UNGAGGING THE WHISTLEBLOWER IN FOREIGN CORRUPTION INVESTIGATIONS: TURNING INTERNATIONAL "BEST PRACTICES" INTO REALITY

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ABSTRACT

Access to information drives successful enforcement of foreign anti-bribery laws. Whistleblowers, by providing intimate knowledge of the inner workings of a corporate entity, one suspected of wrongdoing, can serve to expose serious allegations of foreign bribery. This role is well-documented and championed by international best practices aimed at protecting vulnerable whistleblowers and encouraging substantive disclosures of illegal conduct. Nevertheless, potential informants can be silenced with the inclusion of gag clauses in employee contracts or the threat of financially ruinous litigation, nefarious corporate practices that must be condemned.

Complicating matters, however, is the following wrinkle: threatened whistleblowers can generally obtain legal recourse only in their country of residence, which often affords vastly different legal protections than the country investigating and prosecuting their employer's misconduct. Unfortunately, the international best practices, in relying almost exclusively on voluntary legislative action, provide no concrete approach to reducing the financial and reputational harm faced by prospective whistleblowers.

Thus, it is necessary to reinforce international whistleblower best practices with measures aimed at limiting the force of employer threats. This paper argues that, in addition to the enactment and active enforcement of anti-retaliation provisions, authorities with considerable influence in this legal domain, including the United States, should penalize the use of gag clauses in employee contracts extraterritorially. Further, countries should provide mechanisms for confidential whistleblowing, set up public funding or legal aid for whistleblowers, consider a mechanism for attorney fee shifting to cover deterrent legal fees, and incorporate whistleblower rewards in any substantive enforcement action. Ultimately, these incremental changes will remove unnecessary obstacles

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to whistleblower disclosures and empower authorities tasked with eradicating foreign bribery.

I. INTRODUCTION

A. *The Dilemma of a Foreign Bribery Whistleblower*

Information from corporate whistleblowers,[1] insiders with intimate knowledge of corporate wrongdoing, bolster the prosecutorial capabilities of government authorities tasked with investigating foreign bribery

1. The International Bar Association provides the following succinct definition of whistleblowing: "the making of certain disclosures — internally via a dedicated and clearly communicated reporting mechanism or externally to appropriate authorities — of actual or potential (or 'reasonably anticipated') conduct that an individual reasonably believes to be unlawful." *See* INT'L BAR ASS'N, WHISTLEBLOWER PROTECTIONS: A GUIDE 12 (2018), https://www.ibanet.org/Document/Default.aspx?DocumentUid=a8bac0a9-ea7e-472d-a48e-ee76cb3cdef8 [hereinafter IBA WHISTLEBLOWER GUIDE].

allegations.[2] Those private sector whistleblowers can present an existential threat to the financial wellbeing and reputation of their employer. They bring with them the full force of the prosecuting government, potentially costly sanctions, and adverse reputational effects. This conundrum brings perverse incentives into play. In response to the risks posed by external whistleblowers, companies have utilized legal and contractual threats to silence current and former employees.[3] These strategies include comprehensive non-disclosure agreements, confidentiality clauses, agreements to waive any future monetary rewards, pre-dispute arbitration clauses for whistleblower claims, and the threat of costly litigation—all of which make the disclosure of damaging information untenable.[4]

Although these confidentiality agreements can be legitimate, they can also be used for nefarious business purposes. When employers use legal tactics as a form of intimidation, deriving their threats from contractual obligations colloquially referred to as gag clauses,[5] they impose a significant burden on the enforcement of international anti-bribery laws. Further exacerbating the difficult task of protecting whistleblowers, an anti-bribery enforcement action can commence in a different country—with a substantively different legal framework—than where a whistleblower resides.[6] This leaves the whistleblower to fend for

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2. *See, e.g.*, Sonali Paul, *U.S. SEC Paid $3.75 Million to BHP Billiton Whistleblower: Report*, REUTERS (August 28, 2016), https://www.reuters.com/article/us-bhp-billiton-sec-idUSKCN1130WD; *see also* SHEARMAN & STERLING LLP, FCPA DIGEST: RECENT TRENDS AND PATTERNS IN THE ENFORCEMENT OF THE FOREIGN CORRUPT PRACTICES ACT 28 (2017), https://www.shearman.com/-/media/Files/NewsInsights/Publications/2017/01/FCPA-Trends–Patterns–January-2017–050217.pdf (noting a whistleblower tip led directly to a $25 million FCPA enforcement action against BHP Billiton).

3. *See infra* Section I.B.

4. Jordan Thomas & Tom Devine, *Wall Street's New Enforcers Aim to Muzzle Whistle-blowers*, N.Y. TIMES (July 21, 2014), http://dealbook.nytimes.com/2014/07/21/wall-streets-new-enforcers-aim-to-muzzle-whistle-blowers/.

5. See, *e.g.*, Richard Moberly, Jordan A. Thomas & Jason Zuckerman, De Facto Gag Clauses: The Legality of Employment Agreements That Undermine Dodd-Frank's Whistleblower Provisions, 30 A.B.A. J. LAB. & EMP. L. 87 (2014).

6. *See* U.N. OFFICE ON DRUGS AND CRIME, RESOURCE GUIDE ON GOOD PRACTICES IN THE PROTECTION OF REPORTING PERSONS 79 (2015), https://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf [hereinafter UNODC WHISTLEBLOWER GUIDE] ("[F]oreign bribery cases, for example, have highlighted the gaps in whistleblower protection in international contexts . . . ."). The UNODC Guide highlights a British investigation where the UK whistleblower law's scope of coverage simply did not apply to an employee based in Saudi Arabia. WORKING GRP. ON BRIBERY, OECD, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED KINGDOM 55 (2012), http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf.

themselves in their domestic courts with limited protections, or worse, with a set of conflicting legal obligations.

To eliminate undue burdens for exposing illegal activity, any attempts to silence whistleblowers must, across different jurisdictions, be deemed a sanctionable offense. That effort alone, however, will not offer sufficient protection for potential whistleblowers, as illustrated by AB InBev's efforts in 2016 to silence a potential whistleblower. Fundamentally, the current situation for individual disclosures of foreign bribery allegations demands a different approach to whistleblower protection.

B. *AB InBev: Efforts to Muzzle a Potential Whistleblower*

The operation of a comprehensive legal strategy to silence a whistleblower came to the public's attention in the 2016 settlement agreement between the U.S. Securities and Exchange Commission (SEC) and Anhauser-Busch InBev (AB InBev).[7] AB InBev, the world's largest brewing company,[8] held a forty-nine percent stake in an Indian joint venture called InBev India International Private Limited (IIIPL).[9] That joint venture entered into an agreement with AB InBev's wholly owned subsidiary in India, Crown Beers India Private Limited (Crown), to manage the business arrangement.[10] IIIPL disguised certain expenses as third-party advertising promotions and used those funds to make payments to government officials to increase the sales and production of AB InBev's beer in the country.[11] IIIPL also sought regulatory advantages for its product line,[12] and both efforts qualified as attempts to obtain or retain business in the country.[13] At the end of the investigation, AB

7. Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Anheuser-Busch InBev With Violating FCPA and Whistleblower Protection Laws (Sept. 28, 2016), https://www.sec.gov/news/pressrelease/2016-196.html [hereinafter SEC AB InBev Press Release].

8. Lisa Brown, *A-B InBev Finalizes $100B Billion Acquisition of SABMiller, Creating World's Largest Beer Company*, CHI. TRIB. (Oct. 11, 2016), https://www.chicagotribune.com/business/ct-megabrew-ab-inbev-sabmiller-merger-20161010-story.html.

9. Anheuser-Busch Inbev Sa/nv, Release No. 3808, 2015 WL 1456619 (Sept. 28, 2016), https://www.sec.gov/litigation/admin/2016/34-78957.pdf [hereinafter AB InBev Cease & Desist Order] (cease-and-desist order).

10. SHEARMAN & STERLING LLP, FCPA DIGEST: CASES AND REVIEW RELEASE RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977, 370 (2019), https://fcpa.shearman.com/siteFiles/FCPA%20Headlines/fcpa-digest.pdf [hereinafter SHEARMAN FCPA DIGEST].

11. SEC AB InBev Press Release *supra* note 7.

12. SHEARMAN FCPA DIGEST, *supra* note 10, at 370.

13. 15 U.S.C. § 78dd-1(a) (2018).

InBev settled with the SEC for a little over six million dollars,[14] a relatively small sum in relation to the average Foreign Corrupt Practices Act (FCPA) settlement of over seventy-eight million dollars that year.[15]

The SEC alleged that over the course of the bribery scheme, AB InBev and its Indian subsidiary were apprised of the scheme and failed to adequately address the allegations. In fact, instead of addressing the bribery concerns, AB InBev took burdensome and insidious legal actions in response to the internal complaints. AB InBev entered into a separation agreement with a would-be whistleblower; an agreement that threatened to impose severe financial penalties for violating its non-disclosure terms.[16] The contractual obligation effectively limited the employee's ability to communicate with outside authorities, including the SEC, about potential anti-bribery violations.

The potential whistleblower at the center of this dispute could not effectively rely on India's national legal framework to protect him or her from retaliatory actions stemming from any disclosures of internal company information. Although India took much needed legislative action to facilitate enforcement of the country's anti-corruption framework by passing the Whistle Blower Protection Act in 2014 (Act),[17] the Act, however commendable, limited its reach to whistleblowers seeking to the expose fraud and corruption by public officials—not the private sector individuals offering the bribes.[18] It unfortunately affords no protections to employees seeking to report wrongdoing by corporations,[19] and has seen limited success in practice.[20] This lack of protection is by no means an aberration in domestic legal systems; in fact, as concluded in a 2016 Organization for Economic Cooperation and Development (OECD) study, only fourteen of the forty-three state parties to the

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14. AB InBev Cease & Desist Order, *supra* note 9, at 9.

15. Stanford Law School, *Foreign Corrupt Practices Act Clearinghouse: Total and Average Sanctions*, FCPA.STANFORD.EDU, http://fcpa.stanford.edu/chart-penalties.html (last visited Apr. 8, 2019) [hereinafter STANFORD FCPA STATISTICS] (showing also that the average sanctions have increased exponentially in the last few years, settling at $142 million in 2018).

16. SEC AB InBev Press Release, *supra* note 7.

17. Christine Liu, India's Whistleblower Protection Act - An Important Step, But Not Enough, HARV. U. CTR. FOR ETHICS (June 5, 2014), https://ethics.harvard.edu/blog/indias-whistleblower-protection-act-important-step-not-enough.

18. Whistle Blower Protection Act, 2011, No. 17, Acts of Parliament, 2014 (India) (limiting whistleblower protections to disclosures that relate only to instances of willful misuse of power or willful misuse of discretion by a public servant).

19. *Id.*

20. *See* Liu, *supra* note 17; *see also* Madhu Sivaram Muttathil, *An Indian Perspective on Whistleblowing*, ASS'N OF CORP. COUNS. (Mar. 7, 2018), https://www.accdocket.com/articles/an-indian-perspective-on-whistleblowing.cfm.

OECD Bribery Convention have adopted significant whistleblower protections—and even less actively enforce such protections.[21]

Turning back to the case at hand, any efforts by AB InBev to enforce the whistleblower's contractual obligations to remain silent would have faced almost no legal opposition in Indian courts. Extraterritorial enforcement of the FCPA exposed the confidentiality agreement here, but potential whistleblowers cannot with any regularity be expected to rely on the far-reaching protections of a domestic legal system halfway across the globe.

C. *Proposals for Moving Forward*

As stated by the Jane Norberg, the Acting Chief of the SEC's Office of the Whistleblower, the "[t]hreat of financial punishment for whistleblowing is unacceptable."[22] Here, even the SEC's extraterritorial reach could not have protected the AB InBev whistleblower if financially devastating litigation in the Indian courts arose, highlighting the need for broader legal protections for individuals seeking to expose wrongdoing in countries around the world. Deterrent sanctions, like those imposed by the SEC, provide a much-needed foundation for future whistleblower protections. But those sanctions alone are inadequate because whistleblowers lack necessary safeguards in their own countries.[23]

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21. *See* OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, S. TREATY DOC. NO. 105-43 (Dec. 17, 1997), https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter OECD Convention]; *see also* OECD, *The Role of Whistleblowers and Whistleblower Protection*, *in* THE DETECTION OF FOREIGN BRIBERY 2, 3 (2017) http://www.oecd.org/corruption/anti-bribery/OECD-The-Role-of-Whistleblowers-in-the-Detection-of-Foreign-Bribery.pdf [hereinafter OECD Whistleblowers Report]; *see also* Matthias von Hein, *Whistleblowers in Germany: Loved, Hated, Poorly Protected*, DEUTSCHE WELLE (May 1, 2016), http://www.dw.com/en/whistleblowers-in-germany-loved-hated-poorly-protected/a-19228525 (noting whistleblowers in Germany are often "reviled, discredited, defamed, and they lose their jobs," without legal recourse).

22. Nat'l Whistleblower Ctr., *SEC Settles Charges Against Anheuser-Busch InBev for Illegally Gagging Employee & FCPA Violations*, WHISTLEBLOWERS.ORG (Sept. 28, 2016) https://www.whistleblowers.org/news/sec-settles-charges-against-anheuser-busch-inbev-for-illegally-gagging-employee-fcpa-violations-2/.

23. Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 318-19 (2012) ("[T]he extraordinary potential of the whistleblower reporting mechanism envisioned by the [Dodd Frank] Act likely will not be fully realized . . . because most whistleblowers with 'original information' to share will likely be foreign nationals whose countries are hostile to whistleblowers, and . . . will, as a practical matter, be unprotected from social alienation and/or retaliation in their home countries.") (internal quotation marks omitted).

To frame the recommendations of this paper, Section II discusses the important role whistleblowers have in the active enforcement of anti-bribery laws. Section III describes the various legal obstacles employed against whistleblowers attempting to uncover fraudulent behavior. Finally, Section IV discusses whistleblower protection best practices from a broad collection of legal frameworks and international organizations, and Section V provides practical legal mechanisms for implementing the best practices discussed in the previous section. To best protect whistleblowers, countries should (1) enact and actively enforce extraterritorial anti-retaliation and anti-gagging laws, (2) adopt attorney fees shifting arrangements and invest in legal aid and public funding for whistleblowers, and consider whistleblower rewards for active and indispensable participation in an enforcement action taken against the employer, and (3) introduce a legal framework that enables confidential whistleblowing.

II. The Importance of Whistleblowers in the Anti-Bribery Context

The following section examines the role whistleblowers play in enforcing anti-bribery laws. It discusses their capacity to provide access to otherwise shrouded corporate information, their role in focusing investigators' resources, and their contribution to internal compliance efforts.

A. *Information Gathering*

A corporate insider's access to knowledge often outweighs that of a government investigation task force, whose access is limited to voluntary disclosures and targeted subpoenas.[24] The complexity of corporate structures used to hide illicit payments and bought-for business advantage makes the discovery of foreign bribery an uphill battle for investigators. In the absence of probable cause, and without an avenue to access internal documents, protocols, or the specifics of organizational structures, the prosecutor is left in the dark about foreign bribery. Whistleblowers can provide authorities with the missing link, a rare look into the opaque practices of a corporation.[25] As the OECD

24. *See* Amy Deen Westbrook, *Cash for Your Conscience: Do Whistleblower Incentives Improve Enforcement of The Foreign Corrupt Practices Act?*, 75 WASH. & LEE L. REV. 1097, 1107 (2017) (noting DOJ and SEC investigations are often triggered by information received from corporate insiders).

25. *See* Jeffrey Mathis, *Protecting the Brave: Why Congress Should Amend the Dodd-Frank Act to Better Protect FCPA Whistleblowers*, 49 J. MARSHALL L. REV. 829, 829-830 (2016) (discussing Meng-Lin Liu, a Taiwanese whistleblower who provided documents to the SEC on his employer (Siemens) and its potential FCPA violations; the documents proved vital to the agency's FCPA investigation).

Working Group on Bribery notes, "foreign bribery schemes are often devised behind closed doors and may only involve a small group of participants," highlighting the need for internal access—something that can only be provided by whistleblowers, cooperating witnesses, or confidential informants.[26] In all foreign bribery cases the Working Group analyzed between 1999 and 2017, more than two percent originated from external whistleblower disclosures.[27] Ultimately, any number of significant whistleblower disclosures will assist investigators in gathering information on allegations of foreign bribery and sanctioning those responsible.

B. *Focusing Prosecutor and Investigator Resources*

Whistleblowers serve to alleviate some investigatory costs, allowing a more efficient concentration of manpower and resources on credible allegations of foreign bribery rather than on an indeterminate number of multinationals conducting business in foreign countries.

That said, not all whistleblower tips prove fertile, and investigators are likely to dismiss at the outset information that is "general or vague."[28] Additionally, whistleblowers can be motivated out of greed, revenge, or self-interest in furthering their own careers.[29] The goal then of the investigator is to triage a large set of whistleblower claims into a more workable and credible collection of tips. In the United States, the SEC received over 200 foreign bribery whistleblower allegations in 2018 alone—significantly more than the number of active investigations the agency was able to complete.[30] Nevertheless, the SEC notes that tips from informants and whistleblowers provide an effective means of discovering potential FCPA violations, listing it first and fore

26. OECD, THE DETECTION OF FOREIGN BRIBERY 47 (2017), http://www.oecd.org/corruption/anti-bribery/The-Detection-of-Foreign-Bribery-ENG.pdf.

27. *Id.* at 10.

28. GOV'T ACCOUNTABILITY PROJECT, WHY WHISTLEBLOWERS WAIT: RECOMMENDATIONS TO IMPROVE THE DODD-FRANK LAW'S SEC WHISTLEBLOWER AWARDS PROGRAM 21 (2018), https://www.whistleblower.org/wp-content/uploads/2018/12/GAP_Report_Why_Whistleblowers_Wait.pdf (quoting H. David Kotz, OFFICE OF INSPECTOR GENERAL, U.S. SEC. & EXCH. COMM'N, ASSESSMENT OF THE SEC'S BOUNTY PROGRAM 17 (Mar. 29, 2010), https://www.sec.gov/about/offices/oig/reports/audits/2010/474.pdf).

29. Roomy Khan, *Whistleblower: Warrior, Saboteur Or Snitch?*, FORBES (July 5, 2018), https://www.forbes.com/sites/roomykhan/2018/07/05/whistleblower-warrior-saboteur-or-snitch/#2f35fa1e6362.

30. U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 21 (2018) https://www.sec.gov/sec-2018-annual-report-whistleblower-program.pdf (noting that in FY2018 the SEC received 202 FCPA tips).

most in detailing when it will open an investigation.[31] Mary Jo White, the SEC Chair from 2013 to 2017 acknowledged that SEC whistleblower protections had facilitated the disclosure of significant and valuable tips, of considerable importance to the agency in its investigative capacity.[32]

A simple example provides great insight into the potential assistance whistleblowers can provide investigators. In 2015, a whistleblower-informant pointed prosecutors and investigators in the direction of Transport Logistics International (TLI), exposing its effort to bribe a foreign executive of a Russian state-owned-entity.[33] The firm specialized in nuclear fuel transport and the foreign official had directly asked the whistleblower to pay and launder bribes.[34] The information received by the FBI allowed it to open an investigation and discover additional bribery payments, resulting in a Deferred Prosecution Agreement with the Department of Justice and a sanction of over two million dollars.[35] The investigation of TLI took over three years, but with the help of a whistleblower, the investigators knew exactly where to look.

Whistleblowers, then, "are often credited with reducing regulatory costs, as agencies effectively deputize the public to investigate company practices,"[36] easing some of the burden placed on the authorities to address corruption effectively and efficiently.

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31. CRIMINAL DIV. OF U.S. DEP'T OF JUSTICE & ENF'T DIV. OF U.S. SEC. & EXCH. COMM'N, FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 53 (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf [hereinafter FCPA RESOURCE GUIDE]; *see also* Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 777 (2018) (noting that the whistleblower framework works principally by "enlisting whistleblowers to 'assist the Government [in] identify[ing] and prosecut[ing] persons who have violated securities laws'" (quoting S. REP. NO. 111-176, at 110 (2010)).

32. Robb Adkins & Benjamin Kimberley, *The Globalization of Anti-Corruption Enforcement: Recent Trends and Developments*, *in* INTERNATIONAL WHITE COLLAR ENFORCEMENT: TOP ATTORNEYS ON PREVENTATIVE MEASURES, REGULATORY COMPLIANCE, AND LITIGATION *7 (2014 ed.) [hereinafter Adkins & Kimberley] (noting that the SEC Chair said, "[o]ur whistleblower program already has had a big impact on our investigations by providing us with high quality, meaningful tips.") (internal citation omitted); *see also* Westbrook, *supra* note 24, at 1161 (noting "then-SEC FCPA Unit Chief Kara Brockmeyer cited whistleblower tips and international cooperation as the primary sources of FCPA cases and credited both with the record FCPA enforcement of 2016").

33. OECD Whistleblowers Report, *supra* note 21, at 3.

34. *Id.*

35. *See* Press Release, U.S. Dep't of Justice, Transport Logistics International Inc. Agrees to Pay $2 Million Penalty to Resolve Foreign Bribery Case (Mar. 13, 2018), https://www.justice.gov/opa/pr/transport-logistics-international-inc-agrees-pay-2-million-penalty-resolve-foreign-bribery (indicating the fine was well below the FCPA sanctioning guidelines because the company could not afford the $20 million penalty and invoked financial hardship as a sentencing factor).

36. *See* Westbrook, *supra* note 24, at 1106.

C. *Encouraging Compliance*

The increased likelihood that anti-bribery law violations are discovered by the authorities increases the costs associated with committing them,[37] particularly in an area of the law well known for its monumental sanctions.[38] The ever-present potential for whistleblower disclosures can drive internal compliance changes—discouraging bribery at the outset.[39] After all, "[a] strong compliance program—including robust accounting controls—can be a company's best defense to both limiting FCPA exposure and defending against asserted violations."[40] Therefore, whistleblowers serve both to empower anti-bribery investigators and to encourage internal change, helping to eradicate foreign bribery. But whistleblower disclosures can come at a great personal cost to the whistleblowers themselves.

III. STRATEGIES EMPLOYED TO SILENCE WHISTLEBLOWERS

The transparency and compliance benefits whistleblowers offer the public are largely detrimental to the short-term financial interests of the corporations for which they work or worked, placing a potential whistleblower in a precarious situation. With an increased emphasis on anti-bribery enforcement actions across the globe,[41] companies are motivated to be more aggressive in discouraging employees from disclosing corrupt conduct.[42] Particularly common in these cases are

37. *See* Claire Sylvia & Emily Stabile, *Rethinking Compliance: The Role of Whistleblowers*, 84 U. CIN. L. REV. 451, 462 (2016).

38. *See, e.g.*, SHEARMAN FCPA DIGEST, *supra* note 10, at 48 (noting that the combined monetary penalty for Petrobras to resolve anti-bribery charges in both Brazil and the United States amounted to almost $1.8 billion, of which nearly $700 million went to Brazil's Ministerio Publico Federal).

39. Westbrook, *supra* note 24, at 1106 (noting the specter of whistleblowers provides deterrence and motivates legal compliance).

40. *See* Adkins & Kimberley, *supra* note 32, at *5.

41. *See* STANFORD FCPA STATISTICS, *supra* note 15; *see also* TRANSPARENCY INT'L U.K., SUBMISSION OF WRITTEN EVIDENCE TO THE SELECT COMMITTEE ON THE BRIBERY ACT 2010 (2018), https://www.transparency.org.uk/wp-content/plugins/download-attachments/includes/download.php?id=7701 (noting that as of 2015 the United Kingdom is an "active enforcer" of its Bribery Act); *see also* Heidi Frostestad Kuehl, *The "Fight Song" of International Anti-Bribery Norms and Enforcement: The OECD Convention Implementation's Recent Triumphs and Tragedies*, 40 U. PA. J. INT'L L. 465, 479 (2019) (noting Germany, Italy, South Korea, and the United States are highly active enforcers of anti-bribery laws).

42. Thomas & Devine, *supra* note 4.

retaliatory actions in the course of employment that discharge, demote, suspend, threaten, or harass the whistleblower.[43]

Employment-focused threats for revealing private-sector wrongdoing can be accompanied by an unbearable financial and reputational burden on any disclosure of confidential information, stemming from a contractual obligation to stay silent and keep confidential documents out of the public eye.[44] These obligations fit broadly into four categories: (1) a requirement to report internally any misconduct prior to alerting any external authority, (2) the waiver of any monetary reward for whistleblower, (3) confidentiality agreements that chill the employee's future disclosures in fear of being sued ("gag clauses"), and (4) non-disparagement provisions that bar negative communications about the company with government agencies.[45] All of these provisions, and their widespread use, give rise to a growing trend of corporations seeking to silence whistleblowers and prevent external reporting of misconduct.[46] Further, and perhaps more damaging than the psychological barrier to reporting, whistleblowers have been detained or held criminally liable for disclosing corporate information.[47] Posing yet another risk for those individuals, these criminal sanctions threaten more than just financial ruin. Taken altogether, the tactics described here are representative of the problems that international legal scholars have sought to remedy.

IV. WHISTLEBLOWER PROTECTIONS: BEST PRACTICES

Acknowledging the practical significance whistleblowers have for government authorities tasked with investigating foreign bribery, drafters of two international treaties, the OECD Anti-Bribery Convention and the United Nations Convention Against Corruption

43. *See id.; see also* 15 U.S.C. § 78u-6(h)(1)(A) (2018) (section of Dodd-Frank describing the relevant types of retaliation).

44. Jennifer M. Pacella, *Silencing Whistleblowers by Contract*, 55 AM. BUS. L.J. 261, 272-73 (2018).

45. Moberly, Thomas & Zuckerman, *supra* note 5, at 88-89; *see also* Richard Moberly, *Confidentiality and Whistleblowing*, 96 N.C. L. REV. 751, 762 (2018) (noting on occasion that the non-disparagement clauses included unusually large liquidated damages provisions, further limiting whistleblower reporting).

46. Pacella, *supra* note 44, at 270-71; *see also* Moberly, Thomas & Zuckerman, *supra* note 5, at 765, 767 (noting that in the U.S. Sarbanes-Oxley whistleblower context, broad confidentiality agreements were commonplace; and only 22% of the settlement agreements in the study contained an explicit carve-out for reporting misconduct to the government).

47. *See* OECD Whistleblowers Report, *supra* note 21, at 11 (noting both Russia and Switzerland have treated whistleblowers as criminals); *see also* IBA WHISTLEBLOWER GUIDE, *supra* note 1, at n.37 (noting that whistleblowers in Luxembourg have received criminal convictions for their disclosures).

(UNCAC), sought to impose legally-binding obligations on states to enact whistleblower protections. Those legal duties, laid out in the next section, are somewhat oblique and ill-defined. Thus, to further elucidate the legal obligations, this paper outlines the best practices for whistleblower protection, as set out by a prominent group of non-governmental and inter-governmental organizations.

A. *OECD and UNCAC Obligations to Protect Whistleblowers*

The OECD Anti-Bribery Convention, drafted in the 1990s and opened for signature in 1997, boasts an impressive forty-four party states, including all thirty-six OECD states and eight non-OECD countries.[48] The OECD Working Group on Bribery, in a follow-up Recommendation to the OECD Convention parties, affirms the need for "appropriate measures [] to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions."[49] Similarly, Article 33 of UNCAC obligates states to adopt "appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention."[50] These generalized obligations provide little guidance, however, for effective implementation of whistleblower protections—resulting in the development of a set of best practices by a variety of international organizations.

B. *Other Sources of Best Practices*

The International Bar Association, the OECD Working Group on Bribery, the U.N. Office on Drugs and Crime (UNODC), and Transparency International provide comprehensive guides for

48. *See* OECD, OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD.ORG (Nov. 21, 1997) http://www.oecd.org/corruption/oecdantiberyconvention.htm.

49. OECD Working Grp. on Bribery, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* ¶ IX(iii) (Nov. 26, 2009), http://www.oecd.org/daf/anti-bribery/44176910.pdf.

50. U.N. Office on Drugs and Crime, *United Nations Convention Against Corruption* art. 33, G.A. Res. 58/4, (Oct. 31, 2003), https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

recognizing and harnessing the value of whistleblowers.[51] These guides note first and foremost that deterrence of whistleblowing runs counter to public interest.[52]

The International Bar Association recommendations exclude a subset of whistleblowers, namely those who misuse the process to malign or defame innocent third parties.[53] Additionally, the report seeks to require a standard that the whistleblower "reasonably believe" the information provided is true.[54] These suggestions seek to ameliorate authorities' difficult task of sifting through a large set of tips for worthwhile prosecutorial evidence.[55]

Core to whistleblower best practices is the prohibition of gag clauses in employee contracts; no one should be able to contract out of their right to blow the whistle on corporate misconduct.[56] This strategy seeks, in delineating the whistleblower's preservation of legal rights, to protect him or her from threatening judicial proceedings.[57] This can be done by "carving out a "public interest" exception to their application in cases of whistleblower reporting," and punishing corporate entities that include the provisions in employee contracts—both civilly and criminally.[58] International best practices further seek the establishment of a dedicated avenue for anonymous disclosures to the anti-bribery authorities, including a hot-line or website set up to protect data privacy.[59] Finally, and perhaps most importantly, states are encouraged to implement legal protections against retaliation—introducing criminal

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51. *See* IBA WHISTLEBLOWER GUIDE, *supra* note 1; *see also* G20 ANTI-CORRUPTION WORKING GRP., OECD, STUDY ON WHISTLEBLOWER PROTECTION FRAMEWORKS, COMPENDIUM OF BEST PRACTICES AND GUIDING PRINCIPLES FOR LEGISLATION (2011), https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf [hereinafter OECD 2011 Study]; *see also* UNODC WHISTLEBLOWER GUIDE, *supra* note 6; *see also* TRANSPARENCY INT'L, A BEST PRACTICES GUIDE FOR WHISTLEBLOWING LEGISLATION (2018), https://www.transparency.org/whatwedo/publication/best_practice_guide_for_whistleblowing_legislation [hereinafter TI WHISTLEBLOWER GUIDE].

52. *See, e.g.*, IBA WHISTLEBLOWER GUIDE, *supra* note 1, at 5.

53. *Id.* at 15.

54. *Id.* at 22.

55. *See* TI WHISTLEBLOWER GUIDE, *supra* note 51, at 71 (noting that individuals should not be protected when they make knowingly false disclosures to authorities).

56. IBA WHISTLEBLOWER GUIDE, *supra* note 1, at 17-18; *see also* TI WHISTLEBLOWER GUIDE, *supra* note 51, at 24 ("Loyalty clauses or confidentiality or non-disclosure agreements ('gag orders') should not preclude whistleblowing."); *see also* UNODC WHISTLEBLOWER GUIDE, *supra* note 6, at 16.

57. TI WHISTLEBLOWER GUIDE, *supra* note 51, at 24.

58. IBA WHISTLEBLOWER GUIDE, *supra* note 1, at 6, 17.

59. UNODC WHISTLEBLOWER GUIDE, *supra* note 6, at 50-52 (UNODC releasing its Resource Guide to assist states in meetings its obligations under the UNCAC); *see also* IBA WHISTLEBLOWER GUIDE, *supra* note 1, at 21.

and civil liability for whistleblower retaliation by corporate entities.[60] Taken altogether, these best practices provide a meaningful starting point for reforming domestic whistleblower protections.

V. Implementing Effective Whistleblower Protections

Even with a plethora of legal obligations and international norms aimed at better protecting them, whistleblowers remain vulnerable—much to the detriment of authorities seeking to root out foreign corruption. The best practices, without realistic implementation mechanisms, do little to address the underlying challenges facing whistleblowers, specifically the potential retaliation from their employer and financial distress resulting from "illegal" disclosures and confidentiality lawsuits. Thus, the following suggestions offer modest and realistic legal steps that can be taken to better serve the ultimate objectives of international business practice: transparency and commercial honesty.

A. *Enacting and Actively Enforcing Extraterritorial Whistleblowers Protections*

1. Anti-Retaliation Provisions

The first step in ensuring whistleblowers are able to disclose important information is well outlined in the international best practices: the enactment of whistleblower protections from retaliation. As discussed above, anti-retaliation provisions should offer those individuals subject to vengeful reprisal a mechanism to affirmatively challenge the retaliation in court and offer governmental authorities the power to issue civil and criminal penalties against companies that retaliate against whistleblowers.

These best practices have thus far seen limited success, however, even taking into account the legal and normative pressures under the OECD and UNCAC to enact comprehensive whistleblower provisions.[61] To complicate matters, these adoptions remain a state-by-state legislative decision and are subject to widely divergent enforcement levels.[62] In fact, a variety of countries have not enacted any sincere

60. *See* OECD 2011 Study, *supra* note 51, at 10.

61. OECD, Committing to Effective Whistleblower Protection 11 (2016), https://read.oecd-ilibrary.org/governance/committing-to-effective-whistleblower-protection_9789264252639-en#page1 [hereinafter 2016 OECD Whistleblower Protections] (noting at the time of publication, "at least 27 Parties to the Convention do not provide effective protection to whistleblowers who report foreign bribery in the public or private sector").

62. *Id.* at 104-05.

whistleblower legislation.[63] But that should not discourage advocates; the last decade has seen a vast increase of countries adopting whistleblower protections,[64] and that is a trend worthy of continued pursuit.

Any proposed adoption of anti-retaliation provisions must be met with a similar drive to actively enforce the provisions and afford the framework some legal clout. As laid out in the best practices literature, the dedicated legislation should designate an enforcement body for criminal and civil sanctions.[65] Guidance on how to best implement whistleblower sanctions, and on how best to enforce the provisions, can be found in turning to other legal frameworks and their success. To that end, the OECD Working Group on Bribery actively tracks the enforcement of various whistleblower frameworks, country by country, and the publication of those results in country-specific reports can provide legal observers with the requisite information to model whistleblower enforcement efforts.[66] Thus, as more countries adopt and actively enforce whistleblower protections, there will be normative pressure to assimilate one's domestic legal frameworks and empower individual disclosures.[67]

2. Extraterritorial Gag Clause Prohibitions

Without universal adoption and enforcement of anti-retaliation provisions, legislative changes that may be slow to progress, there are also positive shorter-term prospects. Anti-bribery frameworks can and

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63. *Id.* at 104 (noting that in the realm of private sector whistleblower laws, there exists almost a "legal vacuum").

64. IBA WHISTLEBLOWER GUIDE, *supra* note 1, at 5 (noting, for example, "[r]ecently introduced whistleblower protection schemes are beginning to have an impact in the likes of Holland, Ireland, France and Italy. Australia is on the cusp of landmark reform [and t]he European Commission is set to introduce a proposal for a Union-wide protection").

65. TI WHISTLEBLOWER GUIDE, *supra* note 51, at 28-29 ("[A]ny act of reprisal for, or interference with, a whistleblower's disclosure shall be considered misconduct, and perpetrators of retaliation shall be subject to employment/professional sanctions and civil penalties.").

66. OECD, *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, OECD.ORG, http://www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm (last visited Apr. 23, 2019).

67. Such normative pressure has been utilized with remarkable success in the foreign bribery context before. After nearly two decades during which the United States was the sole enforcer of foreign anti-bribery laws, U.S. officials sought the passage of the OECD Anti-Bribery Convention in 1997. The Convention required the domestic legal systems to enact and enforce anti-bribery legislation. Significantly, within the first three years of its passage, thirty-one of the thirty-five OECD countries had acceded to or ratified the Convention. *See* OECD Convention, *supra* note 21; OECD, RATIFICATION STATUS AS OF MAY 2018, OECD.ORG, http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf (last visited Dec. 4, 2019).

should enforce *extraterritorial* sanctions for contractual clauses that threaten to gag whistleblowers, even before an active investigation is commenced. To illustrate what this may mean practically, the SEC's settlement agreement with KBR, Inc. (KBR) provides a valuable blueprint for legal remedies combatting gag clauses.

In 2015, the SEC levied a $130,000 fine against KBR in an effort to force it to carve out exceptions for whistleblowing in employee confidentiality agreements.[68] KBR had required witnesses to sign a comprehensive confidentiality statement at the start of any interview in an internal investigation.[69] The contract prohibited any discussions regarding the subject matter of the interview without prior authorization from the company's legal department, and threatened disciplinary action for unauthorized disclosures.[70] The SEC noted that there were no allegations that KBR used the provision to undermine any actual whistleblower disclosures, but the mere existence of the clause provided sufficient proof that KBR violated U.S. securities law, specifically legal obligations under Rule 21F-17.[71] Rule 21F-17, enacted in accordance with the Securities Exchange Act of 1934, states that "[n]o person may take any action to impede an individual from communicating directly with the [Securities and Exchange] Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement."[72] The SEC sanction prompted KBR to reconsider any preemptive efforts to silence whistleblowers, and the enforcement of anti-gag laws like Rule 21F-17, even before active anti-bribery proceedings commence, eliminates broadly some of the legal ammunition companies have to threaten potential whistleblowers.

Rule 21F-17 likely does not apply extraterritorially. After all, the U.S. Supreme Court in *Morrison* struck down a remarkably similar argument for a section of the exact same Act that gave the Commission the authority to promulgate Rule 21F-17.[73] Additionally, the 2nd Circuit held that the anti-retaliation provisions of Dodd-Frank do not apply

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68. Kbr, Inc., Release No. 74619, 2015 WL 1456619 (Apr. 1, 2015) (Apr. 1, 2015), https://www.sec.gov/litigation/admin/2015/34-74619.pdf [hereinafter KBR Cease & Desist]; *see also* Richard L. Cassin, *KBR Fined $130,000 for Trying to Gag Whistleblowers*, FCPA BLOG (Apr. 1, 2015), http://www.fcpablog.com/blog/2015/4/1/kbr-fined-130000-for-trying-to-gag-whistleblowers.html.

69. KBR Cease & Desist, *supra* note 68, at 2.

70. *Id.*

71. *Id.* at 3.

72. 17 C.F.R. § 240.21F-17 (2019).

73. *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010) (holding that § 10b-5 of the Securities Exchange Act of 1934, the anti-fraud provision, did not apply extraterritorially, when

extraterritorially to private claims against a whistleblower's former or current employer.[74] These limitations pose a substantial burden on foreign whistleblowers, and although U.S. law presumptively does not "rule the world,"[75] its anti-bribery framework otherwise imposes substantial extraterritorial obligations.

The elimination of gag clauses in employee contracts should be pursued broadly, and this can be extended globally by the SEC with an explicit rule statement addressing the extraterritoriality of Rule 21F-17. After all, the investigation of foreign corruption almost always concerns conduct occurring extraterritorially,[76] and can involve foreign whistleblowers who lack sufficient protections to disclose the misconduct. In countries where whistleblower protections are unavailable, the extraterritorial prohibition, by other countries, of gag clauses in employee contracts will serve as a first line of defense for foreign disclosures. Corporate entities subject to potential sanctions for excluding whistleblower disclosures from confidentiality agreements will certainly be less likely to utilize them. Thus, countries should consider actively enforcing anti-gag laws extraterritorially.

B. *Reducing the Financial Burden on Whistleblowers*

Oft-times legitimately signed confidentiality agreements can also illegally chill an employee's future disclosures to the authorities.[77] The gag clause prohibitions discussed above would declare unenforceable any such contractual provisions that prevent external disclosures for investigative purposes; however, such a declaration would still have to be pursued judicially or administratively.[78] In order to petition for anti-

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the petitioners were unable to show an affirmative indication in the Exchange Act that Congress intended § 10b to be applied to extraterritorial conduct).

74. Liu Meng-Lin v. Siemens AG, 763 F.3d 175 (2d Cir. 2014). Notably, there have been ample articles criticizing the ruling as leaving a "vacuum for foreign whistleblowers." *See, e.g.*, Bradley J. McAllister, *The Impact of the Dodd–Frank Whistleblower Provisions on* FCPA *Enforcement and Modern Corporate Compliance Programs*, 14 BERKELEY BUS. L.J. 45, 61 (2017).

75. Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 115 (2013).

76. SHEARMAN FCPA DIGEST, *supra* note 10, at 47-621 (showing that only 29 of the 207 completed FCPA investigation, current as of January 2019, used the territorial hook of § 78dd-3 to establish jurisdiction over the defendant(s)).

77. *See* Thomas & Devine, *supra* note 4 ("It was no isolated aberration that KBR, one of the nation's largest government contractors, required employees seeking to report fraud to sign internal confidentiality agreements prohibiting them from reporting violations to law enforcement authorities. Rather, it reflects a growing trend of companies trying to silence whistleblowers . . .").

78. *See* Office of the Whistleblower, U.S. Sec. & Exch. Comm'n, *Whistleblower Protections*, SEC. GOV, https://www.sec.gov/whistleblower/retaliation (last visited Dec. 4, 2019) (noting that for

retaliation protections under the law, whistleblower-litigants often face a significant financial burden. Further, retaliatory litigation by the company for whistleblower disclosures can result in similarly intimidating financial distress.[79] Individual employees often have significantly fewer financial means than their employers,[80] and this skewed economic reality may define at the outset a whistleblower's ability to access justice.

1. Public Funding & Legal Aid

Transparency International implores states to establish "[a] fund to provide assistance for legal procedures and support whistleblowers in serious financial need," [81] a proposal likewise supported by the International Bar Association.[82] In Slovakia, for example, all whistleblowers who report criminal or administrative violations and are unable to pay for legal assistance, shall be entitled to receive that legal assistance.[83] Similarly, nongovernmental organizations, like the Transparency Legal Advice Clinic in Ireland, provide free legal advice on protected disclosures with the use of funds provided by their respective states.[84] The provision of these public funds removes part of the financial threat whistleblowers face as they cope with the fallout from their disclosure of corporate misconduct.

2. Attorney Fee Shifting

Furthermore, in anti-retaliation claims the legal framework should provide mechanisms for shifting the attorneys' fees to the employer/retaliator. In the United States, for example, financial remedies in anti-retaliation cases are derived in part from a provision allowing the whistleblower, if they are the prevailing litigant, to recover "compensation for litigation costs, expert witness fees, and reasonable attorneys' fees."[85] South Korea provides a riskier option, compelling the losing

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the enforcement of anti-retaliation laws in the United States, for example, the SEC specifies that "[y]ou may bring an action in federal court . . . [or] the SEC may also bring an enforcement action against a company that violates the anti-retaliation provisions of Dodd-Frank").

79. IBA WHISTLEBLOWER GUIDE, *supra* note 1, at 30 ("Most whistleblowers without legal aid or other forms of financial assistance are unlikely to be able to bring a compensation claim in court either for unlawful termination or discrimination/harassment.").

80. TI WHISTLEBLOWER GUIDE, *supra* note 51, at 52.

81. *Id.* at 50.

82. *See* IBA WHISTLEBLOWER GUIDE, *supra* note 1, at 31 ("For jurisdictions in which legal aid for civil cases is not available or does not include whistleblowers, whistleblower protection frameworks could include protection funds to cover this shortfall.").

83. TI WHISTLEBLOWER GUIDE, *supra* note 51, at 54.

84. OECD Whistleblowers Report, *supra* note 21, at 5, 9 n.6 (noting Transparency International has established Advocacy and Legal Advice Centres in more than 60 countries).

85. 15 U.S.C. § 78u-6(h)(1)(C)(iii) (2010).

party to pay the legal costs of both sides.[86] That fee shifting can emphasize the risk of financial ruin over one's access to justice, convincing whistleblowers the litigation is simply not worth it. In the absence of bad-faith reporting, the attorney fee shifting in whistleblower cases should extend in only one direction: from the well-financed corporation to the individual. Ultimately, this will remove financial pressures from the whistleblower and eliminate a corporation's incentives to initiate frivolous litigation to deter whistleblowing.

3. Whistleblower Rewards & Qui Tam Provisions

Whistleblower rewards can further incentivize external reporting and alleviate some of the main financial concerns linked with the attempted enforcement of employee gag clauses and other retaliatory practices aimed at forcing a whistleblower's hand financially. In this regard, the U.S. whistleblower framework, although described as a patchwork of laws instead of a coherent legal regime, contains a useful mechanism for enlisting corporate whistleblowers.[87] In the aftermath of the 2007-08 sub-prime mortgage crash, the Dodd-Frank Act created the SEC Whistleblower Program, offering, *inter alia*, substantial monetary awards for successful whistleblowers.[88]

The SEC Whistleblower Program sets out specific criteria for the collection of these awards. In the context of the United States, the whistleblower must provide original information to the SEC that leads to a successful administrative or judicial enforcement action with sanctions in excess of one million dollars.[89] Recent case law has limited the definition of a whistleblower under the SEC program to only those that

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86. *See* Sang Beck Kim, *Dangling the Carrot, Sharpening the Stick: How an Amnesty Program and Qui Tam Actions Could Strengthen Korea's Anti-Corruption Efforts*, 36 NW. J. INT'L L. & BUS. 235, 263 (2016) (noting also that "contingency fee arrangements with plaintiffs' attorneys are permitted and frequently utilized in Korea," alleviating only some concerns with the risk of legal fee shifting); *see also* INT'L BAR ASS'N, INTERNATIONAL PRINCIPLES ON CONDUCT FOR THE LEGAL PROFESSION 32-33 (2011), https://www.ibanet.org/Document/Default.aspx?DocumentUid=1730FC33-6D70-4469-9B9D-8A12C319468C (noting that contingency fee arrangements are prohibited as a matter of public policy in certain jurisdictions).

87. Westbrook, *supra* note 24, at 1118 (noting the U.S. legal system affords protections under a variety of different whistleblower regimes, ranging from the False Claims Act, the Civil Service Reform Act of 1978, the Whistleblower Protection Act of 1989, and a diverse set of securities laws including Sarbanes-Oxley and Dodd-Frank).

88. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *see also* 15 U.S.C. § 78u-6(h)(1)(C) (allowing recovery of twice the amount of back pay and a grant of litigation and attorneys' costs for whistleblower actions).

89. 15 U.S.C. § 78u-6(c)(2)(A)-(D) (requiring the whistleblower fulfil a set of additional criteria; for example, not being an employee of a regulatory agency, not having discovered the

report misconduct externally to the SEC, subverting internal compliance checks and protocols.[90] Nevertheless, if all of the additional eligibility criteria are met, the SEC must then compensate a whistleblower based on a percentage of the civil penalties assessed against their current or former employer. Provided there is an eligible whistleblower, or even multiple, the aggregate amount of the awards in any given case must be at least ten percent of the monetary sanctions imposed and cannot exceed thirty percent.[91] The actual percentage is determined by legal staff in the SEC Office of the Whistleblower based on a number of factors that weigh both in favor of and against higher award percentages.[92]

The opportunity to receive financial compensation for disclosure of corporate misconduct prompted a flood of new whistleblower tips, leading to an almost 1000% increase in tips from 2011 to 2012.[93] Not all of these tips led to successful enforcement actions, but since the program's inception the SEC has issued awards of over $326 million to fifty-nine individual whistleblowers—awards that can only be given if the resulting enforcement action was successful.[94] This increase in tips has bolstered the capacity of the foreign bribery investigators and this model can be applied well in other countries seeking to limit whistleblower gagging—because it serves to reduce the financial distress whistleblowers face over the course of their attempted disclosures. However, the usefulness of financial rewards depends largely on the cultural context surrounding the country's whistleblower framework.[95] To achieve any measure of success, the whistleblower awards must be

fraud in an audit required by federal law, or being convicted of a criminal violation in relation to the information disclosed to the SEC).

90. *See* Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 778 (2018).

91. 15 U.S.C. § 78u-6(b)(1) (noting the percentage only applies to the portion of the sanction that is collected rather than the whole sum).

92. *See* 17 C.F.R. § 240.21F-6. The positive factors include the significance of the information provided to the investigators, including the degree to which that information supported the SEC's related legal actions, as well as the degree of additional assistance the whistleblower provided, and the law enforcement interest in penalizing the misconduct the whistleblower disclosed. On the other hand, the whistleblower's culpability, any unreasonable delay in reporting, or an interference with internal compliance programs will decrease the percentage of the award allotted to the whistleblower.

93. *See* U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 23, 29 (2017), https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf (noting also that the SEC paid out nearly $50 million to whistleblowers in 2017 alone).

94. *See* U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 16 (2018), https://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf.

95. TI WHISTLEBLOWER GUIDE, *supra* note 51, at 56.

implemented with meaningful standards and in the context of a wider whistleblower protection framework.

There are a number of important elements indicative of a successful whistleblower incentive program. Notably, as is the case with the SEC Whistleblower Program, an incentive program as described here must keep confidential the identity of the whistleblower—an issue discussed further in the next section. Further, any whistleblower incentive program must be tied to stringent and clear eligibility standards for what qualifies the whistleblower for a monetary reward. Additionally, the program should exempt those involved in the bribery alleged from reaping any of the monetary benefits of the whistleblower program—ensuring whistleblowers cannot profit from their own criminal conduct.

In conjunction with the use of whistleblower awards for accessing valuable insider information, a complementary proposal has been raised by Professor Julie O'Sullivan. In her seminal article, she argues for the introduction of a *qui tam* provision for the private enforcement of whistleblower rights, a remedy that mirrors individuals' rights under the U.S. False Claims Act.[96] The False Claims Act *qui tam* provision allows private citizens to bring suits as "relators" on behalf of the U.S. government for fraud against the government, as long as the claimants are able to provide non-publicly disclosed information.[97] The case is then left under seal for sixty days as the government decides how to proceed—whether to take over the case or leave the claimant to litigate by themselves.[98] These *qui tam* cases can provide participants significant incentives. Whistleblower rewards for such cases vary between ten to thirty percent of the government's total recovery, while the whistleblower's attorneys receive a combination of court-awarded attorneys' fees and a contingent fee based on prior negotiations with the client.[99]

Private justice lawsuits by whistleblowers with intimate knowledge of corporate misconduct will bolster governmental enforcement in the eradication of foreign corruption because it will result in an increase of substantiated claims, leaving the process of sifting through whistleblower tips to the private bar.[100] The financial incentives associated with *qui tam* actions will incentivize members of the plaintiff's bar to

96. Julie Rose O'Sullivan, *"Private Justice" and FCPA Enforcement: Should the SEC Whistleblower Program Include a Qui Tam Provision?*, 53 AM. CRIM. L. REV. 67 (2016).

97. *Id.* at 70.

98. *Id.* at 71; *see also* 31 U.S.C. § 3730(b)(2) (2018) ("The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.").

99. O'Sullivan, *supra* note 96, at 73, 104.

100. *Id.* at 67-68.

effectively screen and represent whistleblowers.[101] This representation will vastly improve whistleblower access to the legal system's protections and empower governmental claims against the corporate entity for breaking the law. Importantly, it does so only for those whistleblowers that have colorable claims of misconduct, as frivolous claims provide little upside for the attorneys—leaving the claim sifting to the private bar rather than the public agencies tasked with investigating corporate misconduct and foreign bribery.[102]

C. *Creating Mechanisms for Confidential Whistleblowing*

The fear of retaliation, particularly for disclosures in a country without effective and comprehensive whistleblower protections, can be limited with the use of confidential whistleblowing.[103] Shrouding a whistleblower's identity can lower risks for the whistleblower's physical safety and preempt significant potential employee retaliation—because the employer will not know who disclosed the harmful information.[104] There are multiple considerations at play here, namely an obligation to maintain the anonymity of a whistleblower for that whistleblower's safety, and the right of the accused to know the identity of their accuser.[105] Precisely for the second consideration, anonymous reporting is illegal is some countries.[106]

Herein lies the important distinction between anonymous reporting and confidential reporting. Anonymous reporting is done by individuals whose identities are not known to either the corporation or the authorities, while confidential reporting is done by individuals known to the authorities but whose identities are not reported as part of the investigation.

Anonymity may result in incomplete investigations, in which the authorities are unable to follow up on important leads or even take action where a disclosure might not have sufficient information.[107] Confidential disclosures, on the other hand, allow anti-bribery authorities to follow-up on valuable information and ensure the veracity of the disclosure is not

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101. *Id.* at 108 ("[V]iewed from the perspective of properly incentivizing counsel to weed out the gems from the 'noise'—a critical issue given the mass of tips and limits on governmental resources—a *qui tam* mechanism may well be necessary to make the SEC Program effective.").

102. *Id.* at 115.

103. TI WHISTLEBLOWER GUIDE, *supra* note 51, at 18-19.

104. *Id.*

105. 2016 OECD WHISTLEBLOWER PROTECTIONS, *supra* note 61, at 65.

106. *See* WORLD LAW GRP., GLOBAL GUIDE TO WHISTLEBLOWING PROGRAMS 7, 79, 142, 166 (2016), https://www.theworldlawgroup.com/knowledge-center (noting that in Australia, India, Portugal, and Spain, anonymous whistleblowing is categorically disallowed).

107. TI WHISTLEBLOWER GUIDE, *supra* note 51, at 20.

tainted by improper motives.[108] They will further blunt any employer's attempt to require, as discussed in Section III, internal disclosure of any misconduct to the legal department prior to contacting anti-bribery authorities.[109] The ability to decide at a later point in the investigation or legal proceeding to disclose the identity of the whistleblower, if necessary "in the public interest or is required by law," may also mitigate some concerns with the illegality of anonymous reporting in a number of countries.[110]

Setting up a mechanism for confidential disclosures, with adequate public education describing the potential steps authorities can take,[111] will ultimately facilitate disclosure where an individual does not trust its corporate employer or the ability of the whistleblower framework to protect them. Thus, only with a commitment to confidentiality will a legal framework enacted in accordance with best practices be able to effectively strengthen a government's anti-bribery enforcement efforts.

VI. Conclusion

Vexatious litigation, gag clauses, and employment retaliation can threaten to overwhelm potential whistleblowers, placing an unreasonable financial and reputational burden on corporate insiders to stay silent. These unnecessary barriers to justice can best be addressed by taking three complementary steps. First, in accordance with international best practices, countries should enact and actively enforce anti-retaliation provisions. This step includes the extraterritorial sanctioning, both civilly and criminally, of the use of gag clauses in employee contracts. Second, to reduce the financial burden on whistleblowers, countries should set up public funding and subsidize legal aid for whistleblowers, consider a mechanism for attorney fee shifting to cover whistleblowers' mounting legal fees, and introduce whistleblower rewards. Finally, countries should adopt a mechanism for confidential whistleblowing, keeping the identity of the whistleblower out of the grasp of companies that may want to act on that information. These changes will, together, serve to better protect whistleblowers, ultimately limiting the pressures against disclosing misconduct and empowering authorities to conduct full and fair investigations.

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108. IBA Whistleblower Guide, *supra* note 1, at 24.

109. Moberly, Thomas & Zuckerman, *supra* note 5 at 88-89; *see also* Thomas & Devine, *supra* note 4.

110. 2016 OECD Whistleblower Protections, *supra* note 61, at 65.

111. *See, e.g.*, Huis Voor Klokkenluiders, *Advies Bij Werkgerelateerde Misstand*, HUISVOORKLOKKENLUIDERS.NL https://www.huisvoorklokkenluiders.nl/onderzoek-naar-een-misstand (last visited Apr. 23, 2019) (providing information for whistleblowers in the Netherlands).