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Chapter 2

Whistleblower Laws: Protections for Employees, Risks to Corporations

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I. Introduction

The United States has a long history, dating to the Civil War era, of encouraging whistleblowers. As early as the 1860s, statutes allowed whistleblowers to share in the recovery from legal actions prosecuting frauds against the government. (See endnote 1.) New laws, such as Sarbanes-Oxley, have broadened the application of whistleblower protections to include virtually all United States corporations. Even more recent developments, including the Dodd-Frank Wall Street Reform and Consumer Protection Act, provide whistleblowers with enormous incentives and further strengthen existing whistleblower protections. Increasingly, the law has provided protections to employees who suffer retaliation as a result of their whistleblowing activities.

These developments present challenges for corporations, as whistleblowers may lead to civil and criminal investigations and liability, regardless of whether the accusations raised by the whistleblowers are well-founded. Under these circumstances, corporations cannot afford to view whistleblowers merely as troublesome employees. Although whistleblowers may have mixed-motives and the concerns they raise are not always legitimate, a hostile approach towards whistleblowers is inconsistent with trends in the law and may expose corporations to liability for retaliation, even if the whistleblower's allegations prove to be without merit.

The best practice for corporations is to be receptive to whistleblowers as part of a vibrant and effective compliance programme, and to protect them from retaliation. Such a programme is increasingly expected, if not required, by law, and may help shield a corporation and its directors from liability in the event that a whistleblower does expose wrongdoing.

II. The Law Provides Many Incentives and Protections for Whistleblowers

Whistleblowers and informers are often celebrated by the government and the media for their courage, but the reality is that while some might be performing a valuable public service, many others are disgruntled employees who have ulterior motives. Although whistleblowers can be a mixed bag, the government actively seeks to solicit their information because whistleblowers can have inside knowledge about corporate practices that are difficult for an outsider, such as an auditor or regulator, to expose. To encourage whistleblowers, Congress has provided monetary incentives and protections from retaliation for corporate insiders who act as whistleblowers.

Although there are many incentive and anti-retaliation laws, this article will focus on whistleblower protections and incentives that apply to public companies and companies that contract with the government, under the False Claims Act, the Sarbanes-Oxley Act, and the Dodd-Frank Act. These whistleblower laws overlap (for instance, many public company also contract with the government), and collectively apply to most companies doing business in the United States. (See endnote 2.)

A. False Claims Act

1. *Qui Tam* Actions and Related Criminal Actions

Corporations that contract with the government must be sensitive to the provisions in the federal False Claims Act, which, among other things, incentivises disclosure of information concerning fraud against the government and protects whistleblowers from retaliation. The False Claims Act authorises whistleblowers to sue, on behalf of the government, an individual or entity that has defrauded the government, and share in any recovery. (See endnote 3.) Such actions are referred to as *qui tam* actions, and the private citizen suing on behalf of the government is known as the "relator". These actions may alert the government to criminal activity, and serve as the trigger for a criminal investigation and prosecution.

The federal False Claims Act's coverage is broad and has been steadily expanded to include not just fraud in defence procurement, which was the target of the original Act, (see endnote 4) but all federal administration of funds, including under TARP. (See endnote 5.) The False Claims Act provides that any person who knowingly submits, or causes another person to submit, false claims for payment of government funds is liable for treble damages and civil penalties of between $5,500 and $11,00 per false claim. (See endnote 6.) The Act applies to, *inter alia*, entities that submit invoices or vouchers for payment to the federal government, as well as entities that receive direct federal funding. Many states, and a few municipalities, have false claims statutes that contain *qui tam* provisions to encourage whistleblowers. Some of these statutes are modelled on the federal False Claims Act, and therefore track the False Claims Act in terms of procedure and the availability of large relator awards. (See endnote 7.)

Procedurally, civil False Claims Act cases can proceed in one of two ways. First, the government can bring a direct civil action against an individual or entity that it believes has defrauded the government. In such cases, whistleblowers play no role. Second, and more relevant here, a whistleblower-relator can initiate a *qui tam* suit against an individual or entity on behalf of the government. When a relator initiates the suit, the complaint is filed under seal, and the government is given an opportunity to investigate the allegations. Based on the investigation, the government decides whether to join the case. (See endnote 8.) If the government

intervenes, the relator is entitled to share in the reward, receiving between 15 and 25 percent of the recovery. If the government does not intervene, and the case proceeds with only the whistleblower-relator pursuing the action on behalf of the government, the relator is entitled to receive between 25 and 30 percent of any recovery. (See endnote 9.)

Recent cases, predominantly involving health care and defence contractor fraud, demonstrate that the filing of the *qui tam* action and the ensuing government investigation into the allegations creates a serious risk of criminal as well as civil liability:

- A *qui tam* action for widespread health care fraud against WellCare Health Plans, one of the largest Medicaid HMO contractors, prompted a federal and state investigation of WellCare. After the first relator, a financial analyst at WellCare, brought suit, and while the *qui tam* complaint remained under seal, he cooperated with the government as an FBI informer, and provided more than 1,000 hours of surveillance audio and video. This led to a massive raid of WellCare's Tampa offices, a significant decline in the value of WellCare stock, and charges against an executive, who ultimately pled guilty. (See endnote 10.) The company entered into a deferred prosecution agreement that required it to, among other things, retain an outside monitor.
- The resolution of a False Claims Act lawsuit against Pfizer arising from its off-label sales and marketing of the pain drug Bextra led to a $1 billion settlement and more than $102 million in payments to six whistleblowers, including one individual who was awarded $51.1 million. Pfizer also paid $1.3 billion as a criminal fine, and one company manager entered a guilty plea and was sentenced to 24 months probation and a fine.
- AstraZeneca Plc's $250 million settlement of False Claims Act litigation arose from the marketing of Seroquel led to two whistleblowers sharing a $45 million reward. AstraZeneca pled guilty to fraud, and paid $90 million in criminal fines, in connection with its drug pricing and marketing practices for Zoladex. The Zoladex fraud led to a $266 million recover under the False Claims Act.
- A military-procurement fraud *qui tam* case arising from allegations that TRW (now owned by Northrop) made defective parts for spy satellites that resulted in serious malfunctions and expensive fixes, led to fines of $325 million and payments to the *qui tam* whistleblower amounting to $48.7 million.

Thus, the risks from a *qui tam* action should not be underestimated. Indeed, even if widespread fraud leading to criminal liability is not revealed, the cost of a government investigation brought on by a *qui tam* action can be enormous and can significantly impact the financial condition of a company, and even a purely civil action can be extraordinarily costly to a corporation. Notably, since the 1986 amendments to the False Claims Act, which significantly strengthened the False Claims Act and the *qui tam* provisions, the number of False Claims Act filings has increased, and the government has recovered over $15.7 billion through *qui tam* actions alone. (See endnote 11.) Of this amount, more than $15.1 billion was recovered in *qui tam* actions that were joined and pursued by the government. (See endnote 12.) Whistleblowers' share of the awards was approximately $2.5 billion, (see endnote 13) and in some cases, the whistleblower awards have topped tens of millions of dollars.

2. FCA Whistleblower Protections

The 1986 Amendments to the False Claims Act created a federal cause of action for any employee who suffers retaliation for participating in a False Claims Act prosecution. (See endnote 14.) This cause of action is not limited to *qui tam* relators, but also protects any person who does any lawful act "in furtherance of" a False Claims action, including investigating, initiating, testifying in furtherance of, or assisting in a False Claims Act prosecution. (See endnote 15.) The scope of protected activity "in furtherance of an action" is not clearly delineated by the courts and is beyond the scope of this overview of the law. It is important to note, however, that courts have generally taken an expansive view of protected activity. For instance, some courts have held that the whistleblower provision protects an employee when the employee did not have a specific awareness of the FCA as long as the employee was engaged in action that was calculated or could reasonably have led to a viable FCA claim. (See endnote 16.)

Courts addressing the scope of the False Claims Act's anti-retaliation provisions have held that the law broadly protects employees against discharge, demotion, threats and harassment, or any other discrimination against an employee in the terms and conditions of employment. The Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, (see endnote 17) which analysed the scope of Title VII's anti-retaliation provision, governs the analysis of what constitutes retaliatory conduct under the False Claims Act, as well as under other federal anti-retaliation statutes. (See endnote 18.) Recently, the Fraud Enforcement and Recovery Act of 2009 strengthened the False Claims Act's anti-retaliation provisions by providing for individual liability against retaliators, and broadening the scope of coverage to protect not just employees, but also contractors and agents.

B. Sarbanes-Oxley Act of 2002

Historically, U.S. law did not broadly protect whistleblowers in corporate America. This changed with the Sarbanes-Oxley Act of 2002 ("SOX"), which enacted an expansive federal whistleblower protection statute for employees of public companies, and amended the obstruction of justice statute to provide criminal penalties for any person or entity that retaliates against an individual for certain whistleblower activity. This year, the civil protections under SOX were further strengthened by the Dodd-Frank Act.

1. Civil Liability Under SOX for Anti-Whistleblower Retaliation

Sarbanes-Oxley broadly protects employees against retaliation for reporting alleged violations occurring within public companies. Under Section 806 of SOX, publicly traded companies, or any officer, employee, contractor, subcontractor, or agent of a publicly traded company, may not "discharge, demote, suspend threaten, harass or in any other manner discriminate against an employee in the terms and conditions of employment" because of any protected whistleblowing activity. (See endnote 19.) Publicly traded companies are defined as companies that have a class of securities registered under section 12 of the Securities Exchange Act of 1934, or are required to file reports under section 15(d) of the Exchange Act. The Act covers all companies that have securities publicly traded in the United States, including American Depositary Receipts ("ADRs"), or are required to file reports with the Securities and Exchange Commission ("SEC"), and does not distinguish between United States and foreign corporations. (See endnote 20.)

Although there had been some dispute whether an employee of a non-publicly traded subsidiary of a publicly traded company was covered under SOX, the Dodd-Frank Act amended SOX to clarify that whistleblower protections apply to employees of subsidiaries of publicly traded companies "whose financial information is included in the consolidated financial statements of [a publicly] traded company". (See endnote 21.) In addition, the Dodd-Frank Act expanded SOX coverage to include employees of "nationally recognized statistical rating organization[s]". (See endnote 22.)

A broad range of activities are protected under Section 806, including (i) "providing information" to federal agencies, Congress, or internally within the company to "a person with supervisory authority over the employee" or a "person working for the employer who has the authority to investigate, discover, or terminate misconduct", and (ii) "participating in a proceeding by filing, causing to be filed, testifying, or otherwise assisting in proceedings." (See endnote 23.) In order for the activity to be protected, the employee must "reasonably believe" that the information provided relates to a violation of federal mail, wire, bank or securities fraud statutes, or a violation of any SEC rule or other provision of federal law relating to fraud against shareholders. (See endnote 24.) If an employee believes he or she suffered retaliation, the employee may file an administrative complaint with the Department of Labor, which will investigate the claim and can order reinstatement, back pay and damages. (See endnote 25.) If the Department of Labor does not timely resolve the case, the employee may pursue the claim in federal court. (See endnote 26.)

The Dodd-Frank Act made several procedural and substantive changes to enhance the protections of SOX by extending the statute of limitations for bringing a claim, voiding any agreement that purports to waive rights and remedies afforded to SOX whistleblowers, and increasing the scope of employers who are subject to the anti-retaliation provisions. (See endnote 27.) These provisions of the Dodd-Frank Act are discussed more fully below.

2. Criminal Liability Under SOX for Anti-Whistleblower Retaliation

SOX also provides for criminal liability for retaliation against whistleblowers. Section 1107 of SOX amended the existing obstruction of justice statute,18 U.S.C. § 1513, by adding a new subsection that imposes criminal sanctions for knowing and wilful retaliation against an individual who provides truthful information to law enforcement officers relating to the commission of any federal offence. (See endnote 28.)

Section 1107 differs from the civil protections for employees under section 806 in several key respects. First, unlike SOX's civil retaliation remedies, which may be pursued only against publicly traded companies and nationally recognised statistical rating agencies, the criminal sanctions in section 1107 extend to "any person", including all companies, employers, supervisors and other retaliating employees. Second, section 1107 punishes retaliation only against those who provide information to law enforcement, whereas section 806 provides that civil liability extends to retaliation against individuals who report potential violations internally. Third, section 1107 applies to retaliation against whistleblowers who report the commission or potential commission of any federal offence, not just the six classes of offence or violations relating to fraud or securities violations listed in section 806. Fourth, section 1107 contains an express provision for extraterritorial application. (See endnote 29.)

Criminal sanctions under section 1107 are stiff, including fines for individuals of up to $250,000 and/or imprisonment up to 10 years, and fines for organisations of up to $500,000. To date, only a handful of criminal prosecutions have been brought under this section, and they have not involved corporate whistleblowers.

C. Dodd-Frank Wall Street Reform and Consumer Protection Act

1. New SEC Reward Programme for Whistleblowers

Most recently, The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which was signed into law on July 21, 2010, (see endnote 30) places a strong emphasis on encouraging and protecting whistleblowers who assist the government in enforcing the securities laws. Though generally focused on a new regulatory plan for the financial system, the Dodd Frank Act also provides new and significant incentives for prospective whistleblowers who provide information to the SEC concerning alleged violations of the securities laws, including violations of the Foreign Corrupt Practice Act.

Pursuant to the whistleblower provision of the Dodd-Frank Act, which will be codified as Section 21F of the Securities and Exchange Act of 1934, the SEC must compensate individuals who voluntarily provide "original information" to the SEC, if that information leads to a successful enforcement action with a recovery of more than $1 million (including penalties, disgorgement and interest). "Original information" is defined as information "derived from the independent knowledge or analysis of the whistleblower", "not known to the Commission from any other source", and "not derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media". (See endnote 31.) Even if a whistleblower provides "original information", the award is not available if the whistleblower is "convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award." (See endnote 32.)

Whistleblowers who qualify for an award under Section 21F are entitled to 10 to 30 percent of the total recovery (including recovery from any SEC action, action by the Department of Justice, or any action taken by state regulators or self-regulatory bodies), and the SEC has discretion to determine the amount of the award within that range. (See endnote 33.) If the SEC declines to reward a whistleblower, or awards less than 10 percent of the total recovery, the whistleblower may appeal the decision to a Federal Appeals court. (See endnote 34.) Section 748 of the Dodd-Frank Act amended the Commodity Exchange Act to create a similar whistleblower incentive programme for the Commodity Futures Trading Commission ("CFTC").

Section 21F repealed and replaced an older, more limited and less generous SEC whistleblower reward programme that had been in place since 1989. (See endnote 35.) That programme, which applied only to insider trading cases and capped rewards at ten percent of any monetary sanctions recovered by the government, had paid out less than $160,000 to only five whistleblowers at the time the Senate issued its Report accompanying the Dodd-Frank Act. In enacting the Dodd-Frank Act whistleblower provisions, Congress explained that its purpose was to "motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud". (See endnote 36.) According to the Senate Report, despite the apparently limited use of the earlier SEC whistleblower reward programme, whistleblower tips are more effective in uncovering fraud at public companies than external auditors and the SEC. Specifically, the Report expresses the view that whistleblower tips are 13 times more effective at detecting fraud than external audits by auditing firms and the SEC. (See endnote 37.)

The new Dodd-Frank Act whistleblower reward programme likely will encourage more whistleblowers to disclose information to the SEC and CFTC. Interestingly, after the Senate Report accompanying the Dodd-Frank Act was released, the SEC granted the largest insider trading tip award ever under the earlier SEC whistleblower reward programme. On July 23, 2010, the SEC announced the award of $1 million to two informants who provided information that led to the reopening of an insider trading investigation against Pequot Capital Management Inc. and the filing

of an enforcement action against Pequot and its CEO. The settlement of that action required the payment of civil penalties totalling $10 million and over $17 million in disgorgement and prejudgment interest. (See endnote 38.)

The Pequot whistleblower announcement suggests that the SEC has a renewed interest in pursuing tips offered by whistleblowers and compensating whistleblowers with much higher awards than it historically had offered. The SEC's action, together with the new provisions of the Dodd-Frank Act, sends a clear message: corporations should expect an expansion of government investigations of civil—and potentially criminal—violations undertaken in response to whistle-blowing.

2. Dodd-Frank Act Whistleblower Anti-Retaliation Right of Action

The Dodd-Frank Act also protects employees who suffer retaliation as a result of their whistleblowing activities. The Act strengthened existing anti-retaliation protections under SOX and created a new federal private right of action for employees who have suffered retaliation as a result of their provision of information to the SEC (and CFTC) in accordance with the whistleblower reward section.

Under section 922 of the Dodd-Frank Act, a plaintiff may pursue a claim directly in federal court against an "employer" for retaliation resulting from an act 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", the Securities Exchange Act of 1934 and "any other law, rule, or regulation subject to the jurisdiction of the [SEC]". (See endnote 39.) Though this private right of action overlaps with SOX's anti-retaliation provision, it is significantly broader in scope because it applies to any "employer", not just to employers that are governed by SOX. Moreover, in contrast to the anti-retaliation provision of SOX, a plaintiff proceeding pursuant to section 922 need not first file a complaint with the Department of Labor before bringing a retaliation action in federal court. (See endnote 40.) Additionally, a claim under section 922 provides a significantly longer statute of limitations, and increased damages. (See endnote 41.)

III. The Best Practice is to Encourage Whistleblowers as Part of a Vibrant and Effective Compliance Programme

Corporations have strong incentives to implement effective compliance programmes and have a proper "information and reporting system", including mechanisms for whistleblower allegations. (See endnote 42.) Reporting within the organisation provides an employer with an opportunity to address possible violations before they become public, protect a corporation's reputation, and resolve issues without significant expenditures required by litigation and government investigation. Additionally, the effective management of internal and external complaints can reduce a corporation's exposure to criminal and civil liability, and serve as an important mitigating factor in sentencing. (See endnote 43.)

A. Compliance Programmes Can Protect Against Criminal Liability and Government Prosecution

1. Non-Prosecution and Deferred-Prosecution Agreements

In the law enforcement arena, the government increasingly has signalled to corporations the importance of internal compliance programmes that support whistleblowers. Corporations that seek to avoid criminal prosecution often enter into non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs). These agreements commonly require companies to implement new compliance programmes or enhance existing compliance programmes to create a culture that is receptive to whistleblowers. (See endnote 44.) The increase in NPAs and DPAs is a byproduct of a shift in DOJ policy towards reforming corrupt corporate cultures rather than indicting, prosecuting and punishing. (See endnote 45.) To that end, some recent examples serve to underscore the importance that the Department of Justice places on encouraging whistleblowers:

- Baker Hughes entered into a DPA for Foreign Corrupt Practices Act violations which required, *inter alia*, that the company enact a code of compliance, inform the employees of it, and create "[a] reporting system, including a 'Helpline' for directors, officers, employees, agents and business partners to report suspected violations of the Compliance Code or suspected criminal conduct". (See endnote 46.)
- Bristol-Myers Squibb entered into a DPA, in connection with securities fraud and activities relating to wholesaler inventory and certain accounting issues, which required remedial measures including, *inter alia*, that the company "provid[e] an effective mechanism in the form of a confidential hotline and e-mail address, of which BMS employees are informed and can notify BMS of any concerns about wholesaler inventory levels or the integrity of the financial disclosure, books and records of BMS". (See endnote 47.)

B. DOJ Prosecution Standards Take Compliance Programmes Into Account

The implementation of effective compliance programmes can be a factor in determining whether the Department of Justice brings criminal charges, or the SEC files an enforcement action, against a corporation for the acts of its directors, employees and agents. The Department of Justice Prosecution Standards specifically require that prosecutors consider, *inter alia*, the existence and adequacy of the corporation's pre-existing compliance programme, including whether the company had a compliance programme that had an adequate reporting system and whether, after the alleged misconduct, the corporation implemented, or took measures to improve, a compliance programme. (See endnote 48.) Although the SEC has not promulgated rules identifying specific factors it will consider in determining whether and how to charge a company that it is investigating, the Commission has explained that in making charging decisions, it considers existing compliance procedures, and efforts the company has undertaken to bolster its compliance procedures after the discovery of misconduct. (See endnote 49.) Thus, a compliance programme that is appropriately responsive to whistleblowers can be an important factor that helps a corporation avoid criminal and SEC liability.

C. The Sentencing Guidelines Allow Courts to Consider a Corporation's Compliance Programmes

If a corporation is ultimately charged with wrongdoing, a compliance programme and whistleblower programme can minimise the corporation's sentence. The Federal Sentencing Guidelines for Organizations create broad incentives for organisations to implement effective compliance and ethics programmes. (See endnote 50.) Under the Guidelines, first promulgated in 1991 and since amended, if an organisation has implemented an effective compliance and ethics programme to

prevent, detect and report violations of the law, it is eligible for a significant reduction in any fine to which it may be subject in connection with a conviction. (See endnote 51.) The Guidelines identify seven steps that the organisation must take in order to qualify for the reduced sentence, one of which is the establishment of "a system for employees and agents to report potential or actual criminal conduct without fear of retaliation". (See endnote 52.)

D. Federal Statutes and Rules Require Whistleblower Programmes

Recently, Congress has mandated that companies engaged in certain businesses enact codes of ethics, compliance programmes and internal policies to address internal whistleblower complaints. For instance, the anti-money laundering provisions of the USA Patriot Act require that financial institutions (defined broadly under the Act to include banks, broker-dealers, casinos, insurance companies and automobile dealers) develop compliance programmes with "internal policies, procedures, and controls" to prevent money laundering. (See endnote 53.)

SOX, the most important and sweeping federal legislation on this front, requires issuers of securities to adopt a code of ethics that is reasonably designed to deter wrongdoing and to promote honest, ethical conduct and compliance with applicable laws, rules and regulations. (See endnote 54.) Additionally, SOX requires that any company that lists its securities on the national securities exchanges and associations have an audit committee with procedures for "the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters", and have procedures for "the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." (See endnote 55.)

Industries outside the financial sector are also affected by rules requiring codes of ethics and compliance programmes. For instance, federal regulations require that all government contractors implement a business ethics awareness and compliance programme, as well as internal control programmes. (See endnote 56.) Additionally, government contractors are required to disclose to the relevant agency's Office of Inspector General whenever they have "credible evidence" of: (1) certain criminal violations; and (2) civil False Claims Act violations. (See endnote 57.) The failure to disclose these violations will constitute grounds for suspension and/or debarment. Thus, government contractors who become aware of a whistleblower's allegations must be vigilant about investigating and reporting the conduct.

IV. Conclusion

U.S. law has increasingly sought to protect and encourage whistleblowers. As a result, corporations must be ever mindful of protections afforded to whistleblowers and the potential liability if the corporation and its executives do not adequately and effectively address whistleblower concerns. It is important for employers to instruct employees properly with respect to compliance and reporting, and create a culture of compliance that solicits employee input and ensures that whistleblowers will not suffer retaliation. This is necessary not only for the effective management of labour relations, but also to preserve shareholder value and prevent criminal and civil liability. If a corporation, its executives and employees are not attuned to these concerns, they run a significant risk of corporate and individual criminal and civil liability.

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Endnotes

1. John T. Boese, *Civil False Claims and Qui Tam Actions* § 1.01[A] (3d ed. 2006, Supp. 2010).
2. Numerous statutes, both new and old, contain whistleblower protection provisions. For example, employees who blow the whistle on fraud related to economic stimulus funds have been given strong protections under Section 1553 of the American Recovery and Reinvestment Act of 2009, commonly referred to as the Stimulus Act. All told, close to twenty federal whistleblower provisions arise under various statutes, including, *inter alia*, protections for employees reporting potential safety and security violations in the transportation sector (i.e. motor vehicles, aviation, railroad), environmental sector (i.e. clean water, clean air, waste disposal), and consumer products sector.
3. 31 U.S.C. § 3730.
4. The original False Claims Act, which was sometimes referred to as the "Lincoln Law" or the "Informer's Act", was enacted in 1863 in response allegations of fraud and the provision of substandard or worthless goods to the Union Army during the American Civil War.
5. Indeed, as recently as last year, Congress passed the Fraud Enforcement and Recovery Act of 2009, which expanded the False Claims Act to include, *inter alia*, fraud through the retention of overpayments made by the government, as well as fraud with respect to funds that are "used on the Government's behalf or to advance a Government program or interest". Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, 123 Stat. 1617, S. 386 § 4 (2009).
6. 31 U.S.C. § 3729; Civil Monetary Penalties Inflation Adjustment, 64 Fed. Reg. 47099 (Aug. 30, 1999), 28 C.F.R. § 85.3(9) (2000).
7. James F. Barger, Jr., *et al.*, *States, Statutes, and Fraud: an Empirical Study of Emerging State False Claims Acts*, 80 Tulane L. Rev. 465, 469, App. A (2005). Moreover, Congress has encouraged states to enact or expand state level false claims laws. Thus, the Federal Deficit Reduction Act of 2005 included several provisions intended to stamp out Medicaid fraud by expanding qui tam litigation at the state level. The Act provided that states enacting liability penalties and qui tam provisions for Medicaid fraud modeled on the federal FCA would receive a 10% reduction in the amount owed by the state to the federal government for the federal portion of any Medicaid recovery. States, of course, could enact broader false claims laws not limited to Medicaid fraud and indeed many did.
8. 31 U.S.C. §3730(b)(2).
9. *Id.* § 3730(d).
10. Carol Gentry, Mike Wells, Associated Press (June 28, 2010), *available at* http://www.msnbc.msn.com/id/37977579/ns/business.
11. http://www.taf.org/FCAstats2009.pdf (as of Sept. 30, 2009).
12. *Id.*
13. *Id.*
14. 31 U.S.C. §3730(h).
15. *Id.*
16. *See, e.g., Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 (9th Cir. 2002) ("specific awareness of the FCA is not required, but the plaintiff must be investigating matters which are calculated, or reasonably could lead, to a viable FCA action") (internal quotation omitted).
17. 548 U.S. 53 (2006).
18. *See, e.g.*, Michael Delikat, Corporate Whistleblowing in the Sarbanes-Oxley Era § 5.4 (1st ed., Supp. 2010).
19. 18 U.S.C. § 1514A(a).

20. Foreign issuers that are exempt from SEC filing requirements pursuant to Rule 12g3-2(b) of the Exchange Act or that have a Level I ADR program (ADRs that are traded between dealers in the over-the-counter market) are not subject to coverage under SOX. Peter M. Panken, SOX *Whistleblower Protections*, American Law Institute – American Bar Association Continuing Legal Education (October 30 – November 1, 2008) (unpublished paper).

21. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 11th Cong. § 929A. See also Sen. Rep. 111-176, at 114 (explaining that amendment to clarify that employees of subsidiaries and affiliates of publicly traded companies were covered under SOX was made to eliminate a defence raised in a substantial number of actions).

22. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 11th Cong. § 922(b). There is lingering debate concerning the application of Section 806 to employees that work abroad. Section 806 does not reflect any intent by Congress that it would apply outside the United States, and it is generally presumed that federal statutes do not apply extraterritorially absent clear language by Congress that the statute should have extraterritorial effect. Thus, federal courts and the Department of Labor have generally been reluctant to apply whistleblower protections to employees working outside the United States. However, where the employment relationship has a substantial nexus with the United States, because the protected conduct occurred within the United States or the retaliatory decision was made in the United States, several decisions have acknowledged that Section 806 could apply to overseas employees. *See Penesso v. LCC International, Inc*, 2005-SOX-16 (ALJ Mar. 4, 2005).

23. 18 U.S.C. § 1514A(a)(1)-(a)(2). An interesting question that has arisen is whether the refusal to participate in potentially illegal work is protected activity that may give rise to a retaliation claim. In analyzing this issue, one federal appellate court has concluded that the mere refusal to work does not constitute "providing information" to a supervisor relating to potential fraud, and thus does not trigger SOX's retaliation protections. *See Getman v. Admin. Rev. Bd.*, No. 07-60509, 265 Fed. Appx. 317, 2008 WL 400232 (5th Cir. Feb. 13, 2008) (unpublished). However, if the employee communicated, with some level of specificity, that his or her refusal to take part in an activity was based on a belief that the activity constituted fraud or some other securities law violation, then the court's decision suggests that the refusal might constitute protected conduct under SOX.

24. 18 U.S.C. § 1514A(a)(1)-(a)(2).

25. *Id.* at § 1514A(b) & (c).

26. *Id.* at § 1514A(b)(1)(B).

27. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 11th Cong. § 922 (c).

28. 18 U.S.C. § 1513(e).

29. *See* 18 U.S.C. § 1513(d) ("There is extraterritorial Federal jurisdiction over an offense under this section").

30. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 11th Cong. § 922 (2010).

31. *Id.* § 922(a)(3).

32. *Id.* § 922(c)(2).

33. *Id.* § 922(a)(5) and (c)(1).

34. *Id.* § 922(f).

35. *Id.* § 923(b)(2).

36. Sen. Rep. No. 111-176, at 110 (2010).

37. *Id.* at 110-111.

38. U.S. Securities and Exchange Commission, Lit. Release No. 21601, *SEC Awards $1 Million for Information Provided in Insider Trading Case (July 23, 2010), available at* http://www.sec.gov/litigation/litreleases/2010/lr21601.htm.

39. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 11th Cong. § 922(a)(h)(1)(A).

40. *Id.* § 922(a)(h)(1)(B)(i).

41. *Id.* § 922(a)(h)(1)(B)(iii) & (C).

42. *See e.g., Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362 (Del. Sup. Ct. 2006); *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. Ct. 1996).

43. Jed S. Rakoff & Jonathan S. Sack, *Federal Corporate Sentencing: Compliance and Mitigation*, § 4.02 (ed. 2007).

44. Peter Spivak and Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 Am. Crim. L. Rev. 159, 159 (Spring 2008) ("The marked increase in [the use of NPAs and DPAs] is arguably the most profound development in corporate white collar criminal practice over the past five years."); *id.* at 184 ("virtually every agreement that was entered into in 2007 required the company to redouble its compliance efforts"). From fiscal years 2004 to 2009, for the DOJ's Criminal Division, the number of DPAs was comparable to the number of corporate prosecutions. Whereas, for the U.S. Attorneys Offices the number of DPAs and NPAs was less than the number of corporate prosecutions. http://www.gao.gov/highlights/d10110high.pdf.

45. *Id.* at 160.

46. A copy of the DPA is available at http://www.law.virginia.edu/pdf/faculty/garrett/bakerhughes.pdf.

47. A copy of the DPA is available at http://www.justice.gov/usao/nj/press/files/pdffiles/deferredpros.pdf.

48. United States Attorneys' Manual, Principles of Federal Prosecution of Business Organizations, § 9-28.800 (2008).

49. 8 SEC Report of Investigation, Exchange Act Release No. 34-44969, 2001 WL 1301408, at n.3 (Oct. 21, 2001).

50. The Guidelines have been extremely effective in prompting companies to implement formal compliance programs (indeed, that was one of their goals), and have served as a model for mandatory compliance programmes (including for government contractors). Since the guidelines were enacted, thousands of corporations have developed formal compliance programmes. According to surveys of these organisations, the Sentencing Guidelines heavily influenced decisions to adopt compliance programmes. A study by the Ethics Officer Association reported that 47 percent of responding corporate ethics officers indicated that the guidelines had "a lot of influence" on the organisation's decision to adopt a compliance programme. *See* John R. Steer, Changing Organizational Behavior—The Federal Sentencing Guidelines Experiment Begins to Bear Fruit (unpublished paper presented at the Twenty-Ninth Annual Conference on Value Inquiry, Tulsa, Oklahoma (Apr. 26, 2001)) (citing Ethics Officer Association, 1997 Member Survey 9 (2000)). Similarly, studies funded by the Sentencing Commission reported that 20% of corporate survey respondents had implemented a compliance programme because of an awareness of the guidelines and another 44% enhanced their existing compliance programmes because of the guidelines. See generally United States Sentencing Commission, Corporate Crime in America: Strengthening the "Good Citizen" Corporation 123-91 (1995).

51. U.S.S.G. § 8C2.5(f) (2009); Jed S. Rakoff & Jonathan S. Sack, *Federal Corporate Sentencing: Compliance and Mitigation* § 4.02[2] (ed. 2007).

52. U.S.S.G. § 8B2.1 (2009).

53. 31 U.S.C. § 5318(h)(1).

54. 15 U.S.C. § 7264; 17 C.F.R. § 229.406(a).

55. 15 U.S.C. § 78j-1(m)(4).

56. Federal Acquisition Regulation § 52.203-13.

57. *Id.* § 52.203-13(b)(3)(i).

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