

**THE CASE FOR AN FCPA EXCEPTION TO DODD-FRANK’S
ANTI-RETALIATION PROVISION**

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“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹

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1. LOUIS D. BRANDEIS, OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT 92 (1914).

I. INTRODUCTION

Congress passed the Foreign Corrupt Practices Act (“FCPA”) in 1977 to combat foreign bribery and to prevent publicly-traded companies from maintaining inadequate books and records.² Whistleblowers are critical to FCPA compliance and enforcement because evidence supporting such violations is difficult (if not impossible) to discover without access to inside company information.³ Whistleblower protection laws function to encourage whistleblowers to come forward and report corporate impropriety without fear of employer retaliation.⁴ Certain FCPA whistleblowers, however, remain unprotected under current federal whistleblower protection laws.

When Congress amended the Securities and Exchange Act of 1934 (“Exchange Act”) to include the FCPA, it attempted to fit a square peg in a round hole.⁵ Indeed, the FCPA is not a traditional securities law at all. Notably, the Securities and Exchange Commission (“SEC”) and the Department of Justice (“DOJ”) jointly enforce the FCPA, imposing both civil and criminal penalties upon violators.⁶ Further, certain sections of the FCPA expressly regulate non-issuer domestic concerns (i.e., U.S. residents).⁷ The securities laws, including the Exchange Act, with few exceptions, largely regulate publicly-traded issuers.⁸ Distinct from most securities laws (and U.S. laws generally), the FCPA also carries extraterritorial application, permitting the federal government to regulate and prosecute foreign companies with de minimis U.S. connections.⁹ Nonetheless, Congress intentionally placed the FCPA within the realm of the securities laws by including it in the Exchange Act.

Notwithstanding the FCPA’s broad scope, it contains no whistleblower protection provision. In fact, the Dodd-Frank Wall Street

2. 15 U.S.C. §§ 78dd-1 to -3 (2012).

3. See Gerard Sinzduk, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1635–36 (2008).

4. Peter D. Banick, Case Note, *The “In-House” Whistleblower: Walking the Line Between “Good Cop, Bad Cop,”* 37 WM. MITCHELL L. REV. 1868, 1875–76 (2011).

5. See *id.* at 1879 (labeling the FCPA’s economic incentives “uncommon” among federal statutes).

6. See §§ 78dd-1 to -3; see also *Spotlight on Foreign Corrupt Practices Act*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/spotlight/fcpa.shtml> (last visited Feb. 5, 2016).

7. § 78dd-2(a).

8. Cf. *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012) (“[T]he court disagrees with the defendants’ contention that the DFA applies only to public companies. . . . [T]he DFA anti-retaliation provisions may apply to privately held companies under appropriate circumstances . . .”).

9. § 78dd-2(i).

Reform and Consumer Protection Act of 2010 (“Dodd-Frank”) provides the only substantive federal statutory recourse FCPA whistleblowers have against employer retaliation.¹⁰ Recognizing the importance of incentivizing individuals to report securities law violations, Congress included a whistleblower protection program as part of Dodd-Frank.¹¹ The Dodd-Frank whistleblower program provides qualifying whistleblowers with a bounty for reporting certain tips and grants statutory protection against employer retaliation.¹² Though the FCPA was enacted as an amendment to the Exchange Act, one of the most robust securities laws in the country, Dodd-Frank does not adequately protect all whistleblowers who report valid FCPA violations. Indeed, Dodd-Frank’s whistleblower program has been held to protect only FCPA whistleblowers who report books and records abuses by issuers, leaving other FCPA whistleblowers, such as those who report bribery violations, exposed to employer retaliation.¹³

Dodd-Frank treats whistleblowers differently depending on who reports the tip, to whom the tip is reported, and the nature of the involved company’s corporate structure.¹⁴ This Note will examine the gaps where Dodd-Frank’s whistleblower program fails to adequately protect FCPA whistleblowers. To properly address these gaps, this Note argues that Congress should amend Dodd-Frank’s anti-retaliation provision to create an FCPA exception that eliminates the issuer/non-issuer distinction as it applies to FCPA whistleblowers and that permits the extraterritorial application of Dodd-Frank’s anti-retaliation provision to qualifying foreign whistleblowers reporting valid FCPA violations.

II. THE WHISTLEBLOWER’S ROLE IN SOCIETY

If sunlight is the best of disinfectants, whistleblowers function as such sunlight in corporate America. Whistleblowers encourage legal compliance on the part of corporations and employers and illuminate corporate wrongdoings that would otherwise go undetected.¹⁵ Clandestine corruption and legal noncompliance threaten consumers, shareholders,

10. See Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376.

11. §§ 78u-6(b), -7(c).

12. *Id.* §§ 78u-6(b), -6(h), -7(c).

13. See, e.g., *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 992–98 (M.D. Tenn. 2012).

14. See *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 183 (2d Cir. 2014); *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623–29 (5th Cir. 2013); *Nollner*, 852 F. Supp. 2d at 992–98.

15. See Banick, *supra* note 4, at 1874–76.

employees, clients, and the federal government.¹⁶ Whistleblowers help deter illegal activity by merely maintaining a presence.¹⁷ The risk that someone will report unscrupulous behavior and potentially implicate the company remains constant.¹⁸

The SEC lacks the requisite knowledge and resources to uncover all instances of corporate misconduct on its own.¹⁹ Insiders with access to information are better positioned to expose fraud and illegality.²⁰ It often costs the insider nothing to discover such information, and typically he or she has the necessary expertise to identify and analyze the extent of the misconduct.²¹ Some illegality may be so deeply engrained in the way business is done that outsiders would be unable to discover it even if they had access to the information.²² Whistleblowers assist SEC and DOJ enforcement by providing information and expertise that may otherwise be unavailable.²³

Whistleblowers also benefit internal corporate compliance efforts.²⁴ Whistleblowers are in a position to inform supervisors of wrongdoing perpetrated by rogue employees.²⁵ For example, if a whistleblower discovers that an executive has been paying bribes to foreign officials against company policy, the whistleblower can inform the company, which in turn can work with the SEC and the DOJ. Such collaboration mitigates potential litigation and enforcement costs, as cooperation by wrongdoers typically reduces the resulting penalty.²⁶ The company then

16. For example, if a corporation skirts safety requirements to maximize production outputs, consumers and employees could bear the brunt of the burden. Similarly, if a company artificially inflates its stock price by engaging in corruption, or is maintaining a multimillion dollar slush fund for purposes of bribing foreign officials, shareholders could be harmed. It is the SEC's mission to prevent such impropriety and to mitigate these risks.

17. See Banick, *supra* note 4, at 1874–75.

18. See *id.*

19. See STEPHEN J. CHOI & A. C. PRITCHARD, *SECURITIES REGULATION: CASES AND ANALYSIS* 770–71 (4th ed. 2015).

20. Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2215 (2010).

21. See *id.* at 2214–15.

22. See *id.* at 2215.

23. See Elizabeth C. Tippet, *The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes-Oxley Mean for Employment Law*, 11 EMP. RTS. & EMP. POL'Y J. 1, 22 (2007) (“The law enforcement role of whistleblowers has become increasingly central as the budgets of regulatory agents shrink.”).

24. Matt A. Vega, *Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act “Bounty Hunting.”* 45 CONN. L. REV. 483, 493, 503–04, 516–17 (2012).

25. See Tippet, *supra* note 23, at 22.

26. Andrew Ceresney, Dir., U.S. Sec. & Exch. Comm'n Div. of Enft, Remarks on 31st International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2014), <http://www.sec.gov/News/Speech/Detail/Speech/1370543493598#VPuOUktYVg0>.

has the opportunity to correct the systemic shortcomings that facilitated the misconduct in the first place.

III. HISTORY OF THE FCPA

Congress passed the FCPA in 1977 after discovering that a number of U.S. companies had bribed foreign officials to further their global initiatives.²⁷ While the FCPA seeks to prevent the bribery of foreign officials, it “has its roots in a homegrown corruption scandal.”²⁸ Indeed, the FCPA has been described “as an outgrowth of the post-Watergate domestic crisis in confidence.”²⁹ By the 1970s, it seemed international bribery was the way domestic corporations conducted business around the world.³⁰ Companies in many different markets were implicated in bribery schemes.³¹ The most notable involved Lockheed Martin, one of the largest aerospace and defense contractors.³² In 1971, Congress provided Lockheed Martin “with a \$250 million federal loan guarantee to [save it from] bankruptcy.”³³ The Emergency Loan Guarantee Board supervised the disbursement to Lockheed Martin and ultimately discovered that the company had paid more than \$22 million in bribes to several foreign governments, including Japan, Italy, and the Netherlands, to guarantee contracts for military aircraft.³⁴ Because the

27. Joe Palazzolo, *From Watergate to Today, How FCPA Became So Feared*, WALL ST. J., <http://online.wsj.com/articles/SB10000872396390444752504578024791676151154> (last updated Oct. 2, 2012).

28. *Id.*

29. Andrew Brady Spalding, *Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 359 (2010).

30. *See id.*

31. *See* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 932–34 (2012). Companies implicated in bribery scandals included Gulf Oil, Exxon Mobil, and Northrop Grumman. *Id.* at 934. Another bribery scandal involved the banana distributor, United Brand. *See* John C. Coffee, Jr., *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1116 (1977). The SEC began investigating its Chairman Eli Black just before his shocking suicide on February 3, 1975. *Id.* The SEC’s investigation revealed that Black and the company had made a series of payments to government officials in Honduras amounting to more than \$1.25 million. *Id.* These bribes helped Black avoid an export duty on bananas. *Id.* The “Banagate Scandal” “shifted the focus of both [the] SEC and popular attention from illegal domestic political contributions to the broader issues arising out of foreign and commercial bribery.” *Id.*

32. *See* Koehler, *supra* note 31, at 934–35.

33. Andrew Brady Spalding, *The Irony of International Business Law: U.S. Progressivism and China’s New Laissez-Faire*, 59 UCLA L. REV. 354, 372 (2011).

34. 1 GARY GIROUX, *BUSINESS SCANDALS, CORRUPTION, AND REFORM: AN ENCYCLOPEDIA* 233 (2013); Spalding, *supra* note 33, at 372.

government had distributed significant funds to Lockheed Martin during the time the company admitted to paying bribes to foreign officials, Congress became especially concerned about corporate corruption in international business dealings.³⁵ These events cast doubt that U.S. companies were engaging in fair business practices abroad.³⁶ In the wake of the Lockheed Martin scandal, the SEC launched investigations into more than 400 U.S. companies.³⁷ These companies, motivated by the prospect of winning overseas contracts, admitted making payments to foreign officials and politicians through offshore slush funds totaling more than \$300 million.³⁸

Consistent with the SEC's investor protection mission, the SEC was primarily concerned with whether the companies were required to publicly disclose bribery and its cover-up to investors.³⁹ At the time, there were no laws prohibiting the bribery of foreign officials. As such, Congress became concerned with the ethical implications and foreign policy consequences of such rampant bribery.⁴⁰ Idaho Senator Frank Church, who spearheaded the congressional investigation, maintained: "[W]e cannot close our eyes to this problem. It is no longer sufficient to simply sigh and say that is the way business is done. It is time to treat the issue for what it is: a serious foreign policy problem."⁴¹ In a House hearing, Representative Solarz of New York remarked:

The conduct of commercial operations by foreign nations in a morally shabby manner is no excuse for American citizens to engage in such scandalous activities as well. . . .

. . . .

. . . [W]hat is at stake here is really . . . the reputation of our own country, and . . . we have an obligation to set a standard of honesty and integrity in our business dealings not only at home

35. Koehler, *supra* note 31, at 935.

36. *See id.* at 935–36.

37. RICHARD L. CASSIN, *BRIBERY ABROAD: LESSONS FROM THE FOREIGN CORRUPT PRACTICES ACT 150* (2008).

38. *Id.*

39. Koehler, *supra* note 31, at 933.

40. *Multinational Corporations and United States Foreign Policy: Hearings Before the Subcomm. on Multinational Corps. of the S. Comm. on Foreign Relations*, 94th Cong. 1–2 (1975) (statement of Frank Church, Chairman, Subcommittee on Multinational Corporations).

41. *Id.* at 2.

but also abroad which will be a beacon for the light of integrity for the rest of the world.⁴²

President Jimmy Carter expressed his “belief that bribery is ethically repugnant and competitively unnecessary. Corrupt practices between corporations and public officials overseas undermine the integrity and stability of governments and harm [U.S.] relations with other countries. . . . [W]idespread overseas bribery ha[s] eroded public confidence in our basic institutions.”⁴³

Even after the FCPA’s enactment, the bribery of foreign officials remains rampant and problematic.⁴⁴ According to Alexandra Wrage, President of TRACE Anti-Bribery Compliance Solutions, such bribery continues to be “a pre-condition for terrorism . . . —[which facilitates] false documentation and [the] moving [of] weapons.”⁴⁵ Bribery helps tainted pharmaceuticals reach foreign markets, as well as other products that may put consumers at risk.⁴⁶ Because of bribery, there have been documented instances of lead paint in children’s toys reaching the market.⁴⁷ Contaminated milk, toxic toothpaste, poison pet food, and other widely consumed products have also reached markets as a result of bribery.⁴⁸ Bribery is a transnational crime that facilitates other crimes, including drug trafficking, human trafficking, and environmental harms.⁴⁹ The FCPA, and the increase in U.S. enforcement, seeks to alleviate these harms by holding perpetrators accountable at both the individual and corporate levels.⁵⁰

42. *The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int’l Econ. Policy of the H. Comm. on Int’l Relations*, 94th Cong. 4–5 (1975) [hereinafter *American Multinational Corporations Abroad: Hearings*] (statement of Rep. Stephen J. Solarz, Member, Subcommittee on International Economic Policy, House Committee on International Relations).

43. Jimmy Carter, *Foreign Corrupt Practices and Investment Disclosure Bill Statement on Signing S. 305 into Law*, AM. PRESIDENCY PROJECT (Dec. 20, 1977), <http://www.presidency.ucsb.edu/ws/index.php?pid=7036>.

44. See Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT’L L. 155, 157 (2009).

45. *FCPA—Is the Cure Worse than Disease*, WALL ST. J. (June 17, 2014), <http://www.wsj.com/video/cfo-network-fcpa-is-the-cure-worse-than-disease/780796FE-FDB3-449B-9009-99054B29893B.html?mod=googlewsj#>. Alexandra Wrage calls Bribery a “barnacle crime” because it is frequently present when other crimes are committed. See *id.*

46. Spahn, *supra* note 44, at 211–12.

47. See *id.* at 211.

48. See *id.*

49. See *FCPA—Is the Cure Worse than Disease*, *supra* note 45.

50. See *id.*

A. *Statutory Framework of the FCPA*

The FCPA is the first piece of legislation of its kind in the world, designed to restore confidence in American business practices both domestically and internationally.⁵¹ The FCPA has two key provisions, both discussed below: the anti-bribery provision and the books and records provision.⁵²

The anti-bribery provision, jointly enforced by the SEC and the DOJ, binds three categories of persons and their agents: issuers,⁵³ domestic concerns,⁵⁴ and “foreign nationals or businesses . . . who take any action in furtherance of a corrupt payment while within the territory of the United States.”⁵⁵ The last category exposes foreign companies to liability by reaching them regardless of whether they maintain their principal place of business in the United States or if they are U.S. residents.⁵⁶

The FCPA prohibits the aforementioned categories (and their agents) from:

- 1) “mak[ing] use of the mails or any means or instrumentality of interstate commerce”;⁵⁷
- 2) “in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift,

51. See Spalding, *supra* note 33, at 370–71; see also Michael B. Runnels & Adam M. Burton, *The Foreign Corrupt Practices Act and New Governance: Incentivizing Ethical Foreign Direct Investment in China and Other Emerging Economies*, 34 *CARDOZO L. REV.* 295, 296 (2012).

52. Runnels & Burton, *supra* note 51, at 306.

53. 15 U.S.C. § 78dd-1(a) (2012). “Issuers” are companies with securities registered in the United States or that are required to file periodic reports with the SEC. *Id.*

54. *Id.* § 78dd-2(h)(1)(A)–(B). “Domestic concerns” include:

- (A) any individual who is a citizen, national, or resident of the United States; and
- (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

Id.

55. ROBERT W. TARUN, *THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS 1* (2d ed. 2012); *accord* § 78dd-3.

56. TARUN, *supra* note 55, at 1.

57. §§ 78dd-1(a), -2(a), -3(a).

promise to give, or authorization of the giving of anything of value”;⁵⁸

- 3) to any a) “foreign official,” b) “any foreign political party or [party] official[s],” c) “any candidate for foreign political office,” d) any official “of a public international organization,” or e) “any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to [the previously mentioned parties]”;⁵⁹
- 4) for the purpose of a) “influencing any act or decision of [the bribed party],” b) “inducing [the bribed party] to do or omit to do any act in violation of the lawful duty of [the bribed party],” c) “securing any improper advantage;” or d) “inducing such [person] to use his influence with a foreign government . . . to affect or influence any act or decision of such government”;⁶⁰
- 5) “in order to assist [the listed categories of persons] in obtaining or retaining business for or with, or directing business to, any person.”⁶¹

Willful violations of the anti-bribery provision may be punished by up to \$100,000 in fines and five years in prison.⁶² Fines are heftier for corporations and may reach up to two million dollars per FCPA violation.⁶³

Along with the anti-bribery provision, the FCPA also contains an accounting provision.⁶⁴ This provision imposes books and records requirements on issuers in particular, requiring them to properly document all transactions.⁶⁵ The statute also requires companies to maintain and devise adequate internal control systems to monitor employees and to ensure company agents and officials make only authorized transactions.⁶⁶ The SEC has primary responsibility for

58. *Id.* It is important to note that liability is not contingent upon the promising party actually making a payment. See TARUN, *supra* note 55, at 3. The mere promise to pay a foreign official is enough to trigger liability under the FCPA. See *id.*

59. §§ 78dd-1(a)(1)–(3), -1(f)(1)(A), -2(a)(1)–(3), -2(h)(2)(A), -3(a)(1)–(3), -3(f)(2)(A).

60. *Id.* §§ 78dd-1(a)(1)–(3), -2(a)(1)–(3), -3(a)(1)–(3).

61. *Id.*

62. *Id.* §§ 78dd-2(g)(2)(A), -3(e)(2)(A), 78ff(c)(2)(A).

63. *Id.* § 78ff(c)(1)(A).

64. *Id.* § 78m.

65. *Id.* § 78m(b)(2)(A).

66. *Id.* § 78m(b)(2)(B).

enforcing the FCPA's accounting provision, but under certain circumstances "the DOJ can bring criminal charges [for] knowing circumvention of internal controls as well as the knowing falsification of books, records, and accounts."⁶⁷

"Congress enacted the . . . accounting provision[] as an additional deterrent to bribery based on its determination that U.S. companies concealed most bribery of foreign officials in their corporate books."⁶⁸ The SEC proposed the accounting "provision[] because investigations had revealed that companies that paid bribes overseas never accurately recorded the illicit transactions on their books. Instead, companies had concealed the bribes by falsely describing the payments as other transactions."⁶⁹ Requiring public corporations to disclose all transactions helps prevent most foreign bribery.⁷⁰ These standardized controls help the SEC remain vigilant and informed.⁷¹

Individuals who violate the books and records provision may be fined up to five million dollars per violation and may be imprisoned for up to twenty years.⁷² Corporations can be fined up to twenty-five million dollars per violation.⁷³

B. *The OECD Amendments: Expanding the FCPA's Jurisdiction*

Congress has amended the FCPA twice: first in 1988⁷⁴ and then again in 1998.⁷⁵ The 1998 amendments significantly broadened the FCPA's territorial and substantive reach.⁷⁶ The amendments conformed the FCPA to meet the requirements of the Organization for Economic Cooperation and Development's ("OECD")⁷⁷ new anti-bribery convention

67. TARUN, *supra* note 55, at 13.

68. Ned Sebelius, *Foreign Corrupt Practices Act*, 45 AM. CRIM. L. REV. 579, 583 n.16 (2008).

69. TARUN, *supra* note 55, at 13.

70. *See id.*

71. *See id.*

72. 15 U.S.C. § 78ff(a) (2012).

73. *Id.*

74. Omnibus Foreign Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

75. International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302.

76. H. Lowell Brown, *Extraterritorial Jurisdiction Under the 1998 Amendments to the Foreign Corrupt Practices Act: Does the Government's Reach Now Exceed Its Grasp?*, 26 N.C. J. INT'L L. & COM. REG. 239, 288 (2001).

77. The OECD was created "in 1961 to stimulate economic progress and world trade." CRIMINAL DIV., U.S. DEP'T OF JUSTICE & ENF'T DIV., U.S. SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 7 (2012), <http://www.justice.gov/iso/opa/resources/29520121114101438198031.pdf>. Signatories to the Anti-

passed in 1997: the Convention on Combating Bribery of Foreign Officials in International Business Transactions (“OECD Convention”).⁷⁸ Indeed, “[t]he OECD Convention can fairly be viewed as a sweeping change in the way the industrialized countries . . . regarded international bribery.”⁷⁹ Importantly, the substantive changes “enlarged the proscribed purposes for corrupt payments to include payments made in order to obtain an ‘improper advantage’ in obtaining or retaining business.”⁸⁰

More significantly, the 1998 amendments expanded the FCPA’s jurisdiction.⁸¹ First, the amendments “broaden[ed] the jurisdictional reach of the act over non-U.S. persons acting within the United States.”⁸² Second, they “broaden[ed] the jurisdictional reach over U.S. persons acting outside the United States.”⁸³ In adopting the 1998 amendments, it is clear Congress intended for the FCPA to reach companies outside the United States. “The OECD Convention . . . called on signatory nations to exercise fully their national and territorial jurisdiction in prohibiting international bribery.”⁸⁴ The amendment largely set aside a territoriality requirement—extending liability to any person/entity, anywhere in the world, if that person/entity is a U.S. national or has sufficient connections to the United States.⁸⁵

Notably, none of the FCPA amendments included a whistleblower protection provision.

IV. THE DODD-FRANK WHISTLEBLOWER PROGRAM

Congress passed Dodd-Frank on July 21, 2010⁸⁶ in response to the 2008 financial and economic crisis.⁸⁷ To date, Dodd-Frank is “[t]he most far reaching Wall Street reform in history,” passed largely to fix the

Bribery Convention, which includes the United States, are required “to criminalize the bribery of foreign . . . officials.” *Id.*

78. Brown, *supra* note 76, at 239.

79. *Id.* at 267.

80. *Id.* at 288.

81. Lucinda A. Low & Timothy P. Trenkle, *U.S. Antibribery Law Goes Global*, A.B.A. BUS. L. SEC. (July/Aug. 1999), <http://apps.americanbar.org/buslaw/blt/8-6antibribery.html>.

82. *Id.*

83. *Id.*

84. Brown, *supra* note 76, at 295.

85. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 4.1, Dec. 17, 1997, 37 I.L.M. 1 (1998); see also 15 U.S.C. §§ 78dd-1(g), 78dd-2(i) (2012).

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

87. *Wall Street Reform: The Dodd-Frank Act*, WHITE HOUSE, <http://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform> (last visited Feb. 6, 2016).

broken regulatory system.⁸⁸ The wide-sweeping legislation “provides common-sense protections for American families, creating [a] new consumer watchdog to prevent mortgage companies and pay-day lenders from exploiting consumers.”⁸⁹

Dodd-Frank also includes a provision entitled “Securities Whistleblower Incentives and Protection” (“whistleblower provision”).⁹⁰ The Dodd-Frank whistleblower provision was designed to provide incentives to individuals to disclose securities laws violations, while enhancing and complimenting existing whistleblower and compliance programs.⁹¹ The Sarbanes-Oxley Act of 2002 (“SOX”),⁹² for example, expanded the reach of whistleblower protections and requires companies to implement controls to identify and prevent fraud.⁹³ SOX extended whistleblower protections beyond federal employees to employees of publicly held companies as well.⁹⁴ Dodd-Frank, however, goes a step further than SOX and broadens the statutory qualifications required to be a “whistleblower” under the statute.⁹⁵ Further, Dodd-Frank enhances protections against employer retaliation, increases the existing statute of limitations, and allows whistleblowers to come forward with reports anonymously.⁹⁶

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 [SEC].”⁹⁷ The information submitted to the SEC must “relate[] to a possible violation of the [f]ederal securities laws . . . that has occurred, is ongoing, or is about to occur.”⁹⁸ Once designated a whistleblower, an individual may be entitled to an award under Dodd-Frank’s bounty provision.⁹⁹ The bounty provision was designed to “‘correct[] the resulting imbalance’ between the potential whistleblower’s ethical desire to report fraud and the economic disadvantages of doing so, such as legal costs and loss of employment, by

88. *Id.*

89. *Id.*

90. U.S. SEC. & EXCH. COMM’N, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 3 (2013), <http://www.sec.gov/about/offices/owb/annual-report-2013.pdf>.

91. *See id.*

92. 18 U.S.C. § 1514A (2012).

93. U.S. SEC. & EXCH. COMM’N, *supra* note 90, at 3.

94. § 1514A.

95. 15 U.S.C. § 78u-6(a)(6) (2012).

96. *Id.* § 78u-6(d)(1)(A), (h)(1).

97. *Id.* § 78u-6(a)(6).

98. 17 C.F.R. § 240.21F-2(a)(1) (2015).

99. § 78u-6(b).

[offering] financial rewards that offset the whistleblower's career risk."¹⁰⁰ Indeed, Congress established the Investor Protection Fund under Dodd-Frank's bounty provision, which is designated by the SEC to pay awards to qualifying whistleblowers.¹⁰¹

While the promise of a financial reward alone may incentivize some whistleblowers to report securities laws violations, the anti-retaliation provision assures whistleblowers that they will not be retaliated against by their employers for coming forward. Dodd-Frank's anti-retaliation provision bars employers from

discharg[ing], demot[ing], suspend[ing], threaten[ing], harass[ing], directly or indirectly, or in any other manner discriminat[ing] against, a whistleblower . . . because of any lawful act done by the whistleblower—(i) in providing information to the [SEC] . . . ; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the [SEC] based upon or related to such information; or (iii) in making disclosures that are required or protected under the [SOX], [the Exchange Act], . . . and any other law, rule, or regulation subject to the jurisdiction of the [SEC].¹⁰²

"Whistleblower" is defined differently in the rules interpreting the anti-retaliation provision than in the definitions section of the whistleblower provision generally. Under the rules, a "whistleblower" is defined as an individual who "possess[es] a *reasonable belief* that the information . . . provid[ed] relates to a possible securities law violation . . . that has occurred, is ongoing, or is about to occur."¹⁰³ The "reasonable belief" language conveys the SEC's broader interpretation of "whistleblower" under the statute. If an individual reports that she

100. Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 TEMP. L. REV. 721, 727 (2014).

101. § 78u-6(g). Awards may be granted to:

[W]histleblowers who voluntarily provided original information to the [SEC] that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to—(A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

Id. § 78u-6(b)(1).

102. *Id.* § 78u-6(h)(1)(a) (citation omitted).

103. § 240.21F-2(b)(1)(i) (emphasis added). Notably, "[t]he SEC's rules reconcile the conflict between Dodd-Frank's definition of a whistleblower, as one who reports to the SEC, with the broader antiretaliation provisions that imply that protections are available for external and internal whistleblowers alike." Pacella, *supra* note 100, at 732.

reasonably believes an employer has violated the securities laws, though she may be ineligible for a monetary award under the bounty provision, she may still be protected against employer retaliation, even if her reasonable belief was wrong.¹⁰⁴ “[T]he anti-retaliation [provision] protections apply whether or not [an individual] satisf[ies] the requirements, procedures and conditions to qualify for an award.”¹⁰⁵

A private right of action exists under Dodd-Frank for individuals who allege they were discharged or discriminated against in retaliation for coming forward with a whistleblower tip.¹⁰⁶ The remedy for such claims includes reinstatement, two times the amount of back pay plus interest, and compensation for attorneys’ fees.¹⁰⁷ Under the SOX anti-retaliation provision, employees are required to file a complaint with the Secretary of Labor before filing a retaliation action in federal court.¹⁰⁸ In contrast, Dodd-Frank foregoes this requirement and is otherwise more protective of the whistleblower.¹⁰⁹

V. DODD-FRANK’S BOUNTY PROVISION DOES NOT ADEQUATELY PROTECT WHISTLEBLOWERS

The whistleblower is a practical and efficient mechanism to help enforce the law.¹¹⁰ Certainly there are concerns that whistleblowers will be over-incentivized to come forward with frivolous claims. A delicate balance must exist between protecting the whistleblower and providing her with the financial incentive to come forward. Notwithstanding the promise of a monetary reward, whistleblowers are less likely to come forward if they do not believe they will be protected against employer retaliation.¹¹¹ Studies show that as many as eighty to ninety percent of

104. § 240.21F-2(b)(1)(iii).

105. *Id.*

106. § 78u-6(h)(1)(B)(i).

107. *Id.* § 78u-6(h)(1)(C).

108. 18 U.S.C. § 1514A(b) (2012).

109. *See* § 78u-6(h)(1)(B)(i).

110. The Whistleblower was featured as Time Magazine’s person of the year in 2002. *Persons of The Year 2002: The Whistleblowers*, TIME, Dec. 30, 2002, <http://content.time.com/time/covers/0,16641,20021230,00.html>. The Segment honored Cynthia Cooper of WorldCom, Sherron Watkins of Enron, and Coleen Rowley of the FBI, all of whom reported their employers and sparked significant legal and political change. *Id.*

111. Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 B.Y.U. L. REV. 73, 113 (“In considering the decision whether or not to blow the whistle . . . , most individuals will be less likely to [do so] if the perceived costs are high. . . . For employees, the most prominent cost of whistleblowing is the threat to one’s career. . . . ‘Most whistleblowers are fired.’”).

whistleblowers are demoted or fired from their jobs for blowing the whistle.¹¹² Few are willing to undertake the risk of “doing the right thing” without basic assurances that they will not be worse off for doing so.

Dodd-Frank’s bounty provision alone does not replace the need for adequate anti-retaliation protection.¹¹³ While the promise of a payout of up to thirty percent of the monetary sanctions seems like a strong incentive, many whistleblowers are unwilling to risk their jobs to pursue this unrealistic bounty.¹¹⁴ Indeed, other countries have opted not to follow Dodd-Frank’s bounty model for this reason.¹¹⁵ In July 2014, the UK Financial Conduct Authority (“FCA”) and the Bank of England Prudential Authority (“PRA”) issued a joint report (the “UK Joint Report”)¹¹⁶ concluding: “[P]roviding financial incentives to whistleblowers will not encourage whistleblowing or significantly increase integrity and transparency in financial markets.”¹¹⁷ If the UK Joint Report’s findings are true, protection against employer retaliation is even more critical than providing monetary incentive to encourage whistleblowers to come forward.

To the extent the bounty provision does encourage whistleblowers to come forward, few will be authorized to collect the award.¹¹⁸ To satisfy the requirements under the bounty provision, a whistleblower must (1) voluntarily provide the SEC, (2) with original information, (3) that leads to the successful enforcement by the SEC of a federal court or administrative action, (4) in which the SEC obtains monetary sanctions totaling more than \$1,000,000.¹¹⁹ Indeed, the statute first requires that an individual satisfy the specific definition of “whistleblower” to qualify for an award.¹²⁰ Because there is so much ambiguity surrounding what

112. *Id.*

113. FIN. CONDUCT AUTH. & THE PRUDENTIAL REGULATION AUTH. FOR THE TREASURY SELECT COMM., FINANCIAL INCENTIVES FOR WHISTLEBLOWERS 7 (2014), <http://www.bankofengland.co.uk/pradocuments/contact/financialincentivesforwhistleblowers.pdf> [hereinafter UK JOINT REPORT].

114. *See id.*

115. *See id.*

116. UK regulatory agencies considered providing financial incentives to whistleblowers, and before deciding not to, they explored the U.S. regulatory regime. *See* Kevin LaCroix, *Whistleblower Bounties: A Good Idea? UK Regulators Say No*, D&O DIARY (Aug. 1, 2014), www.dandodiary.com/2014/08/articles/securities-litigation/whistleblower-bounties-a-good-idea-uk-regulators-say-no. The FCA and the PRA visited several U.S. agencies (including the SEC) to examine whistleblower incentive programs. *Id.* The UK Joint Report, and its findings against providing a whistleblower incentive program were based on shortcomings the agencies observed in the U.S. system. *Id.*

117. UK JOINT REPORT, *supra* note 113, at 7.

118. *See id.*

119. 15 U.S.C. §§ 78u-6(a)(1), (b)(1) (2012).

120. *Id.* § 78u-6(a)(6).

constitutes a “whistleblower,” it is not immediately clear who is actually eligible to collect the award. Further, the ultimate determination of how much the whistleblower will be paid, if she is to be paid at all, is left to the SEC’s discretion.¹²¹ Meeting each prong of the bounty provision is difficult and collecting the whistleblower award is rare.¹²² The UK Joint Report found that “[i]ncentives in the US benefit only the small number whose information leads directly to successful enforcement action resulting in the imposition of fines (from which the incentives are paid). They provide nothing for the vast majority of whistleblowers.”¹²³ Even meeting the one million dollar threshold requirement under Dodd-Frank is difficult—“the SEC imposes fines that could trigger Dodd-Frank’s whistleblower bounty provision less than ten percent of the time, and in those cases, *more than half* of fined firms faced fines below the minimum \$1 million threshold needed to trigger award eligibility.”¹²⁴ Thus, the promise of a whistleblower bounty is not enough protection on its own. To the extent that it encourages whistleblowers to come forward, most will not benefit from the bounty provision’s award. The bounty provision’s shortcomings make protection against employer retaliation all the more important.

VI. DODD-FRANK’S ANTI-RETALIATION PROVISION DOES NOT ADEQUATELY PROTECT FCPA WHISTLEBLOWERS WHO REPORT ANTI-BRIBERY VIOLATIONS BY DOMESTIC CONCERNS

Because the FCPA does not contemplate whistleblower protection in its statutory framework, the best recourse FCPA whistleblowers have in the case of employer retaliation is Dodd-Frank’s whistleblower

121. *Id.* § 78u-6(e)(1)(A). Notably, no FCPA whistleblowers have collected the bounty to date. *FCPA Year in Review: 2014*, JONES DAY (Feb. 2015), http://www.jonesday.com/FCPA-Year-in-Review-2014-02-06-2015/?RSS=true#_ednref88. FCPA whistleblowers who report tips to the SEC against non-issuer domestic concerns may be excluded entirely from collecting the award for failing to fit the definition of a whistleblower as they are not reporting information subject to the jurisdiction of the SEC. *See infra* Part VI.B.

122. *See* UK JOINT REPORT, *supra* note 113, at 2; *see also* Rapp, *supra* note 111, at 152. Since the beginning of the whistleblower program there have been just fourteen awards granted, nine of which were paid in 2014. *See* U.S. SEC. & EXCH. COMM’N, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 10 (2014), <http://www.sec.gov/about/offices/owb/annual-report-2014.pdf> [hereinafter 2014 ANNUAL REPORT].

123. UK JOINT REPORT, *supra* note 113, at 2.

124. Rapp, *supra* note 111, at 92. Firms could purposefully aim to keep fines below the one million dollar million threshold during settlement negotiations with the SEC to avoid the bounty payout. *Id.* at 92–93. The one million dollar threshold is an arbitrary sum that the SEC included in the bounty provision without any explanation or rationalization. *Id.* at 95.

program.¹²⁵ Under the whistleblower program, the anti-retaliation provision exclusively applies to, and binds, all, U.S. issuers, prohibiting such retaliation.¹²⁶ The FCPA, however, has a broader jurisdictional reach and regulates both issuers and non-issuer domestic concerns.¹²⁷ As the FCPA applies to issuers, it is subject to the SEC's jurisdiction.¹²⁸ But,

125. The law surrounding the intended scope of the interaction between Dodd-Frank's anti-retaliation provision and the FCPA is unclear at best. It remains unknown what impact Dodd-Frank will have on future FCPA whistleblower tips. Big firms have speculated that Dodd-Frank will lead to an increase in FCPA violation reports. Morgan Lewis & Bockius predicted that Dodd-Frank's whistleblower provision was "likely to greatly increase the number of FCPA matters under government investigation." Leslie R. Caldwell et al., *Proposed Rewards for FCPA Whistleblowers Raise Risk for Multinational Corporations*, MORGAN LEWIS & BOCKIUS LLP (Apr. 15, 2010), <http://www.morganlewis.com/index.cfm/publicationID/EB106BF5-EA2C-47D7-AC6B-2DFE7553E5EC/fuseaction/publication.detail>. Some argue these predictions never materialized. See Max Stendahl, *FCPA Whistleblower Bounty May Turn Tide for SEC Program*, LAW360 (Aug. 20, 2013, 6:09 PM), <http://www.law360.com/articles/466008/fcpa-whistleblower-bounty-may-turn-tide-for-sec-program>; see also *The Financial Reform Bill's Whistleblower Provisions and the FCPA*, FCPA PROFESSOR (July 20, 2010), <http://www.fcpaprofessor.com/the-financial-reform-bills-whistleblower-provisions-and-the-fcpa> ("[Dodd-Frank's] whistleblower provisions will have a negligible impact on FCPA enforcement."). FCPA tips remain a small percentage of general whistleblower tips under Dodd-Frank. See 2014 ANNUAL REPORT, *supra* note 122, at 20. Though there is some indication that reports are on the rise, of the 3620 total whistleblower tips in 2014, only 159 were related to the FCPA, constituting just over four percent of tips. *Id.* at 20, 27. This number is similar to the number of whistleblower reports received in previous years. See *id.* at 27. Regardless, FCPA tips remain only a small fraction of total whistleblower tips. This small number is likely explained by companies self-reporting to the SEC. According to the FCPA Handbook, "[t]he past decade witnessed an increase in self-reporting by public companies, and most FCPA investigations have been the result of self-reporting." TARUN, *supra* note 55, at 252. The existence of self-reporting, however, does not defeat the need for adequate whistleblower protection. Today, "[t]here appears to now be some trend toward public companies electing not to self-report where possible." *Id.* at 253. Further, it is notable that FCPA statistics do not indicate what percentage of FCPA whistleblowers reported anti-bribery provision violations versus books and records provision violations. See generally Mike Koehler, *A Common Language to Remedy Distorted Foreign Corrupt Practices Act Enforcement Statistics*, 68 RUTGERS U. L. REV. 553 (2016).

126. See § 78u-6(h).

127. §§ 78dd-1, -2. The anti-bribery provision applies to both issuers and domestic concerns. *Id.* The books and records provision applies exclusively to issuers. *Id.* § 78m.

128. *Comparing DOJ FCPA Enforcement to SEC FCPA Enforcement Is Not a Valid Comparison*, FCPA PROFESSOR (July 17, 2014), <http://www.fcpaprofessor.com/comparing-doj-fcpa-enforcement-to-sec-fcpa-enforcement-is-not-a-valid-comparison> ("[C]omparing DOJ FCPA enforcement to SEC FCPA enforcement is not a valid comparison because . . . the DOJ and SEC 'play' on different fields. . . . [T]he SEC has FCPA jurisdiction over only issuers and associated persons (78dd-1—a relatively narrow slice of the range of 'persons' subject to the FCPA). The DOJ, by contrast, has FCPA jurisdiction over issuers and associated persons (78dd-1), as well as domestic concerns (78dd-2—all U.S. companies regardless of form of business organization and U.S. persons) and persons other than issuers or domestic concerns (78dd-3—literally any company in the world or any person in the world to the extent certain jurisdictional requirements are met).").

as the FCPA applies to non-issuer domestic concerns, it is subject to the exclusive jurisdiction of the DOJ.¹²⁹ The result is that whistleblowers bringing reports against non-issuer domestic concerns for violating the FCPA's anti-bribery provision, which is not subject to the SEC's jurisdiction, may not be protected against employer retaliation.

A. Internal Reporting

Courts are divided on whether Dodd-Frank's anti-retaliation provision protects whistleblowers who report claims internally to company superiors rather than directly to the SEC.¹³⁰ Applying *Chevron* deference,¹³¹ many courts have found that the language of Dodd-Frank's anti-retaliation provision is ambiguous and thus have deferred to the SEC's permissible interpretation of it.¹³² Dodd-Frank defines a

129. See Paul R. Berger et al., *Blowing the Whistle on FCPA Violations by Domestic Concerns: A District Court Finds No Protection Under Dodd-Frank*, in DEBEVOISE & PLIMPTON LLP, FCPA UPDATE (2012) 10, http://www.debevoise.com/~media/files/insights/publications/2012/05/fcpa%20update/files/view%20the%20update/fileattachment/fcpa_update_may_2012.pdf ("Though 15 U.S.C. §§ 78dd-2 and 78dd-3, which govern domestic concerns and misconduct 'in the territory of the United States,' are codified in the same title of the United States Code that house the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as other laws enforced by the Securities and Exchange Commission ("SEC"), the SEC has long been understood to lack authority to prosecute so-called dd-2 and dd-3 offenses.").

130. *Compare* Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 629–30 (5th Cir. 2013); *Verble v. Morgan Stanley Smith Barney, LLC*, No. 3:15-CV-74-TAV-CCS, 2015 WL 8328561, at *7–10 (E.D. Tenn. Dec. 8, 2015); *Berman v. Neo@Ogilvy LLC*, 72 F. Supp. 3d 404, 410–11 (S.D.N.Y. 2014), *rev'd*, 801 F.3d 145 (2d Cir. 2015); *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *7 (M.D. Fla. May 12, 2014); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643, at *4–5 (D. Colo. July 19, 2013), *aff'd*, 571 F. App'x 698 (10th Cir. 2014), *with Berman*, 801 F.3d at 155; *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 729–31 (D. Neb. 2014); *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014); *Ellington v. Giacomakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013); *Murray v. UBS Sec., LLC*, 12 Civ. 5914(JMF), 2013 WL 2190084, at *4 (S.D.N.Y. May 21, 2013); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1106–07 (D. Colo. 2013); *Kramer v. Trans-Lux Corp.*, No. 3:11cv1424 (SRU), 2012 WL 4444820, at *5 (D. Conn. Sept. 25, 2012); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 997 (M.D. Tenn. 2012); *Egan v. TradingScreen, Inc.*, 10 Civ. 8202(LBS), 2011 WL 1672066, at *5 (S.D.N.Y. May 4, 2011).

131. *Chevron, Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter If, however, the court determines Congress has not directly addressed the precise question at issue, . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

132. See, e.g., *Kramer*, 2012 WL 4444820, at *4–5; *Egan*, 2011 WL 1672066, at *4–5.

“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*.”¹³³ This language, however, is in direct conflict with section 78u-6(h)(1)(A)(iii), which indicates that no employer may discriminate based on “disclosures that are *required or protected* under [SOX], [the Exchange Act] . . . and any other law, rule, or regulation *subject to the jurisdiction of the [SEC]*.”¹³⁴ The SEC interprets the existing ambiguity to mean “that the statutory anti-retaliation protections apply to three different categories of whistleblowers, and the third category includes individuals who report *to persons or governmental authorities other than the [SEC]*.”¹³⁵ Indeed, the third prong of the anti-retaliation provision functions almost as an exception to Dodd-Frank’s whistleblower definition. The comments to the SEC’s interpretation further clarify that the third prong of the anti-retaliation provision protects whistleblowers who bring reports to those “with supervisory authority over the employee or such other person working for the employer who has authority to investigate, discover, or terminate misconduct.”¹³⁶

An odd dynamic between Dodd-Frank’s anti-retaliation provision and the FCPA is illustrated in those jurisdictions that interpret the third prong of Dodd-Frank’s anti-retaliation provision broadly to protect whistleblowers who report tips internally. In particular, a whistleblower who reports violations of the FCPA’s anti-bribery provision internally against a non-issuer domestic concern employer may not be protected against employer retaliation, as the plaintiff in *Nollner v. Southern Baptist Convention, Inc.* discovered.¹³⁷ In *Nollner*, the plaintiff amended his complaint to include a claim for retaliatory discharge under Dodd-Frank.¹³⁸ International Mission Board (“IMB”), a non-issuer domestic concern under the FCPA’s anti-bribery provision, posted a job vacancy for missionary work in New Delhi.¹³⁹ Mr. Nollner applied for the position and was hired.¹⁴⁰ His wife quit her job of seventeen years to join him, and the two sold their home and assets in anticipation of the move.¹⁴¹ When they arrived in New Delhi, Mr. Nollner learned that the handling of the

133. 15 U.S.C. § 78u-6(a)(6) (2012) (emphasis added).

134. *Id.* § 78u-6(h)(1)(A)(iii) (emphasis added) (citation omitted).

135. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300–01, 34,304 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249) (emphasis added).

136. *Id.*

137. 852 F. Supp. 2d 986, 997 (2012).

138. *Id.* at 988.

139. *Id.* at 989.

140. *Id.*

141. *Id.*

project was largely corrupt.¹⁴² Contractors had been hired without a bidding process or specified contracts, and materials used for the project were unsafe.¹⁴³ Contractors and architects in the company bribed Indian officials with money provided by IMB.¹⁴⁴ Mr. Nollner reported the bribery internally to his supervisors numerous times, but they too were complicit in the bribery scheme.¹⁴⁵ Ultimately, Mr. Nollner was asked to resign and was later terminated because of his reports.¹⁴⁶ Mr. Nollner sued, alleging, among other claims, a claim for retaliatory discharge under Dodd-Frank.¹⁴⁷

The court ultimately dismissed Mr. Nollner's complaint.¹⁴⁸ First, it found that IMB was not an issuer subject to the SEC's jurisdiction.¹⁴⁹ Because of this, Mr. Nollner did not qualify for Dodd-Frank whistleblower protections.¹⁵⁰ Mr. Nollner asserted that Dodd-Frank's anti-retaliation provision "protect[s] *any* employee who reports an FCPA violation by his employer" because of the SEC's involvement in FCPA enforcement generally.¹⁵¹ Despite this plea for adequate FCPA whistleblower protection, the court held that it would "not interpret [Dodd-Frank] as extending its whistleblower protections to companies that otherwise have no relationship to the SEC and that have not committed [a] securities violation[]." ¹⁵² In *Nollner*, the defendant was a non-issuer domestic concern, and thus, though subject to the anti-bribery provisions of the FCPA, it was not subject to the SEC's jurisdiction.¹⁵³

Second, just as IMB was not subject to the SEC's jurisdiction, neither were Mr. Nollner's particular disclosures.¹⁵⁴ The court determined that Mr. Nollner's disclosures were neither "required [nor] . . . protected" by the securities laws within the meaning of the third prong of Dodd-Frank's anti-retaliation provision.¹⁵⁵ The court held that Mr. Nollner could not

142. *Id.* at 989–90.

143. *Id.* at 989.

144. *Id.* at 990.

145. *Id.*

146. *See id.*

147. *Id.*

148. *Id.* at 1002.

149. *Id.* at 997–98.

150. *Id.* at 997.

151. *Id.*

152. *Id.*

153. *Id.* at 996 ("[T]he jurisdiction of the SEC with respect to the FCPA violations is limited only to civil actions to enforce violations by *issuers*, but does not encompass FCPA violations by domestic concerns, which are subject to exclusive DOJ enforcement . . .").

154. *Id.* at 996–97.

155. *Id.* ("[A]n employee is not protected from retaliation if the disclosure at issue—even if [it] relates to an actual legal violation by the employer—concerns a disclosure that is not 'required' or otherwise 'protected' by a law, rule, regulation *within the SEC's jurisdiction*."

“identify any aspect of the FCPA that ‘required’ Mr. Nollner to disclose FCPA violations or ‘protected’ him for doing so, as required by [the third prong of Dodd-Frank’s anti-retaliation provision].”¹⁵⁶ Neither the FCPA nor SOX (nor any other securities law) expressly requires or protects disclosures of FCPA anti-bribery provision violations.¹⁵⁷ Based on the *Nollner* reasoning, FCPA whistleblowers who bring claims internally against their non-issuer domestic concern employers may never be protected by Dodd-Frank’s anti-retaliation provision—even in those jurisdictions that have held that Dodd-Frank protections apply to whistleblowers who report internally.¹⁵⁸ To date, no other court has

(emphasis added) (quoting *Egan v. TradingScreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *6 (S.D.N.Y. May 4, 2011))). In *Asadi*, the plaintiff argued that the FCPA qualifies as a “law, rule, or regulation subject to the jurisdiction of the [SEC]” as required by Dodd-Frank’s anti-retaliation provision. *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-345, 2012 WL 2522599, at *6 (S.D. Tex. June 28, 2012) (quoting 15 U.S.C. § 78u-6(h)(1)(A)(iii) (2010)), *aff’d on other grounds*, 720 F.3d 620 (5th Cir. 2013). There, the court found that “[m]erely alleging the violation of a law or rule under the SEC’s purview is not enough; a plaintiff must allege that a law or rule in the SEC’s jurisdiction explicitly requires or protects disclosure of that violation.” *Id.* at *6 (alteration in original) (quoting *Egan*, 2011 WL 1672066, at *6). *Asadi* was unable to direct the court to a provision of the FCPA that “protected” or “required” the type of internal reports he submitted, and thus Dodd-Frank’s anti-retaliation provision did not apply. *Id.* The Fifth Circuit Court of Appeals did not reach the issue when it affirmed on other grounds. *Asadi*, 720 F.3d at 630. Similarly, in *Meng-Lin Liu v. Siemens A.G.*, the District Court for the Southern District of New York held that FCPA violations do not fall into the “required” or “protected” categories of disclosures listed in Dodd-Frank’s anti-retaliation provision. 978 F. Supp. 2d 325, 330 (S.D.N.Y. 2013), *aff’d on other grounds*, *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014). The decision, however, was appealed to the Second Circuit, which, like the Fifth Circuit, did not decide the issue. *Liu Meng-Lin*, 763 F.3d at 183.

156. *Nollner*, 852 F. Supp. 2d at 997.

157. It is unclear if any FCPA disclosure is “required or protected” by the securities laws. The district court’s decision in *Meng-Lin Liu v. Siemens A.G.* suggests the answer is no. *See* 978 F. Supp. 2d at 330. In determining whether SOX requires or protects disclosure of FCPA violations, the court held:

Section 806 [of SOX] protects employees who report mail fraud, wire fraud, bank fraud, securities fraud, violations of “any rule or regulation of the [SEC]” or “any provision or Federal law relating to fraud against shareholders.” FCPA violations could only conceivably fall within “fraud against shareholders,” but Liu has alleged no intent to defraud shareholders.

Id. (citations omitted) (quoting 18 U.S.C. § 1514A (2012)). Indeed, the Department of Labor has found that FCPA violations are not within the scope of SOX. *In re Gupta*, 2010-SOX-00054, Order and Summary Decision Dismissing Complaint (Dep’t of Labor Jan. 7, 2011).

158. A distinction should not be drawn between issuers and non-issuers for purposes of the application of Dodd-Frank’s anti-retaliation provision to FCPA whistleblowers. The bribery of foreign officials is a global problem that unfairly benefits certain nations and certain industries. Today, non-issuer companies can have as large an international impact as many publicly-traded companies. Some of this country’s largest, most well-known companies are privately held. Cargill, the “international producer and distributor of agricultural products such as sugar, refined oil, chocolate and turkey,” for example, is a

expressly addressed whether Dodd-Frank's anti-retaliation provision protects FCPA whistleblowers who report internally against non-issuer domestic concerns.

B. Reporting to the SEC

Other courts have disregarded the SEC's interpretation of Dodd-Frank's anti-retaliation provision altogether.¹⁵⁹ In contrast, these courts hold that the third prong of the anti-retaliation provision is unambiguous under the first step of *Chevron* and that all whistleblower reports must be made directly "to the [SEC]," as the statute expressly requires.¹⁶⁰ These courts do not extend Dodd-Frank whistleblower protections to individuals who report tips internally.¹⁶¹

Even within single jurisdictions, courts have been divided on whether Dodd-Frank's anti-retaliation protections apply to whistleblowers who report tips internally to company officials or to government entities other than the SEC. In 2014, for example, the Southern District of New York agreed with the Fifth Circuit's conclusion that reports must be made directly to the SEC to invoke Dodd-Frank's whistleblower protections,

non-issuer. *America's Largest Private Companies: Cargill*, FORBES, <http://www.forbes.com/companies/cargill/> (last visited Feb. 19, 2016). "Cargill employs 155,000 employees in [sixty-eight] different countries" with revenue of \$120.4 billion. *Id.* Koch Industries employs more than 100,000 employees worldwide with revenue of \$115 billion. *America's Largest Private Companies: Koch Industries*, FORBES, <http://www.forbes.com/companies/koch-industries/> (last visited Feb. 19, 2016). Dell is a large supplier of PCs with revenue of \$59 billion and more than 100,000 employees. *America's Largest Private Companies: Dell*, FORBES, <http://www.forbes.com/companies/dell/> (last visited Feb. 19, 2016). These companies manage large numbers of employees and actively sell their services and products to customers in the United States and overseas. But whistleblowers who report anti-bribery violations against these companies may not be protected by Dodd-Frank's anti-retaliation provision. Arguably, the line between issuer and non-issuer is blurring as private companies become larger and more powerful. Congress recognized this when it crafted the FCPA to regulate both issuers and non-issuers. As such, U.S. protections against employer retaliation should apply to whistleblowers who report FCPA violations by both issuer and non-issuer companies.

159. See *Asadi*, 720 F.3d at 629–30; *Verble v. Morgan Stanley Smith Barney, LLC*, No. 3:15-CV-74-TAV-CCS, 2015 WL 8328561, at *7–10 (E.D. Tenn. Dec. 8, 2015); *Berman v. Neo@Ogilvy LLC*, 72 F. Supp. 3d 404, 408–11 (S.D.N.Y. 2014), *rev'd*, 801 F.3d 145 (2d Cir. 2015); *Englehart v. Career Educ. Corp.*, No. 8:14-cv-444-T-33EAJ, 2014 WL 2619501, at *7 (M.D. Fla. May 12, 2014); *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 756 (N.D. Cal. 2013); *Wagner v. Bank of Am. Corp.*, No. 12-cv-00381-RBJ, 2013 WL 3786643, at *4–5 (D. Colo. July 19, 2013), *aff'd*, 571 F. App'x 698 (10th Cir. 2014).

160. See cases cited *supra* note 159.

161. Notably, the SEC filed an amicus brief in *Liu Meng-Lin v. Siemens A.G.* reiterating its support for internal reporting. See Brief of the SEC, *Amicus Curiae* in Support of the Appellant, *Liu Meng-Lin v. Siemens A.G.*, 763 F.3d 175 (2d Cir. 2014) (No. 13–4385), 2014 WL 663875.

notwithstanding that in 2013 the same district had also upheld the application of Dodd-Frank's anti-retaliation provision to whistleblowers reporting internally.¹⁶² Similarly, in Colorado, courts have come down on both sides of the issue.¹⁶³ Only in September of 2015 did the Second Circuit finally clarify its position on the issue, holding that Dodd-Frank's anti-retaliation protections extend to employees who report violations to persons or government authorities other than the SEC.¹⁶⁴ Beyond inter-district discrepancies, there now exists a circuit split on the issue, making the law unpredictable and leaving future whistleblowers unsure of whether they will receive protection against employer retaliation.¹⁶⁵ Additionally, these inconsistencies undermine the incentive that anti-retaliation protection was designed to provide in the first place.

It would seem that the most calculated decision for the educated FCPA whistleblower would be to report tips directly to the SEC at all costs. While jurisdictions are in disagreement as to whether internal whistleblower reports are covered by Dodd-Frank's anti-retaliation provision, the provision always applies to whistleblower tips reported directly to the SEC (against issuers).¹⁶⁶ Reporting directly to the SEC, however, does not eliminate the risk posed to some FCPA whistleblowers. Dodd-Frank's anti-retaliation provision likely only applies to FCPA whistleblowers who bring reports against *issuers* directly to the SEC.¹⁶⁷ Courts have yet to consider whether such reports against non-issuer domestic concerns made directly to the SEC are eligible for anti-retaliation protection under Dodd-Frank. However, the outcome would

162. Compare *Berman*, 72 F. Supp. 3d at 408 (“The Court finds the reasoning of the Fifth Circuit in arriving at this conclusion persuasive.”), with *Yang v. Navigators Grp., Inc.*, 18 F. Supp. 3d 519, 534 (S.D.N.Y. 2014) (“[T]he Court finds the reasoning as delineated in *Murray* and other courts in this district persuasive because the two provisions read in conjunction create a potential conflict. Furthermore, the SEC’s interpretation of 15 U.S.C. § 78u-6 . . . is a reasonable reading of the statute that resolves the ambiguity.” (citing *Murray*, 2013 WL 2190084, at *7)), and *Murray v. UBS Sec. LLC*, No. 12 Civ. 5914(JMF), 2013 WL 2190084, at *5 (S.D.N.Y. May 21, 2013) (“The existence of . . . ‘competing, plausible interpretations’ of the statutory provisions compels the conclusion that ‘the statutory text is ambiguous in conveying Congress’s intent.’” (quoting *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 120 (2d Cir. 2007))).

163. Compare *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1105 (D. Colo. 2013), with *Wagner*, 2013 WL 3786643, at *4.

164. *Berman*, 801 F.3d at 155.

165. Compare *id.*, with *Asadi v. G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 629–30 (5th Cir. 2013).

166. 15 U.S.C. § 78u-6(h)(1)(A)(i) (2012) (protecting whistleblowers who “provid[e] information to the [SEC] in accordance with this section”).

167. See *id.* § 78u-6(h)(1)(A); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 996 (M.D. Tenn. 2012) (holding that “because the defendants are not issuers, only the DOJ—not the SEC—has jurisdiction over them with respect to FCPA violations”).

likely parallel the *Nollner* court's logic, excluding protections to those who report non-issuers.¹⁶⁸

The lack of clear legal precedent on the application of Dodd-Frank's anti-retaliation provision to FCPA whistleblowers, nearly three years after *Nollner*, leaves some FCPA whistleblowers hesitant to come forward at all. The Middle District of Tennessee acknowledged that its decision reinforced "the limited scope of [Dodd-Frank] and the apparent lack of remedies available to individual FCPA whistleblowers."¹⁶⁹ The *Nollner* court hinted that state law may provide a cause of action for retaliation against FCPA whistleblowers who report their domestic concern employers.¹⁷⁰ Indeed, "[i]n some jurisdictions, plaintiffs have successfully plugged [the gap between Dodd-Frank's anti-retaliation provision and the FCPA] by premising a state law cause of action for retaliatory discharge on the disclosure of FCPA violations."¹⁷¹ Not all jurisdictions, however, permit a state cause of action.¹⁷² "[O]ther jurisdictions do not recognize a cause of action premised on violations of *any* federal statute."¹⁷³ The court reasoned that it was Congress's job to extend protections to those FCPA whistleblowers who are currently unprotected by state and federal law against employer retaliation.¹⁷⁴ Since *Nollner*, Congress has done nothing to address the existing gap.

VII. DODD-FRANK'S ANTI-RETALIATION PROVISION DOES NOT ADEQUATELY PROTECT FOREIGN FCPA WHISTLEBLOWERS

Beyond Dodd-Frank's failure to protect whistleblowers who report FCPA violations by non-issuer domestic concerns, another gap exists between the goals of the FCPA and the goals of Dodd-Frank's

168. *Nollner*, 852 F. Supp. 2d at 994 ("[W]here an employee reports a violation of a federal law by the employer, [Dodd-Frank] only protects that employee against retaliation if the federal violation falls within the SEC's jurisdiction.").

169. *Id.* at 998.

170. *Id.*

171. *See id.* (citing *D'Agostino v. Johnson & Johnson, Inc.*, 628 A.2d 305, 321 (N.J. 1993); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081, 1090 (Wash. 1984) (en banc); *Kirk v. Shaw Evtl., Inc.*, No. 1:09-cv-1405, 2010 WL 1387887, at *6 (N.D. Ohio Mar. 31, 2010)).

172. *Id.* (citing *Pratt v. Caterpillar Tractor Co.*, 500 N.E.2d 1001, 1003 (Ill. App. Ct. 1986) (finding that FCPA did not implicate a sufficient Ohio policy interest to support an Ohio retaliatory discharge claim)).

173. *Id.* (citing *McCarthy v. Tex. Instruments, Inc.*, 999 F. Supp. 823, 829 (E.D. Va. 1998) (applying Virginia law)); *see also* Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 477 (2009) ("[S]tate laws fail to promote FCPA policy consistently across state lines much less the global market.").

174. *See Nollner*, 852 F. Supp. 2d at 998.

anti-retaliation provision. Foreign whistleblowers play a critical role in FCPA enforcement, yet their reports are currently unprotected by Dodd-Frank's anti-retaliation provision as well.

Many scholars are concerned with what Professor Elizabeth Spahn describes as the "Ugly American" perception of U.S. anti-bribery enforcement: American imperialism.¹⁷⁵ FCPA enforcement, however, hardly benefits U.S. economic interests.¹⁷⁶ In some parts of the world, bribery is the only way to conduct business.¹⁷⁷ Unable to legally engage in such bribery, U.S. entities lose out on key business opportunities that other countries are able to exploit and obtain.¹⁷⁸ With regard to FCPA enforcement, the United States is not exploiting smaller sovereigns for its own economic gain. The prevention and elimination of bribery is an international effort.¹⁷⁹ Developed countries around the world agree that their multinational corporations should not engage in international bribery.¹⁸⁰

Regardless of where one stands on the scope and reach of the FCPA, it is uncontroverted that Congress purposely designed the statute to mitigate the problem of global corporate bribery.¹⁸¹ As it currently stands, the goals of the FCPA should be fully enforced. Part of rigorous enforcement includes adequately protecting foreign whistleblowers who are best positioned to learn about both anti-bribery and books and records violations.¹⁸² Foreign whistleblowers play an important role in giving the FCPA teeth. In 2014, more than eleven percent of all Office of the Whistleblower ("OWB") tips came from foreign whistleblowers from sixty different countries.¹⁸³ Failing to protect foreign whistleblowers against employer retaliation "could put a real damper on the SEC's FCPA enforcement program at a time when officials are fervently hoping

175. See Spahn, *supra* note 44, at 168–69.

176. *Id.* at 172.

177. See *Corruption Perceptions Index 2014: Results*, TRANSPARENCY INT'L, <http://www.transparency.org/cpi2014/results> (last visited Feb. 7, 2016).

178. See Spahn, *supra* note 44, at 172–73.

179. See generally Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *supra* note 85.

180. See *id.*; see also TARUN, *supra* note 55, at 251–52.

181. See *American Multinational Corporations Abroad: Hearings*, *supra* note 42, at 4–5 (statement of Rep. Stephen J. Solarz, Member, Subcommittee on International Economic Policy, House Committee on International Relations).

182. David Smyth, *Freedom to Retaliate Against Foreign Whistleblowers May Not Be as Much Fun as It First Appears*, CADY BAR THE DOOR (Aug. 26, 2014), <http://www.secmiscellany.com/2014/08/26/freedom-to-retaliate-against-foreign-whistleblowers-may-not-be-as-much-fun-as-it-first-appears/>.

183. 2014 ANNUAL REPORT, *supra* note 122, at 23, 29.

employees outside the U.S. will step up and send in the tips.”¹⁸⁴ Yet some courts have declined to protect these whistleblowers against employer retaliation, one of the most important whistleblower protections.¹⁸⁵

Courts approach this issue differently, creating questions of who actually constitutes a “foreign whistleblower.” For example, the Southern District of Texas focused on the location of the whistleblower in deciding whether Dodd-Frank’s anti-retaliation provision applied.¹⁸⁶ In contrast, the Southern District of New York and the Second Circuit focused on the minimal jurisdictional connections between the corporate entity in question and the United States.¹⁸⁷

In *Asadi v. G.E. Energy (USA), LLC*, the plaintiff (“Asadi”), a dual U.S./Iraqi citizen, was employed by U.S. issuer GE Energy.¹⁸⁸ During his employment, Asadi was temporarily relocated from the United States to Amman, Jordan.¹⁸⁹ During this time, Asadi learned that GE Energy had bribed Iraqi government officials.¹⁹⁰ Concerned that this violated the FCPA, Asadi reported the information internally to his superiors and was subsequently terminated as a result.¹⁹¹ Asadi filed suit in federal district court, arguing that GE Energy violated Dodd-Frank’s anti-retaliation provision.¹⁹² In dismissing the complaint, the court held that Asadi had no private right of action because Dodd-Frank’s anti-retaliation provision does not apply extraterritorially.¹⁹³ Though the plaintiff was a U.S. resident employed by a U.S. company, he was not entitled to protection when he reported that the company violated U.S. law.¹⁹⁴ The court’s

184. See Smyth, *supra* note 182. Arguably, this is why the SEC permits qualifying foreign whistleblowers to obtain the bounty under Dodd-Frank. In fact, the SEC’s largest whistleblower reward to date was granted to a foreign whistleblower. See Press Release, U.S. Sec. & Exch. Comm’n, SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290#VPsVs0tYVg0>. Thus, it is clear the SEC wants foreign whistleblowers to come forward with tips.

185. See *Meng-Lin Liu v. Siemens A.G.*, 978 F. Supp. 2d 325, 328–29 (S.D.N.Y. 2013), *aff’d*, *Liu Meng-Lin v. Siemens A.G.*, 763 F.3d 175 (2d Cir. 2014); *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-345, 2012 WL 2522599, at *5 (S.D. Tex. June 28, 2012), *aff’d on other grounds*, 720 F.3d 620 (5th Cir. 2013).

186. See *Asadi*, 2012 WL 2522599, at *5.

187. See *Liu Meng-Lin*, 763 F.3d at 179–83; *Meng-Lin Liu*, 978 F. Supp. 2d at 328–29.

188. 2012 WL 2522599, at *1.

189. *Id.*

190. *Id.* GE Energy hired a woman “closely associated” with the Senior Deputy Minister of Electricity in Iraq in exchange for a lucrative joint venture agreement. *Id.*

191. *Id.* at *1–2. The issue was whether Dodd-Frank’s anti-retaliation provision would apply to reports made internally. *Id.* at 3.

192. *Id.* at *2–3.

193. *Id.* at *4.

194. See *id.* at *7.

reasoning was based primarily on the fact that his office was located outside of the United States.¹⁹⁵

Intuitively, much of the foreign bribery prohibited by the FCPA takes place outside of the United States. In determining the applicability of Dodd-Frank's anti-retaliation protections, it is counterintuitive for courts to predominantly consider the whistleblower's physical location. It makes little sense to protect a whistleblower who works in the New York office of a U.S. international corporation while simultaneously denying protections to the whistleblower who works in that same company's German office. Under such circumstances, companies can keep all of their sensitive information outside of their U.S. offices and shelter themselves from potential liability as a result of whistleblowers. Instead, the courts should focus on the extent to which the FCPA establishes a jurisdictional nexus between the United States and the charged employer. Where the federal government has jurisdiction over an employer under the FCPA, Dodd-Frank's protections against employer retaliation should apply to the whistleblower employee.¹⁹⁶ Indeed, it is fundamentally unfair for the federal government to have essentially unlimited jurisdiction with regard to FCPA enforcement, while simultaneously denying federal protections to individuals who help fulfill the very mission of the SEC and the DOJ under the FCPA. Under these circumstances, U.S. law effectively fails to provide real protection to foreign-based employees who discover and report FCPA violations on the part of U.S. corporations or foreign-based corporations with U.S. connections. In *Asadi*, the FCPA clearly applied to GE Energy and prohibited it from engaging in foreign bribery.¹⁹⁷ Yet, when *Asadi* came forward, he was not protected against employer retaliation for his report.¹⁹⁸ Had *Asadi* never been transferred to the Jordan office and made the same exact report against the company from a U.S. office, he likely would have been protected. Dodd-Frank's jurisdiction should extend as far as the FCPA's jurisdiction in terms of protecting employees against employer retaliation for FCPA whistleblower reports. Indeed, *Asadi* raised this argument in his complaint.¹⁹⁹ The court held that it "need not, and does not, address *Asadi's* argument that the FCPA extends the territorial reach of [Dodd-Frank's anti-retaliation p]rovision."²⁰⁰ The court did not reach the issue

195. *Id.* at *5.

196. This is notwithstanding the significance of whether the report was made internally or directly to the SEC.

197. See 15 U.S.C. § 78dd-1 (2012).

198. *Asadi*, 2012 WL 2522599, at *7.

199. *Id.* at *6.

200. *Id.*

because the securities laws do not “require[] or protect[]” the disclosure of FCPA violations.²⁰¹ Should Congress amend the FCPA to require or protect such disclosures, it could extend the reach of Dodd-Frank’s anti-retaliation provision in certain circumstances to better protect FCPA whistleblowers.

The Second Circuit also denied Dodd-Frank whistleblower protections to foreign whistleblowers.²⁰² In doing so, the court took the nature of the employer into greater consideration.²⁰³ In *Liu Meng-Lin v. Siemens AG*, the plaintiff, Liu Meng-Lin (“Liu”), sued his former employer, Siemens AG (“Siemens”), for retaliatory discharge under Dodd-Frank’s anti-retaliation provision.²⁰⁴ Liu was a citizen of Taiwan who worked as a compliance officer in the healthcare division of Siemens China, Ltd. (“Siemens China”).²⁰⁵ Siemens China is a wholly owned subsidiary of Siemens, a German corporation listed on the New York Stock Exchange (“NYSE”).²⁰⁶ Liu discovered that Siemens China employees were making improper payments to North Korean and Chinese officials.²⁰⁷ Liu reported these claims to superiors through internal company channels and was ultimately demoted and then fired.²⁰⁸ Two months after his termination, Liu reported the FCPA violation to the SEC and filed suit in the Southern District of New York alleging that Siemens violated Dodd-Frank’s anti-retaliation provision.²⁰⁹

The Second Circuit, affirming the district court’s decision, dismissed Liu’s complaint.²¹⁰ The court found that Dodd-Frank’s anti-retaliation provision does not extend extraterritorially to protect foreign whistleblowers.²¹¹ The court grounded its reasoning in principles of statutory construction and interpretation.²¹² The court held that “[i]t is a

201. *Id.* (emphasis omitted).

202. *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175, 183 (2d Cir. 2014).

203. *See id.* at 179–80.

204. *Id.* at 177.

205. *Id.*

206. *Id.* Here, the connections to the United States are more attenuated than in *Asadi*, where the company and the whistleblower both had U.S. connections. *Asadi*, 2012 WL 2522599, at *1.

207. *Liu Meng-Lin*, 763 F.3d at 177.

208. *Id.*

209. *Id.* The Second Circuit did not reach the internal/external reporting issue as previously discussed. *See supra* Part VI.

210. *Liu Meng-Lin*, 763 F.3d at 183.

211. *Id.*

212. *See id.* at 178–83. Notably, the *Asadi* court also looked to canons of statutory interpretation in concluding that Dodd-Frank did not extend extraterritorially. *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-345, 2012 WL 2522599, at *4 (S.D. Tex. June 28, 2012), *aff’d on other grounds*, 720 F.3d 620 (5th Cir. 2013). The Fifth Circuit ultimately affirmed the ruling on other grounds. *Asadi*, 720 F.3d at 630.

longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”²¹³ Indeed, “unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, we must presume it is primarily concerned with domestic conditions.”²¹⁴ The court expanded the Supreme Court’s holding in *Morrison v. National Australian Bank, Ltd.* (finding that section 10(b) of the Securities Exchange Act of 1934 does not reach extraterritorially) to Dodd-Frank’s anti-retaliation provision.²¹⁵ *Morrison* examined “whether Australian purchasers of shares listed on an Australian stock exchange could rely on § 10(b) . . . to sue the Australian bank that issued the shares.”²¹⁶ The *Morrison* Court found that section 10(b) applied only to “transactions in securities listed on domestic exchanges.”²¹⁷ In *Morrison*, the defendant’s American Depository Receipts (“ADRs”),²¹⁸ like Siemens’ in *Liu*,²¹⁹ were traded and registered on the NYSE.²²⁰ The Court held that:

[W]here a plaintiff can point only to the fact that a defendant has listed securities on a U.S. exchange, and the complaint alleges no further meaningful relationship between the harm and those domestically listed securities, the listing of securities alone is the

213. *Liu Meng-Lin*, 763 F.3d at 178 (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)).

214. *Id.* (quoting *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32 (2d Cir. 2010)).

215. *Id.* at 178–83. While it may be clear Congress did not intend for section 10(b) to apply extraterritorially, section 10(b) is quite different from Dodd-Frank’s anti-retaliation provision. Dodd-Frank’s anti-retaliation provision was designed to provide whistleblower protections to those who report a range of securities laws violations. Unlike section 10(b), Dodd-Frank necessarily interacts with other securities laws, which in the case of the FCPA, has a larger jurisdictional reach.

216. *Id.* at 179.

217. 561 U.S. at 267.

218. ADRs represent shares of a foreign corporation. See Vincent M. Chiappini, Note, *How American Are American Depository Receipts? ADRs, Rule 10b-5 Suits, and Morrison v. National Australia Bank*, 52 B.C. L. REV. 1795, 1816 (2011). Large U.S. depository banks purchase foreign securities and issue ADRs in the United States. *Id.* at 1816–17. When investing in ADRs, “one is ‘trading in the U.S. market.’” *Id.* at 1817. The foreign corporation is subject to the same securities laws as all other public corporations traded on national exchanges. *Id.* at 1818.

219. *Liu Meng-Lin*, 763 F.3d at 179.

220. *Morrison*, 561 U.S. at 251.

sort of “fleeting” connection that “cannot overcome the presumption against extraterritoriality.”²²¹

Thus, it is generally accepted that foreign-based companies, absent some greater U.S. connection than being traded on a U.S. exchange, are not subject to U.S. securities laws.²²²

Between the Southern District of Texas’s reasoning in *Asadi* and the Second Circuit’s reasoning in *Liu*, it remains ambiguous whether the United States lacks jurisdiction over foreign whistleblowers because of where the whistleblower is located or, alternatively, because of limited connections between the United States and the employer accused of retaliation. This distinction can be illustrated by slightly altering the facts in *Nollner v. Southern Baptist Convention, Inc.*²²³ Interestingly, the issue of extraterritoriality was not discussed in *Nollner* because the plaintiff brought suit against a non-issuer domestic concern.²²⁴ But had the plaintiff worked for an issuer, the facts would have been very similar to *Asadi*. Mr. Nollner was a U.S. resident working for a U.S. company overseas.²²⁵ Based on *Asadi*, under the altered facts, the court likely would find that Dodd-Frank protections still do not extend to Mr. Nollner. Alternatively, based on *Liu*, if it is more important that the company involved have strong jurisdictional ties to the United States, under the altered facts it is possible Dodd-Frank protections would apply to Mr. Nollner, as IMB was a U.S. company.²²⁶

In *Liu*, the plaintiff also argued that Dodd-Frank’s anti-retaliation provision should apply extraterritorially because the bounty provision applies extraterritorially.²²⁷ The court held that the bounty provision applies extraterritorially because of regulations promulgated by the SEC and not because of congressional intent.²²⁸ Regardless, the court concluded that “even if [it were to] assume that the regulations clearly apply the bounty program to whistleblowers located abroad and that some deference would be due [to] such an agency interpretation, it would not follow that Congress intended the antiretaliation provision to apply

221. *Liu Meng-Lin*, 763 F.3d at 180 (quoting *Morrison*, 561 U.S. at 263). This leaves open the possibility that future foreign whistleblowers who are able to establish a stronger connection between the harm and the domestically-traded securities may have an anti-retaliation claim under Dodd-Frank.

222. See *Morrison*, 561 U.S. at 263.

223. 852 F. Supp. 2d 986 (M.D. Tenn. 2012).

224. *Id.* at 996.

225. *Id.* at 989–90.

226. See *id.* at 996; *Liu Meng-Lin*, 763 F.3d at 180 (citing *Morrison*, 561 U.S. at 263).

227. *Liu Meng-Lin*, 763 F.3d at 181–82.

228. *Id.* at 182–83.

similarly.”²²⁹ Just because one provision applies extraterritorially, this does not mean every provision was intended to apply extraterritorially.²³⁰ The court also recognized the “different international ramifications” of the two provisions.²³¹ It “is far less intrusive into other countries’ sovereignty” to provide monetary incentive to foreign whistleblowers than to regulate employment practices.²³² Essentially, foreign whistleblowers are invited to try their luck at winning the rare Dodd-Frank bounty, but if that effort fails, they will be left unprotected. This lack of adequate protection seems like a harsh U.S. policy, given that the federal government generally wants and encourages foreign whistleblowers to come forward with tips.²³³

Congress may not have intended Dodd-Frank’s anti-retaliation provision to apply extraterritorially, but it is clear that Congress did intend so for the FCPA, especially with the implementation of the 1998 amendments.²³⁴ Courts have focused their attention on the permissibility of the extraterritoriality of Dodd-Frank, rather than the extraterritoriality of the underlying act that made the employer’s conduct a violation in the first place.²³⁵ This misplaced focus is problematic and places Dodd-Frank’s anti-retaliation provision at odds with the goals of

229. *Id.* at 182; *see also* Order Determining Whistleblower Award Claim, Exchange Act Release No. 73174, 2014 WL 4678597, at *1 n.2 (Sept. 22, 2014) (“[A]lthough we recognize that the Court of Appeals for the Second Circuit recently held that there was an insufficient territorial nexus for the anti-retaliation protections of Section 21F(h) to apply to a foreign whistleblower who experienced employment retaliation overseas after making certain reports about his foreign employer, we do not find that decision controlling here; the whistleblower award provisions have a different Congressional focus than the anti-retaliation provisions, which are generally focused on preventing retaliatory employment actions and protecting the employment relationship.” (citation omitted)).

230. *Liu Meng-Lin*, 763 F.3d at 183.

231. *Id.*

232. *Id.*

233. Indeed, Chief of the OWB, Sean McKessy, has said: “Whistleblowers from all over the world should feel . . . incentivized to come forward with credible information about potential violations of the U.S. securities laws.” Press Release, *supra* note 184.

234. According to the October 8, 1998 House Commerce Committee Report, “[the] legislation is designed to level the playing field for business *worldwide* by seeking to reduce foreign bribery *generally*.” H.R. REP. NO. 105-802, at 9 (1998) (emphasis added); *see also* S. REP. NO. 105-277, at 4 (1998) (“Although [the amendment] limits liability to U.S. issuers and U.S. persons acting on U.S. issuers’ behalf, it is expected that the established principles of liability, including principles of vicarious liability, that apply under the current version of the FCPA shall apply to the liability of U.S. issuers for acts taken on their behalf by their officers, directors, employees, agents, or stockholders outside the territory of the United States, regardless of the nationality of the officer, director, employee, agent, or stockholder.”).

235. *See Liu Meng-Lin*, 763 F.3d at 179–83; *Asadi v. G.E. Energy (USA) LLC*, No. 4:12-345, 2012 WL 2522599, at *3–5 (S.D. Tex. June 28, 2012), *aff’d on other grounds*, 720 F.3d 620 (5th Cir. 2013).

the FCPA.²³⁶ The U.S. government routinely uses the FCPA to obtain jurisdiction over foreign-based companies solely on the basis of “fleeting” U.S. connections.²³⁷ It is hard to ignore the truly global nature of FCPA enforcement.

“In 2011, 72 percent of the financial penalties in FCPA cases were assessed by US authorities against non-US companies”²³⁸ As of 2012, “United States businesses ha[ve] produced more than \$3 billion in settlements. But a list of the top companies making these settlements is notable in one respect: its lack of American names.”²³⁹ As of 2014, the top ten largest FCPA settlements continued to consist primarily of foreign companies.²⁴⁰ Recently, “U.S. authorities have begun to aggressively use

236. See *Asadi*, 2012 WL 2522599, at *6.

237. See *SEC v. Straub*, 921 F. Supp. 2d 244, 257–58 (S.D.N.Y. 2013). The plaintiff can establish jurisdiction over the defendant where he can show “that the defendant ‘purposefully availed himself of the privilege of doing business in the forum state and that the defendant could foresee being haled into court there.’” *Id.* (quoting *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 242–43 (2d Cir. 1999)); accord *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (explaining that the “constitutional touchstone” of the due process analysis is “whether the defendant purposefully established ‘minimum contacts’ in the forum” (citing *Int’l Shoe Co. v. State of Washington*, 326 U.S. 310, 316 (1945))). The Southern District of New York found that the executives of the Hungarian telecommunications company, Magyar Telekom, Plc, intentionally engaged in activity designed to violate the FCPA. *Straub*, 921 F. Supp. 2d at 255. The company was publicly traded (through ADRs) on the NYSE. *Id.* The “[d]efendants knew or had reason to know that any false or misleading financial reports would be given to prospective American purchasers of those securities.” *Id.* Essentially, the trading/registration on a national exchange, coupled with knowledge that prospective U.S. purchasers could be influenced by false financial statements, was enough to establish jurisdiction. *Id.* at 255–56. In *Liu Meng-Lin*, it seems at least arguable that Siemens knew its misleading information could reach the U.S. market and thus it purposely availed itself of U.S. law by trading on the NYSE.

238. ARNOLD & PORTER LLP, *THE EXTRATERRITORIAL REACH OF THE FCPA AND THE UK BRIBERY ACT: IMPLICATIONS FOR INTERNATIONAL BUSINESS 1* (2012), http://www.arnoldporter.com/resources/documents/Advisory%20Extraterritorial_Reach_FCPA_and_UK_Bribery%20Act_Implications_International_Business.pdf [hereinafter *EXTRATERRITORIAL REACH OF FCPA*].

239. Leslie Wayne, *Foreign Firms Most Affected by a U.S. Law Barring Bribes*, N.Y. TIMES (Sept. 3, 2012), http://www.nytimes.com/2012/09/04/business/global/bribery-settlements-under-us-law-are-mostly-with-foreign-countries.html?pagewanted=all&_r=0. “These companies . . . include Siemens, the German engineering giant; Daimler, the maker of Mercedes-Benz vehicles; Alcatel-Lucent, the French telecommunications company; and the JGC Corporation, a Japanese consulting company.” *Id.*

240. *Why Do Most of the Top FCPA Settlements Involve Foreign Companies?*, FCPA PROFESSOR (July 9, 2014), <http://www.fcpaprofessor.com/why-do-most-of-the-top-fcpa-settlements-involve-foreign-companies>. The list includes, in order from greatest settlement, Siemens AG (Germany), KBR Halliburton (United States), Total SA (France), Alcoa (United States), Snamprogetti/ENI (Italy), Technip SA (France), JGC Corp. (Japan), Daimler AG (Germany), Weatherford International (Ireland), and Alcatel-Lucent (France). *Id.*

the FCPA . . . to target conduct that seemingly has very little connection with the U.S.”²⁴¹

One of the biggest settlements to date involved the previously mentioned German company, Siemens.²⁴² In November 2006, the Munich Public Prosecutor’s Office in Germany raided multiple Siemens offices and the homes of various Siemens employees, on suspicion that the company had engaged in the bribery of foreign officials and the falsification of books and records to hide the bribes.²⁴³ Siemens ultimately disclosed violations to the DOJ and to the SEC, which triggered a global internal investigation into the company.²⁴⁴ “The scope of Siemens’ internal investigation was unprecedented and included virtually all aspects of its worldwide operations, including headquarters components, subsidiaries, and regional operating companies.”²⁴⁵ The internal investigation revealed evidence of years of corruption on the part of Siemens, spanning several decades in various operating groups and regions.²⁴⁶ The SEC and the DOJ obtained jurisdiction over Siemens because “[a]s of March 12, 2001, [Siemens] was listed on the [NYSE] and was an ‘issuer’ as that term is used in the FCPA. By virtue of its status as issuer, [Siemens] was required to comply with the provisions of the FCPA.”²⁴⁷

241. Douglas N. Greenburg et al., *Prosecutors Without Borders: Emerging Trends in Extraterritorial Enforcement*, LATHAM & WATKINS 5 (Apr. 2011), <https://www.lw.com/search?searchText=prosecutors+without+borders> (follow URL then click article title); accord TARUN, *supra* note 55, at 250 (“Regardless of the jurisdictional nexus, the pattern is clear: the DOJ and SEC are aggressively pursuing bribery conduct by foreign corporations and subsidiaries.”).

242. Press Release, U.S. Dep’t of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008), <http://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html>.

243. Department’s Sentencing Memorandum at 2, *United States v. Siemens Akfiengesellschaft*, No. 1:08-cr-00367 (D.D.C. Dec. 12, 2008), <http://www.justice.gov/sites/default/files/opa/legacy/2008/12/19/siemens-sentencing-memo.pdf>.

244. *Id.*

245. *Id.*

246. *Id.* at 3.

247. Statement of Offense at 1–2, *United States v. Siemens Akfiengesellschaft*, No. 1:08-cv-00367 (D.D.C. Dec. 15, 2008) (citation omitted), <http://www.justice.gov/sites/default/files/opa/legacy/2008/12/16/siemens-ag-stmt-offense.pdf>. Jurisdiction was also established by transfers passing through United States-based correspondent accounts and the use of U.S. mails and telephone lines. *Id.* If the act of passing funds through domestic

correspondent accounts is considered a sufficient basis for FCPA jurisdiction, it would mean that all companies could be subject to the FCPA’s anti-bribery provisions for bribes paid by foreign entities outside of the U.S. to foreign government officials if . . . those payments travel through a correspondent account in the U.S.

Ultimately, Siemens was fined \$450 million in criminal fines by the DOJ and \$350 million in disgorgement by the SEC.²⁴⁸ On the one hand, the U.S. government will collect multimillion dollar settlements from foreign corporations on the jurisdictional basis that the foreign company is traded on the NYSE, but, on the other hand, it maintains that those same “fleeting” connections are insufficient to protect foreign whistleblowers who come forward with valid FCPA claims against the same companies.²⁴⁹ The Second Circuit gave no hint as to what, beyond listing on a national exchange, is sufficient to establish such jurisdiction.

VIII. SOLUTION: THE CASE FOR AN FCPA EXCEPTION TO DODD-FRANK’S ANTI-RETALIATION PROVISION

It is clear that, as the law currently stands, Dodd-Frank’s anti-retaliation provision cannot protect all FCPA whistleblowers. Because the FCPA covers a broader jurisdiction than Dodd-Frank,²⁵⁰ the FCPA does not fit squarely within the securities laws. The courts have narrowly interpreted the application of Dodd-Frank’s anti-retaliation provision to FCPA whistleblowers while ignoring the unique nature and broad scope of the FCPA altogether. Because the courts are unlikely to broaden the scope of Dodd-Frank to better protect FCPA whistleblowers, this task falls upon Congress. The existing gaps leave certain FCPA whistleblowers unprotected against employer retaliation and may discourage them from coming forward.²⁵¹

There are a number of ways to address the existing gaps in FCPA whistleblower protection. The first is to amend the FCPA directly to include its own whistleblower protection program. An FCPA-specific whistleblower program could address the unique needs of FCPA whistleblowers. Because the FCPA already has an extraterritorial scope, obtaining jurisdiction over foreign whistleblowers would not be problematic. An amendment to the FCPA could also expressly protect whistleblowers who report anti-bribery violations against non-issuer

Greenburg et al., *supra* note 241, at 6. It is becoming increasingly true “that US enforcement agencies can make use of these extraterritorial provisions of the FCPA to exert jurisdiction on the basis of actions as slight as registering [ADRs], sending incriminating emails, or making a transfer to a US bank account.” See EXTRATERRITORIAL REACH OF FCPA, *supra* note 238, at 3.

248. Press Release, *supra* note 242. Including payments to German officials for violations, Siemens paid \$1.6 billion dollars in penalties. *Id.*

249. See Liu Meng-Lin v. Siemens AG, 763 F.3d 175, 180 (2d Cir. 2014).

250. See 15 U.S.C. §§ 78dd-2, -3 (2012).

251. This includes foreign whistleblowers and whistleblowers reporting non-issuer domestic concerns.

domestic concerns. The FCPA already regulates this group of non-issuers. Keeping with the current trend in the securities laws, the DOJ could regulate whistleblower reports against domestic concerns.

However, regardless of how logical it may be for the FCPA to have its own whistleblower protection provision, it may not be the most efficient approach. Dodd-Frank already provides a comprehensive whistleblower program that applies generally to help enforce the securities laws.²⁵² Creating another whistleblower program would be expensive and would require the government to essentially reinvent the wheel. The SEC would then play a role in multiple whistleblower programs that, all things considered, would largely be the same. Further, it is important to make sure whistleblower tips are adequately documented and recorded. Logically, these tips should be collected and reviewed in the same place. Adding another whistleblower program to the mix of the securities laws would create unnecessary confusion. It would be more efficient to amend Dodd-Frank to account for the existing gaps between its anti-retaliation provision and the FCPA.

Because Dodd-Frank is a securities law that regulates issuers, it would be impractical to universally expand its scope to reach all non-issuers as well. However, the unique nature of the FCPA should not be discounted, as it has been by the courts.²⁵³ Dodd-Frank should be amended to alter the existing jurisdictional reach of the anti-retaliation provision to protect all FCPA whistleblowers as well. To do this, Congress should implement a two-fold FCPA exception to Dodd-Frank's anti-retaliation provision.²⁵⁴ First, it should permit the anti-retaliation provision to apply to FCPA whistleblowers who report (either internally or to the SEC) that their domestic concern employers violated the anti-bribery provision of the FCPA. This exception would apply notwithstanding the text of the third prong of the anti-retaliation

252. See *id.* § 78u-6.

253. See *Asadi v. G.E. Energy (USA) LLC*, No. 4:12-345, 2012 WL 2522599, at *5-6 (S.D. Tex. June 28, 2012), *aff'd on other grounds*, 720 F.3d 620 (5th Cir. 2013); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 997-98 (M.D. Tenn. 2012).

254. Notably, this could also be done under the SEC's rulemaking authority. See § 78u-6(j). While this would be the fastest and easiest solution, it is probably the least effective. Applying *Chevron* deference, courts would likely find that Congress was clear and unambiguous when it determined Dodd-Frank's anti-retaliation provision applies exclusively to domestic whistleblowers who report tips against issuers. See *Chevron, Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-43 (1984). Under such circumstances, the rule could be entirely discounted by any examining court. As previously discussed, the courts have already disregarded SEC rules based on this reasoning. See *Asadi*, 720 F.3d at 630. An amendment would be the most effective way to address the existing gaps and would bypass overly narrow judicial interpretation.

provision²⁵⁵ requiring that disclosures be protected or required by the securities laws.²⁵⁶ Essentially, the new amendment would expressly protect FCPA disclosures. The amendment would, in turn, recognize the anti-bribery provision of the FCPA as a securities law for purposes of whistleblower anti-retaliation protection.²⁵⁷ While this inevitably expands the jurisdictional reach of Dodd-Frank, it does so in a very narrow and limited way.

The second part of the exception should expressly provide that Congress intends Dodd-Frank's anti-retaliation provision to extend extraterritorially to protect foreign FCPA whistleblowers. The exception should not extend the anti-retaliation provision extraterritorially to *all* whistleblowers who report securities laws violations generally but rather should recognize the unique nature of FCPA reports. Whistleblowers who are employed by a U.S. company and sent overseas to work would then be protected against employer retaliation should they blow the whistle on FCPA violations. Similarly, whistleblowers who report employers that fall under the FCPA's jurisdiction would be protected against retaliation. These protections should extend regardless of whether reports are made internally or directly to the SEC. These two provisions, constituting a narrow FCPA exception to Dodd-Frank's anti-retaliation provision, would close the current gaps and extend whistleblower protection to currently unprotected FCPA whistleblowers.

IX. CONCLUSION

Additional whistleblower protections would encourage more whistleblowers to come forward and report FCPA violations. Whistleblowers like Mr. Nollner, Mr. Asadi, and Mr. Liu would no longer have to choose between maintaining their livelihoods and "doing the right thing." Increasing the scope of whistleblower protection creates a more transparent workplace for companies around the world and levels the playing field for international business by helping eliminate corporate bribery. Dodd-Frank, in its current form, does not adequately protect all FCPA whistleblowers. Given the FCPA's global scope and broad

255. § 78u-6(h)(1)(A)(iii).

256. Alternatively, Congress could amend the FCPA to either expressly "protect" or "require" the disclosure of anti-bribery violations. This would have the same result as amending Dodd-Frank's anti-retaliation provision to create an FCPA exception by satisfying the third prong. Indeed, the problem in *Nollner*, *Asadi*, and *Liu* was that the FCPA did not protect or require the specific disclosures made by the plaintiffs.

257. Asadi essentially urged this in his complaint, but the court refused to address the issue. *Asadi*, 2012 WL 2522599, at *6 (arguing "that, because the FCPA is clearly intended to apply extraterritorially, the Provision also must apply extraterritorially").

jurisdiction, the courts' narrow interpretations have left certain whistleblowers unprotected against employer retaliation. Such gaps may deter those with inside knowledge of FCPA violations from reporting. A new amendment establishing an FCPA exception to Dodd-Frank's anti-retaliation provision would protect these endangered whistleblowers and encourage the unhindered reporting of FCPA violations.