million

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63. See *id.* at 20, 27 (discussing duration and detection of fraud schemes, respectively); see also FREDERICK D. LIPMAN, WHISTLEBLOWERS: INCENTIVES, DISINCENTIVES, AND PROTECTION STRATEGIES 2 (2012) (discussing the importance of employee tips).

64. See U.S. SEC. & EXCHANGE COMMISSION OFFICE OF THE WHISTLEBLOWER, 2017 ANNUAL REPORT TO CONGRESS 3 (2017), <https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf> (promising to “safeguard whistleblower confidentiality”).

65. See *id.* at 16–17 (reviewing the history of awards given post-Dodd–Frank).

66. See Richard Cassin, *The 2016 Enforcement Index*, FCPA BLOG, <http://www.fcpcb.com/blog/2017/1/3/the-2016-fcpa-enforcement-index.html> (last visited Jan. 11, 2018) (relaying FCPA enforcement data from 2016) (on file with the Washington and Lee Law Review).

67. Compare *Notice of Covered Actions*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/whistleblower/nocas?aId=edit-year&year=All> (last visited Apr. 14, 2018) (reporting a comprehensive list of actions) (on file with the Washington and Lee Law Review), with Cassin, *supra* note 66 (providing a condensed synopsis of the cumulative action data from 2017). As discussed below in Part III.B.2, the SEC Office of the Whistleblower posts a Notice of Covered Action for each SEC action in which monetary sanctions have exceeded \$1,000,000 and therefore a whistleblower award claim may be filed. See *Notice of Covered Actions*, *supra* (reporting a comprehensive list of actions).



(US\$3.75 million) for evidence that exposed alleged bribery by the mining company BHP Billiton in connection with its hospitality program during the 2008 Beijing Olympics.<sup>68</sup> The company had resolved an FCPA enforcement action in May 2015, paying the SEC \$25 million. The SEC posted a Notice of Covered Action with respect to the BHP Billiton resolution on June 30, 2015.<sup>69</sup> The SEC announced an award of “more than \$3.5 million” to a whistleblower on May 13, 2016.<sup>70</sup> Nevertheless, there is no official confirmation that the award went to the BHP Billiton employee for an FCPA tip.

## 2. Robust FCPA Enforcement

The likelihood of an FCPA tip leading to a Dodd–Frank whistleblower award is substantial in the current environment of robust FCPA enforcement, even if the award is impossible to confirm due to the SEC’s protection of employee anonymity.<sup>71</sup> As it happened, the Dodd–Frank whistleblower protections and incentives were enacted during an historic surge in FCPA enforcement.<sup>72</sup> With more and more FCPA cases being investigated,<sup>73</sup> inside tips have come to assume correspondingly greater importance.

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68. See McKenzie et al., *supra* note 18 (providing an Australian perspective on recent whistleblower awards).

69. See BHP Billiton Ltd. & BHP Billiton Plc, SEC File No. 3-16546 (2015) (admin. proc.) (levying sanctions and a hefty fine).

70. See Whistleblower Award Proc., SEC File No. 2016-9 (2016) (observing that the SEC had originally denied the claim).

71. There is a circularity to enforcement of the FCPA in the whistleblower incentive context. More enforcement leads to more opportunities for whistleblower awards. More awards lead to more whistleblowers coming forward with tips. More tips make more enforcement of the FCPA possible.

72. See Kevin LaCroix, *Corruption Enforcement Actions Surge, Follow-On Lawsuits Emerge*, D&O DIARY (Apr. 21, 2010), <https://www.dandodiary.com/2010/04/articles/foreign-corrupt-practices-act/corruption-enforcement-actions-surge-follow-on-lawsuits-emerge/> (last visited Jan. 11, 2018) (“[T]he level of Foreign Corrupt Practices Act (FCPA) enforcement in the first quarter of 2010 was ‘unprecedented.’”) (on file with the Washington and Lee Law Review).

73. See *FCPA 2016 Year in Review*, JONES DAY (Jan. 2017), <http://www.jonesday.com/fcpa-2016-year-in-review-01-30-2017/> (last visited on

It was not always so. During the first three decades that the FCPA was in force, the SEC and DOJ brought a handful of actions each year, resolved with moderate fines.<sup>74</sup> For example, the DOJ and SEC<sup>75</sup> brought only five actions in 2004.<sup>76</sup> Beginning in 2007, enforcement and monetary penalties increased dramatically<sup>77</sup> and thirty-eight actions were brought by the SEC and the DOJ.<sup>78</sup> Enforcement has remained strong. 2016 had the largest number of FCPA corporate enforcement actions and total settlement amounts ever:<sup>79</sup> the DOJ brought twenty-one actions and the SEC brought

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Jan. 11, 2018) (reporting that as of December 31, 2016, there were an estimated eighty active FCPA investigations by the government, and 100 additional potential targets) (on file with the Washington and Lee Law Review). In addition, in February 2018, an FCPA tracking service reported that 2017 was the most active year in history for new FCPA-related investigation, with forty-five new FCPA-related investigations publicly disclosed for the first time. See FCPATracker, *2017 Was the Most Active Year in History for New FCPA-Related Investigations*, FCPATRACKER.COM (Feb. 27, 2018), <https://blog.fcptracker.com/2018/02/2017-was-the-most-active-year-in-history-for-new-fcpa-related-investigations/> (listing companies and countries involved in investigations disclosed in 2017) (last visited Mar. 24, 2018) (on file with the Washington and Lee Law Review).

74. See Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence*, 43 IND. L. REV. 389, 389 (2010) (“FCPA enforcement was largely non-existent for most its history.”).

75. In some cases, both the SEC and the DOJ initiate actions against the same person or entity.

76. See *Related Enforcement Actions: Chronological List, 2004*, U.S. DEP’T JUST., <https://www.justice.gov/criminal-fraud/case/related-enforcement-actions-chronological-list-2004> (last updated June 16, 2015) (last visited Jan. 11, 2018) (listing FCPA actions filed in 2004) (on file with the Washington and Lee Law Review).

77. See Westbrook, *Enthusiastic Enforcement*, *supra* note 28, at 496.

78. See *2007 Year-End FCPA Update*, GIBSON DUNN (Jan. 4, 2008), <http://www.gibsondunn.com/publications/pages/2007Year-EndFCPAUpdate.aspx> (last visited Jan. 11, 2018) (providing a thorough synopsis of FCPA enforcement in 2007) (on file with the Washington and Lee Law Review).

79. See Mike Koehler, *The FCPA’s Record-Breaking Year*, CONN. L. REV. (forthcoming) (discussing the “wide spectrum of enforcement actions”). Although 2010 may have had higher enforcement action numbers overall, it was skewed as a result of the so-called “SHOT Show” arrests of twenty-two individuals (which were eventually not pursued). See Steve Johnson, *Sting Charges Dismissed, Guilty Pleas Vacated, FBI Informant Sentenced to Prison*, TFB (Dec. 3, 2012), <http://www.thefirearmblog.com/blog/2012/12/03/show-show-sting-charges-dismissed-guilty-pleas-vacated-fbi-informant-sentenced-to-prison/> (last visited Jan. 11, 2018) (providing a colorful account of the incident) (on file with the

thirty-two.<sup>80</sup> 2017 was close behind: the DOJ brought twenty-nine actions, and the SEC brought ten.<sup>81</sup> The 40th anniversary year of the FCPA featured extensive enforcement of the once “sleepy” law.<sup>82</sup>

The fines assessed as part of FCPA settlement agreements have also increased dramatically.<sup>83</sup> In 2016, for the first time, FCPA corporate fines assessed by the DOJ and the SEC topped \$2 billion for the year.<sup>84</sup> Calendar year 2016 saw the addition of three more “top ten” fines to the FCPA record books: Teva Pharmaceuticals settled for \$519 million, Och-Ziff settled for \$412 million, and VimpelCom settled for \$397.6 million.<sup>85</sup> The all-time record fine of \$965 million, however, was paid by Telia Company AB in 2017,<sup>86</sup> edging out the \$800 million paid by Siemens AG in

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Washington and Lee Law Review).

80. See *2016 Year-End FCPA Update*, GIBSON DUNN (Jan. 3, 2017), <https://www.gibsondunn.com/2016-year-end-fcpa-update/> (last visited Jan. 11, 2018) (summarizing FCPA enforcement in 2016) (on file with the Washington and Lee Law Review).

81. See *2017 Year-End FCPA Update*, GIBSON DUNN 3 (Jan. 2, 2018), <https://www.gibsondunn.com/2017-year-end-fcpa-update/> (detailing 2017 FCPA enforcement).

82. See *id.* at 2 (including statistics illustrating the “meteoric rise” of FCPA enforcement in the last four decades).

83. Enforcement has not been limited to the biggest companies. The SEC is expanding its FCPA enforcement efforts beyond high-value targets to small or mid-sized businesses that previously slipped under the radar. For example, in 2014 the government settled charges against Smith and Wesson Holding Corporation that related to a number of small and unsuccessful bribes. See R. Daniel O'Connor, Geoff Atkins & Lauren M. Modelski, *Smith and Wesson Settlement Raises FCPA Concerns for U.S. Businesses, May Establish a New Claim for an Insufficient Compliance Program*, 12 CORP. L. & ACCOUNTABILITY REP. (BNA) 10, 14 (2014) (“Despite the small and unsuccessful nature of the bribes authorized, the penalties paid by Smith & Wesson still reached almost \$2 million.”).

84. See *2016 Year-End FCPA Update*, *supra* note 80 (announcing that 2016 was a “precedent-setting year” in which the Department of Justice and Securities and Exchange Commission issued “53 combined enforcement actions” and levied “more than \$2 billion in corporate fines”).

85. *Id.*

86. See *Press Release, Telecommunications Company Paying \$965 for FCPA Violations*, U.S. SEC. & EXCHANGE COMMISSION (Sept. 21, 2017), <https://www.sec.gov/news/press-release/2017-171> (last visited Apr. 14, 2018) (reporting that Swedish company Telia would pay a \$965 million global settlement with the SEC, DOJ, and Dutch and Swedish law enforcement to

2008.<sup>87</sup> Also in 2017, Keppel Offshore & Marine joined the top ten list when it agreed to pay \$422 million in fines.<sup>88</sup>

This surge in enforcement has come along with some reorganization at the SEC and the DOJ, which both have earmarked personnel for FCPA investigations.<sup>89</sup> The staffing increase has in turn increased both agencies' ability to respond to tips and other reports of potential FCPA violations.<sup>90</sup> It seems reasonable to assume that the capacity and impetus to respond to whistleblower information has increased accordingly.

### 3. Whistleblowers Are Important to FCPA Collateral Shareholder Suits

The “surge in government enforcement of the FCPA has also increased opportunities for private plaintiffs to bring collateral civil actions.”<sup>91</sup> Shareholders routinely file derivative suits or securities fraud class actions in the wake of an FCPA

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resolve FCPA claims relating to payments in Uzbekistan) (on file with the Washington and Lee Law Review).

87. See Richard Cassin, *Keppel Offshore Lands Seventh on Our Top Ten List*, FCPA BLOG, <http://www.fcpablog.com/blog/2017/12/26/keppel-offshore-lands-seventh-on-our-top-ten-list.html> (last visited Mar. 8, 2018) (providing a revised top ten list of the largest FCPA penalties) (on file with the Washington and Lee Law Review).

88. See *Press Release, Keppel Offshore & Marine Ltd. and U.S. Based Subsidiary Agree to Pay \$422 Million in Global Penalties to Resolve Foreign Bribery Case*, U.S. DEPT JUST. (Dec. 22, 2017), <https://www.justice.gov/opa/pr/keppel-offshore-marine-ltd-and-us-based-subsidiary-agree-pay-422-million-global-penalties> (last visited Apr. 14, 2018) (reporting that Keppel entered into a deferred prosecution agreement with the DOJ and would pay the penalty to resolve charges with U.S., Brazilian, and Singaporean authorities relating to Brazilian bribery offenses) (on file with the Washington and Lee Law Review).

89. See generally Westbrook, *Enthusiastic Enforcement*, *supra* note 28 (discussing the agencies' resources and reorganization).

90. See *id.* at 559 (“The growth in the number of federal personnel tasked with FCPA enforcement has made increased enforcement not only possible, but almost required, by the agencies involved.”); *2017 Year-End FCPA Update*, GIBSON DUNN, *supra* note 81, at 5 (cataloguing the credentials of the “dozens of dedicated and talented” lawyers enforcing the FCPA at the DOJ and the SEC).

91. Amy Deen Westbrook, *Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations*, 73 OHIO ST. L.J. 1217, 1218 (2012).

investigation, often alleging failure of oversight by the board of directors<sup>92</sup> or misleading disclosure.<sup>93</sup> State and federal pleading requirements, however, make an internal whistleblower nearly a necessity in these suits as well.

A successful state shareholder derivative suit often requires insider information because of obstacles to suit posed by technical pleading requirements. To survive a motion to dismiss, shareholders filing a derivative suit must either make a pre-suit demand on the board of directors, i.e., request that the board sue to enforce the company's rights, or plead with particularity facts showing that a pre-suit demand would have been futile and the lack of a pre-suit demand should be excused.<sup>94</sup> Such a showing is exceedingly difficult. For example, in June 2017 the Delaware Chancery Court dismissed shareholders' claims that the Qualcomm board disregarded red flags regarding FCPA compliance lapses in China and Korea.<sup>95</sup> Among the deficiencies the court identified in the complaint was the fact that the plaintiffs failed to allege the "particularized facts" necessary to show pre-suit demand futility.<sup>96</sup>

Similarly, the federal Private Securities Litigation Reform Act of 1995<sup>97</sup> imposes additional pleading requirements on securities

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92. These are known as "Caremark Claims" after a seminal director oversight/fiduciary duty case decided by the Delaware Chancery Court in 1996. *See generally In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996) (approving settlement of a derivative action because shareholders were unlikely to show that the directors violated their fiduciary duty).

93. *See* 17 C.F.R. § 240.10b-5 (2017) (prohibiting manipulative or deceptive devices in connection with the purchase or sale of any security).

94. *See* FED. R. CIV. P. 23.1(b)(3) (requiring plaintiffs to "state with particularity (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority . . . and (B) the reasons for not obtaining the action or not making the effort"). State rules of civil procedure provide the same procedural requirement. *See generally* *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993); *Aronson v. Lewis*, 473 A.2d 805, 808 (Del. 1984); *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009).

95. *See In re Qualcomm Inc. FCPA Stockholder Derivative Litig.*, C.A. No. 11152-VCMR, 2017 WL 2608723, at \*5 (Del. Ch. June 16, 2017) (granting the defendants' motion to dismiss for failure to make a demand or adequately allege demand futility).

96. *See id.* at \*3 (discussing the proper response to "red flags" which indicate an FCPA violation).

97. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in various sections

law class action lawsuits, requiring plaintiffs to plead claims that defendants made false statements with particularity and to create a “strong inference” of scienter in those pleadings.<sup>98</sup> Failure to meet the pleading requirements results in dismissal of the claim.<sup>99</sup> In short, specific information is a requirement of a successful shareholder suit, whether the claim is under state or federal law.

Once a civil suit has commenced, the parties have rights to information held by the other side: such information is obtained through the discovery process. Pleading, however, begins a case, and therefore takes place before the parties have rights to discovery. As a result, requirements that a plaintiff “plead with particularity”<sup>100</sup> are difficult to satisfy without inside information. Consequently, in practice, whistleblowers are key not only to FCPA investigations, but also to collateral suits filed in the wake of such investigations.

### *III. The Whistleblower Incentive Program*

#### *A. Whistleblower Law*

##### *1. Background*

The United States has encouraged whistleblowing since its inception. On July 30, 1778 the Continental Congress unanimously enacted the first whistleblower legislation, which read:

Resolved, That it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors

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of 15 U.S.C.). In addition, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–59 (2007), imposed heightened pleading standards.

98. See 15 U.S.C. § 78u-4(b)(1)–(2) (2012) (setting forth the particularity and scienter pleading requirements).

99. See *id.* § 78u-4(b)(3) (mandating dismissal for non-compliant pleadings).

100. See FED. R. CIV. P. 9(b) (requiring particularity when pleading fraud or mistake).

committed by any officers or persons in the service of these states, which may come to their knowledge.<sup>101</sup>

U.S. whistleblower law, however, has been fairly described as more of a patchwork than a coherent legal regime.<sup>102</sup> Some current laws date back over a century. For example, the False Claims Act (FCA)<sup>103</sup> was first passed in 1863 to provide protection and incentives to persons who report fraud against the government.<sup>104</sup> Strengthened in 1986, the FCA includes both substantial anti-retaliation protections for the persons who report fraud and *qui tam* provisions that permit private parties to file suit in place of the government.<sup>105</sup> Because its *qui tam* provisions permit the recovery of a bounty, the FCA will be discussed in more detail below in Part V.B.

The majority of whistleblower provisions focus on protecting employees from various forms of employer retaliation, most notably discharge.<sup>106</sup> Such anti-retaliation protection is important: reporting legal violations risks the whistleblower's job and career. Some studies show that a majority of employee whistleblowers are demoted or fired for blowing the whistle.<sup>107</sup>

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101. Legislation of July 30, 1778, reprinted in JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789 (Worthington C. Ford et al. eds.) (Washington, D.C., 1904–37) 11:732.

102. See Joel D. Hesch, *Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt*, 6 LIBERTY U. L. REV. 51, 54 (2011) (advocating for the retention of a myriad of different protections); Boyne, *supra* note 42, at 279, 280 (calling U.S. whistleblower protections “an inconsistent legislative patchwork”).

103. 31 U.S.C. §§ 3729–3733.

104. See Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (1863) (codified as amended in 31 U.S.C. §§ 3729–3733); see also Jeanne A. Markey & Gary L. Azorsky, *Companies and Counsel Beware: Companies Cannot Override Employees' Right to Act as Whistle-Blowers Under False Claims Act*, 12 CORP. L. & ACCOUNTABILITY REP. (BNA) 786, 786 (2014) [hereinafter Markey & Azorsky] (discussing the history of whistleblowing).

105. See 31 U.S.C. §§ 3730–3732 (2012) (outlining, among other things, the rights of parties to *qui tam* actions).

106. See generally Sinzduk, *supra* note 38 (providing a comparative analysis of current whistleblower laws).

107. See Geoffrey Christopher Rapp, *Mutiny by the Bounties? An Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd–Frank Act*, 2012 B.Y.U. L. REV. 73, 113 (noting that most whistleblowers are fired).

Whistleblower anti-retaliation protections have thus developed as exceptions to employment “at will” since the 1930s, with an increase in laws protecting employees against discharge appearing since the 1960s.<sup>108</sup> Over thirty federal whistleblower statutes have been passed in the last several decades.<sup>109</sup> In 1978, the United States passed the Civil Service Reform Act of 1978,<sup>110</sup> the first federal statutory cause of action protecting whistleblowers from retaliation.<sup>111</sup> The Whistleblower Protection Act of 1989,<sup>112</sup> enacted in 1989, strengthened protection for federal employees by preventing unlawful retaliation and outlawing adverse employment actions against employees who report prohibited practices to the proper authorities.<sup>113</sup> There are also more specific laws protecting whistleblowers who report particular types of violations, such as discrimination,<sup>114</sup> environmental issues,<sup>115</sup> and conduct adverse to health, safety and welfare.

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108. See Lobel, *supra* note 52, at 441 (discussing the National Labor Relations Act, the Civil Rights Act of 1964, the Fair Labor Standards Act, the Civil Service Reform Act, the Occupational Safety and Health Act, and the Polygraph Protection Act of 1988).

109. See *Federal Whistleblower Protections*, NAT’L WHISTLEBLOWER CTR. (2017), [https://www.whistleblowers.org/index.php?option=com\\_content&task=view&id=816&Itemid=129](https://www.whistleblowers.org/index.php?option=com_content&task=view&id=816&Itemid=129) (last visited Jan. 11, 2018) (providing a comprehensive list of whistleblower laws) (on file with the Washington and Lee Law Review). In addition, there is often a public policy exception to state employment-at-will doctrine which provides a remedy for discharging an employee for reporting a violation of law. Such a claim might be either a tort or contract violation, with higher damages possible in tort jurisdictions.

110. Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.).

111. S. REP. No. 100-413, at 2 (1988).

112. Pub. L. No. 101-12, 103 Stat. 16 (codified in sections of 5 U.S.C.).

113. See Hesch, *supra* note 102, at 63 (referring to the Whistleblower Protection Act as a “ground-breaking law”).

114. The Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e (1991), the Americans with Disabilities Act, 42 U.S.C. § 12101 (2009), the Age Discrimination in Employment Act, 29 U.S.C. § 621 (1967), and the Equal Pay Act, 29 U.S.C. § 206(d) (2016), protect employees (and applicants for employment) from retaliation for reporting discrimination.

115. See, e.g., 42 U.S.C. § 7622 (2012) (protecting whistleblowers under the Clean Air Act); 33 U.S.C. § 1367 (protecting whistleblowers under the Clean Water Act).



The protections and incentives for whistleblowers who report securities laws violations have been the focus of legislation since 2000, with the Sarbanes–Oxley Act (SOX) in 2002<sup>116</sup> and Dodd–Frank in 2010.<sup>117</sup>

## 2. Securities Law and the Sarbanes–Oxley Act

The whistleblower landscape was significantly altered in 2002 with the passage of SOX. Enacted after the Enron and WorldCom scandals in order to protect shareholders and the public against fraudulent financial reporting and accounting practices, SOX increased reporting obligations for issuers,<sup>118</sup> thereby increasing the amount of information required and available for inspection. SOX resulted in revamped and reenergized compliance programs at many issuers. In an effort to encourage and increase internal reporting of violations of U.S. securities laws, SOX § 806 also added substantial protections for whistleblowers, including both federal employees and, for the first time, employees of publicly traded companies.<sup>119</sup> In fact, in an apparent reference to the efforts of Sherron Watkins at Enron, the Senate report that was produced in connection with SOX stated that “in a variety of instances when corporate employees at Enron and [Arthur] Andersen attempted to report or ‘blow the whistle’ on fraud . . . they were discouraged at nearly every turn.”<sup>120</sup>

SOX protects employees who provide information or assist in an investigation regarding any conduct that the employee reasonably believes constitutes a violation of several laws

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116. 18 U.S.C. § 1514A.

117. 12 U.S.C. § 5511.

118. So much so, in fact, that implementation of several of the audit provisions had to be postponed, and some foreign private issuers delisted from U.S. exchanges to avoid what they saw as expensive and burdensome regulation. SOX also imposes an obligation on attorneys to report “up the ladder,” 15 U.S.C. § 7245, or in some cases to a qualified legal compliance committee, 17 C.F.R. §§ 205.2(k), 205(c) (2018).

119. See Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745 (outlining the “whistleblower protection for employees of publicly traded companies”). See generally 18 U.S.C. § 1514A (2012).

120. S. REP. No. 107-146, at 4–5 (2002).

prohibiting fraud, or of any rule or regulation of the SEC.<sup>121</sup> The SOX anti-retaliation provisions were included to prevent employers from discouraging employees with knowledge of improper financial reporting and accounting practices from reporting.<sup>122</sup>

### *B. Dodd–Frank*

#### *1. Dodd–Frank Section 922*

Less than a decade after the passage of SOX, and despite the reporting and assessment mechanisms it imposed on public companies, Congress again found itself grappling with corporate improprieties. Dodd–Frank was passed following the Global Financial Crisis and the discovery in 2008 of Bernard Madoff’s multibillion-dollar Ponzi scheme, along with information that financial analyst and certified fraud examiner Harry Markopolos had been attempting to report Madoff’s fraud to the SEC for many years.<sup>123</sup> With Dodd–Frank, Congress again sought to curb

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121. 18 U.S.C. § 1514A(a)(1). This includes “frauds and swindles,” *id.* § 1341, “fraud by wire, radio, or television,” *id.* § 1343, “bank fraud,” *id.* § 1344, “securities and commodities fraud,” *id.* § 1348, and any provision of federal law relating to fraud against shareholders. *Id.* § 1514A(a)(1). SOX prevents an employer from discharging or retaliating against an employee for engaging in a protected activity. The SOX whistleblower protections only apply when the information is provided to, or investigation conducted by, a federal regulatory or law enforcement agency, a member of Congress or a committee of Congress, or a person with supervisory authority over the employee. *Id.* There is also protection for testifying. *Id.* § 1514A(a)(2).

122. See DAVISPOLK, RECENT DEVELOPMENTS IN WHISTLEBLOWER PROTECTIONS: LEGAL ANALYSIS AND PRACTICAL IMPLICATIONS 2 (2014), [https://www.davispolk.com/files/06.09.14.Recent.Developments.in\\_.Whistleblower.Protections.pdf](https://www.davispolk.com/files/06.09.14.Recent.Developments.in_.Whistleblower.Protections.pdf) (discussing SOX). Like most other whistleblower protection laws, SOX requires whistleblower anti-retaliation claims to be filed with the Department of Labor (DOL). *Id.* SOX, however, added a mechanism to file a complaint in federal district court if the DOL process does not reach a final resolution of the complaint within 180 days. Sarbanes–Oxley § 806(a), 18 U.S.C. § 1514A(b)(1)(B). Nevertheless, the process may take years.

123. See HARRY MARKOPOLOS, NO ONE WOULD LISTEN: A TRUE FINANCIAL THRILLER 1 (2010). In his testimony before Congress, Markopolos revealed that he had attempted to tell the SEC about the Madoff investment fraud in 2000, 2001, and 2005. He also sent information about the fraud to the *Wall Street*

fraudulent activity at the country's largest financial companies, and to implement measures to prohibit and punish corrupt or irresponsible behavior at the institutions in which U.S. citizens invest their savings. Protecting and incentivizing whistleblowers was an integral part of that effort.

Among the tools assembled in the Dodd–Frank statute were specific new rules regarding the protection and treatment of persons who report violations of U.S. federal securities laws to regulatory authorities. Dodd–Frank § 922 added new Section 21F to the Securities Exchange Act of 1934, “Securities Whistleblower Incentives and Protection,”<sup>124</sup> which in many ways superseded the SOX whistleblower provision by strengthening its protections and adding incentives.

Section 922 defines a whistleblower as:

[A]ny individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.<sup>125</sup>

A whistleblower who voluntarily provides original information to the SEC that leads to the successful enforcement by the SEC of a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than \$1,000,000<sup>126</sup> may receive an award equal to between 10% and 30% of the monetary sanctions collected by the SEC.<sup>127</sup> Original information includes information that is (i) derived from the independent knowledge or analysis of the whistleblower; (ii) not known to the SEC from any other source; and (iii) not exclusively derived from an allegation made in a judicial or administrative hearing, a governmental report, hearing, audit or investigation, or from the news media.<sup>128</sup> Dodd–Frank also required the U.S. Department of the Treasury to

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*Journal* and former New York Attorney General Eliot Spitzer.

124. 15 U.S.C. § 78u-6 (2012).

125. *Id.* § 78u-6(a)(6).

126. The SEC rules permit aggregation of multiple SEC cases that arise out of a common nucleus of operative facts. 17 C.F.R. § 240.21F-4(d) (2018).

127. 15 U.S.C. § 78u-6(b).

128. *Id.* § 78u-6(a)(3).

establish the Securities and Exchange Commission Investor Protection Fund to be used to pay whistleblower awards.<sup>129</sup>

As explained by the SEC, the Dodd–Frank bounty system was created to encourage individuals with knowledge of violations of the U.S. securities laws to provide that information voluntarily to the SEC.<sup>130</sup> The bounty thus helps to “correct the imbalance between the potential whistleblower’s ethical desire to report fraud and the economic disadvantages of doing so, such as legal costs and loss of employment, by offering financial rewards to offset the whistleblower’s career risk.”<sup>131</sup>

Dodd–Frank required “Implementation and Transition Provisions for Whistleblower Protection,”<sup>132</sup> and directed the SEC to issue final regulations within nine months to flesh out the statutory provisions. The SEC was also directed to establish a separate office within the agency to administer and enforce the provisions of the Dodd–Frank whistleblower incentives and protections.<sup>133</sup> This office is the Office of the Whistleblower.

## *2. The 2011 SEC Regulations Implementing the Incentive Program*

The process of drafting the regulations implementing the new whistleblower incentive provisions took almost a year and involved an extensive public notice and comment process. The SEC issued proposed Regulation 21F on November 3, 2010, which defined critical terms, outlined the procedures for applying for whistleblower awards, and generally explained the scope of the

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129. *Id.* § 78u-6(g)(1)–(2). The Investor Protection Fund is also used for the Inspector General of the SEC. The money comes from fines the SEC receives which are not used to pay restitution to victims, and by investments made by the fund. *Id.* § 78u-6(g)(3).

130. See Whistleblower Award Proc., SEC File No. 34-73174 (2014).

131. See Jennifer M. Pacella, *Inside or Out? The Dodd–Frank Whistleblower Program’s Anti-Retaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 727 (2014) (providing an overview of Dodd–Frank).

132. 15 U.S.C. § 78u-7(2012).

133. *Id.* § 78u-6.

whistleblower program.<sup>134</sup> In response, the SEC received more than 240 comment letters and approximately 1,300 form letters.<sup>135</sup>

By far, the most controversial provisions related to the relationship between the Dodd–Frank whistleblower program, including its incentives, and internal compliance programs at affected companies.<sup>136</sup> Dodd–Frank § 922 clearly requires a whistleblower to report a violation to the SEC in order to qualify for an incentive award, i.e., a whistleblower who only reports the violation internally is not eligible for a bounty.<sup>137</sup> However, the statute did not address what role a whistleblower’s internal reporting would play in the award decision. Many of the letters addressed the impact of the Dodd–Frank requirements on FCPA compliance and enforcement directly. For example, representatives of eleven large U.S. companies wrote to argue that, given the substantial expertise and well developed compliance programs at many companies, the SEC regulations should encourage whistleblowers to use internal company reporting procedures first.<sup>138</sup> Some argued that the whistleblower program would strengthen FCPA enforcement by encouraging individuals

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134. See Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 17 C.F.R. 240.21f-1–240.21f-17 and 17 CFR 249.1–249.2000 (effective date Aug. 12, 2011) (reconciling whistleblower requirements with the administrative structure of the SEC).

135. The public comments received by the SEC are available at <https://www.sec.gov/comments/s7-33-10/s73310.shtml>.

136. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 17 C.F.R. 240.21f-1–240.21f-17 and 17 CFR 249.1–249.2000, at “Background and Summary,” 4. (effective date August 12, 2011). Other hot button issues in the rulemaking process related to who should be eligible for awards (i.e., should a culpable individual be able to claim an award?) and the procedures for submitting information and making a claim for an award. *Id.*

137. See 15 U.S.C. § 78u-6(b)(1) (2012) (prescribing the payment of awards to “whistleblowers who voluntarily provided original information to the Commission”).

138. Letter from Donna Dabney, Vice President, Sec’y & Corp. Governance Counsel, Alcoa Inc. et al., to Ms. Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (Dec. 17, 2010) (on file with author); see also Letter from Steven A. Tyrrell, to Ms. Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n, (Dec. 17, 2010) (on file with author).

to report.<sup>139</sup> Others argued the opposite.<sup>140</sup> Still others expressed concern about the need to protect foreign whistleblowers, especially in the FCPA context.<sup>141</sup>

The final regulations, “Securities Whistleblower Incentives and Protections,”<sup>142</sup> were approved on May 25, 2011 and took effect on August 12, 2011 (2011 Regulations). The mechanics of the whistleblowing process are fairly straightforward. The SEC Office of the Whistleblower set up a website for individuals seeking to disclose potential violations, complete with a standardized tip form (Form TCR: Tip, Complaint or Referral) for whistleblowers to fill out.<sup>143</sup> There is also a whistleblower hotline to respond to questions from the public about the program.<sup>144</sup> The website posts the Notice of Covered Actions taken by the SEC (i.e., SEC enforcement actions that result in fines of at least \$1,000,000, making them actions with respect to which, if a whistleblower’s tip led to the successful enforcement, an award may be pursued by that whistleblower).<sup>145</sup> Under the rules, individuals who satisfy the Dodd–Frank whistleblower requirements have ninety calendar days after the notice is posted on the SEC website to apply for an award by submitting a Form WB-AOO to the Office of the Whistleblower.<sup>146</sup> Between the start of the Dodd–Frank program

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139. Letter from James S. Lessard-Templin, Customs & Int’l Trade Attorney, to Ms. Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (Dec. 20, 2010) (on file with author).

140. See generally Dave Ebersole, *Blowing the Whistle on Dodd–Frank Whistleblower Reform*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 123 (2011) (submitted as a comment to the SEC) (advocating for a progressive approach to whistleblower reform).

141. Letter from Stephen M. Kohn, Exec. Dir., Nat’l Whistleblowers Ctr., to Ms. Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (Feb. 15, 2011) (on file with author).

142. 17 C.F.R. §§ 240.21F-1–240-21F-17 (2017).

143. *Office of the Whistleblower: Submit a Tip*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/whistleblower/submit-a-tip> (last visited Jan. 25, 2018) (on file with the Washington and Lee Law Review).

144. See *id.* (“Phone: (202) 551-4790.”).

145. *Office of the Whistleblower: Previous News and Releases*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/whistleblower/pressreleases> (last visited Jan. 25, 2018) (on file with the Washington and Lee Law Review).

146. See *Notice of Covered Actions*, *supra* note 67 (providing a comprehensive list of actions).

and the end of fiscal year 2017, the SEC posted a total of 1,080 Notice of Covered Actions, of which 193 were in 2017.<sup>147</sup>

With respect to the controversial issue of internal reporting in the award context, the SEC decided not to require that whistleblowers also report violations internally to be eligible for an award.<sup>148</sup> The 2011 Regulations simply defined whistleblowers as:

(a) Definition of a whistleblower.

(1) You are a whistleblower if, alone or jointly with others, you provide the Commission with information pursuant to the [Procedures for submitting original information] of this chapter, and the information relates to a possible violation of the Federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur. A whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.<sup>149</sup>

Instead of requiring internal reporting for award eligibility, the 2011 Regulations incentivized whistleblowers to use their companies' internal compliance and reporting systems when appropriate.<sup>150</sup> The rules provide that a whistleblower can receive an award for reporting original information to a company's internal compliance and reporting systems if the company self-reports to the SEC and that report leads to a successful enforcement action.<sup>151</sup> In fact, the employee is considered a whistleblower under the Dodd–Frank program as of the date the employee reports the information internally as long as the employee provides the same information to the SEC within 120 days.<sup>152</sup> In addition, if the whistleblower first reports internally

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147. See SEC, 2017 ANNUAL REPORT, *supra* note 16, at 14 (reporting 193 notices); see also U.S. SEC. & EXCH. COMM'N, 2016 ANNUAL REPORT TO CONGRESS ON THE DODD–FRANK WHISTLEBLOWER PROGRAM 14 (2016) (reporting 178 notices); U.S. SEC. & EXCH. & EXCH. COMM'N, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD–FRANK WHISTLEBLOWER PROGRAM 12 (2015) (reporting 709 notices since the program's inception).

148. See 17 C.F.R. § 21F-2(a) (2017) (“Whistleblower status and retaliation protection.”).

149. *Id.*

150. *Id.* § 240.21F-4(b)(7).

151. See *id.* (describing appropriate procedures post-disclosure).

152. *Id.*

and then the entity reports to the SEC, “all of the information that the entity provides to the SEC will be attributed to the whistleblower.”<sup>153</sup> When determining the amount of an award to a whistleblower, if the whistleblower voluntarily participated in his or her company’s internal compliance and reporting system, then the amount of the award may be increased.<sup>154</sup> Conversely, a whistleblower’s interference with internal compliance and reporting is a factor that may decrease the amount of an award.<sup>155</sup>

Accordingly, the Dodd–Frank whistleblower incentive program has paid several awards to whistleblowers identified as having tried first to report their concerns through internal channels. In August 2014, the SEC announced an award of \$300,000 to a company employee who performed audit and compliance functions.<sup>156</sup> The employee initially reported the violations internally, but when the company failed to take action, the employee reported to the SEC.<sup>157</sup> Similarly, in July 2014, the SEC announced an award of more than \$400,000 to a whistleblower who reported a fraud to the SEC after the company failed to address the employee’s concerns internally.<sup>158</sup>

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153. Pacella, *supra* note 131, at 758.

154. *See id.* (“To incentivize employees to blow the whistle internally and to use their companies’ internal compliance and reporting systems, the SEC has included as criteria for increasing an award whether a whistleblower voluntarily participated in an entity’s internal compliance program.”).

155. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,301 (June 13, 2011) (codified at 17 C.F.R. pts. 240 & 249).

156. *See Press Release, SEC Announces \$300,000 Whistleblower Award to Audit and Compliance Professional Who Reported Company’s Wrongdoing*, U.S. SEC. & EXCHANGE COMMISSION (Aug. 29, 2014), <https://www.sec.gov/news/press-release/2014-180> (last visited Apr. 14, 2018) (“Whistleblower Came to SEC After Reporting Internally and Company Failed to Take Action.”) (on file with the Washington and Lee Law Review).

157. *Id.*

158. *See Press Release, SEC Announces Award for Whistleblower Who Reported Fraud to SEC After Company Failed to Address Issue Internally*, U.S. SEC. & EXCHANGE COMMISSION (July 31, 2014), <https://www.sec.gov/news/press-release/2014-154> (last visited Apr. 14, 2018) (“The whistleblower did everything feasible to correct the issue internally. When it became apparent that the company would not address the issue, the whistleblower came to the SEC in a final effort to correct the fraud and prevent investors from being harmed.”) (on file with the Washington and Lee Law Review).



*3. Internal Reporting and Anti-Retaliation: The 2015 SEC  
Interpretive Guidance*

The 2011 Regulations addressed which whistleblowers qualified for the Dodd–Frank incentive awards and anti-retaliation protections. However, the scope of the anti-retaliation provisions—in particular, whether they protect whistleblowers who report internally but not to the SEC—was the subject of controversy for several years.

Section 922 prohibits an employer from discharging or retaliating against an employee for:

- (i) . . . providing information to the Commission in accordance with this section;
- (ii) . . . initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
- (iii) . . . making disclosures that are required or protected under the Sarbanes–Oxley Act of 2002, the Securities Exchange Act, and any other law, rule, or regulation subject to the jurisdiction of the Commission.<sup>159</sup>

The 2011 Regulations set out a definition of whistleblower “for the purposes of the anti-retaliation provisions” of Dodd–Frank as follows:

- (b) [. . .] you are a whistleblower if:
  - (i) You possess a reasonable belief that the information you are providing relates to a possible securities law violation (or, where applicable, to a possible violation of the provisions [relating to temporary restraining orders relating to victim or witness

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159. 15 U.S.C. § 78u-6(h)(1)(A) (2012). Also included among the disclosures that are protected are those in connection with 18 U.S.C. § 1513, which deals with criminal punishment for attempts to kill witnesses, informants or victims. *See* 18 U.S.C. § 1513 (providing the rules regarding “[r]etaliating against a witness, victim, or an informant”). An individual alleging discharge or discrimination under the Dodd–Frank provisions may bring an action directly in a U.S. district court for relief. *See* 15 U.S.C. § 78u-6(h)(1)(B) (directing that actions be brought in the “appropriate district court of the United States”). The Dodd–Frank whistleblower provisions also include a longer statute of limitations for actions and greater damages than were provided in SOX. *See id.* § 78u-6(h)(1)(B)–(C) (detailing the rules for the statute of limitations and damages awards).

harassment) that has occurred, is ongoing, or is about to occur, and;

(ii) You provide that information in a manner described in [the general provisions relating to the protection of whistleblowers against retaliation set out in Section 922 of Dodd–Frank].

(iii) The anti-retaliation protections apply whether or not you satisfy the requirements, procedures and conditions to qualify for an award.<sup>160</sup>

Different courts interpreted the breadth of the anti-retaliation provisions differently. In 2013, the U.S. Court of Appeals for the Fifth Circuit held in *Asadi v. G.E. Energy (USA), L.L.C.*<sup>161</sup> that Dodd–Frank’s anti-retaliation provisions apply only to employees reporting information to the SEC, and do not extend to an employee who reported an FCPA violation only through internal channels.<sup>162</sup> The SEC took the opposite position, arguing in *amicus curiae* briefs in private retaliation lawsuits that individuals are entitled to protection from employment retaliation if they report information about a possible securities violation internally at a publicly traded company, regardless of whether they separately report the information to the SEC.<sup>163</sup>

Confronted with the issue in 2014 in *Liu Meng-Lin v. Siemens AG*,<sup>164</sup> the U.S. Court of Appeals for the Second Circuit sidestepped the internal reporting issue and instead affirmed a trial court’s dismissal of a claim of retaliation for reporting an FCPA violation

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160. 17 C.F.R. § 240.21F-2(b) (2017).

161. *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620 (5th Cir. 2013).

162. *See id.* at 623 (holding that “the plain language of the Dodd–Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC”).

163. *See* SEC, 2017 ANNUAL REPORT, *supra* note 16, at 22 (referring to the *amicus curiae* brief filed by the U.S. Solicitor General, acting on behalf of the DOJ and the SEC, which urged “the Supreme Court to recognize that Dodd–Frank’s statutory language, its legislative history, and the Commission’s rules require that individuals who internally report potential securities violations at a publicly-traded company are entitled to employment retaliation protection, regardless of whether they have separately reported that information to the Commission”).

164. 763 F.3d 175 (2d Cir. 2014).

on extraterritoriality grounds.<sup>165</sup> The next year, in *Berman v. Neo@Ogilvy LLC*,<sup>166</sup> the Second Circuit again confronted the definitional issue, this time finding that the anti-retaliation provisions did protect an employee who, as required by his job, reported internally first.<sup>167</sup> The employee in *Berman* only reported to the SEC after he was fired from his job.<sup>168</sup>

That same year, the SEC issued an “Interpretation of the SEC’s Whistleblower Rules under Section 21F of the Securities Exchange Act of 1934” (2015 Interpretive Guidance) in order to settle the ambiguity.<sup>169</sup> The 2015 Interpretive Guidance stated that an individual’s status as a whistleblower for purposes of protection under the Dodd–Frank anti-retaliation provisions does not require submission of the information to the SEC; instead, internal reporting is sufficient.<sup>170</sup>

Nonetheless, as discussed above, a circuit split developed. On the one hand, there was the argument that in order to qualify as a whistleblower for any Dodd–Frank purposes, including both incentive awards and anti-retaliation protection, an employee must report to the SEC.<sup>171</sup> On the other hand, there was the argument, espoused by the SEC, that that definition including the SEC reporting requirement applies only to the incentive award program.<sup>172</sup> In the anti-retaliation context, employees may also

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165. *See id.* at 178 (deciding to “affirm on the ground that Liu seeks an extraterritorial application of the antiretaliation provision, and that that provision does not apply extraterritorially”).

166. 801 F.3d 145 (2d Cir. 2015).

167. *See id.* at 151 (interpreting the anti-retaliation provisions).

168. *See id.* at 149 (noting that the employee did not report to the SEC until after he was fired, and then sought an anti-retaliation remedy under Dodd–Frank).

169. *See* Interpretation of the SEC’s Whistleblower Rules under Section 21F of the Securities Exchange Act of 1934, 80 Fed. Reg. 47,829 (Aug. 10, 2015) (to be codified at 17 C.F.R. pt. 241).

170. *See id.* (interpreting the anti-retaliation provisions). The SEC explained that anti-retaliation protection does not “depend on adherence to the reporting procedures specified in Exchange Act Rule 21F-9(a) [Procedures for submitting original information to the SEC], but is determined solely by the terms of Exchange Act Rule 21F-2(b)(1) [Prohibition against Retaliation].” *Id.*

171. *See supra* notes 161–163 and accompanying text (giving the Fifth Circuit’s view).

172. *See supra* notes 166–170 and accompanying text (encapsulating the view

qualify as whistleblowers if they “mak[e] disclosures that are required or protected under”<sup>173</sup> SOX—and SOX explicitly protects internal as well as external reporters.<sup>174</sup>

In June 2017, the Supreme Court of the United States granted certiorari in *Digital Realty Trust Inc. v. Somers*.<sup>175</sup> In that case, the U.S. Court of Appeals for the Ninth Circuit had sided with the Second Circuit, affirming the lower court’s decision that the Dodd–Frank whistleblower anti-retaliation provisions extend to all persons who make disclosures of suspected violations, regardless of whether they disclose only internally or to the SEC.<sup>176</sup> The Supreme Court issued its decision on February 21, 2018, reversing the Ninth Circuit decision and, at the same time, abrogating *Berman v. Neo@Ogilvy LLC*. The Supreme Court opted for the narrower approach: the Dodd–Frank anti-retaliation provisions, like its bounty provisions, require whistleblowers to report externally, to the SEC, in order to benefit from the statute’s protections.<sup>177</sup>

### *C. Issues Related to Dodd–Frank Whistleblowers in the FCPA Context*

Although the circuit split regarding the definition of whistleblowers has been resolved, there remain several open

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of the Second Circuit and the SEC).

173. 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012).

174. See Sinzdek, *supra* note 38, at 1633 n.5 (“SOX protects both employees who report internally to supervisors and externally to government regulators.”).

175. *Dig. Realty Tr., Inc. v. Somers*, 137 S. Ct. 2300 (2017). Despite the Supreme Court’s grant of certiorari, lower courts continued to make decisions on one side of the split or the other. See, e.g., *Smith v. Raytheon Co.*, No. 1:17-CV-00438, slip op. at 1 (E.D. Va. Aug. 11, 2017) (siding with the Fifth Circuit by adopting a narrow definition of a whistleblower).

176. See *Somers v. Dig. Realty Tr., Inc.*, 850 F.3d 1045, 1050–51 (9th Cir. 2017) (concluding that *Somers* was a whistleblower under Dodd–Frank, although he made his reports to the company’s senior management and not to the SEC).

177. See *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018) (holding that whistleblowers must report to the SEC in order to fall within the Dodd–Frank definition of whistleblower for purposes of the anti-retaliation protections as well as the incentive program).

issues of interpretation with respect to the application of the Dodd–Frank whistleblower provisions in the FCPA context.

### 1. Domestic Concerns or Just Issuers?

In a 2012 case, the U.S. District Court in the Middle District of Tennessee addressed the ramifications of the shared FCPA jurisdiction of the DOJ and SEC,<sup>178</sup> albeit in the context of the Dodd–Frank anti-retaliation provisions.<sup>179</sup> In *Nollner v. Southern Baptist Convention, Inc.*,<sup>180</sup> the court found that because the employee reported alleged violations of the FCPA anti-bribery provisions by a domestic concern, not by an issuer, the employee did not qualify as a whistleblower for purposes of Dodd–Frank’s anti-retaliation provisions.<sup>181</sup> As discussed above in Part III.B, the anti-retaliation provisions protect whistleblowers who provide information to the SEC; who assist in an investigation or action of the SEC related to such information; or who make disclosures that are required or protected under SOX, the Securities Exchange Act of 1934, or any other law, rule or regulation subject to the SEC’s jurisdiction.<sup>182</sup>

The issue in *Nollner* thus centered on whether the disclosure was “required or protected” by laws within the SEC’s jurisdiction.<sup>183</sup> The court explained that, while the SEC exercises jurisdiction over civil enforcement of FCPA anti-bribery provisions violations by issuers, *Nollner*’s case involved an alleged violation

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178. For an excellent analysis of the DOJ and SEC’s FCPA enforcement jurisdiction, see Black, *supra* note 20, at 1095 (arguing that FCPA enforcement does not fit within the SEC’s mission).

179. *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986 (M.D. Tenn. 2015).

180. 852 F. Supp. 2d 986 (M.D. Tenn. 2015).

181. *See id.* at 997 (finding that “because the defendants are not ‘issuers’ for purposes of the FCPA, they are not ‘subject to the jurisdiction’ of the SEC with respect to FCPA violations”).

182. *See supra* Part III.B (explaining the applicable protections for whistleblowers).

183. *Nollner*, 852 F. Supp. 2d at 995 (asserting that “a plaintiff seeking protection . . . must at least show . . . the disclosure was ‘required or protected’ by that law, rule, or regulation within the SEC’s jurisdiction”).

of the FCPA anti-bribery provisions by a non-issuer domestic concern, an area under the enforcement authority of the DOJ.<sup>184</sup> Because of that distinction, as a non-issuer, Nollner's employer was not subject to the jurisdiction of the SEC, and Nollner did not qualify for Dodd–Frank anti-retaliation protection.<sup>185</sup>

Although not a case that dealt with an incentive award, *Nollner* is a Dodd–Frank whistleblower case.<sup>186</sup> In *Nollner*, the court strictly distinguished between the application of the FCPA to issuers and the application of the FCPA to domestic concerns in the Dodd–Frank whistleblowing context.<sup>187</sup> If a question arises about whether courts will apply the Dodd–Frank whistleblower provisions to all FCPA violations, as opposed to just those by issuers, *Nollner* seems to indicate that they will not.<sup>188</sup>

## 2. Audit and Compliance Personnel and Attorneys

Another issue that has arisen in the Dodd–Frank whistleblower context is whether employees who perform audit, compliance or legal functions for a company can be eligible for incentive awards. With respect to compliance professionals, the answer appears to be “yes.”<sup>189</sup> In August 2014, the SEC awarded

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184. *See id.* at 996 (“Here, because the defendants are not issuers, only the DOJ—not the SEC—has jurisdiction over them with respect to FCPA violations.”).

185. *See id.* at 997 (“Thus, even assuming the allegations to be true, the Nollners may not maintain DFA [Dodd–Frank Act] retaliation claims premised on their reporting of potential FCPA violations by the defendants.”).

186. *See id.* at 992–98 (detailing the “Dodd–Frank Act Claim”).

187. *See id.* at 996 (“Thus, the jurisdiction of the SEC with respect to the FCPA violations is limited only to civil actions to enforce violations by *issuers*, but does not encompass FCPA violations by domestic concerns, which are subject to exclusive DOJ enforcement (civil and/or criminal).”).

188. *See id.* at 1002 (dismissing with prejudice the plaintiffs’ Dodd–Frank claims).

189. Note, however, that the answer appears to be different in the anti-retaliation context. In *Reyher v. Grant Thornton, LLP*, the U.S. District Court for the Eastern District of Pennsylvania dismissed an anti-retaliation suit by a certified public accountant who allegedly was fired for reporting accounting irregularities in certain clients’ tax documents. No. 16–1757, 2017 WL 2880585, at \*1 (E.D. Pa. July 6, 2017). The court dismissed the suit, reasoning that, because the whistleblower worked for a private company and failed to allege that public

\$300,000 to an audit and compliance employee who reported to the SEC after the company did not act on the information the employee provided.<sup>190</sup> Sean McKessy, then-Chief of the SEC's Office of the Whistleblower, said that “[i]ndividuals who perform internal audit, compliance, and legal functions for companies are on the front lines in the battle against fraud and corruption. They often are privy to the very kinds of specific, timely, and credible information that can prevent an imminent fraud or stop an ongoing one.”<sup>191</sup> As a result, they may be eligible for awards, “if their companies fail to take appropriate, timely action on information they first reported internally.”<sup>192</sup>

In April 2015, the SEC announced the award of between \$1.4–\$1.6 million to a whistleblowing compliance employee who provided information for an enforcement action against the employee's company.<sup>193</sup> In its announcement, the SEC further clarified the application of the incentive program to compliance personnel,<sup>194</sup> emphasizing that receipt of a whistleblower award requires the submission of information that derives from the whistleblower's “independent knowledge or independent analysis.”<sup>195</sup> This provision seems to restrict the eligibility of audit and compliance personnel. As the SEC explains, unless an exception applies, “[t]he Commission will not consider information

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companies were among the clients with the problematic accounting, no entity regulated by the SEC was involved. *See id.* at \*7 (“For Reyher, the connection between Grant Thornton and its public company clients is little more than a coincidence.”). Thus, the whistleblower was not protected by Dodd–Frank or SOX. *Id.*

190. *See Press Release, SEC Announces \$300,000 Award to Audit and Compliance Professional Who Reported Company's Wrongdoing*, U.S. SEC. & EXCHANGE COMMISSION (Aug. 29, 2014), <https://www.sec.gov/news/press-release/2014-180#.VAID3Eh2eos> (last visited Apr. 14, 2018) (announcing the whistleblower award) (on file with the Washington and Lee Law Review).

191. *Id.*

192. *Id.*

193. *See In re Claim for Award in Connection with [Redacted] [Redacted]*, Exchange Act Release No. 74781 (Apr. 22, 2015) (Whistleblower Award Proceeding), <https://www.sec.gov/rules/other/2015/34-74781.pdf> (ordering “that Claimant shall receive [Redacted] of the monetary sanctions collected in this Covered Action”).

194. *See id.* at 1 n.1 (applying the provisions of Section 21F).

195. *Id.*

to be derived from [a whistleblower's] independent knowledge or independent analysis" if the whistleblower "obtained the information because" the whistleblower was "[a]n employee whose principal duties involve compliance or internal audit responsibilities."<sup>196</sup>

In the case at hand, however, an exception did apply. The SEC Claims Review Staff found that the employee "had a reasonable basis to believe that disclosure of the information to the [SEC] [was] necessary to prevent the [company] from engaging in conduct that [was] likely to cause substantial injury to the financial interest or property of the [company] or investors," and therefore qualified for the exception in the rule.<sup>197</sup> Andrew Ceresney, then-Director of the SEC's enforcement division, noted that the compliance officer provided the information to the SEC "after responsible management at the entity became aware of potentially impending harm to investors and failed to take steps to prevent it."<sup>198</sup>

In addition to audit and compliance personnel, there have been questions regarding attorney eligibility for whistleblower bounty awards. The 2011 Regulations provide that—for purposes of satisfying the Dodd–Frank requirement that a whistleblower provide independently derived original information—the SEC will not consider information obtained through a communication that was subject to the attorney-client privilege, unless disclosure of that information would otherwise be permitted pursuant to (1) Section 205.3(d)(2) of the SEC's Standards of Professional Conduct for Attorneys, (2) applicable state attorney conduct rules, or (3) "otherwise."<sup>199</sup> Thus, although the default position is that attorneys are ineligible to receive bounties in connection with

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196. *Id.* (explaining the provisions of Section 21F-4(b)(4)(iii)(B)).

197. *See id.* at 2 n.1 (internal quote omitted).

198. Richard L. Cassin, *Compliance Officer Awarded \$1.5 Million under SEC Whistleblower Program*, FCPA BLOG (Apr. 22, 2015, 11:28 AM), <http://www.fcpablog.com/blog/2015/4/22/compliance-officer-awarded-15-million-under-sec-whistleblowe.html> (last visited Dec. 26, 2017) (on file with the Washington and Lee Law Review).

199. *See, e.g.*, 17 C.F.R. §§ 240.21F-4(b)(4)(i)–240.21F-4(b)(4)(ii) (2018) (explaining the requirement).



information they learn in the course of representing a client,<sup>200</sup> there are certain situations in which an attorney may nevertheless be eligible for an award.

First, an attorney would be eligible if she provided information to the SEC permitted under Section 205.3(d)(2) of the Standards of Professional Conduct for Attorneys.<sup>201</sup> Section 205.3(d)(2), adopted by the SEC in 2003, provides that:

(2) An attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary:

(i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;

(ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury . . . ; suborning perjury . . . ; or committing any act . . . that is likely to perpetrate a fraud upon the Commission; or

(iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.<sup>202</sup>

Section 205 provides “permissive disclosure options” on which an attorney may rely when reporting confidential client information to the SEC and seeking a whistleblower incentive award.<sup>203</sup>

Second, an attorney would be eligible for an award if her action in informing the SEC were permitted by applicable state attorney

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200. See Jennifer M. Pacella, *Advocate or Adversary? When Attorneys Act as Whistleblowers*, 28 GEO. J. LEGAL ETHICS 1027, 1045–50 (2015) (setting out the conflicts of interest that result from allowing attorneys to collect whistleblower bounties).

201. See 17 C.F.R. § 205.3(d)(2) (offering the circumstances under which attorneys are eligible to receive bounties).

202. *Id.*

203. See Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. ON REG. 491, 496 (2016) [hereinafter Pacella, *Conflicted Counselors*] (detailing “the permissive disclosure options of the Part 205 Rules to report confidential client information to the SEC for a financial reward”).

conduct rules.<sup>204</sup> Although all state rules prohibit attorneys from knowingly revealing information relating to the representation of a client without the consent of the client, virtually all states also recognize exceptions to this duty based on the state's interest in preventing harm to third persons resulting from the client's illegal or fraudulent acts.<sup>205</sup>

The third situation in which an attorney would be eligible for an award, "otherwise,"<sup>206</sup> remains unclear. It was not explained in the SEC's Adopting Release for the 2011 Regulations, and has not been clarified since. At the very least, "otherwise" would seem to give the SEC discretion to consider privileged information when circumstances, in the judgment of the SEC, warrant it.

There are some indications that anti-retaliation provisions that ordinarily protect employees may also act to protect attorney whistleblowers.<sup>207</sup> In February 2017, the former general counsel of Bio-Rad, Sanford "Sandy" Wadler, was awarded nearly \$10 million<sup>208</sup> in damages for his firing by the company after he reported FCPA concerns relating to the company's operations in China.<sup>209</sup> In that case, the U.S. Magistrate Judge ruled that the

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204. See 17 C.F.R. § 240.21F-4(b)(4)(i) (making attorneys eligible for awards if "disclosure of that information would otherwise be permitted by any attorney pursuant to . . . the applicable state attorney conduct rules").

205. See William McLucas et al., *Attorneys Caught in the Ethical Crosshairs: Secretkeepers as Bounty Hunters Under the SEC Whistleblower Rules*, 46 SEC. REG. & L. REP. 711, 714 (2014) (explicating that the harm can be "likely to result from a client's illegal and/or fraudulent acts").

206. 17 C.F.R. § 240.21F-4(b)(4)(i) (2018).

207. For an excellent discussion of retaliation protections for attorney whistleblowers, see generally Pacella, *Conflicted Counselors*, *supra* note 203.

208. There were subsequent reports that, because the back-pay amounts would be doubled, the original \$8 million estimate was low. See Richard L. Cassin, *FCPA Whistleblower: Former Bio-Rad GC Awarded \$10 Million for Retaliatory Firing*, FCPA BLOG (Feb. 7, 2017, 7:53 AM), <http://www.fcpablog.com/blog/2017/2/7/fcpa-whistleblower-former-bio-rad-gc-awarded-10-million-for.html> (last visited Dec. 26, 2017) ("[Wadler's] lawyers at Kerr & Wagstaffe said the back pay damages will be doubled, resulting in a total award of \$10.8 million.") (on file with the Washington and Lee Law Review).

209. See Final Verdict Form at 3, *Wadler v. Bio-Rad Labs, Inc.*, No. 3:15-CV-02356 (N.D. Cal. Feb. 6, 2017), ECF No. 223 (showing that the jury answered affirmatively the question: "Was Mr. Wadler's engaging in protected activity under the Sarbanes-Oxley Act a substantial motivating reason for Bio-Rad's discharge of Mr. Wadler?").

SOX whistleblower protections preempted attorney-client privilege.<sup>210</sup>

### 3. Extraterritoriality

A third issue for the SEC whistleblower bounty program of particular importance in the FCPA context is its application to foreign whistleblowers. In 2014, the Second Circuit in *Liu-Meng-Lin* decided that the Dodd–Frank whistleblower anti-retaliation provisions did not protect a foreign whistleblower who reported a potential violation of the FCPA.<sup>211</sup>

However, the SEC has been clear that the incentive award system does apply to foreign whistleblowers. In September 2014, in a release concerning the largest award to that date (\$30 million), the SEC reiterated that the bounty incentive program and the anti-retaliation provisions of Dodd–Frank have different congressional purposes, aligned with the two whistleblower descriptions or definitions in the law.<sup>212</sup> As the SEC explained:

In our view, there is a sufficient U.S. territorial nexus whenever a claimant’s information leads to the successful enforcement of a covered action brought in the United States, concerning violation of the U.S. securities law, by the Commission, the U.S. regulatory agency with enforcement authority for such violations. When these key territorial connections exist, it makes no difference whether, for example, the claimant was a foreign national, the claimant resides overseas, the information

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210. See Judgment at 1–2, Wadler, No. 3:15-CV-02356, ECF No. 227 (ordering Wadler’s recovery); see also Melissa Maleske, *GCS May Increasingly Blow the Whistle After Bio-Rad Verdict*, LAW360 (Feb. 9, 2017, 8:39 PM), <https://www.law360.com/articles/890360/gcs-may-increasingly-blow-the-whistle-after-bio-rad-verdict> (last visited Dec. 26, 2017) (“An \$8 million federal jury verdict award for former Bio-Rad general counsel-turned-whistleblower Sanford Wadler may loosen the restrictions of GC privilege and embolden more in-house attorneys to come forward as whistleblowers against their companies, attorneys say.”) (on file with the Washington and Lee Law Review).

211. See *id.* at 177 (dismissing the complaint by a plaintiff who was a citizen and resident of Taiwan).

212. See *In re* Claim for Award in Connection with [Redacted] [Redacted], Exchange Act Release No. 74781 (Apr. 22, 2015) (Whistleblower Award Proceeding), <https://www.sec.gov/rules/other/2015/34-74781.pdf> (ordering the award).

was submitted from overseas, or the misconduct comprising the U.S. securities law violation occurred entirely overseas.<sup>213</sup>

The SEC further explained that this extraterritorial approach is consistent with the congressional purpose of motivating persons with inside knowledge of violations to come forward.<sup>214</sup> For purposes of the incentive award system, determinative factors are whether the whistleblower voluntarily provides original information to the SEC that leads to a successful enforcement action with a fine in excess of \$1,000,000,<sup>215</sup> not nationality or location. In fact, with respect to enforcement of the FCPA, the most likely whistleblowers are located outside the United States.<sup>216</sup>

SEC efforts to incentivize foreign whistleblowers with the bounty system have been fairly successful. In fiscal year 2017, the whistleblower program received tips from individuals in 114 countries outside of the United States,<sup>217</sup> and the SEC estimated that approximately 12% of the individuals participating in the program were located abroad.<sup>218</sup>

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213. *Id.* at 2 n.2. The same award release also declined to follow the stricter territorial approach that the Second Circuit had adopted in *Liu v. Siemens*. See *id.* (allowing the award “notwithstanding the existence of certain aspects of Claimant’s application”).

214. See *id.* (citing S. REP. NO. 111-176, at 110 (2010)). Note, however, that the court in *Liu Meng-Lin v. Siemens* stated that the bounty provision applies extraterritorially because of regulations promulgated by the SEC, not because of Congressional intent. See *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 182–83 (2d Cir. 2014) (“17 C.F.R. § 240.21F–8(c)(2) does not mention the anti-retaliation provision, and indeed, other SEC regulations suggest that the requirements of the anti-retaliation and bounty provisions are to be considered separately.”).

215. See 15 U.S.C. § 78u-6(a)(3) (2012) (defining “original information”).

216. See Jeffrey Mathis, *Protecting the Brave: Why Congress Should Amend the Dodd–Frank Act to Better Protect FCPA Whistleblowers*, 49 J. MARSHALL L. REV. 829, 838 (2016) (“In recent years, the DOJ and SEC have dramatically increased FCPA enforcement, especially internationally. Between 2005 and 2010, more than half of the companies that were involved in FCPA resolutions were either foreign companies or U.S. subsidiaries of foreign companies.”).

217. See SEC, 2017 ANNUAL REPORT, *supra* note 16, at 26 (depicting a map reflecting the countries from which whistleblower tips came in fiscal year 2017).

218. See *id.* at 33 (displaying a chart of whistleblower tips by country in fiscal year 2017).

#### IV. *The Morality of Whistleblowing Incentives*

Perceptions of corporate whistleblowing vary. In the era of Wikileaks and Edward Snowden, some see whistleblowers as heroes, defenders of law, morality, and values more important than company loyalty.<sup>219</sup> Others, however, see them as traitors and violators of their duty of loyalty to their organizations.<sup>220</sup> In addition, some scholars argue that monetary incentives for whistleblowing may ultimately decrease reporting of illegal activity.<sup>221</sup>

##### A. *The Ethics of Whistleblowing*

One way to understand corporate whistleblowing is as a contest between duty toward the public and duty toward the employer. In this understanding, whistleblowing is the individual's moral obligation to society. Individuals have a public duty to report lawbreaking, whether it is a street crime or a violation of the FCPA.<sup>222</sup> At the same time, whistleblowing is the decision to defy one's superiors and (sometimes) harm one's

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219. See generally Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 WORK & OCCUPATIONS 107 (1999).

220. See Frank J. Cavico, *Private Sector Whistleblowing and the Employment-At-Will Doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543, 642 (2004) ("Whistleblowing employees often are vilified as 'snitches,' 'informants' (and most regrettably in the new federal law), and 'traitors,' and consequently may be shunned, 'blackballed,' or threatened or even harmed by fellow employees for not being loyal 'team-players.'").

221. See Naseem Faqih, Note, *Choosing Which Rule to Break First: An In-House Attorney Whistleblower's Choices After Discovering A Possible Federal Securities Law Violation*, 82 FORDHAM L. REV. 3341, 3350–51 (2014) ("Whistleblowers acting in response to a duty to report can be viewed in a better light than those who act—or are perceived to act—in response to a monetary reward . . . this perceived motivation is in turn affected by how whistleblowers are incentivized.").

222. See David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269, 286 (1996) (arguing for the existence of an underlying "prima facie duty to obey the law" for all).

institution.<sup>223</sup> All employees are agents of their organization, and so owe a fiduciary duty of loyalty to the employer.<sup>224</sup> Employees or agents thus have a legal duty to act loyally for the benefit of their employer/principal in all matters connected with that agency.<sup>225</sup>

Whistleblowing thus involves weighing one's duty to society *vis-à-vis* one's duty of loyalty to the organization.<sup>226</sup> A study published in the *Journal of Experimental Psychology* showed that persons who witnessed unethical behavior and reported it used ten times as many terms related to "fairness" and "justice."<sup>227</sup> Participants who witnessed unethical behavior and did not report it used twice as many terms related to "loyalty."<sup>228</sup> The study went on to demonstrate that emphasizing "fairness" might in some cases influence people's decisions regarding reporting violations that they witness.<sup>229</sup> The study suggested that such an emphasis in corporate mission statements and codes could change employees' decisionmaking in the whistleblowing context.<sup>230</sup>

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223. See Lobel, *supra* note 52, at 434 ("[W]histleblowing requires an individual to defy immediate authorities, even when the information disclosed is sensitive and its exposure may harm the organization.").

224. See Leslie L. Cooney, *Employee Fiduciary Duties: One Size Does Not Fit All*, 79 MISS. L.J. 853, 854 (2010) ("As agents of the employers, all employees owe broad fiduciary duties to their employers.").

225. See RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006) (recognizing that this fiduciary duty extends to "all matters connected with the agency relationship").

226. See Gregory Liyanarachchi & Chris Newdick, *The Impact of Moral Reasoning and Retaliation on Whistle-Blowing: New Zealand Evidence*, 89 J. BUS. ETHICS 37, 40 (2009) (arguing that "employees face an extremely difficult choice between their loyalty to the organization on the one hand and their moral and social obligations to do the right thing and potential personal consequences of blowing the whistle on the other").

227. Adam Waytz et al., *The Whistle-Blower's Quandary*, N.Y. TIMES, Aug. 4, 2013, at SR12. For the study underlying the article, see generally Adam Waytz et al., *The Whistleblower's Dilemma and the Fairness-Loyalty Tradeoff*, 49 J. EXPERIMENTAL SOC. PSYCH. 1027 (2013).

228. See Adam Waytz et al., *The Whistleblower's Dilemma and the Fairness-Loyalty Tradeoff*, 49 J. EXPERIMENTAL SOC. PSYCH. 1027, 1027 (2013) ("[W]e propose that differences in people's valuation of moral norms, fairness versus loyalty, contribute to whistleblowing decisions.").

229. See *id.* at 1031–32 (indicating the influence of moral norms).

230. See *id.* at 1032 (discussing the implications of the study).

Such a schematic understanding of two opposed duties tends to obscure other considerations. What about an individual's duty to herself: the risk of harm to the employee from reporting?<sup>231</sup> What about the family and others who rely on the employee? What about the possibility that the employer itself, and many fellow employees, might be harmed by the disclosure? How are such considerations to be "balanced" against the rather unspecific societal harm of violation of the securities laws? In the FCPA context, the societal harms—improper yet often-customary payments made in another country—may seem particularly amorphous.

In fact, the difficulty of grappling with such questions may discourage whistleblowing. A New Zealand study<sup>232</sup> showed that individuals with higher propensities for moral reasoning are more likely to blow the whistle than are individuals with lower levels of moral reasoning.<sup>233</sup> Actually reporting, as opposed to staying silent, would thus seem to be correlated with the difficulty of the decision.

From this perspective, a bounty system simplifies the ethical calculus. Concerns about dependents and oneself are ameliorated by cash payment. More deeply, the critique of bounties—that they reduce the ethical quality of the employee's decision to blow the whistle—may be just the point. Whistleblowers, acting in a corporate context, can truthfully say to themselves that they made a rationally self-interested decision. Bounties thus raise the question of whistleblowing for less than purely principled reasons, with impure hearts and unclean hands, rather than out of a sense of public duty.

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231. See Mathieu Bouville, *Whistle-Blowing and Morality*, 81 J. BUS. ETHICS 579, 582 (2007) (evaluating the moral complications of reporting).

232. The New Zealand study used accounting students as surrogates for their professional counterparts. For a discussion of the use of students in empirical research in the context of corporate disclosures, see Linda Espahbodi, Reza Espahbodi, Norma Juma & Amy Deen Westbrook, *Does Inclusion of Sustainability Priorities in Corporate Strategy Matter to Investors* (unpublished manuscript) (on file with the Washington and Lee Law Review).

233. See Liyanarachchi & Newdick, *supra* note 226, at 44 (demonstrating that the impact of the level of moral reasoning on participants' propensity to blow the whistle increases substantially when they anticipate strong retaliation).

*B. Impure Hearts and Unclean Hands*

Understanding whistleblowing as a public duty has its uses, but also obscures the possibility that whistleblowers may properly report violations for improper reasons. If whistleblowing is justified only when a person acts out of public duty, with purity of heart,<sup>234</sup> then whistleblower bounties may be not only unnecessary, but also wrong.<sup>235</sup> On the other hand, doing the right thing for the public interest, i.e., reporting violations of law for the wrong reason, is still doing the right thing for the public interest.<sup>236</sup> So it is difficult to argue, from a public policy perspective, that disclosures of FCPA violations are only worthwhile if made for altruistic reasons. In August 2012, NCR Corporation (NCR) complained about the motivations of a “purported whistleblower” who alleged that company sales practices in China, the Middle East, and Africa might have violated the FCPA.<sup>237</sup> Nevertheless, the SEC undertook a three-year investigation, eventually declining to recommend an enforcement action.<sup>238</sup> Regardless of

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234. Douglas Oliver, *Whistle-Blowing Engineer*, 129 J. PROF. ISSUES IN ENGINEERING EDUC. & PRAC. 246, 246–56 (2003) (“Whistle-blowing is an activity that should only be entered into with pure motives.”); see Bouville, *supra* note 231, at 584 (“There is a tendency to construe whistle-blowing as mandatory and whistle blowers as heroes, even though these are logically incompatible.”).

235. See Colin Grant, *Whistle-Blowers: Saints of Secular Culture*, 39 J. BUS. ETHICS 391, 392 (2002) (arguing that if a person blows the whistle in anticipation of a reward, the ethical quality of the act is compromised); Bouville, *supra* note 231, at 584 (claiming that if whistleblowing is a “moral obligation,” then rewards are incompatible with this responsibility).

236. See Bouville, *supra* note 231, at 583 (asking “if someone saves my life out of revenge or greed, should I not say ‘thank you’ rather than ‘this was wrong, never do it again?’”); Thomas L. Carson et al., *Whistle-Blowing for Profit: An Ethical Analysis of the Federal False Claims Act*, 77 J. BUS. ETHICS 361 (2008) (contending that “having good motives is not necessary for being morally justified in whistle-blowing”).

237. See Chris Matthews & Sam Rubinfeld, *NCR Investigates Alleged FCPA Allegations*, WALL ST. J. (Aug. 13, 2012, 5:02 PM), <http://blogs.wsj.com/corruption-currents/2012/08/13/ncr-investigates-alleged-fcpa-violations/> (last visited Dec. 28, 2017) (stating “NCR has certain concerns about the veracity and accuracy of the allegations”) (on file with the Washington and Lee Law Review).

238. See Richard L. Cassin, *NCR: SEC Declination Three Years After Whistleblower Complaint*, FCPA BLOG (Aug. 6, 2015, 8:08 AM), <http://www.fcpablog.com/blog/2015/8/6/ncr-sec-declination-three-years-after-whistle-blower-complain.html> (last visited Dec. 28, 2017) (quoting NCR as saying that it



the merits of the allegations, why do the employee's motives matter?

What if the employee is actually culpable? On June 13, 2017, the U.S. House of Representatives passed the Financial Choice Act, which was intended to rewrite much of Dodd–Frank.<sup>239</sup> Among other things, the proposed overhaul would prevent the SEC from rewarding “culpable” whistleblowers who took part in the misconduct they reported.<sup>240</sup> In addition to the political hurdles that the proposed legislation ultimately faced, some attorneys objected to the change based on the adverse effect on ordinary Americans and shareholders that would result from fewer whistleblowers.<sup>241</sup>

It may be the case that an individual's desire for profit or revenge is more likely to promote the public interest in reporting than an individual's virtuous desire to support the law.<sup>242</sup> However,

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had been “informed by the staff of the [SEC] that [the SEC] d[id] not intend to recommend an enforcement action” (internal quote omitted) (on file with the Washington and Lee Law Review).

239. See Financial Choice Act of 2017, H.R. 10, 115th Cong. (2018) (stating that part of the purpose of the Act is to “repeal[] the provisions of the Dodd–Frank Act that make America less prosperous, less stable, and less free”).

240. See *id.* § 828, Denial of Award to Culpable Whistleblowers (preventing bounty payments “to any whistleblower who is responsible for, or complicit in, the violation of the securities laws for which the whistleblower provided information to the Commission”).

241. See Jasmine Ye Han, *Dodd–Frank Overhaul Could Spark Rebound in SOX Whistle-Blower Cases*, BLOOMBERG BNA (June 5, 2017), <https://www.bna.com/doddfrank-overhaul-spark-n73014451928/> (last visited Dec. 29, 2017) (arguing that “the overhaul envisioned in the Financial Choice Act could have one unintended consequence: a possible rebound in the number of SOX whistle-blower claims filed against companies”) (on file with the Washington and Lee Law Review).

242. See Bouville, *supra* note 231, at 587 (“As Mandeville . . . pointed out, greed and other flaws of character may give better results than virtue.”). In 1705, Bernard Mandeville published the poem, *The Fable of the Bees Or Private Vices, Publick Benefits*, with the book. See *id.* (asserting this proposition). Mandeville explained the moral as the:

[I]mpossibility of enjoying all the most elegant comforts of life that are to be met with in an industrious, wealthy and powerful nation, and at the same time, be blessed with all the virtue and innocence that can be wished for in a golden age; from thence to expose the unreasonableness and folly of those, that desirous of being an opulent and flourishing people and wonderfully greedy after all the benefits they can receive as such, are yet always murmuring at and exclaiming against those

should whistleblower incentives be rejected based on an ideal of the ethical purity of the whistleblower, even though they may decrease corruption? What is at issue here: institutional corruption or individual virtue?

Such questions are difficult to address in the abstract; they are almost always situated in specific contexts. Different approaches to conflicts between organizational loyalty and legal compliance may reveal cultural and legal ambivalences about administrative law, transparency, and individual dissent in group settings.<sup>243</sup> Moral analysis of the Dodd–Frank whistleblower incentive system is therefore particularly tricky in the FCPA context, where reporting often happens in fields contested among various U.S. and non-U.S. attitudes and interests.

*C. The Impact of Whistleblower Incentives: Does Paying for Altruistic Behavior Reduce It?*

Assuming that many whistleblowers report for altruistic reasons still raises questions regarding the appropriateness of monetary incentives. Is it right to pay someone to do the right thing? Some scholars have argued that whistleblower bounties may have inadvertent counterproductive effects.<sup>244</sup> Rather than triggering internal motivations of potential reporting individuals, “framing the reporting behavior as a commodity [by paying a monetary award] may actually crowd out, or suppress, internal

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vices and inconveniences that from the beginning of the world to this present day have been inseparable from all kingdoms and states that ever were famed for strength, riches, and politeness, at the same time.

*Id.*

243. See Lobel, *supra* note 52, at 436 (“By introducing parallel analyses in the debates in the area of family ties in criminal procedure, civic disobedience and illegal orders in military settings, and professional roles and legal ethics, the Article illuminates the pervasive need to connect between substance and form . . .”).

244. See Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties and Protections for Reporting Illegal Activity*, 88 TEX. L. REV. 1151, 1151 (2010) (introducing a study that “offers important practical findings about the costs and benefits of different regulatory systems, including findings about inadvertent counterproductive effects of certain legal incentives”).

moral motivation.”<sup>245</sup> The idea of motivational crowding suggests that external monetary rewards or punishments may undermine intrinsic motivations driven by an individual’s sense of moral or civic duty;<sup>246</sup> for example, monetary incentives for charitable acts may decrease principled behavior.<sup>247</sup> Studies show that when children are motivated to perform altruistic acts through an appeal to their self-interest, if the reward is removed, there is no longer any desire to continue performing the task.<sup>248</sup>

Reducing “the right thing” to a cost-benefit analysis, or a competition, may be appropriate and effective when applied to a company’s motivation,<sup>249</sup> but just the opposite when applied to the motivations of people who work there. One recent study has shown that the motivational crowding resulting from financial incentives for whistleblowers combined with a minimum dollar threshold for payment of those incentives may inhibit reporting of frauds falling below the threshold amount.<sup>250</sup>

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245. See *id.* at 1155 (reporting the results of a series of experimental surveys of a representative panel of more than 2,000 employees).

246. See *id.* at 1179 (stressing this theory); EDWARD L. DECI & RICHARD M. RYAN, *INTRINSIC MOTIVATION AND SELF-DETERMINATION IN HUMAN BEHAVIOR* 43 (1985) (distinguishing extrinsic motivation linked to external factors, such as financial incentives, and intrinsic motivation driven by an individual’s sense of morality or duty); see also BRUNO S. FREY, *NOT JUST FOR THE MONEY: AN ECONOMIC THEORY OF PERSONAL MOTIVATION* 11 (1997) (arguing that “the money offer crowds-out the citizens’ motivation to do anything for the common good”).

247. See Feldman & Lobel, *supra* note 244, at 1179 (“For example, paying people in return for their blood might lead donors to view the event as a transaction rather than a charitable act, thereby eroding altruistic blood donations.”).

248. See, e.g., Alfie Kohn, *The Wrong Way to Get People to Do the Right Thing*, *PSYCHOL. TODAY* (May 7, 2015), <https://www.psychologytoday.com/blog/the-homework-myth/201505/the-wrong-way-get-people-do-the-right-thing> (last visited Dec. 29, 2017) (arguing that appealing to self-interest, such as using rewards, makes people less helpful) (on file with the Washington and Lee Law Review).

249. See, e.g., *Dodge v. Ford Motor Co.*, 204 Mich. 459, 507 (Mich. 1919) (articulating the shareholder wealth maximization doctrine); *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969) (establishing a reasonableness test for corporate charitable donations).

250. See Leslie Berger et al., *Hijacking the Moral Imperative: How Financial Incentives Can Discourage Whistleblower Reporting*, *AUDITING: J. PRAC. & THEORY*, Aug. 2017, at 1, 2 (conducting the experiment that explores this inhibition on whistleblowing).

V. *Corporate Whistleblower Incentives in the United States and Other Legal Cultures*

A. *U.S. Enthusiasm for Whistleblower Incentives*

As mentioned, the United States has encouraged whistleblowing since its founding. Whistleblowing is an important aspect of law enforcement in the United States in securities law and in a range of other contexts. Concomitantly, the United States has a long tradition of encouraging and rewarding tipsters.<sup>251</sup> As discussed below, the United States has several “bounty” programs in the corporate whistleblowing context apart from the incentive programs established by Dodd–Frank. These include the False Claims Act, the IRS reporting program, and a now-defunct SEC Office of the Inspector General program for reports of insider trading. In addition, a whistleblower award program was established by the Commodity Futures Trading Commission (the CFTC) at the same time as the SEC program.

In light of this tradition, the establishment of the Dodd–Frank whistleblower incentive system is unsurprising. Congressional debate over Dodd–Frank included assertions that monetary incentives will increase reporting of illegal activity. Then-Senator Richard Shelby (R-Ala.) stated that “the guaranteed massive minimum payments and limited SEC flexibility ensures that a line of claimants will form at the SEC’s door.”<sup>252</sup> Still, the U.S. enthusiasm for whistleblowing incentives is unique.<sup>253</sup>

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251. The idea that the government should pay for the information it requires to enforce the law also runs deep in U.S. legal culture outside the securities law context. Consider the common practice of paying informants.

252. 156 CONG. REC. S4076 (daily ed. May 20, 2010).

253. See Boyne, *supra* note 42, at 279, 280 (“[W]hen the Federal Claims Act was amended in 1986 to increase the likelihood that a whistleblower would receive a financial award, the number of FACA reports of false claims for government funds increased from an average of 6 per year to almost 2 per day in 1999.”).

*B. Other Federal Corporate Whistleblower Incentive Programs*

*1. The False Claims Act*

*Qui tam* suits under the False Claims Act (FCA)<sup>254</sup> are perhaps the first example of a U.S. federal law offering a monetary incentive for employees to report illegal behavior externally.<sup>255</sup> The FCA was enacted in 1863 to target Union contractors defrauding the Lincoln Administration during the Civil War.<sup>256</sup> The FCA enables a whistleblower, as private citizen, to sue a business that is defrauding the U.S. government and to recover funds on the government's behalf.<sup>257</sup> The FCA rewards the whistleblower whose suit recovers government funds and protects her from retaliation, recognizing the risks she undertakes to stop fraud against the government.<sup>258</sup> Under the False Claims Act Reform Act of 1986, if found liable under the FCA, a business must pay as much as three times the government's losses, plus penalties, for each false claim.<sup>259</sup> The DOJ may intervene in the case, but regardless, if funds are recovered by the government, the whistleblower *qui tam* plaintiff (known as the "relator") is entitled to 15%–30% of the recovery, depending on the circumstances.<sup>260</sup>

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254. 31 U.S.C. §§ 3729–3733 (2012).

255. *See id.* § 3730(d) (providing for a 15%–25% whistleblower bounty if the government intervenes in the action, and a 25%–30% bounty if the whistleblower litigates the case to completion without the government).

256. *See* Boyne, *supra* note 42, at 285 (stating that government fraud is not only a contemporary phenomenon in response to increased federalization, but also a historical one that traces back to the Civil War era); Markey & Azorsky, *supra* note 104 (identifying the Act's intent to target private defense contractor fraud during the Civil War).

257. In addition to the federal False Claims Act, approximately thirty states have enacted versions of the statute to allow individuals to bring similar lawsuits in state courts.

258. *See* 31 U.S.C. § 3730 (providing the procedures, rights, and protections granted to relators who bring a civil action under the Act); Boyne, *supra* note 42, at 287–88 (describing the incentives and protections of whistleblowers under the False Claims Act).

259. *See id.* § 3729(1), (3) (setting the penalties for a person found guilty of government fraud).

260. *See id.* § 3730(d) (permitting prevailing relators to recover attorneys' fees and reasonable expenses in addition to the bounty).

Some of the best-known whistleblower bounties have been paid in the FCA context. In 2009, the DOJ awarded six whistleblowers bounties totaling over \$100 million in connection with an investigation into Pfizer Inc.'s promotion of certain pharmaceutical products.<sup>261</sup> In 2010, Cheryl Eckhard was awarded \$96 million for reporting information relating to irregularities at GlaxoSmithKline's manufacturing facility in Puerto Rico.<sup>262</sup> FCA cases are common. In fiscal year 2017, the U.S. government recovered over \$3.7 billion from civil FCA cases.<sup>263</sup> Of the total recovered in 2017, \$3.4 billion was attributed to 669 *qui tam* lawsuits.<sup>264</sup> The government awarded the whistleblowers a total of \$392 million.<sup>265</sup>

## 2. Internal Revenue Service Whistleblower Informant Award Program

Another well-known U.S. federal whistleblower incentive program is run by the Internal Revenue Service (IRS).<sup>266</sup> The IRS

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261. See LIPMAN, *supra* note 63, at 45–46 (“[Pfizer] had agreed to pay \$2.3 billion, the largest healthcare fraud settlement in the history of the Department of Justice, to resolve criminal and civil liability arising from the illegal promotion of certain pharmaceutical products.”).

262. See Peter Howe, *Whistleblower Wins \$96 Million in GlaxoSmithKline Case*, NBCUNIVERSAL (Mar. 21, 2014), [http://www.necn.com/news/new-england/\\_NECN\\_Whistleblower\\_Wins\\_96\\_Million\\_in\\_GlaxoSmithKline\\_Case\\_NECN-251401891.html](http://www.necn.com/news/new-england/_NECN_Whistleblower_Wins_96_Million_in_GlaxoSmithKline_Case_NECN-251401891.html) (last visited Jan. 10, 2018) (detailing the GlaxoSmithKline case, in which the company had to pay a \$750 million penalty for drug manufacturing lapses) (on file with the Washington and Lee Law Review).

263. See *Press Release, Justice Department Recovers \$3.7 Billion From False Claims Act Cases in Fiscal Year 2017*, U.S. DEP'T JUST. (Dec. 21, 2017), <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017> (last visited Apr. 14, 2018) (detailing the types and amounts of recoveries from the False Claims Act in 2017) (on file with the Washington and Lee Law Review).

264. See *id.* (“The number of lawsuits filed under the *qui tam* provisions of the Act has grown significantly since 1986, with 669 *qui tam* suits filed this past year—an average of more than 12 new cases every week.”).

265. See *id.* (stating that whistleblowers “are often essential to uncovering the truth”).

266. See 26 U.S.C. § 7623 (2012) (providing awards to whistleblowers who expose tax underpayments or violations of the Internal Revenue Code).

offers percentages of recovered taxes to those who report tax evasion.<sup>267</sup> This program, which was put into place over thirty years ago, requires the IRS to pay whistleblower awards of 15%–30% of collected proceeds (e.g., tax, penalties, interest and other amounts) that result from an action in which the Treasury Department acts based on information provided by the whistleblower and collects more than \$2,000,000.<sup>268</sup> In 2006, Congress established a whistleblower office within the IRS to administer those awards.<sup>269</sup>

The IRS has recovered billions of dollars in federal taxes based on whistleblower tips, and pays out millions of dollars in rewards each year.<sup>270</sup> In August 2014, the Department of the Treasury issued new regulations<sup>271</sup> that expand its whistleblower reward program, increasing the amount of potential rewards by expanding the definition of collected proceeds.<sup>272</sup> The IRS whistleblower office made 242 awards in fiscal year 2017 totaling more than \$33.9 million.<sup>273</sup>

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267. *See id.* (providing that whistleblowers will receive between 15%–30% of the settlement award).

268. *See id.* § 7623(b)(5)(B) (stating that this awards subsection applies to any action “if the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed \$2,000,000”); *Whistleblower—Informant Award*, IRS, <http://www.irs.gov/uac/Whistleblower-Informant-Award> (last updated Jan. 5, 2018) (last visited Jan. 10, 2018) (detailing the information about submitting a claim and the rules for receiving a reward) (on file with the Washington and Lee Law Review). Awards under 15% may be made when the collected proceeds are below the \$2,000,000 threshold. *Id.*

269. *See* INTERNAL REVENUE SERV., IRS WHISTLEBLOWER PROGRAM FISCAL YEAR 2017 REPORT TO THE CONGRESS 5 (2017) [hereinafter IRS, FISCAL YEAR 2017] (“[T]he Whistleblower Office coordinates with other IRS units, analyzes information submitted, and makes award determinations.”).

270. *See id.* at 3 (stating that whistleblowers have assisted the IRS in collecting \$3.6 billion in revenue since 2007).

271. 79 Fed. Reg. 47,235 (Aug. 12, 2014) (to be codified at 29 C.F.R. pt. 301).

272. *See* 26 U.S.C. § 7623(b) (2012) (stating that a whistleblower receives “as an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action”). Collected proceeds can include taxes, penalties, interest, and additional amounts collected by reason of the information provided, as well as the impact of other tax attributes such as net operating losses.

273. *See* IRS, FISCAL YEAR 2017, *supra* note 269, at 3 (stating that this brings the total monetary awards paid to whistleblowers since 2007 up to \$499 million).

### 3. Other U.S. Whistleblower Incentive Programs

In addition, Dodd–Frank created a whistleblower office and incentive program at the CFTC that mirrors the SEC program. The CFTC whistleblower program provides monetary awards to people who provide original information about Commodity Exchange Act violations that lead to enforcement actions with over \$1,000,000 in sanctions. The CFTC Whistleblower Program was amended in May 2017 to clarify, among other things, that a claimant is not required to be the original source of information received by the CFTC; to add foreign futures authorities to the list of specified authorities to which a claimant may provide information before disclosing it to the CFTC without losing original source status; and to extend the time frames in which a claimant may submit a tip form.<sup>274</sup> To date, the CFTC has made forty-seven final determinations, resulting in four awards.<sup>275</sup>

Other corporate whistleblower bounty schemes include the now-defunct Insider Trading and Securities Fraud Enforcement Act of 1988,<sup>276</sup> which authorized the SEC to pay bounties of up to 10% to persons who provided information that led to the imposition of penalties for illegal insider trading penalties.<sup>277</sup> That program

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274. See *CFTC Adopts Amendments to Whistleblower Program*, PRAC. L. FIN. (WESTLAW), <https://1.next.westlaw.com/Document/I5eda35513fb811e798dc8b09b4f043e0/View/FullText.html?navigationPath=Search%2Fv3%2Fsearch%2Fresults%2Fnavigation%2Fi0ad740360000161330956aaf62a793a%3FNav%3DKNOWHOW%26fragmentIdentifier%3DI5eda35513fb811e798dc8b09b4f043e0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=09c6d9769ef446006cf0b6c8fb18b305&list=KNOWHOW&rank=3&sessionScopeId=e30dd092ac2dd48bb9c63b58a130de76f28a1b755a0650042854fd6558a92f07&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29> (last updated May 24, 2017) (last visited Jan. 26, 2018) (listing the amendments for whistleblower award eligibility) (on file with the Washington and Lee Law Review).

275. See *Final Orders/Award Determinations*, U.S. COMMODITIES FUTURES TRADING COMMISSION, <https://www.whistleblower.gov/orders/> (last visited Mar. 8, 2018) (containing the Final Orders of the Commission and related award determinations regarding complaint applications) (on file with the Washington and Lee Law Review).

276. Pub. L. No. 100-704, 102 Stat. 4677 (codified as amended at 15 U.S.C. §§ 78, 80 (2012)).

277. *Id.* § 21A(e).



was criticized for not being sufficiently generous. Between its inception in 1989 and 2010, it paid a total of \$160,000 based on five claims.<sup>278</sup> Although a payment of \$1,000,000 was made in 2010,<sup>279</sup> the replacement of the program with the Dodd–Frank program transformed the SEC’s approach to tips.<sup>280</sup> Not only are the rewards much larger, but the Dodd–Frank program is better-known, more user-friendly, and features easy communication with and prompt responses from the government.<sup>281</sup>

There are a number of other U.S. federal whistleblower programs, including an act to prevent pollution from ships,<sup>282</sup> the false patent marking statute,<sup>283</sup> and parts of the U.S. Tariff Act of 1930,<sup>284</sup> as well as an array of state whistleblower false claims acts.<sup>285</sup> There are also several states, including Indiana and Utah, that have followed the federal government’s lead and established securities law whistleblower bounty programs.<sup>286</sup> A full analysis of those statutes is beyond the scope of this Article.

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278. See generally OFF. OF INSPECTOR GEN., U.S. SEC. & EXCH. COMM’N, ASSESSMENT OF THE SEC’S BOUNTY PROGRAM (2010), <https://www.sec.gov/files/474.pdf> (detailing the results of the SEC’s assessment of the Commission’s bounty program); see also LIPMAN, *supra* note 63, at 13–14 (stating that the “drafters of Dodd–Frank believed that the SEC had not been sufficiently generous in the past to whistleblowers”).

279. See LIPMAN, *supra* note 63, at 11–12 (stating that the award was for providing information on alleged illegal insider trading in Microsoft Corp. by a hedge fund manager and several Microsoft employees).

280. See *id.* at 12 (stating that Congress was influenced by the SEC’s failure to uncover the Madoff Ponzi scheme).

281. See Baer, *supra* note 10, at 2224–25 (“To implement the new program, the SEC created a new Office of the Whistleblower, which would educate the public and task a group of SEC agents with reviewing and monitoring tips.”).

282. See 33 U.S.C. § 1908 (2012) (establishing penalties for violating the Act and rewards for whistleblowers for information leading to conviction).

283. See 35 U.S.C. § 292 (establishing penalties for false marking of a patent).

284. See Pub. L. No. 71-361, 46 Stat. 590 (codified as amended at 19 U.S.C. § 1619 (2012)) (establishing a reward for a whistleblower that furnishes information of customs fraud).

285. See *State Whistleblower False Claims Laws*, PHILLIPS & COHEN, <https://www.phillipsandcohen.com/State-False-Claims-Statutes/> (last visited Jan. 11, 2018) (providing a full survey of U.S. whistleblower programs) (on file with the Washington and Lee Law Review).

286. See Gretchen Morgenson, *To Crack Down on Securities Fraud, States*

The existence of multiple whistleblower bounty programs does not prove universal U.S. support, or even acceptance of, whistleblowing, but it does demonstrate that the Dodd–Frank whistleblowing programs is not unusual and suggests a general acceptance of bounties in the United States. It is worth noting that the *Time* magazine “Persons of the Year” in 2002 were three whistleblowers: Cynthia Cooper of Worldcom, Coleen Rowley of the FBI, and Sherron Watkins of Enron.<sup>287</sup> Similarly, on July 7, 2016, the U.S. Senate designated July 30, 2016 “National Whistleblower Appreciation Day.”<sup>288</sup>

### *C. International Attitudes Towards Corporate Whistleblowing Incentives*

Many other countries take very different approaches to corporate whistleblowing. Much of the rest of the world lacks whistleblower incentives, or in many cases even basic protections.<sup>289</sup> Consequently, given that the FCPA prohibits the

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*Reward Whistle-Blowers*, N.Y. TIMES (Aug. 21, 2016), [http://www.nytimes.com/2016/08/22/business/to-crack-down-on-securities-fraud-states-reward-whistle-blowers.html?\\_r=0](http://www.nytimes.com/2016/08/22/business/to-crack-down-on-securities-fraud-states-reward-whistle-blowers.html?_r=0) (last visited Jan. 11, 2018) (“In the aftermath of the financial crisis, a growing army of confidential informants—better known as whistleblowers—has helped federal securities regulators identify and prosecute wrongdoers.”) (on file with the Washington and Lee Law Review); *Press Release, A.G. Schneiderman Proposes Bill To Reward And Protect Whistleblowers Who Report Financial Crimes*, N.Y. ST. ATTY GEN. OFF. (Feb. 26, 2015), <http://www.ag.ny.gov/press-release/ag-schneiderman-proposes-bill-reward-and-protect-whistleblowers-who-report-financial> (last visited Apr. 14, 2018) (stating that in 2015 that New York was considering such a whistleblower law) (on file with the Washington and Lee Law Review).

287. See Richard Lacayo & Amanda Ripley, *Persons of the Year 2002: The Whistleblowers*, TIME (Dec. 30, 2002), <http://content.time.com/time/magazine/article/0,9171,1003998,00.html> (last visited Jan. 11, 2018) (detailing the collapse of Enron and the whistleblowers behind the takedown) (on file with the Washington and Lee Law Review).

288. See S. Res. 522, 114th Cong. (2016) (enacted) (designating July 30, 2016 as “National Whistleblower Appreciation Day”).

289. See generally Gregor Thüsing & Gerrit Forst, *Whistleblowing Around the World: A Comparative Analysis of Whistleblowing in 23 Countries*, in WHISTLEBLOWING—A COMPARATIVE STUDY 1, 29 (Gregor Thüsing & Gerrit Forst eds., 2016) (pointing out that there is room for improvement even in the most advanced jurisdictions). Also consider, for example, the suspicious and unsolved

bribery of foreign officials, an FCPA whistleblower is likely to confront somewhat conflicting U.S. and foreign attitudes towards whistleblowing.

Since the turn of the century, there have been some indications that international norms may be slowly shifting in the direction of U.S. law with respect to anti-retaliation protections. In 2003, the United Nations opened the United Nations Convention Against Corruption for signature.<sup>290</sup> The convention requires signatory countries to consider implementing whistleblower protections to encourage employees to report crimes by their employers.<sup>291</sup> So far, 140 countries have signed.<sup>292</sup>

In addition, a few other jurisdictions do have whistleblower incentive programs. In July 2016, the Ontario Securities Commission adopted a whistleblower program that tracks the Dodd–Frank program in certain key ways, including the payment of incentive awards.<sup>293</sup> Under the Ontario program, eligible individuals who voluntarily submit information to the securities commission regarding a breach of Ontario securities law may receive a financial award.<sup>294</sup> The whistleblower award may be payable if the information submitted was of meaningful assistance to the securities commission in investigating the matter and

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death of Russian whistleblower Sergei Magnitsky while in police custody.

290. See *United Nations Convention Against Corruption*, UNITED NATIONS OFF. ON DRUGS & CRIME, <https://www.unodc.org/unodc/en/corruption/unac.html> (last visited Jan. 11, 2018) (describing the purposes and preventive measures of United Nations Convention against Corruption and the history of the instrument in the UN General Assembly) (on file with the Washington and Lee Law Review).

291. See *Signature and Ratification Status*, UNITED NATIONS OFF. ON DRUGS & CRIME (Oct. 3, 2017), <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Jan. 11, 2018) (listing the signatories to the UN Convention against Corruption) (on file with the Washington and Lee Law Review).

292. *Id.*

293. See *generally* OSC POLICY 15-601, WHISTLEBLOWER PROGRAM (2016), [http://www.osc.gov.on.ca/documents/en/Securities-Category1/20160714\\_15-601\\_policy-whistleblower-program.pdf](http://www.osc.gov.on.ca/documents/en/Securities-Category1/20160714_15-601_policy-whistleblower-program.pdf) (detailing the purpose and interpretation of the Ontario Whistleblower Program).

294. See *id.* at 1 (“Under the Program, individuals who meet certain eligibility criteria and who voluntarily submit information to Commission Staff regarding a breach of Ontario securities law may be eligible for a whistleblower award.”).

obtaining a decision that resulted in a final order for monetary penalties of CAD\$1,000,000 or more.<sup>295</sup>

In South Korea, incentive awards are generally not allowed, but may be paid in limited circumstances by the responsible authorities to whistleblowers to prevent damage to public property or to help recover public property.<sup>296</sup> Also, in 2015 it was reported that Russia was considering a whistleblower incentive award system.<sup>297</sup> The Ministry of Labor drafted an amendment to the country's anti-bribery law which would have entitled a person who reported a confirmed instance of graft a payment of up to 15% of the alleged damages to the state budget (capped at approximately \$50,000).<sup>298</sup>

In some Chinese provinces, the Administration for Industry and Commerce will pay whistleblowers the equivalent of anywhere from a few hundred to several thousand dollars for tips regarding bribery and corruption.<sup>299</sup> However, the emergence of anti-corruption norms enforced by whistleblowing mechanisms appears to have met with some resistance.<sup>300</sup> For example, local officials in China have been accused of blocking petitioners seeking

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295. *See id.* (detailing the criteria for determining the whistleblower's eligibility and the amount of the whistleblower award).

296. *See* Thüsing & Forst, *supra* note 42, at 1, 28 (stating that Asian countries overall are more reluctant to rewarding whistleblowers than European countries with South Korea being an outlier).

297. *See* Kristina Furlet, *Russia Mulls Whistleblower Reward Law*, FCPA BLOG (Apr. 16, 2015, 7:28 AM), <http://www.fcpablog.com/blog/2015/4/16/russia-mulls-whistleblower-reward-law.html> (last visited Jan. 11, 2018) (reporting that Russia considered amendments to its anti-bribery law to bring the country's legislation into compliance with international principles and anticorruption norms) (on file with the Washington and Lee Law Review).

298. *See id.* (listing the general provisions of the proposed law).

299. *See* Henry Chen, *Whistleblowers, East and West*, FCPA BLOG (July 23, 2013, 8:02 AM), <http://www.fcpablog.com/blog/2013/7/23/whistleblowers-east-and-west.html> (last visited Jan. 11, 2018) (stating that the reward for whistleblowers will range from \$160 to \$4,900 in U.S. currency) (on file with the Washington and Lee Law Review).

300. *See* Hui Zhi, *China Whistleblowers Hit Local Obstacles*, FCPA BLOG (April 23, 2014, 7:08 AM), <http://www.fcpablog.com/blog/2014/4/23/china-whistleblowers-hit-local-obstacles.html> (last visited Jan. 11, 2018) ("A local party leader said failing to stop the petitioners would be considered a serious dereliction of duty.") (on file with the Washington and Lee Law Review).

to report corruption from meeting with inspectors from the Central Commission for Discipline.<sup>301</sup>

Although European countries are generally considered less willing to reward whistleblowers than the United States, in 2014 the Council of Europe adopted a legal instrument on protecting individuals who report information about acts or omissions in the workplace that represent a serious threat to the public interest.<sup>302</sup> Also in 2014, the European Parliament and Council adopted a market abuse regulation that allows Member States to provide financial incentives to persons who offer relevant information about potential infringements of the law as long as such persons do not have pre-existing duties to report such information, and the information is new and results in a successful enforcement action.<sup>303</sup> In addition, in several European Union (EU) countries,

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301. See *id.* (“Persistent petitioners are often held in ‘discipline centers’ or ‘black jails’ and subject to abuses.”); see also Richard L. Cassin, *Whistleblowers in India Risk Being Murdered*, FCPA BLOG (Oct. 20, 2011, 12:28 AM), <http://www.fcpablog.com/blog/2011/10/20/whistleblowers-in-india-risk-being-murdered.html> (last visited Jan. 11, 2018) (stating that whistleblowers who tried to expose government corruption have been murdered) (on file with the Washington and Lee Law Review); Richard L. Cassin, *Middle East Rulers Wage War On Whistleblowers*, FCPA BLOG (Oct. 14, 2011, 6:00 AM), <http://www.fcpablog.com/blog/2011/10/14/middle-east-rulers-wage-war-on-whistleblowers.html> (last visited Jan. 11, 2018) (stating that whistleblowers are being jailed and murdered in Oman, Iraq, and Jordan for reporting corruption) (on file with the Washington and Lee Law Review).

302. See *Recommendation of the Committee of Ministers to Member States on the Protection of Whistleblowers*, COUNCIL EUR. (Apr. 30, 2014), [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec\(2014\)7&Language=lanEnglish&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2014)7&Language=lanEnglish&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383) (last visited Jan. 11, 2018) (recommending that Member States have a normative, institutional and judicial framework to protect individuals who, in the context of their work-based relationship, report or disclose information on threats or harm to the public interest) (on file with the Washington and Lee Law Review); see also *Whistleblowing in Europe: Legal Protections for Whistleblowers in the EU*, TRANSPARENCY INT’L (Nov. 5, 2013), [http://www.transparency.org/whatwedo/pub/whistleblowing\\_in\\_europe\\_legal\\_protections\\_for\\_whistleblowers\\_in\\_the\\_eu](http://www.transparency.org/whatwedo/pub/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_eu) (last visited Jan. 11, 2018) (stating that the Council action followed a Transparency International report in November 2013 that only four of the Member States offered strong protection to whistleblowers from employer retaliation) (on file with the Washington and Lee Law Review).

303. See *generally* Commission Regulation 596/2014 of Apr. 16, 2014 On Market Abuse (Market Abuse Regulation) and Repealing Directive 2003/6/EC of

especially in the context of competition law, whistleblowers who provide information about cartels in which they were involved may be treated as key witnesses and avoid some penalties.<sup>304</sup>

Partially in response to the 2014 “LuxLeaks” scandal and the 2016 revelations in the Panama Papers, the European Parliament in 2017 voted to require the European Commission to institute stronger protections, albeit without an incentive system, in the EU whistleblowing program.<sup>305</sup> Several EU countries have or have considered anticorruption laws with whistleblower provisions. For example, France passed an anticorruption law in November 2016 that included whistleblowing procedures and some protections against retaliation, but no financial incentives.<sup>306</sup> In fact, the French approach made it clear that the whistleblower should act without any self-interest.<sup>307</sup>

Of non-U.S. anticorruption measures, perhaps the best known is the United Kingdom’s Bribery Act.<sup>308</sup> Enacted in 2010, the Bribery Act is even more stringent than the FCPA in its

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the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, 2014 O.J. (L 173/1), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R0596> (detailing the procedures for reporting infringements and financial incentives to whistleblowers).

304. See Gregor Thüsing & Gerrit Forst, *supra* note 289, at 28 (“In lieu of monetary incentives, a different form of carrot is made use of in practice within the EU: Especially in the field of antitrust regulation.”).

305. See Paige Long, *Financial Sector Tweaks Made to EU Whistleblower Measures*, LAW360 (July 20, 2017, 5:31 PM), <https://www.law360.com/articles/946195/financial-sector-tweaks-made-to-eu-whistleblower-measures> (last visited Jan. 11, 2018) (stating that the European Parliament published a report on suggested amendments to its whistleblowing proposals) (on file with the Washington and Lee Law Review).

306. See Xavier Oustalnier, *First Look at the Whistleblower Provisions in the New French Anti-Corruption Law*, FCPA BLOG (Nov. 21, 2016, 8:18 AM), <http://www.fcablog.com/blog/2016/11/21/xavier-oustalnier-first-look-at-the-whistleblower-provisions.html> (last visited Jan. 11, 2018) (stating that companies are now required to implement measures to prevent and detect corruption in France of foreign countries or influence peddling) (on file with the Washington and Lee Law Review).

307. See *id.* (noting that under the French system, there are no financial incentives and a whistleblower should act without self-interest, which is contrary to the U.S. system).

308. 2010, c. 23 (U.K.).

prohibition of foreign bribery.<sup>309</sup> The United Kingdom considered implementing financial incentives for whistleblowers in July 2014, but decided against them.<sup>310</sup> In a joint report, the UK Financial Conduct Authority and the Bank of England Prudential Regulation Authority noted that they had reviewed the possibility of providing financial incentives, and had visited several U.S. regulatory agencies, including the SEC, that administer such programs.<sup>311</sup> The UK regulators concluded that introducing financial incentives would be unlikely to increase the number or quality of the disclosures that they receive from whistleblowers.<sup>312</sup>

The UK report argued that whistleblower incentives benefit a small number of persons and do not lead to an increase in the number or quality of disclosures.<sup>313</sup> Instead, whistleblower incentives were characterized as a complex, costly governance structure that trigger significant legal fees and could undermine the introduction and maintenance by firms of their own internal whistleblower mechanisms.<sup>314</sup> In fact, the report listed a number of moral and other problems that might result from the imposition of an incentive system, including malicious reporting, entrapment, conflicts of interest in court, inconsistency of regulators' expectations of firms, the difficulty of agreeing on whistleblower qualification criteria, and negative public perceptions.<sup>315</sup>

Of particular interest for purposes of this Article was the UK assessment and description of the Dodd–Frank program. The “Analysis of the US position” noted that, because U.S. awards can be made only when information from a whistleblower leads directly to a successful regulatory or criminal case and appropriate funds are recovered, few whistleblowers are eligible to be considered for

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309. *Id.* § 6.

310. *See* FIN. CONDUCT AUTH. & BANK OF ENG. PRUDENTIAL REG. AUTH., FINANCIAL INCENTIVES FOR WHISTLEBLOWERS 1 (2014) (stating that strong measures are needed to encourage and protect whistleblowers, “who can play an important role in helping to protect the safety and soundness of firms and to prevent and detect wrongdoing”).

311. *Id.*

312. *Id.*

313. *Id.*

314. *See id.* at 2 (listing the report’s key findings on whistleblower incentives).

315. *Id.* at 3.

awards.<sup>316</sup> In addition, the UK regulators blamed the U.S. statutory confidentiality requirement for preventing U.S. regulators from warning firms against retaliation against whistleblowers.<sup>317</sup> Overall, the UK regulators concluded that none of the U.S. agencies that used rewards had seen a significant increase in either the number or the quality of reports from whistleblowers.<sup>318</sup> The UK report concluded: “There is no empirical evidence to suggest that the U.S. system raises either the number or the quality of whistleblower disclosures within the financial services. Nor do the incentives in the U.S. model appear to improve the protection available to whistleblowers.”<sup>319</sup> Rather than create a bounty system, the UK regulators proposed to press ahead with regulatory changes necessary to require firms to have effective whistleblowing procedures, and to make senior management accountable for delivering those procedures.<sup>320</sup>

## VI. Conclusion: Does it Work?

### A. Do the Dodd–Frank Whistleblower Incentives Increase the Quality or Quantity of Tips?

The UK report conflicts with reports made by the SEC’s Office of the Whistleblower and the SEC’s Office of Inspector General regarding the impact of the Dodd–Frank whistleblower program. The SEC Office of Inspector General (OIG), released its Evaluation of the SEC’s Whistleblower Program in January 2013.<sup>321</sup> The OIG

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316. See *id.* at 4 (citing “no more than a handful [of awards granted] since Dodd–Frank came into force in July 2010”).

317. See *id.* (determining that under this course of action, there is no additional protection for whistleblowers).

318. *Id.*

319. *Id.* at 7.

320. See *id.* (“We consider that providing financial incentives to whistleblowers will not encourage whistleblowing or significantly increase integrity and transparency in financial markets.”)

321. See generally OFF. OF INSPECTOR GEN., U.S. SEC & EXCH. COMM’N, Rep. No. 511, EVALUATION OF THE SEC’S WHISTLEBLOWER PROGRAM (2013) [hereinafter SEC, EVALUATION OF WHISTLEBLOWER PROGRAM] (evaluating the whistleblower program and offering recommendations for improvement of the program).



evaluation concluded that the SEC implementation of the final rules made the Dodd–Frank whistleblower program at the SEC “clearly defined and user friendly for users that have basic securities law, rules, and regulations knowledge.”<sup>322</sup> The OIG report praised the promotion of the program on the SEC website, the Office of the Whistleblower’s outreach efforts and response time, and determined that the award levels under the program are appropriate.<sup>323</sup>

In the SEC’s 2017 Annual Report to Congress on the Dodd–Frank Whistleblower Program, Office of the Whistleblower Chief Jane Norberg reported that “the demonstrable benefits of the program continue to materialize.”<sup>324</sup> Chief Norberg noted that during fiscal year 2017 the Office of the Whistleblower paid twelve whistleblowers nearly \$50 million, including three of the ten highest awards that had been paid to date.<sup>325</sup> The SEC went on to assert that the program has had a “transformative” effect on the agency’s enforcement program, and emphasized the hundreds of millions of dollars that have been returned to investors as a result.<sup>326</sup>

In a July 2014 talk at a corporate governance conference, then-SEC Chair Mary Jo White stated that tips from the program “have helped the Enforcement Division identify more possible fraud and other violations and earlier than would otherwise have

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322. *Id.* at v. Several scholars have questioned how much knowledge an individual must have to realize that a securities law violation, particularly an FCPA violation, is taking place. Is this basic common sense, or is the FCPA particularly complex and so unlikely to trigger effective tips? See Dave Ebersole, *Blowing the Whistle on Dodd–Frank Whistleblower Reform*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 123 (2011) (analyzing the Dodd–Frank whistleblower provisions and providing recommendations for the future).

323. See SEC, EVALUATION OF WHISTLEBLOWER PROGRAM, *supra* note 321, at v (“Based on our review of past experience of other whistleblower programs and practical concerns in the administration of the program, we determine the SEC’s award levels are reasonable and should not change at this time.”). The report also rejected the possibility of adding a *qui tam* provision similar to the one in place under the False Claims Act. *Id.*

324. See SEC, 2017 ANNUAL REPORT, *supra* note 16, at 1 (“Whistleblower information has aided the SEC’s efforts to uncover and stop fraudulent investment schemes.”).

325. *Id.* at 10.

326. *Id.*

been possible.”<sup>327</sup> In the 2017 Annual Report to Congress, the SEC asserted, “[w]histleblowers have provided tremendous value to the SEC’s enforcement efforts and significant help to investors,” citing the “hundreds of millions of dollars returned to investors as a result of actionable information that whistleblower brought to the agency.”<sup>328</sup>

This may be particularly true in the context of the FCPA. At an October 2016 securities law conference, then-SEC FCPA Unit Chief Kara Brockmeyer cited whistleblower tips and international cooperation as the primary sources of FCPA cases and credited both with the record FCPA enforcement of 2016.<sup>329</sup>

The Dodd–Frank whistleblower program is growing. The number of whistleblower tips under the program has risen every year since its establishment.<sup>330</sup> The Office of the Whistleblower received over 4,400 tips in fiscal year 2017, nearly a 50% increase from the program’s first full year in 2012.<sup>331</sup> In addition, during fiscal year 2017, the SEC returned nearly 3,200 phone calls from members of the public.<sup>332</sup> Perhaps even more significantly, there is a ready supply of attorneys who specialize in representing

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327. Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, A Few Things Directors Should Know About the SEC, Address at Stanford University Rock Center for Corporate Governance Twentieth Annual Stanford Directors’ College (June 23, 2014); *see also* LABATON SUCHAROW, ACHIEVEMENTS, CHALLENGES AND CHANGE: THE SEC WHISTLEBLOWER PROGRAM YEAR IN REVIEW 3 (2014), <http://www.labaton.com/en/about/press/upload/Achievements-Challenges-and-Change-SEC-Whistleblower-Program-YIR.pdf> (quoting Mary Jo White’s address).

328. SEC, 2017 ANNUAL REPORT, *supra* note 16, at 1.

329. *See FCPA Chief Touts Record High Enforcement Actions—Links Avoiding a Monitor to Early Remediation of FCPA Issues*, BAKER HOSTETLER (Oct. 17, 2016), <https://www.bakerlaw.com/alerts/fcpa-chief-touts-record-high-enforcement-actions-links-avoiding-a-monitor-to-early-remediation-of-fcpa-issues> (last visited Jan. 11, 2018) (summarizing Brockmeyer’s remarks during the annual Securities Docket Conference on October 13, 2016) (on file with the Washington and Lee Law Review).

330. *See* SEC, 2017 ANNUAL REPORT, *supra* note 16, at 1 (showing that the SEC received 224 tips in (partial year) 2011, 3,001 in 2012, 3,238 in 2013, 3,620 in 2014, 3,923 in 2015, 4,218 in 2016, and 4484 in 2017).

331. *See id.* (citing the increasing number of tips as evidence that awareness of the whistleblower program has grown significantly over the years).

332. *See id.* at 8 (stating that many of those phone calls related to the proper procedure for submitting tips).

whistleblowers, and shepherding them through the SEC process. Over half of the award recipients were represented by counsel when they initially submitted their tips, and others retained counsel either during the subsequent investigation or the award process.<sup>333</sup>

The SEC is clear that the payment of awards incentivizes persons to come forward and provide information,<sup>334</sup> and that it positively impacts SEC enforcement of the federal securities laws.<sup>335</sup>

As mentioned above, in fiscal year 2017 the SEC also made twelve awards, bringing the annual total to nearly \$50 million.<sup>336</sup> By the end of the fiscal year, the SEC had awarded a total of approximately \$160 million to forty-six whistleblowers in the history of the program.<sup>337</sup>

The tips received by the Office of the Whistleblower in fiscal year 2017 most often detailed violations of rules relating to corporate disclosures and financial statements (19%), fraud in connection with public offerings (18%), and market manipulation (12%).<sup>338</sup> However, alleged FCPA violations also account for a significant number of the tips each year.<sup>339</sup> Of the 4,218 tips received in 2016, 238 or 5.6% were FCPA-related.<sup>340</sup> Of the 4,484

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333. *See id.* at 18 (“Whistleblowers seeking an award are not required to be represented by counsel unless they choose to file their tips with the Commission anonymously.”).

334. *Id.* at 3.

335. *See id.* (“We are proud that the whistleblower program continues to positively impact the SEC’s enforcement of the federal securities laws. We are confident that it will continue to bolster the agency’s mission of protection of investors and the markets in the years ahead.”).

336. *Id.* at 1.

337. *Id.*

338. *Id.* at 24 (providing a chart of the most common complaint categories reported by whistleblowers).

339. It is worth noting that many of the law firms that specialize in whistleblower law have specific information on their website relating to the FCPA and explaining that FCPA tips could earn a bounty under the Dodd–Frank program. *See, e.g., Foreign Bribery Whistleblowers*, KATZ, MARSHALL & BANKS LLP, <http://www.kmblegal.com/resources/foreign-bribery-whistleblowers> (last visited Jan. 11, 2018) (describing the Foreign Corrupt Practices Act) (on file with the Washington and Lee Law Review).

340. *See* U.S. SEC. & EXCH. COMM’N, 2016 ANNUAL REPORT TO CONGRESS ON

tips received in 2017, 210 or 4.7% were FCPA-related.<sup>341</sup> As discussed above in Part II.B.1, although the SEC's strictly enforced confidentiality requirements make it impossible to confirm whether any of the awards corresponded to an FCPA case, press reports indicated that at least one of the SEC's 2016 awards went to a BHP Billiton employee reporting an FCPA violation.<sup>342</sup>

*B. Do the Dodd–Frank Whistleblower Incentives Improve Enforcement of the FCPA?*

The Dodd–Frank whistleblower incentive system has the potential to increase effective enforcement of the FCPA by encouraging whistleblowers to report FCPA violations to the SEC.<sup>343</sup> 2017 was the second-strongest year on record for enforcement of the FCPA, as measured by the size and volume of recoveries. If more enforcement triggers more compliance, then one might think that the Dodd–Frank incentive program will lead to more compliance. Fear of SEC investigations and enforcement of possible securities law violations, fueled by whistleblowers seeking big financial rewards, may make companies increase their vigilance against violations of the FCPA.

Although the incentive award program is relatively small, it has been well publicized. The publicity itself may be useful. Arguably, the program does not need to pay many awards to have an effect on compliance and decrease corruption. As then-Chief McKessy pointed out in 2012, even one large FCPA-related whistleblower award, if the whistleblower announces it publicly, may attract broad public attention and an influx of new tips.<sup>344</sup> The

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THE DODD–FRANK WHISTLEBLOWER PROGRAM 23 (2016) (providing a chart of the most common complaint categories reported by whistleblowers in 2016).

341. See SEC, 2017 ANNUAL REPORT, *supra* note 16, at 24 (providing a chart of the most common complaint categories reported by whistleblowers in 2017).

342. *Supra* Part II.B.1.

343. *But see* ETHICS RES. CTR., INSIDE THE MIND OF A WHISTLEBLOWER 14 (2012) (showing that monetary incentives are the least likely of the methods being examined to motivate reporting outside the company).

344. See Daniel B. Pickard et al., *The Foreign Corrupt Practices Act: 2013 Year-in-Review*, 31 INT'L TRADE REP. (BNA) 377 (2014) ("FCPA violations [are] increasingly fertile ground for the agency's whistleblowing program, potentially

mere possibility of bounty-hungry whistleblowers may be a strong deterrent to corporations contemplating bribery.<sup>345</sup>

Yet compliance may increase only marginally. SEC and DOJ enforcement of the FCPA has been very high for almost a decade, and many companies subject to the law have already made substantial and costly upgrades to their internal compliance programs.<sup>346</sup> It is possible that some companies cannot do much more. Even the threat of more whistleblowers may not produce significantly more effective compliance programs if companies are already doing what they can.<sup>347</sup>

Moreover, if the Dodd–Frank program has the effect of drawing whistleblowers away from internal reporting channels, there is a risk that it may decrease internal reporting, which may be suboptimal. Whistleblowers prefer to report internally first.<sup>348</sup> Internal reporting gives companies a chance to remedy a problem,

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increasing the importance of self-disclosure of potential violations by corporations.”).

345. *See id.* (“[C]ases against individuals have a great deterrent value as they drive home to individuals the real consequences to them personally that their acts can have.”).

346. *See id.* (stating that “it is more important than ever for companies to implement well-tailored anticorruption compliance programs, including appropriate due diligence on joint venture partners, international agents and other third parties”). Much of this with the help of their attorneys. The resulting FCPA compliance industry has been dubbed “FCPA Inc.” by Professor Mike Koehler in his writings and on his FCPA Professor site. *See* Mike Koehler, *A Common Language to Remedy Distorted Foreign Corrupt Practices Act Enforcement Statistics*, 68 RUTGERS U. L. REV. 553, 554 (2016) (“At present, however, the FCPA’s conversational waters are muddied because this niche practice area (often referred to as FCPA Inc.) lacks a lingua franca, or common language.”).

347. For example, in response to the allegations of bribery by its Mexican subsidiary, Wal-Mart instituted an extensive new compliance program, which, by the end of 2016, was estimated to have cost \$263 million, in addition to the \$557 million investigation it conducted. *See* Matt Kelly, *Walmart FCPA Costs: \$820 Million and Counting*, RADICAL COMPLIANCE (Dec. 4, 2016), <http://www.radicalcompliance.com/2016/12/04/walmart-fcpa-costs-820-million-counting/> (last visited Jan. 11, 2018) (reporting Wal-Mart’s FCPA costs) (on file with the Washington and Lee Law Review).

348. *See* ETHICS RES. CTR., *supra* note 343, at 2, 11 (noting that only 2% of employees solely go outside the company and never report the wrongdoing they have observed to their employer).

stopping the FCPA violations right away.<sup>349</sup> And internal reporting does not raise the vexing conflicts of duties that force the employee to choose between loyalty to the employer and civic obligation.<sup>350</sup>

SEC statistics, however, suggest that this is not the case, and the incentive program is functioning to backstop internal reporting systems that have failed. The SEC reports that by the end of fiscal year 2017, approximately 62% of whistleblower award recipients were insiders in the company with respect to which they reported information of wrongdoing.<sup>351</sup> Furthermore, “[o]f the award recipients who were current or former employees of the entity, approximately 83% raised their concerns internally to their supervisors or compliance personnel, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.”<sup>352</sup>

Still, there remain objections to the program. For example, by imposing the substantial costs of administering the program on the SEC,<sup>353</sup> the incentive system may divert funds that would be better used for enforcement. Or perhaps the incentive system floods the SEC with frivolous tips. The SEC is a famously overstretched agency, as became painfully clear during the Global Financial Crisis and the Madoff scandal.<sup>354</sup>

Each year there are huge discrepancies between the number of tips reported, the number of enforcement judgments,<sup>355</sup> and

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349. *See id.* at 17 (stating that employees internally report to get a more complete picture of the situation and allow the company an opportunity to address the issue).

350. *See id.* at 11 (providing that most employees choose to report internally based on loyalty and personal relationships with supervisors).

351. *See* SEC, 2017 ANNUAL REPORT, *supra* note 16, at 17 (clarifying that despite the fact that a majority of whistleblowers are company insiders, there is no requirement that an individual be an employee or company insider to be eligible for an award).

352. *Id.*

353. *See id.* at 6 (stating that in addition to the Chief and Deputy Chief, the Office of the Whistleblower was staffed with eleven attorneys, four paralegals, and an administrative assistant).

354. *See* LIPMAN, *supra* note 63, at 12 (providing that the SEC failed to uncover the Madoff Ponzi scheme for more than twenty years after investors lost \$65 million).

355. *See* Boyne, *supra* note 42, at 301–02 (“[S]ome scholars have argued that,

number of awards made. No doubt many such tips are without merit, and perhaps others are resolved through negotiation. As of the end of fiscal year 2017, the SEC had received over 22,000 tips but made only forty-six awards based on thirty-seven actions.<sup>356</sup> The low number of tips that lead to awards suggests that the SEC simply cannot act on all of the tips it receives.<sup>357</sup> And once it decides to act, litigation is often slow and expensive, not to mention uncertain.

It is thus conceivable that the Dodd–Frank program could have a suboptimal effect on FCPA compliance. Rather than attempt to instill a culture of cooperation and voluntary compliance, Dodd–Frank may have instituted an expensive policy of (occasionally well-paid) internal surveillance.

### C. Conclusion

As matter of comparative law and social science, however, it is difficult to prove that a more cooperative regime would be more effective. And, based on history and experience, we know that SOX did not prevent the levels of fraud and noncompliance that contributed to if not caused the Global Financial Crisis. SOX relied largely on internal review structures and assessments and SOX evidently failed, or at least the nation endured a great number of violations.<sup>358</sup> So it is unsurprising that over the years Congress has moved from simple prohibitions on fraud to requiring compliance programs to offering an incentive system for information. There

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by failing to institute a *qui tam* system or to impose any costs on the whistleblower, the Act fails to provide an adequate screening mechanism to discourage frivolous tips.”).

356. See generally SEC, 2017 ANNUAL REPORT, *supra* note 16, at 16, 23. See also Baer, *supra* note 10, at 2217 (citing a similarly low number of awards at the end of 2016 and suggesting that the low “hit rate” of 0.2% results from the fact that the strongest tips would come from complicit tipsters, who hesitate to blow the whistle because of the risk of self-incrimination).

357. See *id.* at 2218 (suggesting that the SEC may have too much discretion in deciding how to handle tips and complaints).

358. See Boyne, *supra* note 42, at 292–93 (“Although the Sarbanes–Oxley Act initially appeared to offer whistleblowers an easy path to recover damages, empirical evidence suggests that the path was a particularly steep one.”).

seems to be a growing consensus, at least in the United States, that a strong whistleblower system includes meaningful rewards for the whistleblowers.<sup>359</sup>

There are also ways to improve or at least increase the scope of the incentive award system. Several authors have argued for the imposition of a *qui tam* provision, which would spare administrative resources and deputize whistleblowers in a manner similar to the FCA.<sup>360</sup> Similarly, the SEC could relax the \$1,000,000 threshold for an eligible action.<sup>361</sup> The number seems somewhat random, and prevents whistleblowers in smaller instances from coming forward.

Regardless of whether the Dodd–Frank system of whistleblower compensation is optimal, however, for the foreseeable future it is reasonable to assume that the program will pay awards to whistleblowers who report FCPA violations. As long as the FCPA is vigorously enforced and illicit payments to foreign officials remain a prominent feature of international business, whistleblower incentives will remain attractive to regulators. Thus, for purposes of FCPA enforcement, bounties for whistleblowers are here to stay.

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359. See LIPMAN, *supra* note 63, at 5 (“Incentives to whistleblowers have been increased dramatically as a result of Dodd–Frank and the changes to the Internal Revenue Code in December 2006 mandating whistleblower rewards.”).

360. See Anthony J. Casey & Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam*, 91 WASH. U. L. REV. 1169, 1175 (2014) (theorizing that a whistleblowing program’s ease of entry can swamp an agency with low value information, thereby undermining enforcement, while a *qui tam* action acts as a screening tool for complaints).

361. See Boyne, *supra* note 42, at 302 (“This [million dollar] restriction deviates from the recovery available to whistleblowers under FCA, as under the FCA, whistleblowers may recover their share of the bounty regardless of how much the government recovers.”).