
Democratizing the Global Fight Against Corruption: The Impact of the Dodd-Frank Whistleblower Bounty on the FCPA

MARK V. VLASIC AND PETER ATLEE

I. INTRODUCTION

In many ways, the global fight against corruption has been fought largely by governments and international organizations. Globalization has made corruption increasingly easy and the fight against it increasingly challenging and expensive. The United States is seeking to spread some of those costs by convincing private citizens to get involved in the fight. Previously, private parties had little incentive for joining the fight—and, actually, a large incentive for staying out of it. But recent legislation impacting the U.S. Foreign Corrupt Practices Act (FCPA) has changed all of that and has introduced a potential solution to the collective action problem that may revolutionize the fight against corruption.

This article will argue that, through the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), the United States has provided a model legal framework for expanding state resources in the

Mark V. Vlasic is an adjunct professor of law at Georgetown University Law Center, a senior fellow at Georgetown's Institute for Law, Science & Global Security, and leads the international practice at Madison Law & Strategy Group PLLC. Peter Atlee (B.A., Delaware, J.D., Georgetown) is a graduate of Georgetown University Law Center.

fight against global corruption by solving the collective action problem and incentivizing individual participation in a realm that has traditionally been the exclusive purview of state actors. After briefly describing the state of global corruption and the whistleblower provisions in the Dodd-Frank legislation, the article will explain how adding whistleblower incentives solves the collective action problem and alters the balance of the public choice theory.

The Scale of the Corruption Challenge

The scale of global corruption is huge. According to the World Bank, USD 20 to USD 40 billion are stolen from developing countries every year.¹ Two recent high-profile cases help to illustrate both the scope of global corruption and the toll that it exacts on the developing world. They may also hopefully illustrate the progress that private involvement will bring to the fight.

In the waning months of 2011, Colonel Mu'ammar Qadhafi, long-time leader of Libya, died at the hands of Libyan militants in a revolution sparked by the so-called "Arab Spring." His death, which was captured on a mobile phone camera, was brutal and bloody, as if part of a national catharsis. After his fall from power, there were innumerable questions—about forming a new government and about whether different factions of the Libyan rebels could coalesce and govern effectively. But for all of the fundamental questions about Libya's future, the transitional government

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quickly turned its attention to the one thing everyone could agree on—Qadhafi's fortune.²

entourage.⁵ Those acts immobilized approximately USD 37 billion in the United States and another USD 30 billion throughout Europe.⁶

During his forty-two years as the country's eccentric and despotic ruler, Qadhafi allegedly embezzled, stole, and otherwise illicitly acquired as much as USD 200 billion in assets³—which would amount to USD 30,000 per Libyan citizen.⁴ When the Libyan Revolution began in 2011, the United States and most of Europe took swift action, freezing the foreign assets of Qadhafi and twenty-six members of his

The United States and the European Union both promised to return the assets to the transitional government, and, as of October 2011, the United Nations had authorized the release of USD 1.5 billion.⁷ But during his four decades in power, Qadhafi became adept at hiding his fortune;⁸ so it is likely that there are millions or billions more to be found, and even more likely that the process of finding and recovering his assets will be daunting.

In August 2010, fourteen months before Qadhafi's fall another ex-African dictator, Charles Taylor, former President of Liberia, made headlines around the world when supermodel Naomi Campbell was summoned to testify at his Hague trial.⁹ Taylor was on trial at the Special Court for Sierra Leone on eleven charges of war crimes, crimes against humanity, terrorism, rape, sex slavery, and using child soldiers.¹⁰ Some estimate that the number of his victims ranges in the hundreds of thousands, and one former death squad commander testified that Taylor ordered him to cannibalize dead enemies.¹¹ Most of the money supposedly used to finance these atrocities came from plundering state resources and trading in blood diamonds.¹²

Taylor served only six years as Liberia's president, but had allegedly been stealing assets since the 1980s.¹³ It has been reported that between 1989 and 2003, Taylor acquired up to USD 3 billion in illicit assets—much of it coming from pocketed tax payments and bribes.¹⁴ One UN official estimates that up to 84 percent of the money from the Liberian timber industry ended up in Taylor's pocket during his presidency.¹⁵

Unfortunately, by the time of his indictment at The Hague, most of Taylor's accounts had been drained and his assets hidden. The UN set up a panel to probe the subject of his hidden wealth,¹⁶ and investigators have been searching from shell corporations and Swiss banks to West African diamond mines and under Liberian porches for signs of the assets.¹⁷ Taylor's assets have been frozen, but much of his fortune remains hidden.¹⁸

Global Efforts to Fight Corruption

Stories like Qadhafi's and Taylor's, though extreme, are unfortunately common and have led countries, intergovernmental, and international organizations to expend great amounts of time and treasure to help prevent them from happening again. The United Nations Convention against Corruption (UNCAC) obliges signatory governments to return illicit assets to their rightful owners,¹⁹ and to their credit, governments do work together to freeze, find, and return assets stolen by corrupt officials.²⁰

Taking international cooperation to a new level, World Bank President Robert Zoellick and UN Secretary General Ban Ki-moon partnered in 2007

to launch the Stolen Asset Recovery Initiative, which works with developing countries and financial centers to prevent money laundering and to help recover the proceeds of grand corruption.²¹ Of course, such efforts exist at multiple levels: many countries have their own bribery laws aimed at national and multinational corporations within their borders, while numerous international organizations and non-governmental organizations, such as INTERPOL, EUROPOL, EUROJUST, and the International Center for Asset Recovery (ICAR), maintain anticorruption initiatives and programs.

A New, Unique American Effort to Fight Corruption

While international efforts to fight corruption are at work in every corner of the world, the United States has been particularly diligent in prosecuting the global fight against corruption via its famous – or infamous (depending on who you are) – FCPA. But what makes it unique for the purposes of this article, is that this anti-corruption law took new meaning in 2010, when the U.S. Congress passed a novel law that could permanently change the landscape of the fight against global corruption by enlisting the services of private individuals. While the new Dodd-Frank legislation made headlines throughout the United States when passed, few news outlets highlighted what may become its lasting legacy—democratizing the global fight against corruption. That is because buried in the Dodd-Frank legislation is language that effectively amends the FCPA and allows for monetary rewards to individual whistleblowers for tipping off the U.S. government to bribery of foreign officials. In other words, for the first time, private citizens will have a true and tangible financial stake in the global fight against corruption.

II. FIGHTING GLOBAL CORRUPTION IN THE UNITED STATES

The Current State of Global Corruption

Corruption in the public and private sectors has been a reality of modern life in nearly every country. Often, the worst corruption occurs in political parties, the bureaucracy, and the legislature,²² but petty corruption—bribery—is perhaps the most prevalent, with one in four people worldwide reporting having paid a bribe—most often to police to avoid trouble with the authorities or to grease the wheels of justice.²³ According

to reports, bribery is the most widespread in sub-Saharan Africa, where over half of individuals report having paid a bribe.²⁴

Corruption is not going away; indeed, in some places it is increasing. Over half of respondents to a 2010 survey thought that corruption had increased over the past three years, with the greatest increases, interestingly, coming from European Union (73 percent) and North American (67 percent) countries.²⁵

Until recently, though, the fight against global corruption was the sole province of governments, international, and intergovernmental organizations. Many countries have begun building regional anti-corruption coalitions and transparency initiatives,²⁶ and several international organizations have added anti-corruption initiatives.²⁷ But while many individuals believe the media and government are crucial to fighting corruption, they also believe mere government efforts to fight corruption are generally ineffective.²⁸

The Foreign Corrupt Practices Act

In 1977, the United States enacted the FCPA to counteract corrupt behavior by American companies after an SEC investigation revealed illegal foreign payments totaling over USD 300 million.²⁹ But despite the FCPA, corruption continues to rise. Between 1994 and 2001, over 400 companies provided bribes totaling USD 200 billion to over 100 countries.³⁰ Though the pace of corruption has not slowed, the FCPA has played an increasingly important role in deterring it, with recent cases yielding penalties of several hundred million dollars.

The FCPA essentially makes it unlawful for any U.S. person to bribe a foreign official (or candidate for office) to obtain or retain business.³¹ The statute is written and interpreted broadly to cover most people and companies with any connection to the United States and nearly every form of bribery.³² But it exempts payments made to facilitate, expedite, or secure the performance of routine government action,³³ and it provides several affirmative defenses.³⁴

Penalties for violating the FCPA are substantial.³⁵ Corporate violators may be barred from competing in the federal procurement process and may face criminal fines—up to USD 2 million for each violation.³⁶ Individual violators face criminal fines of up to USD 100,000 or five years in prison.³⁷ The government can additionally bring civil suits for up to USD 10,000 per violation,³⁸ and courts have avenues for ensuring that the penalties exceed the gains of bribery.³⁹

The Dodd-Frank Financial Reform Legislation

In July 2010, President Barack Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which implements a series of financial regulatory reforms intended to prevent a recurrence of the late-

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2000s “Great Recession.”⁴⁰ Section 922⁴¹ of Dodd-Frank effectively amended the FCPA by adding monetary incentives to encourage individuals to report bribery of foreign officials.⁴² Thanks to Dodd-Frank, if an individual⁴³ voluntarily provides the government with original information about a violation of the FCPA, and if that information leads to monetary sanctions of USD 1 million or more,⁴⁴ then he shall be awarded 10-30% of the sanctions.⁴⁵ The Securities and Exchange Commission (SEC) has complete discretion over the amount of award and will consider, among other things: the significance of the information, the degree of assistance it provided, and the government’s interest in deterring future violations.⁴⁶

Sensitive to fears of retaliation against those who report abuses by their companies, the legislation strengthens the whistleblower protections in the Sarbanes-Oxley Act of 2002⁴⁷ and allows for anonymous reporting.⁴⁸ The legislation also includes strict confidentiality requirements and reinstatement, twice back pay, and costs of litigation for any whistleblower that experiences retaliatory behavior.⁴⁹

In June 2011, the SEC issued final regulations clarifying several of the legislation’s provisions.⁵⁰ Importantly – and perhaps most worrisome to corporations – the regulations do not require whistleblower-employees to report information through their company’s internal compliance system before disclosing it to the SEC.⁵¹ The regulations do, however, incentivize internal reporting by allowing the SEC to consider the use of such procedures in setting award amounts.⁵²

The amendments have already had an effect on the fight against global corruption, with the quantity and quality of tips increasing in the eighteen months since Dodd-Frank was enacted.⁵³ Thus, it is likely a matter of time before we start reading headlines regarding the first individual to profit for cooperating with the Department of Justice (DOJ) or the SEC on an FCPA matter.

III. CONVINCING AND ALLOWING PRIVATE INDIVIDUALS TO FIGHT CORRUPTION

Plagued by financial scandals and the influence of money in politics, the United States slipped out of Transparency International's top-twenty least corrupt countries in 2010, falling to twenty-second place, behind Canada (6), Barbados (17), and Chile (21).⁵⁴ Nevertheless, FCPA enforcement has recently become a high priority for the federal government. In December 2008 and February 2009, the government secured penalties of USD 800 million and USD 579 million in two cases.⁵⁵ Then, in January 2010, the SEC formed an FCPA Specialty Unit,⁵⁶ and around the same time, the Department of Justice increased its FCPA staff and, perhaps as a demonstration effect, made twenty-two FCPA-related arrests at a Las Vegas trade show.⁵⁷

Eight of the top-ten settlements in FCPA history came in 2010, and eight companies paid a total of USD 1.6 billion in penalties.⁵⁸ The government increased the number of actions it initiated in recent years as well; 2010 saw an 85 percent increase year-on-year in the number of actions.⁵⁹

The Collective Action Problem and the Fight Against Corruption

The changes to the FCPA signify the government's increased focus on the fight against global corruption. By solving the collective action problem, Dodd-Frank provides private individuals with a financial incentive to take action against global corruption. And in so doing, it also mitigates the information inequalities that hamper government efforts—thus expanding the fight against impunity and making it more efficient. It is because Dodd-Frank solves the collective action problem that private individuals are able to get involved in the fight, and it is because individuals are able to get involved in the fight that global corruption may actually start to decrease.

The government's anti-corruption efforts have often been inhibited by opportunity costs and information inequalities; the Dodd-Frank amendments have the potential to ease both. Although many companies willingly cooperate with authorities, FCPA investigations are financially costly,⁶⁰ requiring a serious investment of taxpayer money and man-hours, possibly years before any benefit is reaped. But more importantly, they are economically costly; resources devoted to one investigation cannot be devoted to another. This opportunity cost is a major inhibition on effectively combating global corruption, especially in an era when government resources are stretched to the limit and potential violators know there is a lower risk of being caught.

Anti-corruption efforts have also suffered from information inequalities that make investigations lengthier, more costly, and less likely to succeed. Corporate insiders and employees are the most likely to be aware of FCPA violations but are, for reasons discussed below, the least likely to share that information with the government. Thus, the SEC and DOJ are often forced to initiate costly investigations with incomplete information. This undoubtedly leads to longer, more costly, or unnecessary investigations, or investigations that are stopped prematurely.

The information inequality was exacerbated by the collective action problem, which often effectively prevented individuals from cooperating with the government to fight corruption. For example, consider an employee at a multinational corporation with original information about her employer's FCPA violations.⁶¹ Such an employee would be unlikely to disclose her information to the federal government for fear of serious reprisals. Her employer could fire her, or, if it chooses not to do that, could reassign her into oblivion and encourage her to quit. She could be "black-balled" from her chosen industry and could risk becoming a social pariah as a "snitch."

In contrast to these concentrated costs, the benefits of the employee's actions would be widely disbursed, and she would likely receive little, if any, of the advantages of her actions. To the extent that a reduction in global corruption reduces the costs of doing business, prices will decrease, but those benefits will be disbursed among consumers worldwide. To the extent that a reduction in global corruption reduces the costs of doing business, profits will increase, but those benefits will be disbursed among investors worldwide. If the employee is neither an investor nor a consumer, she will receive essentially none of the benefits of her actions.

The concentrated costs and disbursed benefits of corruption whistleblowing create a strong disincentive for private individuals to cooperate freely with the government. And even if potential whistleblowers would receive a general, societal benefit from decreased corruption, they would still be dissuaded from acting because of the preference to be free-riders and wait for others to act.

But Dodd-Frank takes an unprecedented step to increase the power of the global fight against corruption by concentrating potential benefits and reducing potential costs. The fight against corruption has, until now, been carried out mostly by states and intergovernmental organizations. Dodd-Frank is, therefore, fairly unprecedented because it incentivizes and allows private individuals to contribute, in a very direct, meaningful way, to an area that has traditionally been state-controlled.⁶²

Dodd-Frank takes this unprecedented step not by adding a new avenue for private participation—presumably, private individuals could always have disclosed information to the government—but by adding an incentive that had been lacking. The “new FCPA” effectively counters the collective action problem by both reducing the concentrated costs of taking action and consolidating the expected benefits. Whereas previously, a whistleblower bore the serious financial risk of retaliation, now if things go forward as planned, he or she bears only the social costs. Although the Dodd-Frank protections are not a guarantee against retaliation or of full compensation, the retaliation protections should decrease and disburse the risks of taking action.

In addition, the new FCPA significantly consolidates the benefits that private actors can expect to gain from their work. A whistleblower with valuable information can still expect to gain the disbursed benefits of reduced global corruption that he or she always could, but, additionally, a whistleblower may also expect to receive thousands or millions of dollars for his or her efforts. As described above, recent settlements and penalties have ranged from the hundreds of millions to billions of dollars; a whistleblower receiving 10 to 80 percent of such a sanction will have his risks and costs more than compensated.⁶⁵ Dodd-Frank should, therefore, largely nullify the collective action problem and encourage individual actors to join the fight against global corruption.⁶⁴

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Public Choice Theory and FCPA Lobbying

The increase in FCPA enforcement has led to the formation of a powerful lobby against aspects of the Act. According to reports, the U.S. Chamber of Commerce hopes to reshape its agenda to make changing the FCPA one of its top priorities.⁶⁵ Lobbying by business groups has intensified with claims that the Act is an economic drag that hurts American competitiveness.⁶⁶ Anti-corruption lobby groups have countered that fighting corruption actually decreases the costs of doing business.⁶⁷

By neutralizing the collective action problem, Dodd-Frank may have

also readjusted the balance of costs and benefits in the lobbying process, as described in public choice theory. The costs of anti-corruption legislation are greatly concentrated on multinational corporations, while the benefits are widely disbursed among the global consumer and investor class. Accordingly, businesses may have a strong incentive to lobby the government to reduce the burdens of FCPA compliance, but individual actors may have a weak incentive to take any action to strengthen the FCPA because they will not likely be adequately compensated for their work.

Dodd-Frank has, however, changed the public choice theory balance by providing individuals with a strong, monetary incentive to take action in favor of strong anti-corruption legislation. The stronger and clearer the FCPA is, the more likely whistleblowers are to receive their awards, and the less likely they are to provide ineffective, inefficient tips. The more likely whistleblowers are to provide effective tips and receive adequate compensation, the more likely they are to join the fight against corruption.

By concentrating and increasing the potential benefits of fighting corruption, Dodd-Frank may actually strengthen the anti-corruption lobby, leading to better legislation and a more effective solution to the collective action problem.

CONCLUSION

The global fight against corruption received a significant boost when the United States developed a model for incentivizing private actors to monitor and report abuses. That model has the potential to be modified and implemented in various other countries. The model effectively turns the collective action problem on its head by limiting the potential costs to individual actors and dramatically increasing the potential rewards; it accordingly encourages individuals to take action against global corruption without a cost-benefit determination.⁶⁸

Through Dodd-Frank, the United States has found a way to bring a multitude of reinforcements to the battlefield in the fight against global corruption. Given the recency of the “Arab Spring” and the large sums of assets allegedly stolen by men like Qadhafi and Taylor, these reinforcements should have a substantial opportunity to affect the fight. The regulations have been in effect for less than a year, so, there is no evidence yet of the effectiveness of the United States’ newest weapon in the fight against corruption. Only time will tell how effective private actors can be in a realm traditionally controlled by the state. But due to the amount of money that is at stake, we will be sure to see headlines about whistleblower bounties. ■

ENDNOTES

- 1 Mark V. Vlasic, "The Search for Gaddafi's Assets: How Libya and the Arab Spring have renewed the global fight against corruption," *Huffington Post*, September 8, 2011, <http://www.huffingtonpost.com/mark-v-vlasic/gaddafi-asset-recovery-libya-arab-spring_b_954126.html?view=print&comm_ref=false> (accessed March 22, 2012).
- 2 Ibid.
- 3 According to reports, most of Qadhafi's assets were bank assets, real estate, and corporate investments.
- 4 Paul Richter, "As Libya takes stock, Moammar Kadafi's hidden riches astound," *Los Angeles Times*, October 22, 2011, <<http://articles.latimes.com/2011/oct/21/world/la-fg-kadafi-money-20111022>> (accessed May 14, 2012).
- 5 Ibid.
- 6 Ibid.
- 7 Ibid.
- 8 "The future of Muammar Gaddafi's assets," *Marketplace from American Public Media*, October 20, 2011, <<http://www.marketplace.org/topics/world/future-muammar-gaddafis-assets>> (accessed May 14, 2012).
- 9 Ivy Mungcal, "Ex-Liberian Leader's War Crimes Case Revisited Ahead of Supermodel's Testimony," *Devex*, August 4, 2010, <<http://wardward.wordpress.com/tag/charles-taylor/>>. Campbell allegedly received a blood diamond from Taylor at a party hosted by Nelson Mandela several years ago. See also: Mark Vlasic, "Look who's coming to dinner: A warlord, a president, a model – and a blood diamond?," *Washington Times*, July 30, 2010, <<http://www.washingtontimes.com/news/2010/jul/30/look-whos-coming-to-dinner>> (accessed January 23, 2012).
- 10 All of which stem from his participation in and financing of atrocities committed by the Revolutionary United Front in Sierra Leone. Ibid.
- 11 Doreen Carvajal, "Hunting for Liberia Missing Millions," *The New York Times*, May 30, 2010, <<http://www.nytimes.com/2010/05/31/world/africa/31taylor.html?pagewanted=all>> (accessed May 14, 2012).
- 12 Vlasic, "Look who's coming to dinner."
- 13 Carvajal, "Hunting for Liberia Missing Millions" (Taylor was fired in the 1980s for embezzling state resources).
- 14 Ibid.
- 15 Adolphus Williams, "Special Court Prosecutor on Charles Taylor's Stolen Assets," *Standard Times Press Sierra Leone*, May 13, 2008, <http://www.standardtimespress.org/artman/publish/article_2941.shtml> (accessed January 23, 2012).
- 16 Ibid.
- 17 Carvajal, "Hunting for Liberia Missing Millions."
- 18 Ibid. One of the authors, Professor Vlasic, served as international legal advisor to the Liberia/Charles Taylor asset recovery team, contracted by Liberia to help track down and return Taylor's assets. One strategy is that, by bringing civil cases against Taylor (and potentially his aiders and abettors) in the United States, it can win a substantial judgment, which could be fulfilled even if the entire fortune is not uncovered.
- 19 United Nations Convention against Corruption, UN/RES 55/61, December 4 2000.
- 20 U.S. Department of State, *Fighting Global Corruption: Business Risk Management (2001-2003)*, <http://www.ogc.doc.gov/pdfs/fighting_global_corruption.pdf> (accessed May 14, 2012).
- 21 "Stolen Asset Recovery Initiative—About Us," World Bank, <http://www1.worldbank.org/finance/star_site/about-us.html> (accessed January 15, 2012).

- 22 Global Corruption Barometer (Transparency International: 2010), 8-9. The education system, NGOs, and the military are perceived as having the lowest levels of corruption, generally.
- 23 *Ibid.*, 12-13.
- 24 *Ibid.*, 16-17; 56 percent of Sub-Saharan Africans admit to having paid a bribe.
- 25 *Ibid.*, 5. Although corruption increased most in Western Europe and America, it is expanding globally; 45 percent of respondents thought corruption had increased in Russia and the former Soviet Union, and 57 percent responded similarly for the Middle East and North Africa.
- 26 In 1996, members of the Organization of American States adopted the Inter-American Convention Against Corruption, which commits its members to standardize their criminal anti-corruption laws. Then, in 1997, the Council of Europe's Council of Ministers adopted twenty guiding principles for compliance with the Council's various anti-corruption conventions. Eleven African countries have adopted twenty-five anti-corruption principles as part of the Global Coalition for Africa. And in Asia, the Asia-Pacific Economic Cooperation promotes government transparency and accountability reforms to create better investment climates. Moreover, thirty-seven countries have signed the Organization for Economic and Cultural Development's convention, which requires each country to enact strong anti-corruption legislation. U.S. Department of State, *Fighting Global Corruption: Business Risk Management (2001-2003)*, 23-25, <http://www.ogc.doc.gov/pdfs/fighting_global_competition.pdf> (accessed May 14, 2012).
- 27 *Ibid.* Both the World Bank and the International Monetary Fund (IMF) have stated that corruption impedes economic growth. Both the United Nations and World Trade Organization are actively fighting corruption, the World Bank has standardized procurement documents, and the International Monetary Fund identifies corruption problems as part of its general evaluation of borrowers.
- 28 *Global Corruption Barometer*, 20, 24.
- 29 U.S. Department of Justice, *Foreign Corrupt Practices Act: Antibribery Provisions*, (Washington, DC), <<http://www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf>> [hereinafter, *Lay Manual*]. The statute generally only applies to U.S. persons, but the provisions do apply to foreign corporations and individuals who have certain ties to the United States. For specifics on which foreign entities are covered by the FCPA, see 15 U.S.C. §§ 78dd-1, *et seq.*
- 30 *Fighting Global Corruption*, 23.
- 31 *Lay Manual*; *Foreign Corrupt Practices Act*, U.S. Code 15, §§ 78dd-1, *et seq.*
- 32 *Ibid.*
- 33 U.S. Code 15, §§ 78dd-1(b), (f)(3).
- 34 *Ibid.*, § 78dd-1(c). Bona fide expenditures are defined as including travel and lodging payments either (1) related generally to the promotion of products or services, or (2) related to the execution or performance of a contract with the foreign government.
- 35 *Ibid.*, § 78ff(a).
- 36 *Ibid.*, § 78ff(c)
- 37 *Ibid.*
- 38 *Ibid.*
- 39 The Alternative Fines Act allows increased penalties of up to twice the pecuniary benefit sought by violating the FCPA, and courts can, at their discretion, impose additional fines equaling or exceeding the defendant's pecuniary gain. *Lay Manual*.
- 40 *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Public Law 111-203.

- 41 Section 922 amends the Securities Exchange Act of 1934 and applies specifically to corruption in the securities industry and is most likely to be used in FCPA actions; Section 748, on the other hand, amends the Commodities Exchange Act to provide the same whistleblowing incentives as Section 922.
- 42 *Dodd-Frank*, § 922.
- 43 The legislation and ensuing regulations place some restrictions on which individuals can receive an award for reporting FCPA violations; the largest category of restrictions is on individuals who obtained the original information through an internal investigation they were legally obligated to conduct. The legislation also bars employees of certain governmental agencies and self-regulatory organizations from receiving awards under the new FCPA framework. U.S. Code 15, § 78u-6(c)(2).
- 44 The statutory language includes judgments, settlements, and other forms of sanctions; thus, the government cannot avoid paying awards by settling cases prior to a judgment against the defendant.
- 45 U.S. Code 15, § 78u-6(b)(1).
- 46 *Ibid.*, § 78u-6(c)(1)(B). The Commission is not to consider the balance of the payout fund.
- 47 116 Stat. 745.
- 48 U.S. Code 15, § 78u-6(d)(1)-(2), (h). If an individual wishes, he can provide the Commission with original information anonymously through counsel, though counsel will be required to reveal the client's identity prior to the disbursement of any award.
- 49 *Ibid.*, § 78u-6(h).
- 50 SEC Release No. 34-64545; Federal Register 76, no. 113 (June 2011): 34300-34384; *Code of Federal Regulations*, title 17, parts 240, 249.
- 51 Cravath, Swaine & Moore LLP, "SEC Adopts Dodd-Frank Whistleblower Rules," May 26, 2011, <http://www.cravath.com/files/Uploads/Documents/Publications/3288715_1.pdf> (accessed May 14, 2012).
- 52 *Ibid.* Where an FCPA action leads to multiple whistleblower claimants, the Commission will consider several factors listed in the final regulations to determine the appropriate allocation of the award. SEC Release No. 34-64545; Federal Register 76, no. 113 (June 2011).
- 53 *Ibid.*
- 54 Dave Graham, "U.S. slips to historic low in global corruption index," *Reuters*, October 26, 2010 <<http://www.reuters.com/article/2010/10/26/us-corruption-transparency-idUSTRE69P0X620101026?>> (accessed March 15, 2012).
- 55 "DOJ and SEC will significantly increase FCPA enforcement efforts," *McDermott Will & Emery*, March 11, 2010, <http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/c2bea4e1-2573-4e83-b0bf-8086e0001d96.cfm> (accessed March 15, 2012).
- 56 *Ibid.*
- 57 *Ibid.*
- 58 "2010 Year-End FCPA Update," *Gibson Dunn*, January 3, 2011, <<http://www.gibson-dunn.com/publications/pages/2010Year-EndFCPAUpdate.aspx>> (accessed January 20, 2012).
- 59 *Ibid.*
- 60 There are no statistics available on how much it costs the government to run an FCPA investigation, but there are good statistics suggesting that private corporations running internal investigations spend millions of dollars on them. In 2009, Avon's investigative costs reached USD 35 million, and the company anticipated another USD 95 million in 2010; Team Inc. also spent about USD 6 million on an investigation of just

- USD 50,000 in potentially illegal payments. “Top 10 FCPA Investigations 2010,” *InfoSECIsland*, January 8, 2011, <<http://www.infosecisland.com/blogview/10663-Top-Ten-FCPA-Investigations-of-2010.html>>. These two examples are on the higher end, but they demonstrate the financial demands of conducting FCPA investigations.
- 61 The cost calculation would be similar for individual (rather than corporate) actors, though the potential costs would be more social and less economic; that is, individual actors would likely be less concerned with employment retaliation and potentially more concerned with social retaliation.
- 62 The FCPA still contains no private cause of action, but the recent amendments nevertheless provide a substantial means for private involvement in and influence over state actions and for expanding the strategy to other countries. The United States’ model of solving the collective action problem by greatly increasing the resources available to fighting grand corruption has the potential to be expanded and implemented in other countries. A complete review of the potential for expanding this model into other countries is beyond the scope of this article given the intricacies of international legal systems. Nevertheless, the basic approach of seeking to ease the collective action problem will provide a general strategy for other countries, which can tailor their specific approach to conditions on the ground.
- 63 Interestingly, this model also provides an opportunity for lawyers in the private sector to make a career out of fighting global corruption—and “doing well by doing good.” Lawyers have previously had the opportunity to make a significant living while fighting international impunity through the Alien Tort Statute, but this legislation expands that opportunity into the global fight against corruption.
- 64 The more pressing question, now, may be whether the amendments swing the pendulum of the collective action problem too far—encouraging individuals to report too many violations too often and reducing the effectiveness of internal compliance procedures. If individual awards are not balanced, it could increase the incidence of false positives and drive up costs to consumers as companies attempt to create insurance policies against huge sanctions.
- 65 “Fight brews over U.S. anti-bribery law as fines jump,” *Thompson Reuters*, September 15, 2011, <http://newsandinsight.thomsonreuters.com/Legal/News/2011/09_-_September/Fight_brews_over_U_S__anti-bribery_law_as_fines_jump/> (accessed March 15, 2012).
- 66 *Ibid.*
- 67 *Ibid.*
- 68 Unfortunately though, the rewards also incentivize whistleblowers to take action without much investigation into the truth of their accusations. SEC discretion over the amount of an award and the decision to prosecute or to not prosecute is, therefore, an important check on the power of individuals in fighting global corruption. SEC discretion will allow the federal government to ensure a proper balance between the incentives to take responsible whistleblower action and the incentives to take frivolous whistleblower action on the off-chance of success. SEC discretion is also an important key to preserving effective government control over foreign affairs—which could be negatively affected if individual actors could force embarrassing suits against U.S. allies.