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The Impact of the Dodd-Frank Whistleblower Provisions on FCPA Enforcement and Modern Corporate Compliance Programs

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The Impact of the Dodd-Frank Whistleblower Provisions on FCPA Enforcement and Modern Corporate Compliance Programs

Bradley J. McAllister

Introduction	45
I. Legal Framework	47
A. The Foreign Corrupt Practices Act	47
B. The Sarbanes-Oxley Act of 2002	48
C. Wall Street Reform and Consumer Protection Act	50
II. Challenges Related to the Dodd-Frank Whistleblower Provisions and the Application of the Law to the FCPA	52
A. 21F(h)(1)(A)(iii) Should Protect Internal Reporting	54
B. Dodd-Frank Whistleblower Provisions Should Apply Extraterritorially	58
C. Special Case of Attorneys, Accountants, and Compliance Professionals	65
III. Emerging Issues Relevant to Corporate Compliance in an FCPA Context	70
A. International Nature of FCPA Violations and Applicability to Dodd-Frank	71
B. Internal Investigations and Corporate Compliance	74
C. Policies from the DOJ Related to Individual Accountability and FCPA Enforcement	81
Conclusion and Recommendations	85

INTRODUCTION

The rise in enforcement of the Foreign Corrupt Practices Act (“FCPA”) by the U.S. federal government is attributable to a dramatic change in federal laws related to corporate compliance. The FCPA, passed in 1977, is the U.S. anti-bribery statute that prohibits bribery of foreign government officials in exchange for business.¹ The passage of two financial laws, the Sarbanes-Oxley Act of 2002 (“SOX”)² and the Wall Street Reform and Consumer Protection Act

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1. 15 U.S.C. §§ 78dd-1-3 (2012).

2. Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, § 806, 116 Stat. 745, 802-04 (codified as amended at 18 U.S.C. § 1514A (2012)).

(“Dodd-Frank”)³ increased the level of mandatory reporting disclosures for public companies and indirectly raised the number of FCPA actions. The FCPA is now a critical enforcement mechanism of the U.S government.

The FCPA, SOX, and Dodd-Frank work in conjunction to create a patchwork of laws that predominate over corporate compliance for publically traded companies. A number of the provisions of Dodd-Frank include express cross-references to SOX and give the U.S. government authority under Dodd-Frank to investigate potential violations of federal securities laws under the jurisdiction of the U.S. Securities and Exchange Commission (“SEC” or “Commission”). Two major changes included in Dodd-Frank are the creation of the SEC’s Office of the Whistleblower and the anti-retaliation provisions.⁴ The Office of the Whistleblower has awarded over \$100 million to whistleblowers since the program’s inception in 2011.⁵ Enforcement actions derived from the whistleblower anti-retaliation provisions contributed continue to shape enforcement of federal securities laws.⁶

There is a divide among the Federal Courts of Appeals regarding the proper interpretation of the definition of a whistleblower for purposes of Dodd-Frank. Federal courts interpret the Dodd-Frank anti-retaliation protections based on the authority to which the employee reported the alleged violations of law; i.e., whether the employee reported the violation to the Commission directly or reported a potential violation through appropriate internal channels first. The statutory definition provides 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*, in a manner established, by rule or regulation, by the Commission.”⁷ The anti-retaliation provisions state that no employer may discriminate against a whistleblower in the terms of employment because of any lawful act done by the whistleblower “in *making disclosures that are required or protected* under the Sarbanes-Oxley Act of 2002 (15 U.S.C. section 7201 *et seq.*), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.”⁸

A failure to extend the whistleblower bounty and anti-retaliation provisions to qualifying individuals who first report internally is contradictory to the fundamental purpose of the Dodd-Frank whistleblower provisions. Additionally,

3. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 15 U.S.C. § 78o (2012)).

4. 15 U.S.C. §§ 78u-6(b)–(c) (2012).

5. U.S. SEC. & EXCH. COMM’N, 2016 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1, <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf> [hereinafter OWB 2016 ANNUAL REPORT TO CONGRESS].

6. *Id.* at 4–5.

7. 15 U.S.C. § 78u-6(a)(6) (2012).

8. 15 U.S.C. §§ 78u-6(h)(1)(A)(i)–(iii) (2012) (emphasis added).

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

the paper will argue that the SEC's formal interpretive guidance related to the Dodd-Frank whistleblower provisions clearly outlines the appropriate incentives for both employees and employers. Notably, it encourages self-reporting of potential violations of the federal securities laws and improving the accountability of corporate ethics and compliance departments in their handling of internal investigations. This paper explores whether disclosures that are required or protected under Dodd-Frank may apply to internal disclosures under the FCPA, by virtue of the FCPA accounting provisions.

Part I presents the legal framework governing modern corporate compliance, including relevant provisions of the FCPA, SOX, and Dodd-Frank. Part II of this paper will analyze the current state of case law regarding the Dodd-Frank whistleblower provisions, with a focus on FCPA investigations. Part III will explore the practical implications of the Dodd-Frank whistleblower provisions on internal investigations and modern corporate compliance departments in light of recent trends in FCPA enforcement. In closing, this paper offers conclusions and recommendations.

I. LEGAL FRAMEWORK

Over the past forty years, corporate compliance in U.S. has been shaped by three major scandals and the federal legislation enacted in response to them.

A. The Foreign Corrupt Practices Act

In the fallout from the Watergate scandal, Congress laid the foundation for modern corporate compliance when it enacted the Foreign Corrupt Practices Act⁹ in 1977.¹⁰ The statute was designed to counteract the widespread use of kickbacks and bribes paid by defense contractors and other U.S. companies to foreign government officials.¹¹ The U.S. Securities and Exchange Commission and the U.S. Department of Justice (“DOJ”) share the responsibility of FCPA enforcement.¹² The SEC is responsible for civil enforcement of the FCPA and has authority over “issuers.”¹³ A company is an issuer if it maintains a class of securities under section 12 of the Securities Exchange Act of 1934 (“Exchange Act”),¹⁴ or is required to file periodic and other reports with the Commission under section 15(d) of the Exchange Act.¹⁵ The definition of issuer also includes

9. 15 U.S.C. §§ 78dd-1-3 (2012).

10. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 962 (2009).

11. *Id.*

12. Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 909 (2010). Additionally, the Federal Bureau of Investigation Fraud Section assists in investigations, along with anti-corruption law enforcement entities around the world.

13. *Id.* at 923-24.

14. 15 U.S.C. § 78l (2012).

15. 15 U.S.C. § 78o(d) (2012).

any company with a class of securities listed on a national securities exchange in the U.S., including non-U.S. based companies.¹⁶

The FCPA is comprised of two key enforcement mechanisms: the anti-bribery provisions and the accounting provisions.¹⁷ Of focus in this article are the accounting provisions that are divided into two categories: the books and records provision and the internal controls provision.¹⁸ The books and records provision requires issuers to make and keep *books, records, and accounts*, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.¹⁹ The internal controls provision requires issuers to “devise and maintain a system of *internal accounting controls* sufficient to provide reasonable assurances that-transactions are executed in accordance with management’s general or specific authorization,” and record “transactions [] as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets.”²⁰

In general, the books and records and internal control provisions apply only to public companies with shares traded on a U.S. securities exchange, whereas the anti-bribery provisions have a broader reach.²¹

B. The Sarbanes-Oxley Act of 2002

In response to the Enron and World-Com accounting scandals, Congress enacted the Sarbanes-Oxley Act of 2002.²² Legal commentators suggest that SOX could be the most important piece of corporate legislation passed since the Exchange Act in 1934, in part because the legislation introduced new reporting requirements and audit certifications for public companies.²³ Combined with the FCPA, SOX creates a “double-edged sword” for the SEC to investigate bribery and corruption.²⁴

Post-SOX, companies are expected to develop tailored corporate compliance and internal audit programs to identify potential FCPA violations.²⁵ Further, SOX has contributed to an increase in FCPA enforcement because the government has greater access to previously undisclosed information regarding

16. U.S. DOJ CRIM. DIV. & U.S. SECS. & EXCH. COMM’N ENF. DIV., A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 11 (2012) [hereinafter FCPA RESOURCE GUIDE].

17. Koehler, *supra* note 12, at 913.

18. 15 U.S.C. §§ 78m-2(A)–(B) (2012).

19. 15 U.S.C. § 78m-2(A) (2012) (emphasis added).

20. 15 U.S.C. § 78m-2(B)(i)(ii) (2012) (emphasis added).

21. Koehler, *supra* note 12, at 921–22.

22. Amy D. Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 515 (2011).

23. Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT’L L.J. 89, 116–17 (2010); see Westbrook, *supra* note 22, at 517.

24. Bixby, *supra* note 23, at 117.

25. See FCPA RESOURCE GUIDE, *supra* note 16, at 56.

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

corporate accounting methodologies.²⁶ SOX reinforces internal reporting structures and “close-loop internal investigations” that encourage a culture of compliance, thus creating an environment where employees are encouraged to report potentially unlawful activity to an internal supervisor before seeking external channels.²⁷

Section 301 of SOX requires listed companies to establish an independent audit committee as a permanent committee of the company’s board of directors.²⁸ The audit committee must establish procedures for receiving complaints regarding accounting, internal accounting controls, or auditing matters from a registered public accounting firm.²⁹ Additionally, the audit committee must establish procedures for receiving “confidential, anonymous submission[s] by employees of the issuer of concerns regarding questionable accounting or auditing matters.”³⁰ SOX regulations force companies to develop strong internal audit procedures and enhanced internal investigation capabilities.³¹ In the fourteen years since SOX was enacted, there are two key takeaways for corporations: (1) there are stronger internal audit requirements; and (2) greater potential legal liability for senior management personnel that are required to certify a company’s financial reports are complete and accurate.³²

A critical reason internal investigations are a new priority under SOX is section 806(C), which prohibits retaliation against an employee that reports corporate conduct that the employee reasonably believes constitutes a violation of the Exchange Act to a person with supervisory authority over the employee.³³ SOX section 806, entitled “Civil action to protect against retaliation in fraud cases,” states that an issuer may not:

discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—(A) a Federal regulatory or law enforcement agency; (B) any Member of Congress or any committee of Congress; or (C) *a person with supervisory authority over the employee*

26. Westbrook, *supra* note 22, at 515–16.

27. Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 *FORDHAM L. REV.* 1245, 1250 (2009).

28. 15 U.S.C. § 78j-1(m)(2) (2012).

29. 15 U.S.C. § 78j-1(m)(4)(A) (2012).

30. 15 U.S.C. § 78j-1(m)(4)(B) (2012).

31. *See* Lobel, *supra* note 27, at 1251.

32. Bixby, *supra* note 23, at 116.

33. Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, § 806, 116 Stat. 745, 802–04.

(or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct).³⁴

Prior to the adoption of SOX in 2002, most private sector whistleblower laws only protected employees who raised concerns about dangers to public health or safety.³⁵ In contrast to the federal regulations over issuers, the public sector has long provided a remedy for whistleblower complaints filed by government contractors via *qui tam* suits under the False Claims Act.³⁶ However, SOX created the first civil remedy for private sector whistleblowers that raise concerns about potential violations of federal securities laws.³⁷ Specifically, section 806(a)(1)(C) protects an employee that reports a potential violation of federal securities law to an internal supervisor or a person with authority to investigate misconduct for the employer.³⁸

The SOX 301 audit committee requirement and the SOX 806 anti-retaliation provision work together to provide a culture of internal reporting and strong anti-retaliation laws that were non-existent in the private sector. Because senior management must certify financial reports under SOX, employees that report potential illegality place senior management on notice of potential violations. This fact is critical to how a corporation manages an internal investigation post-SOX.

C. Wall Street Reform and Consumer Protection Act

Following the 2008 financial crisis and the discovery of the Bernie Madoff Ponzi Scheme, President Obama signed the Wall Street Reform and Consumer Protection Act.³⁹ Congress passed Dodd-Frank to promote overall financial stability by improving the accountability and transparency of the U.S. financial system.⁴⁰ Dodd-Frank expanded on the anti-retaliation protections under SOX in section 21F, entitled “Securities Whistleblower Incentives and Protection.”⁴¹ Section 21F created the whistleblower incentive program and the Office of the Whistleblower (“OWB”) administered by the SEC.⁴² Under the whistleblower

34. 18 U.S.C. §§ 1514A(a)(1)(A)–(C) (2012) (emphasis added).

35. Daniel P. Westman, *The Significance of the Sarbanes-Oxley Whistleblower Provisions*, 21 LAB. LAW. 141, 141 (2005).

36. See 31 U.S.C. § 3279 *et seq.* (2012).

37. Westman, *supra* note 35, at 142.

38. 18 U.S.C. § 1514A(a)(1)(C) (2012).

39. Cheryl Nichols, *Addressing Inept SEC Enforcement Efforts: Lessons from Madoff, the Hedge Fund Industry, and Title IV of the Dodd-Frank Act for U.S. and Global Financial Systems*, 31 NW. J. INT'L L. & BUS. 637, 638 (2011).

40. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

41. 15 U.S.C. § 78u-6 (2012). See *Asadi v. G.E. Energy (USA), L.L.C. (Asadi II)*, 720 F.3d 620, 628 n.11 (5th Cir. 2013).

42. 15 U.S.C. §§ 78u-6(b)–(c) (2012).

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

award program, the Commission is authorized to provide a discretionary award between 10–30% of the total enforcement penalty against an issuer when an individual submits information to the Commission leading to an enforcement action with penalties that exceed \$1 million.⁴³

In addition to the OWB award program, section 21F prohibits retaliation against employees who report information about potential violations of federal securities laws.⁴⁴ Specifically, section 21F(h) states:

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 are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.*⁴⁵

Dodd-Frank section 21F(h)(1)(A)(iii) includes an express cross-reference to disclosures that are “required or protected under SOX,” such as the anti-retaliation protection for disclosures to “a person with supervisory authority over an employee” found in 806(a)(1)(C). Section 21F(a)(6) of Dodd-Frank 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.”⁴⁶ Courts have analyzed “the interpretation of the applicability of Dodd-Frank’s anti-retaliation protections depending on the authority to which the employee reported the alleged violations of law;” i.e., whether the employee reported the violation to the Commission directly or reported a potential violation through appropriate internal channels first.⁴⁷ Section 21F(h)(1)(A)(iii) also provides anti-retaliation protection for disclosures that are “required or protected” under “any other law, rule, or regulation subject to the jurisdiction of the Commission.”⁴⁸

The question remains if an employee is ever required to disclose information under the FCPA, and how a court would decide whether a disclosure is required or protected under 21F(h)(1)(A)(iii) when the employee reasonably believes an

43. Nicole H. Sprinzen, *Asadi v. G.E. 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, 165 (2014); see 15 U.S.C. §§ 78u-6(b)–(c) (2012).

44. 15 U.S.C. § 78u-6(h) (2012).

45. 15 U.S.C. §§ 78u-6(h)(1)(A)(i)–(iii) (2012) (emphasis added).

46. 15 U.S.C. § 78u-6 (2012) (emphasis added).

47. Sprinzen, *supra* note 43, at 169.

48. 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012).

accounting action potentially violates federal securities laws. Judicial opinions that address the extraterritorial reach of the Dodd-Frank whistleblower provisions have offered little in the way of judicial interpretation related to what, if any, disclosures may qualify as “required or protected” under the FCPA for purposes of 21F(h)(1)(A)(iii).⁴⁹

Considering the legal requirements on internal reporting under SOX and Dodd-Frank, the reasons given for denying anti-retaliation protection to employees that first report potentially illegal conduct internally instead of directly to the Commission are blatantly incongruent with the intent of the OWB and the Dodd-Frank whistleblower bounty incentive provisions. The whistleblower provisions of Dodd-Frank must protect individuals that report a potential violation of federal securities laws internally before reporting to the SEC because certain disclosures explicitly acknowledged under section 21F(h)(1)(A)(iii), including provisions of SOX, require internal reporting first. Further, limitations on whistleblower protections for certain employees that conduct internal investigations, such as auditors, attorneys, and compliance professionals, is problematic because these individuals are most likely to come across potentially unlawful accounting activity, and if they are retaliated against for reporting concerns internally, then the integrity of corporate compliance is undermined and the whistleblower provisions would be substantially weakened.

II. CHALLENGES RELATED TO THE DODD-FRANK WHISTLEBLOWER PROVISIONS AND THE APPLICATION OF THE LAW TO THE FCPA

There is a split in the federal District Courts over the proper definition of whistleblower for purposes of Dodd-Frank. The split is based on whether a conflict exists between the definition of whistleblower under Dodd-Frank section 21F(a)(6) and the requirements to qualify as a whistleblower when an employee makes an internal disclosure that is either required or protected under 21F(h)(1)(A)(iii). In recent years, a number of federal courts grappled with the tension between mandatory internal disclosures that are required or protected under SOX as expressly mentioned in section 21F(h)(1)(A)(iii) of Dodd-Frank.

In *Asadi v. G.E. Energy* (“*Asadi I*”), the Fifth Circuit refuted that the definition of whistleblower under Dodd-Frank incorporates the anti-retaliation provision of SOX as cross-referenced in 21F(h)(1)(A)(iii).⁵⁰ The court interpreted the phrase “to the Commission” in the definition of whistleblower to mean that an employee must provide information directly to the Commission on the first instance, rather than internally, to qualify as a whistleblower under

49. See *Asadi v. G.E. Energy (USA), LLC (Asadi I)*, 2012 WL 2522599, at *5 (S.D. Tex. June 28, 2012), *aff’d*, 720 F.3d 620 (5th Cir. 2013) (holding the Dodd-Frank whistleblower provisions do not apply extraterritorially); and *Liu v. Siemens AG (Liu II)*, 763 F.3d 175, 183 (2d Cir. 2014) (holding the Dodd-Frank whistleblower provisions do not apply extraterritorially).

50. *Asadi v. G.E. Energy (USA), L.L.C. (Asadi II)*, 720 F.3d 620, 628 (5th Cir. 2013).

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

Dodd-Frank 21F(h)(1)(A)(iii).⁵¹ The court held that “under Dodd-Frank’s plain language and structure, there is only one category of whistleblowers: individuals who provide information relating to a securities law violation to the SEC.”⁵²

In August 2015, the SEC released formal interpretive guidance clarifying the definition of whistleblower under Dodd-Frank.⁵³ The SEC’s interpretation of Rule 21F affords anti-retaliation protection to whistleblowers who report potential violations of federal securities laws internally first to a supervisor, compliance official, or other person working for the company that has authority to investigate, discover, or terminate misconduct.⁵⁴ The Commission emphasized a broader interpretation of 21F is required to match the overarching goals of the whistleblower program, stating: “an individual who reports internally and suffers employment retaliation will be no less protected than an individual who comes immediately to the Commission. Providing equivalent employment retaliation protection for both situations removes a potentially serious disincentive to internal reporting by employees in appropriate circumstances.”⁵⁵

In *Berman v. Neo@Ogilvy LLC*, the Second Circuit rejected the Fifth Circuit’s single definition of whistleblower outlined in *Asadi II*.⁵⁶ The *Berman* court ruled there is sufficient ambiguity in the statutory definition and the operating provisions of subsections 21F(h)(1)(A)(i)–(iii) such that the Commission’s interpretive rule warrants deference for the proper interpretation of the law.⁵⁷ Additionally, the court held certain provisions of SOX require internal disclosures under 21F(h)(1)(A)(iii) and these mandatory disclosures should not disqualify employees from anti-retaliation protection under Dodd-Frank because of an apparent contradiction in the statutory definition of whistleblower.⁵⁸

Other challenges related to Dodd-Frank whistleblower provisions involve extraterritorial application of the rule and the case of a general counsel who was denied whistleblower protection after reporting alleged FCPA violations internally. In *Liu v. Siemens*, the Second Circuit declined to rule that the whistleblower provisions apply extraterritorially.⁵⁹ However, the SEC recently ruled against the decision in *Liu* in an administrative proceeding, holding that a

51. *Id.* at 625–28.

52. *Id.* at 625.

53. Interpretation of the SEC’s Whistleblower Rules Under Section 21F of the Securities and Exchange Act of 1934, 80 Fed. Reg. 47,829 (Aug. 10, 2015).

54. *Id.* at 47,830.

55. *Id.*

56. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015).

57. *Id.* at 146.

58. *Id.* at 155.

59. *Liu v. Siemens A.G. (Liu II)*, 763 F.3d 175, 183 (2d Cir. 2014).

foreign whistleblower who faces retaliation after reporting internally may be eligible for an award under the whistleblower bounty provision of 21F.⁶⁰

In *Wadler v. Bio-Rad*, the court ruled that a corporate general counsel of over 25 years was entitled to whistleblower protection after repeated attempts to make internal reports to the audit committee of the board of directors and the CEO related to ongoing bribery in China.⁶¹ Additionally, the *Wadler* court ruled that members of the board of directors may be held individually liable for retaliation against employees under SOX section 806 as agents of the corporation.⁶² In recent challenges, the majority of district courts have found 21F sufficiently ambiguous to afford deference to the SEC's interpretation of the alleged conflict between the definition of whistleblower in 21F(a)(6) and the reporting requirement under 21F(h)(1)(A)(iii).⁶³

A. 21F(h)(1)(A)(iii) Should Protect Internal Reporting

In 2006, Khaled Asadi, a U.S. and Iraqi citizen, took a position in Amman, Jordan pursuant to a U.S.-based at-will employment agreement with G.E. Energy.⁶⁴ During negotiations with the Iraqi Minister of Electricity regarding a \$250 billion joint venture agreement, Asadi was informed by a contact within the Iraqi government that G.E. hired a woman who was closely associated to the Minister of Electricity.⁶⁵ The hiring decision was made by appointment from the Senior Deputy Minister "in order to curry favor with the Minister while negotiating a lucrative Joint Venture Agreement."⁶⁶ Asadi reported the hiring decision to his supervisor because he was concerned that the action could damage negotiations and violate the FCPA.⁶⁷

Asadi also reported the conduct to the ombudsperson for G.E., who conducted an interview with him.⁶⁸ Following his interview with the ombudsperson, Asadi alleged that he received a "surprisingly negative" performance review.⁶⁹ According to the complaint, G.E. encouraged Asadi to take a position with fewer responsibilities and initiated negotiations with Asadi to end his employment with the company.⁷⁰ Subsequently, G.E. informed Asadi

60. In the Matter of the Claim for Award in Connection with Redacted, Release No. 73174, n.2 (Sept. 22, 2014).

61. *Wadler v. Bio-Rad Labs., Inc.*, 141 F. Supp. 3d 1005, 1024–27 (N.D. Cal. 2015).

62. *Id.* at 1024.

63. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 154 (2d Cir. 2015); *see* 15 U.S.C. §§ 78u-6(h)(1)(A)(i)–(iii).

64. *Asadi v. G.E. Energy (USA), LLC (Asadi I)*, 2012 WL 2522599, at *1–2 (S.D. Tex. June 28, 2012), *aff'd*, 720 F.3d 620 (5th Cir. 2013).

65. *Id.* at 1.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 2.

70. *Id.*

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

that his termination was executed “as an at-will employee, as allowed under U.S. Law” and that “[a]s a U.S.-based employee you will be terminated in the U.S.”⁷¹

Shortly thereafter, Asadi filed suit in the Southern District of Texas.⁷² First, Asadi argued that his disclosures qualified him for anti-retaliation protection under 21F(h)(1)(A)(iii) because he made disclosures that were protected under SOX when he reported the alleged violation, citing SOX section 806 which provides anti-retaliation protection for internal whistleblowers who provide information regarding any conduct which the employee reasonably believes constitutes a violation of any rule or regulation of the SEC if the information is provided to a person with supervisory authority over the employee.⁷³ Second, Asadi argued that sections 302⁷⁴ and 404⁷⁵ of SOX required him, in his capacity as a G.E. executive, to disclose the potential FCPA violation, and further required G.E. to disclose the investigation in its quarterly and annual reports.⁷⁶ The defendant, G.E. Energy, filed a 12(b)(6) motion to dismiss.⁷⁷ The court in *Asadi I* declined to rule on the issue of whether Asadi qualified as a whistleblower under 21F(h)(1)(A)(iii), holding Dodd-Frank does not apply extraterritorially.⁷⁸

On appeal, the Fifth Circuit reviewed the outstanding issue of “whether an individual who fails to meet the statutory requirements of a whistleblower under section 21F(a)(6) may, in some circumstances, seek relief under the whistleblower-protection provision.”⁷⁹ In *Asadi II*, the court rejected that 21F(h)(1)(A)(iii) is ambiguous regarding the meaning of whistleblower, instead holding Dodd-Frank limits anti-retaliation protection *only* to those individuals who report securities law violations *directly to the Commission*.⁸⁰ The court held the “result does not render 21F(h)(1)(A)(iii) conflicting or superfluous.”⁸¹

The Fifth Circuit ruled there is one statutory definition for a whistleblower and the term does not have a different meaning as it pertains to the whistleblower-protection provision for required disclosures under 21F(h)(1)(A)(iii).⁸² The court stated that 21F(h)(1)(A)(iii) “protects whistleblowers from retaliation, based not on the individual’s disclosure of

71. *Id.*

72. *Id.*

73. *Id.* at 3 n.31 (referencing 18 U.S.C. § 1514A(a) (2012)).

74. SOX section 302 requires a certification statement from the principal executive of a company and its financial officers stating that they are responsible for designing internal controls and procedures for financial reporting; or, they are having such controls and procedures designed under their supervision.

75. SOX section 404 requires the annual reports of public companies to include the company’s own assessment of internal controls over financial reporting and an auditor’s attestation to the effectiveness of the internal control structure and procedures for financial reporting.

76. *Asadi I*, 2012 WL 2522599, at *n.31.

77. *Id.* at 1.

78. *Id.* at 7.

79. *Asadi v. G.E. Energy (USA), L.L.C. (Asadi II)*, 720 F.3d 620, 623 (5th Cir. 2013).

80. *Id.* at 626 (emphasis added).

81. *Id.*

82. *Id.* at 623–24.

information to the SEC but, instead, on that individual's other possible required or protected disclosure(s)," presumably under the mandatory reporting provisions anti-retaliation provisions of SOX.⁸³ The court acknowledged a scenario that may present itself where an employee is required to make disclosures that amount to a protected activity yet still not qualify as a whistleblower for Dodd-Frank purposes.⁸⁴ Nevertheless, the court held Asadi's reading of 21F(h)(1)(A)(iii) fails because there is no conflict between the definition of whistleblower and the third category of protected activity.⁸⁵

The Fifth Circuit's decision in *Asadi II* hinders the type of reporting that Dodd-Frank was designed to protect and "pulls the rug right out from under the whistleblower."⁸⁶ Asadi reported legitimate concerns about potential violations of the FCPA to the individuals who are positioned to investigate the conduct and he was abruptly terminated. If U.S.-based employees are not afforded whistleblower protection for internal reporting, then those same employees are more likely to file whistleblower complaints directly with the SEC's OWB in order to be eligible for the bounty incentive program and other advantages of 21F, such as anonymity.⁸⁷ Following *Asadi*, the Commission filed *amicus curiae* briefs in private retaliation lawsuits to urge federal courts to defer to the SEC's regulations in Rule 21F-2(b)(1) and rule that individuals are entitled to employment retaliation protection if they report information of a possible securities law violation internally at a publicly traded company, regardless of whether they have separately reported the information to the SEC.⁸⁸

The Second Circuit decision in *Berman v. Neo@Ogilvy LLC* marks a split among federal Circuit Courts regarding the proper interpretation of 21F(h)(1)(A)(iii). While not an FCPA matter, the *Berman* case addresses the fact that certain employees—auditors, finance professionals, and attorneys—are often legally required to report certain behavior internally first.⁸⁹ Based on these requirements, an interpretation that limits 21F(h)(1)(A)(iii) to disclosures made directly to the Commission would exclude these important professionals from anti-retaliation protection.⁹⁰

The plaintiff in *Berman* served as the finance director of a media agency.⁹¹ Berman was responsible for the company's financial reporting and its internal

83. *Id.* at 627.

84. *Id.* at 626.

85. *Id.*

86. Sprinzen, *supra* note 43, at 169.

87. *Id.*

88. Brief for U.S. Secs. & Exch. Comm'n as Amicus Curiae Supporting Appellant, at 2–4, Liu v. Siemens A.G., 763 F.3d 175 (2d Cir. 2014) (No. 13-4385), 2014 WL 663875, at *2–4 [hereinafter "SEC Amicus Brief"].

89. *Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 151 (2d Cir. 2015)

90. *Id.* at 151–52.

91. *Id.* at 148.

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

accounting procedures.⁹² Berman filed an anti-retaliation claim under Dodd-Frank 21F six months after he was terminated for making an internal report of fraudulent accounting practices that allegedly violated U.S. Generally Accepted Accounting Principles, SOX, and Dodd-Frank.⁹³ The complaint was dismissed by the District Court “because Berman had been terminated long before he reported alleged violations to the SEC.”⁹⁴ Berman appealed to the Second Circuit and the court ruled that Berman was entitled to pursue his claim for retaliation, even though he did not report to the Commission until nine months after he reported the violation internally.⁹⁵

The *Berman* decision emphasized the importance of a broad interpretation of the whistleblower provisions in order for Dodd-Frank to meet its intended purpose.⁹⁶ More importantly, the court noted that a categorical ban on internal whistleblowing may preclude auditors, financial professionals, and attorneys from whistleblower protection.⁹⁷ For example, section 78j-1(b)(3)(B) of SOX “permits an auditor to report illegal acts to the Commission *only if* the board or management fails to take appropriate remedial action.”⁹⁸ Similarly, attorneys are subject to section 307 of SOX which requires in-house attorneys to report material violations of the securities laws to the chief legal counsel or CEO of a public company, and, if counsel or the CEO does not appropriately respond to the attorney’s internal reporting the attorney *must report* the alleged violations to the audit committee or an independent committee of the board of directors.⁹⁹ Ultimately, the court found the tension between the definition of whistleblower and 21F(h)(1)(A)(iii) to be sufficiently ambiguous to give deference to the reasonable interpretation of the agency charged with administering the statute.¹⁰⁰

The interpretation of whistleblower protections in *Berman* aligns with Congress’ intent behind the Dodd-Frank whistleblower provisions: to protect those who speak up about potential violations of federal securities laws. Section 21F(h)(1)(A)(iii) covers disclosures that are “required or protected” under “any other law, rule, or regulation subject to the jurisdiction of the Commission.”¹⁰¹ The question remains to be considered if an employee is ever required to disclose information under the FCPA, and whether a disclosure in accordance with potential violations of the FCPA accounting provisions that may be required or protected under 21F(h)(1)(A)(iii). Judicial opinions that address the

92. *Id.* at 148–49.

93. *Id.* at 149.

94. *Id.*

95. *Id.* at 155.

96. *Id.*

97. *Id.* at 151.

98. *Id.* (emphasis added).

99. *Id.* at 151–52; see 15 U.S.C. §§ 7245(1)–(2) (2012).

100. *Berman*, 801 F.3 at 155.

101. 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2012).

extraterritorial reach of the Dodd-Frank whistleblower provisions have offered little in the way of judicial interpretation related to what, if any, disclosures may qualify as “required or protected” under the FCPA for purposes of 21F(h)(1)(A)(iii).

B. Dodd-Frank Whistleblower Provisions Should Apply Extraterritorially

The *Asadi I* court’s refusal to extend anti-retaliation protection to the plaintiff, a U.S. citizen who was terminated as a U.S. employee, based on extraterritorial grounds raises concern. Asadi’s position required him to interact with Iraq’s governing bodies in order “to secure and manage energy service contracts for G.E.”¹⁰² Although Asadi worked directly with government officials in the Middle East and was likely trained on FCPA compliance, his internal disclosures were neglected and the court afforded him no anti-retaliation protection for disclosing a potential violation of federal securities laws to the Commission as required under 21F(h)(1)(A)(iii).

Asadi argued that he was required to disclose potential bribery violations because his disclosures were either protected or required by SOX or the FCPA, as incorporated into the anti-retaliation provision.¹⁰³ In *Asadi I*, the District Court held the Dodd-Frank’s anti-retaliation provision *per se* does not apply extraterritorially and the cited provisions of SOX and the FCPA as incorporated into the anti-retaliation provision do not provide relief.¹⁰⁴ The Fifth Circuit affirmed the lower court’s dismissal¹⁰⁵ and rejected Asadi’s plea to find that 21F(h)(1)(A)(iii) applies extraterritorially based on any cross-reference to SOX or the FCPA.¹⁰⁶

The Fifth Circuit wrongfully rejected Asadi’s request to extend the anti-retaliation provision to incorporate disclosures of potential FCPA violations. Moreover, the court failed to adequately address the impact of a protected disclosure under 21F(h)(1)(A)(iii) by a U.S. citizen working for a U.S. corporation abroad. The refusal to extend anti-retaliation protection to a U.S. citizen terminated as a U.S. employee based on extraterritorial grounds alone is inconsistent with Dodd-Frank and highlights the problem with a denial of extraterritorial application of 21F. Asadi’s position required him to interact with Iraq’s governing bodies in order “to secure and manage energy service contracts for G.E.”¹⁰⁷ Although Asadi worked directly with government officials in the

102. *Asadi v. G.E. Energy (USA), LLC (Asadi I)*, 2012 WL 2522599, at *1 (S.D. Tex. June 28, 2012), *aff’d*, 720 F.3d 620 (5th Cir. 2013).

103. *Id.* at 4.

104. *Id.* at 7.

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

106. *Id.* at 620, 625.

107. *Asadi I*, 2012 WL 2522599, at *1.

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

Middle East and was likely trained on FCPA compliance, his internal disclosures were neglected and the court afforded him no anti-retaliation protection.

In *Liu v. Siemens A.G.*, the plaintiff served as the division compliance officer for the healthcare division of Siemens A.G. in China.¹⁰⁸ Liu alleged Siemens China operated a kickback scheme with payments disguised through inflated bids for medical imaging equipment sold to public hospitals in China and North Korea.¹⁰⁹ Over six months, Liu raised concerns about a deal in North Korea that he believed circumvented corporate internal controls imposed after Siemens' FCPA violation in 2008.¹¹⁰ Eventually, Liu refused to approve intermediaries to sell equipment to army hospitals in China, and he was relieved of his responsibility to approve intermediaries in the region.¹¹¹

Following the court's reasoning in *Asadi I*, the Southern District of New York ruled that SOX 806 does not apply extraterritorially and, therefore, Liu was not entitled to anti-retaliation protection under SOX or Dodd-Frank.¹¹² On the applicability of the FCPA to Dodd-Frank 21F(h)(1)(A)(iii), the court held the FCPA itself does not require or protect any disclosures that would qualify him for whistleblower protection under 21F(h)(1)(A)(iii).¹¹³ Regarding any overlap between the protected activity under SOX 806 and the FCPA, the court found that a required or protected disclosure would only fall under "fraud against shareholders" under SOX 806 and not SOX section 806(a)(1)(C) regarding internal reporting to supervisory employees.¹¹⁴

Liu was the first appellate-level decision to address the extraterritorial application of the anti-retaliation provision of Dodd-Frank, and the court affirmed the dismissal of the case based on extraterritorial grounds alone.¹¹⁵ Liu argued that because Siemens voluntarily elected to have a class of its securities publicly listed on the New York Stock Exchange ("NYSE"), the company subjected itself to U.S. securities laws.¹¹⁶ The court rejected this argument based on its reading of *Morrison*, where the Supreme Court held that section 10(b) of the Exchange Act did not have extraterritorial reach because it applied "only [to]

108. *Liu v. Siemens A.G. (Liu I)*, 978 F. Supp. 2d 325, 326 (S.D.N.Y. 2013), *aff'd*, 763 F.3d 175 (2d Cir. 2014).

109. *Id.*

110. *Id.*

111. *Id.* at 327.

112. *Id.* at 330.

113. *Id.* (referencing *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 988 (M.D. Tenn. 2012)).

114. *Id.*

115. Case Comment, *Securities Regulation-Whistleblower Protection- Second Circuit Holds That Antiretaliation Provision of Dodd-Frank Act Does Not Apply Extraterritorially.-Liu Meng-Lin v. Siemens Ag*, 763 F.3d 175 (2d Cir. 2014), 128 HARV. L. REV. 1826, 1829 (2015). On appeal, the Second Circuit framed the issue as follows: "To survive Siemens's motion to dismiss, Liu must demonstrate either (1) that the facts alleged in his complaint state a domestic application of the anti-retaliation provision of the Dodd-Frank Act, or (2) that the anti-retaliation provision is intended to apply extraterritorially."

116. *Liu v. Siemens AG (Liu II)*, 763 F.3d 175, 179 (2d Cir. 2014).

transactions in securities listed on domestic exchanges, and domestic transactions in other securities.”¹¹⁷

The problem with the court’s application of section 10(b) to Liu’s claims is that section 10(b) is the provision that regulates the use of manipulative or deceptive devices in the sale of securities, which is not relevant to the Dodd-Frank anti-retaliation claim nor an appropriate reading of the domestic application of the FCPA.¹¹⁸ An application of *Morrison* to all U.S. securities laws is an over-reading of the Supreme Court’s decision based on the facts of that case alone.

While the Second Circuit issued a decision that was arguably “a doctrinally straightforward application of *Morrison*’s clear and undeniably sweeping articulation of the presumption against extraterritorially,” this application of 21F(h)(1)(A)(iii) fails to take into account why U.S. courts have jurisdiction over FCPA claims, which turns on whether a company is an issuer as defined in the statute.¹¹⁹ Further, the decision in *Liu* “undermines the coherence and effectiveness of Dodd-Frank.”¹²⁰ As mentioned in Liu’s original complaint, he raised concerns internally because of conduct that he believed “circumvented internal compliance procedures put in place after Siemens A.G.’s 2008 guilty plea to FCPA charges.”¹²¹

In the SEC’s complaint filed against Siemens A.G. for its FCPA violations in 2008, the D.C. Circuit found that Siemens violated the bribery and the accounting provisions of the FCPA, resulting in an \$800 million penalty.¹²² Related to the accounting provisions, the complaint alleged:

Siemens made thousands of payments to third parties in ways that obscured the purpose for, and the ultimate recipients of, the payments. In particular, Siemens paid approximately \$1.4 billion in bribes to foreign officials. [. . .] Siemens failed to implement adequate internal controls to comply with the Company’s NYSE listing, including the detection and prevention of violations of the FCPA. First, Siemens engaged in the knowing falsification of books and records [. . .] Second, Siemens employees routinely circumvented the internal controls the Company had in place. [. . .] Finally, Siemens failed to establish adequate internal controls despite its knowledge that corruption was rampant.¹²³

117. *Id.* (referencing *Morrison v. Nat’l Aus. Bank LTD*, 561 U.S. 247, 267 (2010)).

118. *See* 15 U.S.C. § 78j-(b) (2012).

119. Case Comment, *supra* note 115, at 1830.

120. *Id.*

121. *Liu v. Siemens A.G. (Liu I)*, 978 F. Supp. 2d 325, 326 (S.D.N.Y. 2013), *aff’d*, 763 F.3d 175 (2d Cir. 2014).

122. Complaint at ¶ 4, *SEC v. Siemens*, No. 1:08-cv-02167 (D.D.C. Dec. 12, 2008), available at <https://www.sec.gov/litigation/complaints/2008/comp20829.pdf>; *see* SEC Charges Siemens AG for Engaging in Worldwide Bribery, SEC Press Release (Dec. 15, 2008), available at <https://www.sec.gov/news/press/2008/2008-294.htm> (Siemens agreeing to pay \$350 million in disgorgement to settle the SEC’s charges, and a \$450 million fine to the DOJ to settle criminal charges).

123. *Id.* at ¶¶ 75–78.

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

The foreign nature of the activity described in the SEC's complaint against Siemens is difficult to reconcile with the court's holding in *Liu*. The original charges levied against Siemens had a sufficient "domestic application" to be filed in the D.C. Circuit.¹²⁴ First, Siemens, a German company, was charged with violating the FCPA for conduct between 2001–2007 that included illicit business dealings in Venezuela, China, Italy, Israel, Bangladesh, Nigeria, Argentina, Vietnam, Russia, and Iraq.¹²⁵ Second, the D.C. Circuit found that jurisdiction was proper over the claims in federal District Court under sections 21(d), 21(e) and 27 of the Exchange Act because Siemens, "directly or indirectly, made use of the means or instrumentalities of interstate commerce, of the mails, or of the facilities of a national securities exchange in connection with the transactions, acts, practices, and courses of business alleged in this complaint."¹²⁶ Moreover, because 21F(h)(1)(A)(iii) incorporates "any other law, rule, or regulation subject to the jurisdiction of the Commission," it logically follows that an FCPA violation properly filed in the D.C. Circuit in 2008 should fall under the catch-all provision of subsection (iii) and should not be refuted simply on a narrow reading of the pre-Dodd-Frank ruling in *Morrison* that did not even consider the FCPA.

The outcome from the *Liu* decision leaves a "vacuum for foreign whistleblowers" under the Dodd-Frank whistleblower provisions.¹²⁷ In the amicus brief filed in *Liu*, the SEC explained that employees need to be protected from retaliation, whether a violation is reported internally or directly to the SEC.¹²⁸ The Commission emphasized that "employment retaliation is prohibited against individuals who engage in any of the whistleblowing activity described in section 21F(h)(1)(A)(iii)—Including making internal reports at public companies of securities fraud violations."¹²⁹ In adopting the rule, the Commission stated its goal was to preserve the incentives for individuals to report internally first in appropriate circumstances, in accordance with SOX 806.¹³⁰ Moreover, in the amicus brief, the Commission directly challenged the holding in *Asadi* when it argued, "Congress did not unambiguously limit the employment anti-retaliation protections in 21F(h)(1) to only those individuals

124. *Id.* at ¶ 4.

125. *Id.* at ¶¶ 2, 23.

126. *Id.* at ¶ 5.

127. Robb Adkins & Benjamin Kimberly, *The Globalization of Anti-Corruption Enforcement: Recent Trends and Developments*, in 7 ASPATORE, INTERNATIONAL WHITE COLLAR ENFORCEMENT: TOP ATTORNEYS ON PREVENTATIVE MEASURES, REGULATORY COMPLIANCE, AND LITIGATION 7–8 (2014).

128. U.S. SECS. & EXCH. COMM'N, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 20, <https://www.sec.gov/files/owb-annual-report-2015.pdf> [hereinafter OWB 2015 ANNUAL REPORT TO CONGRESS].

129. SEC Amicus Brief, *supra* note 88, at *13 (emphasis added).

130. *Id.* at *16–17 (referencing Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34325 n.223 (June 13, 2011) ("[e]mployees who report internally in this manner will have anti-retaliation employment protection to the extent provided for by [section 21F(h)(1)(A)(iii)], which incorporates the broad anti-retaliation protections of Sarbanes-Oxley section 806").

who provide the Commission with information relating to a securities law violation.”¹³¹

In the amicus filing, the Commission argued that a broader interpretation of the definition is warranted to account for the true purpose of Dodd-Frank. Building on the framework of SOX, the Commission noted that 21F(h)(1)(A)(iii) extends beyond just disclosures to the Commission. The Commission argued that clause (iii) covers, *inter alia*, “an employee’s submission to a public company’s audit committee about questionable accounting practices (including those questionable practices that do not rise to the level of a securities law violation) under section 10A(m)(4) of the Exchange Act, or an in-house counsel’s disclosure under section 307 of Sarbanes-Oxley about a potential breach of the CEO’s fiduciary duty.”¹³²

In August 2015, the Commission released “Interpretation of the SEC’s Whistleblower Rules Under Section 21F of the Securities Exchange Act of 1934” to provide a formal interpretation of Rule 21F-2.¹³³ The SEC clarified the definition of a whistleblower for 21F because of uncertainty regarding the proper statutory interpretation of mandatory internal reporting as incorporated into section 21F.¹³⁴ The Commission issued a regulation titled “Whistleblower status and retaliation protection” that elaborates on the definition of whistleblower in rule 21F-2(a) and the prohibition against retaliation definition in 21F2-(b)(1).¹³⁵

In its formal interpretive guidance, the Commission noted the scope of the anti-retaliation protections afforded under Dodd-Frank was ambiguous.¹³⁶ Rule 21F-2 resolved this ambiguity by creating two separate definitions of whistleblower.¹³⁷ The guidance explains that these two definitions apply in different circumstances and require different reporting procedures.¹³⁸ According to the Commission, the first definition, Rule 21F-2(a), applies only to the bounty incentive program and confidentiality provisions of section 21F.¹³⁹ The second definition, Rule 21F-2(b)(1), applies to the anti-retaliation provisions, stating that “an individual is a whistleblower if the individual provides information in a manner described in Section 21F(h)(1)(A) of the Exchange Act.”¹⁴⁰ The second definition encompasses disclosures that are required or protected under 21F(h)(1)(A)(iii), such as internal disclosures mandated by SOX, and the

131. *Id.* at 18.

132. *Id.* at 19–20.

133. Interpretation of the SEC’s Whistleblower Rules Under Section 21f of the Sec. Exch. Act of 1934, Release No. 75592, at 2 (Aug. 4, 2015) [hereinafter “SEC Interpretive Guidance Under Section 21F”].

134. *Id.*; see *Asadi v. G.E. Energy (USA), L.L.C. (Asadi II)*, 720 F.3d 620, 629–30 (5th Cir. 2013).

135. 17 C.F.R. § 240.21F-2 (2007).

136. SEC Interpretive Guidance Under Section 21F, *supra* note 133, at 1.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 1–2.

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

Commission notes that this interpretation is compatible with the overall goals of the whistleblower program.¹⁴¹

The Commission explained the interpretive rule eliminates a “two-tiered structure of employment retaliation protection” and provides the right incentives for employees to report internally first in appropriate circumstances.¹⁴² The Commission argues a “contrary interpretation would undermine the other incentives that were put in place through the Commission’s whistleblower rules in order to encourage internal reporting” and a different interpretation would “jeopardize the investor-protection and law-enforcement benefits that can result from internal reporting.”¹⁴³ The other incentives that the Commission refers to in its guidance are cooperation credit and the benefits associated with self-reporting a violation.¹⁴⁴ Thus, the SEC’s interpretive guidance suggests there are two different applications of the whistleblower definition under 21F, and that an individual may qualify for anti-retaliation protection under 21F(h)(1)(A)(iii) if the employee reports internally.

A little more than five weeks after the Second Circuit’s decision in *Liu*, the Commission granted an award of more than \$30 million to an anonymous foreign resident whistleblower under the Dodd-Frank whistleblower bounty incentive program.¹⁴⁵ The monetary award *In the matter of the claim* is the largest award under the bounty incentive program to date.¹⁴⁶ The Commission noted that a foreign resident who voluntarily provided original information to the Commission met the definition of whistleblower under Dodd-Frank “notwithstanding the existence of certain extraterritorial aspects of Claimant’s application.”¹⁴⁷ The Commission mentioned the Supreme Court’s decision in *Morrison*, stating:

[T]here 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. When these key territorial connections exist, it makes no difference whether, for example, the claimant was a foreign national, the claimant resides overseas, the information was submitted from overseas, or the misconduct comprising the U.S. securities law violation occurred entirely overseas.¹⁴⁸

141. *Id.* at 2.

142. *Id.*

143. *Id.*

144. *Id.*

145. OWB 2015 ANNUAL REPORT TO CONGRESS, *supra* note 128, at 10.

146. SEC Whistleblower Awards For Tips Resulting in Enforcement Actions, <https://www.sec.gov/page/whistleblower-100million>, (accessed Jan. 8, 2017). In 2016, the top three awards under the bounty incentive program were \$22 million, \$20 million, and \$17 million.

147. In the Matter of the Claim for Award in Connection with Redacted, Release No. 73174, n.2 (Sept. 22, 2014), <https://www.sec.gov/rules/other/2014/34-73174.pdf>.

148. *Id.*

In arriving at this determination, the SEC noted Congress' purpose in creating the Dodd-Frank bounty incentive program is to encourage individuals with knowledge of violations of U.S. securities laws to voluntarily provide that information to the Commission.¹⁴⁹ The Commission acknowledged the Second Circuit's holding in *Liu*, but stated it did not find the decision controlling.¹⁵⁰ In its claim award determination, the Commission clarified that the bounty incentive program and the anti-retaliation provisions have a different Congressional purpose, which align with Rule 21F-2.¹⁵¹ This analysis demonstrates that the Commission wants to encourage whistleblower tips through the bounty incentive program by foreign whistleblowers, and the SEC will make certain accommodations to provide foreign whistleblowers with the same benefits as domestic whistleblowers for reporting a violation of the FCPA that results in an administrative penalty. As discussed in the final section, foreign whistleblower tips regarding potential FCPA violations have increased substantially in the four years since the creation of the OWB in 2011.

The Commission's decision in *In the matter of the claim* demonstrates the SEC's desire to encourage foreign whistleblower complaints through the OWB, despite the precedent against extraterritorial application set in *Liu*. The SEC wants to encourage employees of non-U.S. based companies and foreign employees to provide the Commission with whistleblower complaints because the precedent in *Liu* restricts Dodd-Frank anti-retaliation protection for employees who report through internal channels. After *Liu*, an employer could potentially hire a non-U.S. based employee or a non-U.S. citizen to manage FCPA compliance overseas, which would allow an employer to terminate that individual for raising FCPA concerns without being subjected to the Dodd-Frank anti-retaliation provisions. This outcome does not match the Congressional purpose of Dodd-Frank, and, as the text of *In the matter of the claim* award indicates, there is a sufficient U.S. territorial nexus anytime a whistleblower complaint leads to a successful enforcement action concerning violations of the U.S. securities laws, regardless of whether the complaint is delivered from overseas regarding overseas conduct.¹⁵²

In *Liu I*, the District Court simply held that “[t]he FCPA itself does not require or protect any disclosures.”¹⁵³ As a consequence, internal reports of potential violations of the FCPA would not qualify as protected activity under

149. *Id.* (stating the program was meant “to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated the securities laws”).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Liu v. Siemens A.G. (Liu I)*, 978 F. Supp. 2d 325, 326 (S.D.N.Y. 2013), *aff'd*, 763 F.3d 175 (2d Cir. 2014).

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

21F(h)(1)(A)(iii).¹⁵⁴ The one court to discuss this issue at length, *Nollner v. S. Baptist Convention, Inc.*, noted “it appears that [Dodd-Frank] conceivably could protect FCPA whistleblowers who work for ‘issuers;’” however, the facts in that case were different because it involved an employee of a non-issuer.¹⁵⁵ A case involving an FCPA whistleblower for an issuer is the topic of the next section in the case of *Wadler v. Bio-Rad*.¹⁵⁶

C. Special Case of Attorneys, Accountants, and Compliance Professionals

The *Wadler v. Bio-Rad* case and investigation strengthened the connection between the Dodd-Frank whistleblower provisions and the FCPA by providing clarity on three key issues. First, the Northern District of California ruled that individual members of boards of directors may be liable under section 806 of SOX for retaliation against internal whistleblowers and corporate directors may be held individually liable for retaliation against whistleblowers under Dodd-Frank.¹⁵⁷ Second, the court followed the *Berman* decision and held Wadler employee’s failure to provide information or assistance to the Commission before reporting internally did not defeat his claim under 21F(h)(1)(A)(iii).¹⁵⁸ Third, the court analyzed the relationship between the corporation, the SEC, and external counsel when allegations of bribery surfaced within the corporation and throughout the investigation.¹⁵⁹ The third point sheds light on the process of self-disclosure and corporate compliance that is fundamental to modern settlement negotiations with the Commission.¹⁶⁰

Bio-Rad is a U.S. company headquartered in California that sells medical products and equipment to hospitals, universities and similar public entities and officials.¹⁶¹ Bio-Rad admitted to violations of the accounting provisions of the FCPA by engaging in corrupt activity in Russia, Thailand, and Vietnam. Penalties for the violations amounted to \$55.1 million.¹⁶²

For nearly 25 years, Wadler served as general counsel for Bio-Rad.¹⁶³ In his complaint, Wadler alleged that “[i]n 2009, Bio-Rad’s corporate officers became

154. *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 998 (M.D. Tenn. 2012) (“[T]he FCPA does not itself protect whistleblowers: it contains no anti-retaliation provisions and affords no private cause of action.”).

155. *Id.* The *Nollner* case involved a non-issuer.

156. *Wadler v. Bio-Rad Labs., Inc.*, 141 F. Supp. 3d 1005, 1018 (N.D. Cal. 2015).

157. *Id.*

158. *Id.*

159. *Id.*

160. Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, In the Matter of Bio-Rad Laboratories, Inc., Admin. Proc., File No. 3-16231, <http://www.sec.gov/litigation/admin/2014/34-73496.pdf> [hereinafter “Order In the Matter of Bio-Rad Laboratories”].

161. *Wadler*, 141 F. Supp. 3d at 1008.

162. *Id.*

163. *Id.*

aware that certain of its employees and agents in Vietnam, Thailand, and Russia may have violated provisions of the FCPA.”¹⁶⁴ Following the discovery of these potential violations, Bio-Rad hired outside counsel to investigate whether Bio-Rad employees engaged in bribery in China, in part based on Bio-Rad’s sales exposure in China and because “China is a country where corruption is notoriously widespread.”¹⁶⁵ Outside counsel determined there was no evidence of corrupt payments made by Bio-Rad in China.¹⁶⁶

In or around 2011, Wadler noticed a discrepancy between the amount of sales in China and a corresponding lack of supportive documentation for those transactions, which amounted to hundreds of millions of dollars over a few years.¹⁶⁷ Wadler made a number of requests to obtain documents from senior management because he was concerned the lack of documentation could qualify as a books and records violation under the FCPA.¹⁶⁸ Wadler obtained a few documents that showed “unambiguous evidence of potential bribery.”¹⁶⁹ Additionally, Wadler learned that standardized language regarding FCPA compliance was removed from documents translated into Chinese and used for operations in China.¹⁷⁰

Wadler’s termination was “effectuated by the CEO” but the decision to terminate Wadler “was made by a vote of the entire Board.”¹⁷¹ Wadler alleged that the Board members who made the decision to terminate him “were aware that [he] had reported bribery, books-and-records violations, and related misconduct to persons with supervisory authority over him and to other persons at Bio-Rad who had the authority to investigate, discover, or terminate such misconduct.”¹⁷² According to Wadler, he was terminated for reporting potential FCPA violations “‘up the ladder’ when it became clear that the company was not taking reasonable steps to investigate and remedy FCPA violations.”¹⁷³

As the general counsel at Bio-Rad, Wadler adhered to the standards of professional conduct when he reported internally to the CEO and the Board’s audit committee. His actions were consistent with the SEC’s rules for the “Implementation of Standards of Professional Conduct for Attorneys,” which, under section 307 of SOX, require an attorney to report evidence of a material violation of U.S. securities laws within a company’s internal reporting

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1009.

171. *Id.*

172. *Id.*

173. *Id.*

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

structure.¹⁷⁴ Additionally, section 806 of SOX prohibits retaliation against a whistleblower who reports a potential violation to one's supervisor.¹⁷⁵ Section 806 expressly prohibits retaliation against whistleblowers who provide information to an individual with "supervisory authority over the employee" or "such other person working for the employer who has the authority to investigat[e], discover, or terminate misconduct," even if the whistleblower did not provide information about possible illegal conduct to the Commission.¹⁷⁶ Therefore, an attorney's duty to report internally under section 307 should not disqualify him for whistleblower protection under section 806. In fact, attorneys, internal audit, and compliance professionals have the most to lose through a denial of whistleblower protections under 21F(h)(1)(A)(iii) because (a) these employees are generally responsible for internal reporting; and (b) without anti-retaliation protection, it would be less likely that serious violations of securities laws would be disclosed or remedied.

The *Wadler* court noted the circuit split over the Dodd-Frank 21F, explaining that a minority of courts held the provisions apply only to individuals who provide information directly to the Commission,¹⁷⁷ While the majority of courts have interpreted the provisions to additionally provide protection to internal whistleblowers.¹⁷⁸ The *Wadler* decision is explained in three parts: (1) it references inconsistencies associated with internal disclosures that are required under SOX; (2) it analyzes the canon of statutory interpretation against surplusage in legislative drafting; and (3) it interprets the legislative history of 21F(h)(1)(A)(iii).¹⁷⁹

First, the court referenced 15 U.S.C. section 78j-1(b) to prove the ambiguity of the definition of whistleblower as applied to 21F(h)(1)(A)(iii).¹⁸⁰ 15 U.S.C. section 78j-1(b) of SOX, entitled "Required response to audit discoveries," mandates an auditor to "as soon as practicable, inform the appropriate level of the management of the issuer and assure that the audit committee of the issuer, or the board of directors of the issuer in absence of such a committee, is adequately informed with respect to illegal acts that have been detected."¹⁸¹

174. Section 307 "(1) [requires] an attorney to report evidence of a material violation of securities laws or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive office of the company (or the equivalent thereof); and (2) if the counsel or officers does not respond to the evidence, requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors." 15 U.S.C. § 7245 (2012).

175. 18 U.S.C. § 1514A(1) (2012).

176. *Wadler*, 141 F. Supp. 3d at 1015; see 18 U.S.C. § 1514A(a)(1) (2012).

177. *Wadler*, 141 F. Supp. 3d at 1024.

178. *Id.*

179. *Id.* at 1024–26.

180. *Id.* at 1025.

181. 15 U.S.C. § 78j-1(b)(1)(B) (2012); see *Wadler*, 141 F. Supp. 3d. at 1015 (referencing *Somers v. Digital Realty Trust, Inc.*, 119 F. Supp. 3d 1088, 1101–02 (N.D. Cal. 2015)).

Because section 78j-1(b) requires auditors to report illegal conduct internally before reporting to the Commission, the definition of whistleblower is in conflict with subsection (iii) of 21F and the SEC's interpretation warrants deference.¹⁸²

Second, the court analyzed the first two subsections of 21F(h). The court determined that subsection (iii) must encompass internal whistleblowers, otherwise "there would be surplusage in subsections (i) and (ii)."¹⁸³ Subsection (i) prohibits retaliation against a whistleblower "in providing information to the Commission in accordance with [21F(h)(1)(A)];" however, that language would be rendered superfluous if only those who provide information to the SEC would qualify as whistleblowers under Dodd-Frank, because subsection (iii) explicitly protects required disclosures under SOX—a law that *requires internal reporting* in certain instances.¹⁸⁴

Lastly, the court referenced the legislative history of Dodd-Frank, showing that subsection (iii) was added at the last minute.¹⁸⁵ According to the court, this fact suggests that Congress was not satisfied with the breadth of 21F(h) in the final stages of the legislative process, and that Congress intended to expand the breadth of the provision, not limit it to whistleblowers who report only to the Commission.¹⁸⁶

Mandatory internal reporting under SOX is bolstered by the knowledge element of the FCPA accounting provisions. In a cease and desist action against Bio-Rad, the order cites section 30A(f)(2) of the FCPA which defines "knowledge" as "a knowing state of mind as to a circumstance may be established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstances does not exist."¹⁸⁷ Thus, if an accountant, lawyer, or compliance professional becomes aware of a potential violation of the FCPA, i.e., "knows" that a potential violation exists, the person's role may require a disclosure of that potential violation, or else the person would meet the requisite knowledge for a violation of the FCPA. The accounting provisions take this conduct into consideration by imposing liability on individuals who "*knowingly circumvent or knowingly fail to implement* a system of internal accounting controls or *knowingly falsify* any book, record, or account."¹⁸⁸

Under the accounting provisions, an attempt to cover up a bribery payment will amount to a violation of the FCPA. So, if an employee becomes aware of a

182. *Wadler*, 141 F. Supp. 3d at 1025.

183. *Id.*

184. *Id.*

185. *Id.* at 1026.

186. *Id.*

187. Order In the Matter of Bio-Rad Laboratories, *supra* note 160, at 8.

188. Jennifer D. Taylor, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 863 (2001) (emphasis added); see 15 U.S.C. § 78m(b)(5) (2012); see also FCPA RESOURCE GUIDE, *supra* note 16, at 44.

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

potential violation, any action taken by the individual to conceal the payments or shield them from discovery could amount to a violation of the FCPA accounting provisions, or a criminal charge levied by the DOJ for conspiracy to violate the FCPA.¹⁸⁹ An attempt to falsely characterize a bribe payment as proceeds from legitimate sales activity is an example of a violation of the FCPA accounting provisions that the SEC has brought in the past.¹⁹⁰ Of note, section 802 of SOX “prohibits altering, destroying, mutilating, concealing, or falsifying records, documents, or tangible objects with the intent to obstruct, impede or influence a potential or actual Federal investigation.”¹⁹¹ This section also prohibits “any accountant from knowingly and willfully violating the requirement that all audit or review papers be maintained for a period of five years.”¹⁹²

In a 2014 cease and desist order, Bio-Rad was charged with violating both accounting provisions of the FCPA: the books and records provision and the internal control provision.¹⁹³ The first violation under the books and records provision, section 13(b)(2)(A), was violated when

[Bio-Rad] subsidiaries falsely recorded the payments to the agents/distributors as payments for legitimate services or commissions, when the true purpose of these payments was to make corrupt payments to government officials to obtain business. The false entries were then consolidated and reported by Bio-Rad in its consolidated financial statements.¹⁹⁴

The second violation under the internal controls provision, section 13(b)(2)(B), was violated because although Bio-Rad had an ethics policy prohibiting the payment of bribes and various policies and procedures requiring accurate books and records, its systems of internal controls proved insufficient to provide reasonable assurances that such payments would be detected and prevented.¹⁹⁵ At the time Wadler was terminated, Bio-Rad was scheduled to meet with the SEC regarding its ongoing internal FCPA investigations.¹⁹⁶ Wadler alleged that Bio-Rad disclosed the China conduct to the SEC, but attempted to rebut concerns that an employee had reported internally about potential FCPA violations in China at an earlier date.¹⁹⁷ In Bio-Rad’s March 8, 2013 10-K statement, the company reported there were “significant deficiencies in [its] internal control over financial reporting, including the unauthorized issuance of distributor contracts at [its] Chinese subsidiary, [its] lack of control

189. FCPA RESOURCE GUIDE, *supra* note 16, at 45.

190. *Id.*

191. 18 U.S.C. § 1519 (2012).

192. *Id.* at 42; *see* 18 U.S.C. §§ 1519–20 (2012).

193. Order In the Matter of Bio-Rad Laboratories, *supra* note 160, at 8.

194. *Id.* at 9.

195. *Id.*

196. Wadler v. Bio-Rad Labs., Inc., 141 F. Supp. 3d 1005, 1009 (N.D. Cal. 2015).

197. *Id.*

over pricing and [its] ineffective methods of analyzing credit risk and in some instances, the lack of sufficient documentation for the time of revenue recognition.”¹⁹⁸ Following this announcement, Bio-Rad’s external auditors resigned amid disagreement with the company’s senior management regarding accounting deficiencies at Bio-Rad.¹⁹⁹ If Bio-Rad’s senior personnel had knowledge of unlawful payments in China, by virtue of an internal report, that would limit their co-operation credit for self-reporting the violation and demonstrate that their internal controls were inadequate.

III. EMERGING ISSUES RELEVANT TO CORPORATE COMPLIANCE IN AN FCPA CONTEXT

The modern focus of the Commission’s FCPA enforcement regime includes the following key issues: self-reporting and cooperation, holding individuals accountable for FCPA violations, cooperation with foreign regulators, and ongoing efforts to ensure that the FCPA is enforced to its fullest extent.²⁰⁰ The FCPA penalty calculation matrix centers upon three things: self-disclosure, cooperation, and remediation.²⁰¹ In today’s enforcement environment, cooperation credit is the statutory “carrot” used to incentivize companies to self-report potential violations of the FCPA to the government.²⁰² In comparison, the SEC’s Division of Enforcement has referred to its other investigative tools, such as the whistleblower bounty incentive program, as the “stick” of FCPA enforcement.²⁰³

There remains a substantial amount of uncertainty regarding the breadth of SEC’s authority under the FCPA. The difficulty in applying other statutes to the FCPA lies in the fact that “judicial scrutiny is virtually non-existent in the FCPA context.”²⁰⁴ A lack of adversarial proceedings, vague definitions of prohibited conduct, and difficulties in applying the law across foreign jurisdictions are a few themes that distinguish the FCPA from other areas of federal law.²⁰⁵ These characteristics add uncertainty for companies that conduct their own investigations into whether conduct with a foreign official or an employee of a state-owned enterprise might constitute a violation of the FCPA.²⁰⁶ In practice,

198. *Id.* at 1009–10.

199. *Id.* at 1010.

200. Andrew Ceresney, Dir., Div. of Enforcement, ACI’s 32nd FCPA Conference Keynote Address, Washington, D.C. (Nov. 17, 2015), available at <http://www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html> [hereinafter “Ceresney Keynote Address”].

201. *Id.*

202. *Id.*

203. *Id.*

204. Koehler, *supra* note 12, at 909.

205. *Id.* at 909–10.

206. Taylor, *supra* note 188, at 871.

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

critics suggest that the “FCPA means simply what the DOJ and the SEC say it means.”²⁰⁷

A large majority of FCPA actions are resolved through pleas, SEC settlement negotiations, Non-Prosecution Agreements (“NPAs”), or Deferred Prosecution Agreements (“DPAs”) rather than through adversarial proceedings.²⁰⁸ An NPA or DPA usually results in lesser penalties, but corporations must agree to the SEC’s version of the facts and interpretation of the law.²⁰⁹ In recent years, SEC officials have made it clear that corporations will no longer be eligible for an NPA or a DPA if the corporation does not self-report a potential violation to the Commission, and the strictest penalties imposed under the FCPA are levied when the SEC or the DOJ discovers the conduct through one of its investigative channels.²¹⁰

The Dodd-Frank OWB has led to an increase in whistleblower complaints for potential FCPA violations, which reach the SEC from all over the world. The threat of whistleblower complaints through the OWB has altered corporate compliance and internal investigations. An increase in whistleblower complaints increases the likelihood that the SEC will discover evidence of a FCPA violation; and will learn the time a company could have known that a potential FCPA violation exists. The practical implications of the Dodd-Frank whistleblower provisions are beginning to take shape; however, the question remains whether the whistleblower provisions will contribute to lasting, positive change among corporate compliance departments or if the provisions will create barriers to self-reporting.²¹¹

A. International Nature of FCPA Violations and Applicability to Dodd-Frank

In the past ten years, U.S. efforts to battle corruption under the FCPA have become increasingly more international.²¹² Since the beginning of the whistleblower program, the Commission has received whistleblower tips from individuals in 95 countries outside of the United States.²¹³ In the 2015 fiscal year, the Commission received whistleblower submissions from individuals in 61 foreign countries.²¹⁴ The OWB received the highest number of international tips from the United Kingdom, Canada, the People’s Republic of China, India,

207. Koehler, *supra* note 12, at 909–10.

208. *Id.* at 909.

209. *Id.*

210. Ceresney Keynote Address, *supra* note 200.

211. Sundar Narayanan, *Are Whistleblower reward programs really a good idea?* THE FCPA BLOG (Nov. 30, 2015, 10:08 AM), <http://www.fcpablog.com/blog/2015/11/30/are-whistleblower-reward-programs-really-a-good-idea.html>.

212. Sprinzen, *supra* note 43, at 177.

213. OWB 2015 ANNUAL REPORT TO CONGRESS, *supra* note 128, at 24.

214. *Id.*

and Australia.²¹⁵ The creation of the SEC's Dodd-Frank whistleblower program and the SEC's OWB in 2010 enable the SEC to discover FCPA violations when a company fails to self-report.²¹⁶ As globalization brings the international economy closer and countries besides the U.S. develop new anti-corruption laws, companies face a greater risk of being caught by a whistleblower, a foreign government authority, a former employee, foreign news media, or a competitor.²¹⁷ Of the top ten largest FCPA penalties imposed all time, seven of the companies are headquartered outside of the U.S.²¹⁸

Among the investigative tools at the disposal of the SEC's FCPA unit, the whistleblower bounty provision may transform how the SEC is alerted of potential bribery.²¹⁹ In the first three months after the whistleblower bounty program became law, the SEC received approximately one report a day regarding possible foreign bribery from potential whistleblowers.²²⁰ Whistleblower tips for potential violations of the FCPA have increased significantly since the Whistleblower Program started in 2011. In 2012, there was a total of 115 whistleblower tips for potential FCPA violations.²²¹ In 2015, the number of tips rose to 186, an increase of 162%.²²² Tips received via the OWB may escalate FCPA enforcement because an increase in the number and size of recent FCPA penalties will incentivize employees to report potential FCPA violations to the SEC and be eligible for a bounty award.²²³

FCPA enforcement has increased substantially in the past fifteen years, resulting in higher penalties.²²⁴ In 2005, the average FCPA settlement with the SEC was approximately \$7 million.²²⁵ In 2007, oil field services company Baker Hughes settled the then-largest FCPA enforcement action when it paid a \$44 million penalty.²²⁶ By 2010, the average settlement was approximately \$78

215. *Id.*

216. Ceresney Keynote Address, *supra* note 200.

217. Kara Brockmeyer, Chief FCPA Unit, Div. of Enforcement, Panelist at ACI's 32nd FCPA Conference, Washington, D.C. (Nov. 17, 2015).

218. Richard L. Cassin, *Teva ranks fourth on our new Top Ten list*, THE FCPA BLOG (Dec. 27, 2016), <http://www.fcpublog.com/blog/2016/12/27/teva-ranks-fourth-on-our-new-top-ten-list.html>.

219. Aron Friedman et al., *Stay Afloat During the Tidal Wave of FCPA Cases*, 29 ASSOC. OF CORP COUNS. DOCKET 26, 27-28 (2011).

220. Joe Palazzolo, *After Dodd-Frank, SEC Getting At Least One FCPA Tip A Day*, WALL ST. J. BLOG (Sept. 30, 2010), <http://blogs.wsj.com/corruption-currents/2010/09/30/after-dodd-frank-sec-getting-at-least-one-fcpa-tip-a-day/>.

221. OWB 2015 ANNUAL REPORT TO CONGRESS, *supra* note 128, at 28 App'x A.

222. *Id.*

223. Adkins & Kimberly, *supra* note 127, at 13.

224. Friedman, *supra* note 219, at 28.

225. Alex Brackett, *SEC 'broken windows' enforcement policy is showing FCPA results*, THE FCPA BLOG (Oct. 6, 2015), <http://www.fcpublog.com/blog/2015/10/6/alex-brackett-sec-broken-windows-enforcement-policy-is-showi.html>.

226. Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 AM. U. BUS. L. REV. 291, 307 (2014); see SEC Charges Baker Hughes with Foreign Bribery and With Violation 2001 Commission Cease-and-Desist Order, SEC Press Release No. 2007-77 (Apr. 26, 2007), <https://www.sec.gov/news/press/2007/2007-77.htm>.

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

million²²⁷ and by 2014, the average FCPA penalty reached \$156 million.²²⁸ December 2014 saw the second largest FCPA violation ever when French power company Alstom pled guilty to violating the FCPA and settled with the SEC and the DOJ for \$772 million.²²⁹

Despite this uptick in enforcement penalties, legal professionals argue that 2015 signaled a shift in FCPA enforcement policy towards a higher volume of settlements at the expense of lower penalty amounts.²³⁰ By September 30, 2015, the SEC had settled nine enforcement actions, averaging \$9.7 million per settlement, with the largest settlement at \$25 million.²³¹ This trend towards lower penalties may be a result of the Commission's emphasis on cooperation credit and its decision to pursue cases "involving less traditional items of value."²³² As a consequence of pursuing less traditional bribery cases, the SEC launched an investigation into hiring practices by financial institutions, including a fine for FCPA violations levied against BNY Mellon for hiring relatives of government officials of a Middle Eastern sovereign wealth fund in exchange for business.²³³

In the FCPA Resource Guide, the Commission states, "[a]ll issuers must comply with Sarbanes-Oxley requirements, several of which have FCPA implications," including sections 302, 404, and 802.²³⁴ Further, the guide acknowledges that the FCPA's accounting provisions are directed at issuers and that an issuer's books and records include those of its consolidated subsidiaries and affiliates: "an issuer's responsibility extends to its subsidiaries or affiliates under its control, *including foreign subsidiaries and joint ventures.*"²³⁵ Therefore, companies must ensure that the accounting and compliance procedures of foreign subsidiaries are in accordance with the law to ensure a consolidated financial statement does not violate the accounting provisions.

This is particularly important for FCPA enforcement because the books and records of foreign subsidiaries may be consolidated into the books and records of the parent corporation.²³⁶ For example, the Commission pursued a case where a California company was ordered to pay \$1.5 million in civil disgorgement and \$1.7 million in fines when two of its Chinese joint ventures paid more than

227. Brackett, *supra* note 225.

228. *Id.*

229. *Alstom Pleads Guilty and Agrees to Pay \$772 Million Criminal Penalty to Resolve Foreign Bribery Charges*, DOJ Press Release No. 14-1448 (Dec. 22, 2014), <http://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery>.

230. Brackett, *supra* note 225.

231. *Id.*

232. Ceresney Keynote Address, *supra* note 200.

233. In the Matter of The Bank of New York Mellon Corp., Exchange Act Release No. 75720 (Aug. 18, 2015), <https://www.sec.gov/litigation/admin/2015/34-75720.pdf>.

234. FCPA RESOURCE GUIDE, *supra* note 16, at 42.

235. *Id.* at 43 (emphasis added).

236. See Order In the Matter of Bio-Rad Laboratories, *supra* note 160, at 2–3, 9.

\$400,000 in bribes to Chinese officials.²³⁷ If a federal court confronts a Dodd-Frank anti-retaliation case in which an attorney or auditor makes an internal report of alleged fraud based on the accounting provisions of a foreign subsidiary or joint venture and the employee faces retaliation, the individual should have protection for this disclosure under 21F(h)(1)(A)(iii). However, under *Asadi* and *Liu*, employees may not be protected for exactly these types of disclosures.

Wadler provides a good example of the difficulties associated with limiting the anti-retaliation provisions to employees based in the U.S. For example, if *Wadler* was based in China he may not have qualified for anti-retaliation protection under *Asadi* or *Liu*. Thus, should an employee of a U.S. issuer report a potential FCPA violation both internally and to the SEC, under the current state of the law, the court may hold that *Morrison* applies and section 21F(h)(1)(A)(iii) does not have extraterritorial application.²³⁸ Despite the fact that employees may be subjected to U.S. employment, regulatory, and criminal laws, the individual would not have legal redress for internal reporting of FCPA violations, even if required by the company's own internal policies and procedures.²³⁹ For these reasons, 21F(h)(1)(A)(iii) should not be limited on the basis that it does not apply extraterritorially.

B. Internal Investigations and Corporate Compliance

Dodd-Frank provides new incentives for whistleblowers to report FCPA violations to the government.²⁴⁰ These provisions have transformed FCPA compliance programs because of the broad enforcement of the FCPA and the increase in penalties for violations.²⁴¹ In the near future, the whistleblower provisions will likely have a substantial impact on FCPA enforcement, corporate compliance, and self-reporting of FCPA violations.²⁴² Studies demonstrate that “the vast majority of whistleblowers first tried to report law violations internally before turning to external reporting channels,” but a negative response from their employer led them to make external reports.²⁴³ The Dodd-Frank whistleblower provisions strike the appropriate counter-balance to employee retaliation because the incentives for external reporting may prove substantial enough to persuade some employees to report to the OWB first.

Interested parties are divided about whether the whistleblower provisions send the right signal to corporations and whether the practical effect of the provisions will match the congressional purpose of Dodd-Frank. Critics argue

237. FCPA RESOURCE GUIDE, *supra* note 16, at 43 (emphasis added).

238. Sprinzen, *supra* note 43, at 195.

239. *Id.*

240. Friedman, *supra* note 219, at 28.

241. *Id.*

242. *Id.*

243. Sprinzen, *supra* note 43, at 190–91.

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

the bounty incentive provision will encourage employees to report potential violations directly to the government “to the likely detriment of the company” who should identify and remediate the violation itself.²⁴⁴ Supporters argue that the law protects financial markets and shareholders by providing employees with an avenue to report violations to government authorities while maintaining anonymity.²⁴⁵ Even though studies show that many employees seek to report internally first, if courts do not extend anti-retaliation protection under 21F(h)(1)(A)(iii), then employees may look externally first. This could weaken internal corporate compliance measures and undermine the purpose of Dodd-Frank.

Recently, the U.S. government has emphasized the importance of self-reporting potential violations to the Commission.²⁴⁶ For example, the SEC calculates an FCPA enforcement penalty differently when a company self-reports a potential violation compared to when the violation is discovered by the SEC through a whistleblower complaint. Among the benefits of self-reporting are reduced charges and penalties, realized through an NPA or DPA.²⁴⁷ The Division of Enforcement announced it will not consider a DPA or an NPA if a company fails to self-report a violation and the Commission discovers it through one of its investigative channels.²⁴⁸ As the Division of Enforcement Chief noted, “[i]n each FCPA case where the SEC entered into a DPA or NPA, the company involved self-reported the violations, and then provided significant cooperation throughout the investigation.”²⁴⁹

In consideration of the incentives for self-reporting and the constant threat that the government could learn of a potential violation before a company is aware it is under investigation, most companies will develop robust internal reporting channels rather than silencing their employees when a concern is raised. In general, a company wants to maintain control over when and how alleged violations of the law are reported to the government.²⁵⁰ The enactment of SOX likely contributed to an increase in information for FCPA investigations and an increase in companies who reported borderline transactions rather than risk SEC discovery and investigation later.²⁵¹ Before Dodd-Frank, less responsible companies would make an internal risk calculation of whether to self-report corrupt activity or attempt to remediate internally and not notify the

244. *Id.*

245. *Id.*

246. Bixby, *supra* note 23, at 115.

247. Ceresney Keynote Address, *supra* note 200.

248. *Id.*

249. *Id.*; see Koehler, *supra* note 226, at 909.

250. Sprinzen, *supra* note 43, at 152.

251. Amy D. Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 516 (2011).

government.²⁵² After Dodd-Frank, the decision not to self-report became riskier because there are more incentives for whistleblowers to report directly to the SEC.²⁵³

In order to be eligible for cooperation credit, the company must demonstrate strong internal controls. Corporations must show the Commission how they addressed internal reports of fraud and how they worked to adjust transactional and political risk calculations as a result of information gathered related to alleged corrupt practices by employees, intermediaries, or foreign officials. Companies should also develop tailored corporate compliance programs that are “dynamic and evolve as the business and markets change.”²⁵⁴

In the FCPA Resource Guide, the Commission points to a number of “Hallmarks of a Corporate Compliance Program” that provide guidance on key compliance initiatives to ensure a company that self-reports will not be penalized for weak internal controls.²⁵⁵ The key to an effective compliance program is a risk-based due diligence review that calculates geo-political risk based on the company’s own exposure. In addition to a dynamic corporate compliance program that improves as it gathers new information, a company’s interactions with the Commission during an ongoing investigation are critical to mitigate or avoid a potential FCPA penalty. An SEC cease and desist order, known as the Seaboard Report, is used as a benchmark to determine how well a company has cooperated with the SEC during an investigation.²⁵⁶

The Seaboard Report identifies four broad categories used to measure a company’s level of cooperation with an ongoing government investigation: self-policing prior to the discovery of the misconduct, self-reporting of misconduct when it is discovered, remediation, and cooperation with the government once the investigation has begun.²⁵⁷ Additionally, the question of whether a company developed a culture of compliance is usually analyzed when the government considers the effectiveness of its corporate compliance program. The Chair of the Commission, Mary Jo White, had stated that companies should ask

252. Friedman, *supra* note 219, at 34.

253. *Id.*

254. FCPA RESOURCE GUIDE, *supra* note 16, at 56.

255. *Id.* at 57–62. The Hallmarks include the following categories: commitment from senior management and a clearly articulated policy against corruption; code of conduct and compliance policies and procedures; oversight, autonomy and resources; risk assessment; training and continuing advice; incentives and disciplinary measures; third-party due diligence and payments; confidential reporting and internal investigation; continuous improvement; periodic testing and review; mergers and acquisitions; and lastly, pre-acquisition due diligence and post-acquisition integration.

256. U.S. SECS. & EXCH. COMM’N, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES AND EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS, (Oct. 23, 2001), <https://www.sec.gov/litigation/investreport/34-44969.htm> [hereinafter SEABOARD REPORT]; see U.S. SECS. & EXCH. COMM’N, SEC SPOTLIGHT: ENFORCEMENT COOPERATION PROGRAM, (Sept. 20, 2016), <https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml>.

257. U.S. SECS. & EXCH. COMM’N, SEC SPOTLIGHT: ENFORCEMENT COOPERATION PROGRAM, (Sept. 20, 2016), <https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml>.

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

themselves “if they have created an environment where employees can report internally without fear of retaliation.”²⁵⁸ White recommended that companies speak clearly about confidentiality provisions so that employees understand that it is always permissible for employees to report possible securities laws violations to the Commission.²⁵⁹

A recent trend that has drawn the attention of SEC enforcement attorneys is the modification of employment confidentiality agreements that are designed to restrict an employee’s access to the OWB bounty incentive program.²⁶⁰ The SEC addressed this in the 2015 fiscal year, stating that the use of confidentiality, severance, and other non-disclosure agreements by employers that interfere with an individual’s ability to report potential wrongdoing to the SEC will continue to be a focus of enforcement.²⁶¹ In April 2015, the Commission fined KBR, Inc. \$130,000 for using “improperly restrictive language” in employee confidentiality agreements with in-house counsel.²⁶²

The SEC’s cease and desist order stated that the language found in the KBR form confidentiality agreement had the potential to impede communications between employees and Commission staff. The problematic language prohibited employees from discussing the substance of an internal investigation interview without clearance from KBR’s law department under penalty of disciplinary action, including termination.²⁶³ The SEC determined this language undermined the purpose of section 21F and Rule 21F-17(a), which is to “encourage individuals to report to the Commission.”²⁶⁴ The SEC administrative proceeding found the language had the potential to stifle the whistleblowing process and the language infringed on federal whistleblower protections.²⁶⁵

The example of the confidentiality agreement in KBR, Inc. demonstrates how section 21F is altering the concerns of in-house counsel and corporate compliance programs. Corporate compliance professionals are keenly aware that the whistleblower bounty incentive program may motivate employees to report conduct to the OWB or the government if they do not feel their concerns are

258. Patrick Hunnius, *Regulatory Overreach: The SEC’s Whistle-Blower Rule 21F-17*, BNA CORP. COUNS. WEEKLY, (Oct. 14, 2015), <https://www.bloomberglaw.com/document/XDSEIJH0000000?campaign=bnaemailink&jcsearch=bna%2520a0h3y6x1p3#jcite>.

259. *Id.*

260. OWB 2016 ANNUAL REPORT TO CONGRESS, *supra* note 5, at 19–20.

261. OWB 2015 ANNUAL REPORT TO CONGRESS, *supra* note 128, at 6.

262. Hunnius, *supra* note 258.

263. *In re* KBR Inc., SEC Admin. Proc. File No. 3-16466, at 3 (Apr. 1, 2015).

264. *Id.* (referencing Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Release No. 34-64545, at 198 (Aug. 12, 2011)). The language in the confidentiality agreement states: “I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.”

265. Hunnius, *supra* note 258.

being addressed, or after they are discharged. Exchange Act Rule 21F-17(a) states that “[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.”²⁶⁶ Moreover, as the SEC’s Director of Enforcement explained in 21F-17, “SEC rules prohibit employers from taking measures through confidentiality, employment, severance, or other type of agreements that may silence potential whistleblowers before they can reach out to the SEC.”²⁶⁷

In 2016 the Commission continued its targeted enforcement against the use of restrictive employment agreements that limit an employee’s right to report unlawful conduct to the SEC.²⁶⁸ A series of four enforcement actions in this area sent a clear signal that the Commission is focused on protecting the rights of whistleblowers.²⁶⁹ One of the four settlement actions involved violations of the FCPA.²⁷⁰ In October 2016, the SEC Office of Compliance Inspections and Examinations issued a National Exam Program Risk Alert to inform registrants that internal documents related to compliance with Rule 21F-17 may fall under heightened scrutiny in the near future.²⁷¹ Specifically, registrants are encouraged to review compliance manuals, codes of ethics, employment agreements, and severance agreements to ensure compliance with Rule 21F-17.²⁷²

These issues came up in the case of *In the Matter of Merrill Lynch, Pierce, Fenner & Smith Incorporated and Merrill Lynch Professional Clearing Corp.*, where the SEC entered into an administrative settlement agreement with the corporation for violating Rule 21F-17(a).²⁷³ In *Merrill Lynch*, the company used employee agreements that restricted an employee’s right to voluntarily disclose confidential information to the Commission or other authorities.²⁷⁴ As a result of the settlement, Merrill Lynch updated its employee severance agreements to state clearly that nothing in the agreements prohibits employees from voluntarily communicating with the SEC regarding suspected violations of law.²⁷⁵

266. 17 C.F.R. § 240.21F-17(a) (2007).

267. Hunnius, *supra* note 258.

268. OWB 2016 ANNUAL REPORT TO CONGRESS, *supra* note 5, at 19.

269. *Id.*

270. *Id.* at 20.

271. U.S. SECS. & EXCH. COMM’N, 6 NATIONAL EXAM PROGRAM RISK ALERT, EXAMINING WHISTLEBLOWER RULE COMPLIANCE 1 (Oct. 24, 2016), <https://www.sec.gov/ocie/announcement/ocie-2016-risk-alert-examining-whistleblower-rule-compliance.pdf>.

272. *Id.* at 3.

273. *In the Matter of Merrill Lynch, Pierce, Fenner & Smith Inc.*, SEC Admin. Proc., File No. 3-17312, at 19 (June, 23, 2016).

274. *Id.*

275. *Id.*

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

Additionally, the settlement required the company to inform employees of their whistleblower rights through mandatory annual training.²⁷⁶

In the case of *In the Matter of BlueLinx Holdings Inc.*, the Commission instituted a cease and desist order and entered into a settlement agreement with BlueLinx Holdings, Inc. after it violated Rule 21F-17(a) by using restrictive language in severance agreements.²⁷⁷ BlueLinx required that its employees accept the terms of its severance agreement as a prerequisite to receiving monetary severance payments and other consideration from the company.²⁷⁸ As in *Merrill Lynch*, the severance agreement restricted employees from disclosing confidential information to governmental agencies until after they had consulted the corporate legal department. Additionally, the Commission noted that, nearly two years after the adoption of Rule 21F-17, BlueLinx had added a clause to effectively waive any access to the OWB bounty program.²⁷⁹ “Employee understands and agrees that Employee is waiving the right to any monetary recovery in connection with any such complaint or charge that Employee may file with an administrative agency.”²⁸⁰ The SEC noted that “[r]estrictions on the ability of employees to share confidential corporate information regarding possible securities law violations with the Commission and to accept financial awards for provision information to the Commission undermine the purpose of Section 21F.”²⁸¹ The Commission ordered BlueLinx to pay a civil penalty of \$265,000 for these violations.²⁸²

Less than a week later, the Commission instituted proceedings against Health Net, Inc. for violations of Rule 21F-17 that were similar to the violations of BlueLinx.²⁸³ Once again, the corporate severance agreement required employees to waive any right to a monetary reward for submitting information regarding potential securities violations to a government agency.²⁸⁴ The agreement expressly required employees to waive “the right to file an application for award for original information submitted pursuant to section 21F of the Securities Exchange Act of 1934.”²⁸⁵ For these violations, the Commission ordered Health Net to pay \$340,000 and to undertake remedial compliance measures.²⁸⁶

276. *Id.*

277. *In the Matter of BlueLinx Holdings, Inc.*, SEC Admin. Proc., File No. 3-17371, at 2 (Aug. 10, 2016).

278. *Id.* at 3.

279. *Id.* at 4.

280. *Id.*

281. *Id.*

282. *Id.*

283. *In the Matter of Health Net, Inc.*, SEC Admin. Proc., File No. 3-17396 (Aug. 16, 2016).

284. *Id.* at 3.

285. *Id.*

286. *Id.* at 4. Pursuant to the order, Health Net must make reasonable efforts to contact employees who signed the waiver between 2011 and 2015 and to provide those former employees with a link to the SEC order and “a statement that Health Net does not prohibit former employees from seeking and

In September 2016, the Commission instituted proceedings against Anheuser-Busch InBev for violations of the FCPA at the company's wholly-owned subsidiary in India and a corresponding violation of Rule 21F-17(a).²⁸⁷ InBev was funneling unlawful payments to Indian government officials through a pair of local promotion companies.²⁸⁸ These payments were improperly recorded as legitimate commissions or promotional costs despite having been used to influence government officials to obtain product orders or to increase working hours for the subsidiary brewery.²⁸⁹ The Commission charged InBev with violating the books, records and internal controls provisions of the FCPA.²⁹⁰

Additionally, the Commission found that InBev violated Rule 21F-17(a) by including language in a separation agreement that barred a former employee of the Indian subsidiary from communicating with Commission staff.²⁹¹ The employee had made an internal report with InBev that raised concerns about improper payments to government officials.²⁹² He urged InBev employees to conduct due diligence on one of the promotional companies because of questions related to a "lack of sales experience, staff, and infrastructure."²⁹³ After termination the employee engaged in discussions with the Indian subsidiary regarding potential employment law claims related to his termination.²⁹⁴ Subsequently, he signed a separation agreement with the subsidiary that limited his ability to communicate any confidential or proprietary information, subject to a \$250,000 liquidated damages.²⁹⁵ After signing the agreement, he stopped communicating with Commission staff because he believed that such communication would violate the liquidated damages clause.²⁹⁶ The Commission found that the separation agreement impeded an employee from directly communicating with Commission staff regarding a possible securities law violation, thereby violating Rule 21F-17(a).²⁹⁷

The Commission ordered InBev to pay a total fine of \$6,008,291, including disgorgement of \$2,712,955 and a civil penalty of \$3,002,955.²⁹⁸ The Commission also forced InBev to adopt a number of changes to its internal

obtaining a whistleblower award from the Securities and Exchange Commission pursuant to Section 21F of the Exchange Act."

287. In the Matter of Anheuser-Busch InBev SA/NV, SEC Admin. Proc., File No. 3-17586 (Sept. 28, 2016).

288. *Id.* at 4–5.

289. *Id.* at 2.

290. *Id.* at 8.

291. *Id.*

292. *Id.* at 6.

293. *Id.*

294. *Id.*

295. *Id.* at 6–7.

296. *Id.* at 7.

297. *Id.* at 9.

298. *Id.*

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

policies and controls to enhance FCPA compliance.²⁹⁹ Before the order was issued, InBev amended those of its separation agreements that imposed confidentiality restrictions on departing employees of its U.S. entities. The agreements now make clear that they do not prohibit employees from reporting possible violations of federal law to governmental agencies.³⁰⁰ The Commission noted that during the investigation into InBev, the company advised its subsidiary to destroy or hide documents, and several employees reported instances in which managers removed documents out of the building and into a “secret location.”³⁰¹

In addition to the incentives to promote individual cooperation through the OWB and strengthening enforcement of Rule 21F-17(a), the Commission will likely encourage greater communication regarding the handling of internal complaints by corporate legal and compliance departments. The integrity of the internal investigation, whether voluntarily revealed to the Commission by the corporation or not, will now undoubtedly adopt a more important role when suspicion of an FCPA violation is raised internally at a foreign subsidiary. Overall, this trend may lead to corporations speaking more frequently with Commission staff about potential FCPA violations and the manner in which a corporation handles foreign and domestic internal complaints.

C. Policies from the DOJ Related to Individual Accountability and FCPA Enforcement

In September 2015, Deputy Attorney General Sally Yates issued a DOJ guidance memorandum (“Yates Memo”) with a direction to increase individual accountability for corporate wrongdoing in government investigations.³⁰² The primary objective of the Yates Memo is to increase DOJ prosecution of individuals in white-collar cases. The Yates Memo addresses six steps that the DOJ will take to pursue individual corporate wrongdoing.³⁰³ According to the

299. *Id.* at 10–11.

300. *Id.* at 8. The separation language now states: “I understand and acknowledge that notwithstanding any other provision in this Agreement, I am not prohibited or in any way restricted from reporting possible violations of law to a governmental agency or entity, and I am not required to inform the Company if I make such reports.”

301. *Id.* at 7.

302. Sally Quillian Yates, Deputy Att’y Gen., *Individual Accountability for Corporate Wrongdoing*, (Sept. 9, 2015), <http://www.justice.gov/dag/file/769036/download>.

303. *Id.* The six steps listed are: 1) To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct; 2) Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation; 3) Criminal and civil attorneys handling corporate investigations should be in routine communication with one another; 4) Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals; 5) Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires, and declinations as to individuals in such cases must be memorialized; and 6) Civil attorneys should consistently focus on individuals, as well as the company, and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.

memorandum, cooperation credit will be determined based on whether the corporation provides all relevant information about culpable individuals who engaged in unlawful conduct.³⁰⁴

The memorandum states that “in order for a company to receive *any* consideration for cooperation . . . the company must completely disclose to the [DOJ] all relevant facts about individual misconduct.”³⁰⁵ This potential change in cooperation credit marks a policy shift from less credit to no credit in instances where a corporation does not provide the names of culpable individuals to the SEC during a self-report.³⁰⁶ In other words, the new policy appears to be: Anything less than complete cooperation equals no credit.³⁰⁷

The Yates Memo presents new challenges for employees who conduct internal corporate investigations, which will particularly affect lawyers and internal investigators. In accordance with lawyer ethics requirements in the American Bar Association’s Model Rules of Professional Conduct, Rule 1.13(a)-(b) states:

[a] lawyer employed or retained by an organization represents the organization, [and] [i]f a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action . . . that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.³⁰⁸

Following an internal report, it is highly likely that an in-house attorney or investigator will interview employees regarding their disclosures. This interview involves a tripartite relationship between the corporate entity, the in-house counsel, and the individual employee.³⁰⁹ In many respects, the interests of the individual and the corporate entity are adverse to one another.³¹⁰ Typically, this situation requires an in-house counsel to provide the employee who reports a potential violation with an “*Upjohn* warning,” which clarifies to the employee

304. Katrice B. Copeland, *DOJ’s New “Individual Accountability” Policy Pits Employers Against Employees*, JURIST – ACADEMIC COMMENTARY (Oct. 13, 2015), <http://jurist.org/forum/2015/10/katrice-bridges-DOJ-Individual-Accountability.php> (emphasis added).

305. See Yates, *supra* note 302.

306. Kurt Wolfe, *The (Unintended) Consequences of the Yates Memorandum*, CORP. COUNS. (Nov. 11, 2015), <http://www.corpcounsel.com/id=1202742168098/The-Unintended-Consequences-of-the-Yates-Memorandum#ixzz3rD4nZuUn>.

307. *Id.*

308. MODEL RULES OF PROF’L CONDUCT R. 1.13(a)–(b) (2015).

309. Grace M. Giesel, *Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. MIAMI L. REV. 109, 110 (2010).

310. MODEL RULES OF PROF’L CONDUCT R. 1.13(f) (2015) (“In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interest are adverse to those of the constituents with whom the lawyer is dealing.”).

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

being interviewed that the attorney represents the corporation and not the individual.³¹¹ Establishing these relationship boundaries between the lawyer and the employee at the outset of the conversation informs the employee that he or she is not the client of the in-house attorney.³¹² This creates a perverse incentive for both parties relative to the sharing of information, unless the employee maintains anti-retaliation protection.

On one hand, the in-house attorney is motivated by a desire to obtain the greatest disclosure from the individual so as to benefit the corporate entity.³¹³ On the other hand, the employee is interested in protecting their personal interests and may not fully understand that the in-house lawyer and the employee are not working towards a common goal.³¹⁴ In short, the employee “may not realize that statements made to the attorney ultimately might be used against the individual by the entity or other parties, such as the government in a criminal prosecution.”³¹⁵ When an employee first reports a potential violation, an employee may not be aware that their testimony can be used against them in a future government investigation.³¹⁶ Further, if the employee is involved in the conduct being disclosed, that employee may not be able to prevent the corporate entity from reporting that employee pursuant to the Yates Memo for any revelations that may incriminate the employee.³¹⁷

After the DOJ’s Yates Memo, it is unclear if corporations can preserve attorney-client privilege during an internal investigation and still comply with the requirement that corporations present all relevant facts about culpable individuals to the government.³¹⁸ The Yates Memo may “make every employee a potential bargaining chip” for corporations that are under investigation.³¹⁹ This could suffocate internal reporting for fear that revealing incriminating information, leaving an employee exposed to individual liability. With stronger incentives for corporations to earn cooperation credit through self-disclosure, it is plausible that corporations could modify the language of an *Upjohn* warning or use negotiation tactics to elicit more information from culpable lower-level employees in order to limit culpability that would be imputed to the corporation at-large.³²⁰

311. Giesel, *supra* note 309, at 110 n.1 (referencing Brian Martin, *Process Makes Perfect: Managing In-House Attorney-Client Privilege*, INSIDE COUNS., at 10 (Mar. 2010) available at <http://www.insidecounsel.com/Issues/2010/March-2010/Pages/Process-Makes-Perfect.aspx>).

312. *Id.*

313. *Id.* at 117.

314. *Id.* at 110.

315. *Id.*

316. Copeland, *supra* note 304.

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

A November 2015 *Washington Post* article described an upcoming DOJ draft policy that proposes providing corporations with guidance on the proper method of self-reporting potential FCPA violations.³²¹ In an effort to increase transparency into the benefits that companies receive for self-reporting, the draft policy would include guidance for corporations regarding penalty calculations under the FCPA.³²² The draft policy will also complement the Yates Memo by informing companies when the government may favor a declination over a full investigation.³²³ Critics of the policy, however, argue that if the number of declinations rises, then overall FCPA deterrence will fall.³²⁴

Declinations in an FCPA investigation are not uncommon, but they are rarely discussed because the results are not available to the public. According to the FCPA Resource Guide, “[i]n appropriate circumstances, DOJ and SEC may decline to pursue charges against a company based on the company’s effective compliance program, or may otherwise seek to reward a company for its program, even when that program did not prevent the particular underlying FCPA violation that gave rise to the investigation.”³²⁵ That the SEC and DOJ have procedures for handling declinations highlights that the government recognizes a single compliance failure by a company “does not necessarily mean that a particular company’s compliance program was not generally effective.”³²⁶

To clarify corporate compliance best practices, the DOJ hired Hui Chen on November 3, 2015 to serve in a newly created position as the Department’s full-time compliance expert.³²⁷ As part of her duties, Chen helps U.S. prosecutors develop appropriate benchmarks for evaluating corporate compliance programs.³²⁸ Additionally, she is responsible for analyzing a company’s compliance program both when a violation arises and when a company acts to remediate the compliance failure.³²⁹

The hiring of Ms. Chen signals to corporate compliance departments that the DOJ wants to cultivate an ongoing dialogue between corporations and the government to improve internal compliance efforts and information sharing. Consequently, corporations should improve at identifying and addressing FCPA compliance risks internally before conduct amounts to a potential FCPA

321. Ellen Nakashima, *Justice Department Could Give Firms a Pass on Foreign Bribery if They Confess*, WASH. POST (Nov. 12, 2015), https://www.washingtonpost.com/world/national-security/justice-department-weighs-changes-in-how-it-pursues-foreign-bribery-cases/2015/11/10/95ef0322-87be-11e5-9a07-453018f9a0ec_story.html.

322. *Id.*

323. *Id.*

324. *Id.*

325. FCPA RESOURCE GUIDE, *supra* note 16, at 56.

326. *Id.*

327. *New Compliance Counsel Expert Retained by the DOJ Fraud Section*, DOJ Press Release, <http://www.justice.gov/criminal-fraud/file/790236/download>.

328. *Id.*

329. *Id.*

Dodd-Frank, the FCPA, and Modern Corporate Compliance Programs

violation. As Chen's role develops, it will be important to see what information, if any, is publicized regarding her recommendations to corporations and how the DOJ's Fraud Section utilizes this hire to develop the government's procedures around self-reporting FCPA violations.

CONCLUSION AND RECOMMENDATIONS

If the U.S. Supreme Court, or any other federal court, hears a case regarding the proper interpretation of 21F(h)(1)(A), it should rule that an employee qualifies as a whistleblower if he or she first reports to their internal supervisor in accordance with the SEC's interpretive guidance. The reporting channels under 21F(h)(1)(A) encompass the most common forms of reporting in modern corporate compliance; therefore, reporting through these channels should not disqualify an employee for whistleblower protection. Dodd-Frank builds upon SOX's purpose, which is to strengthen internal reporting, accountability, and compliance. The practical implications of Dodd-Frank are beginning to take form, and the courts must play an equal role in shaping the legislation in upcoming years. Clarifying the scope of Dodd-Frank protections for U.S.-based employees working abroad is important because of the steadily increasing number of FCPA complaints the OWB receives. Further, there is a strong argument that disclosures are required or protected under the FCPA, especially given the consistencies between disclosures that are required or protected under SOX and Dodd-Frank.

On a macro-level, the federal laws governing corporate compliance are more interwoven and stronger than ever. On a micro-level, companies are working to accommodate this dramatic shift in regulatory compliance. As this article nears completion, *Wadler v. Bio-Rad* continues in the courts. In December 2016, a federal judge denied Bio-Rad's motion to exclude all testimony based on information that Wadler learned in the course of his service as Bio-Rad's counsel, based on the argument that the company did not waive the attorney-client privilege over its privileged and confidential information.³³⁰

Wadler argued that SOX and Dodd-Frank preempt state ethical duties and "use of client confidences in [SOX] Section 806 retaliation proceedings is appropriate."³³¹ The court decided on Wadler's behalf, ruling that Congress and the SEC unambiguously intended to afford protections for attorneys that disclose privileged information necessary to comply with SOX reporting requirements.

330. *Wadler v. Bio-Rad Labs., Inc.*, 212 F. Supp. 3d 829, 829 (N.D. Cal. 2016).

331. *Id.* at 837 (citing SEC Final Rule: Implementation of Standards of Professional Conduct for Attorneys, 68 Fed. Reg. 6296-01, 2003 WL 247093, *6296 (Feb. 6, 2003) (codified at 17 C.F.R. § 205 (2007))).

A state ethical rule that deprives an attorney of such protection “interferes with the methods by which Sarbanes-Oxley was designed to achieve its objective.”³³²

Going forward, companies must strengthen internal controls to ensure that confidential corporate information is not the subject of jury trials.³³³ The importance of strong internal compliance networks for public companies cannot be understated where there are recent examples of in-house lawyers and compliance officers claiming retaliation for blowing the whistle on their own employers.³³⁴ Thus, corporations must strike the right balance between internal reporting requirements under Dodd-Frank, SOX, and the FCPA and the entity’s rights to its confidential material. This balance starts with building a dynamic corporate compliance group that adapts to changes in the law and engages with its employees in a manner that protects their individual rights.

332. *Id.* at 854–57 (“Accordingly, the Court finds that to the extent the ethical obligations governing attorneys who practice in California impose stricter limits on the disclosure of privileged and confidential information in this action than are imposed under Sarbanes-Oxley Act, as reflected in Part 205, the former are preempted.”).

333. Sara Randazzo, *Trial Reveals Pitfalls of Whistleblower Claims From In-House Corporate Lawyers*, WALL ST. J. (Jan. 15, 2017), <http://www.wsj.com/articles/trial-reveals-pitfalls-of-whistleblower-claims-from-in-house-corporate-lawyers-1484488801>.

334. *Id.*