ASADI V. GE ENERGY (USA) L.L.C.: A CASE STUDY OF THE LIMITS OF DODD-FRANK ANTI-RETALIATION PROTECTIONS AND THE IMPACT ON CORPORATE COMPLIANCE OBJECTIVES

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I. Introduction

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[1] ("Dodd-Frank," "Dodd-Frank Act," or "the Act") was enacted in the wake of the financial crisis of 2007 and 2008. Among numerous other undertakings, Dodd-Frank provided whistleblower protections and so-called "bounty provisions" for company employees who report securities law violations to the U.S. Securities and Exchange Commission ("SEC"), and sometimes to employers. Under some circumstances, Dodd-Frank also protects employees who report violations of other laws enforceable by the SEC. The whistleblower protections were meant to encourage company employees to report violations of law by protecting them from employment retaliation that may arise as a result of reporting violations. However, a paradox has developed in the application of Dodd-Frank's whistleblower protections. We pose a hypothetical to illustrate:

> A U.S. citizen, who has dual citizenship in Iraq, is employed by a U.S. company as a United States-based employee. He is "temporarily relocated" to Amman, Jordan, where, for five years, he has maintained an office. In Jordan, the employee serves as a liaison to the government of Iraq and coordinates with the Iraqi government to secure and maintain energy service contracts for his employer. The employee learns that his employer has hired someone in country for the alleged purpose of currying favor with Iraq government officials with whom the employee is responsible for negotiating service contracts. The employee becomes concerned that the hiring violates the U.S. Foreign Corrupt Practices Act's ("FCPA") prohibition of bribery of foreign government officials, to which law he believes his company is subject. The employee reports his concerns to his supervisor and the company ombudsman. He is unexpectedly terminated soon thereafter by an e-mail from his employer's human resources office in the United States, which says that he is being terminated under U.S. law.

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1. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 U.S.C. and 15 U.S.C.).

> Does this employee have a private right of action under Dodd-Frank for retaliatory termination in violation of the whistleblower protections of that Act for reporting possible FCPA violations to his employer?

The U.S. District Court for the Southern District of Texas answered that question in the negative in *Asadi v. G.E. Energy (USA), L.L.C.*[2] The district court's ruling was affirmed on appeal to the Fifth Circuit.[3]

The courts' rulings—that the employee was not protected by Dodd-Frank's whistleblower protections following his disclosures of potential violations of the FCPA—may surprise the reader from a common-sense perspective and from a factual perspective. In addition, from a legal perspective the courts' decisions may be surprising because of the extent to which the extraterritorial application of the FCPA itself has been discussed by commentators and courts alike. Should not the law protect an employee of a U.S. company who reports potential FCPA violations? The federal courts have said sometimes the answer is "no." In the early district court cases, the courts found that limitations on the extraterritorial application of U.S. laws left unprotected an employee reporting potential violations of U.S. criminal laws where the employee was living and working abroad, with foreign duties and responsibilities, and had only perfunctory connections with the U.S. operations of the company.[4] At the appellate level, this reasoning has not been rejected, but it has not been adopted either; rather, the *Asadi* case was decided on other grounds.[5] However, the reasoning that resulted in the denial of the extraterritorial application of the Dodd-Frank anti-retaliation provisions was grounded in U.S. Supreme Court precedent and therefore could be a possible basis for decision in future cases.

Dodd-Frank's objective to encourage company employees to report violations of U.S. laws, rules, and regulations to law enforcement, agency regulators, and, in some cases, company management, is served by the anti-retaliation protections that the Act's whistleblower provisions offer. Companies want their employees to first report alleged legal violations internally—not externally—so that they can investigate the allegation, decide whether there is a violation, and determine whether they can defend against the allegation, identify any wrongdoers, and remediate the situation. Although in a given situation, a company may determine to self-report identified violations, in general, companies want to make that determination themselves, not have employees make it for them by revealing alleged violations to the government without giving companies an opportunity to perform the steps just mentioned.

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2. No. 4:12-345, 2012 WL 2522599, at *7 (S.D. Tex. June 28, 2012).
3. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 630 (5th Cir. 2013).
4. *See, e.g.*, Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986 (M.D. Tenn. 2012); Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).
5. *Cf.* Liu v. Siemens A.G., No. 13 Civ. 317(WHP), 2013 WL 5692504, at *7–8 (S.D.N.Y. Oct. 21, 2013) (holding that Dodd-Frank whistleblower protections do not have extraterritorial application).

Moreover, the Principles of Federal Prosecution of Business Organizations (the "Principles"), which are the governing guidelines and considerations that the U.S. Department of Justice ("DOJ") follows when making determinations about whether and how to charge a company or otherwise resolve corporate criminal violations, place significant emphasis on the implementation and effectiveness of companies' corporate compliance programs.[6] Dodd-Frank furthers those goals as well by offering protection against retaliation—and real remedies for retaliatory actions—to whistleblowers.

In addition to the anti-retaliation provisions included in the statute, Dodd-Frank also directed the SEC to develop a program and to promulgate rules providing monetary awards to individuals who provide original information to the SEC relating to the violation of a securities law, rule, or regulation. The program was fully implemented in mid-2011 and therefore at the time of this writing has been in effect for two and one-half years. Commentators and employment and securities law practitioners commonly refer to the program as a "bounty" program. There is strong disagreement among commentators, academics and practitioners—typically stemming from which side of the issue they are on—about whether this element of Dodd-Frank has been successful and whether it fosters corporate compliance. One point is clear: the SEC's "bounty" program encourages corporate employees who become aware of legal violations to become statutorily defined "whistleblowers" by reporting violations to the SEC in order to qualify for the monetary awards that the agency offers.

Putting aside the debate about the merits or drawbacks of the SEC's monetary award program, the Dodd-Frank anti-retaliation provisions do support corporate compliance efforts, at least in theory. Whistleblowers are, or at least perceive that they are, offered protections for their disclosures. Employees who feel protected in raising sensitive issues with their employers, like allegations of legal violations, are more likely to raise them with their employers rather than with third parties, like law enforcement agencies and officials.

However, when those protections are cut off at the geographic borders of the country—as they were most recently by the district court in the *Asadi* case, and even after the appellate court ruling in that case, could be again—company employees undoubtedly feel exposed. Without those protections in place, employees who discover real evidence of corporate legal violations are likely to go to the place where they feel most likely to obtain legal protections, which is likely to be, accurately or not, government law enforcement and regulatory authorities. Over time, companies will particularly feel the effects of this ruling as it becomes more

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6. Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Dep't Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memo], http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

widely known.[7] Company employees will realize that if they discover evidence of criminal or civil regulatory wrongdoing while working for a U.S. company abroad, they may not be protected from retaliation. Thus, if they report those violations in good faith to their employer and their employer does not embrace those reports and seek to investigate, identify, and remedy them with integrity, they could be transferred, demoted, or subject to other retaliation, like termination. Moreover, these individuals may have no protection from their employer for reports that they make to U.S. law enforcement authorities of the same legal violations.

Increasing the potential impact of the *Asadi* decisions is that modern international companies often engage in manufacturing, sales, services, negotiations, or other business activities in numerous geographic locations around the world. Indeed, approximately forty percent of profit for firms listed in the Standard & Poor's top 500 companies now comes from overseas,[8] and companies are more international in their focus and operations than ever before. Hand-in-hand with the development and expansion of international business endeavors, we have seen the expansion of global law enforcement. New laws have extraterritorial application,[9] existing laws are enforced with increasing reach beyond U.S. borders,[10] and law enforcement bodies in countries around the world are working more collaboratively and in conjunction with each other.[11] Thus, while the enforcement environment is becoming more global and responsible enforcement agencies are finding ways to extend enforcement beyond country borders, *Asadi* may have narrowed the geographic application of a law meant to offer employment protection for individuals who become aware of evidence of legal violations. *Asadi* also made clear that any reports of legal violations must be made to the SEC to trigger the protection of the anti-retaliation provisions. Now that those reports must be made to the SEC, there may be more limited opportunities for internal company

7. This is especially true as this ruling becomes the basis for additional court decisions, like the recent *Liu v. Siemens A.G.* case. 2013 WL 5692504.

8. Rick Newman, *Why U.S. Companies Aren't So American Anymore*, U.S. NEWS & WORLD REP. (June 30, 2011).

9. *See, e.g.*, Dodd-Frank Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864–65 (amending 15 U.S.C. §§ 77v(a), 78aa, 80b-14).

10. *See, e.g.*, Criminal Information, United States v. Alcatel-Lucent France, S.A., No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/alcatel-lucent-sa-etal/12-27-10alcatel-et-al-info.pdf.

11. *See, e.g.*, Press Release, U.S. Dep't of Justice, Parker Drilling Company Resolves FCPA Investigation and Agrees to Pay $11.76 Million Penalty (Apr. 16, 2013) (acknowledging assistance of United Kingdom law enforcement authorities in investigation), *available at* http://www.justice.gov/opa/pr/2013/April/13-crm-431.html; Press Release, U.S. Dep't of Justice, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011) (acknowledging law enforcement assistance from authorities in Greece, Poland, and the United Kingdom), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-446.html; Press Release, U.S. Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010) (acknowledging assistance from Costa Rican and French law enforcement authorities), *available at* http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html.

consideration of such issues.

Conceivably, the substantive area in which this tension may have the greatest impact on corporate compliance is that of international anti-corruption and bribery enforcement. Certain countries are considered by commentators, law enforcement agencies, and non-governmental organizations alike to have higher risk profiles in terms of the likelihood of corruption and bribery activities in those jurisdictions.[12] At the same time that there are more opportunities in those countries for foreign bribery, money laundering, or other corruption, there may be fewer employment protections offered to employees of U.S. companies doing business there for reporting violations internally before going to external government law enforcement authorities.

This Article (1) introduces the question of extraterritorial application of Dodd-Frank whistleblower protections with a hypothetical scenario; (2) examines the compliance objectives of the Principles; (3) reviews the statutory whistleblower protections afforded by Dodd-Frank; (4) explains how the law came to deny anti-retaliation protection for a U.S. citizen working for a U.S. company abroad and require SEC reporting by examining the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*[13] and analyzing the *Asadi* case and other key federal court cases considering the extraterritorial application of the Dodd-Frank whistleblower protections in the wake of *Morrison*; and (5) discusses the tension between the compliance objectives of the Principles and the *Asadi* district court and appellate decisions. This Article concludes by discussing the importance of the *Asadi* decisions for U.S. companies with employees working abroad, and by advocating for those companies to view *Asadi* as a call for strengthening internal compliance programs to encourage internal reporting.

II. THE COMPLIANCE OBJECTIVES OF THE U.S. DEPARTMENT OF JUSTICE'S PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS

The Principles are a set of guidelines and policy announcements that the DOJ has promulgated governing the questions of whether and how to charge business entities.[14] The DOJ has directed its prosecutors and those employed in the ninety-four U.S. Attorneys' offices around the country to follow the Principles in charging decisions related to criminal misconduct by business organizations.[15] More specifically, the Principles outline factors that prosecutors should consider

12. *See, e.g.*, CORRUPTION PERCEPTIONS INDEX 2012, TRANSPARENCY INTERNATIONAL, *available at* http://files.transparency.org/content/download/537/2229/file/2012_CPI__EN.pdf; *see also* GLOBAL CORRUPTION BAROMETER 2013, *available at* http://www.transparency.org/whatwedo/pub/global_corruption_barometer_2013.

13. 130 S. Ct. 2869 (2010).

14. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-28.000 (2008) [hereinafter U.S.A.M.], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam.

15. *See id.*

when deciding whether to charge a company; the availability of credit for various corporate behaviors, such as cooperation and the implementation of corporate compliance programs; and the handling of attorney-client privilege and work product issues. The Principles also address the selection of charges, plea agreements, and alternative ways to resolve criminal activity.[16] The guidelines and policies enunciated in the Principles apply to the consideration of criminal conduct by all types of business organizations, including companies, partnerships, sole proprietorships, government entities, and unincorporated associations.[17] Although they do not create any legally enforceable rights for individuals or companies who deal with federal prosecutors, and they create no private right of action,[18] the Principles are important because they are more than aspirational. As part of the U.S. Attorneys' Manual, a resource that is disseminated to all federal prosecutors and available to the public, the Principles constitute statements of internal DOJ policy that all federal prosecutors are required to follow.

Prosecutorial discretion is a hallmark of the duties and responsibilities of federal prosecutors.[19] The Principles identify issues, give guidance, and outline the contours of prosecutorial discretion. For example, regarding charging decisions, the Principles state that "the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law."[20] The Principles then provide a number of policy considerations that prosecutors should weigh in "exercising [their] discretion."[21] Further, the Principles state that when discharging their prosecutorial responsibilities . . . prosecutors should ensure that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities—are adequately met . . . ."[22]

However, the Principles also state firm DOJ policies that prosecutors are required to follow, either as a matter of institutional decision-making, or as a result of court decisions or Congressional enactments that have resulted in certain requirements for the DOJ. For example, in the context of the attorney-client privilege and the work product doctrine, the DOJ has issued a policy that "prosecutors should not ask for [waivers of the protections] and are directed not to do so."[23] This policy represents a change from the position of the DOJ imple-

16. *Id.* §§ 9-28.1100 to .1300.
17. *Id.* § 9-28.000 n.1.
18. *Id.* § 9-28.1300(B).
19. *See id.* § 9-27.110(B); *see generally* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008).
20. U.S.A.M., *supra* note 14, § 9-28.300(B).
21. *Id.*
22. *Id.*
23. *Id.* § 9-28.710.

mented in January 2003, which considered whether a target company agreed to waive the attorney-client privilege and work product protections as incidents of a company's cooperation.[24]

Corporate compliance is a key objective of the Principles, as well as a mitigating factor. As the Principles state, the overriding purpose of the criminal justice system, which shapes the mission of the prosecutor, is to "secure the facts in a manner that encourages corporate compliance and self-regulation."[25] At the same time, the Principles counsel prosecutors to be mindful of the potential harm to "blameless investors, employees, and others" and the resulting public perception of the prosecutorial mission as a result of decisions made regarding corporate criminal prosecutions.[26] With respect to the factors to consider in determining whether to charge a company, two of the nine enumerated factors involve the company's compliance program: (1) "the existence and effectiveness of the corporation's pre-existing compliance program"; and (2) "the corporation's remedial actions, including any efforts to implement an effective corporate compliance program."[27] The Principles also specifically discuss the pervasiveness of wrongdoing within the corporation. In counterbalance to pervasive conduct, which the Principles state is appropriate to charge, they state that "it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, . . . for the single isolated act of a rogue employee."[28]

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24. *See* Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Dep't Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations, §§ VI, XII (Jan. 20, 2003). The so-called "Thompson Memo" stated that in determining whether to charge a corporation or to give the corporation sentencing credit for cooperation, the corporation's willingness to cooperate with the government's investigation is a relevant factor, with respect to which a prosecutor may consider the corporation's willingness to waive the attorney-client and work product protections. *Id.*

Following distress about this policy from commentators and practitioners alike, as well as a ruling going against the DOJ in the criminal case of KPMG that turned on the issue of whether a company can be considered to be "cooperating" with a federal criminal investigation if it indemnifies employees allegedly involved in the conduct under scrutiny during the course of an investigation, the DOJ changed the policy in 2006. On December 12, 2006, then-Deputy Attorney General Paul McNulty issued a memorandum instructing DOJ prosecutors that privilege and work product waiver requests going forward would require supervisor approval after being subjected to close scrutiny. *See* McNulty Memo, *supra* note 6, § VII(B)(2). The directive had the effect of scaling back the use of waiver demands, although it did not entirely prevent them. *See id.* § XIII(B) (permitting prosecutors to continue to consider a company's willingness to waive the protections in making cooperation evaluations).

In August 2008, then-Deputy Attorney General Mark Filip issued a new memorandum that focused on the disclosure of "relevant facts," rather than the waiver of the attorney-client privilege and the attorney work product doctrine. *See* Memorandum from Mark Filip, Deputy Attorney General, to Heads of Dep't Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations, § 9-28.720 (Aug. 28, 2008). Pursuant to the new guidelines, prosecutors may only make a waiver request in extremely limited circumstances. *See id.* Moreover, in evaluating the company's cooperation, prosecutors may not consider whether the company has advanced legal fees to employees or engaged in certain other defense-related conduct. *Id.*

25. U.S.A.M., *supra* note 14, § 9-28.100.

26. *Id.*

27. *Id.* § 9-28.300(A)(5)−(6).

28. *Id.* § 9-28.500(A).

The theme of corporate compliance is woven throughout the guidance and policies of the Principles. For instance, under the Principles, in a prosecutor's decision of whether and how to charge a company (or how to otherwise resolve criminal conduct), whether that company has implemented a compliance program, and the effectiveness of that program are significant considerations. An entire section of the Principles is dedicated to corporate compliance programs. It notes that the purpose of such programs is to "prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with applicable criminal and civil laws, regulations, and rules."[29] Corporate compliance is discussed in the context of consideration for credit for assisting the government in its investigation: "In conjunction with regulatory agencies and other executive branch departments, the Department encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities."[30] Although those factors may not outweigh other considerations, and a decision still may be made to prosecute the company, a company's compliance program has considerable weight in the analysis.[31]

In the context of cooperation, the Principles also discuss the adequacy of the corporate compliance program. A company that has a reasonably adequate compliance program (despite any alleged violations under investigation) may get "credit" for having such a compliance program and its willingness to cooperate. A company cannot have an adequate compliance program where it is purely a "paper program," that is, one that states principles of compliance but fails to implement them.[32] Instead, according to the Principles, "the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives."[33]

Although the Principles note that there is no formula for assessing corporate compliance programs, they provide certain questions that a prosecutor should ask in the assessment.[34] These questions include whether the program is well-designed, whether it is specific to the business and its inherent risks, whether it is applied earnestly and in good faith, whether it works, and whether the program includes mechanisms for effectively detecting and preventing violations.[35] Prosecutors will consider whether employees are adequately trained on the compliance

29. *Id.* § 9-28.800(A).

30. *Id.* § 9-28.750.

31. Countervailing considerations include "prosecution and economic policies specific to the industry or statute." *Id.*; *see also id.* § 9-28.800(A) (stating that the nature of some crimes may mandate prosecution notwithstanding the existence of a compliance program).

32. *See id.* § 9-28.800(B).

33. *Id.*

34. *Id.*

35. *Id.*

program, and whether the company audits the program and seeks to make improvements based on the audit results.[36] A "truly effective compliance program," notes the Principles, may result in charges only against employees and agents responsible for wrongdoing, or may mitigate charges or penalties against the company itself, where other law enforcement policies do not dictate another result.[37]

Compliance programs come into play in the context of remediating a company's wrongdoing as well. In determining whether to prosecute a company and how to resolve corporate criminal cases, the Principles state that a prosecutor should consider the company's remedial efforts.[38] These include a company's "timely and voluntary disclosure in evaluating the adequacy of the [company's] compliance program and its management's commitment to the compliance program."[39] A company's remedial efforts also include efforts to make restitution and efforts to "improv[e] an existing compliance program" or to "disciplin[e] wrongdoers" within the corporation.[40] Thus, the concept of corporate compliance is critical to the concepts of corporate criminal enforcement. Corporate compliance plays a central role under the Principles in the prosecution of and cooperation and remediation by targets of criminal investigations.

III. DODD-FRANK WHISTLEBLOWER PROVISIONS

Against the background of the importance of corporate compliance to all aspects of the criminal enforcement guidelines, we consider the operation of the Dodd-Frank anti-retaliation provisions.

A. Purpose of the Act

Dodd-Frank[41] was signed into law on July 21, 2010. It was enacted in the wake of the 2007 and 2008 financial crisis, during which the federal government was forced to step in on several occasions to prop up the failing credit markets. Liquidity issues began in the summer of 2007, but serious concern began in March 2008 when federal regulators forced the Bear Sterns takeover by JPMorgan Chase.[42] September 2008 was punctuated by four never-before-seen events: (1) the federal government took over Fannie Mae and Freddie Mac, the home mortgage giants, at a point when they had become "virtually the only source of funding for

36. *See id.* ("[P]rosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts.").
37. *Id.*
38. *See id.* § 9-28.900(A).
39. *Id.* § 9-28.750.
40. *Id.* § 9-28.900(A).
41. Pub. L. No. 111-203, 124 Stat. 1376 (2010).
42. Roddy Boyd, *The Last Days of Bear Stearns*, CNNMONEY.COM (Mar. 31, 2008, 1:59 PM), http://money.cnn.com/2008/03/28/magazines/fortune/boyd_bear.fortune/.

banks and other home lenders looking to make home loans";[43] (2) Merrill Lynch agreed to sell to Bank of America for a fraction of its stock trading price when its liquidity evaporated in one day;[44] (3) Lehman Brothers filed for protection in the largest U.S. bankruptcy up to that date;[45] and (4) the federal government loaned American International Group, Inc., otherwise known as AIG, $85 billion to save the failing insurer from a similar fate.[46]

A report prepared by the Congressional Research Service on Dodd-Frank summarized the atmosphere that lead to the conceptualization of Dodd-Frank as follows:

> Beginning in 2007, U.S. financial conditions deteriorated, leading to the near collapse of the U.S. financial system in September 2008. Major banks, insurers, government-sponsored enterprises, and investment banks either failed or required hundreds of billions in federal support to continue functioning. Households were hit hard by drops in the prices of real estate and financial assets, and by a sharp rise in unemployment.[47]

The Act's intended result was to improve the accountability and transparency of the U.S. financial markets and system.[48] Commentators have frequently stated that the legislation was directed at ending the then-commonly held conception that any one financial institution was "too big to fail."[49] Instead, under Dodd-Frank, failing big businesses are to be wound down.[50] In one speech, an SEC Commissioner emphasized the groundbreaking "shift in the legal, regulatory and policy landscape affecting our markets and our economy" that was intended to flow from Dodd-

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43. David Ellis, *U.S. Seizes Fannie and Freddie*, CNNMONEY.COM (Sept. 7, 2008, 8:28 PM), http://money.cnn.com/2008/09/07/news/companies/fannie_freddie/index.htm.

44. Charlie Gasparino, *Bank of America to Buy Merrill Lynch for $50 Billion*, CNBC.COM (Sept. 14, 2008, 7:42 PM), http://www.cnbc.com/id/26708319.

45. *Lehman Brothers Files for Bankruptcy, Scrambles to Sell Key Business*, CNBC.COM (Sept. 15, 2008, 3:26 AM), http://www.cnbc.com/id/26708143; Carrick Mollenkamp, Susanne Craig, Serena Ng & Aaron Lucchetti, *Lehman Files for Bankruptcy, Merrill Sold, AIG Seeks Cash*, WALL ST. J. (Sept. 16, 2008, 6:52 PM), http://online.wsj.com/article/SB122145492097035549.html.

46. Tami Luhby, *Fed in AIG Rescue—$85B Loan*, CNNMONEY.COM (Sept. 17, 2008, 10:21 AM), http://money.cnn.com/2008/09/16/news/companies/AIG/index.htm.

47. BAIRD WEBEL, CONG. RESEARCH SERV., THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: ISSUES AND SUMMARY, at Summary (2010), *available at* http://assets.opencrs.com/rpts/R41350_20100729.pdf.

48. *See* Dodd-Frank, Pub. L. No. 111-203, 124 Stat.1376, 1376 (2010) ("An Act [t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.").

49. *See, e.g.*, Ben Hallman, *Four Years Since Lehman Brothers, 'Too Big to Fail' Banks, Now Even Bigger, Fight Reform*, HUFFINGTON POST (Sept. 15, 2012, 12:30 PM), http://www.huffingtonpost.com/2012/09/15/lehman-brothers-collapse_n_1885489.html.

50. *See id.* ("The council has the power to seize a failing bank and unwind it in an orderly way.").

Frank.[51] She noted that the changes would "touch every aspect of our financial markets, from consumer credit to proprietary trading at financial firms, from [the over-the-counter] derivatives markets to securitization, and from private fund registration and regulation to corporate governance at public companies."[52] If size portends might, Dodd-Frank's size dictates its might over previous securities fraud enforcement legislation. Dodd-Frank significantly outsized the most recent prior groundbreaking legislation in the area of financial reform, the Sarbanes-Oxley Act of 2002 ("SOX"); Dodd-Frank is 849 pages long, while SOX is sixty-six pages long, and Dodd-Frank requires more than 240 rulemakings and nearly seventy studies, as compared to SOX's mandated sixteen rulemakings and six studies.[53]

Among these endeavors, the Act established several new whistleblower protections. Two of these new provisions protect individuals employed in the financial services industries.[54] Section 748 of the Act amended the Commodity Exchange Act ("CEA") to prevent retaliation against an employee who reports, provides information, or assists in a judicial or a Commodities Futures Trading Commission ("CFTC") administrative action based on information relating to a violation of the CEA.[55] Section 1057 of the Act relates to disclosures by employees of companies engaged in providing consumer financial products or services, or a material service in connection with such products or services. The section protects individuals who make disclosures of violations of Title X of the Dodd-Frank Act, known as the Consumer Financial Protection Act of 2010, or any law that is subject to the jurisdiction of the Dodd-Frank-created Consumer Financial Protection Bureau ("CFPB"), assists in any related proceeding, or objects to or refuses to participate in any activity, policy, or practice that the employee reasonably believes violates any law enforceable by the CFPB.[56] These sections provide similar protections; both sections provide a private right of action to aggrieved employees, although section 1057 establishes an administrative procedure that must first be followed before filing a judicial action.[57]

Further, section 922 of the Act provides a private cause of action for statutorily-defined "whistleblowers" who face retaliation for giving voice to their allegations of more general illegal conduct under the securities laws or other laws enforced by the SEC. In short, section 922 permits reporting employees who suffer retaliation by their employers as a result of making disclosures of illegal acts or otherwise cooperating with the SEC in connection with the agency's investigation

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51. Kathleen L. Casey, Comm'r, Sec. & Exch. Comm'n, The Regulatory Implementation and Implications of Dodd-Frank (Jan. 23, 2011), *available at* http://www.sec.gov//speech/2011/spch012311klc.htm.

52. *Id.*

53. *Id.*

54. JON O. SHIMABUKURO & L. PAIGE WHITAKER, CONG. RESEARCH SERV., WHISTLEBLOWER PROTECTIONS UNDER FEDERAL LAW 4 (2012).

55. Dodd-Frank Act, Pub. L. No.111-203, § 748, 124 Stat. 1376, 1739–46 (2010).

56. *Id.* § 1057, 124 Stat. at 2031–32.

57. *Compare* § 748, *with* § 1057.

or litigation of causes of action for illegal acts to file suit against their employer for redress of the retaliation.[58] Section 922 also provides whistleblower protections under the rubric of so-called "bounty provisions" for company employees who report to the SEC violations of law under the authority of the SEC. The whistleblower protections and bounty provisions aim to together encourage the reporting of potential securities and other law violations, and protect reporting individuals. The specific protections and operation of section 922 are discussed in further detail below.

B. Anti-Retaliation Provisions

Specifically, section 922 of the Dodd-Frank Act amended the Securities Exchange Act of 1934 to add a section prohibiting retaliation against an individual for reporting to the SEC violations of the securities laws, assisting in any SEC investigation, or making disclosures that are required by SOX, the Securities Exchange Act of 1934, or any other law under the SEC's jurisdiction.[59] Section 922 lays out the protections for disclosing company employees in two parts: first, providing a definition of a protected "whistleblower," and second, setting forth a proscription against retaliation against a whistleblower. Dodd-Frank defines a "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws *to the Commission*, in a manner established, by rule or regulation, *by the Commission*."[60]

The anti-retaliation provisions of the Act protect whistleblowers from retaliation in three categories of circumstances, providing:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of Title 18, United States Code, and any other law, rule or regulation subject to the jurisdiction of the Commission.[61]

58. Dodd-Frank Act § 922, 124 Stat. at 1845–46 (codified as amended at 15 U.S.C. § 78u-6(h) (2012)).
59. *Id.* (adding § 21F to the Securities Exchange Act of 1934).
60. 15 U.S.C. § 78u-6(a)(6) (emphasis added).
61. *Id.* § 78u-6(h)(1)(A).

Where these proscriptions are violated, Dodd-Frank provides, inter alia, a private cause of action for whistleblowers alleging retaliatory discharge or other forms of discrimination under certain circumstances.[62]

Thus, in order to demonstrate a violation of the anti-retaliation protections by an employer, and therefore the existence of a private cause of action by the employee against the employer under the Dodd-Frank Act, the employee must show the following:

> (1) he or she was retaliated against for reporting a violation of the securities laws[;] (2) [the employee] reported that information to the SEC or to another entity [as provided by the Act]; (3) the disclosure was made pursuant to a law, rule, or regulation subject to the SEC's jurisdiction; and (4) the disclosure was "required or protected" by that law, rule, or regulation within the SEC's jurisdiction.[63]

If the aggrieved employee brings a successful lawsuit, the available remedies include the following:

> (i) reinstatement with the same seniority status that the individual would have had, but for the discrimination;
> (ii) twice the amount of back pay otherwise owed to the individual, with interest; and
> (iii) compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.[64]

The SEC has provided some limited publicly available guidance regarding the application of these provisions. Although focused on providing explanation of the application of the so-called "bounty" provisions, the guidance also briefly addresses the anti-retaliation provisions. It provides: "Employers may not discharge, demote, suspend, harass, or in any way discriminate against you because of any lawful act done by you in providing information to [the SEC] under the whistleblower program or assisting us in any investigation or proceeding based on the information submitted."[65] In addition to being eligible to bring a private cause of action, the guidance notes that under SOX, an individual who suffers retaliation

62. *Id.* § 78u-6(h)(1)(B) ("An individual who alleges discharge or other discrimination . . . may bring an action under this subsection in the appropriate district court of the United States . . . ."). Lawsuits must be brought within six years of the retaliation, or, if not initially apparent to the plaintiff that he has a cause of action, within three years of when the "facts material to the right of action are known or reasonably should have been known by the employee." *Id.* § 78u-6(h)(1)(B)(iii). In any event, no lawsuit may be brought more than ten years after the violation occurs. *Id.*

63. Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 995 (M.D. Tenn. 2012).

64. 15 U.S.C. § 78u-6(h)(1)(C).

65. *Frequently Asked Questions*, SEC OFFICE OF THE WHISTLEBLOWER, www.sec.gov//offices/owb/owb-faq.shtml (follow question 15 hyperlink) (last visited Nov. 20, 2013) [hereinafter *Whistleblower FAQ*]; *see also* 17 C.F.R. § 240.21F-2 (2013) (SEC rule explaining whistleblower protections).

as a result of his or her disclosure, including internal reports to his or her employer, may be entitled to file a complaint with the U.S. Department of Labor.[66]

C. The "Bounty Provisions"

Operating hand-in-hand with the whistleblower protections are the monetary award provisions, often referred to as "bounty provisions." Although not the focus of this Article, these provisions of the Act merit mention because they are integral to the anti-retaliation provisions, and because they likely drive the public's general perception of the Act's whistleblower protections. Dodd-Frank provided for the development of a program by the SEC to provide monetary awards to individuals who provide information relating to the violation of a securities law, rule, or regulation to the Commission.[67] In order to qualify for a monetary award, the individual must have voluntarily provided "original information" leading to the successful enforcement of a matter. "Original information" is defined as information that is independently known to the whistleblower, is not otherwise known to the SEC, did not come exclusively from allegations made in a judicial or administrative hearing, in a government report, hearing, audit, or investigation, or from the news media, unless the whistleblower was a source of that information.[68]

The SEC has publicized the program well. In addition, the SEC has issued guidance to inform the public about the program and how it is administered by the SEC.[69] The program has received a lot of attention, and the SEC rules implementing it were anxiously anticipated. Because the program was so well-publicized, it is reasonable to conclude that it has had significant impact on the general public's impression of whistleblower protections, particularly vis-à-vis the SEC.

The SEC guidance addresses corporate compliance programs directly. The guidance addresses the circumstance where a company has an internal compliance process, hypothetically asking, "[c]an I report internally and still be eligible for a whistleblower award?"[70] The guidance states that in such circumstances, the SEC will "consider your place in line for determining whether your information is 'original information' to be the date you reported it internally."[71] The guidance also specifically states,

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66. *See Whistleblower FAQ*, *supra* note 65.

67. 15 U.S.C. § 78u-6(b)(1) (providing for the SEC to prescribe regulations to implement the whistleblower award program).

68. *Id.* § 78u-6(a)(3).

69. *See Whistleblower FAQ*, *supra* note 65. The guidance states that information will "lead to" a successful SEC action, as required under the whistleblower program to be eligible for a reward, if the information "causes [the SEC] to open a new investigation, re-open a previously closed investigation or pursue a new line of inquiry in connection with an ongoing investigation, and [the SEC] bring[s] a successful enforcement action based at least in part on the information." *Id.*

70. *Whistleblower FAQ*, *supra* note 65.

71. *Id.*

> [y]ou may also be eligible if you report your information internally first to your company, and the company later reports your information to [the SEC], or reports the results of an internal investigation that was prompted by your information, as long as you also report directly to us within 120 days.[72]

If the company to which the report is made conducts an investigation and reports the results to the SEC, the disclosing employee will get the benefit of the information that the Company's investigation yields when the SEC is considering whether the whistleblower should receive an award "and if so where the award should fall in the 10% to 30% range."[73]

Where the SEC is successful in enforcing a law, rule or regulation violation as a result of the information provided, and recovers more than $1 million, the SEC is *obligated* by statute to pay an award of between ten and thirty percent of the amount collected from the monetary sanctions imposed to the individual who provided the information.[74] Notably, while the amount of the award is subject to the discretion of the SEC,[75] whether or not to pay some amount of money to the whistleblower is not.[76] At the instruction of Congress, the SEC will consider whether it would be appropriate to provide whistleblowers a private right of action in the nature of a qui tam proceeding on behalf of the whistleblower and the SEC in the event that the SEC chooses not to investigate allegations brought to its attention by the whistleblower.[77] Responsible for investigating the question, the Office of the Inspector General for the SEC determined in January 2013 that since the whistleblower program has only been in place since August 2011, it was too early to make the determination.[78] This is a determination that we can expect to be

72. *Id.*; *see also* 17 C.F.R. § 240.21F-4(c).

73. *Whistleblower FAQ*, *supra* note 65; *see also* 17 C.F.R. § 240.21F-4(b)(7), .21F-4(c).

74. 15 U.S.C. § 78u-6(b) (2012).

75. *Id.* § 78u-6(c)(1)(A). The Act prescribes a number of criteria that the SEC must take into account in determining where in the ten to thirty percent range the award will fall, including "the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action;" "the degree of assistance provided by the whistleblower and any legal representative of the whistleblower" in the action; "the programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead to the successful enforcement of such laws; and . . . such additional relevant factors as the Commission may establish by rule or regulation." *Id.* § 78u-6(c)(1)(B). In deciding the amount of the award, the Dodd-Frank Act provides that the SEC may not take into consideration the balance of monies collected by the SEC as sanctions (as distinguished from disgorgement or restitution to victims) and deposited in a fund created for that purpose. *See id.*; *see also id.* § 78u-6(g) (establishing and defining purpose of the fund).

76. The award provision of the Act provides, in relevant part: "In any covered judicial or administrative action, or related action, the Commission, . . . *shall* pay an award or awards . . ." *Id.* § 78u-6(b)(1) (emphasis added).

77. *See* Dodd-Frank Act, Pub. L. No. 111-203, § 922(d)(1)(G), 124 Stat. 1376, 1849 (2010) (asking the SEC Office of Inspector General whether it would be useful "for Congress to consider empowering whistleblowers or other individuals, who have already attempted to pursue the case through the Commission, to have a private right of action to bring suit based on the facts of the same case, on behalf of the government and themselves").

78. *See* OFFICE OF AUDITS, OFFICE OF INSPECTOR GEN., U.S. SEC. & EXCH. COMM'N, EVALUATION OF THE SEC'S WHISTLEBLOWER PROGRAM 28 (2013).

made in the future, with the potential that a private right of action eventually may be granted for rebuffed whistleblowers.

Many commentators have argued that the SEC's "bounty" program for whistleblowers under Dodd-Frank encourages employees with information regarding potential violations to race to the SEC to report the violations rather than to report them first to internal company management.[79] Their argument is that offering employees money—a cut of the action, so to speak—encourages them to report externally first, even if they ultimately decide to report internally. Other commentators have argued that statistics show that the majority of whistleblowers do attempt to report internally first before reporting legal violations to law enforcement or other external outlets.[80] How the bounty provisions would play out in practice was a subject of considerable debate during the drafting phase of the rules. Despite the recommendation of commentators to the draft rules that the SEC require employees to report alleged law violations to their employers before reporting to the SEC in order to be given "whistleblower" status and protections, the SEC refused to make that concession. The SEC instead outlined the "incentives" written into the rules to encourage employees to report to employers—namely, reporting first to an employer is permitted, the employee can get the benefit of the company's investigation, and the employee can potentially receive a higher award amount after getting the benefit of the company's investigation.[81] In any event, the SEC's "bounty" program encourages corporate employees who become aware of legal violations to become statutorily defined "whistleblowers" and to report violations to the SEC in order to qualify for the monetary awards being offered by that agency.

By all accounts, the whistleblower bounty program has been successful for the SEC. As required by rule, the SEC posts on its website notices of actions exceeding $1 million so that individuals who believe they may be eligible for an award under the whistleblower program will be able to apply.[82] During the SEC's fiscal year 2012, the first full year of the program, the SEC received 3,001 whistleblower reports.[83] In contrast, in 2011, the program was fully in effect for

79. *See, e.g.*, Matt Atkins, *New US Whistleblower Provisions*, FINANCIER WORLDWIDE (Aug. 2011), http://www.financierworldwide.com/article.php?id=8372; Joseph De Simone & Marcia E. Goodman, *SEC's Final Rules on Whistleblower Bounty Program May Impact Corporate Compliance Programs*, MAYER BROWN LEGAL UPDATE (June 20, 2011), http://www.mayerbrown.com/pt/publications/SECs-Final-Rules-On-Whistleblower-Bounty-Program-May-Impact-Corporate-Compliance-Programs-06-20-2011/; Mike Delikat, *Dodd-Frank's Whistleblower Bounty Provisions: The First Wave of Tips Filed with the SEC and What Public Companies Should Do Now*, AM. BAR ASS'N, http://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/national_conference_on_equal_employment_opportunity_law/mw2012eeo_delikat.authcheckdam.pdf.

80. *Key Issues: Whistleblower Bounty Program*, PWC CTR. FOR BD. GOVERNANCE, http://www.pwc.com/us/en/corporate-governance/whistleblower-bounty-program.jhtml (last visited Nov. 20, 2013).

81. *See supra* note 70 and accompanying text.

82. *See Whistleblower FAQ*, *supra* note 65; *see also* 17 C.F.R. § 240.21F-10 (2013).

83. U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, FISCAL YEAR 2012, at 4 (2012).

only seven weeks before the end of the fiscal year; the Commission received 334 reports during that period.[84] Thus, from 2011 to 2012, the SEC saw a nearly ten-fold increase in the number of reports. The then-Director of the SEC's Division of Enforcement, Robert Khuzami, stated that the first whistleblower to collect under the program "provided the exact kind of information and cooperation we were hoping the whistleblower program would attract."[85] The SEC reported that in 2012, in total, there were 143 enforcement judgments and orders issued that exceed the $1 million threshold and potentially qualify as eligible for a whistle-blower award.[86]

As of the writing of this Article, the SEC has made three awards under the whistleblower program, but has posted over one hundred notices on its website. In August 2012, the SEC made its first payout of an award under the whistleblower program,[87] to a whistleblower who reportedly "helped the SEC stop an ongoing multi-million dollar fraud."[88] The SEC awarded nearly $50,000 to a whistleblower who provided information to the SEC that led to a court ordering more than $1 million in sanctions, of which approximately $150,000 had been collected at the time of the payout.[89] The payout amount represented a thirty percent award, the maximum allowed under the program.[90] The SEC also noted that additional recoveries against any defendants in the case would result in additional payments to the whistleblower.[91] The second award was made in June 2013 to three tipsters about an investment fraud that ultimately sent a hedge fund chief executive to prison.[92] The SEC awarded the whistleblowers fifteen percent of any monies that

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84. U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, FISCAL YEAR 2011, at 5 (2011). Written reports of possible securities law violations made between the time that Dodd-Frank became law and before the adoption of the SEC's Final Rules implementing the program are not included in these numbers, although tipsters who made those reports may be eligible to apply for an award under the program. *Id.* at 6 n.12.

85. Press Release, U.S. Sec. & Exch. Comm'n, SEC Issues First Whistleblower Program Award (Aug. 21, 2012) [hereinafter SEC Press Release 2012-162], *available at* http://www.sec.gov/servlet/Satellite/News/Press Release/Detail/PressRelease/1365171483972.

86. Press Release, U.S. Sec. & Exch. Comm'n, SEC Receives More Than 3,000 Whistleblower Tips in FY2012 (Nov. 15, 2012) [hereinafter SEC Press Release 2012-229], *available at* http://www.sec.gov/servlet/Satellite/News/PressRelease/Detail// (2012)delease, U.S. Sec. and,l.1365171485882. On the other hand, the press release announcing the first award under the whistleblower program noted that the SEC did not approve a claim from a second individual seeking an award because the information provided "did not lead to or significantly contribute to the SEC's enforcement action." SEC Press Release 2012-162, *supra* note 85.

87. U.S. SEC. & EXCH. COMM'N, *supra* note 83, at 8.

88. SEC Press Release 2012-229, *supra* note 86.

89. U.S. SEC. & EXCH. COMM'N, *supra* note 83, at 8.

90. SEC Press Release 2012-162, *supra* note 85.

91. *Id.*; *see also* U.S. SEC. & EXCH. COMM'N, *supra* note 83, at 8 (noting pending motions for additional judgments in the case may lead to more recoveries for the whistleblower).

92. Press Release, U.S. Sec. & Exch. Comm'n Office of the Whistleblower, SEC Announces Whistleblower Action (June 12, 2013), *available at* http://www.sec.gov/news/press/2013/2013-06-announcement.htm (describ-ing SEC order awarding whistleblowers in connection with an enforcement action against a hedge fund CEO).

it recovers in an enforcement action against the executive, although at the time of the SEC release announcing the award, the SEC had not recovered any monies.[93] On October 1, 2013, the SEC announced the award of more than $14 million to a whistleblower who reported information that led to an enforcement action that recovered substantial investor funds.[94] The SEC did not disclose the percentage of the award to the whistleblower or other details, noting that the whistleblower did not want to be identified.

The determination of where on the ten to thirty percent spectrum an award will fall also includes a corporate compliance consideration. The SEC guidance sets forth the factors that the SEC will consider in determining where in the ten to thirty percent range an award will be set. Factors that inure to the increase of an award include the significance of the information provided to the SEC's success in litigating any matter; the extent of assistance provided; and the law enforcement interest in making such awards.[95] In addition, in making the award decision, the SEC will consider whether, and the extent to which, the whistleblower participated in the company's internal compliance system and reported the alleged legal violations to his or her employer before or at the same time of reporting them to the SEC.[96]

Factors that may reduce the amount of an award include the whistleblower's participation in the alleged violations or any unreasonable delay in reporting the violation.[97] Concerning the company's compliance mechanisms, the SEC also will consider whether the whistleblower interfered with the company's internal compliance and reporting systems. In its Frequently Asked Questions section of its website, the SEC gives the example of making false statements to the company's compliance department that "hindered its efforts to investigate possible wrongdoing."[98] The SEC has at least implicitly acknowledged companies' efforts to encourage internal reporting of violations and the value of those efforts. However, it remains to be seen what impact on the ultimate award decisions it will have if a violation is not first reported internally. Moreover, there is no current means to determine if a violation was reported internally first because transparency into SEC decision-making depends on what the SEC determines to disclose.

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93. *Id.*

94. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Awards More Than $14 Million to Whistleblower (Oct. 1, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258.

95. 17 C.F.R. § 240.21F-6 (2013); *Whistleblower FAQ*, *supra* note 65.

96. *See Whistleblower FAQ*, *supra* note 65 (discussing how the whistleblower's participation in a company's internal compliance system may either increase or reduce the award percentage).

97. *Id.*

98. *Id.*

IV. THE LIMITS OF EXTRATERRITORIAL APPLICATION OF DODD-FRANK ANTI-RETALIATION PROVISIONS

Given the relatively recent enactment of the Dodd-Frank Act, only a handful of courts have interpreted the anti-retaliation provisions of Act.[99] Each of these cases has involved allegations that the plaintiff's employer retaliated against the plaintiff employee following the employee's report of alleged FCPA violations to various authorities. The cases have primarily involved the interpretation of the applicability of Dodd-Frank's anti-retaliation protections depending on the authority to which the employee reported the alleged violations of law. The district court in the *Asadi* case decided the issue of whether the anti-retaliation provisions apply extraterritorially.[100] The case's reasoning was not adopted by the appellate court but is still plausible for future court cases, and, in fact, was the basis for the Southern District of New York's decision in *Liu*. In order to understand the reasoning of the *Asadi* decisions, it is helpful to understand the state of jurisprudence when the *Asadi* case was filed.

A. Morrison v. National Australia Bank Ltd. *and the Presumption Against Extraterritorial Application of U.S. Laws*

In *Morrison v. National Australia Bank Ltd.*,[101] the Supreme Court considered the question of the extraterritorial application of the SEC anti-fraud laws. In that case, the Court made the first modern pronouncement of a presumption against extraterritoriality in the context of statutory construction. The legal controversy underlying the *Morrison* case arose out of allegations by foreign investors in National Australia Bank Limited ("National Australia Bank"), the largest bank in Australia, that HomeSide Lending, Inc. ("HomeSide"), a Florida mortgage service business purchased by the bank, and HomeSide's officers manipulated financial models to make the company's mortgage-servicing rights appear more valuable than they really were.[102] The investors claimed that National Australia Bank and its chief executive officer ("CEO") were aware of misrepresentations to this effect made in the bank's annual reports, public statements, and other public documents.[103] They also claimed that the subsequent write-down of HomeSide's assets on two occasions, necessary because of the deceptions and totaling more than $2 billion, resulted in losses to the investor plaintiffs that were recoverable under

99. *See id.* (stating that the whistleblower program only makes awards available in connection with information submitted to the SEC after July 21, 2010, the effective date of enactment of Dodd-Frank).

100. Asadi v. G.E. Energy (USA), L.L.C., No. 4:12-345, 2012 WL 2522599, at *7 (S.D. Tex. June 28, 2012).

101. 130 S. Ct. 2869 (2010).

102. *Id.* at 2875–76.

103. *Id.*

the Securities and Exchange Act of 1934 and an SEC rule promulgated pursuant to the Act.[104]

Shares of National Australia Bank stock were traded on the Australian Stock Exchange Limited and on other foreign securities exchanges, but not on any securities exchange in the United States.[105] The bank did, however, list American Depository Receipts ("ADRs"), which represent the right to receive a specific number of a foreign-listed entity's shares, on the New York Stock Exchange.[106] By the time the case was heard by the Second Circuit and then the Supreme Court, the plaintiffs in the case were solely Australian citizens who had purchased shares of the bank prior to the write-downs.[107]

The plaintiffs brought suit against National Australia Bank, HomeSide, and officers of the two companies in the Southern District of New York for securities law violations under sections 10(b) and 20(a) of the Securities and Exchange Act of 1934[108] and SEC Rule 10b-5.[109] The District Court granted the defendants' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim,[110] finding that the court had no jurisdiction over the case because of the minimal connection between the conduct at issue and the United States.[111] The Court of Appeals for the Second Circuit affirmed the District Court's decision on a

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104. *Id.*

105. *Id.* at 2875.

106. *Id*.

107. *Id.* at 2876. Robert Morrison, an American investor in National's ADRs, was an original plaintiff in the case, but his claims were dismissed by the District Court for failure to allege damages. Morrison did not appeal the decision, but he continued to be listed as a petitioner to the Court of Appeals for the Second Circuit and the Supreme Court. *See id.* at 2876 n.1.

108. Securities and Exchange Act of 1934, §§ 10(b), 20(a), 15 U.S.C. §§ 78j(b), 78t(a) (2012). Section 20(a) provides:

> Every person who, directly or indirectly, controls any person liable under any provision of [the Exchange Act] or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a). The petitioners stated section 10(b) as the basis for derivative liability under section 20(a). Section 10(b) provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe . . . .

15 U.S.C. § 78j.

109. *See* 17 C.F.R. § 240.10b-5 (2013) (making unlawful fraud or deceit in connection with the purchase or sale of any security).

110. *See* Fed. R. Civ. P. 12(b)(1); Fed. R. Civ. P. 12(b)(6).

111. *See Morrison*, 130 S. Ct. at 2876 (explaining that the District Court found no jurisdiction in the case because the acts in question were only a link in the broad chain of the alleged fraud scheme).

similar basis, stating that the alleged conduct in the United States did not "compris[e] the heart of the alleged fraud."[112]

The Supreme Court affirmed the Second Circuit, not on the basis of lack of subject matter jurisdiction, but on the basis of the petitioners' failure to state a claim.[113] The broader import of the decision, however, is that the Court dismissed the long-used Second Circuit "conduct-and-effects" test for determining whether a securities law has extraterritorial effect. The Court made its pronouncement under the guise of "reaffirming" the principle that a statute does not have extraterritorial effect unless a contrary intent appears: "It is a '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.'"[114] The Court indicated its allegiance to this "canon of construction," which it also called a "presumption about a statute's meaning," not a "limit upon Congress's power to legislate."[115]

Justice Antonin Scalia, who is often characterized as a strict constitutional constructionist[116] and who wrote the majority opinion, criticized the approach taken by the Second Circuit and noted that it was in conflict with the Court's "long and often recited" principle that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[117] Justice Scalia characterized the Second Circuit's approach of focusing on section 10(b)'s silence as to its extraterritorial application as an invitation to "discern" Congressional intent.[118] He noted that the Second Circuit and other federal courts of appeals had in many cases over many decades adopted this approach in determining the application of the Exchange Act, and particularly section 10(b), to fraud schemes with conduct and effects outside the United States.[119] Although the Second Circuit consistently reached the conclusion that section 10(b) did not apply when the stock transactions underlying the alleged securities law violations occurred abroad, it reached that conclusion by way of different reasoning, resulting in the adoption of the "conduct-and-effects" test.[120] That test asked, "(1) whether the wrongful conduct occurred in the United States, and (2) whether the wrongful conduct had a substantial effect in

112. *See id.* (internal quotation omitted) (citing the lower court's opinion).

113. *See id.* at 2877, 2888 (finding petitioners failed to state a claim because all aspects of the purchases complained of by petitioners who still have live claims occurred outside the United States).

114. *See id.* at 2877 (citing EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991) (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949))).

115. *Id.*

116. Justice Scalia does not like the characterization "strict constructionist," and instead refers to himself as an "originalist." *See* Justice Antonin Scalia, Remarks at the Woodrow Wilson International Center for Scholars: Constitutional Interpretation the Old Fashioned Way (Mar. 14, 2005), *available at* http://www.cfif.org/htdocs/current/guest_commentary/scalia-constitutional-speech.htm.

117. *Morrison*, 130 S. Ct. at 2878.

118. *Id.* (internal quotation marks omitted).

119. *Id.*

120. *Id.* at 2879.

the United States or upon United States citizens."[121] Justice Scalia argued that criticisms of the test, which focused on the difficulty of its application, demonstrated "the wisdom of the presumption against extraterritoriality."[122]

The Court applied the presumption against extraterritoriality to the statutory language of section 10(b) and Rule 10b-5, as a SEC Rule promulgated pursuant to that section.[123] The Court found that the statutory language itself did not indicate that it applies abroad because even the use of the term "interstate commerce" in the statute was not enough to establish the extraterritorial reach of the statute.[124] In addition, the reference to "foreign commerce" in the definition of "interstate commerce"—"trade, commerce, transportation, or communication . . . between any foreign country and any State"[125]—does not defeat the presumption.[126] Similarly, the Court found that references in the Congressional statement of the purpose of the Exchange Act to the quotation abroad of securities prices traded on domestic exchanges do not overcome the presumption.[127] The context of the statute also did not change the result.[128] Moreover, the Court pointed to sections 30(a)[129] and 30(b)[130] of the Exchange Act, which specifically address the extraterritorial application of the Exchange Act, as evidence that Congress intended to make certain provisions, rather than the entirety, of that law have extraterritorial effect.[131]

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121. SEC v. Berger, 322 F.3d 187, 192 (2d Cir. 2003).

122. *Morrison*, 130 S. Ct. at 2881. The Court's opinion summarized the assertions of commentators who criticized the unpredictable and inconsistent application of section 10(b) to transnational cases, that Congress did not consider the extraterritorial application of section 10(b) and therefore left it open for interpretation by the courts, and that using Congressional silence on the matter as a justification for judicial interpretation "violates the traditional principle that silence means no extraterritorial application." *Id.* at 2880–81.

123. *Id.* at 2881–83.

124. *Id.* at 2882 (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 251 (1991)).

125. 15 U.S.C. § 78c(a)(17) (2012).

126. *Morrison*, 130 S. Ct. at 2882.

127. *Id.*

128. *Id.* at 2882–83.

129. Section 30(a) provides in part:

> It shall be unlawful for any broker or dealer . . . to make use of the mails or of any means or instrumentality of interstate commerce for the purpose of effecting on an exchange not within or subject to the jurisdiction of the United States, any transaction in any security the issuer of which is a resident of, or is organized under the laws of, or has its principal place of business in, a place within or subject to the jurisdiction of the United States, in contravention of such rules and regulations as the Commission may prescribe . . . .

15 U.S.C. § 78dd(a) (2012).

130. Section 30(b) provides, in relevant part, "[t]he provisions of [the Exchange Act] or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States," unless he does so in violation of regulations promulgated by the SEC designed "to prevent . . . evasion of [the Act]." *Id.* § 78dd(b).

131. *See Morrison*, 130 S. Ct. at 2883 (noting that although several provisions of the Act reference extraterritorial application, "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms").

Applying this reasoning to the facts of the case, the Court found that the connections of the case to the United States related to the manipulation of HomeSide's financial models, and misleading public statements made there.[132] However, that conduct was not the basis for the petitioners' legal claims. The Court noted that the focus of the Exchange Act is on purchases and sales of securities, which did not take place in the United States, not the deceptive conduct that the petitioners alleged took place in the United States.[133] The Court found that section 10(b) "reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."[134] The Court concluded that the case "involves no securities listed on a domestic exchange, and all aspects of the purchases complained of by those petitioners who still have live claims occurred outside the United States."[135] Accordingly, it held that the petitioners failed to state a claim, and affirmed the dismissal of the complaint on that ground.[136]

Justice John Paul Stevens wrote a concurring opinion in *Morrison* disagreeing with the majority's reasoning, but agreeing with the Court's holding. Justice Stevens pointed to the same statutory language cited by the majority and the stated purpose of the statute as support for his argument that "while § 10(b) may not give any 'clear indication' on its face as to how it should apply to transnational securities frauds . . . it does give strong clues that it should cover at least some of them."[137] He pointed to the text of section 10(b) regulating interstate commerce, including "between any foreign country and any State, or between any State and any place or ship outside thereof."[138] He also pointed to the extraterritorial references in sections 2(2) and 30, as well as in the Exchange Act's legislative history.[139] He argued that the Second Circuit has done "the best job of discerning what sorts of transnational frauds" Congress meant to regulate.[140] Justice Stevens also gave two examples of cases that could be successfully litigated under the

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132. *Id.* at 2883–86.

133. *See id.* at 2884. Although not central to the Court's reasoning, it also noted that the Securities Act of 1933 similarly focuses on domestic transactions, making it unlawful to sell a security without registering, through a prospectus or otherwise, making use of "any means or instruments of transportation or communication in interstate commerce or of the mails." *Id.* at 2885. The Court noted that the SEC has interpreted that statute not to include sales occurring outside the United States. *Id.*

134. *Id.* at 2888.

135. *Id.*

136. *Id.*

137. *Id*. at 2894 (Stevens, J., concurring).

138. *Id.* at 2892 n.9 (citing 15 U.S.C. §§ 78j, 78c(a)(17), 78b(2), 78dd(b) (2012)).

139. *See id.* (citing 15 U.S.C. §§ 78b(2), 78dd(b), and referring to "[t]he prices established and offered in [securities] transactions are generally disseminated and quoted throughout the United States and foreign countries and constitute a basis for determining and establishing the prices at which securities are bought and sold" as a basis for regulation under the Exchange Act).

140. *Id.* at 2894.

Second Circuit's conduct-and-effects test, but that would be foreclosed under the majority's test because the securities at issue were purchased or sold abroad and are not listed on a domestic exchange.[141] Justice Stevens wrote:

> Imagine, for example, an American investor who buys shares in a company listed only on an overseas exchange. That company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price—and which will, upon its disclosure, cause the price to plummet. Or, imagine that those same executives go knocking on doors in Manhattan and convince an unsophisticated retiree, on the basis of material misrepresentations, to invest her life savings in the company's doomed securities.[142]

Justice Stevens reasoned, "[b]oth of these investors would, under the Court's new test, be barred from seeking relief under § 10(b)."[143] Concluding that the "oddity of that result should give pause," he argued that the majority should have affirmed the Second Circuit's reasoning as the best resolution of the question.[144] Moreover, he noted that other circuits would have gravitated to the test as well if the Court affirmed the Second Circuit's reasoning.[145] Nonetheless, Justice Stevens concluded that he would affirm the lower court's ruling dismissing the petitioners' action, saying that while "[s]ome cases involving foreign securities transactions have extensive links to, and ramifications for, this country," the case at bar "has Australia written all over it."[146] Thus, the Court in *Morrison* set the precedent against the application of U.S. laws extraterritorially.

B. Egan v. TradingScreen, Inc.*: The First Application of Dodd-Frank's Anti-Retaliation Provisions*

The decision by the U.S. District Court for the Southern District of New York in *Egan v. TradingScreen, Inc.*[147] is the first in which a federal court considered the application of the whistleblower protections of Section 922 of the Dodd-Frank Act. The case did not involve the question of the extraterritorial application of the law. However, it was significant because it established that an aggrieved employee could establish a *prima facie* case under the anti-retaliation provisions without reporting the alleged law violations directly to the SEC.

141. *See id.* at 2895.
142. *Id.*
143. *Id.*
144. *Id.*
145. *See id.* at 2890, 2895 (noting that the majority opinion "turns § 10(b) jurisprudence . . . on its head," whereas the Second Circuit's test previously had the "tacit approval" of Congress and the "general assent" of the other circuits).
146. *Id.* at 2895.
147. No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

The District Court in *Egan* considered the retaliation claim of the former director of sales of a financial software business that provided hedge funds, asset managers, private bankers, and high net-worth individuals with internet-trading software.[148] The plaintiff learned that the CEO was diverting corporate assets to another company that he solely owned and he reported the CEO's conduct to the president of the company, who passed the information to the board of directors.[149] The independent directors hired the law firm of Latham & Watkins to conduct an internal investigation of the allegations made by the plaintiff, and thereafter issued a report confirming the allegations.[150] Although the independent directors informed the CEO that he would have to resign, the CEO obtained control of the board, was able to prevent the independent directors from forcing his resignation, and ultimately fired the company president and the plaintiff.[151]

In response to the plaintiff's Dodd-Frank claim, the defendants alleged that the plaintiff was not covered by the anti-retaliation provisions because he did not personally contact the SEC to report the CEO's conduct.[152] The court found that the defendants' interpretation of the Dodd-Frank whistleblower provisions was too narrow, and that although some of the paragraphs of the protection provisions require reporting of illegal conduct directly to the SEC, not all of the provisions include that requirement.[153] Although, by its language, the definition of "whistleblower" provided in the Act requires reporting to the SEC, the third paragraph of the anti-retaliation provision protects as whistleblowers individuals who make disclosures of securities law violations required or protected by law and "subject to the jurisdiction of the Commission."[154] The latter paragraph does not itself require reporting to the SEC. The court in *Egan* found that "a literal reading of the definition of the term 'whistleblower' in 15 U.S.C. § 78u-6(a)(6), requiring reporting to the SEC, would effectively invalidate § 78u-6(h)(1)(A)(iii)'s protection of whistleblower disclosures that do not require reporting to the SEC."[155] The court found unconvincing the plaintiff's argument—at the other end of the spectrum—that this contradiction evidences that Congress did not intend to require whistleblowers to report law violations to the SEC to find protection under the Act's anti-retaliation provisions.[156] Instead, the court took a middle road.

The court relied on traditional principles of statutory construction and looked to the provision of the Dodd-Frank Act extending whistleblower anti-retaliation

148. *See id.* at *1–2. The plaintiff also alleged federal securities law violations, and a number of state-law claims, including a claim under the Delaware state whistleblower protection law. *Id.*
149. *Id.* at *2.
150. *Id.*
151. *Id.*
152. *Id.* at *3.
153. *Id.* at *4.
154. *Id.*
155. *Id.*
156. *Id.*

protections to individuals providing disclosures to the newly-created CFPB as demonstrating that Congress was capable of extending whistleblower protection to persons other than those reporting to a specific federal agency.[157] That provision of the Act protects individuals who make disclosures to the CFPB or to other federal, state, and local enforcement authorities and even the individual's employer, of violations of law or regulation falling under the CFPB's jurisdiction.[158] The court found that the "absence of similarly broad protections for whistleblowers alleging securities law violations indicates that Congress intended to encourage whistleblowers reporting such violations to report to the SEC."[159]

Accordingly, the court in *Egan* found that the first two paragraphs of the Dodd-Frank whistleblower protections require that the plaintiff report the violations to the SEC. However, the court construed the third paragraph of the provision—relating to disclosures that are required or protected by certain enumerated laws—as an exception to Dodd-Frank's definition of a whistleblower.[160] The court found that under that paragraph, a plaintiff who brings an action for illegal retaliation under Dodd-Frank need only demonstrate that the plaintiff made a disclosure of a violation of one of four prescribed categories, but not that he or she made this disclosure to the SEC.[161] The court further found that under that paragraph, a plaintiff must allege "that a law or rule in the SEC's jurisdiction explicitly requires or protects disclosure of that violation."[162]

With regard to the plaintiff's specific allegations in *Egan*, the court found that the plaintiff had not pled facts that could establish that the violations at issue fell into the categories listed in the third paragraph, but that the plaintiff had sufficiently alleged that he acted jointly with the former president, the independent directors, and the lawyers of Latham & Watkins in investigating the conduct of the CEO.[163] The court found, however, that the plaintiff needed to allege facts supporting his claim on information and belief that the law firm attorneys reported the conduct to the SEC.[164] On the defendants' motion to dismiss, the court granted the plaintiff leave to amend his retaliation claim in order to allege the necessary facts.[165]

The court's decision left open the possibility that disclosures could be made to other law enforcement authorities besides the SEC or to the disclosing employee's employer. The decision established that the requirements for that coverage are that the alleged violations are covered by the third category, within the enforcement

157. *Id.*
158. *Id.* (citing 12 U.S.C. § 5567(a)(1)).
159. *Id.*
160. *See id.* at *5.
161. *See id.*
162. *Id.* at *6.
163. *Id.* at *9.
164. *Id.*
165. *Id.* at *10.

authority of the SEC, and that the law requires or protects the disclosure.

C. *The International Focus of U.S. Corporate Anti-Corruption Enforcement*

U.S. efforts to combat corporate corruption have become increasingly international in focus in the past decade as U.S. law enforcement has stepped up enforcement under the FCPA. According to Lanny Breuer, the former Assistant Attorney General for the Criminal Division, "FCPA enforcement is . . . vital to ensuring the integrity of our markets."[166] At an annual FCPA conference in 2010, he stated:

> [The] FCPA enforcement program serves not only to hold accountable those who corrupt foreign officials, but in doing so it also serves to make the international business climate more transparent and fair for everyone. FCPA enforcement both roots out foreign corruption and deters it from taking hold in the first place.[167]

The FCPA includes two main provisions. The anti-bribery provision proscribes the offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official, foreign political party or candidate, or any other person for purposes of influencing any act or decision of the foreign official in his official capacity, inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or securing any improper advantage.[168] The provision also prohibits such an act for purposes of inducing a foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of the government or instrumentality, in order to assist the issuer in obtaining or retaining business for or with, or directing business to, any person.[169] The accounting provisions require "issuers," defined as companies that have SEC-registered securities or that are required to file periodic reports with the SEC, to maintain books, records, and accounts that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.[170] The provisions also require issuers to implement a system of internal accounting controls that will provide reasonable assurances that transactions, including the disposition of assets, are executed in accordance with management authorization, and transactions are recorded to permit preparation of proper financial statements.[171] Criminal penalties and, where corporate securities issuers are involved, civil penalties are available for violations of these provisions.

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166. Lanny A. Breuer, Assistant Attorney Gen., Speech at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010), *available at* http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html.

167. *Id.*

168. *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2012).

169. *See* § 78dd-1(a).

170. *See id.* § 78m(b)(2).

171. *See id.*

The FCPA has an international reach and covers extraterritorial conduct in certain circumstances. Any issuer or U.S. citizen, national, resident or U.S.-organized entity may be prosecuted for using the U.S. mails or any means or instrumentality of interstate commerce in furtherance of a corrupt payment to a foreign government official. "Interstate commerce" is defined by the FCPA as any "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof . . . ."[172] The joint DOJ/SEC guidance on FCPA enforcement and compliance issued in November 2012 takes the position that

> placing a telephone call or sending an e-mail, text message, or fax from, to, or through the United States involves interstate commerce—as does sending a wire transfer from or to a U.S. bank or otherwise using the U.S. banking system, or traveling across state borders or internationally to or from the United States.[173]

Pursuant to well-established agency law, even companies or individuals who are not issuers, U.S. citizens, nationals, residents, or U.S.-organized entities may be prosecuted under the FCPA if they directly, or through a third party, engage in any act in furtherance of a corrupt payment while in the United States.[174] In the jointly-issued guidance, the DOJ and SEC give the following example: "a foreign national who attends a meeting in the United States that furthers a foreign bribery scheme may be subject to prosecution, as may any co-conspirators, even if they did not themselves attend the meeting."[175] Under established conspiracy law, the DOJ and SEC also take the position that "[a] foreign national or company may also be liable under the FCPA if it aids and abets, conspires with, or acts as an agent of an issuer or domestic concern, regardless of whether the foreign national or company itself takes any action in the United States."[176] The guidance cites settled cases in which this principle was relied upon for jurisdictional authority by the DOJ.[177]

Further, and most relevant to the factual scenario discussed in this Article in connection with the *Asadi* case, U.S. companies or persons may be subject to the anti-bribery provisions whether they act directly or indirectly, even if they act outside the United States.[178] Since the 1998 amendments to the FCPA, this basis for jurisdiction does not require that interstate commerce be used in furtherance of

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172. *Id.* §§ 78dd-2(h)(5), 78dd-3(f)(5), 78c(a)(17) (each defining "interstate commerce").

173. U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 11 (2012) [hereinafter FCPA RESOURCE GUIDE].

174. *See* 15 U.S.C. § 78dd-3.

175. FCPA RESOURCE GUIDE, *supra* note 173, at 12.

176. *Id.*

177. *See id.* at 107 n.60 (citing Criminal Information, United States v. JGC Corp., No. 11-cr-260 (S.D. Tex. Apr. 6, 2011), *available at* http://www.justice.gov/criminal/fraud//cases/jgc-corp/04-6-11jgc-corp-info.pdf; Criminal Information, United States v. Snamprogetti Netherlands B.V., No. 10-cr-460 (S.D. Tex. July 7, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/snamprogetti/07-07-10snamprogetti-info.pdf).

178. *See* 15 U.S.C. §§ 78dd-1(g), 78dd-2(i)(1) (2012).

the corrupt payment scheme. As the legislative history provided,

> [T]he OECD Convention calls on parties to assert nationality jurisdiction when consistent with national legal and constitutional principles. Accordingly, the Act amends the FCPA to provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States. This exercise of jurisdiction over U.S. businesses and nationals for unlawful conduct abroad is consistent with U.S. legal and constitutional principles and is essential to protect U.S. interests abroad.[179]

Thus, the DOJ and the SEC have significant and wide-ranging reach beyond U.S. borders in the area of FCPA enforcement, particularly where a U.S. citizen or company is involved, and a significant number of cases have been successfully brought or resolved premised on this jurisdictional basis.

Although enacted in 1977, enforcement of the FCPA has increased dramatically in the past ten years. Prior to 2007, the SEC brought just a handful of FCPA-related proceedings per year; since 2007, the SEC has brought at least ten and an average of twelve proceedings per year.[180] In 2010, forty-eight new FCPA cases were filed by the DOJ.[181] In total, in 2010, companies paid a record $1.8 billion in financial penalties to the DOJ and the SEC combined.[182] Although 2011 did not see as many prosecutions as 2010, it was the second-most prolific year in terms of FCPA prosecutions.[183] The year 2013 also saw increased levels of enforcement.[184]

In response to criticism that FCPA enforcement disadvantages businesses in terms of competing with their foreign competitors, Assistant Attorney General Breuer noted the enforcement trend against foreign companies as well as domestic companies that engage in bribery: "[W]e do not only prosecute U.S. companies

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179. *See* S. REP. NO. 105-277, at 3 (1998).

180. *See SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Nov. 20, 2013). In 2010, the SEC's Enforcement Division created a specialized enforcement unit to focus specifically on FCPA enforcement. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence (Jan. 13, 2010), *available at* http://www.sec.gov/news/press/2010/2010-5.htm.

181. KROLL ADVISORY SOLUTIONS, 2012 FCPA BENCHMARKING REPORT, at 7 (2012). In general, the number of FCPA enforcement actions increased 85% from 2009 to 2010. *Id.*

182. *Id.*

183. *See FCPA and Related Enforcement Actions, Chronological List, 2011*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/cases/2011.html (last visited Nov. 20, 2013) (listing 2011 cases). In 2012, FCPA criminal prosecutions were down to pre-2007 levels. *See FCPA and Related Enforcement Actions, Chronological List, 2012*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/cases/.html (last visited Nov. 20, 2013) (listing 2012 cases).Those results likely were due in large part to two phenomena: first, the significant staff resources required to prepare the joint DOJ/SEC guidance on the FCPA, and second, the ongoing nature of several very large and wide-ranging FCPA investigations that may result in agreed resolutions or adversarial proceedings in the future. *See, e.g.*, FCPA RESOURCE GUIDE, *supra* note 173.

184. As of October 2013, enforcement actions had already surpassed the number of cases in all of 2012. *See FCPA and Related Enforcement Actions, Chronological List, 2013*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/cases/2013.html (last visited Dec. 18, 2013) (listing 2013 cases).

and individuals under the FCPA. [Between 2005 and 2010,] more than half of our corporate FCPA resolutions have involved foreign companies or U.S. subsidiaries of foreign companies."[185] A review of the case listings provided by the DOJ and the SEC on their websites reflects the large number of foreign companies and foreign operations of U.S. businesses, and individuals who are non-U.S. citizens or are employed abroad that have been the subject of enforcement actions in recent years.[186]

Given this increase in international enforcement, it is unsurprising that whistleblower reports since the enactment of Dodd-Frank have in significant part included alleged violations of the anti-bribery provisions or accounting transparency provisions of the FCPA. A 2012 study reflects that corporate executives at large companies are concerned about their exposure to bribery risk and that they have made significant investments in anti-bribery compliance.[187] The results showed awareness of the risks of foreign bribery in global business operations, as well as sensitivity to the importance of compliance to mitigate risks. Kroll Advisory Solutions, a division of Kroll Inc., the international investigative and risk-management firm, surveyed 139 senior corporate compliance executives at companies with revenues ranging from $100 million to over $10 billion.[188] Ninety-five percent of those who responded believed their companies' exposure to bribery risk has increased or held steady over the last two to three years, and eighty-five percent believed their risk exposure would increase or stay the same in the future.[189] Seventy percent of the executives who participated said that they

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185. Breuer, *supra* note 166.

186. *See, e.g.*, Second Superseding Indictment, United States v. Hoskins, No. 3:12-cr-00238-JBA (D. Conn. July 30, 2013) (indictment of senior vice president for the Asia region of a French power company), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/pomponi/de50-second-superseding-indictment.pdf; Criminal Complaint, United States v. Cilins, No. 13-MAG-975 (S.D.N.Y. Apr. 15, 2013) (charging a French citizen with attempting to obstruct an ongoing investigation into whether a mining company paid bribes to obtain mining rights in the Republic of Guinea), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/cilinsf/CriminalComplaint.pdf; Deferred Prosecution Agreement, United States v. Orthofix Int'l, N.V., No. 4:12-cr-00150-RAS-DDB-1 (E.D. Tex. July 10, 2012) (resolving allegations against multinational medical device manufacturer and distributor incorporated in Curacao and with facilities in the United States, Europe, Mexico, and elsewhere of FCPA violations in connection with payments to Mexican officials to secure sales of medical supplies and devices), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/orthofix/2012-07-10-orthofix-dpa.pdf; Deferred Prosecution Agreement, United States v. Marubeni Corp., 12-cr-022 (S.D. Tex. Jan. 17, 2012) (resolving charges against Japanese trading company headquartered in Tokyo arising out of bribe payments to Nigerian officials in order to obtain and retain contracts to build liquefied natural gas facilities on Bonny Island, Nigeria), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/marubeni/2012-01-17-marubeni-dpa.pdf; Deferred Prosecution Agreement, United States v. Panalpina World Transp. (Holding) Ltd., No. 4:10-cr-00769 (S.D. Tex. Nov. 4, 2010) (resolving DOJ and SEC allegations against a global freight forwarding and logistics services firm based in Basel, Switzerland, and other related companies and individuals concerning $27 million in bribe payments to officials of African and Asian countries, Brazil, and Russia), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/panalpina-world/11-04-10panalpina-world-dpa.pdf.

187. *See* KROLL ADVISORY SOLUTIONS, *supra* note 181, at 7.

188. *Id.* at 5.

189. *Id.* at 9.

were "very well prepared" to handle bribery risks vis-à-vis their company's anti-bribery compliance program.[190] Fifty-three percent have increased their budget for anti-bribery compliance in the last year.[191] A large percentage of survey respondents agreed with the statement that robust compliance policies and procedures provide them with a competitive advantage.[192] No doubt because of increased enforcement efforts, U.S. and international companies have stepped up compliance initiatives and are placing greater value on compliance principles, and are seeing the benefits in ways other than just avoiding prosecution.

D. Nollner v. Southern Baptist Convention, Inc. *and the First Judicial Consideration of Retaliation Claims for Reporting Alleged FCPA Violations*

Against this background of increased enforcement to stem U.S. and international corporate involvement in foreign bribery, the U.S. District Court for the Middle District of Tennessee considered the first retaliation case under Dodd-Frank's whistleblower provisions that involved reports of alleged FCPA violations. *Nollner v. Southern Baptist Convention, Inc.*[193] was decided in 2012, just two months before the district court opinion was issued in *Asadi.* The court in *Nollner* did not reach the substantive issues in the case. Instead, the court dismissed the plaintiffs' retaliation claims on the grounds that the plaintiffs' employer was not an issuer under the securities laws and therefore only the DOJ and not the SEC had jurisdiction over the FCPA violations. The *Nollner* court held that the FCPA did not protect or require the whistleblower disclosures and therefore the plaintiffs' anti-retaliation claim could not stand.

In *Nollner*, the plaintiffs, a married couple, filed suit against Southern Baptist Convention, Inc., the International Mission Board of the Southern Baptist Convention, Inc., and Global Enterprise Services, LLC, for breach of contract, promissory estoppel, state law retaliatory discharge claims, and a claim for retaliatory discharge under Dodd-Frank.[194] The plaintiffs' claims arose out of a contract to provide mission work on behalf of the Southern Baptist church in New

190. *Id.* at 11.

191. *Id.* at 10. Of those who responded, eighty-one percent stated that they require the other party in an M&A deal to complete a due diligence questionnaire to assess their level of anti-bribery compliance; seventy-eight percent noted that in an M&A deal they review existing contracts and third party relationships for this purpose; sixty-five percent stated that they review their target companies' third parties for potential corruption. *Id.* at 15.

192. *See id.* at 13. Cited benefits included enhancing their reputation with customers, enabling better service for clients, improved relations with vendors, increasing employee morale, and freeing up management time to focus on the business. *Id.*

193. 852 F. Supp. 2d 986 (M.D. Tenn. 2012).

194. *Id.* at 988. The plaintiffs' initial complaint, filed in Tennessee state court, asserted retaliatory discharge claims under Tennessee common law and the Tennessee Public Protection Act, TENN. CODE ANN. § 50-1-304 (2013). The plaintiffs filed an amended complaint adding a retaliatory discharge claim under Dodd-Frank. The defendants removed the action on the ground that the federal court had federal question jurisdiction over the Dodd-Frank Act claim and supplemental jurisdiction over the state law claims. *Nollner*, 852 F. Supp. 2d at 988.

Delhi, India for two to three years.[195] The contract included a position for a construction manager and the candidate's spouse, who would be considered a "vital part of the team."[196] In preparation for moving to New Delhi, the Nollners sold all of their assets, Mr. Nollner gave up his construction career, and Mrs. Nollner gave up her job of seventeen years.[197]

The plaintiffs alleged that when they arrived in New Delhi, the defendants frustrated their ability to get involved with the project there, including by not allowing Mr. Nollner to meet with the architect or contractor until some months into the project and refusing to share with him certain information regarding the project.[198] Mr. Nollner also learned information that he alleged indicated that the defendants were bribing local Indian officials in connection with the project, and the contractor and architect allegedly attempted to bribe Mr. Nollner several times after he complained about their performance.[199] Mr. Nollner reported these issues to his supervisors on multiple occasions, but they did not act on the reports and allegedly "seemed unbothered, if not complicit."[200] Two years after the Nollners accepted the posting in India, Mr. Nollner's superiors asked him to resign.[201] When Mr. Nollner refused to resign, the defendants terminated his employment, claiming that his position was no longer necessary.[202] The Nollners alleged that they were terminated for reporting "unsafe building practices and permits" and for reporting and/or refusing to participate in "bribes and other illegal payments."[203] Among other claims, plaintiffs alleged that the Dodd-Frank anti-retaliation provisions protected Mr. Nollner against retaliation for reporting the defendants' FCPA violations.[204]

In considering the plaintiffs' claims on a motion to dismiss, the court noted that the first two paragraphs of the anti-retaliation provisions protect whistleblowers who report potentially illegal activity to the SEC or who work with the SEC directly, in some manner, concerning potential securities violations.[205] The court noted, however, that the third paragraph "does not require that the whistleblower have interacted directly with the SEC—only that the disclosure, to whomever made, was 'required or protected' by certain laws within the SEC's jurisdic-

195. *Nollner*, 852 F. Supp. 2d at 989.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 989–90.
200. *Id.* at 990 (citing First Amended Complaint ¶ 46, *Nollner*, 852 F. Supp. 2d at 986 (Nos. 3:12-cv-00040, 3:12-cv-00043)).
201. *Id.*
202. *Id.*
203. *Id.* (citing First Amended Complaint ¶¶ 54–55, *Nollner*, 852 F. Supp. 2d at 986 (Nos. 3:12-cv-00040, 3:12-cv-00043)).
204. *Id.*
205. *Id.* at 993.

tion."[206] This was the same ruling made in the *Egan* case. Thus, according to the court in *Nollner*, the third paragraph protects individuals who report certain SEC law violations to persons or governmental authorities other than the SEC.[207]

In reasoning similar to that employed by the *Egan* court, the *Nollner* court noted that the plain language of the third paragraph of the anti-retaliation provisions, in *not* requiring reporting to the SEC, conflicts with the definition of "whistleblower" in the statute, which, according to the court, "defines a whistleblower as anyone who reports securities violations to the Commission."[208] Citing *Egan*, the district court in *Nollner* found that the third paragraph of the anti-retaliation provision provides a "narrow exception" to the whistleblower definition.[209] The *Nollner* court called the third paragraph the "catch-all" provision and stated that "where an employee reports a violation of a federal law by the employer, the [Dodd-Frank Act] only protects that employee against retaliation if the federal violation falls within the SEC's jurisdiction," namely, if it involves a violation of the federal securities laws.[210] Citing *Egan*, the *Nollner* court further stated that the catch-all provision only protects disclosures that are "required or protected" by the federal securities laws.[211] Any other disclosure—even one based on an actual legal violation—is not protected.[212]

However, the *Nollner* court disagreed with the *Egan* court in one regard. The *Egan* court held that Dodd-Frank "protects whistleblowers who fulfill an existing duty to disclose, but does not protect those who report violations of SEC laws or regulations that do not impose such a duty."[213] The *Nollner* court called that interpretation too narrow, and asserted that the Act protects whistleblowers who make "protected" disclosures in addition to "required" disclosures.[214] The court stated that in sum, a plaintiff seeking whistleblower protection under Dodd-Frank must demonstrate the following:

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206. *Id.*

207. *See id.* (citing Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300–01 (June 13, 2011) (codified at 17 C.F.R. pts. 240, 249)).

208. *Id.* at 994 n.9 (internal quotation marks omitted).

209. *Id.*

210. *Id.* at 994.

211. *Id.* at 994–95 (citing Egan v. TradingScreen, Inc., No. 10 Civ. 8202(LBS), 2011 WL 1672066, at *6 (S.D.N.Y. May 4, 2011)).

212. *See id.* (quoting *Egan*, 2011 WL 1672066, at *6) ("[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.").

213. *Id.* at 995 n.10 (quoting *Egan*, 2011 WL 1672066, at *6).

214. *Id*. The court in *Nollner* also discounted the argument of the defendants that the Dodd-Frank Act anti-retaliation provisions only apply to public companies, and held that they apply to private companies as well under appropriate circumstances—namely, where the securities laws that were allegedly violated applied to private companies. *See id.* at 995.

> (1) [H]e or she was retaliated against for reporting a violation of the securities laws[;] (2) the plaintiff reported that information to the SEC or to another entity (perhaps even internally) as appropriate; (3) the disclosure was made pursuant to a law, rule, or regulation subject to the SEC's jurisdiction; and (4) the disclosure was "required or protected" by that law, rule, or regulation within the SEC's jurisdiction.[215]

The court found that the Nollners' claims, if proven, appeared to establish that the defendants violated the FCPA.[216] However, the court held that the Nollners were not protected against retaliation for their disclosures for two reasons. First, the court found that the defendants were not "issuers," as defined by the Securities Exchange Act, and therefore they were not subject to SEC regulation or enforcement.[217] Instead, the court found that "only the DOJ—not the SEC—[had] jurisdiction over them with respect to FCPA violations."[218] Second, the court found that the activities that the plaintiffs disclosed were not enforceable by the SEC.[219] Accordingly, the court concluded that the Nollners' Dodd-Frank claim failed and dismissed it with prejudice.[220]

In dicta, the court surmised that Dodd-Frank's whistleblower protections "could conceivably protect FCPA whistleblowers who work for 'issuers,'" although it noted that was not the situation presented in the case under consideration.[221] Noting that the FCPA itself does not provide whistleblower protections or provide a private cause of action, the court stated that "it falls to Congress to protect individual FCPA whistleblowers who are not otherwise protected from retaliation under state or federal law for disclosing FCPA violations."[222] As almost a call for legislative action, the *Nollner* court noted, "[t]he court is constrained to reach this result because of the limited scope of the [Dodd-Frank Act anti-retaliation provisions] and the apparent lack of remedies available to individual FCPA whistleblowers."[223]

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215. *Id.*
216. *Id.* at 997.
217. *Id.*
218. *Id.* at 996. The court also noted that "the FCPA does not create a private right of action for post-violation claims." *Id.* (citing Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1029–30 (6th Cir. 1990)).
219. *Id.* at 997. ("[T]he violations reported by Mr. Nollner do not 'relate to violations of the securities laws' (*i.e.*, he is not a 'whistleblower' under the [Dodd-Frank Act]) and do not concern actions by a company otherwise subject to SEC jurisdiction.").
220. *Id.* at 997–98. The court also found that it did not have a basis for federal jurisdiction over the plaintiffs' remaining state law claims and dismissed them as well. *Id.* at 1001–02.
221. *See id.* at 998. The court did not reach the question of whether a Dodd-Frank whistleblower is "required" to report conduct when failing to do so could expose that individual to criminal liability. *Id.* at 997 n.13.
222. *Id*. at 998.
223. *Id.*

E. Denial of Dodd-Frank's Extraterritorial Application in Asadi v. G.E. Energy (USA), LLC

Following the *Nollner* decision, in *Asadi*,[224] the District Court for the Southern District of Texas decided that Dodd-Frank does not offer whistleblower protection to an employee who reported possible FCPA violations outside the United States to a supervisor.[225] The plaintiff, Khaled Asadi, alleged that G.E. Energy (USA), L.L.C. ("GE Energy") terminated his employment in retaliation for reporting to internal company supervisors his concerns about potential violations of both the FCPA and company policies.[226] Asadi claimed that GE Energy or its employees may have violated the U.S. law against foreign bribery by hiring a local Iraqi woman who was reportedly closely associated with the Senior Deputy Minister of Electricity in order to "curry favor" with the Minister while GE Energy was negotiating a $250 million joint venture agreement between GE Energy and the Minister.[227]

Asadi brought suit against his former employer, alleging causes of action under Dodd-Frank's whistleblower protections, as well as a state-law breach-of-contract claim.[228] In support of his allegations, Asadi alleged that he maintained dual citizenship in Iraq and the United States, and that he was employed by GE Energy between 2006 and 2011 as the GE-Iraq Country Executive.[229] Although considered a U.S.-based employee of GE Energy, Asadi allegedly agreed to "temporarily relocate" to Amman, Jordan, where he coordinated with Iraqi government agencies to establish and maintain energy service contracts for GE Energy.[230] He maintained an office in Amman at the time he agreed to relocate.[231] Asadi alleged that in approximately June 2010, an Iraqi government official expressed concern to Asadi that the Iraqi woman's hiring was meant to "curry favor" with the Minister with whom Asadi was then negotiating.[232] He further alleged that the Joint Venture Agreement "had long been a subject of speculation [within] the Iraqi government because it was to be a 'Sole Source' contract which is generally not allowed under Iraqi contracting laws."[233]

Asadi alleged that he was concerned about the effects on negotiations that the hiring may have and that the hiring also may have violated the FCPA.[234]

224. No. 4:12-345, 2012 WL 2522599 (S.D. Tex. June 28, 2012), *aff'd*, 720 F.3d 620 (5th Cir. 2013).
225. *Id.* at *1, *7.
226. *Id.* at *1.
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*

He reported the issue to his supervisor, a Regional Executive for GE Energy.[235] He stated that he also brought the issue to the attention of a colleague from GE Energy's Oil and Gas Division and later, together with that employee, reported it to the Ombudsperson for GE Energy.[236] The Ombudsperson eventually interviewed Asadi.[237] Shortly after his interview, Asadi claimed that he received a "surprisingly negative" performance review.[238] He alleged that his previous ten reviews were all positive.[239] Thereafter, Asadi alleged, he was pressured to resign his position despite a recent two-year assignment extension.[240] Asadi alleged that GE Energy aggressively tried to get him to take a severance until GE Energy abruptly ended all negotiations and fired him on June 24, 2011.[241] Asadi was allegedly terminated by an e-mail from an employee from GE Energy's Human Resources Department.[242] The e-mail stated that GE Energy was terminating his employment "as an at-will employee, as allowed under U.S. law" and that "[a]s a U.S.-based employee you will be terminated in the U.S."[243]

In responding to GE Energy's motion to dismiss, Asadi argued that he was a protected "whistleblower" under Dodd-Frank even though he did not report the alleged FCPA violation to the SEC, but instead to his supervisor and GE Energy's Ombudsperson.[244] He argued that under *Egan*, "his disclosures were 'required' or 'protected' under the Sarbanes-Oxley Act of 2002 . . . and the FCPA."[245] There was no argument between the parties regarding whether GE Energy was an issuer because it is, and therefore the jurisdictional basis on which the *Egan* case was dismissed did not preclude the claim in the *Asadi* case. Instead, in support of its motion to dismiss, GE Energy argued that *Egan* was wrongly decided and that Asadi "should be held to Dodd-Frank's statutory definition of 'whistleblower,' which requires a report to the SEC."[246] The court concluded that it did not need to decide the issue of whether Asadi fit the definition of a protected whistleblower because the question of the extraterritorial application of the whistleblower protections disposed of the motion.[247]

The District Court found the Supreme Court's decision in *Morrison* control-

235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at *2.
239. *Id.*
240. *Id.* Asadi alleged that his supervisor encouraged him to accept "a reduced role in the region with little or no responsibility." *Id.*
241. *Id.*
242. *Id.*
243. *Id.* (internal quotation marks omitted).
244. *Id.* at *3.
245. *Id.*
246. *Id.*
247. *Id.* at *3, *4.

ling.[248] The District Court found that in *Morrison*, the Supreme Court reaffirmed the "longstanding principle" that unless Congress has expressed a clear intention to give a statute extraterritorial effect, either in the statutory language or its context, the courts must assume that it has none and that it has solely domestic application.[249] The *Asadi* court found that the language of the Dodd-Frank anti-retaliation provisions is silent regarding whether the protections apply extraterritorially.[250] Further, the court found that the statute has a provision giving federal courts extraterritorial jurisdiction over certain enforcement actions brought by the SEC or the United States, not private actions like Asadi's retaliation claims.[251] The court juxtaposed Dodd-Frank's whistleblower provisions with another section of Dodd-Frank, enacted specifically to legislatively supersede *Morrison* in the context of SEC civil enforcement or U.S. criminal enforcement of securities anti-fraud laws in cases involving only foreign investors.[252] Section 929P(b) enables the SEC and the DOJ to bring enforcement actions in certain matters that would otherwise not be subject to U.S. jurisdiction.[253] As the *Asadi* court outlined, in a section entitled "Extraterritorial Jurisdiction," the new Dodd-Frank provision provided jurisdiction to federal courts over an "action or proceeding brought or instituted by the Commission or the United States" under three specific statutory sections where the action or proceeding alleged a statutory violation involving "conduct within the United States that constitutes significant steps in furtherance of the violation" or "conduct occurring outside the United States that has a foreseeable substantial effect within the United States."[254] The court in *Asadi* distinguished statutes like Section 929P(b), and Section 30(a) of the Exchange Act, which was discussed in the *Morrison* case, from Dodd-Frank's whistleblower protections, stating "[b]y their plain language, these provisions do not apply to private actions such as Plaintiff's."[255] Therefore, the court found the context of the statute did not provide for its extraterritorial application.[256]

The court then considered whether the substantive laws of which the plaintiff reported alleged violations, or the plaintiff's factual position, served to extend the extraterritorial application of Dodd-Frank.[257] The court rejected Asadi's claim that the Dodd-Frank protections should apply to the plaintiff because of the plaintiff's alleged factual connections to the United States, likening the case to the factual

248. *Id.* at *4.
249. *Id.*
250. *Id.*
251. *Id.*
252. *See id.*
253. *Id.* at *4 n.40.
254. *Id.*; *see* Dodd-Frank Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864–65 (2010) (amending 15 U.S.C. §§ 77v(a), 78aa, 80b-14).
255. *Asadi*, 2012 WL 2522599, at *4.
256. *Id.* at *4.
257. *Id.* at *5–6.

posture of *Morrison*.[258] The court found that the reference to U.S. employment and law in the e-mail terminating Asadi and the plaintiff's dual U.S. and Iraqi citizenship were not enough to extend the protections' reach.[259] Specifically, the *Asadi* court focused on the defendant GE Energy's arguments, and noted that although Asadi was a dual U.S. and Iraqi citizen and he was terminated "under U.S. law" as a U.S. employee, "the majority of events giving rise to the suit occurred in a foreign country."[260]

In considering the plaintiff's arguments, the court also found that neither SOX nor the FCPA extended the territorial reach of the Dodd-Frank whistleblower protections because although those statutes have extraterritorial reach themselves, they did not protect or require the plaintiff's report to GE Energy supervisors and colleagues of potential FCPA violations by GE Energy.[261] Rather, SOX protects the internal reporting of certain securities laws violations by domestic employees and reporting relating to required disclosures and internal controls by companies subject to SOX, not individuals.[262] The Texas district court cited to *Carnero v. Boston Scientific Corp.*,[263] a pre-*Morrison* case in which the First Circuit held that because SOX was silent as to its extraterritorial reach, the statute's whistleblower provision did not extend to protect a foreign citizen working outside of the United States for a subsidiary of the employer corporation.[264]

As to the FCPA, Asadi argued that because the FCPA is clearly intended to apply extraterritorially, the statute must serve to extend the extraterritoriality of the Dodd-Frank whistleblower provision in the context of an employee who reported potential violations of the FCPA.[265] However, as the *Asadi* court noted, the FCPA, for its part, does not require or protect the reporting of alleged violations at all.[266] Thus, it concluded that the plaintiff's factual allegations did not fit within Dodd-Frank's anti-retaliation provision and therefore the court did not need to address whether the FCPA extends the extraterritorial reach of Dodd-Frank.[267] The court granted the defendants' motion to dismiss all of the plaintiff's claims.[268]

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258. *Id.* at *5.

259. *Id.*

260. *Id.* (internal quotation omitted).

261. *Id.* at *5–6.

262. *Id.*

263. *Id.* (citing Carnero v. Boston Scientific Corp., 433 F.3d 1, 4, 18 (1st Cir. 2006)).

264. *Carnero*, 433 F.3d at 8.

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

266. *Id.*

267. *Id.* In reaching this conclusion, the court also referenced cases in the context of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), noting that other federal courts have held that predicate acts in foreign countries in violation of statutes with extraterritorial reach do not rebut the presumption enunciated in *Morrison* against extraterritoriality of the RICO statute. *Id.* at *5 & n.51 (citing Norex Petroleum v. Access Indus., 631 F.3d 29, 33 (2d Cir. 2010); United States v. Phillip Morris USA, Inc., 783 F. Supp. 2d 23, 29 (D.D.C. 2011); Cedeño v. Intech Grp., Inc., 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010)).

268. *Id.* at *7. The plaintiff alleged that the court had supplemental jurisdiction over the breach of contract claim. Concluding that the plaintiff stated no claim under the Dodd-Frank anti-retaliation provision, the court

Thus, the court in *Asadi* decided the case narrowly, relying on the preliminary determination of whether the Dodd-Frank whistleblower protections covered employees working overseas, and never deciding whether the plaintiff qualified as a "whistleblower" under Dodd-Frank's anti-retaliation provision.[269]

F. The Limits of Dodd-Frank's Anti-Retaliation Provisions Affirmed on Appeal

Asadi appealed his case to the Fifth Circuit. On appeal, Asadi conceded that he was not a "whistleblower" within the definition of the term in the Act because he did not provide information to the SEC.[270] However, he argued that the Dodd-Frank whistleblower-protection provision should be construed to protect individuals who make disclosures that are required or protected under SOX, the Securities Exchange act, or other laws subject to the jurisdiction of the SEC.[271] The court held that "the plain language of the Dodd-Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC."[272] Because Asadi did not provide information to the SEC, the court held that his whistleblower-protection claim failed.[273]

Asadi argued on appeal, as he did at the district court level, that there is a conflict between the definition of "whistleblower" in the statute, which requires reporting to the SEC, and the third category of activities protected under the statute, which does not require SEC reporting. According to Asadi, reading the third category of protected activities to require reporting to the SEC would conflict with the whistleblower definition. The court acknowledged that the district courts that had considered the question up to that point, including in *Egan*, *Nollner*, and *Kramer v. Trans-Lux Corp.*,[274] had all concluded that the language in the two provisions is either conflicting or ambiguous.[275] Accordingly, those courts concluded that the Dodd-Frank whistleblower protections extend to protect against retaliation individuals who do not make disclosures to the SEC in certain circumstances.[276]

The Fifth Circuit, however, ruled that the conclusion that there is a conflict or ambiguity to the Dodd-Frank whistleblower protections "rests on a misreading" of

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found that it could not exercise supplemental jurisdiction and that the plaintiff had failed to allege any other basis for jurisdiction. Therefore, the court dismissed the plaintiff's breach of contract claim as well. *Id.*

269. *See id.* at *3, *6.

270. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 624 (5th Cir. 2013).

271. *Id.*

272. *Id.* at 623.

273. *Id.*

274. No. 3:11cv1424 (SRU), 2012 WL 4444820, at *4 (D. Conn. Sept. 25, 2012) (finding that it is not "unambiguously clear that the Dodd-Frank Act's retaliation provision only applies to those individuals who have provided information relating to a securities violation to the Commission").

275. *Asadi*, 720 F.3d at 624, n.6.

276. *See id.* at 624. The Fifth Circuit did not draw attention to the fact that in each of the cited cases, although the courts found that Dodd-Frank's whistleblower protections extend in certain circumstances to individuals who did not report their allegations to the SEC, each district court ultimately ruled that the plaintiffs were not entitled to protection against retaliation for various reasons.

the statute.[277] Rather, according to the appellate court, the only category of protected whistleblowers are individuals who provide information to the SEC relating to a securities-law violation.[278] The categories in 15 U.S.C. § 78u-6(h)(1)(A) set forth the protected activities in a whistleblower-protection claim.[279] Asadi claimed that this reading meant that an individual could make a required or protected disclosure under SOX, the Securities Exchange Act, or other laws under the jurisdiction of the SEC yet fail to qualify as a protected whistleblower if he or she did not make the disclosure to the SEC.[280] However, according to the court, reading the protected activities as additional definitions of protected whistleblowers would mean that "individuals could take actions falling within the third category of protected activity yet fail to qualify under the more narrow definition of whistleblower," which, in the court's view, is not supported by the plain text of the statute.[281] Rather, the court found that the third category of protected activity protects whistleblowers who report securities law violations to the SEC when the disclosure is protected or required under another legal provision.[282] The court gave the example of a company manager who was terminated after reporting a securities law violation to the SEC and to the company's CEO, concluding that the manager would be protected from retaliation under the third category of protected activities because his disclosure to the CEO was protected by the SOX anti-retaliation provision for reports of civil or criminal fraud against shareholders.[283]

The court affirmed the district court's dismissal of Asadi's claim but did not do so on the basis of the application of *Morrison's* presumption against extraterritorial application of federal statutes. In fact, the Fifth Circuit did not address the lower court's *Morrison* reasoning, concluding that it was unnecessary to do so because its ruling that Asadi was not a statutorily-protected whistleblower controlled.[284] However, the reasoning from the *Asadi* district court is still viable, and was the basis for the Southern District of New York's denial of a Dodd-Frank whistleblower protection claim by a Taiwanese resident against Siemens A.G. in the *Liu* decision, issued after the *Asadi* appellate court decision.[285]

V. ANALYSIS: *ASADI*'S EROSION OF COMPLIANCE PRINCIPLES IN THE CONTEXT OF INTERNATIONAL CORPORATE ANTI-BRIBERY EFFORTS

The Dodd-Frank whistleblower provisions have been the subject of much discussion, with some commentators and practitioners arguing that they serve to

277. *Id.* at 625.
278. *Id.* at 629.
279. *Id.* at 625.
280. *See id.* at 626.
281. *Id.*
282. *Id.* at 627.
283. *Id.* at 627–28 (citing protections for reports under 18 U.S.C. § 1514A).
284. *See id*. at 630 n.13.
285. *See* Liu v. Siemens A.G., No. 13 Civ. 317(WHP), 2013 WL 5692504 (S.D.N.Y. Oct. 21, 2013).

protect the financial markets by encouraging the reporting of harmful legal violations.[286] Others have argued that the provisions—particularly the "bounty" provisions—encourage employees to report potential violations to law enforcement authorities, to the likely detriment of the company, rather than to employers who could and should identify and remediate violations.[287] At least one commentator has argued that these are hollow concerns, because research has demonstrated that the vast majority of whistleblowers first tried to report law violations internally before turning to external reporting channels.[288] The response that they received from their employers, who ignored, rebuffed, or retaliated against them, led them to make external reports.[289] The Dodd-Frank anti-retaliation provisions address these concerns in the securities law context.

At least the protections afforded by the anti-retaliation provisions (distinguished from the bounty provisions) are consistent with the compliance objectives of the Principles. As outlined in Part II, *supra*, the Principles take into account a company's compliance program in connection with charging, cooperation credit, and sentencing credit decisions, as well as decisions regarding how to resolve criminal cases.[290] Compliance is an objective of the Principles. Indeed, it is a stated purpose of the criminal justice system, as implemented under the guidance of the Principles, to encourage corporate compliance and self-regulation.[291] Compliance is also a mitigating factor under the Principles. On one hand, a good, functioning compliance program that is reasonably calculated to prevent and identify non-compliant behavior can affect the prosecutor's decisions in regard to all phases of the criminal justice process, from charging to case disposition and to sentencing. On the other hand, a company that lacks a compliance program or merely has a "paper" program that has not been implemented in practice is unlikely to inure any benefits to the company in terms of the prosecutor's decisions. Ultimately, these decisions are made with an eye to the well-established purposes of the criminal justice system—to punish, remediate, and prevent such conduct from happening again.[292]

Accordingly, the view of the prosecutor regarding the appropriate handling of a specific corporate case is considered through this lens, and companies under investigation or targets for prosecution benefit from having an effective compliance program in place. Companies that have otherwise-effective compliance programs—putting aside the events under scrutiny—benefit from the real and perceived effects that such a program has on punishment of responsible parties,

286. *Cf. supra* note 79 (citing various commentators critiquing this position).
287. *See id*.
288. *See Key Issues: Whistleblower Bounty Program*, *supra* note 80.
289. *Id.*
290. *See generally supra* Part II.
291. U.S.A.M., *supra* note 14, § 9-28.100.
292. *See id.* § 9-28.300(B).

remediation of any wrongdoing, and future prevention of the same conduct.

The anti-retaliation provisions similarly encourage corporate compliance. In the case of Dodd-Frank's anti-retaliation protections, employees who meet the statutory definition of "whistleblower" are protected from employment retaliation for making certain disclosures of unlawful conduct.[293] Not only does the Act proscribe retaliatory conduct, but it also gives effect to the proscription by granting an offended whistleblower a private cause of action against an employer that retaliates against that individual.[294] The effect of the Dodd-Frank anti-retaliation provisions is to offer protection and comfort to company employees who have evidence of legal violations by their employers or fellow employees. Protecting individuals who come forward with information about potentially unlawful conduct serves the dual public interests of (1) policing unlawful activity and (2) protecting individuals who assist in that effort. Individuals who believe that they will be protected against retaliation for reporting such information are more likely to make those reports. Employees who have learned information suggesting that their employer or their colleagues have violated the law are likely to have some natural hesitancy to report that information. They may be hesitant because of the implications of the substantive conduct under the law for their employer, colleagues, and themselves. They also may be hesitant because of the implications for the individual in terms of his or her own employment as a result of disclosing the information. That hesitancy can affect the decisions employees make regarding how to handle the information they have learned or observed. Where employees feel that their reports will be well-received by their employer and they have confidence that their employment will not be jeopardized by making such reports, they are more likely to voice concerns about potential legal violations internally to their employer. Of course, this is the route that corporate employers prefer.

A company's receipt of reports of potential legal violations through internal mechanisms like hotlines, managers, and the company's compliance or legal departments gives the company the opportunity to investigate the allegations, determine whether there is indeed a true legal violation or whether there is some other explanation for the employee's concern, and, in some cases, remediate the issue. In many if not most cases, employee complaints can be resolved without the need for disclosure of the issue to law enforcement authorities. However, even where disclosure is called for, a company that receives a report first is able to position itself in the best possible light, both from the perspective of its understanding of the facts concerning the situation—thus enabling the company to cooperate with any resulting law enforcement investigation—and, where appropriate, in terms of any defense that it may have to criminal or civil liability for the company itself arising out of the conduct. In addition, where the company itself is

293. 15 U.S.C. § 78u-6(h)(1)(A) (2012).

294. *Id.* § 78u-6(h)(1)(B).

not complicit in the alleged violation and instead the conduct was undertaken by an employee in violation of the company's policies and procedures, the company can quickly take action to discipline the employee, including potentially terminating the employee, and remedy any resulting effects of the employee's actions. This approach not only *looks* good to law enforcement authorities, it *is* good. These efforts perpetuate the threefold goals of the criminal justice system by encouraging punishment of culpable parties for illegal acts, remediating such acts, and setting examples that will discourage future conduct of the same sort.

On the other hand, it is common sense that employees would be much less likely to raise concerns about possible legal violations internally when the employees do not believe that they will have employment protection if they raise these concerns. When an employee reports allegations of legal violations of which the company was previously unaware, the company will, in the natural course, take action after the report. That action may come in the form of an internal investigation of the allegations and the allegedly involved employees, potentially including the employee who made the allegation. In the worst case scenario for the employee—and an imprudent handling of the situation by the company when dealing with a good-faith report of wrongdoing—the employer will at the outset of the inquiry be armed with information that may result in the company taking an aggressive posture against the employee. This can result in retaliation against the employee, up to and including demotion or termination. These situations are the very types of situations that have resulted in the civil employment cases related in this Article.

Accordingly, the imposition of the anti-retaliation provisions of the Dodd-Frank Act, like anti-retaliation provisions under other statutory frameworks, legally mandates the employment protections that encourage employees to first report evidence of certain securities and other legal violations within the jurisdiction of the SEC to employers before or instead of (or at least contemporaneous to) reporting them to outside law enforcement. In this way, employees are afforded employment protection in spite of their reports. In addition, the protections encourage the internal reporting that provides companies the opportunity to investigate and appropriately resolve the allegations, including potentially reporting them to law enforcement themselves. These are the exact purposes of the compliance framework that the criminal justice system encourages and of the compliance principles enunciated in the Principles.[295]

However, the "bounty" provisions of the Dodd-Frank Act impose other considerations in the area of anti-retaliation employment protections for legal violation reporting. The bounty provisions offer some protections to individuals who want to report internally first. The SEC has called these protections "incentives."[296] But

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295. *See* U.S.A.M., *supra* note 14, § 9-28.100.

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

by and large, they put a priority on reporting to the SEC. The Dodd-Frank bounty provisions and the SEC rules promulgated thereunder have two characteristics that encourage company employees to report evidence of legal violations to the SEC or other permitted outlets covered by Dodd-Frank. First, they offer monetary awards for reports of evidence that result in the successful civil prosecution of the violations; depending on the case, these awards may be quite sizable.[297] Second, they offer anonymity to the reporting employee during the entirety of the investigation and prosecution of the matter, and potentially even after.[298] Indeed, a reporting whistleblower need only reveal his or her identity at the conclusion of the matter, when the allegation has already been investigated and litigated and it is already known whether the prosecution of the matter was successful. And the SEC has shown some willingness to protect whistleblower's identities even after that point.[299]

Accordingly, a whistleblower reporting violations to the SEC or other permissible authority may remain anonymous to the SEC or other authority through the entirety of the process and only must reveal his or her identity at the conclusion when the prosecution has been successful, monies have been recovered, and the SEC is ready to make a monetary award under the bounty provisions. At that point, because the matter is resolved, the whistleblower is likely to be less worried about revealing his identity because any retaliation from his employer is going to have less effect. He has been recognized by a court finding or settlement as justified in his report. Under those circumstances, his employer is less likely to fire him, or it will matter less because the investigation and prosecution is complete and he may have received some reward. In addition, any retaliation by his employer can be more easily remedied because a finding of the legitimacy of the employee's report has already been made. Of course, if the matter does not result in a successful prosecution and no monies are ever recovered, no award will be made, and therefore the whistleblower will never have to reveal his identity.

Commentators, compliance practitioners, and government enforcement officials all talk of the "tone at the top" and the "culture of compliance" that is required for good compliance functioning and an effective compliance program.[300] In other words, companies should have management buy-in so that it is clear to all company employees that legal violations of a particular sort will not be tolerated, there will be repercussions for violations, and employees will be rewarded—perhaps tangibly in addition to intangibly—for compliance efforts and reporting

297. *See, e.g.*, *supra* note 87–94 and accompanying text.

298. *See* 17 C.F.R. 240.21F-7 (2013).

299. *See supra* note 94 and accompanying text.

300. *See, e.g.*, Michael Volkov, *How to Define "Tone-at-the-Top*,*"* CORRUPTION, CRIME & COMPLIANCE (Sept. 30, 2012), http://corruptioncrimecompliance.com/2012/09/how-to-define-tone-at-the-top/; Donna Epps, *10 Ways To Measure The Tone At The Top*, CORPORATE COMPLIANCE INSIGHTS (June 4, 2012), http://www.corporatecompliance.com/10-ways-to-measure-the-tone-at-the-top/.

suspect activities to internal company resources poised to investigate and ameliorate such issues. Thus, the company's treatment of whistleblowers who report potential violations and their handling of the reported issues are critical to the compliance culture. As a related principle, the treatment of whistleblowers who make those reports is just as critical to a company's compliance culture—or at least an employee's perception of it.

It is against this framework that we consider the effect of the *Asadi* decisions. The Fifth Circuit ruled that Asadi had no protection from retaliation as a result of his disclosures because he did not report them to the SEC.[301] However, in reaching its ruling, the appellate court did not overrule the lower court's reasoning. Rather, the appellate court essentially said that it did not need to address that reasoning because it could affirm the denial of Asadi's retaliation claim on the basis that he did not meet the statutory definition of "whistleblower."[302] Accordingly, the district court's reasoning may still be in play, as evidenced by the *Liu* decision. Thus, if an employee of a U.S. securities issuer is stationed overseas and reports a potential FCPA violation to the SEC and internally to company management, some federal district courts considering a private action brought by the employee against his employer for retaliation could rule that *Morrison* applies to prevent the extraterritorial application of Dodd-Frank's whistleblower protections. (And, of course, we know from *Nollner* that if the company is not an issuer, the SEC has no jurisdiction under the FCPA for a report of foreign bribery conduct, so the reporting employee in that situation would have no whistleblower protection.[303]) The effect of that hypothetical—but not unrealistic—situation would be to leave overseas employees of U.S. companies unprotected. In this day of increasingly global business activities and seamlessness in operations worldwide, global access, and the ease of communications between the most remote locations, company employees can often be far-flung and yet operate on a daily basis as if they are right down the hall from each other in U.S. company headquarters. They may be subject to U.S. employment and regulatory law and U.S. criminal laws. However, with respect to reporting certain U.S. legal violations, they may be left out on their own.

Without the anti-retaliation protections for whistleblowers, it is perfectly permissible for a U.S. employer to demote or fire a foreign-stationed employee who reports to the company or to the SEC or another law enforcement agency violations of securities or other laws that are subject to SEC jurisdiction where the conduct occurs in a foreign country. The ability of U.S. law enforcement to exercise jurisdiction and prosecute the conduct under U.S. criminal or securities laws has no effect on the applicability of the provisions. The plaintiff in *Asadi*

301. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 623 (5th Cir. 2013).
302. *Id*. at 630 n.13.
303. Nollner v. S. Baptist Convention, Inc., 852 F. Supp. 2d 986, 997–98 (M.D. Tenn. 2012).

reported to company compliance supervisors potential FCPA violations, which the DOJ or the SEC could have prosecuted and over which a U.S. federal court could have exercised jurisdiction, given the involvement of a U.S. company in the alleged conduct.[304] However, the district court held that the plaintiff whistleblower was not protected under the Dodd-Frank's anti-retaliation provisions because those provisions did not specifically provide for their extraterritorial application and the FCPA statute itself did not extend the reach of those protections.[305] And the appellate court ruled that the plaintiff had not reported to the SEC, so he was not a statutorily-protected whistleblower.[306]

The decision is made all the more interesting from an analytical perspective because the purpose of the FCPA is global anti-bribery compliance and enforcement where U.S. interests are involved. When enacted in 1977, its stated purpose was to level the playing field for U.S. companies operating and competing around the world by stopping the conduct and punishing violations.[307] Similarly, FCPA enforcement authorities, in discussions of their enforcement efforts, in guidance to avoid legal violations, and in attachments to enforcement resolutions themselves encourage companies to impose compliance programs intended to set standards, look for and mitigate risks, and punish misconduct.[308] But the *Asadi* decision pulls the rug right out from under the whistleblower who tries to report concerns about certain legal violations to company officials without also reporting them to the SEC—even though those company officials are the very individuals who are positioned to investigate such allegations and remediate them internally or report them to law enforcement. Employees who learn that they will not be afforded employment protection for making such reports to internal company channels are more likely to make those reports directly to the SEC, as prescribed by Dodd-Frank protections, or other law enforcement authorities, where they can potentially take advantage of identity protections at least until the matter is investigated and resolved (and potentially financial benefits as well).

So what does this mean for modern international companies? In order to encourage internal reporting by company employees who believe they have information relating to violations of law, companies must provide comfort to employees through company compliance programs. Employees who make good-faith reports of legal violations should be protected from employment retaliation. Processes should be in place to ensure serious consideration and investigation of such reports. Outlets for making reports should be provided. Confidentiality

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304. *See* Asadi v. G.E. Energy (USA), L.L.C., No. 4:12-345, 2012 WL 2522599, at *1–2 (S.D. Tex. June 28, 2012).

305. *Id*. at *7.

306. *Asadi*, 720 F.3d at 623.

307. *See* FCPA RESOURCE GUIDE, *supra* note 173, at 2, 104 n.2.

308. *See, e.g.*, Deferred Prosecution Agreement, United States v. Orthofix Int'l, N.V., *supra* note 186, attachment C. Attachment C to deferred prosecution and non-prosecution agreements with corporate offenders typically sets forth corporate compliance program enhancement recommendations or requirements.

of reports should be ensured, where possible. Management should support internal reports and should foster a "compliance culture," where employees are encouraged to bring good-faith reports of legal violations to the attention of company compliance or other officials. Focusing on establishing a strong compliance program will help make employees feel secure in their ability to bring serious concerns to the attention of the company and confident that the company will handle those issues professionally and responsibly. Strong corporate compliance principles and processes help foster (although they certainly cannot guarantee) employee loyalty. And loyal employees are more likely to want to help their employer solve problems and less likely to seek to profit from them, to the potential disadvantage of the employer.

VI. CONCLUSION

Since the Fifth Circuit's ruling in *Asadi*, it is reasonable to expect that the reasoning applied therein—that employees who do not make their reports of alleged wrongdoing to the SEC are not protected by Dodd-Frank's whistleblower provisions—will be adopted by district courts hearing retaliation cases under Dodd-Frank going forward. However, there is still room for the *Morrison* reasoning applied at the trial level in the *Asadi* case to be adopted by district courts considering cases in which the employee reported to the SEC and meets the statutory definition of whistleblower but is located overseas. And so, under either reasoning, the answer to the hypothetical set forth in the Introduction of this Article is "No"—an employee of a U.S. company who is stationed overseas and who discloses information about potential FCPA violations occurring there is not protected from retaliation, at least where he does not make a report to the SEC, and potentially even if he does make such a report.

It is probably unlikely that the *Asadi* decisions are going to cause any outcry among U.S. employees working abroad or other segments of the general public. However, it may be true that when Congress drafted and enacted Dodd-Frank's whistleblower protections, it was not the desired effect that U.S.-based employees of U.S. companies working abroad who witnessed legal violations that are enforceable under U.S. law potentially cannot receive U.S. employment protections, including in cases where they make disclosures to the SEC. And it is certainly possible that U.S. company employees working abroad who are aware of the current state of the law in this area will make the decision to save any reports of legal violations—if they are inclined to report them at all—for government enforcement authorities rather than company compliance officers. Indeed, the Fifth Circuit's decision in *Asadi* requires that employees either save their reports for the SEC or make them internally in conjunction with reports to the SEC in order to be protected by Dodd-Frank's anti-retaliation provisions. At a minimum, the courts' interpretation of the Dodd-Frank whistleblower protections against retaliation has left a hole in the employment protections for employees making reports either to company management or to law enforcement of U.S. criminal law violations. Change in this area will likely only occur if Congress takes further legislative action to extend the anti-retaliation provisions of Dodd-Frank or to enact new whistleblower protections.