[Journal of Criminal Law and Criminology](https://scholarlycommons.law.northwestern.edu/jclc)

Volume 102 | Issue 1 Article 6

Winter 2012

In Spite of Its Good Intentions, the Dodd-Frank Act Has Created an FCPA Monster

Heidi L. Hansberry

0091-4169/12/10201-0195
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 102, No. 1

Printed in U.S.A.

COMMENTS

IN SPITE OF ITS GOOD INTENTIONS, THE DODD–FRANK ACT HAS CREATED AN FCPA MONSTER

Heidi L. Hansberry*

I. INTRODUCTION

The Foreign Corrupt Practices Act (FCPA)[1] has the noble goal of deterring corporations and individuals from engaging in corrupt dealings with foreign officials. To achieve this goal, the FCPA outlaws the bribery of foreign officials (the anti-bribery prong) and condemns deficient accounting practices (the books and records prong).[2] The FCPA empowers both the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) to enforce these two prongs.[3]

The DOJ and SEC have been overwhelmingly successful in their enforcement efforts, as measured by the price tags of the settlements they have achieved. The top ten corporate FCPA settlements in the past three years alone amount to over $3.1 billion,[4] a figure that includes criminal fines, civil disgorgement, and prejudgment interest collected by both

* J.D. Candidate, May 2012, Northwestern University School of Law; B.A., Yale University, 2006. I would like to thank Professor Juliet Sorensen and Robert Silvers for their assistance in developing the idea for this Comment. Additionally, I owe much gratitude to Will Singer, Jessica Fricke, and Eric Westlund for their invaluable suggestions and edits.

[1] 15 U.S.C. §§ 78dd-1 to 78dd-3 (2006).

[2] 15 U.S.C. §§ 78dd-1(a), 78m(a).

[3] *See The Lay Person's Guide to the Foreign Corrupt Practices Act Antibribery Provisions*, U.S. DEP'T OF JUST. 2, http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf (last visited Sept. 30, 2011) [hereinafter *The Lay Person's Guide*].

[4] *J&J Joins New Top Ten*, FCPA BLOG (Apr. 8, 2011, 4:43 PM), http://www.fcpablog.com/blog/2011/4/8/jj-joins-new-top-ten.html (citing the following corporate fines: Siemens ($800 million), KBR/Halliburton ($579 million), BAE ($400 million), Snamprogetti Netherlands B.V. ($365 million), Technip S.A. ($338 million), JGC Corporation ($218.8 million), Daimler AG ($185 million), Alcatel-Lucent ($137 million), Panalpina ($81.8 million), Johnson & Johnson ($70 million)).

agencies.[5] These figures make it clear that the FCPA has created a high-stakes game for implicated corporations, issuers, and individuals.

A significant development for the FCPA occurred in July 2010, when Congress passed the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act).[6] This act amended the Securities Exchange Act of 1934, which contains the FCPA.[7] Notably, the Dodd–Frank Act added provisions that protect whistleblowers who report Securities Exchange Act violations. The provisions mandate that whistleblowers receive a percentage of the fines resulting from government convictions or settlements.[8] Subject to certain requirements, whistleblowers are entitled to 10%–30% of the total fines imposed on companies for providing information that assists the government in its investigation of Securities Exchange Act allegations.[9]

In addition to providing qualifying whistleblowers with a bounty, the Dodd–Frank Act protects whistleblowers in two other respects. First, it allows whistleblowers to remain anonymous up to the point of receiving their financial awards.[10] Second, the Dodd–Frank Act allows whistleblowers to redeem their bounties unless they are convicted of a crime related to the reported FCPA violations.[11]

The Dodd–Frank Act's whistleblower bounties and enhanced whistleblower protections have strengthened the power of the FCPA. A 10%–30% minimum payout means that the Dodd–Frank Act guarantees qualifying whistleblowers multi-million dollar bounties, based on the top figures in the last few years. This financial incentive for whistleblowers, in addition to the benefit of anonymity and the policy to provide financial awards to complicit, but non-convicted, whistleblowers, is dangerous. This Comment will argue that with such a big carrot, anonymity, and a free pass for complicit behavior that does not result in a conviction, whistleblowers

---

[5] *The FCPA's Top Ten*, FCPA BLOG (July 20, 2010, 8:28 AM), http://www.fcpablog.com/blog/2010/7/20/the-fcpas-top-ten.html.

[6] Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of U.S.C. (2006 & Supp. IV 2011)) [hereinafter Dodd–Frank Act].

[7] Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2006).

[8] Dodd–Frank Act, 15 U.S.C. § 78u-6(b) (Supp. IV 2011).

[9] *Id.*

[10] § 78u-6(h)(2)(A) ("Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C).").

[11] § 78u-6(c)(2)(B).

are more likely to submit incomplete or frivolous claims or, in the worst-case scenario, engage in behavior that encourages or brings about FCPA violations.

The Dodd–Frank Act's whistleblower protections add to the burden on corporations, in particular. Corporations are at an extreme disadvantage because of the financial repercussions of fighting FCPA accusations, and a cost–benefit analysis nearly always results in corporations settling claims with the SEC or submitting to fines and monitoring imposed by the DOJ.[12] Once FCPA charges are brought or an FCPA investigation is initiated, corporations tend to settle or plead rather than litigate.[13] There are several reasons for this tendency. First, the FCPA provides for only two affirmative defenses.[14] Second, the FCPA imposes successor liability—liability for acquired corporations' FCPA violations, in a strict liability manner—for acts occurring prior to the entity's acquisition by the parent company. Third, the government's burden of proof has never been tested in court with regard to companies accused of FCPA violations,[15] so companies are unable to benefit from any FCPA precedent. Thus, the "feds [have] immense power . . . . [because] they don't have to prove their legal theories of bribery in court."[16]

The whistleblower provisions will likely increase the number of FCPA

---

[12] 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 ("[A] settled SEC FCPA enforcement action does not necessarily represent the triumph of the SEC's legal position over the company's, but rather reflects a risk-based decision primarily grounded in issues other than facts and the law. It is simply easier and more cost-efficient for a company to settle an SEC FCPA enforcement (notwithstanding whatever dubious and untested legal theory it is based on) than to participate in long, protracted litigation with its principal government regulator."); *see also* Richard L. Cassin, *The Company Line*, FCPA BLOG (July 29, 2010, 6:22 AM), http://fcpablog.com/blog/2010/7/29/the-company-line.html ("[Corporations are] strictly liable under respondeat superior for crimes committed by employees in the scope of their jobs. That's why no company has fought against FCPA charges in court for more than two decades.").

[13] *See* William McGrath, *Corporate Defendant Lindsey Manufacturing Tried and Convicted on FCPA Charges (Along with 3 Other Individuals)*, FED. SEC. L. BLOG (May 11, 2011), http://www.fedseclaw.com/2011/05/articles/foreign-corrupt-practices-act-1/corporate-defendant-lindsey-manufacturing-tried-and-convicted-on-fcpa-charges-along-with-3-other-individuals (noting that only two companies, Harris Corporation and Lindsey Manufacturing, have litigated FCPA cases through trial).

[14] *See infra* Part II.A.

[15] In contrast, individuals accused of FCPA violations have taken allegations to trial rather than plead guilty. *See, e.g.*, *In re* Grand Jury Proceedings, No. 08-50343, 2009 WL 226163 at *1 (9th Cir. Jan. 23, 2009); United States v. Kozeny, 664 F. Supp. 2d 369 (S.D.N.Y. 2009); United States v. Jefferson, 623 F. Supp. 2d 678 (E.D. Va. 2009).

[16] Nathan Vardi, *The Bribery Law Racket*, FORBES, May 24, 2010, at 70, 71.

investigations and also lessen a defendant's ability to combat the charges, given the nature of complaints from anonymous whistleblowers. Whistleblower anonymity may prevent a company from conducting a thorough internal investigation of the alleged conduct or exploring a whistleblower's potential ulterior motives. Thus, companies and individuals may more frequently choose to settle or plead guilty to FCPA charges, regardless of the legitimacy of the allegations, because of the uncertainty resulting from anonymous accusations.

Corporations have much to lose by taking FCPA allegations to trial. The mere fact that a corporation is under investigation by the government has reliably damaging results on shareholder confidence and stock prices.[17] One would imagine that litigation would only exacerbate this negative economic effect, due to the increase in publicity at the trial phase. While companies face such significant economic risk, they might never call the bluff of the government, who may rely upon whistleblowers with frivolous claims, albeit unknowingly. Corporations' cost–benefit analyses, therefore, lead them to abandon the idea of litigating FCPA allegations.[18]

With the added muscle that the Dodd–Frank Act's whistleblower provision provides, the FCPA has become a monster. This Comment suggests ways to temper the FCPA in order to preserve its worthwhile goals of punishing and deterring bribery of foreign officials while reducing the chances of companies being unfairly punished and whistleblowers being improperly incentivized and rewarded. These proposed changes to the FCPA fall into two categories: the prevention of whistleblower abuse and the strengthening of a corporation's ability to defend itself. The specific proposals include the following: (1) the addition of language that warns whistleblowers about prosecution for the provision of false information, (2) the elimination of the anonymity privilege, (3) a cap on the whistleblower's bounty, and (4) the creation of additional defenses.

Following this introduction, Part II of this Comment provides an overview of the history and anatomy of the FCPA. Part III explains the Dodd–Frank Act's applicability to the FCPA. Part IV critiques the Dodd–Frank Act's whistleblower provisions in the context of the FCPA. Part V outlines policy issues and proposals for amendments to the Dodd–Frank Act and the FCPA. Part VI contains concluding remarks.

---

[17] Patrick Conroy & Raymund Wong, *The Wider Costs of FCPA Investigations*, KROLL GLOBAL FRAUD REPORT, Mar. 2009, at 12, *available at* http://www.docstoc.com/docs/61261696/Global-Fraud-Report (noting that of thirty-one companies facing FCPA allegations, nine had statistically significant declines in stock prices and that the "impact on market capitalization of an FCPA-related announcement was far larger than the regulatory settlement imposed").

[18] *See* Koehler, *supra* note 12.

II. The History and Anatomy of the FCPA

The FCPA was passed in 1977 as a reaction to a series of scandals.[19] Data revealed that approximately 400 American companies admitted to making corrupt or "questionable" payments to foreign officials, amounting to over $300 million, in the 1970s.[20] Theodore Sorensen described the policy rationale underpinning the creation of the FCPA:

> *It is unethical* for a corporation to pay bribes or kickbacks to foreign officials to induce them to violate their duty—a practice subversive of sound government, sound business and sound relations between the two, no matter how deeply entrenched it may have become in the host country; a costly, wasteful interference with the free competitive market system; and a cynical, shabby technique of getting business which usually rewards the richest, most reckless and ruthless while passing on the cost to those who can afford it least.[21]

In this climate, Congress enacted the FCPA in an attempt to "restore public confidence in the integrity of the American business system."[22]

In addition to serving important policy objectives, the FCPA filled a significant gap in the law concerning bribery. Bribery within U.S. territory is punishable by several different laws.[23] Bribery of foreign officials outside of the U.S. was formerly punishable only indirectly by tax and securities law violations, specifically if companies (1) failed to report payments to foreign government officials to the SEC, (2) deducted corrupt payments as a business expense on a tax return, or (3) financed corrupt payments with secret funds or phony entities.[24] As noted by Sorensen in 1976, bribery of a foreign official was not illegal if it occurred outside U.S. territory.[25] Thus, Congress enacted the FCPA in order to directly criminalize the act of bribery of a foreign official in foreign territory.[26]

The FCPA was groundbreaking for its time, as it was the first international anti-bribery statute of its type and scope in the world.[27] The U.S. made efforts to spread its gospel as well, and it played a leading role in creating the Organization for Economic Cooperation and Development's

[19] *The Lay Person's Guide*, *supra* note 3, at 1.

[20] *Id.* (noting a DOJ report that summarized data compiled by the SEC).

[21] Theodore C. Sorensen, *Improper Payments Abroad: Perspectives and Proposals*, 54 FOREIGN AFF. 719, 724 (1976).

[22] *The Lay Person's Guide*, *supra* note 3, at 2.

[23] *Id.* at 1 (referencing the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (2006), and the Travel Act, 18 U.S.C. § 1952 (2006), which permit federal prosecution for violations of state commercial bribery laws).

[24] Sorensen, *supra* note 21, at 724.

[25] *Id.*

[26] *Id.*

[27] Robert C. Blume & J. Taylor McConkie, *Navigating the Foreign Corrupt Practices Act: The Increasing Cost of Overseas Bribery*, 36 COLO. LAW. 91, 91 (2007).

Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which was signed by thirty-four countries in 1997.[28]

A. THE STRUCTURE AND EVOLUTION OF THE FCPA

The FCPA is part of the Securities Exchange Act of 1934.[29] Generally speaking, the FCPA prohibits companies, including their employees and agents, from engaging in corrupt conduct with foreign officials.[30] The FCPA applies to issuers, which include any U.S. or foreign company registered with or required to file reports to the SEC,[31] and "domestic concerns."[32] The FCPA penalizes offering anything of value to a foreign official in an attempt to influence that official or to secure an advantage in obtaining or retaining business.[33] The FCPA also targets the circumstances that allow bribery to go undetected by imposing standards for book- and recordkeeping and penalizing the failure to meet these standards.[34]

Two amendments to the FCPA mark its trend of becoming stricter and wider in scope over time. In 1988, Congress raised the amount it could fine both companies and individuals for FCPA violations.[35] The 1988

---

[28] *The Lay Person's Guide*, *supra* note 3, at 2.

[29] FCPA, Pub. L. No. 95-213, 91 Stat. 1494, 1494 (1977).

[30] *The Lay Person's Guide*, *supra* note 3, at 1.

[31] In the context of the anti-bribery prong of the FCPA, an "issuer" may be both an entity that is registered with the SEC and an entity that is required to file reports to the SEC, as well as the agents and corporate executives of such issuers. 15 U.S.C. § 78dd-1(a) (2006). In the context of the books and records prong of the FCPA, an "issuer" is limited to entities that issue securities registered with the SEC. § 78m(a).

[32] § 78dd-2; *see also The Lay Person's Guide*, *supra* note 3, at 3 ("A 'domestic concern' is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.").

[33] § 78dd-1(a) ("It shall be unlawful for any issuer which has a class of securities registered pursuant to section 78*l* of this title or which is required to file reports under section 78*o*(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to (1) any foreign official . . . (2) any foreign political party or official thereof or any candidate for foreign political office . . . .").

[34] § 78m.

[35] *1977 Legislative History—House Report, Trade and Competitiveness Act*, U.S. DEP'T OF JUST., 916, 924 (July 7, 2009, 7:52 AM), http://www.justice.gov/criminal/fraud/fcpa/history/1988/tradeact-100-418.pdf [hereinafter *1977 Legislative History*] ("The House bill

amendment also imposed liability for acts of third parties[36] and expanded the anti-bribery prong to include "securing any improper advantage."[37] Finally, the 1988 amendment expanded the term "foreign official" to include members of public international organizations,[38] enlarging an ambit that already included anyone holding public office and the employees of a state-owned or state-run business or entity.[39]

A second amendment in 1998 widened the scope of the FCPA to include foreign nationals and businesses that committed an act in furtherance of an FCPA violation in the U.S.[40] The FCPA, therefore, currently reaches foreign companies and foreign nationals, as long as they have the prescribed nexus to the U.S.[41] The 1998 amendment also clarified that the FCPA applies to natural and legal persons, i.e., corporate entities, who committed acts in furtherance of a bribe.[42] Notably, however, foreign officials themselves cannot be prosecuted under the FCPA.[43]

The 1988 amendment also tempered the FCPA, but this Comment argues that it did not sufficiently dial down its strength. The amendment

---

amended both the FCPA and Section 32(c) of the Exchange Act to raise the maximum criminal fine for a firm or domestic concern from $1 million under present law to $2 million, and for individuals from $10,000 to $100,000 (maximum potential imprisonment for an individual remains at 5 years). The House bill also created a new civil penalty of $10,000."). This bill is titled the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. V, 102 Stat. 1107 (codified in scattered sections of U.S.C. (2006)).

[36] *1977 Legislative History*, *supra* note 35, at 919.

[37] *See* U.S. DEP'T OF JUSTICE, REDLINE COMPARISON OF FCPA TO THE FINAL VERSION OF S. 2375, at 4, *available at* http://www.justice.gov/criminal/fraud/fcpa/docs/s23751.pdf [hereinafter REDLINE COMPARISON]; *see also* 15 U.S.C. §§ 78dd-1(a)(1)(A)(iii), 78dd-2(a)(1)(A)(iii).

[38] *See* REDLINE COMPARISON, *supra* note 37; *see also* 15 U.S.C. §§ 78dd-1(a)(1)(A)(iii); 78dd-2(a)(1)(A)(iii).

[39] Obiamaka P. Madubuko, *Emerging Markets: Risky Business or Golden Opportunities?*, *in* FOREIGN CORRUPT PRACTICES COMPLIANCE ISSUES (2010), *available at* http://www.mwe.com/info/pubs/Foreign_Corrupt_Practices_Act_Compliance_Issues.pdf.

[40] 15 U.S.C. § 78dd-3; *see also The Lay Person's Guide*, *supra* note 4, at 2 ("The anti-bribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.").

[41] *See The Lay Person's Guide*, *supra* note 3, at 3 ("A foreign company or person is . . . subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States. There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce.").

[42] REDLINE COMPARISON, *supra* note 37, at 13.

[43] 15 U.S.C. §§ 78dd-1 to 78dd-3.

raised the mens rea requirement from recklessness to knowledge.[44] This stricter knowledge requirement, however, does not protect individuals who consciously disregard the existence or likelihood of FCPA violations and thus prohibits a "head-in-the-sand" defense.[45] Furthermore, the amendment did not require knowledge for a parent company, which is held vicariously liable for acts committed by an acquired company, even if those acts occurred prior to the acquisition.[46]

Second, Congress's 1988 amendment created several affirmative defenses. Liability was no longer imposed for "reasonable and bona fide expenditure[s],"[47] also known as "grease payments," or for routine governmental action.[48] Congress also eliminated liability for payments that were legal according to the written laws of the foreign official's country.[49] This Comment takes the position that these defenses, while appropriate, are insufficient.

B. ENFORCEMENT TRENDS

The FCPA was not heavily enforced during the first twenty years of its existence and was considered a "legal sleeping dog."[50] Enforcement actions by both the DOJ and the SEC have recently increased dramatically.[51] A representative example of the recent surge in enforcement is the FBI sting resulting in sixteen indictments in January 2010.[52] The indictments alleged violations of the FCPA by twenty-two corporate executives and employees trading military and law enforcement products.[53] Undercover agents posing

---

[44] *1977 Legislative History*, *supra* note 35, at 918–19.

[45] *Id.*

[46] *Id.* at 922–23; Carolyn Lindsey, *More Than You Bargained For: Successor Liability Under the U.S. Foreign Corrupt Practices Act*, 35 OHIO N.U. L. REV. 959, 965–66 (2009).

[47] 15 U.S.C. § 78dd-1(c)(2).

[48] *The Lay Person's Guide*, *supra* note 3, at 4–5.

[49] 15 U.S.C. § 78dd-1(c)(1).

[50] Blume & McConkie, *supra* note 27, at 91 (quoting Carolyn Hotchkiss, *The Sleeping Dog Stirs: New Signs of Life in Efforts to End Corruption in International Business*, 17 J. PUB. POL'Y & MARKETING 108, 108 (1998)).

[51] Blume & McConkie, *supra* note 27, at 1, 5; *see also Fact Sheet: The Department of Justice Public Corruption Efforts*, U.S. DEP'T OF JUST. (Mar. 27, 2008), http://www.usdoj.gov/opa/pr/2008/March/08_ag_246.html (noting that the DOJ has "substantially increased its focus on FCPA violations" since 2001); Alice S. Fisher, Assistant Att'y Gen., U.S. Dep't of Justice, Prepared Remarks at the American Bar Association National Institute on the Foreign Corrupt Practices Act (Oct. 16, 2006), *available at* http://www.justice.gov/criminal/fraud/pr/speech/2006/10-16-06AAGFCPASpeech.pdf.

[52] *See* Press Release, U.S. Dep't of Justice, Twenty-Two Executives and Employees of Military and Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

[53] *Id.*

as foreign officials uncovered the scheme.[54] In the press release related to this FBI operation, the Assistant Director of the FBI's Criminal Investigative Division stated that "[i]nvestigating corruption at all levels is the number one priority of the FBI's Criminal Division."[55] This example makes it clear that the sleeping dog days of the FCPA are over.

Another indicator of heightened FCPA enforcement is an increase in cooperation between U.S. and international authorities. With its international reach, FCPA enforcement often necessitates the assistance of foreign law enforcement agencies. The *New York Times* described the progression of FCPA enforcement from a "lonely battle" waged by the U.S. independently to a cooperative, international team effort that is "growing every day and getting better and better," according to Assistant Attorney General Lanny Breuer.[56] In November 2011, Breuer announced the DOJ's plan to provide guidance on its enforcement of the FCPA's bribery provisions, but he warned that the DOJ has no intention of "supporting reforms whose aim is to weaken the FCPA and make it a less effective tool for fighting foreign bribery . . . . This is precisely the wrong moment in history to weaken the FCPA."[57] The enforcement of FCPA violations shows no sign of slowing, and this trend helps to explain the growing concern of multinational corporations as well as their increasing expenditures on consultants and lawyers to advise them on how to adapt to this aggressive enforcement environment.[58]

III. THE DODD–FRANK ACT AND ITS APPLICABILITY TO THE FCPA

Prior to the enactment of the Dodd–Frank Act, the FCPA did not have a whistleblower protection provision.[59] Other statutes, however, did have such provisions.[60] Congressional hearings reflect that inadequate

---

[54] *Id.*

[55] *Id.*

[56] Diana B. Henriques, *F.B.I. Snares Weapons Executives in Bribery Sting*, N.Y. TIMES, January 21, 2010, at A3.

[57] Mike Scarcella, *DOJ Plans New Guidance On Foreign Bribery Enforcement*, BLT: BLOG OF LEGAL TIMES (Nov. 8, 2011), http://legaltimes.typepad.com/blt/2011/11/doj-plans-new-guidance-on-foreign-bribery-enforcement.html.

[58] *See* Vardi, *supra* note 16 ("'This is good business for law firms,' says Joseph Covington, who headed the Justice Department's FCPA efforts in the 1980s and is now codirector of white-collar defense at Jenner & Block. 'This is good business for accounting firms, it's good business for consulting firms, the media—and Justice Department lawyers who create the marketplace and then get [themselves] job[s].'").

[59] *See* 15 U.S.C. §§ 78dd-1 to 78dd-3 (2006).

[60] *See, e.g.*, Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers, and the Implications of the Sarbanes–Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1063–64, 1068 (2004) ("[The Sarbanes–Oxley Act] provides federal statutory

whistleblower protection in the context of misconduct by U.S. contractors overseas was a topic of concern among members of Congress in 2009.[61] Representative John Dingell stated that "there is an egregious lack of both accountability and transparency" in reference to U.S. contractors doing work overseas.[62] Representative Earl Blumenauer also said that "our laws have been inadequate to curb what became a free-for-all for contractors overseas," and he promoted measures that would "define and reign in unacceptable and damaging contractor abuses."[63]

Cue the Dodd–Frank Act, enacted on July 21, 2010, which amended the Securities Exchange Act of 1934 to include section 21(F), entitled "Securities Whistleblower Incentives and Protection."[64] The Dodd–Frank Act 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."[65] The amendment describes the financial payments that whistleblowers receive for "original information."[66] In

---

protection to whistleblowers who report fraud at publicly traded companies, provides criminal penalties for retaliation against whistleblowers, and requires publicly traded companies to institute procedures for handling internal complaints . . . . In addition to its application to whistleblowing about securities fraud and accounting violations, § 1107 also criminalizes retaliation against an employee who reports any federal offense to law enforcement."); *see also* Michelle M. Kwon, *Whistling Dixie About the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions*, 29 VA. TAX REV. 447, 459 (2010) ("The False Claims Act promotes a 'working partnership' between the qui tam plaintiff and the government by effectively deputizing private citizens to prosecute fraud against the federal government as full participating parties in the litigation, whether or not the government intervenes."); *id.* at 455–70 (describing the Internal Revenue Code enhancements to the whistleblower program for the Internal Revenue Service, which had been authorized by statute since as early as 1867 to pay awards to whistleblowers).

[61] *E.g.*, 155 CONG. REC. E1721 (daily ed. July 10, 2009) (statement of Rep. Ken Calvert) ("Last week, a letter signed by seven congressmen and women went to President Obama, urging him to swift action on the issue of whistleblower protection for federal employees, 'Whistleblowers are our nation's best resource against fraud and abuse of the public trust,' the letter says. 'Legal victories for employees who have been retaliated against for blowing the whistle are almost nonexistent. We encourage you to support congressional efforts to reform the inadequate system of whistleblower protections, such as H.R. 1507.'").

[62] 156 CONG. REC. 6704 (2010).

[63] *Id.*

[64] Dodd–Frank Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841–49 (codified as amended at 15 U.S.C. § 78u-6 (Supp. IV 2011)).

[65] 15 U.S.C. § 78u-6(a)(6).

[66] § 78u-6(b)(1); *see also* § 78u-6(a)(3) ("The term 'original information' means information that—(A) is derived from the independent knowledge or analysis of a whistleblower; (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report,

addition, the Dodd–Frank Act provides a robust confidentiality component, preserving a whistleblower's identity up until a financial reward is issued.[67] Under the Dodd–Frank Act, an anonymous FCPA whistleblower can communicate with government officials through an attorney prior to the time of payment.[68]

The Dodd–Frank Act's financial incentives for whistleblowers are substantial. Whistleblowers receive 10%–30% of the financial penalties imposed on a company.[69] Compared to whistleblower provisions in other statutes, this percentage is typical. The IRS Whistleblower Act and the False Claims Act whistleblower provisions, for example, also give whistleblowers 10%–30% of the total money recovered as a result of their assistance.[70] The IRS Whistleblower Act, the False Claims Act, and the Dodd–Frank Act (to a more limited degree) also allow whistleblowers to recover even if their "tips" are based on publicly available information.[71] Additionally, all three acts theoretically reward whistleblowers who planned or initiated the actions that led to the crime at issue, unless they were convicted for involvement in the crime.[72]

The Dodd–Frank Act affords FCPA whistleblowers several more notable advantages. First, FCPA whistleblowers are not required to pursue a corporation's internal administrative avenues for their complaints, observations, or concerns—a policy that condones whistleblower reports to federal law enforcement agencies as a first step.[73] Second, the Dodd–Frank Act allows whistleblowers to appeal their awards should they disagree with

---

hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.").

[67] § 78u-6(h)(2)(A) ("Except as provided in subparagraphs (B) and (C), the Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower, except in accordance with the provisions of section 552a of title 5, United States Code, unless and until required to be disclosed to a defendant or respondent in connection with a public proceeding instituted by the Commission or any entity described in subparagraph (C).").

[68] § 78u-6(d)(2).

[69] § 78u-6(b)(1); *see also* § 78u-6(a)(1) (limiting eligibility to actions against companies that result in monetary sanctions exceeding $1 million).

[70] *See* Kwon, *supra* note 60, at 456–57.

[71] *Id.* at 458; *see also supra* note 66 and accompanying text.

[72] *See* 15 U.S.C. § 78u-6(c)(2)(B) ("No award under subsection (b) shall be made—(B) to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section."); Kwon, *supra* note 60, at 458 ("A qui tam plaintiff convicted of criminal conduct arising from his or her role is not entitled to any award.").

[73] 15 U.S.C. §§ 78dd-1 to 78dd-3.

the government's appraisal of their assistance.[74] Third, the Dodd–Frank Act protects whistleblowers from retaliatory acts committed by any employer, covering whistleblowers employed by a subsidiary company and closing a loophole present in other statutes.[75] Fourth, the Dodd–Frank Act creates a private cause of action that allows whistleblowers to bring suit for employer retaliation damages.[76]

Although the Dodd–Frank Act's whistleblower provision is consistent with other acts that protect whistleblowers, these statutory protections are problematic in that they reward whistleblowers in ironic situations: when they have been involved in the reported conduct and when they provide publicly available information. The Dodd–Frank Act takes whistleblower protection several significant steps further with its appeal and anti-retaliation aspects. The next Part will explore policy reasons for the Dodd–Frank Act's robust whistleblower protections. This Comment will argue that even considering these goals, the Dodd–Frank Act has gone too far.

IV. DODD–FRANK'S NOBLE GOALS BUT MISGUIDED LEGISLATION FOR THE PROTECTION OF FCPA WHISTLEBLOWERS

A. POLICY RATIONALES IN FAVOR OF WHISTLEBLOWER PROTECTIONS

Stronger whistleblower protections and incentives will likely cause an increase in the reporting of FCPA violations. The SEC recently reported receiving one to two "high value" tips per day, up from about a dozen per year prior to the enactment of the Dodd–Frank Act.[77] The SEC further indicated that whistleblower tips were frequently submitted by attorneys acting on behalf of whistleblowers and were "of good enough quality to allow the agency to begin following up quickly."[78] Another agency, the Treasury Inspector General for Tax Administration (TIGTA), found that the IRS whistleblower program increased the detection of and, consequently, the number of punishments for tax violations.[79] TIGTA also reported that the program was more effective and less expensive than the Service's own

[74] § 78u-6(f).

[75] *See* § 78u-6(h)(1)(A); T. Marcus Funk, *Getting What They Pay For: The Far-Reaching Impact Of the Dodd–Frank Act's 'Whistleblower Bounty' Incentives on FCPA Enforcement*, 5 WHITE COLLAR CRIME REP. 640, 640 (Sept. 10, 2010).

[76] 15 U.S.C. § 78u-6(h)(1)(B)(i); Funk, *supra* note 75, at 641.

[77] Dave Clarke, *SEC Gets More Whistleblower Tips*, REUTERS (Feb. 4, 2011, 3:27 PM), http://www.reuters.com/article/2011/02/04/us-sec-whistleblower-idUSTRE7135UA20110204.

[78] *Id.*

[79] Kwon, *supra* note 60, at 449 (discussing the TIGTA June 2006 audit report).

internal method of selecting tax returns for audit.[80]

Increased reporting will facilitate more enforcement. More enforcement will likely lead to more deterrence. Deterring the behavior prohibited by the FCPA means advancing several congressional policy goals. These goals, noted by Congress in its hearings leading up to the enactment of the FCPA, are described in the following House of Representatives report:

> [The payment of bribes] erodes public confidence in the integrity of the free market system. It short-circuits the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products. In short, it rewards corruption instead of efficiency and puts pressure on ethical enterprises to lower their standards or risk losing business. Bribery of foreign officials by some American companies casts a shadow on all U.S. companies. The exposure of such activity can damage a company's image, lead to costly lawsuits, cause the cancellation of contracts, and result in the appropriation of valuable assets overseas . . . . Corporate bribery also creates severe foreign policy problems for the United States. The revelation of improper payments invariably tends to embarrass friendly governments, lower the esteem for the United States among the citizens of foreign nations, and lend credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations . . . . [A] strong antibribery statute would actually help U.S. corporations resist corrupt demands.[81]

The prevention of foreign bribery is critical to preserving the integrity and success of American business and foreign relations. By facilitating reports of FCPA violations, whistleblower protections are consistent with the goals of the FCPA.

Increased assistance from whistleblowers, resulting from robust whistleblower protection and incentives, also theoretically reduces the government's costs of detecting and proactively investigating violations of the FCPA. Acting essentially as informants, whistleblowers provide inside information that may otherwise be difficult or time-consuming for the government to obtain. As volunteers, whistleblowers are perhaps more likely to be cooperative, as compared to other types of informants, thus enhancing the efficiency of FCPA investigations. Finally, whistleblowers provide free labor, as they are paid from the spoils of successful FCPA investigations. Since they are paid on commission, whistleblowers constitute a less expensive means of investigating FCPA violations.

The financial incentives for whistleblowers may also aid in countering social pressure to not report crime. A law review article posits that whistleblowers face "extreme societal disapproval . . . . [N]ot only has the

---

[80] *Id.*

[81] H.R. REP. NO. 95-640, at 4–5 (1977).

law been generally unsympathetic to whistleblowers, but so have co-workers and others outside the organization who do not support a decision to report wrongdoing."[82] The article advocates for strong whistleblower protection laws to combat the anti-whistleblower climate.[83] Incentives to overcome various social obstacles seem especially important in light of a study on whistleblowers indicating that "82% experienced harassment after blowing the whistle, 60% were fired, 17% lost their homes, and 10% admitted to having attempted suicide."[84] The negative consequences suffered by whistleblowers should not be ignored. The challenge lies in creating provisions that will adequately protect whistleblowers while not creating perverse incentives that will undercut important policy goals.

B. PROBLEMS WITH THE DODD–FRANK ACT'S LEGISLATION

1. False Information

One of the Dodd–Frank Act's policy goals is to facilitate the reporting of *truthful* allegations to law enforcement. A significant problem of the Dodd–Frank provision is that whistleblowers face no criminal consequences for submitting false reports. The only check on whistleblowers is outlined in the section called "Provision of False Information," which states:

> (i) PROVISION OF FALSE INFORMATION—A whistleblower shall not be entitled to an award under this section if the whistleblower (1) knowingly and willfully makes any false, fictitious, or fraudulent statement or representation; or (2) uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry.[85]

Aside from the deprivation of a financial award, the Dodd–Frank Act does not specify any sort of punishment for the provision of false or fraudulent information.

One critic of whistleblower legislation stated the following concern: "Any time you incentivize rank-and-file workers with a lot of money, rational actors are going to respond. You're going to see an increase in

---

[82] Cherry, *supra* note 60, at 1051–52.

[83] *Id.* at 1052.

[84] *Id.* at 1053 (quoting David Culp, *Whistleblowers: Corporate Anarchists or Heroes? Towards a Judicial Perspective*, 13 HOFSTRA LAB. & EMP. L.J. 109, 113 (1995)).

[85] Dodd–Frank Act, 15 U.S.C. § 78u-6(i) (Supp. IV 2011). Note that the Dodd–Frank Act also included a similar amendment to the Commodities Exchange Act. In contrast to the amendment to the Securities Exchange Act, the amendment to the Commodities Exchange Act states that a person who provides false information "shall be subject to prosecution under section 1001 of title 18." 7 U.S.C. § 26(m) (Supp. IV 2011).

enforcement activity regardless of whether the action violates the law."[86] The SEC receives tips from various types of whistleblowers, including employees within an accused corporation, competitors of an accused corporation, counterparties of the accused corporation, and jilted spouses of wrongdoers.[87] These different types of whistleblowers may have different motives for coming forward, including illegitimate or ulterior motives.

The danger is that such illegitimate motives may be so strong and the protections of the Dodd–Frank Act so robust as to enable false claims. The dangers of false claims include not only false convictions, but also the wasted time spent sifting through meritless claims. Thus, an influx of "tips" from overeager or fraudulent whistleblowers could launch a series of fishing expeditions that would, at best, reduce the efficiency of the oversight system and, at worst, unjustly put innocent corporations in compromised positions.[88]

2. Respondeat Superior

Whistleblowing also exacerbates the unfairness of *respondeat superior* liability for criminal acts. Under the *respondeat superior* principle, the FCPA holds a company vicariously and strictly liable for the actions of its employees, subsidiaries, and subsidiary's employees.[89] Punishing a corporate entity, disconnected as the majority of its directors and employees may be from any of the alleged misconduct, seems inherently unfair, especially when fines are so colossal.

This form of liability is also problematic because of the reach of the FCPA's *respondeat superior* policy, which extends to subsidiary entities and the *past* acts of acquired companies, i.e., before the company was

---

[86] Samuel Rubenfeld, *Expanded Whistleblower Program Could Aid FCPA Enforcement*, DOW JONES NEWS (Apr. 12, 2010, 4:39 PM), http://www.advfn.com/news_Expanded-Whistleblower-Program-Could-Aid-FCPA-Enforcement_42346346.html; *see also* Koehler, *supra* note 12 ("Among other law firms with an FCPA practice or FCPA practitioners writing about the subject, Morgan Lewis stated that the 'new law is likely to greatly increase the number of FCPA matters under government investigation'; Fried Frank predicted that the 'new whistleblower program may end up playing a key role in identifying and prosecuting violations of the FCPA'; and Richard Cassin on the FCPA Blog guessed that the 'bounty program will result in more FCPA cases against corporations.'") (citations omitted).

[87] Clarke, *supra* note 77.

[88] Shruti Shah & Robert N. Walton, *The SEC's Tricky Balancing Act*, FCPA BLOG (Nov. 8, 2010, 7:28 AM), http://www.fcpablog.com/blog/2010/11/8/the-secs-tricky-balancing-act.html.

[89] *See* JAMES T. O'REILLY ET AL., PUNISHING CORPORATE CRIME 17 (2009) ("[A] corporation is liable for criminal acts of its employees and agents done within the scope of their employment with intent to benefit the corporation even without proof that the act was expressly authorized or approved by the corporation.").

actually acquired by the parent company.[90] Thus, a company can be held responsible for acts of others over which it never exerted any control because it had no authority to do so. Because strict liability is imposed, companies are handicapped when facing suits or prosecutions based on a crime committed by their employee or subsidiary.[91]

Strict, vicarious, criminal liability for the act of a rogue employee, a distant subsidiary, or a recently acquired company violates basic notions of justice. This policy seems especially unfair given that the government has no burden to prove that a company had actual knowledge of or actively encouraged the culpable behavior.[92]

A primary concern with liability imposed via *respondeat superior* is that companies will be disincentivized to create strong compliance programs "for fear that the return on such an investment will be only to expose the company to increased liability."[93] The more extensive a corporation's compliance program, the more successful it will be in detecting prohibited conduct. Greater success means greater exposure because the corporation will be obligated to report its discoveries to the government and will be held liable for the uncovered crimes of its employees via *respondeat superior*. Thus, the FCPA actually disincentivizes corporations from implementing effective compliance programs.

3. Complicit Behavior

Another troubling aspect of the Dodd–Frank Act is that short of

---

[90] *See* ROBERT TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK 100 (2010) ("A company contemplating an acquisition or merger should conduct sufficient due diligence to assure itself that the target's employees or agents have not engaged in and/or do not intend to make improper payments to government officials in the performance of a company business.").

[91] Thomas R. Fox, *Proposed Reforms to the FCPA: The Compliance Defense and Respondeat Superior*, FCPA COMPLIANCE & ETHICS BLOG (Nov. 2, 2010, 8:08 P.M.), http://tfoxlaw.wordpress.com/2010/11/02/proposed-reforms-to-the-fcpa-the-compliance-defense-and-respondeat-superior/.

[92] *See Justice for Corporate Defendants?*, FCPA BLOG (June 10, 2008, 3:28 AM), http://www.fcpablog.com/blog/2008/6/10/justice-for-corporate-defendants.html ("*[R]espondeat superior* [is] the legal doctrine by which companies are vicariously liable for crimes committed by employees acting within the scope of their employment—that is, within their actual or apparent authority and on behalf of the corporation. It has left companies completely defenseless in the face of criminal charges under the FCPA. Once an employee admits to an FCPA violation or is found guilty, the company is automatically guilty too.").

[93] ANDREW WEISSMANN & ALIXANDRA SMITH, U.S. CHAMBER INST. FOR LEGAL REFORM, RESTORING BALANCE: PROPOSED AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT 13–14 (Oct. 2010), *available at* http://www.scribd.com/doc/40239287/Chamber.

receiving criminal convictions, whistleblowers complicit in the crimes they report are not precluded from obtaining bounties. Under the Dodd–Frank Act, financial awards are not provided "to any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section."[94] The Dodd–Frank Act, therefore, draws a distinction between a cooperating informant who is convicted of a crime and a whistleblower. One could imagine a situation, however, where a whistleblower is complicit in or encourages the FCPA violation. Yet if no charges are brought against such whistleblowers or if those charges do not result in convictions, then whistleblowers would still receive financial awards, in spite of the role they played. Thus, the Dodd–Frank Act arguably over-incentivizes whistleblowers by overlooking contributory conduct when doling out financial awards. The danger, therefore, is that the Dodd–Frank Act will produce the behavior that it seeks to prevent.

4. Circumvention of Internal Protocols

Additionally, the Dodd–Frank Act's whistleblower provision might encourage whistleblowers to intentionally ignore or circumvent a company's own methods for handling misconduct. One critic notes the possibility that whistleblowers might "bypass a company's existing compliance procedures," which could "undermine good corporate compliance programs."[95] Why would whistleblowers report tips to their company if they could be paid by the government for reporting them instead? Since whistleblowers may remain anonymous and are protected from employer retaliation, a financially motivated employee would rationally choose to notify law enforcement authorities. The inevitable result in this scenario is that internal compliance programs will become futile, defeating the ultimate purpose of the FCPA, which is to enhance a corporation's internal controls in order to detect bribery early, address issues sooner, and prevent FCPA violations in the first place.

5. Opportunism

An additional concern is that opportunistic whistleblowers might be able to make educated guesses as to the existence of FCPA violations with only limited, indirect knowledge of potential or actual allegations. The Dodd–Frank whistleblower provision requires "original information," which it defines as deriving from a whistleblower's independent knowledge or analysis, limited only by the requirement that such information was not

---

[94] 15 U.S.C. § 78u-6(c)(2)(B) (Supp. IV 2011).
[95] Shah & Walton, *supra* note 88.

obtained from a court hearing, government report, audit, or investigation.[96] This standard is vague and overbroad. Furthermore, the financial incentives for a whistleblower to engage in independent analyses encourage individuals to proactively accuse companies without any direct knowledge.

There are two possible outcomes following allegations lodged by opportunistic whistleblowers who do not possess any concrete evidence but may nevertheless present enough information to meet the minimal requirements of "original information." First, such allegations could lead to a coincidental discovery of FCPA violations. If one believes that the end justifies the means, then this result is a desirable one. However, ought the whistleblower to receive a 10%–30% payment for making an educated guess? If the opportunistic "whistleblower" *is* rewarded in this type of situation without actually contributing (or risking) anything, then we would potentially encourage a movement of citizens to be overly meddlesome in business matters. Encouraging inexperienced vigilantes to investigate corporations could also have implications for evidence preservation and admissibility. The second likely result of a baseless accusation by a supposed whistleblower is that such allegations could launch fishing expeditions. In this scenario, the government's time and limited resources will have been wasted.

Another possible whistleblower claim is one where a whistleblower gives the government "tip of the iceberg" information. Whistleblowers who lead law enforcement to greater-than-anticipated FCPA violations would qualify for a large award without having "earned it" by providing commensurate assistance or information.[97] It seems excessively generous to reward a person with a percentage of the ultimate penalty that the government obtains,[98] rather than one that is proportionate to the utility of

---

[96] 15 U.S.C. § 78u-6(a)(3).

[97] It is important to note that the award paid to a whistleblower is, to an extent, discretionary. The government has the ability to choose what percentage, within the mandated range of 10%–30%, of a guilty company's penalty will go to a whistleblower. The government is instructed to take into account several criteria, as listed in the Dodd–Frank Act:

> (B) CRITERIA.—In determining the amount of an award made under subsection (b), the Commission—(i) shall take into consideration—(I) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action; (II) the degree of assistance provided by the whistleblower and any legal representative of the whistleblower in a covered judicial or administrative action; (III) the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and (IV) such additional relevant factors as the Commission may establish by rule or regulation; And (ii) shall not take into consideration the balance of the Fund.

15 U.S.C. § 78u-6(c)(1)(B).

[98] Michael F. Perlis & Wrenn E. Chais, *Will Whistle-Blowing Be Millions Well Spent?*,

the information provided. Disproportionately large awards seem unreasonable and could encourage overzealous behavior.

V. POLICY ISSUES AND PROPOSED REMEDIES

A. POLICY REPERCUSSIONS OF EXCESSIVELY STRONG WHISTLEBLOWER PROTECTIONS

As whistleblower protections will likely increase the number of reported FCPA violations, it is important to address the negative policy repercussions of over-enforcing the FCPA. Fears concerning the over-enforcement of the FCPA include the discouragement of international business and investment and a decreased competitive advantage for the U.S.[99] This fear is rational in light of successor liability for FCPA violations. Successor liability is the principle that corporations acquiring other entities inherit that entity's liabilities.[100] In this context, FCPA violations and therefore FCPA liability can be transferred to otherwise innocent parent companies in the process of business mergers and acquisitions.[101] This form of liability has the potential to stifle business growth.

Several companies have fallen victim to the successor liability hook.[102] For example, Alliance One, which merged with Dimon Incorporated, was held liable for the actions of Dimon's foreign subsidiaries.[103] Alliance One was required to engage a compliance monitor for three years as part of a mandatory compliance program.[104] In a related civil suit, Alliance One's settlement with the SEC included a disgorgement of $10 million.[105]

FORBES.COM (Sept. 15, 2010, 1:25 PM), http://www.forbes.com/2010/09/15/whistle-blowers-sec-opinions-columnists-perlis-chais.html.

[99] *See* D. Michael Crites & Mark A. Carter, *Why the Foreign Corrupt Practices Act Is Hurting Our Businesses and Needs to Be Reformed*, NAT'L L. REV. (May 15, 2011), http://www.natlawreview.com/article/why-foreign-corrupt-practices-act-hurting-our-businesses-and-needs-to-be-reformed ("The real effect of DOJ's aggressive enforcement is that it is stifling American companies from doing business abroad and here at home. Companies themselves have to bear the burden of conducting extensive internal investigations if faced with FCPA charges. Many businesses would rather end operations with foreign countries than risk expansive DOJ investigations and spend resources to fight FCPA charges.").

[100] *See* Lindsey, *supra* note 46 (citing United States v. Alamo Bank of Tex., 880 F.2d 828, 830 (5th Cir. 1989)).

[101] *Id.*

[102] WEISSMANN & SMITH, *supra* note 93, at 17 (describing the fate of two companies, Alliance One and Snamprogetti).

[103] *Id.*

[104] *Id.*

[105] *Id.*

The DOJ has emphasized that when a company acquires another company, it must conduct extensive due diligence and disclose any possible FCPA violations to the DOJ to avoid successor liability.[106] Thus, companies will be required to finance extensive internal audits and investigations to prevent FCPA charges, which is likely to present a significant expense. This policy has handicapped corporations considering mergers and acquisitions:

> The uncertainty about how much due diligence is sufficient, coupled with the threat of successor liability even if thorough due diligence is undertaken, have in recent years had a significant chilling effect on mergers and acquisitions. For example, Lockheed Martin terminated its acquisition of Titan Corporation when it learned about certain bribes paid by Titan's African subsidiary that were uncovered during pre-closing due diligence; Lockheed Martin was simply unwilling to take on the risk of FCPA successor liability for those bribes.[107]

The FCPA-compliance costs of business mergers and acquisitions—whether they are expressed in terms of due diligence to detect liability or fines resulting from liability—threaten to have serious repercussions for U.S. business growth.

B. PROPOSED CHANGES TO THE DODD–FRANK ACT WHISTLEBLOWER PROVISION

This Comment proposes several amendments to the Dodd–Frank Act that would prevent or limit whistleblower abuse. First, the Dodd–Frank Act amendments to the FCPA should include a notice identical to the one found in the Dodd–Frank Act amendments to the Commodities Exchange Act.[108] The Commodities Exchange Act amendment admonishes whistleblowers who provide false or fraudulent information that they will not only be disqualified from receiving a financial award, but also "shall be subject to prosecution under section 1001 of title 18."[109] A similar warning in the whistleblower provision of the Dodd–Frank Act may deter those with malicious intent who intend to fabricate evidence against corporations in order to reap a reward. With nothing to lose and millions of dollars to gain, whistleblowers are incentivized to submit false claims, but a warning could decrease that incentive.

Second, Congress should eliminate the anonymity guarantee for whistleblowers. The ability to remain anonymous likely enables whistleblowers who lodge false, fraudulent, or speculative claims because they are penalized by neither the government nor the company that they

[106] *See* Lindsey *supra* note 46, at 981–85.
[107] WEISSMANN & SMITH, *supra* note 93, at 15.
[108] 7 U.S.C. § 26(m) (Supp. IV 2011).
[109] *Id.*

accuse for making frivolous allegations. For the same reasons, whistleblowers may be more likely to engage in complicit behavior that brings about violations when their identities are kept confidential. Eliminating the anonymity privilege would likely reduce the number of meritless or otherwise undesirable claims.

Third, a whistleblower's financial award could be capped or, at the very least, made directly proportionate to the calculated damages resulting from the particular information provided. In other words, the whistleblower's financial reward could be scaled down to include a percentage of the penalty that would have resulted from the whistleblower's tips alone. This approach would substitute for the existing policy that provides whistleblowers with a percentage of the gross penalty, which takes into account all of the misconduct, including what the government was able to discover later in the investigation above and beyond the information provided by the whistleblower. The average whistleblower reward, therefore, would be more modest, but not likely so small as to negate the financial incentive altogether.

This discussion of proportionality and caps raises the question of whether there is a need for a financial incentive at all. In commenting on the Sarbanes–Oxley whistleblower provisions,[110] Geoffrey Rapp clarifies the argument in favor of providing bounties to whistleblowers:

> Merely protecting whistleblowers should not be the only goal. Rather, the goal should be to optimize the quantity and quality of information that whistleblowers bring to light about ongoing corporate malfeasance, and to do so in a way that makes early intervention by public and private enforcement authorities feasible and effective.[111]

Thus, there are several important reasons to retain a financial incentive for whistleblowers. The whistleblower's responsiveness to follow-up questions may be quicker, and the quality of the information may be better. Rapp is also a proponent of big-carrot bounties, where whistleblowers are guaranteed a minimum amount of recovery and where there is judicial review of such granted awards.[112] Rapp highlights the argument that "[a]n informer would have little incentive to give original information upon occasions at considerable personal risk to officers of the United States if his compensation rested in the absolute discretion, almost, one might say, in the

[110] Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes–Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 92 (2007) (describing the Sarbanes–Oxley Act of 2002 as "[Congress's] uniform, national, anti-retaliation provision to protect whistleblowers who exposed their employers' financial and accounting fraud").

[111] *Id.* at 116.

[112] *Id.* at 117.

whim, of an executive officer."[113]

The big-carrot system of the FCPA, however, is based upon assumptions that the quality, speed, and volume of tips correlate with the amount of the resulting financial reward. Financial awards could just as likely provoke claims that are vague, tangential, or otherwise unfounded from people who are solely motivated by money. A study summarized by Rapp, however, reveals regret among 33% of past whistleblowers, who reported that they would not blow the whistle again because "it wasn't worth it."[114] Is this a problem that more money can fix? Or are there potentially other reasons for whistleblowers' regret that money cannot solve? Further research is warranted to determine what and how much, exactly, motivates good-faith whistleblowers.

Another weakness in Rapp's argument for big-carrot bounties is the fact that a whistleblower may be incapable of properly estimating the bounty at the stage of coming forward with the first tip. It is difficult to argue that there is a threshold over which whistleblowers will be financially incentivized when whistleblowers are, practically speaking, not able to foresee how the government will calculate damages and, consequently, their reward. A reward with a cap, or one that is scaled back and directly tied to the whistleblower-provided information, is more appropriate.

C. PROPOSED CHANGES TO THE FCPA

1. The Problem: Companies Are Paralyzed in Response to FCPA Charges

A significant problem with the Dodd–Frank Act's enhancement of the FCPA whistleblower protections is that it makes it even harder for corporations to combat FCPA allegations. Corporations often decide that FCPA allegations are not worth fighting in court, in part because publicity related to FCPA allegations has a significant negative impact on stock prices.[115] Additionally, given that the government's ability to prove various components of an FCPA charge has not frequently been tested in court, precedent cannot be relied upon to inform strategy or predict outcomes.[116] Several internet blogs are especially vocal about this problem. One blog writer elaborated upon this argument:

> Against the backdrop of little substantive FCPA case law, the FCPA is enforced based

---

[113] *Id.* at 117 n.160 (quoting Lewis v. United States, 32 Fed. Cl. 59, 64 (1994)).

[114] *Id.* at 118 (citing Sonja L. Faulkner, After the Whistle Is Blown: The Aversive Impact of Ostracism 6 (Aug. 1998) (unpublished Ph.D. dissertation, University of Toledo) (on file with author)).

[115] Conroy & Wong, *supra* note 17.

[116] *See* McGrath, *supra* note 13.

> largely on government enforcement agency interpretations that have never been accepted by a court . . . . [N]otwithstanding the dubious and untested legal theories they are based on, [FCPA allegations that reasonable minds would question] are routinely settled by companies via a resolution vehicle that does not require the company to admit or deny the SEC's allegations. Quite simply, a settled SEC FCPA enforcement action does not necessarily represent the triumph of the SEC's legal position over the company's, but rather reflects a risk-based decision primarily grounded in issues other than facts and the law. It is simply easier and more cost-efficient for a company to settle . . . .[117]

Companies, therefore, are significantly disadvantaged because they face the possibility of FCPA charges without the benefit of sufficient guidance or precedent.

In 1976, one year prior to the enactment of the FCPA, Theodore Sorensen wrote that the issue of international bribery was far more complex than it appears and shed light on the rationale behind affirmative defenses.[118] First, he argued that some payments to foreign officials, absent a quid pro quo and if of "an amount appropriate under the circumstances, to a qualified and responsible professional for his performance of legitimate and necessary services, may well be perfectly justifiable."[119] He further drew a distinction between companies that voluntarily seek an unlawful benefit and companies that, under duress or coercion, seek something to which they are lawfully entitled.[120] Prior to the enactment of the FCPA, courts recognized that companies forced to pay off a foreign official to save their businesses from dissolution were not guilty of bribery.[121]

Sorensen argued that "not even all payments made to foreign officials should be judged alike."[122] He points out, for example, that not all large payments to foreign officials are necessarily unethical: "The payment of a large commission to a[] [foreign official] agent is no more clear evidence of illegality than is payment of a large commission to an American real estate agent on the sale of an expensive home."[123] Sorensen further lists examples of situations where the determination of the existence of bribery is far from simple because the public and private sectors can often be intertwined.[124]

[117] Koehler, *supra* note 12.
[118] Sorensen, *supra* note 21, at 719.
[119] *Id.* at 721.
[120] *Id.* at 722.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.* at 723 (noting several hypothetical examples, including one where a member of a country's royal family owns a company with which a U.S. company wishes to form a joint venture and another where a U.S. company wishes to invest in a company owned by a country's prime minister).

Disentangling the two in order to show bad motives and abuse can, in certain situations, be difficult.[125]

This sympathetic perspective on bribery in the pre-FCPA era was not, however, imported into the statute of the FCPA. The two affirmative defenses included in the statute, the written laws defense and the reasonable and bona fide expenditures defense,[126] are insufficient and are themselves problematic. First, these two defenses leave a significant gap, as they do not cover the scenarios of duress, coercion, or extortion by a foreign official. Second, the written laws defense is too narrow, as it fails to include cultural practices and traditional methods of conducting business, which are not typically codified as law. Regarding the reasonable and bona fide expenditures defense, the DOJ has provided only the following limited clarification for what constitutes a bona fide payment: "Personal gifts masquerading as business expenditures will not qualify for this defense. Rather, the defense covers payments such as travel and lodging expenses, as well as small samples of the company's products."[127] The vagueness of this defense creates a gray area that could be exploited by the government and is difficult to defend against. The government should instead provide a detailed definition and an exhaustive list of what constitutes reasonable and bona fide payments.

2. The Solution: Additional Defenses to FCPA Liability

In order to assist those accused of FCPA violations in defending themselves, this Comment proposes additional defenses. These defenses ought to be formally recognized in the text of the FCPA, alongside the existing two affirmative defenses. Such codification, as well as guidance for the elements required to satisfy each defense, would signify the government's acceptance of their legitimacy and therefore encourage defendants to raise them. Furthermore, when proving a defense, the defendant's burden is typically a preponderance of the evidence, rather than the higher standard of beyond a reasonable doubt.[128] This lower standard could provide an advantage to defendants or at least encourage them to litigate. Additional defenses, in showing that FCPA charges are rebuttable, may alleviate corporate anxiety concerning FCPA liability in the realm of international business expansion and mergers and acquisitions.

The first proposed defense is a compliance defense, which would allow a company to show evidence of sufficient due diligence that was,

---

[125] *Id.* at 724.
[126] 15 U.S.C. §§ 78dd-1(c), 78dd-2(c) (2006).
[127] Blume & McConkie, *supra* note 27.
[128] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 203 (5th ed. 2009).

through no fault of company, unsuccessful in the detection of FCPA violations.[129] This defense would allow a company to combat successor liability because it would not be penalized for the failure to disclose historical criminal acts of a company with which it merged or that it acquired if it took reasonable steps to uncover it.[130] Significant steps taken in an attempt to comply with the FCPA ought to be rewarded.

A second proposal is for a lack of knowledge defense for FCPA violations imposed via *respondeat superior* and successor liability.[131] These forms of liability violate the FCPA's own knowledge requirement in the plain language of the statute.[132] The culpability of rogue employees acting on their own, engaging in conduct neither encouraged nor approved by the leadership of a corporation, should not be imputed to the company as a whole in the form of multi-million dollar fines. The absence of a joint enterprise reflects a lack of knowledge on behalf of the company. With its use of *respondeat superior*, the FCPA unfairly imposes strict liability on a company for behavior that it neither condoned nor knew about.[133] Lack of knowledge, therefore, should either serve as a complete defense or at least as a mitigating factor in scaling back the fines imposed on companies facing liability for the actions of a single employee.

The FCPA's legislative history does not indicate a rejection of a knowledge requirement for successor liability:

> Nothing in the legislative history suggests that the statute was intended to allow a parent corporation to be charged with criminal violations of the anti-bribery provisions by another company, even a subsidiary, if it had no knowledge of improper payments. At most, the drafters indicated that if a parent company's ignorance of the actions of a foreign subsidiary was a result of conscious avoidance, or 'looking the other way,' that such parent could be in violation of section 102 requiring companies to devise and maintain adequate accounting controls.[134]

The knowledge requirement is justified in the context of successor liability because it would prevent the punishment of companies that are far removed from the criminal conduct, which may have occurred prior to any association with the company they acquired. A knowledge requirement seems especially appropriate if the FCPA violations were committed by a single individual who represents only a small percentage of the company's personnel. Imputing liability from an individual actor to an entire company and then to a parent company goes too far.

---

129 WEISSMANN & SMITH, *supra* note 93, at 13–14.
130 *Id.* at 20.
131 *Id.* at 13–14.
132 *See supra* Part II.A.
133 WEISSMANN & SMITH, *supra* note 93, at 21.
134 *Id.* (citing S. REP. NO. 95-114, at 11 (1977)).

A third proposal is for a duress defense for situations where extortion[135] or other forms of coercion occur. A bribe, by definition, involves two parties: the offeror of the bribe and the recipient of the bribe. Excluding situations where one of these two parties is an undercover agent, both parties share the culpability for the commission of the crime if the bribe is actualized. The question, therefore, is to what extent the recipient's conduct mitigates the offeror's culpability.

Some might argue that even in cases where a recipient extorted a bribe, the two crimes, extortion and bribery, ought to be viewed separately. In this sense, the crime of extortion would not lessen the crime of bribery, the rationale being that the bribery itself is no less reprehensible under any conditions. Professor James Lindgren takes this approach and described the need for a clear message about the wrongness of the behavior, regardless of the presence of extortion:

> Unless a legislature clearly indicates otherwise, there is no reason to let off a briber just because he was also a victim of extortion. If we were to let the briber off, he could continue to cheat the public and other bidders, safe in the knowledge that the official was corrupt enough to refuse him a fair chance without a payoff.[136]

This argument does not address the possibility for the offeror to receive a reduction in sentence. Such a reduction would preserve the deterrent effect of being punished, while adjusting for circumstances in which another person shares the blame.

One can imagine certain cultural circumstances that create scenarios where well-intentioned actors are coerced to engage in bribery because of threats by corrupt officials. Evidence of this sort of influence ought to either fully or partially exonerate those facing liability. Thus, there should be gradations of culpability built into the statute that allow for reductions in jail time and fines when the bribe-takers have significantly contributed to the commission of the crime.

This Comment proposes two final defenses for inclusion in the FCPA:

---

[135] "The act or practice of obtaining something or compelling some action by illegal means, as by force or coercion." BLACK'S LAW DICTIONARY 664 (9th ed. 2009).

> The dividing line between bribery and *extortion* is shadowy. If one other than the officer corruptly takes the initiative and offers what he knows is not an authorized fee, it is bribery and not extortion. On the other hand, if the officer corruptly makes an unlawful demand which is paid by one who does not realize it is not the fee authorized for the service rendered, it is extortion and not bribery. In theory it would seem possible for an officer to extort a bribe under such circumstances that he would be guilty of either offense whereas the outraged citizen would be excused.

ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 538–39 (3d ed. 1982).

[136] James Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 826 (1988).

the act of state doctrine and the public authority defense. These are defenses for individuals, but they could indirectly benefit corporate entities that would be held responsible for their employees' actions per *respondeat superior*. Both defenses are likely to apply to the context of FCPA violations, as evidenced by *United States v. Giffen*. James Giffen, an American businessman, unsuccessfully invoked both the act of state doctrine and the public authority defense.[137] Giffen was charged with making corrupt payments to Kazakh officials.[138] The government alleged that these payments were intended to secure and retain business for the defendant's New York-based corporation in violation of the FCPA.[139]

The Kazakh government hired Giffen's corporation as a consultant on the government's sale of its oil and gas reserves.[140] Later, the Kazakh government named Giffen a counselor to the president, a "semi-official title that enabled Giffen to effect numerous oil and gas transactions."[141] Kazakh officials further designated Giffen as a representative, consultant, and agent at various times.[142] The Kazakh government paid Giffen's company almost $67 million in fees.[143] The government alleged that Giffen paid Kazakh officials $78 million for their personal benefit in order to influence the officials to continue business with Giffen's corporation.[144]

Giffen argued that the act of state doctrine warranted the dismissal of the counts against him.[145] The act of state doctrine prevents U.S. courts from "inquiring into the validity of the Public acts a recognized foreign sovereign power committed within its own territory."[146] Giffen argued that his actions, including the payments, were done in his capacity as an agent of the Kazakh government and that he was authorized to create and maintain bank accounts and to receive funds on behalf of the Kazakh government.[147] Giffen argued that because he was an official of Kazakhstan, his acts qualify as public acts of a foreign sovereign nation and are, therefore, beyond the reach of U.S. courts, which are precluded from assessing the legality or validity of such official acts.[148]

---

[137] 326 F. Supp. 2d 497 (S.D.N.Y. 2004).
[138] *Id.* at 499.
[139] *Id.*
[140] *Id.*
[141] *Id.* at 499–500.
[142] *Id.* at 500 n.5.
[143] *Id.* at 500.
[144] *Id.*
[145] *Id.* at 501.
[146] *Id.* at 501 (quoting Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 706 (1976)).
[147] *Id.* at 502.
[148] *Id.* at 502–03.

The court held that the act of state doctrine did not apply because the defendant's secret payments to the Kazakh officials did not qualify as official acts insofar as they were not required for the performance of his purported official duties.[149] Further, the payments in question occurred outside of the territory of Kazakhstan, in both Switzerland and the U.S., and the doctrine protects only those acts of a foreign sovereign that occur in its territory.[150] Thus, the *Giffen* court held that the act of state doctrine did not bar Giffen's prosecution and denied his motion to dismiss.[151]

Even though the court rejected Giffen's act of state doctrine argument, the case is instructive because it reveals scenarios where the act of state defense strategy could be employed. Giffen might have been successful if the payments in question were required of him in his role as a foreign official and if he had made the payments in Kazakhstan. By precluding a U.S. court's review of the acts, the act of state doctrine would prevent FCPA liability. Theoretically, the act of state doctrine could not only shield an individual from FCPA liability, but also an affiliated company on the hook via *respondeat superior* or successor liability. And while it is similar to the written law's affirmative defense, the act of state defense could afford more coverage because it could potentially include traditions and customs that are often not part of the black letter law of a country.

Giffen also pursued the public authority defense.[152] The public authority defense is a common law defense[153] that involves proving that a defendant committed an illegal act pursuant to the instruction or permission of a legitimate government entity or official, i.e., a public authority.[154] The defendant must prove an objectively reasonable belief that the entity or official had actual authority to permit the illegal act.[155] Further, the defense is limited to situations where the government official did in fact possess the authority to authorize the defendant's actions.[156]

Procedural requirements for this defense are codified in Rule 12.3 of the Federal Rules of Criminal Procedure. Rule 12.3 limits the public authority defense to acts committed on behalf of a law enforcement agency or federal intelligence agency.[157] A defendant's speculation that the public

[149] *Id.* at 503.
[150] *Id.*
[151] *Id.* at 508.
[152] United States v. Giffen, 473 F.3d 30, 31 (2d Cir. 2006).
[153] United States v. Pitt, 193 F.3d 751, 756 (3d Cir. 1999).
[154] United States v. Fulcher, 250 F.3d 244, 253–54 (4th Cir. 2001).
[155] *Id.*
[156] *Id.* at 254.
[157] FED. R. CRIM. P. 12.3(a)(1). A defendant must provide notice of the defense and make a prima facie showing that the act occurred under color of public authority, including

authority knew about the criminal acts and simply ignored them does not rise to the level necessary for the public authority defense to apply.[158]

A second version of the public authority defense is called entrapment by estoppel.[159] This defense does not require that the defendant received actual authorization, i.e., authorization that the government official is legally permitted to give.[160] Rather, this defense eliminates liability when the government induces a defendant to commit illegal actions and leads the defendant "to rely reasonably on his belief that his actions would be lawful by reason of the government's *seeming* authorization."[161]

In dicta, the Second Circuit rejected Giffen's usage of both versions of the public authority defense.[162] The court acknowledged Giffen's claim that he made numerous disclosures of his conduct to the U.S. government and that the government asked him to report information about the President of Kazakhstan.[163] Giffen never told the government, however, that he intended to commit the actions that the government charged him with, namely bribery and fraud.[164] Thus the government's requests of him "did not constitute authorization to commit the crimes charged."[165] Regarding entrapment by estoppel, the court stated that "government officials neither induced him to commit these crimes nor led him to an objectively reasonable belief that he had received authorization."[166]

Though the act of state doctrine defense and the public authority defense were not effective for Giffen, one can imagine a set of facts that would yield success. These defenses, therefore, should be included as affirmative defenses in the FCPA.

3. Sentencing and Mitigation

If the above-noted defenses are found to be categorically objectionable, all of the above factors should, at the very least, allow for gradations of punishment in the mitigation phase of criminal trials or a reduction in the fines assessed in civil proceedings. Discounts in sentences

---

identifying the government agency, the government official who authorized the act, and the relevant time period of the government-authorized actions. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL § 2055 (1997).

[158] U.S. DEP'T OF JUSTICE, *supra* note 157.

[159] United States v. Giffen, 473 F.3d 30, 41 (2d Cir. 2006).

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.* at 41–42.

[165] *Id.*

[166] *Id.* at 42–43.

or fines are appropriate because business relations are complex, especially in situations of trade between different nations with governments that are involved in industry to varying extents. As Sorensen stated, "reasonable men and even angels will differ on the answers" to complicated ethical dilemmas that the FCPA presents.[167]

The Federal Sentencing Guidelines for bribery, however, provide for no gradations of punishment based on the above-listed factors. Indeed, with respect to duress, they are consistent with Lindgren's position and do not allow for downward departures:

> Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency. Notwithstanding this policy statement, personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure.[168]

The Sentencing Guidelines for FCPA convictions also do not explicitly include mitigating factors concerning extortion or duress in the calculation of jail time or financial penalties.[169]

A recent case provides support for granting departures for mitigating factors in the context of the FCPA. In *United States v. Bradstreet*, the defendant was convicted of an FCPA violation.[170] The circuit court discussed the fact that, in general, the Federal Sentencing Guidelines "place essentially no limit on the number of potential factors that may warrant a departure."[171] Quoting comments from the Federal Sentencing Guidelines, the court further noted that "[w]hen a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted."[172] The court of appeals in *Bradstreet* affirmed the downward departure granted by the district court on the basis of the defendant's post-sentence rehabilitative efforts.[173] This case indicates that there is some degree of flexibility in granting downward departures for FCPA convicts. However, preliminary research reflects that downward

---

[167] *See* Sorensen, *supra* note 21, at 724.

[168] U.S. SENTENCING GUIDELINES MANUAL § 5K2.12 (2010).

[169] § 2C1.1.

[170] 135 F.3d 46, 48 (1st Cir. 1998) [hereinafter *Bradstreet I*].

[171] United States v. Bradstreet, 207 F.3d 76, 82 (1st Cir. 2000) [hereinafter *Bradstreet II*] (quoting Burns v. United States, 501 U.S. 129, 136–37 (1991)). In *Bradstreet I*, the circuit court affirmed the defendant's conviction but vacated the sentence and remanded. 135 F.3d at 58. In *Bradstreet II* the circuit court affirmed the district court's grant of departure on the sentencing remand. 207 F.3d at 84.

[172] *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 1A(4)(b) (1995)).

[173] *Id.* at 83–84.

departures for FCPA violations are extremely difficult to obtain.[174]

VI. CONCLUSION

The clear trend of the anti-bribery movement is that legislation is expanding—in scope, force, and to other jurisdictions throughout the world.[175] Although the FCPA sends a laudable message to U.S. companies and the world, it has nevertheless exceeded its bounds, especially with the whistleblower provisions added by the Dodd–Frank Act. This Comment has proposed changes that will curb abuses of opportunistic or fraudulent whistleblowers by arguing for the elimination of whistleblower anonymity and a cap on bounties. Further, this Comment has argued that the FCPA should be tempered by the addition of defenses or mitigating factors, which take into account gradations of culpability.

This Comment and its recommendations are especially relevant given the recently established Whistleblower Office in the SEC's Division of Enforcement.[176] This office has been tasked with the promulgation of rules concerning the Dodd–Frank Act whistleblower program.[177] This Comment highlights many problems of the Dodd–Frank Act's whistleblower provisions and their impact on the FCPA, which ought to be considered as the Whistleblower Office shapes the evolution of whistleblower-assisted law enforcement of the FCPA.

The changes proposed in this Comment do not lessen the importance or effectiveness of the FCPA's mission to tackle corruption. Instead, the proposals constitute ways to rein in the FCPA so that it does not become a profit-generating sword of the government that unreasonably restrains U.S. business. These changes will make companies more likely to litigate allegations, thereby allowing our adversarial system to test the validity and strength of FCPA claims and whistleblower accusations. Further, these

---

[174] *See* United States v. Livesay, 146 F. App'x 403 (11th Cir. 2005) (vacating and remanding a downward departure granted to the defendant because of the extent of his cooperation); United States v. Botts, 135 F. App'x 416 (11th Cir. 2005) (rejecting a downward departure because no reasons were specified for granting such to the defendant); United States v. Martin, 135 F. App'x 411 (11th Cir. 2005) (rejecting a downward departure because the sentencing court provided insufficient reasons for it).

[175] JONATHAN PICKWORTH, YUET MING THAM & JOSEP MARIA JULIA, DLA PIPER, GLOBAL ANTI-BRIBERY LAW NET TIGHTENS ITS GRIP (Mar. 21, 2011), *available at* http://www.dlapiperrapidresponse.com/export/sites/rapid-response/bulletins/pdfs/CCI_Alert_Global_Anti_Bribery.pdf (noting that the U.K., Spain, and China have introduced new anti-bribery legislation).

[176] *See* Press Release, U.S. Sec. & Exch. Comm'n, Sean McKessy Named Head of Whistleblower Office (Feb. 18, 2011), *available at* http://www.sec.gov/news/press/2011/2011-47.htm.

[177] *Id.*

changes will allow FCPA cases to benefit from judicial review and will build precedent upon which companies can rely. Additionally, a natural consequence of litigating FCPA charges will be to bring to light frivolous or false whistleblower claims, with a possible deterrent effect upon similarly inclined whistleblowers. Since these proposed changes would result in greater transparency and less fear of litigation on behalf of targeted companies, the changes would likely enhance companies' compliance and self-reporting. These proposed amendments would allow the Dodd–Frank Act's goals to be achieved but would make the FCPA less of a monster.