CEP Magazine - January 2020
International whistleblowing legislation and America's False Claims Act

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

In the first of this two-part series, we discussed the success of the United States' federal False Claims Act (FCA),[1] the rise of international whistleblowers through a study of the Michael Epp case,[2] and what global companies need to do to prepare. In this follow-up, we review exemplary international whistleblowing laws that have been recently enacted and what they mean for global corporate compliance. Our review is not exhaustive but reflects a fair cross section of non-American whistleblowing laws.

Why aren't international whistleblower laws modeled on the FCA?

Over the last several years, a number of foreign countries have passed whistleblower laws. Implemented purportedly to bolster anti-corruption efforts around the globe, these international whistleblower laws, when compared to the FCA, lack the hallmark elements of a strong and effective whistleblower program.

First, most of these international laws provide no financial incentive to whistleblowers. Of the handful of countries that do provide a monetary award, many cap recoveries at levels that may be deemed inconsistent with the risk taken by whistleblowers. Second, although most laws provide some confidentiality and anti-retaliation protections to whistleblowers, a number require whistleblowers to report in "good faith," "without malice or negligence," and based on a "reasonable suspicion" of misconduct, which are fairly subjective standards. Some actually expose whistleblowers to liability if their reports are deemed untrue or not in the public interest. Although the defense bar and industry welcome these prefiling requirements, these limitations do little to promote whistleblowing outside the United States. Third, very few offer whistleblowers financial compensation for retaliatory actions taken against them. We could only find one, the European Union (EU) Whistleblower Directive, that provides for payment of whistleblowers' attorney fees and costs in litigating retaliation claims. Fourth, unlike the FCA, these laws often lack a clear and distinct regulatory authority or prosecutorial agency in charge of enforcing specific whistleblower laws.

By comparing a broad cross section of these international whistleblower statutes to the FCA, a clear pattern emerges. These laws lack the teeth and scope of the FCA.

Whistleblowing English style

The United Kingdom (UK) was one of the earliest countries to enact whistleblower protection, defined in the Public Interest Disclosure Act of 1998.[3] This act includes both confidentiality and anti-retaliation provisions and provides for financial compensation for retaliatory actions. Notably, there is no cap on the amount of retaliation award. But, unlike the FCA, the Public Interest Disclosure Act does not provide any financial incentives

solely for whistleblowing. Whistleblowers must demonstrate that they reasonably believe that their disclosures were made in the public interest to receive anti-retaliation protection. The lack of a monetary incentive and the requirement that a whistleblower reasonably believes that disclosure is in the public interest have led to a lack of any meaningful impact.

Whistleblowing Italian style

Italy first enacted protections for whistleblowers in the public sector in 2012. But it was not until 2017 that Italy extended these protections to whistleblowers in the private sector, the first set of whistleblower private-sector protections ever passed in Italian legislative history. Under the Italian whistleblower laws, entities are prohibited from discriminating or retaliating against whistleblowers, and can be sanctioned if they do. Whistleblowers' confidentiality is also protected. Despite this recent revitalization, these laws fail to offer any financial incentives for whistleblowing. In addition, whistleblower protection does not attach to reports that are slanderous, defamatory, or maliciously or negligently unfounded. To date, Italy has not fully embraced the concept of private attorneys general vetting out fraud for profit.

Whistleblowing Irish style

In July 2014, Ireland's Protected Disclosures Act (PDA)[4] came into effect. The PDA established whistleblower protections for both public- and private-sector employees for the first time in Irish history. The PDA provides whistleblowers with both confidentiality and anti-retaliation protections, including immunity for making a report. It also provides whistleblowers with a private right of action and compensation for retaliation. There is no monetary award for blowing the whistle, and any disclosure must first be made to the whistleblower's employer with a reasonable belief that the disclosure is in the public interest. Ironically, Ireland is home to many of the largest American-controlled companies in the world. Although the PDA includes a private right of action for retaliation, without any financial incentive, it is unlikely that whistleblowers in Ireland will pursue the PDA.

Whistleblowing French style

In 2016, the French Parliament enacted Sapin II: the law on transparency, the fight against corruption, and the modernization of French economic life. For the first time in French history, this law afforded protection to whistleblowers. In fact, the concept is so new that the Council of Europe issued a 2014 pamphlet explaining what whistleblowing is.[5] Unlike the FCA, however, Sapin II offers no financial reward to whistleblowers and actually prohibits any monetary award. Sapin II also defines a "whistleblower" to be one who reveals or reports in a "selfless manner" and in "good faith."

Although whistleblowers in France do not receive any monetary award, Sapin II does offer protections to whistleblowers, including confidentiality, protection from retaliation, and a promise of no punishment for reporting a violating company. A whistleblower, however, must report the violation to their employer first as a condition of moving forward, a concept eschewed long ago in the FCA. Although Sapin II signifies the French government's intent to eliminate corruption, and it seems to be evolving legislation, the lack of any financial incentives and the requirement that a whistleblower report in a selfless manner and in good faith are unlikely to motivate French whistleblowers.

Whistleblowing Dutch style

In 2016, the Dutch Whistleblowing Act became law. It requires all employers with 50 or more employees to implement internal reporting procedures and bans retaliation against employees who report fraud. The act also created the House for Whistleblowers to perform both advisory and investigative functions. Again, although

whistleblowers in the Netherlands receive identity and retaliation protections, the Dutch act offers no monetary award. Additionally, whistleblowers must both have a reasonable suspicion of wrongdoing and first report wrongdoing internally to their employers in order to be protected.

Whistleblowing German style

In 2016, Germany amended the German Act of Financial Services Supervision. For the first time in the country's history, it created whistleblower protections for employees of all companies. Prior to 2016, whistleblowers in Germany faced civil and criminal liability under German labor laws for reporting alleged wrongdoing. Whistleblowers in Germany are now entitled to confidentiality protections, along with anti-retaliation protections. However, this protection attaches only so long as the whistleblowers do not intentionally or negligently submit an untrue disclosure. Finally, there is no monetary award in German law. Accordingly, Michael Epp, who received $16 million under the FCA, would have received nothing under German law, had he chosen that alternative. Although Germany has progressed from the days of criminal and civil liability for blowing the whistle, it still has a long way to go to spur German whistleblowers to come forward.

Whistleblowing Canadian style

The Canadian provinces have taken varying and innovative approaches to whistleblower laws. In 2016, the Ontario Securities Commission (OSC) adopted a whistleblower program that included financial rewards for whistleblowers for the first time in Canadian history. Ontario's program is one of the very few that offers a financial incentive to whistleblowers. By including this financial incentive provision, the OSC confirmed that the key to a successful whistleblower program is financial award, as in the American system.

The amount of a whistleblower award is discretionary. It ranges from 5% to 15% of the total judgment, but it is capped at $5 million. Opponents of this cap believe it may prevent high-level executives from blowing the whistle. Multiple factors determine a whistleblower's award, including the timeliness and importance of the report, the whistleblower's cooperation, and any involvement by the whistleblower in the reported misconduct. Whistleblowers only receive a reward if their report results in an enforcement action of more than $1 million. Three recent awards totaling $7.5 million were the first of their kind by a Canadian securities regulator and have garnered a fair amount of attention; however, little information about the cases or the whistleblowers has been revealed.

As with the FCA and almost all the international whistleblower laws, the Ontario law protects whistleblowers against retaliation and offers some measure of confidentiality. Whistleblowers may also file a civil suit against their employer for retaliation, and remedies may include reinstatement and double damages, similar to the FCA. And, as in the FCA, a Canadian whistleblower can be someone other than a company employee, such as a supplier, contractor, or client. Since the Ontario law's enactment, more than 200 tips have been received by the OSC, making it one of the more currently successful international whistleblower programs. The OSC has made it easy for interested whistleblowers to submit information, via an online web form.[6]

Although the provinces of Quebec and Alberta also recently implemented whistleblower programs, neither offers any financial incentives. There are other interesting differences as well. Of note, under the Alberta Securities Act,[7] a whistleblower is defined as an "employee." Although this term is widely interpreted to include contractors and affiliates, it does not sweep as wide as the FCA or Ontario law. Quebec's law recently came under fire for not providing anti-retaliatory protections after a government employee whistleblower was fired after blowing the whistle.[8] In sum, these other Canadian provinces should model themselves after Ontario if they want to truly encourage whistleblowers.

Whistleblowing within the European Union

In April, the European Parliament overwhelmingly approved (591 for, 29 against, 33 abstentions) the EU Whistleblower Directive (Directive), which provides universal whistleblower protections for all potential reporting persons located within EU member states. Interestingly, these protections apply whether or not the reporting person is a citizen of an EU member state. Any EU member state without a whistleblower law (18 of the 28) has two years within which to enact one. This will be an interesting process to watch unfold.

The Directive does not include any financial incentive to whistleblowers. Thus, its potential impact is questionable. Without a comprehensive system of whistleblower protections, many alleged violations may go unreported. Although the Directive requires that whistleblowers reasonably suspect that misconduct occurred, it protects whistleblowers from civil and criminal liability if they had reasonable grounds to believe the disclosures were necessary. The Directive also provides compensation for retaliation, such as reinstatement, lost wages, and damages, including attorney fees.

The Directive has motivated at least one EU country to progress in enacting whistleblower laws. In June, a proposed bill was submitted to the Spanish Parliament that would make Spain the first EU country to apply the Directive. Previously, Spain did not have any specific whistleblower legislation. Of note, the legislation was proposed by Spanish anti-corruption activist group Xnet,[9] not by the legislature itself. In the coming years, it will be interesting to see who drives EU countries to enact whistleblower laws—activist groups, such as Xnet, or the country's legislators.

In addition to parts of Canada, only a small handful of countries follow the FCA in providing financial incentives for whistleblowers to come forward. For example, in South Korea, the Act on the Protection of Public Interest Whistleblowers became effective in 2011, offering whistleblowers confidentiality and an award of 4% to 20% of recovered funds, up to $2 million.[10] The Ghanaian Whistleblower Act includes a bounty of 10% of the recovered amount or an amount determined by the attorney general, in consultation with the inspector general of police. It also gives whistleblowers the right to apply for police protection if they reasonably believe that they, their families, or their properties are endangered.[11] Slovakia's newly established Office for the Protection of Whistleblowers, which began operating in March, provides protection to whistleblowers—along with a reward for those reporting on unlawful activities.[12]

Strong anti-bribery laws but weak whistleblower laws

Interestingly, Europeans have demonstrated a clear appetite for passing strong anti-corruption and anti-bribery statutes, such as the U.K. Bribery Act.[13] Violations of the U.K. Bribery Act result in a maximum of 10 years' imprisonment, along with an unlimited fine and the potential for property confiscation. The act has been characterized as one of the toughest anti-corruption statutes in the world, given its strong penalties and broad extraterritorial reach. Many other EU member states have enacted anti-bribery laws with steep fines.

For example, in the Netherlands, active bribery is an offense pursuant to sections 177 and 178 of the Dutch Criminal Code (the DCC),[14] and passive bribery is an offense pursuant to DCC Sections 363 and 364. Offering or receiving a bribe carries a maximum sentence of six years or a maximum fine of EUR 82,000. Judicial bribery carries a maximum sentence of nine years, or even 12 years if the bribery occurs in criminal proceedings, and a maximum fine of EUR 82,000. Both individuals and entities can be held criminally liable with maximum fines of up to 10% of a company's annual turnover. Austria's Criminal Code Amendment Act makes public sector bribery ("Bestechlichkeit") punishable by imprisonment for terms varying with the amount of advantage obtained (e.g., if the advantage is greater than EUR 50,000, up to 10 years' imprisonment). For offering a commercial bribe,

corporate entity violations are punishable by fines of 15% to 20% of annual revenue.

France's newly invigorated Sapin II, which focuses on how to prevent bribery and corruption, recognizes the importance of whistleblowers in rooting out fraud. The French authorities have been very vocal in promoting these efforts. Under Sapin II, larger public and private sector entities must adopt an internal whistleblowing system that ensures alerts are documented and addressed. And companies failing to implement measures to prevent and detect corruption can be fined up to EUR 1,000,000 for the breach—even if misconduct has not actually occurred. Directors can be fined up to EUR 200,000.

In Germany, penalties include five years' imprisonment (10 years' imprisonment in severe cases involving a member/official of a public body), a criminal fine, and disgorgement. Thus, European legislatures understand that in order to effectively deter companies and individuals from engaging in bribery and corruption, the law must have teeth.

For example, in 2012 the Government of Kazakhstan adopted "Rules on rewarding those who disclose facts of corruption offences or otherwise assist in the fight against corruption." Under the rules, individuals who report corruption can receive remuneration from the government if the reported facts are confirmed and a court sentences the target of the report.[15] But when it comes to whistleblower statutes, the laws are mostly ineffective. Philosophically, many countries have not embraced the concept or benefits of private whistleblowers. With the number of international whistleblower laws growing, however, only time will tell if they will measure up to the FCA without identified financial incentives and stringent whistleblower protections.

Conclusion

The 1986 amendments to the American FCA revealed the untapped potential of whistleblowers to uncover fraud, waste, and abuse and to be the engine leading the billions of dollars in recoveries. We believe the confluence of increasingly global business, coupled with worldwide laws that normalize whistleblowing without financially incentivizing it locally, has set the stage for the next big wave of FCA development: a rise in international whistleblowers.

To avoid being caught in the growing riptide, US companies with worldwide operations must take compliance seriously and manage their FCA risk globally. As more international whistleblowers come forward, a legitimate global compliance program must have effective procedures for employees and others to report concerns and provide protections against retaliation.

Acknowledgments

The authors acknowledge and express their thanks to Erica Jaffe, Esq., for her contributions to this article. Jaffe is an associate in Morgan Lewis's litigation practice in Philadelphia. They also thank Pamela Coyle Brecht, Esq., chair of Pietragallo's Qui Tam/False Claims Act National Practice Group, for her insight, scholarship, and assistance with this article.

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Takeaways

- Many foreign countries have passed whistleblower laws in the last few years.
- Unlike the False Claims Act, most of these international whistleblower laws lack financial incentives and anti-retaliation protections to encourage whistleblowing.
- These international whistleblower laws lack the punch of international anti-corruption laws.
- Global business and worldwide laws that normalize whistleblowing without financially incentivizing it locally have set the stage for a rise in international whistleblowers.
- Companies with robust compliance programs and processes will be the best prepared to address the rise in international whistleblowers.

1 31 U.S.C. §§ 3729-3733.
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4 Protected Disclosures Act 2014, no. 14 (Ir.), .
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