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PROTECTING THE BRAVE: WHY CONGRESS SHOULD AMEND THE DODD-FRANK ACT TO BETTER PROTECT FCPA WHISTLEBLOWERS

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I. COMBATTING CORRUPTION

Meng-Lin Liu recognized the damage that corruption causes, and he risked his livelihood to do what he could to stop it.[1] Liu, a Taiwan resident, was a compliance officer for Siemens China Limited ("SCL"), a Chinese subsidiary of Siemens A.G., a German corporation with securities registered in the United States.[2] While working as a compliance officer, Liu discovered that SCL was making inflated bids to sell medical equipment to hospitals in North Korea and China.[3] Third party intermediaries would sell the equipment and would forward portions of the purchase price to the officials that accepted the bids.[4]

In October 2009, Liu expressed concerns that the company was violating compliance measures put in place after Siemens

*I graduated from The John Marshall Law School in Spring 2016. This comment is dedicated to my late friend Jean Maurice Nahkla.

1. *See generally* James Thuo Gathii, *Defining the Relationship Between Human Rights and Corruption*, 31 U. PA. J. INT'L L. 125, 182-83 (2009); Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 177 (2d Cir. 2014).

2. Meng-Lin Liu v. Siemens A.G., 978 F. Supp. 2d 325, 326 (S.D.N.Y. 2013).

3. *Id.*

4. *Id.*

plead guilty to a Foreign Corrupt Practices Act ("FCPA") violation in 2008.[5] According to Liu, in December 2009, the company retaliated against him for raising concerns by giving him a negative performance evaluation.[6] However, this did not stop Liu's efforts to correct the company's wrongdoing.[7] During 2010, Liu attempted to change company procedures and cut ties with the intermediaries involved in the kick back scheme.[8] His superiors thwarted both of these attempts, and, in August 2010, he was stripped of nearly all his authority.[9]

Liu's efforts to end this corruption persisted and he compiled documentation proving the scheme.[10] Late that year, Liu presented the documents first to the company's CFO and then during a meeting attended by the President and CEO of SCL.[11] The same day as that meeting, Liu received a letter ordering him to not report to work for the remaining three months of his contract.[12] Early the following year, Liu reported the possible FCPA violations to the United States Securities Exchange Commission ("SEC").[13]

Corruption, such as that experienced by Liu, imposes significant economic, political, and social costs on society.[14] Businesses use bribes to obtain a business advantage, reduce costs, enhance efficiencies, or gain access to relationships or markets.[15] However, bribes have negative ramifications such as interfering with free market systems and blocking market entry.[16] Corrupt conduct can harm an entire economy by potentially increasing costs, lowering growth rates, and reducing productivity.[17] Bribery encourages self-gain over societal wellbeing, increases income inequality, and obstructs access to

5. *Id.*
6. *Liu*, 978 F. Supp. 2d at 327
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *See* Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325, 328 (2012) (discussing research that shows corruption brings "impediment to economic growth, degradation of social and political institutions, misallocation of resources and skills, impoverishment, and numerous other societal ills").
15. *Id.*
16. Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT'L L. 861, 869-75 (2010) (arguing that bribes ruin free market economies); *see also* Philip M. Nichols, *Are Extraterritorial Restrictions on Bribery a Viable and Desirable International Policy Goal Under the Global Conditions of the Late Twentieth Century? Increasing Global Security by Controlling Transnational Bribery*, 20 MICH. J. INT'L L. 451, 459 (1999) (arguing that bribery distorts prices, reduces outside investment).
17. *Id.*

education, government, and other important societal resources.[18] Bribery also undermines governmental systems by encouraging government leaders to make decisions based on personal financial gain instead of their constituents' best interests.[19]

For decades, many countries have not actively fought corruption. However, in 1997 many nations increased their efforts in curbing corruption in international business.[20] For example, in 1997, the Organization for Economic Cooperation and Development ("OECD") adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("The Convention").[21] The Convention requires its forty-one signatories to criminalize bribery of foreign officials, establish a framework for criminal sanctions, strengthen accounting laws, and cooperate with signatories which are investigating or seeking extradition of those charged with bribery offenses.[22]

In 2003, the United Nations adopted the Convention Against Corruption ("UNCAC"), which is similar to both the FCPA and OECD Convention.[23] The UNCAC, however, is especially directed towards transnational bribery.[24] Nations within the European Union, United Kingdom, Africa, and Asia formed several regional anti-bribery agreements.[25] While these conventions provide a comprehensive framework and guidelines for battling corruption, their actual effect has been less significant because compliance and enforcement varies widely.[26]

The United States has lead in the fight against corruption since 1977. In that year, Congress passed the first major anti-

18. Gathii, *supra* note 1 (explaining that corruption depletes resources for healthcare services, food, housing, and water).

19. Spahn, *supra* note 16, at 875 (arguing that bribery creates a government that is "up for sale" and drives away honest political actors).

20. *See generally* Kathleen M. Hamann et. al, *Developments in U.S. and International Efforts to Prevent Corruption*, 40 INT'L LAW. 417, 423-27 (2006) (discussing recent anti-corruption enforcement actions taking place internationally).

21. *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 21 May 2014*, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (May 21, 2014), www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf.

22. *Id.*

23. *Convention Against Corruption,* U.S. GOVERNMENT PUBLISHING OFFICE (Oct. 31, 2003), www.gpo.gov/fdsys/pkg/CDOC-105tdoc43/content-detail.html.

24. David C. Weiss, *The Foreign Corrupt Practices Act, SEC Disgorgement of Profits, and the Evolving International Bribery Regime: Weighing Proportionality, Retribution, and Deterrence*, 30 MICH. J. INT'L L. 471, 479 (2009).

25. Sarah Bartle et al., *Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 1265, 1294 (2014).

26. *Id.*

corruption legislation in the world, the FCPA.[27] In recent years, FCPA enforcement has intensified dramatically, and the United States is increasingly exercising the international reach of the Act.[28]

One major hindrance on FCPA enforcement is the secrecy inherent to corruption that makes it difficult to detect.[29] As a result, regulating agencies must heavily rely on people privy to the information, known as whistleblowers, for tips regarding potentially illegal conduct.[30] Whether the whistleblower reports information directly to the regulating agencies, or to internal compliance programs that investigate and correct the conduct, he or she is important in the fight against corruption.[31] As the SEC and Department of Justice ("DOJ") continue to do their part in combatting corruption and consistently expand international enforcement of the FCPA, they are encouraging and incentivizing whistleblowers and the development of internal compliance programs alike.[32]

People like Liu who make the brave decision to become a whistleblower suffer a variety of consequences in both their personal and professional lives.[33] In the United States, the Dodd-

27. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977); 15 U.S.C. §§ 78m(b); *id.* § d(1); *id.* §§ (g)-(h); *id.* § 78 dd-1-3; *id.* § 78 ff (West 1997 & Supp. 2008).

28. In 2005 there were only twelve combined prosecutions, while in 2010 there were 48 DOJ and 26 SEC prosecutions. Gibson Dunn, *2014 Mid-Year FCPA Update,* Gibson Dunn (July 7, 2014), www.gibsondunn.com/publications/pages/2014-Mid-Year-FCPA-Update.aspx. In 2013 there were 19 DOJ and 8 SEC. *Id.* Through the end of June 2014, there had been 13 DOJ actions and 2 SEC actions. *Id.* While there has been a decline in the amount of prosecutions since 2010, there has also been a sharp increase in non-prosecution and deferred prosecution agreements. Mike Koehler, *The Foreign Corrupt Practices Act Under the Microscope*, 15 U. PA. J. BUS. L. 1, 4 (2012); *see also* Mike Koehler, *A Foreign Corrupt Practices Act Narrative,* 22 MICH. ST. INT'L. L. REV. 961, 963 (2014) (analyzing the increase in pre-judgment settlements).

29. Bill Shaw, *The Foreign Corrupt Practices Act and Progeny: Morally Unassailable*, 33 CORNELL INTL. L.J. 689, 694 (2000), www.foreignaffairs.com/articles/54388/john-brademas-and-fritz-heimann/tackling-international-corruption-no-longer-taboo).

30. *See* Indira Carr & David Lewis, *Combating Corruption Through Employment Law and Whistleblower Protection*, 39 INDUS. L.J. 52, 53 (2010) (stating that because it is difficult to detect corruption and wrongdoing externally, whistleblowers can be very effective in uncovering corruption).

31. Kristian Soltes, *Facilitating Appropriate Whistleblowing: Examining Various Approaches to What Constitutes "Fact" to Trigger Protection Under Article 33 of the United Nations Convention Against Corruption*, 27 AM. U. INTL. L. REV. 925, 927 (2012).

32. Nicole H. Sprinzen, *Asadi v. GE Energy (USA) L.L.C.: A Case Study of the Limits of Dodd-Frank Anti-Retaliation Protections and the Impact on Corporate Compliance Objectives*, 51 AM. CRIM. L. REV. 151, 152 (2014).

33. Andrew Smith, *There Were Hundreds Of Us Crying Out For Help: The Afterlife Of The Whistleblower*, THE GUARDIAN (Nov. 22 2014),

Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") provides FCPA whistleblowers with rewards as well as protection from the negative consequences a whistleblower may experience. [34] However, recent transgressions in the United States court system leave potential whistleblowers uncertain of whether they have any protection at all.[35] To continue its role as the leader in combating corruption, the United States must amend Dodd-Frank to better protect potential whistleblowers.

Part II of this comment will discuss the extraterritorial reach of the FCPA, and the role that whistleblowers and internal compliance programs serve in its enforcement. Part III will analyze the whistleblower provisions of Dodd-Frank, their significance for those who report potential FCPA violations, and how recent U.S. court rulings may prevent many of those people from receiving any of the benefits the provisions offer. Finally, Part IV will propose that Dodd-Frank be amended to assure potential whistleblowers that they will not be left out to dry after reporting corrupt conduct.

II. EXTRATERRITORIAL APPLICATION OF THE FCPA

In order for the FCPA to be effective, it must apply extraterritorially, and people with inside knowledge of corrupt conduct must be willing to come forward with the information. This section will discuss: (A.) The concept of extraterritoriality; (B.) an overview of the FCPA; (C.) extraterritorial application of the FCPA; and (D.) the United States' reliance on whistleblowers and internal compliance programs for FCPA enforcement.

A. Extraterritorial Application of United States Laws

Some Congressional statutes seek extraterritorial jurisdiction by regulating people or conduct outside of the United States.[36] Due to the longstanding concept that nations exercise exclusive jurisdiction within their own territory, extraterritorial laws have traditionally been approached with caution.[37] As former United States Supreme Court Justice Joseph Story put it, "[E]very nation

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www.theguardian.com/society/2014/nov/22/there-were-hundreds-of-us-crying-out-for-help-afterlife-of-whistleblower.

34. *See* Robert Anello, *Be Careful Where You Whistleblow: Courts Impose Limits on Dodd-Franks Protection for FCPA Whistleblowers,* FORBES (Aug. 20, 2014), www.forbes.com/sites/insider/2014/08/20/be-careful-where-you-whistle-while-you-work-courts-impose-limits-on-dodd-franks-protection-for-fcpa-whistleblowers/.

35. *Id.*

36. Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1677 (2012).

37. *Id.*

possesses an exclusive sovereignty and jurisdiction within its own territory," and "it would be wholly incompatible with equality and exclusiveness of the sovereignty of all nations, that any one nation should be at liberty to regulate either persons or things not within its own territory."[38] It therefore follows that Acts of Congress have long carried a presumption against extraterritoriality.[39]

However, over time, nations have become more accepting of extraterritorial regulations.[40] In the United States, the decision as to whether a statute can apply extraterritorially involves a two-step analysis.[41] First, analyzing the power Congress exercised by enacting the statute.[42] Second, determining whether there was Congressional intent for the statute to apply outside of the United States.[43]

The first step requires an examination of Congress's power to enact the statute.[44] While Congress can pass laws with extraterritorial reach, both the United States Constitution and international law limit Congress's power to regulate conduct outside of the United States.[45] Given the historical background and significance of these types of laws, courts often approach such constitutional questions with great prudence.[46]

If a statute is ruled constitutional, the court then must determine whether Congress intended for it to apply extraterritorially.[47] Such Congressional intent can be shown in two ways. First, if a statute is intended to regulate conduct abroad, Congress can make it clear by including extraterritorial provisions.[48] For example, the general terrorism law includes a provision that applies the law to conducts that "occur primarily outside the territorial jurisdiction of the United States, or

38. JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS, (Hilliard, Gray & Co. 1834).

39. *Id.*

40. *See generally* Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts of Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 379 (1966) (explaining arguments against territorial approaches to conflicts of law).

41. Parrish, *supra* note 36, at 1685.

42. *Id.*

43. *Id.*

44. *Id.*

45. There is no territorial limit on acts of Congress. United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991) (holding, "Generally, there is no constitutional bar to the extraterritorial application of United States penal laws"). However, there are several limitations to application of extraterritorial laws. *See* Parrish, *supra* note 36, at 1685 (explaining how the U.S. Constitution, the Fifth Amendment, and international law limits extraterritorial enforcement of United States laws).

46. Parrish, *supra* note 36, at 1685.

47. *Id.*

48. *Id.*

transcend national boundaries in terms of the means by which they are accomplished.[49]

While a statute without an extraterritorial provision is presumed to only apply domestically, Congressional intent to regulate foreign conduct may be imputed if the law focuses on international activity.[50] There is no established test for such analysis, but the FCPA is an example of a statute that carries extraterritorial power even though it lacks an explicit extraterritorial provision.[51]

B. Overview of the FCPA

In 1976, an SEC investigation revealed that hundreds of U.S. companies were bribing foreign officials.[52] The following year, Congress responded by enacting the FCPA as an amendment to the Securities Exchange Act of 1934 ("Securities Exchange Act").[53]

Both the DOJ and SEC enforce the FCPA.[54] Enforcement of the FCPA is carried out through two sets of provisions.[55] The first set is the accounting provisions. These provisions require issuers ("issuers" are generally companies that are required to register their securities with the SEC, or those that are required to file reports with the SEC) to implement certain record keeping and internal controls standards.[56] The provisions also require issuers to implement bookkeeping practices to ensure that any records accurately reflect their transactions in reasonable detail.[57] The provisions further require that issuers create internal accounting controls that ensure that transactions are executed with appropriate authorization.[58]

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49. 18 U.S.C.A. § 2331.

50. *See* Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325, 3329 (1997) (noting that perhaps one of the most noteworthy instances of Congress's intent to control conduct outside the United States is the Foreign Corrupt Practices Act).

51. *Id.*

52. Tor Krever, *Curbing Corruption? The Efficacy of the Foreign Corrupt Practices Act*, 33 N.C. J. INTL. L. & COM. REG. 83, 87 (2007).

53. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977).

54. *Id.*

55. 15 U.S.C. § 78m(b); *id.* § 78m(2); *id.* § 78m(b)(2).

56. 15 U.S.C. § 780(d); *Id.* § 781(g); 15 U.S.C. § 78m(b); *id.* at § 78m(2).

57. *See* 15 U.S.C. § 78m(b)(3)(7) (defining "reasonable detail" as a "level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs"); *see also* H.R. REP. NO. 94-831, at 10 (1977) (noting that, "[T]he issuers records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush funds and payment of bribes").

58. 15 U.S.C. § 78m(b)(2)*; see also* Bartle et al., *supra* note 25, at 1271-72 (noting that when evaluating internal controls systems, the SEC considers several factors: "(i) the role of the board of directors; (ii) communication of corporate procedures and policies; (iii) assignment of authority and

The second set is the anti-bribery provisions that prohibit bribery of foreign officials for purposes of securing a business benefit.[59] The anti-bribery provisions outlaw improper payments to any person for purposes of obtaining or securing a business benefit abroad.[60] An anti-bribery provision violation occurs when seven elements are met: (1) any issuer, domestic concern ("domestic concerns" are generally any person that is a U.S. citizen, resident, or national, or any business located or organized in the U.S), or any person inside the United States ("any person" has been interpreted broadly, and extends to any officer, director, employee, or agent or any stockholder of the issuer or domestic concern); (2) that makes use of mails or any other means or instrumentality of interstate commerce; (3) to corruptly; (4) offer to pay, promise to pay, authorize the payment of any money, or, offer a gift, promise to give, or authorize the giving of anything of value; (5) to any foreign official, political party or candidate for political office or any other person while knowing that some payment will be passed on to such parties; (6) to influence any act or decision, inducing unlawful action or inducing action to influence any act of a government or instrumentality to secure any improper advantage, (7) to obtain, retain or direct business to any person.[61]

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responsibility; (iv) competence and integrity of personnel; (v) accountability for performance and compliance with policies and procedures; and (vi) objectivity and effectiveness of the internal audit function").

59. 15 U.S.C. § 78(f)(1), (g), (h), *id.* § 78dd-1; 78dd-2; *id.* § 78dd-3; *id.* § 78ff.

60. 15 U.S.C. § 78m(b)(2).

61. Cherie O. Taylor, *The Foreign Corrupt Practices Act: A Primer,* 17 CURRENTS: INT'L TRADE L.J. 3, 4 (2008); 15 U.S.C. §§ 780(d), 781(g); 15 U.S.C. § 78dd-2(a); 15 U.S.C. § 78dd-3(a); 15 U.S.C. §§ 78dd-2(a), *id.* § 78dd-3(a). In the Senate Report attached to the FCPA it is noted that "[t]he word 'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipient." S. REP. NO. 95-114, at 10 (1977); *see also* United States v. Kay, 513 F.3d 461, 465 (5th Cir. 2008) (providing a jury instruction for this element). The Act does not define "anything of value", and courts have interpreted the term broadly. *See* Bartle et al., *supra* note 25, at 1277 (2014) (explaining that "anything of value" has included "money, gifts, discounts, charitable donations, use of resources [e.g., materials, facilities, and equipment], entertainment, luxuries [e.g., food, travel, meals, lodging], and promises of future employment"); *see also* Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 914-15 (2010) (stating "recent FCPA enforcement actions allege facts concerning 'things of value' across a wide spectrum"); 15 U.S.C. § 78dd-1 (for issuers); *id.* § 78dd-2 (for domestic concerns); *id.* § 78dd-3 (for "any person"). The term "foreign official" has been interpreted broadly. *See* Mike Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. TOL. L. REV. 99, 101-04 (2011) (detailing the large scope of people that "foreign official" may cover); 15 U.S.C. § 78dd-1(a)(1)(A)&(B); *id.* § (2)(A)&(B); *id.* § (3)(A)&(B) and 78dd-2(a)(1)(A)&(B); *id.* § (2)(A)&(B); *id.* § 3(A)&(B); 15 U.S.C. § 78dd-1 (for issuers); *id.* § 2 (for domestic concerns); *id.* § 3 (for "any person"). Some of these elements are the topic of hot debate. *See generally* Rouzhna Nayeri, *No Longer the Sleeping Dog, the FCPA Is Awake and Ready to Bite: Analysis of the Increased FCPA Enforcements, the Implications, and Recommendations for*

Any issuer, domestic concern, or person that is found to violate the FCPA may face civil penalties, criminal penalties, or government procurement sanctions.[62] However, depending on the circumstances, companies may be offered the opportunity to enter deferred-prosecution or non- prosecution agreements.[63]

Due to the burdens of complying with the FCPA, critics accuse the Act of making American companies less competitive in international business.[64] In order to address these criticisms, Congress amended the FCPA twice, adding two affirmative defenses and expanding its international reach.[65] The first affirmative defense allows for payments that are "lawful under the written laws" of the country in which they are made.[66] The second affirmative defense permits payments that are "reasonable and bona fide expenditures."[67] Congress also passed legislation that allows a corporation to make "grease" payments to expedite the performance of routine government actions.[68] The Amendments also included provisions intended to expand the international reach of the FCPA, partly as an effort to level the playing field for American companies.[69]

Reform, 27 N.Y. INTL. L. REV. 73, 82 (2014*)* (arguing that several terms within the FCPA are too ambiguous and interpreted too broadly); *see also* Cyavash Nasir Ahmadi, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 11 J. INT'L BUS. & L. 351 (2012) (proposing several changes to the FCPA).

62. 15 U.S.C. § 78dd-1 (for issuers); *id.* § 2 (for domestic concerns); *id.* § 3 (for "any person").

63. *See* D. Michael Crites, *The Foreign Corrupt Practices Act at Thirty-Five: A Practitioner's Guide*, 73 OHIO ST. L.J. 1049, 1059 (2012) (providing examples of deferred prosecution and non-prosecution agreements).

64. *See* Jennifer Dawn Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 867-70 (2001) (discussing ways the FCPA can inhibit American businesses).

65. *See* Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 318-19 (2012) (examining changes that have been made to the FCPA); 15 U.S.C. § 78dd-1 (for issuers); *id.* § 78dd-2 (for domestic concerns); *id.* § 78dd-3 (for "any person").

66. 15 U.S.C. § 78dd-1 (for issuers); *id.* § 78dd-2 (for domestic concerns); *id.* § 78dd-3 (for "any person").

67. 15 U.S.C. § 78dd-1 (for issuers); *id.* § 78dd-2 (for domestic concerns); *id.* § 78dd-3 (for "any person").

68. 15 U.S.C. § 78dd-1 (for issuers); 78dd-2 (for domestic concerns); § 78dd-3 (for "any person"). *See also* Ivan Perkins, *Illuminating Corruption Pathways: Modifying the FCPA's "Grease Payment" Exception to Galvanize Anti-Corruption Movements in Developing Nations*, 21 CARDOZO J. INT'L & COMP. L. 325, 338-44 (2013) (discussing the history and reasoning behind the creation of the exception, and identifying issues that it creates).

69. *See* Ivan Perkins, *Illuminating Corruption Pathways: Modifying the FCPA's "Grease Payment" Exception to Galvanize Anti-Corruption Movements in Developing Nations*, 21 CARDOZO J. INT'L & COMP. L. 325, 338-44 (2013) (discussing the history and reasoning behind the creation of the exception, and identifying issues that it creates).

C. The Extraterritorial Reach of the FCPA

In recent years, the DOJ and SEC have dramatically increased FCPA enforcement, especially internationally.[70] 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.[71] In 2010, foreign companies "were responsible for 94 percent of the penalties imposed on corporations."[72] A list of recent and current FCPA cases proves that the trend continues, as it shows a large number of enforcement actions against foreign companies, domestic companies functioning abroad, and foreign nationals.[73]

The FCPA applies extraterritorially through multiple provisions.[74] First, any issuer, domestic concern, or person can be held liable for "any act outside the United States in furtherance of a violation of the anti-bribery provisions of the Act …irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce."[75]

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70. *Id*; Koehler, *supra* note 28, at 4.

71. Lanny A. Breuer, Assistant Attorney Gen., Speech at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), www.justice.gov/criminal/pr/speeches/2010/crm-speech101116.html.

72. Philip Urofsky & Danforth Newcomb, *Recent Trends and Patterns in FCPA Enforcement*, FCPA Digest 1, 5 (Jan. 20, 2011), http://fcpa.shearman.com/files/5e1/5e13bd87afdb6375d24106e9be4c1954.pdf?i=4cc77c6ff7e8b5511ed46036cb879f70 (last visited Oct. 10, 2014).

73. *See, e.g.*, Deferred Prosecution Agreement, United States v. Hewlett-Packard Polska, SP. Z O.O., No. CR-14-202 EJD (N.D. Cal. 2014) (charging a Polish employee, five Russian employees, and a group of individuals in Mexico, employed by H.P. subsidiaries in each country, in connection with "creating a slush fund for bribe payments", to facilitate bribes to "foreign officials"); *see also* United States v. ZAO Hewlett-Packard A.O., No. CR-14-201 DLJ (N.D. Cal. 2014) (reaching a plea agreement for Russian subsidiary), www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-zao/hp-russia-plea-agreement.pdf; *see* United States v. Hewlett-Packard Mexico, S. de R.L. de C.V. (2014) (entering non-prosecution agreement for Mexican subsidiary), www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-mexico/hp-mexico-npa.pdf; *see also* Second Superseding Indictment, United States v. Hoskins, No. 3:12-cr-00238-JBA (D. Conn. 2013) (charging French company Alstoms senior vice president for Asia region in connection with improper payments in power plant project in Indonesia), www.justice.gov/criminal/fraud/fcpa/cases/pomponi/de50-second-superseding-indictment.pdf; *see* Criminal Complaint, United States v. Cilins, No. 13-MAG-975 (S.D.N.Y. 2013) (charging Frederic Cilins, a French citizen, "with attempting to obstruct an ongoing investigation into whether a mining company paid bribes to obtain mining rights in the Republic of Guinea"), www.justice.gov/sites/default/files/criminal-fraud/legacy/2013/04/15/Criminal-Complaint.pdf.

74. *See* Sprinzen, *supra* note 32, at 157 (explaining the international reach of the FCPA).

75. 15 U.S.C. §§ 78dd-1(g)1; *id.* § 2(i)(1); *id.* § 78dd-2(h)(5); *id.* § 78dd-3(f)(5); *id.* § 78c(a)(17); *see* H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 N.C. J. INTL. L. & COM. REG.

The FCPA defines "interstate commerce" as "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof."[76] Under this definition, any issuer, domestic concern, or person that sends a fax, email, telephone call, or text message either to or from the United States is subject to FCPA enforcement regardless of location.[77] Likewise, any issuer, domestic concern, or person is subject to FCPA enforcement by using any United States banking system, or traveling to, from, or within the United States.[78] Thus, a U.S. national or company is prohibited from violating the FCPA regardless of whether they are within the United States and even if that conduct does not have any other nexus to the United States.[79]

Second, an issuer is not required to have any physical presence or regular conduct in the United States.[80] Issuers are companies that have securities registered in the United States, are required to file reports under Section 15(d) of the Securities Exchange Act, or own more than fifty percent of the voting stock of another entity in the United States.[81] Accordingly, any company that qualifies as an issuer can be held liable for FCPA violations regardless of whether the conduct occurred or was directed towards the United States.

Finally, a foreign national or foreign company can become subject to FCPA enforcement by committing an act in furtherance of a corrupt payment while inside the United States, or by conspiring with or acting as an agent for a domestic concern or issuer while committing such conduct.[82]

239, 291 (2001) (explaining that the 1998 amendments "greatly extended the jurisdictional reach of the FCPA by making violations of the Act by foreign individuals and entities, in addition to actions by U.S. nationals overseas, prosecutable in the United States").

76. 15 U.S.C. § 78dd-2(h)(5); *id.* § 78dd-3(f)(5); *id.* § 78c(a)(17).

77. Criminal Division of the United States Department of Justice and Enforcement Division of the United States Securities Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, United States Department of Justice, (Nov. 14 2012), www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf.

78. *Id.*

79. *Id.*

80. *See* Brown, *supra* note 75, at 317 (noting that "[I]n short, jurisdiction based on nationality is asserted over all U.S. persons regardless of the sites of the acts in furtherance of the violation and regardless of whether there is a nexus to interstate commerce within the United States").

81. 15 U.S.C. § 780(d); *id.* § 781(g).

82. S. REP. NO. 105-277, at 3 (1998); *see also* Brown, *supra* note 75, at 358 (explaining that the U.S. has jurisdiction of over foreign nationals who commit an act in furtherance of violations of the FCPA).

D. FCPA Effectiveness Largely Relies on Internal Compliance and Whistleblowers

In recent years, the SEC and DOJ have increasingly encouraged companies to develop internal compliance programs to detect and correct corrupt or illegal conduct.[83] Internal controls are not a new concept; the FCPA actually requires that companies take some compliance measures.[84] Since 2010, though, both the SEC and the DOJ have increasingly incentivized developing and expanding of internal compliance programs.[85] During that year, the SEC rolled out a new program to encourage cooperation with FCPA investigations and enforcement actions.[86] The program introduced deferred prosecution agreements ("DPA's") and "non-prosecution agreements ("NPA's").[87] Though the legitimacy of these agreements is debated, the SEC and DOJ use them to reward companies that have compliance programs in place.[88]

For example, in 2013, the SEC used its first NPA to resolve an FCPA violation by Ralph Lauren Corporation ("RLC").[89] In reaching the agreement, the SEC acknowledged that its decision not to prosecute RLC was impacted by the company's internal compliance initiatives and willingness to self-report.[90] Even when DPA's and NPA's are not offered, the SEC and DOJ have been more lenient to companies if they self-report or have effective internal compliance measures.[91] There is reason to believe internal compliance will be encouraged even more, as James Sensenbrenner, the Chairman of the House Subcommittee on Crime, Terrorism, and Homeland Security, has suggested amending the FCPA to provide an affirmative defense to companies that have compliance programs.[92]

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83. Bartle et al., *supra* note 25, at 1311.

84. 15 U.S.C. § 78m(b); *id.* § 78m(2).

85. Koehler, *supra* note 28, at 990.

86. *SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations*, (Jan. 13, 2010), United States Securities Exchange Commission, www.sec.gov/news/press/2010/2010-6.htm

87. *Id.*

88. *See* Koehler, *supra* note 28, at 7 (arguing that DPA's and NPA's are problematic because they lack transparency and do not follow the principles of the rule of law). Koehler argues the use of these agreements are "a blow to the rule of law which values enforcement of the law in an open, transparent matter and in the context of an adversarial proceeding," and went on to state that because the "use resolution vehicles that are not subjected to one ounce of judicial scrutiny, this is not something to praise, it is something to lament." *Id.*

89. Koehler, *supra* note 28, at 989.

90. *Id.*

91. Richard L. Cassin, *Top Ten Disgorgements*, FCPA Blog (Mar. 14, 2011, 8:02 AM), www.fcpablog.com/blog/2011/3/14/top-ten-disgorgements.html#--Top Ten Disgorgements; Koehler, *supra* note 28, at 990.

92. *Foreign Corrupt Practices Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th

Along with internal compliance programs, the United States also relies on whistleblowers to report potential FCPA violations.[93] The SEC assures potential whistleblowers that the Commission is willing and able to provide benefits and protection.[94] In September 2014, the SEC handed out a thirty million dollar reward, the largest ever, to a non-United States citizen who reported FCPA violations that occurred abroad.[95] Sean McKessy, Chief of the SEC's Office of the Whistleblower, asserted that the award "shows the international breadth of our whistleblower program as we effectively utilize valuable tips from anyone, anywhere to bring wrongdoers to justice."[96] He even went so far as to claim that "[w]histleblowers from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the U.S. securities laws."[97]

Despite these assurances, many whistleblowers actually may not receive any protection from the United States at all.[98] Some courts have held that if an employee follows the encouraged method of reporting FCPA violations internally instead of directly to the SEC, they may not be considered a whistleblower.[99] Also, as the law currently stands, the anti-retaliation provisions of Dodd-Frank do not apply extraterritorially, thus foreign whistleblowers do not receive any protection even if they report a legitimate FCPA violation that is prosecuted.[100]

Cong. 1 (2011).

93. Carr, *supra* note 30.

94. *In the Matter of the Claim for Award in Connection with Redacted*, United States Securities Exchange Commission (Sept. 22, 2014), www.sec.gov/rules/other/2014/34-72301.pdf.

95. *SEC Announces Largest-Ever Whistleblower Award,* United States Security Exchange Commission (2014), www.sec.gov/News/PressRelease /Detail/PressRelease/1370543011290#.VEq9KCldVqs. The award was announced after the decision in *Liu*. *Id*.; Liu Meng-Lin v. Siemens AG, 763 F. 3d 175, 177 (2d Cir. 2014). The SEC took the opposite position of the court in *Liu,* and explained, "[i]n 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 violations of the U.S. securities laws, by the Commission, the U.S. regulatory agency with enforcement authority for such violations". *Id.* The SEC further stated that its belief is this type of approach is the best way to effectuate the purpose of the program which was to "further the effective enforcement of the U.S. securities laws by encouraging individuals with knowledge of violations of these U.S. laws to voluntarily provide that information to the Commission." *In the Matter of the Claim for Award in Connection with Redacted*, Release No. 73174 (S.E.C. Release No. Sept. 22, 2014).

96. In the Matter of the Claim for Award in Connection with Redacted, *supra* note 95.

97. *Id.*

98. Anello, *supra* note 34.

99. Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012); Egan v. TradingScreen, Inc., 2011 WL 1672066, at *3 (S.D.N.Y. May 4, 2011) [hereinafter *Egan* I].

100. Anello, *supra* note 34.

These rulings strongly contradict the message that the SEC and DOJ are sending to potential whistleblowers.[101] On one hand, the United States government is actively encouraging internal reporting of misconduct and assuring whistleblowers they are safe to come forward. On the other hand, they find themselves without any protection or reward if they report internally, or are located outside of the United States, where most of the corrupt conduct is likely to occur.[102]

III. THE INTERSECT OF DODD-FRANK AND THE FCPA

As mentioned in section II, persons that report corrupt conduct suffer a variety of personal and professional consequences.[103] To help assure that coming forward with information on corruption won't ruin a person's life, Congress enacted the Dodd-Frank Whistleblower Provisions which protect whistleblowers.[104] This section will (A.) discuss the Dodd-Frank Whistleblower Provisions; (B.) discuss a series of court rulings that limit the effectiveness of the provisions; and (C.) examine how these court rulings undermine the message the United States has been sending whistleblowers, and disincentivizing coming forward with information.

A. Dodd-Frank Whistleblower Provisions

In 2010, Congress passed Dodd-Frank.[105] The Act was a direct response to the financial crisis of 2008 and overhauled regulation of the financial system.[106] Section 922 of Dodd-Frank is particularly important for individuals who report potential FCPA violations.[107] This provision added Section 21F to the Securities Exchange Act, which protects whistleblowers.[108] The provision

101. *Id.*

102. Mike Koehler, *The Odd Dynamic Persists*, FCPA PROFESSOR (Oct. 22. 2013, 12:02 AM), http://fcpaprofessor.blogspot.com/2010/07/financial-reform-bills-whistleblower.html.

103. *See* Section II.

104. 15 U.S.C. § 78u-6 (2012).

105. 15 U.S.C. § 78u-6(h) (2012).

106. *See* Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91, 96 (2012) (claiming that "[T]he Dodd-Frank Act was the government's historic response to the causes of the economic crisis").

107. 15 U.S.C. § 78u-6(h) (2012); *see also* Mike Koehler, *The Financial Reform Bill's Whistleblower Provisions and the FCPA*, FCPA PROFESSOR (July 20, 2010, 12:02 AM), http://fcpaprofessor.blogspot.com/2010/07/financial-reform-bills-whistleblower.html (explaining that sections 922-924 are especially important for FCPA enforcement because they create new whistleblower protections that may apply to FCPA whistleblowers).

108. 15 U.S.C. § 78u-6 (2012) (amending The Securities Exchange Act of 1934 by inserting Sec. '21F, titled "Securities Whistleblower Incentives and Protection").

defines a whistleblower as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."[109] Section 922 protects a whistleblower by keeping identities anonymous until an action is commenced, offering financial rewards for reports of securities law violations, and prohibiting retaliatory actions by employers.[110] By providing these protections, this provision encourages the reporting of conduct that potentially violates securities laws, including the FCPA.[111]

The financial rewards provisions of Section 922 have come to be known as the "Bounty Provisions", and are integral to the enforcement of the FCPA.[112] They allow for financial compensation to be awarded to a whistleblower that provides "original information" regarding alleged misconduct.[113] The amount that the whistleblower receives depends on a number of factors, but if the information leads to a recovery of more than one million dollars, the whistleblower must receive between ten and thirty percent of the monetary sanctions.[114]

The anti-retaliation provisions set forth in Section 922 prohibit an employer from discharging, demoting, suspending, threatening, harassing or treating an employee in any discriminatory manner as a response to the employee providing information to the SEC regarding illegal conduct.[115] They also prohibit such conduct in retaliation for making disclosures that are required under the Sarbanes-Oxley Act of 2002, the Securities Exchange Act, or any other law, rule, or regulation under the jurisdiction of the SEC.[116] If the company retaliates against the employee, Dodd-Frank provides a private cause of action.[117] If the

109. 15 U.S.C. §78u-6(a).

110. Dodd-Frank Act, 15 U.S.C. §78u-6(h)(2)(A); 15 U.S.C. § 78u-6(c)(2)(B); 15 U.S.C. § 78u-6(h)(1)(A).

111. *See* S. REP. NO. 111-176 at 110 (2010) (noting that Congress's intent in enacting the whistleblower provisions in Dodd-Frank was to motivate whistleblowers to come forward so the Government can identify those who violate securities laws).

112. Sprinzen, *supra* note 32, at 153 (explaining "[c]ommentators and employment and securities law practitioners commonly refer to the program as a 'bounty program'").

113. 15 U.S.C. § 78u-6(a)(3) (stating that original information must be "derived from the independent knowledge or analysis of a whistleblower.").

114. 15 U.S.C. § 78u-6(c)(1)(A). The Act provides several criteria that the SEC must consider in determining the amount of the award, including the significance of the information provided, the degree of assistance provided by the whistleblower, and the Commission's interest served by awarding whistleblowers. *Id.* The SEC may not take into account 15 U.S.C. § 78u-6(c)(1)(B). *Id.*

115. 15 U.S.C. § 78u-6(h)(1)(A).

116. 15 U.S.C. § 78u-6(h)(1)(B)(i).

117. To demonstrate a cause of action, the employee must show:

(1) he or she was retaliated against for reporting a violation of the

employee wins the lawsuit, he is entitled to reinstatement with the same seniority status as before, plus twice the amount of back pay, with interest, and compensation for litigation costs.[118]

Although the benefits of Dodd-Frank's whistleblower provisions would seem to provide adequate security for those reporting FCPA violations, courts are split as to how a person qualifies as a whistleblower.[119] Also, courts have uniformly found that they did not apply extraterritorially and, thus, offer no protection to FCPA whistleblowers abroad.[120]

B. Scaring Away Whistleblowers

A series of court rulings may scare away potential whistleblowers for two reasons. First, the cases created great uncertainty as to how a person qualifies as a whistleblower.[121] Second, the cases established that whistleblowers located outside of the United States will not be protected from retaliation by his employer.[122] The first relevant case was *Morrison v. National Australia Bank Limited.*[123] The FCPA was not at issue in *Morrison*, but the case still impacted the availability of protection for FCPA whistleblowers.[124] In *Morrison*, a group of investors in the National Australia Bank alleged that the bank engaged in deceptive conduct when purchasing a Florida mortgage servicing company.[125] The investors filed suit in the United States District Court in New York, alleging that this conduct violated the Securities Exchange Act.[126]

The District Court dismissed the case and the Supreme Court ultimately affirmed that decision.[127] The Supreme Court's majority opinion, written by Justice Scalia, relied heavily on the

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securities laws[;] (2) [the employee] reported that information to the SEC or to another entity;

(3) the disclosure was made pursuant to a law, rule, or regulation subject to the SEC's jurisdiction;

(4) the disclosure was "required or protected" by that law, rule, or regulation within the SEC's jurisdiction.

Nollner, 852 F. Supp. 2d at 995 *(*M.D. Tenn. 2012*)* (holding that plaintiff was not entitled to Dodd-Frank anti-retaliation protection because the disclosed conduct did not violate securities laws).

118. 15 U.S.C. § 78u-6(h)(1)(C).

119. Asadi v. G.E. Energy (USA), L.L.C., 720 F. 3d 620, 621 (5th Cir. 2013); *Nollner*, 852 F. Supp. 2d at 995; Egan, 2011 WL 1672066, at *3.

120. Anello, *supra* note 34.

121. *Id.*

122. *Id.*

123. Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 247 (2010).

124. Sprinzen, *supra* note 32, at 153.

125. *Morrison*, 561 U.S. at 247.

126. *Id.*

127. *Id.*

presumption against extraterritoriality.[128] Justice Scalia noted that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[129] The majority concluded that the Securities Exchange Act did not clearly indicate that Congress intended the statute to apply extraterritorially.[130] Thus, the Court presumed that Congress only intended the Act to apply to securities listed on a domestic exchange.[131] Ultimately, even though the Court found that the Bank's conduct was illegal, the Securities Exchange Act did not reach its conduct because the bank was not listed on an American stock exchange.[132] As discussed in Section II, the presumption against extraterritoriality was not a new concept, but *Morrison* effectively reaffirmed it.[133]

Two years later, the District Court for the Southern District of Texas applied the principles of *Morrison* in *Asadi v. G.E. Energy (USA), LLC.*[134] In *Asadi,* the plaintiff, Khaled Asadi, a citizen of both Iraq and the United States, was a United States employee of G.E. who was "temporarily relocated" to work at a GE office in Amman, Jordan.[135] While in Amman, Asadi became concerned about potentially crooked hiring practices at GE and corrupt agreements between GE and the Iraqi government.[136] After expressing concerns about the possibility of FCPA violations to his supervisor, he received poor performance reviews and was eventually fired.[137] In 2011, Asadi filed suit in the United States alleging violation of Dodd-Frank's whistleblower provisions and state-law breach of contract claims.[138]

At first glance, it was not actually clear whether Asadi even qualified as a whistleblower. The language in Dodd-Frank requires that a whistleblower report the information to the SEC, and Asadi never actually reported the conduct to the SEC.[139] However, two other District Courts had already held that the language of Dodd-Frank was too narrow and that, despite the statutory language, a person could qualify as a whistleblower

128. *Id*.
129. *Id*. at 248.
130. *Id*. at 265.
131. *Id* at 256.
132. *Id*.
133. Sprinzen, *supra* note 32, at 153.
134. Asadi v. G.E. Energy (USA), LLC, 2012 WL 2522599 (S.D. Tex. June 28, 2012).
135. *Id*. at *1.
136. *Id*.
137. *Id*.
138. *Id*.
139. *Id.;* Dodd-Frank Act, 15 U.S.C. § 78u–6(h)(1)(A).

without reporting directly to the SEC.[140] Ultimately, the *Asadi* court did not reach this issue.

Instead, the Court dismissed Asadi's Dodd-Frank claim because the language of the anti-retaliation provision does not overcome the presumption against extraterritorial application.[141] The Court held that the anti-retaliation provision only applies where a disclosure is required or protected under SOX,[142] the Securities Exchange Act,[143] or any other law, rule, or regulation subject to the jurisdiction of the Commission.[144] Asadi argued that his disclosures were protected under Section 806 of SOX and required under Sections 302 and 404 of SOX.[145] But the Court rejected this argument, holding that Section 806 also does not overcome the presumption against extraterritorially.[146]

Asadi further argued that his disclosures were protected by another law subject to the jurisdiction of the Commission: the FCPA.[147] However, the Court dismissed this argument because Asadi did not prove that the FCPA protects or requires disclosure of violations.[148] Asadi appealed the District Court decision.[149]

The Fifth Circuit affirmed the District Court, but reached its decision through different reasoning.[150] The Fifth Circuit addressed the issue that the lower court bypassed, and held that Asadi did not qualify as a whistleblower because he did not report any information to the SEC.[151] Thus, the Fifth Circuit entirely

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140. *Nollner*, 852 F. Supp. 2d at 995; *Egan*, 2011 WL 1672066, at *3. The conflict is that Dodd-Frank's statutory definition of whistleblower requires the disclosure be made to the SEC. *Id.* However, the anti-retaliation provision protects an employee for reporting the misconduct without specifying that the disclosure be made to the SEC. *Id.* In *Egan,* the court acknowledged that a literal reading of the definition requiring reporting to the SEC would "effectively invalidate" the anti-retaliation provisions protection of disclosures that are not reported to the SEC. *Id.* The Court decided that the best solution was to treat the provision's protected reports that are not made to the SEC as a "narrow exception" to the statutory definition of a whistleblower. *Id.* The court in *Nollner* followed the reasoning set out in *Egan*. *Nollner* 852 F. Supp. 2d at 995.

141. *Asadi*, 2012 WL 2522599 at *5.

142. 15 U.S.C. 7201 *et seq.*

143. 15 U.S.C. 78a *et seq.*

144. *Asadi*, 2012 WL 2522599 at *6.

145. Section 806 of SOX provides whistleblower protection for employee of publicly traded companies in the United States. 18 U.S.C. § 1514A.

146. *Id. In Camero v Boston Scientific Corp.*, the First Circuit held that there was no indication in the language, legislative history, or application of the statute itself that allowed for Section 806 of SOX to overcome the presumption against extraterritoriality. Carnero v. Boston Sci. Corp., 433 F.3d 4, 18 (1st Cir. 2006); 18 U.S.C. § 1514A.

147. *Asadi*, 2012 WL 2522599, at *6.

148. *Id.*

149. Asadi v. G.E. Energy (USA), L.L.C., 720 F. 3d 620, 621 (5th Cir. 2013).

150. *Id.*

151. *Id.*

avoided the extraterritorial reach of the anti-retaliation provision.[152]

The Second Circuit, though, recently saw this exact issue in *Liu v. Siemens*.[153] After Liu was discharged from his job, he filed suit in the United States District for the Southern District of New York.[154] Liu alleged that Siemens violated Dodd-Frank's anti-retaliation provision by firing him for reporting potential FCPA violations.[155] The District Court, following the reasoning of *Morrison* and the district court in *Asadi*, held that Liu's claims must be dismissed because the anti-retaliation provision did not overcome the presumption against extraterritoriality.[156] The Court rejected Liu's arguments that his disclosures were protected under Section 806 of SOX, ruling that it also does not overcome the presumption against extraterritoriality.[157] The Court further held that disclosure of FCPA violations are not required or protected by Section 806 regardless of its extraterritorial jurisdiction.[158] The court also discussed the issue of whether a person must report information to the SEC to qualify as a whistleblower but refrained from taking a stance on the issue[159].

On appeal, the Court of Appeals of the Second Circuit upheld the District Court's opinion.[160] The only issue the Second Circuit addressed was whether the anti-retaliation provision applies extraterritorially.[161] Due to similarities in the facts of each case, the Court used *Morrison* as precedent in holding that merely listing some securities in the United States does not avail a company to extraterritorial jurisdiction of United States laws.[162]

The Court then looked at the language of the anti-retaliation provision, and found that it "contains no hint that the anti-retaliation provision is meant to apply extraterritorially."[163]

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152. Sprinzen, *supra* note 32, at 153.

153. *Liu*, 763 F.3d at 177.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* By the time the District Court ruled on *Liu*, several other courts had followed the *Egan* stance on the issue. Ellington v. Giacoumakis, 977 F. Supp. 2d 42, 42 (D. Mass. 2013); Murray v. UBS Sec., LLC, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *3–7 (S.D.N.Y. May 21, 2013); Genberg v. Porter, 935 F. Supp. 2d 1094, 1106–07 (D. Colo. 2013); Kramer v. Trans–Lux Corp., No. 11 Civ. 1424(SRU), 2012 WL 4444820, at *3–5 (D. Conn. Sept. 25, 2012). However, at least one other court adopted the *Asadi* Fifth Circuit ruling declining to read in the exception. Wagner v. Bank of Am. Corp., No. 12–cv–00381–RBJ, 2013 WL 3786643, at *4–6 (D. Colo. July 19, 2013); Banko v. Apple, Inc., No. 13-02977, 2013 WL 6623913, at *2-3 (N.D. Cal. Dec. 16, 2013).

160. *Liu*, 763 F.3d at 177.

161. *Id.*

162. *Id.*

163. *Id.*

Therefore, Liu was not provided any protection.[164] This decision was the first, and only, time that a United States Circuit Court ruled on the matter.[165]

C. How These Cases Undermine Internal Compliance and Provide Disincentives for Whistleblowers

Morrison, Liu, and Asadi have major implications for potential FCPA whistleblowers.[166] Each case effectively limits, or entirely eliminates, protection for FCPA whistleblowers.[167] Moreover, the results of these cases seem to be at odds with both the SEC's strong encouragement of internal compliance and the increasing extraterritorial enforcement of the FCPA.[168] While reporting corruption is encouraged, potential whistleblowers are (1) left wondering whether they will receive protection if they report the misconduct to internal compliance programs; and (2) not provided any protection if they are not within the United States.

1. Internal Compliance May Leave Whistleblowers without Protection

After these cases, it remains unclear who qualifies as a whistleblower under Dodd-Frank.[169] The plain language of Dodd-Frank requires a person to report misconduct to the SEC in order to trigger protection.[170] However, the anti-retaliation provision only requires that the disclosure is required or protected by statute in order to receive anti-retaliation protection.[171] A number of district courts have held that this is a contradiction and ruled that disclosure to the SEC is not required.[172] Likewise in 2011, the SEC published a rule granting protection to whistleblowers regardless of whether the disclosure was made internally or to the SEC.[173] The SEC also filed an *amicus* brief in *Liu*, urging the

164. *Id.*

165. Anello, *supra* note 34.

166. Sprinzen, *supra* note 32, at 153.

167. *Id.*

168. Mike Koehler, *The Odd Dynamic Persists*, FCPA PROFESSOR (Oct. 22. 2013, 12:02 AM), http://fcpaprofessor.blogspot.com/2010/07/financial-reform-bills-whistleblower.html.

169. Anello, *supra* note 34.

170. *Asadi*, 720 F. 3d at 621.

171. *Id.*

172. SEC Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34304 (June 13, 2011).

173. The SEC promulgated a rule to side step the issue of whether a whistleblower must report to the SEC. *Id.* When the rule was announced, the SEC stated "[t]his change to the rule reflects the fact that the statutory anti-retaliation protections apply to three different categories of whistleblowers,

Second Circuit to show deference to its rule and allow protection for disclosures made internally.[174] Despite the desires of the SEC, the Second Circuit did not rule on the issue as the claim was dismissed for other reasons.[175]

In contrast, the Fifth Circuit in *Asadi* ruled that to qualify as a whistleblower, the disclosure must be made to the SEC.[176] Although the ruling in *Asadi* is of higher authority, several district courts have taken the opposite position.[177] The likely result of this conflict is that a potential whistleblower is either not going to come forward with the information for fear of not being protected, or is going to go straight to the SEC with the information.[178] Both situations undermine the general purpose of the provisions.[179] Withholding information about corruption allows corruption to persist.[180] Moreover, requiring reports to be made to the SEC contradicts the encouraged practice diminishes the benefits of internal compliance.[181]

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and the third category includes individuals who report to persons or governmental authorities other than the [SEC]." *Id.*; 17 C.F.R. § 240.21F–2(b)(1).

174. The SEC filed an *amicus curiae* brief before the Fifth Circuit's decision in *Liu*. Brief for the SEC as Amici Curiae Supporting Petitioners, Liu Meng-Lin v. Siemens AG, 763 F. 3d 175, 177 (2d Cir. 2014). In the brief, the SEC urged the court to adopt its rule on that a whistleblower need not disclose the information to the SEC because ruling otherwise would "jeopardize the benefits of internal reporting." *Id.*

175. *Liu*, 763 F. at 182.

176. *Asadi*, 720 F. 3d at 621.

177. *Liu*, 763 F.3d at 177

178. *Infra* note 180 (stating that a primary objective of the whistleblower protections is to avoid burdens that prevent whistleblowers from first reporting internally).

179. *See* S. REP. NO. 111-176 at 110 (2010) (stating that the SEC would gain more from a whistleblower program that encourages people with knowledge of violations to come forward).

180. *See* Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the scope of Private Whistleblower Suits to Overseas Employer*, 46 HARV. J. ON LEGIS. 425, 427-28 (2009) (arguing that whistleblower protection needs to be expanded and claiming between that forty to sixty of the 240 to 300 billion dollars lost in corruption annually is through bribery and petty corruption).

181. *See* Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 752 (2014) (noting that internal whistleblowing allows wrongful conduct to be detected earlier, reduces costs, and improves relationship with government; *see also* Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 728 (2014) (noting that "[e]ffective internal compliance programs and the existence of compliance officers within companies provide enormous benefits"). Parcella further argues that internal compliance programs offer assurance that companies are adhering to the numerous laws and regulations imposed upon them, an internalization of compliance policies by employees to ethically affect business decision making, the need for fewer regulatory burdens as legislators and regulators could be

2. Employees Working Overseas Are Not Protected From Retaliation

The only point of clarity these cases provide is that the anti-retaliation provision will not apply extraterritorially as it is currently written.[182] Considering the emphasis that *Morrison* placed on the presumption against extraterritoriality, this was the easiest decision that the courts could make.[183] Given that there is no indication of Congressional intent for the provision to extend internationally, there is likely no argument that could have persuaded the courts otherwise.[184]

This result is troublesome because, as mentioned above, the SEC and DOJ have made great efforts to expand international enforcement of the FCPA while also simultaneously incentivizing internal compliance.[185] In doing so, the United States government is encouraging employees stationed abroad to first report possible FCPA violations internally.[186] Meanwhile the Chief of the SEC's Office of the Whistleblower is essentially advertising its whistleblower protections as all-inclusive, But these cases show that that is simply not true.[187] Instead, any employee stationed abroad that reports possible FCPA violations taking place outside the United States will be open to retaliation from their employer for reporting the misconduct.[188] This unfortunate reality undermines the efforts of the United States government and the purpose of the FCPA.[189] Lack of protection from retaliation will certainly prevent whistleblowers from coming forward, thus leaving corruption unpunished.[190] While some may argue that the potential for a bounty award is enough incentive to come forward, it is important to remember that bounty rewards are far from guaranteed.[191] Additionally, strong preference for a bounty may undermine the concept of internal compliance.[192] These negative

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convinced that companies are not motivated solely by self-interest, and the identification of problems before they become larger and more problematic issues. *Id.*

182. *Morrison*, 561 U.S. at 247.

183. *Liu*, 763 F.3d at 182.

184. *Id.*

185. Bartle et al., *supra* note 25, at 1311.

186. *Id.*

187. *SEC Announces Largest-Ever Whistleblower Award*, United States Securities Exchange Commission, *(*Sep. 22 2014), www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290#.VEq9KCldVqs; Anello, *supra* note 34.

188. *Id.*

189. *See* Hamann et al., *supra* 20, at 422 (discussing recent anti-corruption enforcement actions taking place internationally).

190. *Id.*

191. Koehler, *supra* note 28, at 8.

192. *Id.*

implications inhibit the effectiveness of the FCPA.[193] If the United States government is going to continue its extraterritorial enforcement of the FCPA, it must amend Dodd-Frank so that potential whistleblowers abroad can feel safe about reporting corruption either internally or to the United States.

IV. CONGRESS SHOULD AMEND DODD-FRANK TO BETTER PROTECT FCPA WHISTLEBLOWERS

The negative impacts of corruption are undeniable, and societies at large stand to benefit from the fight against it.[194] While other countries are increasingly joining the effort to fight international corruption, the United States has led the cause.[195] Many other nations have developed anti-corruption policies, but most are not strictly enforced, which leaves the United States as the leading force in combatting corruption.[196]

However, Asadi and Liu have exposed the shortcomings of whistleblower protection in the United States, and these shortcomings are serious threats to the efforts made against corruption.[197] The United States needs to continue to lead the fight and, at the very least, protect its own citizens from retaliation for reporting corruption. Even though certain aspects of the FCPA may be controversial and opinions on its effectiveness vary widely, the FCPA is here to stay.[198]

There are many different elements of FCPA enforcement that some believe need fine-tuning or general reconstruction.[199]

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193. Pacella, *supra,* note 181.

194. Nichols, *supra* note 14.

195. Weiss, *supra,* note 24.

196. For the past ten years, Transparency International assesses the enforcement of the OECD Anti-Bribery Convention. Shruti J. Shah, *OECD Enforcement Grades Are In (And Still Aren't Pretty),* THE FCPA BLOG (Oct. 23, 2014), www.fcpablog.com/blog/2014/10/23/oecd-enforcement-grades-are-in-and-still-arent-pretty.html. Each country receives a grade of either active, moderate, limited, and little or no enforcement. *Id.* This year, the grade was based upon each countries enforcement actions from 2010-2013. *Id.* Only four of the 41 signatories received a grade of "active" (United States, Germany, U.K., and Switzerland). *Id.* Five countries received a "moderate" grade (Italy, Canada, Australia, Austria, and Finland). *Id.* Therefore, according to the report, "there is no deterrence to foreign bribery in countries which make up 34.6% of the world's exports." *Id.*

197. *Meng-Lin Liu,* 978 F. Supp. 2d at 326; *Asadi*, 720 F. 3d at 621.

198. In 2013, Charles Duross, at the time the deputy chief of the U.S. Department of Justice's FCPA unit, stated, "We're investing in the [FCPA] program… everyone's committed to doing this work." Brian Mahoney, *Expect More Big FCPA Cases in 2014: DOJ, SEC Officials*, LAW 360 (Nov. 19, 2013), www.law360.com/articles/489940/expect-more-big-fcpa-cases-in-2014-doj-sec-officials. Kara N. Brockmeyer, the chief of the U.S. Securities and Exchange Commission's FCPA unit, also stated "One of the things that we are doing very actively is ... we are spreading the message of the FCPA". *Id.*

199. In 2012, the US Chamber of Commerce Institute for Legal Reform

However, a necessary and easy action that Congress can take is to amend the Dodd-Frank whistleblower provisions in the Securities Exchange Act to provide protection to foreign FCPA whistleblowers. This will better fulfill the objectives of the FCPA. The amendment would eliminate disincentives for potential whistleblowers by: (1) protecting potential whistleblowers outside of the United States; (2) providing protection to potential whistleblowers regardless of whether they report misconduct internally or directly to the SEC; and (3) affording protection to potential whistleblowers that were not required by law to report the corrupt conduct.

To achieve this, the whistleblower provisions should read as follows (changes marked in bold):

1. A whistleblower is any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the **Commission or to an internal compliance department of an entity that is subject to the provisions of the Foreign Corrupt Practices Act**, in a manner established, by rule or regulation, by the Commission[200]

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wrote a letter to the SEC and DOJ seeking guidance on "several issues and questions of significant concern to businesses seeking in good faith to comply with the FCPA." US Chamber of Commerce, et. al., *Guidance Concerning the Foreign Corrupt Practices Act*, Letter to Lanny Breuer and Robert Khuzami (Feb. 21, 2012), http://crossbordergroup.typepad.com/files/fcpa_guidance_letter_02_21_2012.pdf. One area the letter addressed was the need for clarification on what entities may be considered "instrumentalities" of foreign governments. *Id.* The letter stated that the current ambiguity has led to a "chilling effect on legitimate business activity...and a costly miscalculation of compliance resources." *Id.* The letter also sought guidance on what would be considered "an effective FCPA compliance program" such that a program would receive favorable treatment on an enforcement action. *Id.* The letter then sought an outline of "reasonable standards for [pre-acquisition] diligence and identify factors that will be considered in determining whether diligence was adequate," to address the issues concerning parent liability and successor liability. *Id.* Further, as the DOJ has stated that it will not prosecute "de minimis" gifts and hospitality, the letter asked for a "clear standard for gifts and hospitality that ordinarily will not be subject to enforcement action." *Id.* Moreover, the letter asked for clarification of the *Mens Rea* standard that will be applied for corporate liability. *Id.* The FCPA only holds individuals liable for "willful violations", but does not specify how corporations may be held criminally liable. *Id.* The final major issue addressed was the DOJ's practice of "Declination Decisions." *Id.* The letter asked for the DOJ to consider changing its practice of not providing details or information as to why some investigations are closed with without any charges being filed. *Id.* The letter claimed that such information would be "tremendously useful to companies seeking to comply with the FCPA." *Id.* The SEC responded to the letter in November 2012, providing guidance on some of the issues that were addressed. Bartle, *supra* note 25, at 1313.

200. This would amend the language of Dodd-Frank Act, 15 U.S.C. §78u-6(a).

> 2. No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower--
>
> i. in providing information to the Commission in accordance with this section;
> ii. in 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. in making disclosures that **if true, may lead to an enforcement action under the Foreign Corrupt Practices Act against the employer or one or more of its employees,** or are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of Title 18, United States Code, and any other law, rule or regulation subject to the jurisdiction of the Commission.[201]

These amendments would remove major disincentives that potential whistleblowers might face. First, with the amended language, the whistleblowing statute would overcome the presumption against extraterritoriality.[202] By including a direct reference to the FCPA, there would be a clear indication that the provisions carry an intention to apply extraterritorially. This intention is evident because the FCPA is designed to curtail conduct that is likely to occur outside of the United States.[203] A reference to the FCPA will assure United States citizens stationed that their employer will not be allowed to retaliate against them for reporting misconduct. The same assurance would also protect foreign nationals that work for any company that is subject to the FCPA.

Second, by providing that a whistleblower may be a person that reports FCPA violations internally, the statute would clarify that a whistleblower does not need to report the misconduct to the SEC first.[204] This ensures that internal compliance would not be undermined and that the potential whistleblower would not need to make the difficult decision of whether to report the misconduct or to internally or to the SEC. Instead, the person could decide what they felt was the most appropriate method of reporting the misconduct, knowing that their employer cannot retaliate against them in any way.

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201. This would amend the language of Dodd-Frank Act, 15 U.S.C. § 78u-6(h)(1)(B)(i).

202. *Id.*

203. Anello, *supra* note 34.

204. *Liu*, 763 F.3d at 182.

Third, the amended statute eliminates the notion that to receive protection, the disclosure must be required or protected under a current United States statute.[205] Thus, the potential whistleblower would not need to guess whether the disclosure will be one that is required or protected, but rather, would only need to know that the conduct might be a violation of the FCPA. This would eliminate the suppression of rightful disclosures by assuring that the person will be protected from retaliation even though the disclosure is not required, and even if it does not actually lead to an FCPA enforcement action.

Consider the following hypothetical, which illustrates the troublesome conditions that currently confront potential whistleblowers and that my proposed amendment would prevent. A large United States manufacturer decides to expand its market in another country.[206] To do so, the company sends one of its top strategists to work at its subsidiary in the target country. Through the course of their duties, that employee obtains knowledge that the president of the foreign subsidiary has been bribing foreign officials. In exchange for the bribes, the foreign country's officials agree to classify the company's products as a different product in order to avoid a higher tariff schedule.[207]

The employee understands that it actually benefits the company financially to refrain from corrupt conduct, and also believes it is morally wrong to illegally bribe foreign officials.[208] The employee reports the misconduct to the compliance department of the foreign subsidiary as potential violations of the FCPA. The next day, the employee is told that he is under investigation for sexual harassment and is suspended indefinitely. Two weeks later, the employee is terminated for sexual harassment of another employee and is sent back to the United States. Under these reasonably conceivable circumstances, the employee would not receive any protection in the United States from the retaliation he suffered for reporting the corrupt

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205. *Id.*

206. Some argue that international expansion of U.S. companies contributes great economic growth for the United States economy. Elizabeth Dexheimer, *Companies Expanding Overseas Create U.S. Jobs, Study Says*, BLOOMBERG NEWS (Dec. 3, 2012), www.bloomberg.com/news/2012-12-04/companies-expanding-overseas-create-u-s-jobs-study-says.html. Those that follow this belief claim that international business activities also create a substantial amount of jobs for American citizens. *Id.*

207. In some instances, government officials demand bribes from importers under the threat of classifying products in a more heavily taxed category. Roberta Gatti, *Corruption and Trade Tariffs, or a cause for Uniform Tariffs*, The World Bank Development Research Group, http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2216 (last visited Nov. 7, 2014). Similarly, companies sometimes offer bribes to those government officials to persuade them to categorize the product in a category that carries a lower tax. *Id.*

208. Nichols, *supra* note 14.

practices.[209] He would not be protected simply because he reported the misconduct internally first, and all of the conduct occurred abroad.

However, the proposed amendment to Dodd-Frank would allow the employee to come forward with the information without having to worry about the retaliation he may suffer. This type of protection would help avoid the increases in income inequality, obstruction in access to education, the government, and other important societal resources, and all of the other negative impacts brought on by corruption.[210]

V. CONCLUSION

Our country started the fight against corruption, and should continue the effort while also adapting to the forces of globalization.[211] To do so, the United States government should make it clear that people who join the cause are safe from retaliation and should not hesitate to help.[212] As the circumstances currently stand, whistleblowing may be too risky for many people.[213] The government is sending a conflicting message of

209. Anello, *supra* note 34.

210. Gathii, *supra* note 1.

211. Aside from the moral concerns of combatting corruption, the United States also has significant economic interests fighting corruption. ALAN LARSON ET. AL., CORRUPTION AND THE GLOBAL ECONOMY 237-38 (Kimberly Ann Elliott, 1997). Alan Larson argues that U.S. actions against corruption are motivated by the fact that among other factors, bribery distorts global markets and hinders economic development, undermines democratic accountability, weakens unstable governments, and creates a trade barrier for companies that refuse to engage in corrupt practices. *Id.* Larson goes on to claim that the U.S. ultimately seeks to create a level playing field for U.S. firms, while also strengthening international competition and as a result encouraging economic development and democratic institutions. *Id.* Shang-Jin Wei suggests that as the world becomes increasingly global, anti-corruption efforts (especially those of the IMF) are becoming increasingly important. Wei claims that corruption may prevent a country from being able to enjoy the benefits that globalization may offer. Shang-Jin Wei, *Corruption and Globalization,* BROOKINGS POLICY BRIEF SERIES (April 2001), www.brookings.edu/research/papers/2001/04/corruption-wei; *see also* Anup Shah, *Corruption,* GLOBAL ISSUES (last updated Sept. 4, 2011), www.globalissues.org/article/590/corruption (explaining that the globalized international economy needs to be further scrutinized because it makes corruption easier and further disenfranchises people suffering as a result of corruption).

212. *See* Sprinzen, *supra* note 32, at 153 (presenting the question "[s]hould not the law protect an employee of a U.S. company who reports potential FCPA violations?" and arguing that they should have protection).

213. Whistleblowers can be retaliated against in many ways. *See* Pacella, *supra* note 181 (explaining that whistleblowers can experience nonfinancial disincentives including psychological pressure, social isolation, workplace harassment, threats and mistreatment, exclusion from business opportunities, termination, and other consequences).

incentivizing internal compliance, while simultaneously disincentivizing internal compliance by not providing protection to potential whistleblowers. This will only slow down the fight against corruption.[214]

As the courts currently interpret the statutes, the SEC and DOJ cannot alleviate this issue in an effective manner. To fix this problem, Congress should amend Dodd-Frank with language similar to that proposed in Section IV above. In doing so, Congress would be allowing the United States to continue its fight against corruption and maintain its role as the leader in effectively curbing corruption for the benefit of society at large.

214. *Id.*