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Dodd-Frank's Whistleblower Provision Fails to Go Far Enough: Making the Case for a Qui Tam Provision in a Revised Foreign Corrupt Practices Act

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DODD–FRANK'S WHISTLEBLOWER PROVISION FAILS TO GO FAR ENOUGH: MAKING THE CASE FOR A QUI TAM PROVISION IN A REVISED FOREIGN CORRUPT PRACTICES ACT

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I. INTRODUCTION

In the wake of the 2008 financial collapse, Congress enacted the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank).[1] Section 922 (the whistleblower provision) of Dodd–Frank establishes the parameters of the new Securities and Exchange Commission (SEC) whistleblower program.[2] The whistleblower provision has changed the regulatory landscape in which businesses operate and has provided incentives for whistleblowers to come forward with information relating to potential regulatory violations. Since enactment, attorneys have been deciphering how the post-Dodd–Frank environment will function. The general business consensus toward the new provision is reflected in the words of former Congressman and co-author of the Sarbanes–Oxley Act,[3] Mr. Michael G. Oxley:

> Most of Dodd–Frank affects financial companies, but this is an area which hits all public companies, as well as companies that are subject to federal securities laws. In my estimation, the law goes too far, because it not only accommodates whistleblowers, but actually incentivizes them to go outside the structure of the company. Dodd–Frank significantly reduces the effectiveness of internal due process and may, in practice, eliminate it in these instances, as it accelerates potential regulatory and legal proceedings. I think we had it right in Sarbanes–Oxley, which, in my view, struck a better balance between the rights of whistleblowers and the interests of companies to manage internal financial processes.[4]

While the reach of Dodd–Frank is substantial, this Comment goes

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

2. 15 U.S.C.A. § 78u-6 (West 2010).

3. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C). The Sarbanes–Oxley Act (SOX) was the first statute that provided retaliatory protection for whistleblowers at the federal level and required internal controls for businesses. *See generally* Jennifer Christian, Note, *Whistleblower Protection Under Sarbanes–Oxley: Key Provisions and Recent Case Developments*, 31 OKLA. CITY U. L. REV. 331 (2006). Some believe that Dodd–Frank's whistleblower provision has contradicted the policy of SOX. *See, e.g.*, Dave Ebersole, Comment, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 ENTREPREN. BUS. L.J. 123, 138 (2011) ("By incentivizing external reporting to the detriment of internal compliance, Dodd–Frank contradicts the policy behind SOX 404 provisions promoting effective internal control systems.").

4. E-mail from Mr. Michael G. Oxley, Of Counsel, Baker & Hostetler LLP, former Congressman and Chairman of the House Financial Services Committee, to author (Oct. 28, 2011, 14:54 EST) (on file with author) [hereinafter E-mail from Mr. Michael Oxley].

against the general business consensus and argues that Dodd–Frank does not go far enough with regard to how the whistleblower provision is applied to the Foreign Corrupt Practices Act (FCPA).[5] Dodd–Frank imposes statutory roadblocks and administrative hindrances that will prevent the whistleblower provision from contributing to the enforcement of the FCPA. It is a wonder if Congress fully understood or even contemplated the effect Dodd–Frank would have on FCPA enforcement prior to Dodd–Frank's enactment.

Dodd–Frank's whistleblower provision rests on sound principles in that it recognizes the importance of including private citizens in detecting financial crimes, but private citizens can contribute more than being mere informants. The solution, as argued in this Comment, is for Congress to amend the FCPA to include a qui tam provision that would allow people to sue FCPA violators on behalf of the government and for themselves, thereby enforcing the FCPA more effectively.[6]

Part II of this Comment provides a brief overview of relevant background information. Part III elaborates on the shortcomings of Dodd–Frank as applied to the FCPA. Part IV makes the case for a qui tam provision within a revised FCPA. Part V concludes with a call to action.

II. BACKGROUND

In order for one to appreciate the crux of this Comment, one must first understand two statutes (Dodd–Frank and the FCPA) and one legal mechanism (a qui tam provision). Brief background information on each is provided below. Dodd–Frank is discussed first, followed by qui tam provisions and the FCPA.

A. Dodd–Frank's Whistleblower Provision

President Barack Obama signed Dodd–Frank into law on July 21, 2010, implementing what has been deemed the most sweeping financial reform since the Great Depression.[7] The statute affects a number of different areas of law, but implicates the FCPA through the whistleblower provision.[8]

Generally stated, the whistleblower provision provides any member

5. 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3 (2006). The FCPA is a statute prohibiting foreign bribery and is discussed more fully *infra* Part II.C.

6. Qui tam provision background information is discussed *infra* Part II.B.

7. *See* Recent Legislation, *Dodd–Frank Act, Pub L. No. 111-203, § 922, 124 Stat. 1376, 1841-49 (2010) (to be codified at 15 U.S.C. § 78U-6)*, 124 HARV. L. REV. 1829 (2011).

8. 15 U.S.C.A. § 78u-6 (West 2010).

of the public, a bounty between ten to thirty percent, if they provide new information to the SEC that ultimately leads to an enforcement action over one million dollars.[9] The whistleblower provision applies to any SEC judicial or administrative action, which includes FCPA actions.[10]

Legislative history indicates that Congress included the whistleblower provision to "motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recovery money for victims of financial fraud."[11] Citing testimony of whistleblower Harry Markopolos,[12] the Senate Report indicates that whistleblower tips detected over fifty percent of fraud schemes uncovered in public companies.[13]

There are a number of requirements that must be satisfied before a whistleblower will recover an award.[14] First, the whistleblower must submit the information voluntarily.[15] The whistleblower must also provide "original" information, meaning "derived from the independent knowledge or analysis of a whistleblower," and "not known to the Commission from any other source."[16] This information must result in a successful SEC enforcement action with money paid in an amount over the one million statutory minimum.[17] While "related actions" such as those brought by the DOJ may satisfy the statutory requirements, an SEC action must share a common nucleus of operative fact to the

9. *See id.* § 78u-6(b)(1).

10. *Id.* § 78u-6(A)(1). ("[C]overed judicial or administrative action means any judicial or administrative action brought by the Commission under the securities laws . . . ."). Commentators have opined that the FCPA will be one of the security laws most affected by Dodd–Frank. *See, e.g.*, Ebersole, *supra* note 3, at 132 ("[M]any tips incentivized by Dodd–Frank are expected to report Foreign Corrupt Practices Act . . . violations."). In 2011, FCPA tips represented only 3.9% of the overall tips brought to the SEC's whistleblower office. *See* U.S. SECURITIES & EXCHANGE COMMISSION ANNUAL REPORT ON THE DODD–FRANK WHISTLEBLOWER PROGRAM, FISCAL YEAR 2011, at app. A (2011), *available at* http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf.

11. S. REP. NO. 111-176, at 110 (2010).

12. Mr. Markopolos is a financial analyst, independent fraud investigator, and certified fraud examiner who repeatedly provided the SEC with information on a Ponzi scheme run by Bernard Madoff, for an eight-and-a-half year period between May 2000 and December 2006, only to have the organization ignore his tips, allowing the fraud to reach $50 Billion before finally being caught. *See Assessing the Madoff Ponzi Scheme and Regulatory Failures, Hearing Before the Subcomm. on Capital Mkts., Ins., & Gov't Sponsored Enters. of the Comm. on Fin. Servs.*, 111th Cong. 4-5 (2009) (statements of Mr. Markopolos).

13. *See* S. REP NO. 111-176, at 110.

14. "Whistleblower," as used in Dodd–Frank, "means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of a securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U.S.C.A. § 78u-6(a)(6) (West 2010).

15. SEC Rules, Securities Whistleblower Incentives and Protections, 17 C.F.R. § 240.21F-4 (2011).

16. 15 U.S.C.A. § 78u-6(a)(3) (West 2010).

17. *Id.* § 78u-6(b)(1).

"related action," or no reward will be given.[18]

Several individuals are excluded from receiving an award, such as employees of the DOJ or SEC and their family members, and foreigner government officials, including employees of state-owned enterprises.[19] In addition to the provision incentivizing reporting, Dodd–Frank includes an anti-retaliation provision giving whistleblowers a cause of action and immediate jurisdiction in federal court if an employer takes retaliatory action against a whistleblower.[20]

Whistleblowers do not have to report the violations internally to their company before reporting to the SEC.[21] This was a widely debated issue leading up to the promulgation of the rules by the SEC. Some argue that by not requiring internally reporting first, whistleblowers will circumvent internal compliance programs.[22] Others believe that requiring internal reporting first would effectively eliminate the program, as whistleblowers would face increased hurdles and would likely not report at all.[23] Following the SEC's release of its final rules that did not include the "report first" requirement, an amendment was proposed in Congress, deemed the "Whistleblower Improvement Act."[24] If it had been enacted, it would have required whistleblowers to report internally first.[25] It is likely that the debate surrounding the reporting first requirement will continue.

B. Qui Tam Provisions

Qui tam is the commonly used abbreviated form of the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which translates into "who as well for the king as for himself sues in this

18. *Id.* § 78u-6(a)(5) ("'[R]elated action' . . . means any judicial or administrative action . . . based upon the original information provided by a whistleblower . . . that led to the successful enforcement of *the Commission action*.") (emphasis added). To determine whether two or more proceedings involve the same common nucleus of operative facts, courts look at "factors such as 'whether the facts are related in time, space, origin or motivation,' 'whether they form a convenient trial unit,' and whether treating them as a unit 'conforms to the parties' expectations."' *In re* Iannochino, 242 F.3d 36, 46 (1st Cir. 2001) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982)) (internal quotation marks omitted).

19. *See* 15 U.S.C.A. § 78u-6(c)(2) (West 2010).

20. *See id.* § 78u-6(h).

21. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 34-64545, 2011 WL 2293084 (May 25, 2011) [hereinafter SEC Final Rule Release] ("[W]e have determined not to include a requirement that whistleblowers report violations internally.").

22. *See id.* at 34324. Mr. Oxley's quote at the beginning of this Comment also captures this point of view. *See* E-mail from Mr. Michael Oxley, *supra* note 4.

23. *See* E-Mail from Mr. Michael Oxley, *supra* note 4.

24. H.R. 2483, 112th Cong. 1st Sess. (2011).

25. *Id.*

matter."[26] A qui tam provision allows an individual plaintiff, known as a relator, to sue for themself and on behalf of the government.[27]

Such actions have an extensive history within the laws of England and the United States, and qui tam actions are believed to have originated around the end of the thirteenth century.[28] The American experience with qui tam provisions began soon after the first settlers arrived in the country.[29] Colonial legislatures enacted qui tam statutes, and such actions were brought forth both before and after the signing of the Constitution.[30]

The rationale behind a qui tam provision was that the "common informer" was needed for self-regulation, as the king and colonial governments lacked the resources to enforce their laws effectively.[31] Individual citizens were better positioned and were an inexpensive supplement to the government's limited resources. However, qui tam actions were not without their critics. Critics have long expressed the countervailing concern that overzealous citizens enforcing the law would bring meritless claims.[32]

While qui tam provisions have been included in several statutes,[33] the provisions are most associated with the False Claims Act (FCA),[34] where they have been employed with undeniable success.[35] The FCA is

26. BLACK'S LAW DICTIONARY (9th ed. 2009).

27. *See* Vt. Agency of Natural Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 769 (2000).

28. *Id.* at 774; *see also* JAMES B. HELMER, JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION § 2-1 (5th ed. 2007) (stating most commentators trace the first qui tam provision to around 14th century). *But see* CHARLES DOYLE, QUI TAM: THE FALSE CLAIMS ACT AND RELATED FEDERAL STATUTES, 2 (Cong. Research Serv. 2000), *available at* http://www.fas.org/sgp/crs/misc/R40785.pdf (finding "[t]he earliest cited example of a qui tam provision is the 695 declaration of King Withred of Kent . . . ").

29. *Vermont Agency*, 529 U.S. at 776.

30. *See id.* Solidified in our jurisprudence, the landmark constitutional law case of McCulloch v. Maryland, 17 U.S. 316 (1819) was a qui tam action. *See also* HELMER, *supra* note 28, § 2-1.

31. *See* HELMER, *supra* note 28, §§ 2-1, 2-2 ("William Holdsworth, a leading English historian, [said] the reason for the development of *qui tam* provisions was that England had no organized police force or system of inspectors, so the Government needed to enlist 'the injured man' in the cause of law and order by offering a large bounty . . . .") (citing 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. 1923).

32. James Y. Ho, Note, *State Sovereign Immunity and the False Claims Act: Respecting the Limitations Created by the Eleventh Amendment Upon the Federal Courts*, 68 FORDHAM L. REV. 189, 194 (1999) (stating that "overzealous pursuit of bounty by qui tam relators" was a factor that caused qui tam provision to fall to disuse in England). There has also been questions regarding the Constitutionality of qui tam provisions, but the overwhelming majority of courts have concluded that the action is constitutional. *See generally* HELMER, *supra* note 28, §§ 4-1 to 4-8.

33. *See, e.g.*, 25 U.S.C. § 201 (2006) (providing cause of action and share of recovery against a person violating Indian protection laws).

34. 31 U.S.C. §§ 3729-33 (2006).

35. *See* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 53 (2002) (stating that qui tam provisions in the FCA has been "extraordinarily successful as a regulatory tool" and discussing the reasons why).

the government's "primary . . . tool for combating fraud."[36] Since significant amendments to the FCA in 1986,[37] qui tam actions under the FCA have recovered over $40 billion dollars for taxpayers, including over $4 billion in 2011 alone.[38]

While Dodd–Frank's whistleblower provision shares commonalities with qui tam actions, the differences are significant. Though both actions provide a "bounty" for informants, whistleblowers are at the complete mercy of the enforcement agencies to pursue their claim. Qui tam relators, on the other hand, may bring their suit alone if the government does not wish to intervene.[39] More importantly, Dodd–Frank's whistleblower provision suffers from shortcomings, to be discussed in Part III, that do not afflict qui tam actions.[40]

C. The FCPA

President Jimmy Carter signed the FCPA into law on December 20, 1977, signaling to businesses that the United States was taking its first steps to curb foreign bribery.[41] In passing the law, Congress carefully scrutinized the "ethically repugnant and competitively unnecessary" acts of bribery that American companies had been conducting abroad.[42] Congress found that more than 400 companies had made questionable or illegal payments totaling well over $300 million to foreign government officials, politicians, and political parties in the years prior to enactment of the bill.[43] The consensus among Congress was that "foreign bribery is a reprehensible activity" and "action must be taken to proscribe it."[44]

Substantively, the FCPA prohibits corruptly offering or giving anything of value to a foreign official for the purpose of obtaining or retaining business, or otherwise influencing that official's decision-making ability.[45] The statute also contains a "books and record" provision requiring companies to maintain specific recordkeeping

36. S. REP. NO. 99-345, at 2 (1985), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5266.

37. For a discussion of the significance of the 1986 amendments and the resulting changes to the law, *see generally* HELMER, *supra* note 28, § 2-6(b).

38. *See Qui Tam Statistics*, TAXPAYERS AGAINST FRAUD, http://www.taf.org/statistics.htm (last visited Feb. 18, 2012) [hereinafter *Qui Tam Statistics*].

39. 31 U.S.C. § 3730(b)(4)(B) (2006).

40. *Compare* Part III, *with infra* Part IV.A.

41. *See* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 912 (2010).

42. *Id.* at 913 ("[President Carter] share[d] Congress' belief that bribery is ethically repugnant and competitively unnecessary.").

43. *See* H.R. REP. NO. 95-640, at 4 (1977) ("These corporations have included some of the largest and most widely held public companies in the United States; over 117 of them rank in the top Fortune 500 industries.").

44. *Id.* at 6.

45. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2006).

standards and internal accounting controls.[46]

The FCPA has no private cause of action.[47] The statute's enforcement is shared between the Department of Justice (DOJ) and the SEC.[48] The SEC enforces the civil aspects of the statute and has jurisdiction over "issuers," defined as public companies that are required to make filings with the SEC.[49] The DOJ enforces the criminal aspects of the statute and has jurisdiction over "domestic concerns," which includes individuals and both public and private companies.[50]

Despite the statute's passage in the late seventies, it lay dormant and arguably underutilized for much of its existence.[51] Typically, the enforcement agencies brought only two to three enforcement actions between 1977 and 2002.[52] However, the number of enforcement actions grew precipitously in the new millennium.[53] Enforcement numbers have set records year after year, with 2010 registering seventy-four enforcement actions totaling $1.8 billion in aggregate penalties, including eight of the top ten penalties since the statute's inception.[54]

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46. *See id.* § 78m.

47. There is no expressed provision granting private parties a cause of action under the FCPA, and courts have refused to imply one. *See* Lamb v. Phillip Morris, Inc., 915 F.2d 1024 (6th Cir. 1990).

48. The legislative history indicates Congressional intent for shared jurisdiction between the DOJ and SEC. *See* S. REP. NO. 95-114, at 11–12 (1977).

49. *See* LUCINDA A. LOW ET AL., ENFORCEMENT OF THE FCPA IN THE UNITED STATES: TRENDS AND THE EFFECTS OF INTERNATIONAL STANDARDS, 1665 PLI/CORP 711, 722–23 (2008) ("'[I]ssuers' constitutes a narrower universe defined as companies that register securities in accordance with 15 U.S.C. § 781 or are required to file reports under 15 U.S.C. § 78o(d), or any officer, director, employee or agent of such company.").

50. *See id.* at 722 ("'[D]omestic concern' covers a large universe of persons and entities, including individual U.S. citizens (wherever located), U.S. resident aliens, corporations and other business entities (including partnerships) organized under the laws of a state of the United States or having their principal place of business in the United States, and officers, directors, employees and agents of any of these entities, regardless of their nationality.") (footnote omitted). The DOJ may also bring civil actions, where appropriate. PAUL V. GERLACH & GEORGE B. PARIZEK, THE SEC'S ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT, *in* 3 FOREIGN CORRUPT PRACTICES ACT REPORTER § 14:3 (West, 2d ed. 2008).

51. *See* Koehler, *supra* note 41, at 913 ("As routinely described, FCPA enforcement was largely (yet not entirely) non-existent from 1977 until circa 2002."); *see also* Michael B. Bixby, *The Lion Awakens: The Foreign Corrupt Practices Act—1977 to 2010*, 12 SAN DIEGO INT'L L.J. 89, 103 (2010) ("During the first quarter century of the FCPA's history, enforcement of the law appears to have been minimal, at best. Clearly, the FCPA was underutilized in achieving the purposes for which the law was created.").

52. *See* Koehler, *supra* note 41, at 913.

53. *See* Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 522–23 (2011); *see also* Bixby, *supra* note 51, at 104–06 (discussing enforcement actions from 2003 to 2010).

54. *See* Lanny A. Breuer, Assistant Attorney General, Speech at 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *available at* http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html. For 2010 enforcement figures, *see FCPA Year in Review 2010*, STEPTOE & JOHNSON LLP (Mar. 15, 2011), http://www.steptoe.com/publications-newsletter-129.html; *see also Recent Trends and Patterns in*

While the number of enforcement actions for 2011 (forty-eight) was down compared to the previous year, it was still the second highest year within the statute's history.[55] In 2012, enforcement actions dropped to twenty-three.

What is unclear and is often lost in the discussion of enforcement statistics is whether the number of enforcement actions accurately reflects the underlying instances of foreign bribery.[56] Has bribing of foreign officials actually increased since enactment of the FCPA, or has the agenda of the enforcement agencies merely changed? While questions such as these remain, it is likely the case that bribery, like other crimes, will never be completely eradicated.[57] As such, it is also likely that enforcement of the FCPA will always be a priority.

FCPA cases are rarely litigated as the vast majority of FCPA allegations are resolved through deferred or non-prosecutorial agreements, pleas, settled civil complaints, cooperation agreements, or consent decrees.[58] Despite companies resolving alleged violations through these avenues, commentators frequently argue that the FCPA fails to provide sufficient guidance regarding its punishable offenses.[59] Since inception, the FCPA has been criticized for being ambiguous.[60] Even after two amendments to the statute, these criticisms remain.[61]

FCPA Enforcement, SHEARMAN AND STERLING LLP (Jan. 20, 2011), http://www.shearman.com/files/upload/FCPA-Trends-and-Patterns-Jan-2011.pdf.

55. *See 2011 Year-End FCPA Update*, GIBSON DUNN (Jan. 3, 2012) http://www.gibsondunn.com/publications/Documents/2011YearEndFCPAUpdate.pdf.

56. *See generally* Phillip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 FLA. J. INT'L L. 169 (2006) (arguing that the FCPA has been greatly under-enforced since enactment and elaborating on the problems inherent with estimating enforcement efficiency). It would be interesting to see if Segal felt, given the increase in FCPA enforcement actions following the writing of his article, that present enforcement levels were adequate.

57. *See id.* at 174 ("The realistic goal cannot be to eradicate foreign bribe-giving, any more than legislatures that prohibit murder believe they will completely do away with homicide."); *accord* Ethan S. Burger & Mary S. Holland, *Why the Private Sector Is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 FORDHAM INT'L L. J. 45, 50 (2006) ("Corruption will never be entirely eradicated . . . .").

58. *See* Koehler, *supra* note 41, at 929.

59. *See, e.g.*, Jennifer Dawn Taylor, Comment, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861 (2001) ("[T]he legislation ambiguously defines prohibited conduct and its provisions lack an adequate standard by which to determine the nature of contemplated activity.").

60. *See, e.g.*, Note, *The Accounting Provisions of the Foreign Corrupt Practices Act: An Alternative Perspective on SEC Intervention in Corporate Governance*, 89 YALE L. J. 1573, 1575 (1980) ("The accounting provisions of the FCPA were framed in ambiguous, far-ranging terms . . . ."); Laura E. Longobardi, *Reviewing the Situation: What Is to Be Done with the Foreign Corrupt Practices Act?*, 20 VAND. J. TRANSNAT'L L. 431, 446 (1987) ("These ambiguities are perhaps the clearest evidence that the FCPA is a very poorly drafted piece of legislation.").

61. *See* William Alan Nelson II, *Attorney Liability Under the Foreign Corrupt Practices Act: Legal and Ethical Challenges and Solutions*, 39 U. MEM. L. REV. 255, 299 (2009) ("The FCPA has

Legislators recently held hearings regarding the FCPA, indicating a possible willingness to amend the statute once again.[62] While a previously proposed amendment would have created a limited private right of action,[63] no proposals currently include adding a qui tam provision.[64]

III. SHORTCOMINGS OF DODD–FRANK'S WHISTLEBLOWER PROVISION AS APPLIED TO THE FCPA

Collectively, the shortcomings of Dodd–Frank's whistleblower provision can be divided into two categories. The first category includes statutory impediments, meaning that either the statute or the SEC regulations of the whistleblower program result in actions that hinder the FCPA and its goals. The second category includes general administrative concerns that will materialize once the statute is given effect. These two categories are discussed in turn.

A. Statutory Impediments

1. SEC Must Have an Enforcement Action

Dodd–Frank requires the SEC to complete a successful enforcement action prior to any payout being awarded to a whistleblower.[65] While this makes sense in the vast majority of securities violations—as these

many ambiguities in both its scope and application."); *see also* United States v. Kay, 359 F.3d 738, 743–44 (5th Cir. 2004) ("[T]he district court concluded that the FCPA's language is ambiguous . . . . We agree with the court's finding of ambiguity . . . .").

62. *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Judiciary*, 112th Cong. (2011); *Examining Enforcement of the Foreign Corrupt Practices Act, Hearing Before the Subcomm. on Crime and Drugs of the Comm. of the Judiciary*, 111th Cong. (2010).

63. *See* H.R. Res. 2152, 111th Cong., 1st Sess. (2009).

64. There has never been a proposal by Congress to include a qui tam provision within the FCPA. Professor Paul D. Carrington has advocated for such a provision within the FCPA, but for use by foreign nationals. *See* Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 L. & CONTEMP. PROBS. 109 (2007) [hereinafter *Law and Transnational Corruption*]; Paul D. Carrington, *Enforcing International Corrupt Practices Law*, 32 MICH. J. INT'L L. 129 (2010). Other authors have either asserted more broadly that the FCPA should be amended to include a private cause of action, or have argued that there are greater opportunities for the private sector to join in the fight against corruption. *See, e.g.*, Burger & Holland, *supra* note 57; Bucy, *supra* note 35; Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 CAL. L. REV. 185 (1994) (private cause of action for competing businesses); Aaron R. Petty, Note, *How Qui Tam Actions Could Fight Public Corruption*, 39 U. MICH. J.L. REFORM 851 (2006). While the author of this Comment concurs with much of the reasoning underpinning these proposals and the conclusion that the private sector needs to be better utilized in the fight against corruption, this Comment argues that the best solution is a qui tam provision within the FCPA that all persons can utilize.

65. *See* 15 U.S.C.A. § 78u-6(a)(1) (West 2010); 17 C.F.R. § 240.21F-3 (2011).

violations would be subject to SEC jurisdiction—the FCPA's dual enforcement structure means that there will be violations of the FCPA that will never be eligible for a whistleblower award. In many FCPA enforcement actions, either the SEC lacks jurisdiction or the DOJ alone conducts the action.[66] As the SEC's jurisdiction is limited to issuers, the SEC does not have jurisdiction over most privately held companies, and individuals.[67] Individuals have become increasingly targeted for violating the FCPA,[68] yet the requirement of an SEC action hinders this goal, as tips involving individuals will not be incentivized.

The fact that DOJ actions will satisfy as a "related action" under the statute does not remedy the problem. In order for there to be a whistleblower award, the DOJ action must share a common nucleus of operative fact with an SEC action.[69] But if the DOJ alone has jurisdiction, the SEC can never bring the necessary related action. Therefore, no whistleblower will ever be able to recover a reward for reporting bribery by companies not subject to SEC jurisdiction, and no one will likely submit tips.

In short, Dodd–Frank provides no incentives for whistleblowers to come forward and report violations where the SEC has no jurisdiction—leaving out tips involving individuals and privately-held companies. The requirement of an SEC action before recovery as applied to the FCPA is poor policy and fails to incentivize tips from otherwise unlikely to be discovered instances of foreign bribery.

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66. *See, e.g.*, United States v. AGA Med. Corp., No. 0:08-cr-00172-1 (D. Minn. June 3, 2008); United States v. BAE Systems, No. 1:10-cr-00035 (D.D.C. Feb. 4, 2010); United States v. Basu, No. 02-cr-475 (D.D.C. Nov. 26, 2002); United States v. Sengupta, No. 02-cr-40 (D.D.C. Jan. 30, 2002); United States v. Kozeny, No. 05-cr-518 (S.D.N.Y. May 12, 2005); United States v. Bridgestone Co., No. 4:11-cr-00651 (S.D. Tex. Sept. 15, 2011); United States v. Carson, No. 09-cr-077 (C.D. Cal. Apr. 8, 2009); United States v. Control Sys. Specialist, Inc., No. CR-3-98-073 (S.D. Ohio Aug. 19, 1998); United States v. Eagle Bus. Mfg. Inc., No. B-91-171 (S.D. Tex. Oct. 2, 1991); United States v. F.G. Mason Eng'g Inc., No. 90-0029 (D. Conn. June 1, 1990); United States v. Giffen, No. 03-cr-663 (S.D.N.Y. Mar. 28, 2003); United States v. Giffen, No. 03-cr-404 (S.D.N.Y. Apr. 3, 2003); United States v. Green, No. 2:08-cr-00059 (C.D. Cal. Feb. 4, 2009); United States v. ABB Inc., No. 4:10-cr-00664 (S.D. Tex. Sept. 29, 2010); United States v. ABB Vetco Gray, Inc., No. CR H-04-279 (S.D. Tex. June 22, 2004); United States v. Latin Node, Inc., No. 09-20239 (S.D. Fla. Mar. 23, 2009); United States v. Godsey, No. 09-cr-349 (D.D.C. Dec. 1, 2009); United States v. Nguyen, No. 2:08-cr-00522 (E.D. Pa. Oct. 29, 2009); United States v. Saybolt N. Am. Inc., No. 98-CR010266-WGY, (D. Mass. Aug. 18, 1998).

67. *See* LUCINDA A. LOW ET AL., *supra* note 49, at 722–23.

68. ROBERT W. TARUN, ET AL., INTRODUCTORY ESSAY: A PROPOSAL FOR A UNITED STATES DEPARTMENT OF JUSTICE FOREIGN CORRUPT PRACTICES ACT LENIENCY POLICY, 1891 PLI/CORP 115, 124 n.20 (2010) ("[T]he DOJ has increasingly focused on prosecuting individuals engaged in FCPA misconduct, particularly in light of the perceived substantial deterrent effect of such prosecutions.").

69. SEC Final Rule Release, *supra* note 21, at 34305 ("We have not modified the rule to permit a whistleblower to recover in a related action absent a successful Commission action, because the statute expressly requires a successful Commission action before there can be a 'related action' upon which a whistleblower may recover.") (footnote omitted).

2. One Million Dollar Statutory Minimum

Dodd–Frank's one million dollar statutory minimum[70] is another example of the statute's whistleblower provision falling short as applied to the FCPA, as Dodd–Frank fails to incentivize whistleblower tips for *all* acts of bribery. The reason for including this minimum amount of recovery is not explicitly stated in the legislative history. One plausible reason is that the whistleblower provision was designed to catch the worst of the worst offenders of securities violations.

Dodd–Frank was passed to eliminate "too big to fail firms" indicating Congressional intent on monitoring the largest entities in the regulatory scheme.[71] Perhaps Congress felt the whistleblower provision should also focus on the largest offenders. If this justification is accepted, then the threshold amount is evidence that the government has limited resources and, at some point, must arbitrarily filter tips to focus prosecutorial resources on violations it deems worthy of pursuing.

The issue with this threshold is that the FCPA was meant to prohibit *all* bribery, irrespective of the amount given or the degree of damage. The FCPA has broad provisions prohibiting giving "*anything* of value,"[72] and it includes no statutory minimum or *de minimis* exception.[73] While FCPA violations have recently hit record amounts, including Siemen AG's $1.6 billion penalty,[74] these violations overshadow numerous other actions that recover less, but are still important. Enforcement actions that are resolved for amounts less than Dodd–Frank's statutory minimum still yield significant penalties.[75]

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70. 15 U.S.C.A. § 78u-6(b)(1) (West 2010).

71. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, at 1 (201) ("To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.").

72. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2006) (emphasis added).

73. Marie M. Dalton, Note, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U. J. L. & BUS. 583, 598 (2006) ("There is no minimum pecuniary value required to implicate the bribery prohibitions and no de minimis exception exists to prevent the Act's application.").

74. SEC v. Siemens Aktiengesellschaft, No. 08-CV-02167 (D.D.C. Dec. 12, 2008).

75. *See, e.g.*, United States v. Hioki, No. 08-795 (S.D. Tex. Dec. 8, 2008) ($80,000); United States v. Pitchford, No. 02-CR-00365 (D.D.C. Sept. 3, 2002) ($400,000); United States v. Goodyear Int'l Corp., No. 89-0156 (D.D.C. May 11, 1989) ($250,000); *In re* Omega Advisors, Inc. (July 6, 2007) ($500,000); United States v. Self, No. 8:08-cr-110-AG-1 (C.D. Ca. Nov. 17, 2008) ($40,000); United States v. Young & Rubicam, Inc., 741 F. Supp. 334 (D. Conn. 1990) ($500,000); United States v. Westinghouse Air Brake Tech. Corp., No. 08-cv-706 (E.D. Pa. Feb. 14, 2008) ($300,000); United States v. Kay, 200 F. Supp. 2d 681 (S.D. Tex. 2004) ($1,300); SEC v. Murphy, No. H-02-2908 (S.D. Tex. Aug. 1, 2002) ($11,298); SEC v. Ashland Oil, Inc., No. 86-CV-1904 (D.D.C. July 8, 1986) (injunction only); SEC v. Avery Dennison Corp., No. 2:09-cv-5493 (C.D. Cal. July 28, 2009) ($518,470); *In re* Ball Corp., Exchange Act Release No. 34-64123 (Mar. 24, 2011) ($300,000); SEC v. BellSouth Corp., No.

As a society, it would seem that we should care about combating corruption, no matter the penalty charged or amount recovered. Corruption is corruption; a person who makes a $5 bribe is just as culpable as a person who makes a $5 million bribe. Yet, Dodd–Frank's whistleblower provision provides no incentive to informants with small-bribe information.

If one adheres to the view that bribery breeds more bribery,[76] then by failing to target all bribery, systemic problems will be left unreported by whistleblowers. Congress sought to avoid the problematic situation in which detection of financial crimes was left solely to the enforcement agencies by passing Dodd–Frank's whistleblower provision in the first place, yet for small-time bribes that is exactly what will occur.

The rational whistleblower questioning whether to report incidents of small-time bribery faces a dilemma.[77] The whistleblower may forego coming forward with information relating to the bribery, given the uncertainty of achieving the statutory amount required for an award. A whistleblower must have great courage and resolve as they often have to risk their entire career in exposing a crime.[78] Would a whistleblower want to risk so much and fall short of any compensation? In weighing the risks of whistleblowing against the questionable result of an award, refusing to come forward with information may be a rational decision for that potential whistleblower.

One could argue that the million dollar threshold, even if failing to incentivize tips for smaller instances of bribery, will not be all that limiting given that targeting the largest of bribes produces a deterrent effect to all bribers.[79] It is likely that individuals engaged in smaller

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02-0113 (N.D. Ga. Jan. 15, 2002) ($150,000); SEC v. Chiquita Brands Int'l, Inc., 1:01-cv-02079 (D.D.C. Oct. 3, 2001) ($100,000); SEC v. Con-way, Inc., No. 08-1478 (D.D.C. Aug. 27, 2008) ($300,000); SEC v. Delta & Pine Land Co., No. 1:07-cv-01352 (D.D.C. July 26, 2007) ($300,000); SEC v. Int. Bus. Mach. Co., 00-Civ-3040 (D.D.C. Dec. 21, 2000) ($300,000); SEC v. Montedison, S.P.A., No. 1:96-CV-02631, (D.D.C. Mar. 30, 1996) ($300,000); SEC v. Nature's Sunshine Prods. Inc., No. 09-0672 (D. Utah July 31, 2009) ($650,000); SEC v. Triton Energy Co., No. 97-CV-00401 (D.D.C. Feb. 27, 1997) ($385,000); SEC v. Veraz Networks, Inc., No. 5:10-cv-2849 (N.D. Cal. June 29, 2010) ($300,000).

76. SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM 126 (2009) ("Frequently, in a competitive environment, bribery breeds more bribery, until the system is permeated with corruption.").

77. An example is illustrative. Imagine that whistleblower *A* has information that company *B* is bribing foreign organization *C* with $75,000 cash. It is not clear that this bribe would result in a recovery that satisfies the $1,000,000 threshold. Whistleblower *A* would likely question whether to report. *See* SEC v. Schering-Plough Corp., No. 04-0945, (D.D.C. June 9, 2004) (similar facts and only a $500,000 penalty imposed).

78. *See* S. REP. NO. 111-176 at 111 (2010) ("Recognizing that whistleblowers often face the difficult choice between telling the truth and the risk of committing 'career suicide . . . .'"); *see also* HELMER, *supra* note 28, § 1-2 ("In all cases, the whistleblower risks (and is usually successful in) losing his job, career, family, and friends.").

79. I owe my thanks to Claire Sylvia for this point. I also owe my thanks to Ben Dusing for the

instances of bribes will reconsider their actions when record-setting enforcement penalties are assessed to other perpetrators. Further, it would be impossible for any enforcement agency, even with the assistance of private citizens, to target all instances of bribery.

Nevertheless, the one million dollar threshold is an arbitrary requirement. While the threshold may be representative of Dodd–Frank's focus on the worst offenders, it conflicts with Congressional intent, as shown in the FCPA, to prohibit all instances of foreign bribery. Dodd–Frank's million dollar threshold, as applied to the FCPA, is an unnecessary statutory impediment.

3. Exclusion of Foreign Government Employees

FCPA violations, by virtue of involving foreigners, almost necessarily have to occur off American soil. It follows that a major source of knowledge relating to bribes are foreigners. However, under Dodd–Frank's final rules, foreign government employees, including employees of state-owned enterprises are unable to receive an award.[80] This is a shortcoming as applied to the FCPA; employees of state-owned enterprises are often better positioned to uncover bribes, and excluding these individuals from recovery runs contrary to the trend of increasing transnational anti-bribery efforts.[81]

The SEC, in finalizing the rules for Dodd–Frank, contemplated and decided against one commentator's proposal that the foreign government employee exemption not be included.[82] In justifying its decision to include the exemption, the SEC cited concerns of interfering with foreign sovereignty, potentially undermining treaties, and incentivizing foreigners not to report locally, as well as questions about how to protect foreign whistleblowers.[83]

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following additional points: one could also quarrel with whether the statutory threshold is all that limiting given the current enforcement trends of the FCPA. The current norm is large payouts, as shown in 2010. Furthermore, one could argue whether whistleblowers have to risk their careers under Dodd–Frank, given that they are able to report anonymously and would become publicly known only after they receive their award, in which case they likely no longer care about being known to the company. These are legitimate points, but there are, in fact plenty of FCPA violations being resolved for under the statutory amount that do not get highly publicized. *See* cases cited *supra* note 75. As to whistleblowers reporting anonymously and risking very little, this is not so much a problem related to the statutory amount as much as a problem of Dodd–Frank generally. *See infra* Part III.B.3. This latter problem could be fixed by the FCPA adopting a qui tam provision. *See infra* Part IV.F.

80. 17 C.F.R. § 240.21F-8(c)(2) (2011).

81. *See* Letter from National Whistleblower Center to Securities and Exchange Commission (Feb. 10, 2011), *available at* http://www.sec.gov/comments/s7-33-10/s73310-159.pdf.

82. SEC Final Rule Release, *supra* note 21, at 34334 ("We have decided to maintain the exclusion for 'foreign officials' as proposed.").

83. *Id.* at 34335 ("[Potential repercussions include] the perception that the United States is interfering with foreign sovereignty, potentially undermining foreign government cooperation under

Even assuming the SEC reached the proper decision, the exclusion is still a statutory impediment. The SEC's commentary did not seem to doubt this; its justifications were relating only to notions of foreign comity.

B. Administrative Concerns

1. Too Much Reliance on the SEC

Dodd–Frank requires the whistleblower to rely entirely on the SEC, but the problem with this structure is that the SEC has a poor track record with whistleblower programs. This is not the SEC's first venture into a whistleblower program. Previously, the SEC operated a whistleblower program that was ineffective to the point of nonexistence. During its twenty-two year lifetime, the prior program paid out a "meager total of $159,537" to five whistleblowers.[84]

The SEC's biggest whistleblower black eye was shown by its handling of Harry Markopolos, who on numerous occasions tried to bring the Bernard Madoff Ponzi scheme[85] to the SEC's attention, only to be turned away.[86] Despite numerous tips over an eight-and-a-half year period, the SEC failed to detect and end the crime.[87]

Dodd–Frank's whistleblower program differs from the old SEC program in several respects. The SEC has adopted some of the offered recommendations to strengthen its whistleblower program under Dodd–Frank.[88] Changes have included a new whistleblower office,[89] and a

existing treaties (including multilateral and bilateral mutual legal assistance treaties), the incentive for foreign officials to make reports to the United States rather than to local authorities, and concerns about protection of foreign officials who become whistleblowers.").

84. S. REP. 111-176, at 111 (2010) (citing Assessment of the SEC's Bounty Program, Office of Inspector General, U.S. Sec. & Exchange Comm'n, Report No. 474, Mar. 29, 2010).

85. Bernard Madoff was the perpetrator of an "infamous Ponzi scheme" that existed for decades through his company Bernard L. Madoff Investment Securities LLC. During the course of the fraud, there were approximately 90,000 disbursements of fictitious profits to Madoff investors totaling $18.5 billion. Mr. Madoff pled guilty and was sentenced to 150 years in prison. For more information on the fraud, see *In re* Bernard L. Madoff Inv. Sec., LLC, 440 B.R. 243, 249–53 (Bankr. S.D.N.Y. 2010), *leave to appeal denied*, 2011 WL 3897970 (S.D.N.Y. 2011).

86. *See Assessing the Madoff Ponzi Scheme and Regulatory Failures, Hearing before the Subcomm. on Capital Markets, Insurance, and Government sponsored Enterprises of the Comm. on Financial Service*s, 111th Cong. 4-5 (2009) (statements of Mr. Markopolos).

87. *Id.*

88. The Office of Inspector General had recommended that the program develop specific criteria for recommending award of bounties and incorporating best practices from the DOJ and IRS, among others. *See* OFFICE OF INSPECTOR GENERAL, ASSESSMENT OF THE SEC'S BOUNTY PROGRAM, at iv–v (Mar. 29, 2010) [hereinafter ASSESSMENT OF THE SEC'S BOUNTY PROGRAM], *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2010/474.pdf.

89. *Office of the Whistleblower*, SEC, http://www.sec.gov/whistleblower (last visited Feb. 18,

minimum guaranteed award to successful whistleblowers.[90] However, the office employs only a small staff for what it estimates to be around 30,000 tips each year.[91]

Even assuming the new whistleblower office can correct the prior failings of the SEC, and notwithstanding the SEC's "increased anticorruption commitment . . . and more robust compliance oversight," the fact remains that the SEC is "a very small navy to patrol a very large ocean."[92] The SEC has a well-documented history of being under-resourced.[93] Importantly, Dodd–Frank applies to all securities violations and not just to violations of the FCPA.[94] The scope of violations reported will likely be expansive. Whether FCPA tips will be a high priority is an open question.

The problem with relying solely on the SEC to prosecute crimes is that, historically, the SEC has shown itself incapable.[95] Dodd–Frank assists the SEC only with detection of regulatory violations. Just because a violation is detected, does not necessarily mean that the violation will be prosecuted. As a result, Dodd–Frank's whistleblower provision places too much reliance on the SEC.

2. Whistleblower's Inability to Bring the Claim

Dodd–Frank creates unnecessary work for the SEC in managing a new whistleblower office and program, in addition to its main duties. More SEC bureaucracy is not the answer to enforcing FCPA and serves only to weaken whistleblower representation in a manner that hinders the uncovering of financial crimes.

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90. *See* 15 U.S.C.A. § 78u-6(b)(1)(A) (West 2010).

91. *See* SEC Final Rule Release, *supra* note 21, at 34354.

92. Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 203–04 (2010).

93. *See In re* Nat'l Presto Indus., 347 F.3d 662, 664 (7th Cir. 2003) ("Federal agencies have limited resources, and the SEC in particular is often outgunned by the affluent defendants that it sues."); *In re* SmithKline Beckman Corp. Sec. Litig., 751 F. Supp. 525, 535 (1990) ("Private litigation aids effective enforcement of the securities laws because private plaintiffs prosecute violations that might otherwise go undetected due to the SEC's limited resources."). The SEC itself recognizes that it is limited in resources, see SEC Final Rule Release, *supra* note 21, at 34325 ("[D]ue to our limited resources . . . .").

94. 15 U.S.C.A. § 78u-6(A)(1) (West 2010) ("[C]overed judicial or administrative action means any judicial or administrative action brought by the Commission under the securities laws . . . .").

95. *See* Jerry W. Markham, *The Subprime Crisis-Some Thoughts on a "Sustainable" and "Organic" Regulatory System*, 4 FIU L. REV. 381, 406 (2009) ("The SEC was incapable of detecting or preventing the Enron era scandals, the subprime crisis or even Bernard Madoff's monstrous $50 billion Ponzi scheme."); Michael J. Borden, *The Role of Financial Journalists in Corporate Governance*, 12 FORDHAM J. CORP. & FIN. L. 311, 365 (2007) ("The SEC is incapable of effectively monitoring all corporate activity for fraud.").

Rather than letting the whistleblower become part of the solution in managing the SEC's workload,[96] Dodd–Frank's whistleblower program minimizes the role of the whistleblower to its most basic level—an informant. Whistleblowers are not a part of the litigation, but are merely a piece of the evidence if their tip goes that far. The whistleblower does not have a stake in the matter beyond the potential award that may arise from a successful SEC action. The whistleblower is reliant on the resources and determination of the SEC to bring a claim, litigate, and vociferously battle to vindicate wrongs. While questions exist over whether a whistleblower could intervene in settlements,[97] it seems odd that the whistleblower does not participate in the litigation as the norm, given their interest in the matter.

As a practicing attorney from one of the most successful whistleblower firms in the country has aptly recognized, "The decision whether to shut whistleblowers and their attorneys out of SEC investigations could be the linchpin of whether this new law will be successful . . . ."[98] This may be true, but because Dodd–Frank creates a paradigm that by its very nature minimizes the role of whistleblowers, the failure of the program could be predetermined. While whistleblowers may take steps to assist the SEC, ultimately the critical decision—whether to actually bring a claim—is solely within the discretion of the SEC.

For whistleblowers, the inability to bring a claim themselves means that their tip or information may be lost when it gets to the SEC, similar to what has occurred in the IRS's whistleblower program.[99] Whistleblowers will find no solace in the fact that the new SEC program is based upon the IRS program.[100]

The inability to bring a claim may also mean no claim is ever brought, or even if a claim is brought the whistleblowers might have to fight the government to ensure that they get their fair share.[101] In short,

96. If the FCPA adopted a qui tam provision, the enforcement workload would not overburden the SEC, as private citizens could provide the much needed supplemental resources. *See infra* Part IV.C.

97. *See* Memorandum from Cadwalader, Wickerham & Taft to Clients & Friends, The Dodd-Frank Whistleblower Provisions: Considerations for Effectively Preparing for and Responding to Whistleblowers, n.16, (May 26, 2011), *available at* http://www.cadwalader.com/assets/client_friend/052611DoddFrankWhistleblowerProvisions.pdf.

98. Eric R. Havian, *The SEC Whistleblower Program: How to Avoid Killing a Good Idea*, TRUTHOUT.ORG (Dec. 15, 2010), http://www.truth-out.org/solution-dont-let-wall-street-get-away-with-it-protect-and-reward-sec-whistleblowers65971.

99. *See* MaryClaire Dale, *IRS awards $4.5 Million to Whistleblower*, USA TODAY (Apr. 8, 2011) http://www.usatoday.com/money/perfi/taxes/2011-04-08-irs-whistleblower-taxes-reward.htm ("The accountant filed a complaint with the IRS in 2007 . . . but heard nothing for two years.").

100. *See* S. REP. NO. 111-176, at 111 (2010).

101. The government has fought awards to whistleblowers in a number of contexts. *See, e.g.*,

the whistleblower's inability to bring the claim is a significant disincentive to the whistleblower.

3. Low Risk, High Reward Paradigm

The final administrative concern of Dodd–Frank is the bitter and inequitable paradigm it creates. Generally, whistleblowers must put their careers on the line and take tremendous risk for what they believe is right.[102] However, these difficulties may have disappeared under Dodd–Frank as whistleblowers can submit a tip anonymously and have no requirement to report internally first.[103]

While this is beneficial for the whistleblower, awards under Dodd–Frank may not be commensurate with the efforts of the whistleblower. Essentially, Dodd–Frank creates a lottery mentality for potential whistleblowers.[104] Whistleblowers and their attorneys are likely to receive "a large sum of money for not actually doing a lot of legal work."[105] This paradigm has already created great angst in the business community and defense bar, and ultimately could lead to the new programs undoing.

Currently, some businesses are concerned that Dodd–Frank's whistleblower provision will breed over-reporting and the abrogation of internal controls.[106] This might come to fruition as Congress, in enacting Dodd–Frank, created incentives for reporting without requiring the whistleblower to have some "skin in the game."[107] Dodd–Frank creates an environment where the whistleblower can easily provide a tip to the SEC and then sit back, without any further effort, to await a potential pay-day;[108] the whistleblower only has to fill out a 6-page

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HELMER, *supra* note 28, § 1-4(b) (discussing DOJ marginalizing whistleblower contributions and awards in FCA context); Dennis J. Ventry, Jr., *Whistleblowers and Qui Tam for Tax*, 61 TAX L. 357, 364–67 (2008) (noting hard times of whistleblowers attempting to collect their share of judgments and settlements under IRS's original whistleblower statute).

102. *See supra* note 78 and accompanying text.

103. *See* SEC Final Rule Release, *supra* note 21, at 34301 ("[W]e have determined not to include a requirement that whistleblowers report violations internally.").

104. *See* Lucienne M. Hartmann, Comment, *Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd–Frank Act and the Emergence of "Greedy," the Eighth Dwarf*, 62 MERCER L. REV. 1279, 1303–13 (2011).

105. *Id.* at 1309.

106. *See* Steven J. Pearlman & Dawn Mertineit, *SEC's Rules Implementing Dodd–Frank's Bounty Provisions Provide Whistleblowers with a Dangerous Weapon*, 39 SEC. R. L.J. 141 (2011); *see also* E-mail from Mr. Michael Oxley, *supra* note 4.

107. *See* Ebersole, *supra* note 3, at 162–63.

108. This new paradigm was recognized in the tax whistleblower statute. *See* Ventry, *supra* note 101 at 383. ("[The] current bounty system may encourage *more* whistleblowers to come forward than a qui tam system, because the procedures of a bounty system are less onerous; whistleblowers can simply submit a claim . . . [rather than] hire a lawyer.").

document to submit their tip.[109]

This new paradigm may provide greater protection to the whistleblower, but it also creates problems for both companies and whistleblowers: a whistleblower is subject to minimal risk for a (potentially) considerable reward, and a company is subject to maximum risk with minimal remedies to discourage an employee from acting out of haste or with a lack of information. Such a paradigm will likely increase lobbying against whistleblowers, mar the perception of whistleblowers, and could eventually defeat the program.

Essentially, this "paradigm argument" recognizes the concerns that businesses have over the lack of an internal "report first" requirement and argues that Dodd–Frank failed to go far enough in creating an equitable design that incentivizes reporting while ensuring that the business has an opportunity to address the alleged violation. The end result is opposition from the business community and a program that will further perpetuate stereotypes and pejorative connotations that have stigmatized whistleblowers.[110]

IV. THE CASE FOR A QUI TAM PROVISION IN THE FCPA

If whistleblowers are afforded a proper role—beyond mere informant—the government will be able to do more to combat foreign bribery than it could acting alone. While Dodd–Frank purports to utilize whistleblowers, it falls short.[111] The solution to correct Dodd–Frank's shortcomings and combating foreign bribery is to amend the FCPA to include a qui tam provision because: (1) a qui tam provision would not suffer from Dodd–Frank's shortcomings; (2) a qui tam provision is an excellent regulatory tool for detecting and prosecuting low-visibility crimes; (3) a qui tam provision leverages the strengths of whistleblowers better than Dodd–Frank's whistleblower statute can; (4) a qui tam provision could help clarify and establish the parameters of the ambiguous FCPA; (5) a qui tam provision represents sound public policy in the FCPA; (6) a qui tam provision could be more equitable for businesses than Dodd–Frank. Each of these points is elaborated upon below.

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109. Forms are submitted to the SEC on a Form TCR (Tip, Complaint or Referral). The 6-page (plus instructions) document is available at *Form TCR*, SEC, http://www.sec.gov/about/forms/formtcr.pdf (last visited Feb. 18, 2012).

110. For a sample of stereotypes or negative-connotation names that whistleblowers have been called see, for example, Robert T. Rhoad & Matthew T. Fornataro, *A Gathering Storm: The New False Claims Act Amendments and Their Impact on Healthcare Fraud Enforcement*, 21 HEALTH L. 14, 21 (2009) (greedy bounty hunters); TOM DEVINE ET AL., THE CORPORATE WHISTLEBLOWER'S SURVIVAL GUIDE: A HANDBOOK FOR COMMITTING THE TRUTH xi (2011) (rat, tattletale, fink, and turncoat).

111. *See supra* Part III.

A. A Qui Tam Provision Would not Suffer from Dodd–Frank's Shortcomings

Dodd–Frank's whistleblower provision fails to go far enough as applied to the FCPA because statutory and administrative impediments hinder its success.[112] A qui tam provision, on the other hand, makes sense in the FCPA because it would not suffer from these shortcomings and would better effectuate Congress's goal of enhanced regulatory enforcement.

The statutory impediments of Dodd–Frank[113] would not be applicable to a qui tam provision. First, qui tam provisions would not need to be limited to SEC-only enforcement actions.[114] With a qui tam provision, the whistleblower would file a claim in camera with the courts and notify the applicable enforcement agency.[115] There would be no need for the "related action" requirement either. This would be more in line with the policy of fighting corruption and would not create disparate treatment between public and private companies (and individuals).

Second, a qui tam provision would not be constrained by the one million dollar statutory threshold that currently afflicts Dodd–Frank, as no statutory minimum would be necessary.[116] While the private sector may filter out claims that fail to provide a sufficient return to justify the investment by attorneys, the private sector is better suited to fulfill that role over a broad statutory filter. Attorneys would have the option to pursue claims out of principle or to invest time in smaller bribery claims that might be prosecuted in a shorter amount of time.

Third, qui tam provisions could also allow foreign government employees to bring claims, which is something Dodd–Frank currently bars them from doing.[117] Given their proximity to the crime, foreigner government employees are better situated to have knowledge of bribery. Further, the inclusion of foreign government employees would promote transnational anti-bribery efforts and strengthen Organization for

112. *See supra* Part III.

113. *See supra* Part III.A.

114. Compare this with Dodd–Frank, which incentivizes tips for actions only where the SEC has jurisdiction. *See supra* Part III.A.1.

115. This could be modeled after the FCA's qui tam provision. *See* 31 U.S.C. § 3730(b)(2) (2006) ("The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.").

116. *See supra* Part III.A.2. This could be modeled after the FCA's qui tam provision, which contains no statutory minimum that claims must exceed before they can be brought. *See* 31 U.S.C. §§ 3729–3733 (2006).

117. *See supra* Part III.A.3. This could be modeled after the FCA's qui tam provision, which states, "A *person* may bring a civil action for a violation of [the statute]." 31 U.S.C. § 3730(b) (2006) (emphasis added). Person is defined broadly under 1 U.S.C. § 1 (2006) to include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

Economic Development (OECD) commitments.[118]

Additionally, the FCPA's proposed qui tam provision would not suffer from the administrative concerns of Dodd–Frank.[119] The whistleblower would bring the claim with a qui tam action, and the government would have the option to join in the action.[120] The qui tam relator would bring a necessary supplement of private resources to the under-resourced and overworked SEC. The qui tam relator also would have no concerns over representation like those of the Dodd–Frank whistleblowers.[121] Finally, the qui tam enforcement model would be more equitable in terms of payouts being commensurate with the whistleblower's efforts.[122]

B. A Qui Tam Provision Is an Excellent Regulatory Tool for Detecting and Prosecuting Low-Visibility Crimes

Both fraud and bribery are difficult to detect because they are low-visibility crimes.[123] Despite this inherent difficulty, qui tam provisions have proven themselves undeniably successful in uncovering and prosecuting fraud, and this success can likely be replicated in the context of foreign bribery.[124]

The success of qui tam provisions in uncovering fraud can be attributed to mechanics of the action that uses a "rogue to catch a

118. *See* Letter from National Whistleblower Center to Securities and Exchange Commission, *supra* note 81. For a discussion of the United States' OECD commitments, see generally Robert D. Tronnes, Note, *Ensuring Uniformity in the Implementation of the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 33 GEO. WASH. INTL. L. REV. 97 (2000).

119. *See supra* Part III.B (discussing administrative concerns of Dodd–Frank's whistleblower provision).

120. The FCPA's qui tam provision could be similar to the FCA's. *See* 31 U.S.C. § 3130(b)(4) (2006) ("[T]he Government shall [either] proceed with the action . . . or notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.").

121. *See supra* Part III.B.2 (discussing the lack of whistleblower representation concerns).

122. *See supra* Part III.B.3 (discussing the changing paradigm post Dodd–Frank).

123. *Compare* Hyatt v. Northrop Corp., 883 F. Supp 484, 487 (C.D. Cal. 1995) ("Because of the inherent difficulty in detecting fraud . . . ."), *with* United States v. Myers, 527 F. Supp. 1206, 1229 (E.D. N.Y. 1981) ("[B]ribery is difficult to detect"); *accord* William L. Larson, Note, *Effective Enforcement of the Foreign Corrupt Practices Act*, 32 STAN. L. REV. 561, 569 (1980) ("[I]t is difficult to discover [FCPA] violations . . . because the violations occur outside the United States and both parties to the bribe try to conceal it.").

124. *See* Pamela H. Bucy, *"Carrots and Sticks": Post-Enron Regulatory Initiatives*, 8 BUFF. CRIM. L. REV. 277, 322 (2004) ("The number of suits filed and monetary judgments obtained in qui tam FCA actions, especially when compared to other existing private attorney general actions, shows that the qui tam FCA private justice model is successful."). Within fiscal year 2011 alone, over $4 billion was recovered through state and federal qui tam suits. *See Qui Tam Statistics*, *supra* note 38.

rogue,"[125] which is desirable for the environment in which bribery occurs. Using a "rogue to catch a rogue" means using someone on the inside of the illegal act to turn on his cohorts and provide information relating to the illegal act to the enforcement agency.

As one commentator notes, "Bribery takes place in the shadows. It may never be visible to anyone but the immediate actors."[126] Generally, those with insider information about the bribery are in the best position to come forward with their knowledge. Whistleblowers "are in a unique position to deter and detect noncompliant behavior,"[127] and qui tam provisions allow whistleblowers to utilize their unique position to enforce the law.

Commentators believe that the FCA's qui tam provision can be replicated in other areas,[128] such as protecting national financial markets.[129] According to one scholar, qui tam actions are the only existing "private justice" model that is effective.[130] Qui tam actions have a proven track record for detecting and prosecuting low-visibility crimes, and a qui tam provision in the FCPA could achieve success on par with the FCA's qui tam provision given the similarities between the underlying crimes that both statutes punish.

C. A Qui Tam Provision Leverages the Strengths of Whistleblowers Better Than Dodd–Frank's Whistleblower Statute Can

A qui tam provision is the mechanism that best leverages the power of the government with the resources and value of the whistleblower.[131] By denying enforcement power to the whistleblower in Dodd–Frank, Congress passed a statute that ignores what has been undeniably successful in the FCA. Congress also ignored an opportunity to give a

125. CONG. GLOBE, 37th Cong., 3d Sess. 955–56 (1863) (remarks of Mr. Howard).

126. Daniel K Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 689 (2004).

127. Ventry, *supra* note 101, at 382; *see also* HELMER, *supra* note 28, § 2-3 ("[Q]ui tam action . . . [is] an invaluable aid in detecting and prosecuting low-visibility offenses.") (citation omitted).

128. *See, e.g.*, Ventry, *supra* note 101 (tax); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384 (2000) (civil rights); Peter S. Menell, *Economic Implications of State Sovereign Immunity from Infringement of Federal Intellectual Property Rights*, 33 LOY. L. A. L. REV 1399, 1444 (2000) (intellectual property rights); Catherine T. Struve, *The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation*, 5 YALE J. HEALTH POL'Y L. & ETHICS 587 (2005) (surveillance of potentially harmful drugs).

129. Bucy, *supra* note 35, at 76 ("The qui tam FCA private justice model should be expanded to cover protection of . . . national financial markets.").

130. *Id.* at 79 ("This Article argues that only one existing private justice model, the qui tam action in the FCA . . . is effective.").

131. *See id.* at 58–59.

needed supplement to the enforcement agencies' limited resources.[132]

Whistleblower programs that leave enforcement power solely with the government have not matched the success that qui tam suits have enjoyed, as demonstrated by examples from the SEC and IRS whistleblower programs.[133] Enforcement agencies are unable to match the resolve and resources of private individuals with prosecution capabilities. This is one of the reasons courts found an implied right of action in many securities laws—because the government lacks sufficient resources to adequately enforce its laws.[134] Further, given that whistleblowers are often victims themselves,[135] they have a connection to the crime, and their motivation often far exceeds that of the SEC and DOJ.[136] These intangibles make the whistleblower a truly ardent prosecutor.

History shows that allowing private citizens to sue on behalf of the government, and not just provide a tip, leads to better enforcement of the law. Both in England and the United States, qui tam actions have long been employed when government enforcement was insufficient.[137]

As one Senator stated during hearings regarding the FCA in the

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132. *See id.* at 53 (stating that qui tam in the FCA has been "extraordinarily successful as a regulatory tool" and discussing the reasons why).

133. The IRS whistleblower program and the SEC whistleblower program have been criticized for being ineffective, see, for example, Michelle M. Kwon, *Whistling Dixie About the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions*, 29 VA. TAX REV. 447, 451 (2010) (stating that the prior IRS whistleblower program was underused and ineffective); Ken Barry, *New Report from the GAO Flags Problems with the IRS Whistleblower Program*, ACCOUNTINGWEB (Sept. 21, 2011), http://www.accountingweb.com/topic/tax/new-report-gao-flags-problems-irs-whistleblower-program (detailing GAO criticisms to the newly revamped IRS whistleblower program); ASSESSMENT OF THE SEC'S BOUNTY PROGRAM, *supra* note 88 (finding original SEC whistleblower program ineffective).

134. *See* deHaas v. Empire Petroleum Co., 435 F.2d 1223, 1230 (10th Cir. 1970) ("[P]rivate enforcement of the security laws is necessary due to the limited resources of the SEC.").

135. Far too frequently the whistleblowers themselves are subject to retaliation as a result of coming forward. *See, e.g.*, Rebecca L. Dobias, *Amending the Whistleblower Protection Act: Will Federal Employees Finally Speak Without Fear?*, 13 FED. CIR. B.J. 117, 117 (2003) (stating a study found one in fourteen federal employees experienced retaliation after whistleblowing); *Whistleblower Woes*, 271 SCIENCE 35, 35 (Jan. 5, 1996), *available at* http://www.sciencemag.org/content/271/5245/35.full.pdf (finding two-thirds of scientific whistleblowers experience negative consequences for their actions, including one in four losing their job).

136. The employees of the SEC and DOJ do not have the kind of first-hand experience with the crime, nor will they have been retaliated against. A troubling concern that some commentators have suggested is that the SEC's motivations for enforcing crimes against major companies is questionable as SEC employees often work for these same major companies following their SEC employment, see, for example, William D. Cohan, *Destruction at the SEC?*, BUSINESSWEEK (Sept. 1, 2011), http://www.businessweek.com/magazine/destruction-at-the-sec-09012011.html (arguing for a termination and restart to the SEC as it has "long had a too-cozy relationship with Wall Street").

137. *See* HELMER, *supra* note 28, §§ 2-1, 2-2 ("William Holdsworth, a leading English historian, [said] the reason for the development of qui tam provisions was that England had no organized police force or system of inspectors, so the Government needed to enlist [whistleblowers].") (citing 4 HOLDSWORTH, A HISTORY OF ENGLISH LAW (3d ed. 1923).

1940s, "What harm can there be if 10,000 lawyers in America are assisting the Attorney General of the United States in digging up war frauds?"[138] The same can be said within the context of the FCPA. Is there harm from having 10,000 lawyers assisting the DOJ and SEC in detecting and deterring foreign bribery?[139] From an enforcement perspective, there is likely no harm.

D. A Qui Tam Provision Could Help Clarify and Establish the Parameters of the Ambiguous FCPA

Under the current FCPA enforcement environment, the DOJ and SEC have been criticized for basing their prosecutions on dubious and untested theories,[140] yet businesses have not challenged these theories in court, as it often makes more sense for them to reach a settlement with the enforcement agencies.[141] These settlements do not get scrutinized by the courts.[142] As a result, the enforcement agencies act as "the prosecutor, judge, and jury" in any given case.[143] Wielding this enforcement power, the FCPA has been interpreted to mean whatever these agencies have determined it to mean.[144] The lack of judicial review is a problem within the FCPA; the "view that something means whatever one chooses it to mean makes for enjoyable reading, but bad law."[145] Some believe that the FCPA, as an ambiguous statute, has made for bad law.[146]

If the paradigm of enforcement were to shift, with individual plaintiffs bringing suit on behalf of the government, then cases may

138. HELMER, *supra* note 28, § 5-5(a), 294 n.37 (citing 89 CONG. REC. 7607 (daily ed. Sept. 17, 1943) (remarks of Sen. Langer)).

139. Perhaps FCPA qui tam litigation would be an ideal area for jobless law school graduates to pursue! *See* Nathan Koppel, *U.S. News: Bar Raised for Law-Grad Jobs—Employment Prospects Dim as Firms Retrench, Derailing Career Paths for Many*, WALL ST. J., May 6, 2010, at A3 (discussing bleak job market for recent law graduates).

140. *See* Koehler, *supra* note 41.

141. *Id.* at 929.

142. *Id.* at 929–30.

143. Michael Volkov, *The FCPA & "Voluntary Disclosure": An Enigmatic Threat to Due Process*, 20 WLF LEGAL OPINION LETTER (Oct. 7, 2011), *available at* http://www.wlf.org/Upload/legalstudies/legalopinionletter/10-7-11Volkov_LegalOpinionLetter.pdf.

144. Cortney C. Thomas, *The Foreign Corrupt Practices Act: A Decade of Rapid Expansion Explained, Defended, and Justified*, 29 REV. LITIG. 439, 457 (2010) ("[P]rosecutors have had near-unfettered abilities to push the prosecutorial envelope, creating new tools by means of diversion agreements and broadening the scope of the Act.").

145. Harrington Mfg. Co. v. White, 475 F.2d 788, 797–98 n.6 (5th Cir. 1973) (discussing the difficulty of patent claim construction).

146. *See, e.g.*, Taylor, *supra* note 59 at 861 ("[T]he legislation ambiguously defines prohibited conduct and its provisions lack an adequate standard by which to determine the nature of contemplated activity").

actually be litigated before a judge.[147] While the DOJ and SEC have large "carrots and sticks" at their disposal to persuade companies to settle,[148] individual plaintiffs do not. Under the proposal in this Comment, individuals would have to litigate in the courts.

Litigation could led to an increased amount of case law that might clarify the myriad of ambiguities that currently afflict the FCPA, assuming that litigation actually clarifies law rather than creates further ambiguity. It could be true that attorneys may intentionally try to create ambiguity, but determining the meaning of a particular term or terms in a statute can be achieved through litigation. For example, in *United States v. Kay*, one of the few FCPA cases that went to trial, the meaning of the business nexus element of the FCPA was clarified.[149]

The idea that qui tam actions would bring an increased amount of case law may be criticized under the following circumstances: where the individual plaintiff brings suit and the government joins in the litigation. In such circumstances, the company may choose to settle given the aforementioned incentives the government has at its disposal.[150] Such a result would receive little, if any, judicial review, leaving the case law neither better nor worse. However, if the FCA's rapid expansion of cases following significant strengthening of its qui tam provision is any indication of what might result in the FCPA, the concern that case law will not expand under this Comment's proposal is unlikely to materialize.[151]

E. A Qui Tam Provision Represents Sound Public Policy in the FCPA

Professor Mike Koehler, a leading FCPA scholar and blogger, has opined that Dodd–Frank as applied to the FCPA represents bad public

147. The FCA's qui tam provision is illustrative. In the early 1980s government contractor fraud was estimated to have been costing the government $50 billion a year, yet few, if any, cases were being brought. *See* Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL'Y 89, 89 (1997). Following significant strengthening of the qui tam provision with the 1986 amendments to the act, the qui tam relators were able to recover those billions that would have otherwise been lost to fraud. *See* Sydney Strickland, *A Policy-Based Solution to the False Claim Act's Faulty Incent Structure*, 35 J. LEGAL PROF. 449, 459 (2011); *see also* Joseph E.B. White, *U.S. False Claims Act: Deputizing the Public to Combat Fraud*, 38 FALSE CLAIMS ACT & QUI TAM Q. REV. 17 (2005) (showing statistics that since 1986, thousands of qui tam cases has been filed).

148. Koehler, *supra* note 41, at 924–30.

149. 359 F.3d 738, 761 (5th Cir. 2004) (finding that the business nexus element did not go to the FCPA's "core of criminality").

150. *See* Koehler, *supra* note 41, at 924–30.

151. *See* HELMER, *supra* note 28, at xi–xii (discussing how in 1984 the author could read every opinion dealing with the FCA in less than 2 hours, but that following the 1986 amendments over 5,000 cases had been filed).

policy.[152] Professor Koehler would likely find the inclusion of a qui tam provision within the FCPA to also represent bad public policy.[153] According to the argument of Professor Koehler, "A settled SEC FCPA enforcement action does not necessarily represent the triumph of the SEC's legal position over the company's . . . but rather reflects a risk-based decision primarily grounded in issues other than facts and the law."[154] Professor Koehler asserts that because of this risk-based decision making and the fact that the FCPA crimes are "enforced like no other security violation," it does not make sense to punish corporations for behavior whose legality cannot be determined given the parameters of the FCPA.[155]

This argument, taken to its logical conclusion, would argue against any sort of enforcement of the FCPA, as the parameters of the law have never been firmly established. The statute has been described as ambiguous since the beginning of its existence.[156] According to the DOJ, the statute's ambiguity may actually be necessary flexibility to take into account the nature of foreign bribery.[157] If the parameters must be completely delineated prior to enforcement, the statute may never be useable.

What is unaccounted for in Professor Koehler's argument is the role that qui tam provisions can play in establishing the parameters of the law.[158] Including a qui tam provision is sound public policy, notwithstanding the lack of parameters the current FCPA provides. In fact, the lack of parameters is all the more reason for the law to adopt a qui tam provision. Ambiguous statutes are nothing new, and where legislatures have failed to thoroughly articulate parameters of a law, courts have fulfilled that role.[159] It is axiomatic that the "province and

152. *See* Letter from Mike Koehler, Professor Butler Univ. to Securities and Exchange Commission (Sept. 3, 2010), *available at* http://www.sec.gov/comments/df-title-ix/whistleblower/whistleblower-10.htm [hereinafter Letter to SEC from Mike Koehler]. Professor Mike Koehler runs a blog http://www.fcpaprofessor.com/ and has testified before Congress in regards to enforcement the FCPA.

153. E-mail from Mike Koehler, Assistant Professor of Business Law, Butler Univ., to author (Aug. 11, 2011 12:27 EST) (on file with author).

154. *See* Letter to SEC from Mike Koehler, *supra* note 152.

155. *See id.*

156. *See supra* notes 59–61 and the citations therein.

157. For example, Greg Andres, acting Deputy Assistant Attorney General argued that the "law's treatment of foreign officials needed to be *flexible* to account for the various governments around the world." *See* Joe Palazzolo, *Sensenbrenner Will Introduce FCPA Bill*, WALL ST. J. BLOG (June 14, 2011) http://blogs.wsj.com/corruption-currents/2011/06/14/sensenbrenner-will-introduce-fcpa-bill/ (emphasis added).

158. *See supra* Part IV.D.

159. *See* Elizabeth R. Baldwin, Note, *Damage Control: Staking Claim to Employment Law Remedies for Undocumented Immigrant Workers After* Hoffman Plastic Compounds, Inc. v. NLRB, 27 SEATTLE U. L. REV. 233, 264 (2003) ("[W]hen Congress has drafted an ambiguous statute, our system

duty of the judicial department [is] to say what the law is."[160] Our system of common law is designed to expound upon statutes. As such, qui tam litigation could provide a viable mechanism for courts to delineate the parameters of the FCPA.

Buttressing the policy argument in favor of a qui tam provision within the FCPA is the effect qui tam actions have on reinforcing American democratic principles. "[C]itizen involvement in the enforcement of public policy confirms the importance of the individual to the functioning of an effective democracy."[161]

Studies have shown whistleblowers' motivations reflect four themes: integrity, altruism or public safety, justice, and self-preservation.[162] These are the kinds of social norms that the United States should seek to foster. A qui tam action allows the type of citizen involvement that creates a successful outcome for the government, the individual, and society generally. "People will have more faith in a system that they feel they have more influence over," and "corrupt acts will be deterred as a result of the qui tam actions . . . ."[163] Accordingly, strong public policy favors adding a qui tam provision within the FCPA.

F. A Qui Tam Provision Could Be More Equitable for Businesses Than Dodd–Frank

Dodd–Frank's "lottery mentality"[164] has made the whistleblower provision controversial and unpalatable to businesses. While the general hostility of businesses towards whistleblowers is unlikely to disappear completely, the model represented by qui tam actions is one that businesses could at least find more equitable.

A qui tam plaintiff must actually confront the business in a lawsuit, reveal their identity, and substantiate their claims while exerting greater thought and effort than Dodd–Frank whistleblowers. In other words, a qui tam plaintiff actually has "skin in the game," as compared to a Dodd–Frank whistleblower.[165] As between an invested and transparent

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of separation of powers mandates that courts interpret what the law says."); *see also* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002) (discussing the value in legislatures drafting ambiguous statutes).

160. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

161. CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 1:13 (2011).

162. Aaron Kesselheim et al., *Whistle-Blowers Experiences in Fraud Litigation Against Pharmaceutical Companies*, 362:19 NEW ENG. J. MED. 1832 (May 13, 2010).

163. Petty, *supra* note 64, at 876.

164. Hartmann, *supra* note 104, at 1303–13.

165. *See* Ebersole, *supra* note 3, at 162–63; *see also supra* Part III.B.3.

qui tam relator and a stealth whistleblower with a lottery mentality, it would seem that the business should favor the qui tam relator.

The reality for businesses is that Dodd–Frank is on the books and likely to remain there for the foreseeable future.[166] Amending the FCPA to include a qui tam provision will cause minimal or no harm to businesses as they will already have in place compliance controls in response to Dodd–Frank. As commentators have suggested, in response to Dodd–Frank businesses should: (1) update internal controls and ethics programs to include educating and training employees, (2) ensure proper reporting procedures are in place, and (3) respond quickly to potential misconduct.[167] These measures are precisely what would need to be done if the FCPA were to adopt a qui tam provision. Since businesses likely will have already implemented these measures as a result of Dodd–Frank, businesses will suffer no additional costs.

Some critics may argue that a qui tam provision in the FCPA would result in increased litigation and meritless claims, thereby imposing additional costs.[168] This argument was made with the FCA, but the FCA qui tam experience has shown results that go against what critics believed: the rate of meritless qui tam claims was roughly equal to that of civil claims overall.[169] Furthermore, mechanisms similar to those included within the FCA can be included within the revised FCPA statute to minimize frivolous claims.[170] Minimizing frivolous lawsuits can also be accomplished by the enforcement agencies actively supervising the qui tam suits.[171]

A qui tam action represents a better model than Dodd–Frank's whistleblower provision because the qui tam plaintiff must actually make efforts to substantiate their allegations and are financially, emotionally, and physically tied to their claims. It is unlike "playing the

166. The statute includes a provision for Congress to be kept informed of its utility, see 15 U.S.C.A. § 78u-6(g)(5) (West 2010).

167. *See* JORDAN ETH ET AL., COPING WITH THE NEW DODD–FRANK WHISTLEBLOWER RULES, 1904 PLI/CORP 257, 275–76 (2011).

168. *See* William E. Kovacic, *Whistleblower Bounty Lawsuits As Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1825 (1996) ("Decentralized enforcement systems can generate excessive litigation, elicit substantial numbers of nuisance suits, and provide tools by which firms strategically use the courts to impede efficient behavior by rivals.") (internal citations omitted); Paula J. Zimmerman, Note, *The Sequoia Significance: The Role of the Civil False Claims Act's Dismissal Provision in Procurement Reform*, 29 PUB. CONT. L.J. 329, 345 (2000) ("As more [qui tam] suits are being filed, it is inevitable that there are more meritless suits among them.").

169. *See Law and Transnational Corruption*, *supra* note 64, at 130.

170. *See, e.g.*, 31 U.S.C. § 3730(d)(4) (2006) ("If the government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.").

171. *See* Bucy, *supra* note 35, at 74.

lottery" in that it requires more than simply reporting a company's potential violation to the SEC. Further, a qui tam provision likely poses no additional costs to businesses. As such, a qui tam provision should be preferred by businesses over what Dodd–Frank currently affords.

V. CONCLUSION

The time is now for Congress to amend the FCPA. Several individuals have recently testified before Congress suggesting that the statute be revised, and congressional leaders have mulled amendments.[172] Congressman Jim Sensenbrenner, the American Bar Association, and the Chamber of Commerce, among others, have all shown a desire to see the statute reformed.[173]

If the FCPA is amended, Congress should include a qui tam provision within the revised FCPA. The storied qui tam provision has an extensive history of providing a viable mechanism for assisting enforcement when the underlying crimes were difficult to detect and government resources were scarce. Qui tam actions have a proven track record of being one of the most successful government programs[174] that actually *returns* money to the Treasury Department each year.

While businesses and some commentators may think that Dodd–Frank's whistleblower provision has gone too far, this is simply not true as applied to the FCPA. Dodd–Frank's whistleblower provision did not go far enough, and adopting a qui tam provision is the solution.

Finally, anyone concerned about including a qui tam provision within the FCPA should heed the words of Greg Andres, acting United States Deputy Assistant Attorney General: "Our view is if companies aren't paying bribes, then they don't have anything to worry about."[175] If companies or individuals are not bribing foreigners, then should it really matter to them how or by whom a statute prohibiting bribery is enforced?

172. *See supra* note 62.

173. *See* FCPA PROFESSOR, http://www.fcpaprofessor.com/category/fcpa-reform (last visited Feb. 18, 2012) (containing content that is updated frequently and an archive of blog posts from FCPA Professor Mike Koehler relating to reforming the FCPA).

174. The term "government program" is used loosely in this sentence to recognize that qui tam provision allows private citizens to sue on the government's behalf, and in this sense, functions as a program for the benefit of the government.

175. Palazzolo, *supra* note 157.