International Handbook on Whistleblowing Research

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requests to be made to the Anti-Corruption and Civil Rights Commission to prohibit 'disadvantageous measures' being taken at various stages, expressly mentions the process of collecting evidence.

53. This is provided, for example, in Public Interest Disclosure Act 1994 (ACT), s. 27, Whistleblower Protection Act 2010 (Malaysia), s. 19 and Public Interest Disclosure Act 2008 (NT), s. 18. Article 16 of the Act on the Protection of Public Interest Whistleblowers 2011 (Korea) goes further by providing for 'preferential consideration in personnel affairs'. Significantly, Whistleblower Act 2006 (Ghana), s. 17 and Whistleblower Protection Act 2010 (Uganda), s. 11 provide for state protection where the life or property of a whistleblower or their families are believed to be in danger. Article 13 of the Act on the Protection of Public Interest Whistleblowers 2011 (Korea) also provides for 'personal protection measures'.

54. Associative discrimination is also included in anti-discrimination statutes. For examples of legislative protection for third parties see Whistleblower Protection Act 2010 (Malaysia), s. 7, Whistleblower Protection Act 1993 (South Australia), s. 9(1) and Protected Disclosures Act 2000 (New Zealand), s. 19A. The last specifically covers people who 'volunteer supporting information'. Protecting people who are mistakenly perceived as whistleblowers would be consistent with the approach taken in anti-discrimination laws, for example, the Equality Act 2010 (UK).

55. Whistleblower Act 2006 (Ghana), s. 16 deals specifically with legal aid for whistleblowers and Act on the Protection of Public Interest Whistleblowers 2011 (Korea), art. 22 enables the Anti-Corruption and Civil Rights Commission to pay 'relief money' to cover a range of matters, including litigation expenses.

56. Whistleblower Act 2006 (Ghana), s. 20 created a Whistleblower Reward Fund and Act on the Protection of Public Interest Whistleblowers 2011 (Korea), art. 26 provides for resolutions to be made by a Reward Deliberation Board. Whistleblower Protection Act 2010 (Malaysia), s. 26 allows the enforcement agency to reward whistleblowers for disclosing improper conduct or reporting reprisals.

57. PDA 2000 (NZ), s. 6B requires an Ombudsman to provide information and guidance on a range of matters relating to how the legislation works. More specifically, where an allegation of unlawful reprisal is made to an authority in the Australian Capital Territory, it must supply the complainant with information about the protection and remedies available under the legislation. In South Africa, the relevant minister must issue 'practical guidelines which explain the provisions of this Act and all procedures which are available in terms of any law to employees who wish to report or otherwise remedy an impropriety'. All organs of state must give every employee a copy of these guidelines or must take 'reasonable steps to bring the relevant notice to the attention of every employee'.

58. The findings of a Whistleblowing Commission inquiry into the operation of UK whistleblowing legislation were published at the end of 2013. This Commission was established by the charity Public Concern at Work.

16. Because they have evidence: Globalizing financial incentives for corporate fraud whistleblowers

Tom Faunce, Kim Crow, Tony Nikolic and Frederick M. Morgan, Jr[*]

INTRODUCTION: THE NEED FOR AN EFFECTIVE GLOBAL ANTI-CORPORATE FRAUD SYSTEM

The power and size of supranational corporations in the global economy has increased their ability to strategically formulate, undertake and hide lucrative organizational corruption, bribery and fraud on the public purse (Faunce 2006). This chapter reviews the published state of research on financial incentives to individuals who have inside knowledge of corporate fraud and who come forward to regulators. Internal informants represent one of the most significant sources of evidence of corporate fraud. For this reason, this chapter will explore research on the nature and effectiveness of the financial incentives system for whistleblowers under the US False Claims Act, 31 USC (FCA), and examine whether it could provide a good governance model for more widespread international use.

More specifically, this chapter first presents an overview of the FCA and analyzes how its basic mechanisms have been implemented at the federal and state levels in the United States. It then compares those features of the FCA to jurisdictions outside the Unites States which similarly provide material incentives, assistance or compensation for informants (whether institutionally internal 'whistleblowers' or external 'bell-ringers', see Miceli, Dreyfus and Near, Chapter 3) about fraud on the public purse. It will highlight which features of the FCA system have emerged from the preceding analysis as crucial elements of that system's effectiveness. Finally, the chapter will explore international trade and investment agreements as mechanisms for globalizing an anti-fraud model drawing upon the essential features of the FCA.

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OVERVIEW OF THE US FCA

The US FCA can be viewed as a relatively contemporary manifestation of an ancient common law concept. This collection of rules allowed individuals who had information relevant to crimes to initiate a suit on behalf on the King and, if successful, be financially rewarded by the state under a doctrine described by the Latin maxim *qui lam pro domino rege quam pro se ipso,* usually abbreviated to the words *qui tarn* (Baird 1994). For example, English records from 695 AD show that King Whitred of Kent declared that rewards would be provided for persons who informed the King of people working during the Sabbath (Doyle 2009: 2). By the fourteenth century the English common law allowed such a citizen prosecutor of fraud on the public purse to receive 50 per cent of the recovery (Pitzer 1972).

This English common law concept of private enforcement of public rights was enshrined in ten of the 14 statutes passed by the first US Congress (*Stillwell v Hughes Helicopters,* 1989).[1] The concept was codified in the FCA in 1863, being enacted in response to Civil War suppliers who fraudulently sold substandard ammunitions, pack animals and other items to Union army purchasers (Haron *el al.* 2009). The FCA was substantially overhauled in 1986 and further amended in 2009 with bipartisan political support.

In 2009 Congress passed (and President Obama signed) the Fraud Enforcement and Recovery Act 2009 (FERA) to rectify interpretative ambiguities in the FCA that had allowed subcontractors and non-governmental entities to escape responsibility for proven frauds. The amendments focused on increasing whistleblower protections and government accountability, as well as expanding the breadth of the conduct covered by the Act. Today, the scope of the FCA extends to a wide range of prohibited conduct. In the words of the US Supreme Court, 'the [FCA] was intended to reach all types of fraud, without any qualification, that might result in financial loss to the Government'.[2]

Justifications for the FCA with *qui tarn* enforcement procedures are generally based upon three principles: (1) the need to provide realistic incentives to informants (called 'relators') and their legal representatives for disclosure of fraudulent conduct; (2) the unwillingness of the Department of Justice (DOJ) to pursue and aggressively prosecute fraud cases; and (3) the limited enforcement resources available to the DOJ (Kovacic 1996, cited in Beck 2000: 563). While Congress recognized that the government did have capacity to detect fraud, it also recognized that it lacked the required level of intelligence offered by insiders in finding

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and punishing wrongdoers (Beck 20(H): 563). The mission for the FCA and its *qui tam* provisions explicitly is to reward relators who bring fraudulent schemes to the attention of the government. Uncovering such activities is crucial to the public profile of the FCA and its deterrent effect (House of Representatives (US) 2009).

Applications of the FCA have been very broad. Defense contracting and the energy sector have been major areas of FCA litigation (Urbas *et al.* 2012: 113). It is estimated that in the United States as much as 10 per cent of general public health expenditure could be the result of fraud or anti-competitive behavior, in spite of regulatory measures in place (FBI 2007). In the health services and pharmaceuticals sectors, the FCA has been applied to the marketing of drug products for uses unapproved by government regulators, often accompanied by kickbacks to doctors to encourage such prescriptions (Harris 2009); knowingly or recklessly distributing adulterated or otherwise unsafe drug products (Wilson 2011); submitting inflated claims to government agencies for reimbursement (Voreacos 2012) and basing such claims on clinical trial research fraud (FDA 2002);[3] data suppression (Breggin 2006: 255) and selective publication of clinical trial outcomes (Turner *et al.* 2008: 252); international bribery (LaCroix 2011); scientific misconduct (Tavare 2012: 377); bias in drug trials (Rising *et al.* 2008: 1567); ghost-written literature in prominent journals promoting false benefits and risks (Healy and Cattell 2003: 22-7); as well as influencing prescribing practices (Healy 2006: 138).

Since the FCA's • inception in the 1860s, relators (in the form of intra-organizational 'whistleblowers' and extra-organizational 'bell-ringers') encouraged by such mechanisms, have become its most versatile and valuable tool in uncovering fraudulent conduct by the private sector against the public purse. The Senate Judiciary Committee described the FCA as: '[OJne of the most successful tools for combating waste and abuse in Government spending' and 'an extraordinary civil enforcement tool used to recover funds lost to fraud and abuse'.[4]

The basic mechanism utilized by the FCA (and its variations in related US federal and state statutes) is relatively simple. A relator with information on fraud against the government first convinces a large 'no-win no-fee' legal firm to represent him or her in the case (a law firm is not required, but an experienced lawyer can greatly assist a lay person with the process). That firm then draws upon its expertise in appropriately packaging the case for the relevant federal or state law enforcement officials. If those officials agree to proceed (or, if they don't, the informant and his legal team in most US jurisdictions can continue nonetheless), a *qui tam* action is filed under seal, and a 'disclosure statement' containing all the relevant and material facts is presented to

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the DOJ or the local state US attorney. The defendant does not learn about a pending *qui tam* action until the seal is lifted, at which time the complaint is provided to the defendant.[5] Following an investigation, if the government decides to intervene or join the case, it takes over the running of it. The individual who initially made the disclosure remains as relator to the proceedings. These provisions provide one the most important protective mechanisms for FCA informants.

One important aspect of the FCA model is that an action can be brought by anyone who has knowledge of fraud (as mentioned, whether a 'whistleblower' in the sense of an organizational member or a 'bell-ringer', that is, an extra-organizational informant), provided that it is not based on already publicly disclosed allegations or transactions in a criminal, civil or administrative hearing; in a congressional, administrative or Government Accountability Office report, hearing, audit or investigation; or from the news media.[6] These limitations are designed to avoid 'parasitic claims' by individuals who have made no material contribution to uncovering the fraud or providing the factual basis of the case.

In return for their efforts over what is usually many years, FCA relators (and their attorney working on a no-win no-fee basis) receive a share of the recovery ranging from 15 to 30 per cent (but averaging at the low end of that scale), as well as protection from retaliation. More specifically, when a *qui tam* action is successfully prosecuted, the relator is allowed a 15-25 per cent share of the (potentially) triple damages the government recovers if it intervenes through the DOJ; and between 25-30 per cent where the government does not.[7] A relator who is criminally convicted in connection with the fraud receives zero, and similarly, one who is found by the court to be a fraud 'planner and initiator' (rather than a 'perpetrator') may receive zero, though this is left to the court's discretion.[8] Related financial incentive systems exist in several federal and state programs in the United States.[9] As mentioned, a substantial proportion of a FCA relator's recovery goes to taxes and to his or her legal team; in the latter case, the large potential amounts encourage the largest law firms to sustain cases without income through many years of proceedings.

FCA actions often result in parallel criminal actions. For example, in the fiscal year 2011, 21 such criminal convictions were recorded, resulting in '$1.3 billion in criminal fines, forfeitures, restitution and disgorgement under the Food, Drug and Cosmetic Act (FDCA)' (DOJ 2012b). These criminal proceedings ensued due to a failure to comply with regulations under the FDCA which stipulate that all drugs must be approved by the Food and Drug Administration to ensure safety and efficacy for the public.[10]

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Modes of financial incentives and compensation for informants vary under state versions of the FCA covering fraud on state governments. Under the Illinois False Claims Act, for example, funds recovered as a result of violations are managed by the state treasurer." Section 175/8(a) creates a whistleblower and reward protection fund where all proceeds as a result of actions brought under this provision are deposited. Excluded from this are attorney's fees, expenses and costs recovered from a defendant who violates section 4 of the Act, which will not be considered part of the proceeds (section 175/8(a)). Section 175/8(b) expressly provides powers for the Illinois Attorney General to receive one-sixth of the recovered funds, with another one-sixth paid to state law enforcement authorities such as the police as a contribution to policing purposes. The remaining two-thirds are disbursed to *qui tam* plaintiffs and as otherwise specified under the Act (section 175/8(b)). Any remaining sums are deposited in the General Revenue Fund for Illinois (section 175/8(b)).

GLOBAL FRAUD INFORMANT INCENTIVES PROGRAMS

Many jurisdictions provide legislation designed to protect whistleblowers from retaliation (see Faslerling, Chapter 14 and Lewis, Devine and Harpur, Chapter 15). Occasionally such 'protections' coincide with the establishment of government funds to financially compensate them (Bowden 2005: 3). Yet, there has been a slow uptake of financial incentive programs for corporate 'whistleblowers' and 'bell-ringers' (Lobel 2009: 440; Cohn 2001: 469). These fraud informant financial incentive programs, to the extent that they exist in illustrative national laws in differing global regions, will now be briefly examined so as to establish a basis for comparison with the US FCA.[12]

United Kingdom, Australia and Canada

The United Kingdom, Australia and Canada share a common legal tradition that has recently begun to give greater recognition to the place of *qui tam* actions in fighting fraud on the public purse.

The United Kingdom's Employment Rights Act (ERA) 1996, as amended in 1998 by the Public Interest Disclosure Act (PIDA), provides that workers who can demonstrate that they have been penalized for making a protected disclosure under the ERA 1996 can pursue a cause of action for compensation.[13]

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The ERA 1996 (as amended), section 47B(1) states: 'A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure'. In the same section, the provision that the employee 'shall suffer no detriment in their employment as a result' creates a wide basis for financial compensation (Martin 2003: 1). Under section 124(4)(b), whistleblowers can also attain higher compensation awards when they can demonstrate that they have experienced retaliation by way of dismissal.

Yet, financial compensation under the ERA 1996 system is significantly different to the type and scale of potential awards under the US FCA system. More recently, the global financial market collapses and other health and safety events provided the impetus for the United Kingdom legislature to examine enhancing the effectiveness of whistleblower laws through incentive mechanisms (Pyper 2013). The UK Home Office Asset Recovery Action Plan, for example, noted the United Kingdom's interest in implementing *qui tam* style laws to enable the enlistment of private citizens to- combat fraud more effectively (Home Office (UK) 2007: 34).

While no legislation was introduced, in March 2008 a UK Sub-Committee indicated that due to its successes in the United States, the United Kingdom could benefit from implementing a FCA-like program with *qui tam* provisions (Burchell 2008). The United Kingdom also currently has an anti-trust whistleblower rewards programs in place through the Office of Fair Trading (OFT). In 2008 the OFT began offering financial rewards to whistleblowers who disclosed information regarding cartel conduct (OFT 2010). Under this informant reward scheme, an individual may receive up to UK£ 100,000 for providing information on a cartel to the OFT.

The relative slowness with which the United Kingdom has taken up such provisions may be partially explained by a comment in the Home Office Action Recovery Plan: 'Clearly the *qui tam* provisions of FCA are embedded in a very different US historical, legal and cultural context. They would be a novel import into England and Wales' (Home Office (UK) 2007: 35). Such a critique appears to refer to the 'privatized' nature of law enforcement implicit in the FCA concept, the notion of a bounty for performing civic duties and the fear that the legal system will be overwhelmed with trouble-makers fabricating claims for financial gain.

Similar concerns have persisted in Australia. Currently in Australia there exists legislation aimed at protecting whistleblowers from reprisals, however, there are no statutes based on a *qui tam* type of financial reward provisions (Brown, Latimer, McMillan and Wheeler 2008). The prospect

of introducing a version of the US FCA with *qui tam* provisions has been raised in government inquiries in Australia (House of Representatives Standing Committee (Australia) 2009: 83). But the same concerns about differing legal traditions have been expressed as in the United Kingdom (Feldman and Lobel 2009).

In terms of financial compensation, each Australian state varies regarding the compensation offered. For its first 16 years, the New South Wales regime did not allow proceedings for damages (Protected Disclosure Act 1994 (NSW); see Callahan *et al.* 2004: 879), a situation which only changed in 2010 (Public Interest Disclosures Act). In South Australia, reprisals can justify financial compensation as a tort under the Equal Opportunity Act 1984. In Queensland, whistleblower law provides for damages arising from injuries such as physical and psychological, health and career. Variations of remedies are available in the Australian Capital Territory in the Public Interest Disclosure Act 2012 (ACT); in Victoria in the Whistleblower Protection Act 2001, Protected Disclosures Act 2012 (.Vic.); and in Tasmania in the Public Interest Disclosure Act 2002 (Tas.). All of these Acts provide for remedies under tort law, including exemplary damages in retaliation cases (Callahan *et al.* 2004: 879; Brown, Latimer, McMillan and Wheeler 2008).

The Commonwealth Fraud Control Guidelines (CFCG) indicate that litigation or criminal action may follow from breaches of the Public Service Act 1999, the Criminal Code, the Crimes Act 1914, the Competition and Consumer Act 2010 and the Financial Management and Accountability Act 1997, which in section 44(3) provides that public authorities are expected to act ethically and protect funds from being used for purposes not otherwise authorized (Osterhaus and Fagan 2009: 4). Nevertheless, whistleblowers are required, generally without the assistance of a ‘no-win no-fee’ legal team, to gather enough evidence to convince regulators to prosecute the defendant (Callahan *et al.* 2004: 7; Brown, Latimer, McMillan and Wheeler 2008). This presents obvious difficulties in the ability of a whisteblower to conduct a long and costly legal process against powerful public and private organizations (Ruhnka *et al.* 2000: 283).

In Canada in 2011, the Ontario Securities Commission (OSC) announced it was considering legislation to implement a program of financial incentives for people voluntarily providing original information to the OSC about marketplace misconduct. If the information resulted in successful enforcement and monetary sanctions of over CAN$1 million, the whistleblower would be eligible to receive between 10 and 30 per cent of the amounts recovered (Brown 2011).

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Europe and the European Union

The European community has examined the prospects of enacting a version of the US FCA with *qui tarn* provisions as a means of protecting revenue and expenditure of the European Union from corporate fraud (Riley 2003). At the national level, however, there has so far been little movement towards such schemes.

The legal basis for the European model was supported by Article 280(4) of the European Community (EC) Treaty. This treaty provides for the necessary adoption of measures combating fraud that otherwise may affect the financial interests of the EU (Riley 2003). The idea was to afford effective and equivalent protection to its Member States. The EU recognized that the US FCA provided significant advantages in terms of its capacity to deter and recover funds in the public's interests. The aim of this 'supra-national' legislation was to provide European Public Prosecutors (EPP) with equivalent power to conduct community wide investigations and enforcement to rein in fraud (Riley 2003). Yet the European FCA model is still to eventuate.

On 1 April 2010, the Hungarian competition authority (Gazdasági Versenyhivatal) introduced an informant financial rewards program under the Hungarian Competition Act (HCA) 2010. Article 79A(1) of the HCA 2010 relevantly provides (*inter alia):*

> **[a] natural person who has disclosed to the Hungarian Competition Authority written evidence qualifying as indispensable for the establishment of an infringement, committed by competitors by means of agreements or concerted practices which infringe Article 11 or Article 81 of the EC Treaty and which directly or indirectly aimed at fixing purchase or selling prices, sharing of markets, including bid rigging, or at the allocation of production or sales quotas, shall be entitled to obtain informant reward.**

Article 79A(3) of the HCA relevantly provides entitlements for whistle-blowers to receive a reward of 1 per cent of the fine levied up to a maximum of Hungarian forints (HUF) 50 million or US$225,000. The Act also provides that 'in case more than one different natural person provide[s] indispensable evidence, each of them shall be entitled to [an] informant reward' but that '[o]ne person is entitled to receive [the] informant reward only one time'.[14] Article 79B(2), *inter alia,* provides the Competition Authority with powers to allow the whistleblower (informant) receiving the reward to be heard as a witness and to request that their personal details be managed confidentially. While the Act specifically allows a whistleblower to remain anonymous, it also warns

the whistleblower that the confidential handling of their identity may have an effect on the probative value of the information provided.

Although no primary English language sources have been identified by the authors, secondary sources refer to the existence in Lithuania of a financial reward incentive scheme for persons disclosing 'valuable information' about crime in Lithuania (TIL 2009). Part A of the Transparency International Report on Lithuania mentions Government Resolution 75 that provides for a whistleblower to be rewarded 10 per cent of the value of damages paid for crime or the value of amounts recovered for criminal conduct, if a conviction for a crime carrying imprisonment as a penalty is recorded (TIL 2009: 5).

The Transparency International Report identifies numerous deficiencies with Resolution 75, including its application to convictions for a limited range of crimes, which generally excludes crimes of corruption but includes 'financial crimes and/or crimes against a standing economic order'; the unavailability of the reward mechanism if monies are unable to be recovered from the convicted person(s); the Resolution only states a maximum reward, thus the absence of a minimum payment offers no incentive to make disclosures; there is no mechanism for determining the value of the information, for example, if a recovery of money is based on information from multiple sources. Furthermore, there is no protection for whistleblowers from negative employment consequences (Osterhaus and Fagan 2009: 6). There are separate laws protecting whistleblowers in other respects, though not under dedicated whistleblower protection laws, and only utilizing a suite of legislation addressing disparate situations (Osterhaus and Fagan 2009: 7-8; see also Banisar 2006: 10-11).

The effectiveness of Resolution 75 is not ascertainable. There is no analysis or raw data concerning the payment of rewards pursuant to the Resolution, and Transparency International sources dated 2009 state that no such payments had been made at that time (Osterhaus and Fagan 2009: 18).

South Korea

The Korean Fair Trade Commission (KFTC) is empowered to adopt and enforce competition laws in Korea under the 2005 Monopoly Regulation and Fair Trade Act (MRFTA).[15] In 2010, 103 cartel cases were filed with the KFTC, of which 62 cases were successful in recovering an average of Korean won (KRW) 586 billion or a total of US$516 million, representing record fines for that year; a representative case involved collusion amongst oil refineries to restrict competition amongst petrol stations (Choi and Baek 2011: 1). KFTC is working closely with anti-fraud and

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antitrust regulators in Australia, the European Union, Japan and Germany to internationalize cooperation for multinational transactions (Choi and Baek 2011: 1).

India and Pakistan

The Central Vigilance Commissioner of India has recommended legislation creating financial incentives for anti-fraud whistleblowers based on the US False Claims Act model (Press Trust of India 2012).

In 2007, the Competition Commission of Pakistan (CCP) introduced a rewards program for whistleblowers (informants) to uncover cartel conduct/activity (Koury 2012: 1). The CCP is governed by the Competition Act 2010 and is part of a broader framework of Pakistan's anti-fraud policy to enhance and protect trade and competition. The revised Guidelines on the Reward Payment to Informants Scheme (CCP 2007) are issued pursuant to regulation 56 of the Competition Commission.[16]

The salient features provided for under the Guidelines involve the payment of rewards ranging from rupees (INR) 200,000 to 5 million (US$2,200 to US$55,000). The quantum of rewards depends upon a number of factors as relevantly provided for under the Guidelines (section 3(1)). The rewards are calculated and granted on the basis that the information provided by the whistleblower meets criteria which encompass the usefulness of the information; the seriousness of the cartel; the efforts made by the informant; and the level and nature of involvement by the whistleblower (section 3(2)). Further criteria involve the accuracy and verifiability of the information revealing the cartel conduct.[17]

The Pakistan model combines financial rewards with added protections that include that the 'identity of the whistleblower shall be kept secret unless he agrees to give evidence' (section 4). When the whistleblower has fulfilled the criteria set out in section 3 of the Guidelines, there are further provisions that direct the CCP to release the reward in a four-stage process under section 5. The four stages provide the CCP with power to release the payments based upon the validity and reliability of the information, and its use in the eventual findings of the illegality (section 5(i)-(iv)).

Ghana and Uganda

The Ghanaian Whistleblower Act, 2006 Act 720 appears to be the first African legislation to incorporate a reward scheme for good faith intra- or

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extra-organizational informants providing information to listed regulatory bodies on 'impropriety'. The Act defines 'impropriety' to include any past or likely to occur illegality, economic crime, miscarriage of justice, waste or mismanagement or misappropriation by a public institution, degradation of the environment, and the endangerment of the health or safety of an individual or community.

In recognition of Ghana's cultural mores, the list of bodies to report to include a chief, head or elder of the whistleblower's or bell-ringer's family and head of a 'recognized religious body', in addition to a range of government offices and institutions. The use of non-public bodies as recipients of disclosures gives rise to different confidentiality issues, since some such bodies are not subject to any statutory or contractual obligations of confidence. Accordingly the Act, in section 6(3), imposes heavy fines or not less than two years' imprisonment for conviction of a breach of a whistleblower's statutory right to confidentiality concerning the disclosure.

The Act confers on the pre-existing Commission on Human Rights and Administrative Justice (CHRAJ) the power to receive complaints of retaliatory conduct and to make orders that are 'just in the circumstances', including an order of a financial reward payment. For enforcement purposes, orders of the CHRAJ are given the same status as orders and judgments of Ghana's High Court. The Act also confers on whistleblowers a separate right of action to sue for damages, and to apply for police protection in specified circumstances.

The Ghanaian legislation is one of the few financial incentive systems for whistleblowers that utilizes a dedicated fund established under legislation: the Whistleblower Reward Fund. The Fund comprises the accumulation of voluntary contributions and amounts allocated by Parliament (including those recovered from fraudsters). Section 23 of the 2006 Act provides:

> **A whistleblower who makes a disclosure that leads to the arrest and conviction of an accused person shall be rewarded with money from the Fund.**

Section 24 provides:

> **A whistleblower whose disclosure results in the recovery of an amount of money shall be rewarded from the Fund with:**
>
> **(a) 10 per cent of the amount of money recovered, or**
> **(b) the amount of money that the Attorney-General shall, in consultation with the Inspector-General of Police, determine.**

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It appears that sections 23 and 24 establish a right to financial reward, even if no money is recovered from fraudsters. The country profile for Ghana published in March 2012 on the Business Anti-Corruption Portal (2012) suggested that there have not been any rewards paid under the 2006 Whistleblower Act and the authors were unable to identify any detailed evaluation of the specific overall efficacy of the Act (Global Integrity Report 2009; Quaye and Coombs 2011; Ziem and Gyebi 2012).

The Ugandan Whistleblower Protection Act 2010 rewards informants on fraud with 5 per cent of the money recovered (section 19).

China, Taiwan and Nepal

Article 12 of the Taiwanese Anti-Corruption Informant Rewards and Protection Regulation declares the safety of informants and the punishment 'pursuant to the law' of those retaliating against informants (Ministry of Justice (Taiwan) 2005).

In 2008, China's Ministry of Finance, National Audit Office, Chinese Regulatory Commission, China Banking Regulatory Commission and China Insurance Regulatory Commission enacted the Basic Internal Control Norms for Enterprises. One tier below laws such as the Corporate Law and Securities Law enacted by the National People's Congress, article 43 prevents retaliation against whistleblowers but does not make clear if they are entitled to a cause of action against their retaliating employers.

In 2002, the Kingdom of Nepal enacted the Prevention of Corruption Act, 2059. The Act punishes a wide range of corrupt conduct involving public offices and government activities. Section 58 of the Act, entitled 'Provision relating to Rewards', provides:

> **The investigating authority may give an appropriate reward to the person assisting it in connection with inquiries, investigation or collection of evidence in the offences punishable under this Act.**

ASPECTS AND ADVANTAGES OF THE US FCA FOR A GLOBAL MODEL

The above brief survey arguably highlights how much more sophisticated the US FCA system is compared with other forms of financial incentives for informants on corporate fraud. With this perspective in mind, the potential advantages of the US FCA as a template for a global model of such laws can now be explored in greater detail.

Prevention of Spurious, Frivolous, Vindictive or Parasitic Claims

A common argument against whistleblower financial incentive programs is that they will motivate employees to fabricate claims, to initiate proceedings over matters that should involve the normal fulfilment of their duties, will reward complicity in corruption, or provide information already in the public domain (Callahan and Dworkin 1992: 274). Research, however, suggests that most whistleblowers disclose information chiefly for moral or ethical motives, such as furthering public safety or justice, and that this is not altered by schemes such as the FCA (Getnick and Skillen 2003; Kesselheim *et al.* 2010: 1834).

Nevertheless, there are a variety of robust mechanisms built into the FCA to reduce the likelihood of such events occurring (Howse and Daniels 1995). For example, the Attorney General investigates any allegations that involve violations contrary to the FCA[18] and, after filing the claim, the whistleblower must serve all documents and evidence upon the government *in camera*, which is to remain under seal for 60 days.[19] During this period the Attorney General has an opportunity to investigate and assess the probative value of the evidence before accepting or declining the matter. Indeed, a *qui lam* relator can bring the matter to court without the Attorney General's assistance. This is not prudent because the whistleblower (and his or her legal representative) risks paying his or her own costs and possibly the costs of the corporation if the matter is fabricated or frivolous.[20] Further, the 'first in time' FCA amendments prevent other insiders from bringing a similar action based on the same facts. This promotes a race to be first to disclose out of fear that others will bring forward the essential information and so reap both the financial rewards and accompanying immunity (Depoorter and De Mot 2006).

Frivolous claims present particular challenges to FCA law-makers because they increase costs associated with investigations by authorities (Orisini Broderick 2007: 962). Empirical research reveals that whilst the FCA *qui tam* provisions are not perfect and remain open to actions by frivolous litigants searching for monetary gains, the cost-benefit ratio of implementing FCA *qui tam* laws remains favourable, with a 95 per cent success rate in government supported *qui tam* cases (Wang 2007: 7). Moreover, the FCA investigation process does provide sufficient safeguards for investigators and the Attorney General to determine whether claims have merit prior to proceedings to hearing the matter in court (Orsini Broderick 2007: 963). The FCA system allows government prosecution costs to be reduced due to diminished investigation times and quality of evidence brought to trial (Scammell 2004: 71).

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opponents ot *qui tam* suggest that the costs to the community are increased when the DOJ must investigate the high number of allegations that prove to be frivolous.[21] The available evidence suggests, however, that the returns from successful cases far exceed the costs that must be expended to weed out the frivolous claims (Alexion 2012: 404). For example, from 1987 to 2010 the government declined to intervene in 78 per cent of FCA cases because the DOJ did not believe that the case would succeed (Alexion 2012: 404), or otherwise determined that it should not intervene in the particular circumstances of the case (Grassley 2006).[22] Similar findings were made by Orsini Broderick (2007: 949), however the empirical research suggests that while 78 per cent of *qui tam* claims were dismissed, the 22 per cent that succeeded provided for a positive overall cost benefit recovery (Orsini Broderick 2007: 949).

Broad Definition of 'False Claims'

One of the strengths of the FCA system beyond those in the comparative financial incentive laws above is that it directly proscribes a wide variety of corporate activities in many sectors of society, including medical, hospital and financial services, pharmaceutical manufacture and distribution, as well as defense contracting. These include: (1) presenting a false claim; (2) making or using a false record or statement material to a false claim; (3) possessing property or money of the government and delivering less than all of it; (4) delivering a certified receipt with intent to defraud the government; (5) buying public property from a federal officer or employee, who may not lawfully sell it; (6) using a false record or statement material to an obligation to pay or transmit money or property to the government, or concealing or improperly avoiding or decreasing an obligation to pay or transmit money or property to the government; (7) conspiring to commit any such offense.[23] There is no requirement to prove specific intent to defraud under the FCA, and the standard of knowledge encompasses actual knowledge, deliberate ignorance and reckless disregard.[24]

Informants Supported by 'No-Win No-Fee' Legal Team with or without Regulator

It is the ability of relators to recover a reward for exposing fraudulent activity that distinguishes the US FCA from most other jurisdictions. Amongst the FCA's particular strengths are not just the large financial incentives available to relators, but how its numerous features robustly

deal with two central reasons why people choose not to report fraud on the government: the belief that no improvement will result from the disclosure, and the fear that powerful forces will exact career, personality and family-destroying reprisals. The FCA significantly promotes the likelihood that genuine fraud on the government will be uncovered and dealt with. It does this, first, by allowing ordinary citizens who have inside knowledge of fraud to file lawsuits on behalf of taxpaying citizens as a whole. Secondly, in most forms of the legislation at federal and state levels, the *qui tam* provisions allow the 'relator' to continue with an action even if the relevant DOJ declines to assist,[25] although this type of action is far less successful.

Thirdly, the FCA system allows relators to be protected and assisted by their own 'no-win no-fee' lawyer, who in most instances will supplement the work and resources of government legal officials. The FCA's provisions ameliorate many of the logistical and resource problems for government regulators by allowing the whistleblower's private attorneys to share or assume the burden of investigating and litigating the case, and by providing the government with strong and often first-hand evidence of wrongdoing, thereby reducing its overall cost of such litigation (Scammell 2004: 71). In addition to the benefits of uncovering fraud on the government, *qui tam* laws serve the public and national interest by reducing litigation costs and deterring abuse, waste, corruption and fraud (Getnick and Ski lien 1996).

Fourthly, a *qui tam* action is filed under seal, meaning that the defendant does not learn about a pending *qui tam* action until the seal is lifted. These provisions provide one of the most important protective mechanisms for FCA informants.

Encouraging Better Corporate Governance

Many of the countries listed above provide leniency programs encouraging organizations to implement internal compliance strategies (Aubert *et al.* 2005: 2). Another valuable feature of the FCA model is that it provides a more robust mechanism for a government to improve corporate governance and compliance.

One example is the implementation of Corporate Sentencing Guidelines which determine the penalties for corporations which have been charged with federal crimes. Corporations that have established internal accountability systems receive decreased fines and fewer sanctions than those that have not (Dworkin 2002: 464).

Further examples of FCA-induced improved corporate governance include government initiated 'Corporate Integrity Agreements' (CIAs). The use of such agreements to promote internal accountability mechanisms is illustrated by a 2012 FCA case involving GlaxoSmithKlein (GSK) and the US government. In a series of settlement agreements, GSK pleaded guilty to two charges of misbranding pharmaceuticals, one charge of failing to report safety data, and reached a compromise on a series of allegations made under the FCA. GSK accepted a criminal fine and forfeiture of US$1 billion for the three criminal charges and a further US$1.03 billion was paid under *qui tam* provisions for off-label promotion of pharmaceuticals and the payment of kickbacks to doctors (DOJ 2012a).

In addition to the monetary settlements, the US government and GSK also entered into a binding corporate integrity agreement (Department of Health and Human Services (US) 2012). The agreement imposed onerous requirements to mitigate the risk of future fraud. The requirements include the establishment of a corporate integrity structure within the existing organization. This structure includes a senior manager substantially dedicated to ensuring the integrity of GSK operations and overseen by a 'Compliance Committee'; the maintenance of an appropriate Code of Conduct; and a corporate 'Disclosure Program' enabling employees to confidentially report compliance breaches.

The corporate integrity agreement also specifies the monetary penalties that accrue for breaches of the agreement and, in the case of a 'material breach' (as defined for the CIA), for GSK to be excluded from participation in US federal health care programs. Exclusion would have the effect that GSK pharmaceuticals would not attract the Federal Government drug rebate, with the result that GSK would be priced out of the mainstream pharmaceuticals market. Although the agreement is primarily directed at GSK's US operations, Appendix D establishes a mirror integrity framework applicable to GSK's global operations. The integrity framework for GSK's global operations is not as onerous in detail as the main body of the agreement, yet, it constitutes a powerful risk mitigation tool for the US government, particularly given GSK's use of overseas manufacturing facilities.

Deterrent Effect

The FCA *qui tam* provisions appear to provide a substantial deterrent effect on potential wrongdoers (Stringer 1996, cited in Orsini Broderick 2007: 949). It has been argued that the 1986 amendments to the *qui tam* provisions of the FCA coincided with a 'significant increase' in the

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number of Fortune 500 companies adopting or updating organizational Codes of Conduct (Ruhnka *el al.* 2000). It is estimated that savings as a result of the deterrent effect from *qui tam* in the first ten years (1986 to 1996) ranged between US$35.6 billion and US$71.3 billion; whilst for the second ten-year period (1996 to 2006) these figures were estimated to have risen between US$105.1 billion and US$210.1 billion (Stringer 1996, cited in Orsini Broderick 2007: 981).

Provision for Triple Damages and Criminal Penalties

Offenders may be sued for triple damages, criminal penalties of up to US$11,000 per violation, costs, expenses and attorney's fees in a civil action brought either by the United States or by a *qui tam* relator (whistleblower) in the name of the United States.[26] Additional liability may also flow under the FCA from any retaliatory action taken against whistleblowers. Such provisions seem to be critical in creating an incentive for corporations to settle negotiations rather than take the risk of going to trial. As a result, rather than being necessarily punitive, they act in a greater proportion of cases as a mechanism to save the public substantial court costs.

Synergy between Federal and State FCAs

The FCA has been so successful in recovering money on a national scale that 30 states in the United States have implemented their own models. While these models vary, their purpose of combatting fraud and recovering funds lost to fraud is consistent. The growing number of states enacting their own versions of the FCA often results in the federal and state governments being linked as co-plaintiffs. Section 4(e) of FERA amends section 3732 of the FCA by clarifying that the seal does not preclude service or disclosure of such materials to the states. There are now 29 states and the District of Columbia with their own False Claims Acts covering fraud on state government programs, including the major states in terms of budget and population, New York, California, Texas and Florida.

Financial Compensation for Retaliation

Robust anti-retaliation protections are found in the FCA.[27] These provisions have proven successful in protecting the competing interests of individuals, companies and governments.

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The FCA provides that any employee, contractor or agent who 'whistleblows' about fraud shall be entitled to all relief necessary to make him or her 'whole', if discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against.[28] This is of particular importance given recent studies by Glazer and Glazer indicating that of some 41 whistleblowers, 28 struggled to find later employment (Glazer and Glazer 1989).

In the United States, most employees dismissed for whistleblowing can recover large damages under tort laws for 'firing in violation of public policy', including punitive damages for serious misconduct (Callahan and Dworkin, cited in Callahan *et al.* 2004: 879). Some states provide whistleblowers with a full range of compensatory remedies that include punitive damages, while other states provide variations to these laws that include limiting available remedies to reinstatement, economic loss through lost wages, benefits and attorney fees and costs (Callahan *et al.* 2004: 879).

Proven Effectiveness of the FCA

The proven success of the FCA model as an anti-fraud measure is one of the main features making it worthy of consideration for a global model. Since 1987, when whistleblowers initiated only 30 of the 373 new matters (8 per cent), there has been a substantial increase in recoveries from *qui tarn* initiated matters (DOJ 2012b). In 2011, 762 new FCA matters were initiated, 84 per cent of which (638 cases) were initiated using the FCA's *qui tam* whistleblower provisions and yearly recovery is approaching US$9 billion (Taxpayers Against Fraud Education Fund 2011a, 201 lb). The FCA model has facilitated the recovery of more than US$30 billion in defrauded US government funds in the past two decades (DOJ 2010, 2012b; see also Urbas *et al.* 2012: 113). Whistleblowers collectively received more than US$532 million in rewards from the recoveries collected in 2011 (DOJ 2012b).

The FCA has been very successful in providing an incentive that is cost effective (Howse and Daniels 1995: 526). It is estimated that US$15 is returned to the US treasury for every US$1 spent on FCA investigations and litigation (Meyer 2006; Laemmle-Weidenfeld 2013). Indeed, there has been a positive reception to recoveries under the FCA for the US taxpayer.

The US FCA has proven so successful that the concept of private citizen actions against government fraud is now branching into areas involving fraud against private corporations and the citizens they interact with. The Dodd-Frank Wall Street Reform and Consumer Protection Act

signed into law on 21 July 2010 is a recent example. The reward provisions in section 922 of this legislation add a new section 21F to the Securities Exchange Act 1934 that allows the Securities and Exchange Commission (SEC) to award large bounties (10-30 per cent of any sanctions exceeding US$1 million including penalties, disgorgement and restitution) to informants (not government employees or auditors) who report securities and commodities fraud in areas such as debit cards, hedge funds and mortgages. These amendments accord whistleblowers a private right of action against retaliation by employers (for reinstatement, back pay and attorney's fees) provided that the whistleblower has reported externally to regulators. One important difference between Dodd-Frank and the FCA is that a Dodd-Frank whistleblower is not provided a right to bring a lawsuit on behalf of the public; instead, the whistleblower is dependent on the SEC to fde charges and collect fines in order to fund any reward.

Amongst the touted reasons for the effectiveness of the FCA system is its potential to decentralize monitoring and uncover violations that would otherwise pass undetected or would only be detected without the insider's assistance at a high cost to enforcement agencies (Aubert *et al.* 2005: 2). The existence of a *qui tam* FCA system means that governments do not have to calculate expenditure on combating fraud and corruption chiefly on abstract calculations of likelihood of detection and punishment (Depoorter and De Mot 2006). It has been estimated that whistleblowing by individual *qui tam* relators is under-incentivized when it is inhibited by prospective government 'free-riding' and over-incentivized when it weakens the government's bargaining position or interests in wider enforcement issues (Depoorter and De Mot 2006).

USING TRADE AND INVESTMENT LAW TO IMPLEMENT A GLOBAL MODEL AGAINST CORPORATE FRAUD

Fraud by multi-national corporations (MNCs) is now one of the greatest threats to economic security, public health and environmental sustainability. Much of the political and economic power of MNCs is exercised through their influence on multilateral and bilateral trade negotiations (Faunce 2006). The World Trade Organization (WTO) arguably promotes an explicit agenda (through closed door 'liberalization' negotiations permitted by the General Agreement on Trade in Services) in facilitating increased control by private corporations that receive significant indirect and direct financial assistance from taxpayer funds (Faunce 2006).

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As another example, the need of US banks to rapidly lend OPEC (Organization of the Petroleum Exporting Countries) petrodollars to finance interest repayments encouraged the World Bank and the International Monetary Fund (IMF) to loan vast sums to developing nations. To meet loan repayments these countries were then required by structural readjustment programs to compete with each other in trades of sugar, cotton, tobacco, forest timber and coffee that directly benefitted MNCs. The monies obtained often went to MNCs for armaments rather than education or public health services. Since 1987, the result has been that the IMF received US$2.4 billion more from Africa than it provided in finance, and by the end of 2002, the poorest nations in Africa had transferred US$167 billion to service First World creditors. This allowed those banks to make up to three times what was originally lent, as well as to finance takeovers by MNCs of Third World public infrastructure, such as telecommunications, 'old-photosynthesis' (oil, coal or natural gas based) electricity and fuel systems, as well as health care facilities. Over this time, developing nations'- childhood and perinatal mortality increased as health systems collapsed and necessary professionals migrated. Regional and bilateral preferential trade agreements have become bridgeheads to drive pro-private corporate changes into domestic regulatory systems (Faunce 2006).

International trade and investment agreements almost unanimously permit anti-fraud measures, thus making them a fertile ground to implement a global FCA model. To highlight this, specific examples will now be given of how explicit such agreements are in supporting the right of nation states to implement robust anti-corporate fraud measures in the interest of free market competition.

In Europe, for example, Article 280 of the EC Treaty provides an explicit legal basis for operations by the Community and the Member States to combat fraud and other unlawful activities that are damaging to the Community's financial interests. Drawing upon this, the European Anti-Fraud Office (OLAF), in addition to carrying out investigations, is now responsible for devising and preparing legislation for the protection of the Community's financial interests and the fight against fraud.

The WTO's multilateral General Agreement on Trade in Services (GATS) provides in Article XIV (General Exceptions):

> **Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:**

(a) necessary lo protect public morals or to maintain public order;
(b) necessary to protect human, animal or plant life or health;
(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
(i) the prevention of deceptive and fraudulent practices.

The capacity to regulate against fraud and cooperate in the prevention of fraud are also common components of bilateral and preferential trade agreements. One illustrative example is the Australia-United States Free Trade Agreement (AUSFTA) which provides in Article 14.6 (Cross Border Consumer Protection):

2. The Parties recognize the existing mechanisms for cooperation in relation to consumer protection, including: ...

(b) the OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders of 2003.

3. The Parties shall further strengthen cooperation and coordination among their respective agencies, including the US Federal Trade Commission (FTC) and the Australian Competition and Consumer Commission (ACCC) in areas of mutual concern, in particular fraudulent and deceptive commercial practices against consumers: ...

(b) in the development of coordinated strategies to combat fraudulent and deceptive commercial practices against consumers, both bilaterally and multilaterally.

Likewise, AUSFTA, Article 16.6 (Online Consumer Protection) provides:

The Parties recognize the importance of maintaining and adopting transparent and effective measures to protect consumers from fraudulent and deceptive commercial practices when they engage in electronic commerce.

AUSFTA, Article 13.10 (Financial Services Exceptions) provides:

4. For greater certainty, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with this Chapter, including those relating to the prevention of deceptive and fraudulent practices.

The fact that most trade and investment agreements expressly permit anti-fraud regulation suggests that representatives of nation states could implement a global financial incentive system for informants on corporate fraud (presumably based closely on the US FCA model) either

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through a specific multilateral treaty, by adding a specific chapter on the topic to existing multilateral, regional or bilateral trade and investment deals, or by simply convening a working group to draw up a model for national legislation.

The advantages of such a global system relate chiefly to more effective measures to deal with improper use of the global reach and political and economic power of MNCs. Given that the business models of such MNCs (including utilization of fraudulent practices) are likely to be essentially the same whichever national jurisdiction they operate in, it makes little sense for those practices to be strongly dealt with only in North America under the US FCA system, whilst essentially remaining undetected or ignored by regulators in the other countries in which they operate. In terms of effective law enforcement, prosecutors in differing nations will frequently encounter cases that will benefit from evidence obtained under coherent rules from multiple jurisdictions. Further, many of the large legal firms running FCA cases are now global in nature, meaning that lawyers in multiple jurisdictions are already familiar with the basic workings of the FCA. The model of governments outsourcing work to the private sector through consultancies, the use of litigation funding organizations, the spread of no-win no-fee litigation and the scale of fraud likely to be perpetrated by MNCs using similar methods in different jurisdictions, also support the establishment of a global model for financial rewards to informants on corporate fraud. Utilizing international trade and investment agreements to drive this public interest-oriented normative reform may begin the process of re-establishing their democratic legitimacy as normative instruments not primarily designed to advance the interests of MNCs.

CONCLUSION

This chapter has reviewed the published research on financial incentives for whistleblowers against corporate fraud. It has developed an argument that the US FCA encompasses many features that could be incorporated in a global anti-fraud system based on financial rewards for informants and has highlighted existing research concerning the numerous nations who have implemented such incentives and compensations, in some cases explicitly drawing from the US FCA model. There is certainly room for much more research here. This could, for example, include an investigation of why, despite recommendations by their own law reform bodies, many legal systems have been hesitant to incentivize informants of corporate fraud. A major gap in the existing literature is the absence of

inter-jurisdictional research quantifying how much taxpayer funds are lost and recovered in different nations pursuant to their existing methods of discovering and prosecuting corporate fraud.

If this chapter has established at least a *prima facie* case lor considering that some form of globalization of core features from the US FCA would be beneficial, then the question arises as to what implementation mechanism should be utilized. The most obvious such mechanism involves trade agreements: multilateral, regional and bilateral. The advantage of placing such a scheme in these agreements is that trade sanctions represent a powerful enforcement mechanism in a globalized economy. Furthermore and most importantly, almost all trade agreements explicitly permit ratifying nations to regulate strongly against fraudulent practices by corporations in their efforts to promote genuine market competition. Developing a trade-based global model for financial rewards for informants on corporate fraud may begin the slow process of re-democratizing the international trade and investment law normative regime.

NOTES

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1. *United States ex ret. Stillwell* v *Hughes Helicopters,* 714 F.Supp. 1084, 1086 n.2 (C.D. Cal. 1989).
2. *United States v Neifert-White,* 390 US 228, 232 (1968).
3. FDA letter to R.L. Borison, personal communication, 26 November 2002; see also *United States* v *Maria Carmen Palazzo, MD,, Ph.D., MMM* (2005) District Court Louisiana, Docket no. 05-266.
4. Senate Judiciary Committee, 23 March 2009.
5. 31 USC s. 3730(b).
6. 31 USC s. 3730(e)(4).
7. 31 USC s. 3730 (d)(l)-(2).
8. 31 USC s. 3730(d)(3).
9. See Insider Trading and Securities Fraud Enforcement Act (1988).
10. FDCA 21 USC s. 301.
11. 740 ILCS 175/1-17578.
12. 31 USC ss. 3729-3733.
13. Employment Rights Act 1996, ss. 48(l)(a), 49, 103A, 124(1)(a).
14. Hungarian Competition Act 2010, art. 79A(3).
15. Monopoly Regulation and Fair Trade Act, Statutes of South Korea, Act No. 7796 (1961), 2005; see also Yun 2002: 3.
16. General Enforcement Regulations, 2007 (Revised Guidelines on the Reward Payment to Informants Scheme).
17. Guidelines, s. 3(3).
18. 31 USC s. 3730(a).
19. 31 USC s. 3730(2).
20. 31 USC. s. 3730(2).

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21. 31 USC s. 3730(a).
22. Personal communication, 26 April 2012.
23. 31 USC s.3729(a).
24. 31 USC s.3729(b)(1).
25. 31 USC s.3730(c).
26. 31 USC s.3729(a).
27. 31 USC ss. 3729-3733.
28. 31 USC s. 3730(h).

17. When it all goes bad: Criminal remedies

Maureen Spencer and John Spencer

INTRODUCTION

Criminal law provides at best only partial protection to whistleblowers who are victimized for having spoken out. The measures that do exist are patchy and specific to particular situations. This chapter reviews criminal law provisions in a number of jurisdictions and considers how effective they have been in deterring and punishing the victimization of whistle-blowers.

One of the earliest British whistleblower protection measures drew on criminal law. In the late 19th century, John Hood, an employee of the Cambrian railway company for over 20 years, had given devastating evidence to a House of Commons Select Committee about hours of work endured by railway workers. He was promptly dismissed. The directors of the company were summoned to the Bar of the House and told, 'A great principle has been infringed, the principle that evidence given before this house should be free and unrestrained'. The outcome was the Witnesses (Public Enquiries) Protection Act 1892, which is still in force today.[1] The relevant section reads as follows:

> **Every person who commits any of the following acts, that is to say who threatens, or in any way punishes, damnifies or injures or attempts to punish, damnify or injure any person having given evidence upon any enquiry or on account of the evidence which he has given upon any such an enquiry shall, unless such evidence was given in bad faith, be guilty of a misdemeanour and be liable on conviction thereof to a maximum penalty of £100, or to a maximum imprisonment of three months.[2]**

The statute also provides monetary compensation for the victims:

> **any sum of money which [the court] may think reasonable, having regard to all the circumstances of the case, by way of satisfaction or compensation for loss of situation, wages, status, or other damnification or injuries suffered by the complainant through or by means of the offence may be awarded.[3]**

Although more recent whistleblower protection laws often include remedies for whistleblowers who have suffered harm, most stop short of

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Whistleblowing - the disclosure of wrongdoing by organizational insiders - is vital to modem public accountability and integrity across all organizations and societies. This important *Handbook* offers original, cutting-edge analyses of the conceptual and practical challenges that researchers face in order to better inform the way whistleblowing is understood and confronted by organizations, regulatory authorities and governments.

Featuring contributions from scholars and policy practitioners in a number of diverse fields - including sociology, political science, psychology, information systems, media studies, business, management, criminology, public policy and several branches of law - the book provides a comprehensive guide to existing research and blueprints for how new research should be conducted in the future. It covers conceptual and definitional fundamentals of whistleblowing and strategies for researching whistleblowing in an organizational context, as well as law reform, regulation, management practicalities and research ethics. It also charts the lessons of 30 years of empirical research and maps out new questions and projects for future decades,

This *Handbook,* with its unique perspective on the complex, multi-faceted and often controversial nature of whistleblowing research, will be a vital resource for researchers, policy makers and organizations around the world.

A.J. Brown is Professor of Public Policy and Law and Program Leader, Public Integrity and Anti-corruption at the Centre for Governance and Public Policy, Griffith University, Australia, **David Lewis** is Professor of Employment Law at Middlesex University, UK, **Richard Moberly** is Associate Dean for Faculty and Professor of Law at the University of Nebraska College of Law, USA and **Wim Vandekerckhove** is Senior Lecturer in Organizational Behaviour at the University of Greenwich Business School, London, UK.

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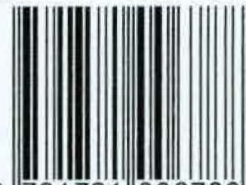

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In the Public Interest

Protecting Whistleblowers and Those Who Speak Out

Peter Bowden

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in the Public Interest

Protecting Whistleblowers and Those Who Speak Out

Peter Bowden

> ^ *This book is a DIY handbook for teachers, trainers and administrators, both public and private, as well as for the whistleblowers themselves.* ”

About this book

In the Public Interest: Protecting Whistleblowers and Those Who Speak Out aims to strengthening whistleblowing practices - the capability of any of us to speak out successfully whenever, in our working lives, we come to know of unethical or illegal practices. To be successful, however, whistleblowers need to avoid the backlash that often descends upon them, while still stopping the wrongdoing.

Governments worldwide, aware of the benefits that blowing the whistle can bring, have instituted procedures for protecting whistle- blowers. More people need to know about these developments, including teachers in colleges and universities, and trainers and consultants in the work force. Managers in organisations, both public and private, will also benefit from this book, for they are the ones increasingly being called upon to develop internal whistleblowing systems.

In the Public Interest addresses developments in three countries - the US, Australia, and the UK. The legislation and procedures work differently in each country, and have had varying degrees of success. The book examines these differences, attempting to learn from the more successful and suggesting approaches for further strengthening.

Case examples include:

- Julian Assange, WikiLeaks
- Paul More, HBOS, the Global Financial Crisis
- Deep Throat, Richard Nixon
- Daniel Ellesberg, The Pentagon Papers
- Toni Hoffman, Bundaberg Hospital
- John Kiriakou, the Central Intelligence Agency

About the author

Dr Peter Bowden's background is in institutional strengthening, concentrating since 2003 on institutional ethics. He was Professor of Administrative Studies at the University of Manchester, and, prior to that, Coordinator of the MBA program at Monash University.

Peter has worked with or advised a number of international organisations, including the World Bank, the Asian Development Bank, and agencies of the United Nations. Most of this work was on strengthening national or sectoral institutions. He currently lectures, consults and writes on ethics, and has an extensive background in working with whistleblowers and in whistleblowing practices.

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