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The impact of international whistleblowing on global corporate compliance

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This is the first part of a two-part article.

Over the last 33 years, whistleblowers have enjoyed historic success advancing claims under the United States' False Claims Act (FCA). The United States government has recovered more than \$62 billion as a result of both the FCA and the efforts of mostly domestic whistleblowers. Although the great majority of whistleblowers have been US citizens, that trend is changing. The rise of international whistleblower laws and the global notoriety of the FCA have sparked global interest. Specifically, an increase in non-US citizens filing and obtaining recoveries under the FCA is a new but growing phenomenon. Interestingly, these whistleblowers are not taking advantage of their own countries' whistleblower laws, most likely because international whistleblower laws, unlike the FCA, generally do not provide a monetary financial incentive to whistleblowers. Nor do most offer the robust whistleblower protections provided by the FCA. Lastly, experienced attorneys are disincentivized to pursue these claims, as none of these laws provide for the payment of counsel fees or costs on successful claims. These laws purportedly help to minimize government corruption and fraud, but they will fail without financial incentives and strong protections to whistleblowers.

In this first part of a two-part article, we discuss the success of the FCA, the rise of international whistleblowers through a study of the Michael Epp case, and what global companies need to do to prepare. In the concluding part, we review exemplar international whistleblowing laws that have been recently enacted and what we predict will be their impact.

The FCA has set the global standard

The FCA has become the most successful fraud, waste, and abuse statute in the world, with recoveries in excess of \$62 billion, largely due to whistleblowers.^[1] American whistleblowers had a watershed year in 1986. The US Congress amended the FCA to provide for individual whistleblowers (also called relators) to file claims on behalf of the US government and, if successful, receive anywhere from 15% to 30% of any recovery or settlement. These 1986 amendments, which added the "qui tam" provisions, catapulted the FCA from a little-known and rarely used aging anti-fraud statute into the muscular tool that it is today. Since the FCA provides for "treble damages" and civil monetary penalties for each false claim, a whistleblower's award may be quite significant. Whistleblowers have filed the vast majority of all FCA cases. In fiscal year 2018, for example, whistleblowers initiated 84% of new FCA cases, and cases initiated by whistleblowers accounted for 75% of the government's \$2.9 billion in recoveries that year.

At its heart, the FCA has five key elements driving its success:

1. The FCA provides whistleblowers the statutory right to bring a claim in the name of the government and
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receive 15% to 30% of any recovery. This financial incentive has single-handedly made the FCA the most successful anti-fraud statute ever passed by any legislature in the world.

2. The FCA includes a strong anti-retaliation provision to protect whistleblowers who come forward by providing robust remedies such as reinstatement, back pay, and double damages.
3. The FCA provides prevailing whistleblowers the right to have their attorney fees and costs paid by the defendants.
4. There are active government agencies and devoted prosecutorial professionals enforcing the FCA. These government entities have broad powers to investigate and prosecute claims.
5. The FCA allows standing to bring a qui tam action to a broad class of persons with appropriate knowledge, including entities, and does not require a claim to be reported internally first. Importantly, a whistleblower does not have to be an employee of the target company. Whistleblowers often have been customers, vendors, former employees, and, increasingly, competitors. Many also do not realize that whistleblowers do not have to be US citizens, or even residents of the United States, to bring an FCA action.

The rise of the international whistleblower: The Michael Epp case

Let's look more closely into the fact that whistleblowers do not have to be American citizens or residents to file suit under the FCA. In the past several years, more non-US citizens and nonresident Americans are taking advantage of the FCA. The relators' qui tam bar has started to focus its efforts on these international whistleblowers. The defense bar and industry also are honing in on this trend to facilitate strong compliance efforts across companies' global operations.

The case of Michael Epps exemplifies this new paradigm. Epp, a German employee of an American food company (Supreme Foodservice) based in Dubai, filed his claim under the qui tam provisions of the FCA in the United States District Court for the Eastern District of Pennsylvania. (The Pietragallo law firm co-represented Epp in his case.) Epp alleged that Supreme violated the FCA by knowingly overcharging for food and water provided to the US military in Afghanistan. Supreme settled the FCA claims for \$101 million, with \$16 million awarded to Epp. His qui tam claim also prompted a criminal and administrative investigation by the U.S. Department of Justice (DOJ) into alleged violations of the Foreign Corrupt Practices Act (FCPA) as well as other fraud statutes.

These additional investigations led to a corporate guilty plea and criminal penalties of \$288 million, in addition to the \$101 million paid to settle the FCA claims. Thus, a German citizen living in Dubai exposed a scheme that resulted in \$389 million in civil and criminal penalties under the FCA, and other anti-fraud and anti-corruption statutes. Notably, under the German whistleblower laws, discussed later in this article, Epp would have recovered nothing.

Other examples of non-US whistleblowers include a 2013 whistleblower at an Indian pharmaceutical company, Ranbaxy, who received \$48.6 million for providing information under the FCA regarding the company's alleged misrepresentations relating to the safety and efficacy of its drugs.^[2] In 2016, a Hong Kong-based former employee of Winds Enterprises Ltd. helped the government uncover an alleged scheme involving the evasion of import duties on Chinese and Madagascar sportswear. For his efforts, the whistleblower received \$300,000.^[3]

American-controlled companies have vast global operations

More foreign citizens, expatriate Americans, American citizens with dual citizenship, and foreign-based whistleblowers will bring more, not fewer, claims under the FCA. Foreign whistleblowers are studying their

homegrown laws, which we will review in more detail in the next part of this article, but we predict that few will use them unless or until they are substantially amended.

The stage is set for the next wave of FCA developments, which will include more international whistleblowers. As businesses become increasingly global and barriers to trade lessen, US companies will base more of their workforces abroad. Both employees and data move from country to country at a breakneck pace.

International whistleblowers are studying and now availing themselves of US laws—and the rewards that follow from successful cases. It is a win for both the American taxpayer and the whistleblower. Non-US citizens from more than 83 countries have applied for rewards under various US laws in addition to the FCA, earning millions in whistleblower awards.^[4] For example, after the inception of its whistleblower program in 2011, the Securities and Exchange Commission (SEC) has received tips from individuals in 119 countries outside the United States. In fiscal year 2018 alone, whistleblower submissions came from individuals in 72 foreign countries.^[5] Recently, an international whistleblower received a \$500,000 SEC award.^[6] Not all awards are this modest. In 2014, an overseas whistleblower collected \$30 million, which at the time was the largest-ever award under the SEC's whistleblower program.^[7]

What should US companies with global operations do?

Although we predict that US companies will see more international whistleblowers bring FCA cases, this will not happen overnight. In many countries around the world, whistleblowing is antithetical to the existing corporate societal and legal culture. Even though an international whistleblower would enjoy the financial rewards and protections the FCA offers, these incentives may still not be enough to overcome the cultural stigma of whistleblowing that is present in many countries. It will take time for cultures to shift, but a shift is in the wind.

Companies, therefore, have limited time to develop a plan to manage increased whistleblower risk. The best offense is a good defense, and compliance is, and will always be, the first line of defense. Although US companies have focused on educating their international workforces about the FCPA and securities and tax laws, they need to increase their focus on international whistleblowers.

Compliance efforts should be highly proactive and much more nuanced to new trends. Corporations should not wait for a billion-dollar settlement before they act. It is imperative to add the broad international reach of the FCA to the current compliance regime. As we saw with Michael Epp, whistleblowers can be both foreign citizens and foreign-based. They can bring a claim under one statute that leads to a host of other criminal and civil proceedings with the risk of significant fines, penalties, and, at times, more adverse results.

A strong compliance program can mitigate potential civil, criminal, and administrative liability. In addition to government actions, shareholder actions often follow governmental and/or qui tam actions. The DOJ and SEC have issued guidance to assist companies to understand effective compliance programs. The DOJ and the SEC jointly issued their Resource Guide to the U.S. Foreign Corrupt Practices Act in November 2012,^[8] and the DOJ more recently issued guidance in February 2017, titled Evaluation of Corporate Compliance Programs.^[9]

The guidance outlines three fundamental questions that the Justice Manual directs prosecutors to ask when evaluating a company's compliance program:

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith?" In other words, is the program being implemented effectively?

3. “Does the corporation’s compliance program work” in practice?^[10]

Questions 2 and 3 ask whether there are adequate means through which internal whistleblowers can report their concerns, and whether the company has a meaningful process for thoroughly investigating both foreign and domestic complaints. The best-designed compliance program in the world is mere lip service absent effective reporting and investigation procedures. The more employees feel empowered to raise their good-faith concerns internally, the more an entity can minimize its risk that the employees raise their concerns outside the company.

A whistleblower is often a current or former company employee who believes their concerns were not appropriately addressed or remedied. Returning to our earlier case study, Michael Epp raised his concerns to his supervisors, but they were dismissed. Worse, shortly after he raised his concerns, Epp was terminated by the very people to whom he voiced his concerns.^[11]

So where should companies start? For one, conduct a different type of global risk assessment than has been done in the past. Understand where your pressure points are and where to focus key compliance resources. Corporate clients are advised to assess things such as their routes to market, foreign government touchpoints, and travel and expense spend, because these are all high-risk areas from an FCPA perspective. Corporate compliance departments must evaluate international FCA risk in their regular ongoing risk assessments. Companies should have a firm understanding of which of their divisions sell to the US government and what kinds of controls are already in place. To know your risk is the first step in mitigating it.

To minimize whistleblower risk, companies should review their reporting and investigation mechanisms. Do you have a speak-up culture, or do employees perceive that the company will either ignore or punish internal whistleblowers? Is there an internal hotline or other anonymous way for employees to report concerns? Is it used? Are interpreters on hand to review hotline calls that may come in from a variety of countries with their own cultural mores? These are all questions prosecutors will ask.

When employees do speak up with good-faith concerns, praise—do not condemn—them. Make sure employees, particularly high-level leaders, understand that when they raise a concern, they are protecting the company. DOJ prosecutors care very much about tone at the top. Creating a culture where employees feel supported to report their concerns is an important part of setting the right tone.

When concerns are raised, the company must thoroughly vet, document, and investigate these issues. After an investigation has been conducted, it is paramount to circle back with the internal whistleblower. If the concern was not substantiated, the whistleblower should know that, but also understand that the company took their concerns seriously and appreciated the whistleblower for speaking up. Hell hath no fury like a whistleblower scorned. No longer can a hotline call in Denmark be of no concern to a compliance officer in Detroit.

Conclusion

There is little debate that the FCA has become the most successful fraud, waste, and abuse statute in the world, and international whistleblowers have taken notice. With this rise of international whistleblowers using the FCA, it is imperative for corporations to have in place robust compliance programs and processes across the globe.

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Part 2 will be published in the January issue of CEP magazine.

Takeaways

- The US False Claims Act is the most successful fraud, waste, and abuse statute in the world, largely due to whistleblowers and their counsel.
- The False Claims Act does not limit whistleblowing to US citizens.
- More international whistleblowers are using the False Claims Act to bring claims against US companies.
- US companies can mitigate potential False Claims Act liability by implementing strong compliance programs that establish robust reporting channels for alleged misconduct.
- Today's internal whistleblower can become tomorrow's False Claims Act relator; companies must thoroughly investigate and address issues raised via internal reporting channels.

1 Department of Justice, "Justice Department Recovers Over \$2.8 Billion from False Claims Act Cases in Fiscal Year 2018," press release, December, 21, 2018, <http://bit.ly/2nPg9hn>.

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4 National Whistleblower Center, Whistleblower Reward Programs: An International Framework For The Detection of Corruption and Fraud, accessed September 30, 2019, <http://bit.ly/2oEgX9h>.

5 SEC, 2018 Annual Report to Congress: Whistleblower Program, 2018, <http://bit.ly/2nTIGlV>.

6 SEC, "Whistleblower Award Proceeding," Release No. 86431, July 23, 2019, <http://bit.ly/2mjem3F>.

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8 DOJ and SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act (Revised June 2015), <http://bit.ly/2lWSXg9>.

9 U.S. Dep't of Justice, Criminal Div., Evaluation of Corporate Compliance Programs (Updated April 2019), <http://bit.ly/2Z2Dp8R>.

10 U.S. Dep't of Justice, Justice Manual (2018), <http://bit.ly/2GtxXFt>.

11 United States of America ex rel. Michael Epp v. Supreme Foodservice AG, No. 10-CV-1134 (E.D. Pa. 2014), <http://bit.ly/2nTMR15>.

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