A Positive-Sum Game: Why A *Qui Tam* Provision in the FCPA Would Benefit Both Whistleblowers and Covered Entities

David Levintow[*]

ABSTRACT

In ancient Persia, a judge who accepted a bribe was flayed alive and his successor was required to sit on a chair made from the predecessor's skin, lest he forget the penalty for perverting justice when handing down judgments.[1] *Though we penalize corruption in less grisly fashion today, the seriousness with which it is dealt remains. Bribery of foreign government officials distorts the marketplace, destabilizes governments, and erodes public trust. The Foreign Corrupt Practices Act is the United States' principal statutory scheme to detect, punish and deter these acts. Its passage and enforcement have sparked a nearly global effort to root out bribery of foreign officials. Notwithstanding the progress that has been made, the FCPA can and should be improved. An amendment to the FCPA to include a* qui tam *provision, which allows whistleblowers to bring private suits against companies engaged in misconduct, would address two shortcomings in the law. First, whistleblowers could take advantage of an improved mechanism by which to hold wrongdoers accountable, with all the incentives of the SEC's existing whistleblower program, but a greater likelihood of success. Second, the long-term interests of covered entities would be served by the development of new case law to guide their conduct, decision-making, and potential disclosures. Because domestic bribery statutes have been interpreted by U.S. courts more narrowly than the DOJ and SEC interpret the FCPA, covered entities would also benefit if courts imposed reasonable limits on prosecutorial discretion.*

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[*] *J.D. Expected May 2021, The George Washington University Law School.*

[1] I cannot take credit for knowing this macabre fact offhand. Rather, I stumbled upon it while reading the opinion in *United States v. Terry*, 707 F.3d 607, 612 (6th Cir. 2013) (*citing* Herodotus, *The Histories* 5:25 (A.D. Godley trans., Harvard Univ. Press 1920)).

INTRODUCTION

The Foreign Corrupt Practices Act (FCPA) is the preeminent federal statute addressing bribery of foreign government officials.[2] The first law of its kind, passage of the FCPA aimed to prohibit individuals and businesses from bribing foreign government officials to obtain or retain business. The FCPA has fostered significant international cooperation in enforcement and information sharing and led many other nations to enact similar anti-corruption laws.[3] FCPA enforcement is very active; in the past five years the U.S. Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have levied $10 billion in fines against covered entities and individuals.[4] Seen as a necessary tool to support fair markets in an increasingly globalized economy, the FCPA has proven a potent weapon in the global fight against corruption.

As the federal government's primary weapon to fight corruption in international business, the FCPA has been widely debated, criticized and amended. Commentators have suggested various reforms over the past two decades, and since its initial passage Congress has twice enacted amendments to address the statute's perceived deficiencies.[5] As one would expect given the FCPA's global impact and potential penalties, there is ongoing scrutiny of its implementation.

This Note proposes that this debate include consideration of a *qui tam* provision that rewards whistleblowers in cases where the government successfully recovers funds lost to fraud and corruption. This Note is not the first call for an amendment to the FCPA, nor the first to espouse the propriety of a *qui tam* provision in the context of securities enforcement. However, two important grounds for amendment and inclusion of a *qui tam* provision within the FCPA merit consideration.

First, the Supreme Court's recent ruling in *Digital Realty*[6] is both detrimental to whistleblowers and inconsistent with DOJ and SEC enforcement guidelines. *Digital Realty* held that only the whistleblower who goes first to the SEC is protected under the Dodd-Frank whistleblower provisions. This textually valid interpretation is at odds with DOJ and SEC

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[2] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95–213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78m(b), (d)(1), (g)–(h), 78dd(1)–(3), 78ff (2012)).

[3] For example, the OECD Anti-Bribery Convention, the United Nations Convention Against Corruption (UNCAC), the U.K. Bribery Act, Brazil's Clean Company Act, and France's Loi Sapin II.

[4] Stanford Law Sch., *Foreign Corrupt Practices Act Clearinghouse: A Collaboration with Sullivan & Cromwell*, http://fcpa.stanford.edu/statistics-analytics.html?tab=2.

[5] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107 (1988) (codified as amended at 15 U.S.C. §§ 78dd(1)–(3), 78ff (2012)), amended by International AntiBribery and Fair Competition Act of 1998, Pub. L. No. 105–366, 112 Stat. 3302 (1998) (codified as amended at 15 U.S.C. §§ 78dd(1)–(3), 78ff (2012)).

[6] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 778 (2018).

informal guidance and sentencing guidelines which provide that internal disclosure of misconduct and resultant investigations by corporations are vital and can mitigate potential sanctions for corporate defendants.[7] The *Digital Realty* ruling thus funnels whistleblowers straight to the SEC, undercutting longstanding enforcement guidance that a corporate culture encouraging internal disclosure of misconduct and voluntary self-audits is vital to effective FCPA compliance.

Second, *qui tam* litigation of FCPA claims could provide the additional guidance that covered entities need most. Critics frequently describe FCPA enforcement activity as arbitrary, and corporations often must look to Non-Prosecution Agreements (NPA's) and Deferred Prosecution Agreements (DPA's) for guidance.[8] But with the stakes as high as they are, there is significant risk to covered entities who must rely heavily on non-binding standards and sources to guide corporate conduct. Moreover, FCPA litigation would likely limit the scope of future enforcement. Considering the narrow manner in which courts have interpreted domestic bribery statutes, closer and more regular judicial scrutiny of FCPA enforcement actions could better define the limits of prosecutorial discretion. A *qui tam* provision may not be a panacea to the problem of identifying legal authority under the FCPA, but it is a sensible prescription.

This Note will first discuss the FCPA: its origins, provisions and current state of enforcement. Next, this Note will summarize the whistleblower mechanism currently afforded by the FCPA, as well as the whistleblower mechanism within the False Claims Act (FCA). Then, this Note will provide support for two alternative grounds for an incorporation of the FCA's *qui tam* provision into the FCPA: the realities of a post-*Digital Realty* world and the importance of case law for both regulators and companies. Finally, this Note will conclude by addressing the principal counterarguments and some analytical challenges.

I. THE FCPA

A. *Origins*

[7] U.S. DEP'T OF JUST. AND U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 66 (2nd ed. 2020) (available at https://www.justice.gov/criminal-fraud/file/1292051/download) [hereinafter FCPA Resource Guide].

[8] *See infra* Section III B.

The United States enacted the world's first international anti-bribery statute in 1977.[9] The FCPA can trace much of its roots to the Watergate Scandal,[10] when the SEC discovered that hundreds of corporations used slush funds to make not just illegal campaign contributions in the United States, but also corrupt payments to foreign officials.[11] Passage of the FCPA thus served several purposes: repairing the reputation of U.S. businesses, restoring public confidence in the financial integrity of U.S. companies, and deterring conduct seen as an impediment to the efficient functioning of global markets.[12]

Broadly speaking, the FCPA prohibits the making of improper payments to foreign government officials and imposes strict reporting and recordkeeping requirements on corporations to facilitate enforcement.[13] In 1988, Congress amended the FCPA to add two affirmative defenses: the local law defense and the reasonable and bona fide promotional expense defense.[14] In 1998, after the Organisation for Economic Co-operation and Development (OECD) enacted the Anti-Bribery Convention, the FCPA was again amended to conform to its requirements.[15] These amendments expanded the FCPA's scope to include payments made to secure "any improper advantage;" reach certain foreign persons whose conduct in the United States assists the payment of a foreign bribe; include international organizations within the definition of "foreign official;" add an alternative jurisdictional ground based on nationality; and apply criminal penalties to foreign nationals employed by or acting as agents of U.S. companies.[16]

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[9] Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1, 78dd-3, 78ff, 78m.

[10] While the Watergate Scandal was one catalyst for the FCPA, Congress was at the time already investigating Lockheed in an international bribery scandal separate from Watergate. In 1971, Congress provided Lockheed Corporation with a $250 million loan to prevent bankruptcy and, soon afterwards, discovered that Lockheed had been paying bribes to foreign governments to secure contracts. By the time Congress held hearings to consider the need for international anti-bribery legislation, Lockheed had already disclosed that it had paid bribes to the Netherlands, Japan, and Italy. *See* Andrew B. Spalding, *Unwitting Sanctions: Understanding Antibribery Legislation as Economic Sanctions Against Emerging Markets*, 62 FLA. L. REV. 351, 359-60 (2010); *see also Lockheed Bribery: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs*, 94th Cong. 1 (1975).

[11] *See* S. REP. NO. 95-114, at 2 (1977); H.R. REP. 95-640, at 4 (1977).

[12] *See* S. REP. NO. 95-114, at 3-4 (1977); H.R. REP. No. 95-640, at 4-5 (1977).

[13] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95–213, 91 Stat. 1494.

[14] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107.

[15] International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105–366, 112 Stat. 3302.

[16] *Id.* On November 8, 2019 a British national working for a French company was convicted of one count of conspiracy to violate the FCPA and six counts of violating the FCPA. Having never set foot in the United States, the conviction of Lawrence Hoskins reinforces the global potential of FCPA enforcement. *See* United States v. Hoskins, No. 3:12-cr-00238 (D. Conn. Nov. 8, 2019). Previously, the Second Circuit Court of Appeals had rejected the DOJ's attempt to expand the FCPA's scope, ruling that a non-resident foreign national

B. Structure

1. Anti-Bribery Provisions

The FCPA's anti-bribery provisions prohibit companies and individuals from corruptly making any offer, payment, or promise to pay of any money, gift, or thing of value to a foreign government official for the purpose of obtaining or retaining business.[17] The FCPA does not proscribe every payment to a foreign official, only those that are intended to:

(1) influence a foreign official to act or make a decision in his official capacity, or

(2) induce such an official to perform or refrain from performing some act in violation of his duty, or

(3) secure some wrongful advantage to the payor.[18]

Furthermore, these payments are only criminalized to the extent that they assist (or intend to assist) the payor in efforts to obtain or retain business from the payee.[19] Notwithstanding these textual limitations, the FCPA has often been interpreted broadly.[20] "Things of value" have ranged from the

operating entirely outside the United States could not be liable for FCPA violations under conspiracy theories unless he was directly liable under the statute as an employee, director or "agent" of a U.S. company. The Second Circuit noted that to hold otherwise would be to "transform the FCPA into a law that purports to rule the world." United States v. Hoskins, 902 F.3d 69, 92 (2d Cir. 2018). As a result, the key issue at trial turned on whether Hoskins acted as an agent of the U.S.-based Alstom subsidiary. On February 26, 2020, Hoskins' conviction was overturned on the grounds that the Government had not sufficiently demonstrated that Hoskins was an agent of the US-based subsidiary. United States v. Hoskins, No. 3:12cr238 (JBA), 2020 U.S. Dist. LEXIS 32663, at *24-28 (D. Conn. Feb. 26, 2020). While the government will likely appeal, the fact that Hoskins money laundering convictions were upheld is a reminder that the DOJ has several arrows in its quiver to combat foreign bribery.

[17] 15 U.S.C. §§ 78dd-1 to -3.

[18] United States v. Kay, 359 F.3d 738, 743 (5th Cir. 2004).

[19] *See id.* The Fifth Circuit in *Kay* concluded that bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes, while not *per se* violations of the FCPA, could fall within the purview of the Act because those lower tax payments could help a payor obtain or retain business.

[20] *See* SEC v. Schering-Plough Corp., Litigation Release No. 18740, 82 SEC Docket 3732 (June 9, 2004). In *Schering-Plough*, the SEC alleged that the company violated the FCPA when its subsidiary in Poland made donations to a foundation whose Chairman was heading the Polish Governmental Health Fund. Although this matter was resolved with Schering-Plough paying a penalty for violating the books and records provisions of the FCPA (these donations were not reflected on the company's books), this enforcement action still stands for the proposition that a charitable donation to an organization affiliated with a foreign government official could constitute a "thing of value," albeit a thing of subjective value to the official.

typical cash-stuffed briefcase[21] to the less typical all-expenses paid executive training program,[22] and the provision of internships to relatives of foreign government officials.[23]

2. Internal Records Provisions

The scope of the books and records and internal controls provisions of the FCPA is narrower than the anti-bribery provisions, applying only to publicly held companies with shares traded on a U.S. exchange, although this category also includes numerous foreign companies with shares traded on a U.S. exchange.[24] In essence, these provisions require companies to maintain books and records that fully and accurately reflect their transactions.[25] By way of example, Walmart recently paid $282 million dollars to settle claims that it violated the FCPA's internal controls provisions by not investigating certain "red flag" payments to third party intermediaries.[26]

3. Coverage

The FCPA delineates several different categories of persons over whom the government may exercise jurisdiction.[27] First, the statute applies to any company issuing securities regulated by federal law (an "issuer"), prohibiting them from using interstate commerce in connection with certain types of corrupt payments to foreign officials.[28] Those same prohibitions apply to any "domestic concern,"[29] a broad term that encompasses "any individual who is a citizen, national, or resident of the United States,"[30]

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[21] *See* United States v. Kellogg Brown & Root LLC, Case No. H-09-071 (S.D. Tex. Feb. 6, 2009).
[22] *See* SEC v. UTStarcom, Inc., Case No. CV-09-6094 (JSW) (N.D. Cal. filed Dec. 31, 2009).
[23] JP Morgan Chase & Co., SEC Administrative Proceeding File No. 3-17684 (Nov. 16, 2016), https://www.sec.gov/litigation/admin/2016/34-79335.pdf.
[24] *See* 15 U.S.C. §§ 78m(b)(2)(A)-(B). The statute applies, in relevant part, to "[e]very issuer which has a class of securities registered pursuant to section 12 of this title [15 U.S.C.S. § 78l] and every issuer which is required to file reports pursuant to section 15(d) of this title."
[25] *Id.*
[26] Walmart Inc., SEC Administrative Proceeding File No. 3-19207 (June 20, 2019), https://www.sec.gov/litigation/admin/2019/34-86159.pdf. From 2000-2011, Walmart's subsidiaries in Brazil, China, India, and Mexico paid certain third-party intermediaries without reasonable assurances that those transactions were consistent with the prohibition against making improper payments to government officials. When Walmart learned of these anti-corruption risks, it did not sufficiently investigate the allegations or mitigate the risks.
[27] *See* United States v. Hoskins, 902 F.3d 69, 84-85 (2d Cir. 2018).
[28] 15 U.S.C. § 78dd-1(a).
[29] 15 U.S.C. § 78dd-2(a).
[30] 15 U.S.C. § 78dd-2(h)(1)(A).

wherever that person happens to be in the world. Additionally, the FCPA covers businesses that are organized under state or federal law or who have their principal places of business in the United States.[31]

C. *Enforcement*

The FCPA is both a criminal and civil statute. The DOJ is responsible for criminal enforcement of the FCPA, while the SEC primarily handles civil enforcement.[32] As global anti-corruption efforts have increased in recent years, the DOJ and SEC frequently cooperate with their foreign counterparts to effectuate FCPA enforcement.[33] FCPA enforcement was virtually nonexistent until the early 2000's but has increased dramatically over the past two decades.[34] Although there was some question as to whether these trends would slow under the Trump administration,[35] the past several years have been among the most active for FCPA enforcement. The DOJ and SEC have collectively completed 167 actions since 2017[36] and levied over $10 billion in penalties.[37] While eleven individuals pled guilty to FCPA charges during 2019, and four more were convicted at trial, not a single public company challenged its FCPA charges in court.[38]

There is no private right of action under the FCPA.[39] The only evidence that Congress intended a private right of action is from a statement in the

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[31] *See* 15 U.S.C. § 78dd-2(h)(1)(B).
[32] FCPA Resource Guide at 3-4.
[33] This cooperation occurs not just in the investigation and information sharing context, but also applies to judgments. The DOJ and SEC will often credit penalties that corporate defendants pay to foreign regulatory bodies when determining their financial penalties. For one example, note the terms of the settlement made between Petrobras and U.S. and Brazilian authorities (available at https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-fcpa-violations).
[34] Stanford Law Sch., *Foreign Corrupt Practices Act Clearinghouse: A Collaboration with Sullivan & Cromwell*, http://fcpa.stanford.edu/statistics-analytics.html.
[35] In a 2012 interview with CNBC, Donald Trump derided the FCPA, stating that "every other country goes into these places, and they do what they have to do. It's a horrible law and it should be changed. I mean, we're like the policeman for the world. It's ridiculous." *See* Jim Zarroli, *Trump Used to Disparage an Anti-Bribery Law; Will He Enforce It Now?*, NPR (Nov. 8, 2017), https://www.npr.org/2017/11/08/561059555/trump-used-to-disparage-an-anti-bribery-law-will-he-enforce-it-now. At one point President Trump's top economic advisor indicated that changes to the FCPA may be forthcoming. *See* Tal Axelrod, *Kudlow Says Trump 'Looking At' Reforming Law On Bribing Foreign Officials*, THE HILL (Jan. 17, 2020), https://thehill.com/homenews/administration/478846-kudlow-says-trump-looking-at-reforming-law-on-bribing-foreign.
[36] Through October 30, 2020.
[37] *See* Stanford Law Sch., *Foreign Corrupt Practices Act Clearinghouse: A Collaboration with Sullivan & Cromwell*, http://fcpa.stanford.edu/statistics-analytics.html?tab=1.
[38] Richard L. Cassin, *The Top Three FCPA Stories of 2019*, THE FCPA BLOG (Dec. 30, 2019, 7:18 AM), https://fcpablog.com/2019/12/30/the-top-three-fcpa-stories-of-2019/.
[39] *See, e.g.*, Lamb v. Phillip Morris, Inc., 915 F.2d 1024, 1028-29 (6th Cir. 1990); McLean v. Int'l Harvester Co., 817 F.2d 1214, 1219 (5th Cir. 1987); *see also* Thompson v.

House Committee Report that the "Committee intends that the courts shall recognize a private cause of action based on this legislation . . . on behalf of persons who suffer injury as a result of prohibited corporate bribery."[40] The Senate Report did not contain a similar statement, and there is no evidence of subsequent legislative efforts to amend the language of the FCPA to include a private right of action after it was enacted.[41]

A whistleblower who wishes both to be protected from retaliation and to be rewarded for presenting credible allegations of FCPA violations therefore must use the process established by the SEC's Office of the Whistleblower (OTW). The SEC's OTW, created by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"),[42] seeks to help the agency detect misconduct, punish violators of securities laws, and reward those who come forward with actionable information.[43] The whistleblower program provides relators a share of any administrative or judicial judgment award exceeding $1,000,000.[44] Additionally, the program grants anonymity to whistleblowers,[45] provides anti-retaliation protections,[46] and offers legal recourse for any whistleblower who suffers employer retribution.[47]

A laudable program, the SEC's OTW is not without its own shortcomings. Since its inception, the SEC has received nearly 40,000 tips.[48] Those 40,000 tips have led to only 106 awards to whistleblowers, for roughly a .26% payoff rate.[49] From 2012, the first year for which the SEC has full-year data, to 2020, the number of whistleblower tips received by the SEC has

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Thompson, 484 U.S. 174, 179 (1988) ("In determining whether to infer a private cause of action from a federal statute, our focal point is Congress' intent in enacting the statute. As guides for discerning that intent, we have relied on the four factors set out in Cort v. Ash, 422 U.S. 66, 78 (1975), along with other tools of statutory construction. Our focus on congressional intent does not mean that we require evidence that Members of Congress, in enacting the statute, actually had in mind the creation of a private cause of action . . . The intent of Congress remains the ultimate issue, however, and "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.").

[40] H.R. Rep. No. 95-640, at 10 (1977).

[41] *See* S. Rep. No. 95-114 (1977); *see also* Republic of Iraq v. ABB AG, 768 F.3d 145, 171 (2d Cir. 2014).

[42] *See* 15 U.S.C. § 78u-6 (2012).

[43] For a thorough analysis of the SEC's Whistleblower Program, *see* Victor A. Razon, *Replacing the SEC's Whistleblower Program: The Efficacy of a Qui Tam Framework in Securities Enforcement*, 47 PUB. CONT. L.J. 335 (2018).

[44] 15 U.S.C. § 78u-6(a)(1).

[45] 15 U.S.C. § 78u-6(h)(2)(A).

[46] 15 U.S.C. § 78u-6(h)(1)(A).

[47] 15 U.S.C. § 78u-6(h)(1)(B)(i).

[48] U.S. SEC. & EXCH. COMM'N, 2019 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2020) at 27.

[49] *See id* at 9.

grown by approximately 130%.[50] Since 2016, the SEC has seen a 60% increase in annual tips.[51] Despite this increase in information flows, the annual number of awards to whistleblowers has remained relatively flat.[52] Moreover, the granting of an award is tied to an "administrative or judicial proceeding."[53]

These data and features suggest three unfortunate limitations to the effectiveness of the SEC's Whistleblower Program. First, the program, which offers a very low barrier to entry[54] and the possibility of a significant reward,[55] attracts a plethora of low-quality information.[56] Second, the increasing rate of annual tips coupled with a stagnant rate of awards suggests a problem of enforcement resources. The SEC is constrained in its ability to

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[50] *See id* at 27.

[51] In those four years, the SEC has received at least 850 whistleblower tips alleging violations of the FCPA. *Id.* at 28. The number of awards that have been made to FCPA whistleblowers is not known because ensuring whistleblower confidentiality requires the SEC to redact the name of the enforcement action upon which the award is based. However, the SEC does note that "whistleblowers have assisted the Commission in bringing enforcement cases involving an array of securities violations, including offering frauds, such as Ponzi or Ponzi-like schemes, false or misleading statements in a company's offering memoranda or marketing materials, false pricing information, accounting violations, internal controls violations, *Foreign Corrupt Practices Act (FCPA) violations*, and insider trading among other types of misconduct." *See id.* at 25 (emphasis added).

[52] SEC's OTW awarded 12 individuals in 2016, 12 in 2017, 13 in 2018, and only 8 in 2019. Admittedly, 2020 was a blockbuster year for the Whistleblower Program – the SEC awarded more whistleblowers (39) than in the three prior years combined. Whether the 2020 award rate was an aberration or a sign of things to come remains to be seen. *See* U.S. SEC. & EXCH. COMM'N, 2020 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2020) at 27.

[53] 15 U.S.C. § 78u-6(a)(1). The SEC recently amended its rules to allow for recovery after N/DPA's. Previously, a whistleblower whose information leads a company to enter into an N/DPA with the government was not entitled to an award. As of yet, no whistleblowers have been rewarded in conjunction with an FCPA settlement. *See* SEC Whistleblower Program Proposed Rule (available at https://www.sec.gov/rules/proposed/2018/34-83557.pdf)

[54] Tips may be submitted through an online form (accessible at https://www.sec.gov/whistleblower/submit-a-tip).

[55] In 2018, the SEC announced three awards in a single day totaling $84 million. *See* Press Release, SEC, *SEC Announces Its Largest-Ever Whistleblower Awards* (Mar. 19, 2018), https://www.sec.gov/news/press-release/2018-44.

[56] *See generally* Anthony J. Casey & Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam*, 91 WASH. U. L. REV. 1169 (2014). Casey and Niblett argue quite persuasively that the cost commitment for *qui tam* relators, as compared to SEC OTW whistleblowers, screens out low-quality information while maintaining the incentives for high-quality information and lawsuits, improving both enforcement and deterrence. *See also* Razon, *supra* note 43, at 347 ("The lack of quality information comes as little surprise given the potential for a significant bounty award coupled with strict anonymity and anti-retaliation provisions under the whistleblower program . . . [Individuals] have much to gain and nothing to lose.").

adequately investigate every allegation of wrongdoing.[57] And finally, the FCPA enforcement process, which usually is closed with an NPA or DPA, makes an award to a whistleblower much less likely.

Thus, would-be whistleblowers are right to question whether the incentives and protections promised by Dodd-Frank are somewhat illusory. Another whistleblowing mechanism, one with a similar reward structure and framework of anti-retaliation protections, as well as a higher barrier to entry, is addressed next.

D. An Alternative Model of Enforcement: FCA's Qui Tam

The False Claims Act (FCA) has been well-summarized by commentators and need not be discussed in great detail here.[58] A statutory scheme designed to deter and punish fraud against the federal government,[59] the FCA's origins lie in the widespread fraud perpetrated by unscrupulous government contractors during the Civil War.[60] The main provision of the FCA prohibits any person from presenting "a false or fraudulent claim for payment or approval" to the United States.[61] Two enforcement mechanisms exist to effect this prohibition. First, the United States Attorney General can bring a civil action to remedy violations of § 3729.[62] Second, a private party (the "relator") can bring an action in the name of the United States – the quintessential *qui tam* action.[63]

When a *qui tam* relator files an FCA suit in a federal court, the DOJ can take one of four actions:

> (1) proceed with the action, in which case the action is conducted by the Government;[64]

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[57] *See* Razon, *supra* note 43, at 347 ("An excess of meritless tips may lead the Enforcement Division to overlook meritorious ones because of the volume of information.") The SEC's budget has been increased by only 4% over the past four years (https://www.sec.gov/foia/docs/budgetact.htm).

[58] *See generally* Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381 (2001); John P. Robertson, *The False Claims Act*, 26 ARIZ. ST. L.J. 873 (1994); *The History and Development of Qui Tam,* 1972 WASH. U. L. Q. 81 (1972).

[59] Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948, 951 (5th Cir. 1994).

[60] Wilkins v. St. Louis Hous. Auth., 314 F.3d 927, 933 (8th Cir. 2002).

[61] 31 U.S.C. § 3729(a).

[62] 31 U.S.C. § 3730(a).

[63] 31 U.S.C. § 3730(b); Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 545 U.S. 409, 412 (2005). *Qui Tam* is short for the Latin phrase, *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, roughly translated to "he who brings an action for the king as well as for himself."

[64] 31 U.S.C § 3730(b)(4)(A).

> (2) decline to take over the action, in which case the relator maintains the right to continue the action;[65]
>
> (3) settle the action, even over the relator's objection, if the court determines that the proposed settlement is fair, adequate, and reasonable under all the circumstances;[66] or
>
> (4) dismiss the action notwithstanding the objections of the person initiating the action so long as the person has been notified by the Government and the court has provided the person with an opportunity for a hearing on the motion.[67]

If the DOJ proceeds with the action, the relator receives 15-25% of either the settlement or judgment, depending upon how substantially that person contributed to the prosecution of the action.[68] The FCA also contains an anti-retaliation provision that prohibits any employee, agent, or independent contractor of the company from retaliating against the whistleblower.[69] This provision enables whistleblowers to be made whole should they be "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" as a result of their bringing an action under the FCA.[70]

The fundamental distinction between whistleblowing under the FCA and FCPA is that under the FCA, a relator brings the information to the attention of the government by filing a private *qui tam* action; in the FCPA context, a whistleblower anonymously brings information directly to the SEC.[71] This distinction results in dramatic differences in the quality of information provided by whistleblowers. As mentioned previously, only about .2% of whistleblower complaints to the SEC result in an award.[72] By contrast, the DOJ intervenes in approximately 20% of *qui tam* actions filed under the FCA, and of those, roughly 95% result in settlement or judgement in favor of the United States (and the relator).[73] Thus, about 19% of *qui tam* actions

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[65] 31 U.S.C. § 3730(b)(4)(B).
[66] 31 U.S.C. § 3730(c)(2)(B).
[67] 31 U.S.C. § 3730(c)(2)(A)
[68] 31 U.S.C. § 3730(h).
[69] 31 U.S.C. § 3730(h)(1).
[70] *Id.*
[71] *See* Casey & Niblett, *supra* note 57, at 1185.
[72] That this number might be higher if the SEC had greater resources is not particularly relevant to the analysis. For present purposes, suffice it to say that one whistleblowing mechanism leads to significantly more successful actions.
[73] U.S. DEP'T OF JUST., FRAUD STATISTICS: 1986-2019 (Jan. 9, 2020), https://www.justice.gov/opa/press-release/file/1233201/download.

result in relator awards, compared to the .2% award rate for SEC whistleblowers. This nearly a hundred-fold difference in success rate is perhaps an imperfect comparison given the relative youth of the SEC's whistleblower program, but it implies that a *qui tam* action is generally more meritorious than a complaint to the SEC.

On these grounds alone, several commentators have suggested that the FCA's *qui tam* framework should replace the SEC's Whistleblower Program for purposes of reporting violations of securities laws.[74] However, there are two additional grounds which have yet to receive adequate attention. First, the Supreme Court's decision in *Digital Realty* exacerbates the problem facing whistleblowers by limiting Dodd-Frank's protections to only those whistleblowers who report wrongdoing to the SEC, but not internally to their company.[75] This holding contradicts FCPA enforcement priorities and guidance issued by the DOJ and SEC. Second, *qui tam* litigation in the FCPA context would provide what covered entities need most: binding case law to guide their conduct. These two considerations are addressed below.

II. FCPA REFORM

A. *A Post-Digital Realty World Is Troublesome for Whistleblowers.*

Paul Somers worked as a Vice President of Portfolio Management at Digital Realty, a real estate investment trust, from 2010-2014.[76] While assigned to the firm's Singapore office, Somers alerted senior management on several occasions that his boss, Senior Vice President Kris Kumar, had committed serious misconduct, including hiding seven million dollars in cost overruns on a Hong Kong development project.[77] The alleged misconduct, if true, would violate the internal controls requirements of the Sarbanes-Oxley Act ("SOX").[78]

Somers' suit against Digital Realty alleged that the company violated the anti-retaliation provisions of Dodd-Frank when it terminated his employment in retaliation for his making internal reports of misconduct.[79] Critically, Somers reported these potential SOX violations only to his employer, not to the SEC.[80] Digital Realty filed a motion to dismiss, claiming that Somers was not entitled to Dodd-Frank's whistleblower protections

[74] *See, e.g.*, Razon, *supra* note 43, at 347; Casey & Niblett, *supra* note 57, at 1185.
[75] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 778 (2018).
[76] Somers v. Dig. Realty Tr., Inc., 119 F. Supp. 3d 1088, 1092 (N.D. Cal. 2015).
[77] *Id.*
[78] *Id.*
[79] *Id.* at 1091-92.
[80] *Id.*

since he failed to report the alleged misconduct to the SEC.[81] The District Court denied Digital Realty's motion to dismiss and the Court of Appeals for the Ninth Circuit affirmed, noting that the federal circuits were split on how strictly to interpret the term "whistleblower" within the anti-retaliation provisions of Dodd-Frank.[82]

The anti-retaliation provision in question is found in Section 21F of the Securities and Exchange Act of 1934 and states:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 *et seq.*), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.[83]

Subdivision (iii) references Sarbanes-Oxley's disclosure requirements and protections that bar retaliation against an employee who reports violations to "a person with supervisory authority over the employee."[84] But importantly, the prefatory clause of Section 21F extends these protections only to "whistleblowers."[85] In the definitions section of Dodd-Frank, a whistleblower is defined as a person who provides "information relating to

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[81] *Id.*

[82] *Id.*; Somers v. Dig. Realty Tr., Inc., 850 F.3d 1045, 1045-47 (9th Cir. 2017). In the 2013 case *Asadi v. G.E. Energy (USA), L.L.C.*, the Fifth Circuit interpreted "whistleblower" narrowly, dismissing a plaintiff's action when he had not made a disclosure to the SEC. 720 F.3d 620, 621. Conversely, the Second Circuit, in the 2015 case *Berman v. Neo@Ogilvy LLC*, applied *Chevron* deference to the SEC's regulation, interpreting the provision to extend protections to both those who make disclosures internally and those who make disclosures to the SEC. 801 F.3d 145, 155.

[83] 15 U.S.C. § 78u-6(h)(1)(A).

[84] 18 U.S.C. § 1514A(a). *See also Dig. Realty*, 850 F.3d at 1049.

[85] 15 U.S.C. § 78u-6(b)(1).

a violation of the securities laws to the *Commission*."[86] Interpreting this section strictly, whistleblower protections for an internal disclosure of misconduct therefore extend only to individuals who previously, or simultaneously, reported that misconduct to the SEC.

The Supreme Court found that Dodd-Frank's definition of whistleblower was "unequivocal."[87] In so holding, the Court reinforced the tenet that when a statute includes an explicit definition, courts must follow that definition, "even if it varies from a term's ordinary meaning."[88] The Court reasoned that this strict interpretation was proper because the core objective of Dodd-Frank's whistleblower program was "to motivate people who know of securities law violations to tell the SEC."[89] Somers did not provide information "to the Commission" before his termination, so he was not a "whistleblower" at the time of the alleged retaliation and was therefore precluded from seeking relief under the statute.[90]

This strict reading of § 78u-6(h)(1)(A) arguably misses the forest for the trees. A statutory term can mean different things in different contexts, and the Court should reasonably consider context in determining a term's meaning.[91] Here, subdivision (iii) expressly extends protections to internal disclosures.[92] To interpret those protections as extending only to those who make disclosures to the SEC would, as the Ninth Circuit noted, narrow subdivision (iii) "to the point of absurdity; the only class of employees protected would be those who had reported possible securities violations both internally and to the SEC, when the employer—unaware of the report to the SEC—fires the employee solely on the basis of the employee's internal report."[93]

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[86] 15 U.S.C. § 78u-6(a)(6). (Emphasis added).
[87] Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 777 (2018).
[88] *Id.* at 776-77; *see also* Burgess v. United States, 553 U. S. 124, 130 (2008).
[89] *Dig. Realty*, 138 S. Ct at 777; *see also* S. Rep. No. 111-176, at 38. The Court's reliance on legislative history here was objected to by Justices Thomas, Alito and Gorsuch, although they concurred in the judgment. Their objection here was sensible, as the "core objective" explicated by the Court is not present in the statute. The preamble to Dodd-Frank notes that its purpose is "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system . . . " Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010). One could readily argue that extending whistleblower protections to individuals who report misconduct internally but not to the SEC at the time of retaliation furthers the objective of improving accountability in the financial system. The malleability of legislative history has led one former judge and scholar to describe it as akin to "looking over a crowd and picking out your friends." Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).
[90] *Dig. Realty*, 138 S. Ct. at 778.
[91] *See* King v. Burwell, 135 S. Ct. 2480, 2493 n.3 (2015).
[92] 15 U.S.C. § 78u-6(h)(1)(A)(iii).
[93] *Dig. Realty*, 850 F.3d at 1049.

There is also an element of redundancy to the Court's interpretation. To strictly define "whistleblower" in the prefatory clause renders subdivision (i) superfluous. If a whistleblower is one who provides information to the SEC, and is thus entitled to statutory protections, subdivision (i) adds nothing to that section of the statute. That section, in the Court's reading, effectively states: "one who provides information relating to a violation of the securities laws to the Commission is protected in providing information to the Commission." Conduct implied by one statutory term need not be spelled out again. It is a bedrock maxim of statutory interpretation that courts should give effect, if possible, to all statutory language.[94] Moreover, "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."[95] Courts endeavor to avoid "ascribing to one word a meaning so broad that it is inconsistent with its accompanying words."[96] Accordingly, a statutory word should be defined by the company it keeps.

Putting aside the correctness of the Court's interpretation of § 78u-6(h)(1)(A), their holding also runs counter to the DOJ and SEC's FCPA enforcement priorities and their guidance to covered entities. The DOJ and SEC, in their FCPA Guide, state that a "hallmark" of any effective corporate compliance program is an internal reporting mechanism that includes an "efficient, reliable and properly funded process for investigating" allegations of FCPA violations.[97] The DOJ's Principles of Federal Prosecution of Business Organizations suggest that federal prosecutors consider whether the company made a voluntary and timely disclosure, as well as the relevant evidence provided with that disclosure.[98] Relevant evidence provided with a disclosure implies at least some internal investigating on the part of the organization. Additionally, the U.S. Sentencing Guidelines permit the government to file a motion for a reduced sentence if a defendant corporation's cooperation is sufficient and includes voluntary disclosure of

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[94] *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 174 (2001); *Digital Realty*, 850 F.3d at 1050.
[95] Marx v. Gen. Revenue Corp., 568 U.S. 371, 386 (2013).
[96] *See* Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995). In *Gustafson*, the Court relied on *noscitur a sociis* to interpret the word "communication" in §2(10) of the Securities Act of 1933 to refer to only public communication, rather than all communication, since the word was included on a list with "notice, circular, [and] advertisement," making it apparent that use of the term was intended to cover just public communications. To interpret the term as covering all communications would have made inclusion of "notice, circular, [and] advertisement" redundant. Here too, one could argue that use of the term "whistleblower" immediately preceding a provision describing communication to the SEC counsels against defining the term in a manner that would swallow up the ensuing provision.
[97] FCPA Resource Guide at 66.
[98] U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-28.900 (2015), https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.900.

an offense prior to its discovery.[99] Without adequate whistleblower protections, corporate investigations initiated by internal disclosures are less likely to occur with comparable levels of frequency and accuracy.

An internal investigation is also a significant financial undertaking – one dataset compiled through a joint project by Stanford Law School and Sullivan & Cromwell, LLP indicates that a typical FCPA internal investigation costs in excess of $1 million per month.[100] Simply stated, the federal government wants and needs corporations to do this work for them. Robust corporate internal investigations conserve scarce government resources and inform enforcement decisions.[101] The likelihood of corporations doing this work, which not infrequently is informed by whistleblowers, is starkly diminished after *Digital Realty*.[102]

At bottom, enforcement of the FCPA requires meaningful participation from private actors. The international scope of the law and the conduct it implicates often render government-initiated enforcement actions inadequate. As has been noted by others, government enforcement needs to be complemented by private enforcement.[103] Employees and agents in far-flung locations are integral to the global fight against bribery of foreign officials.

For individual actors to play a role in FCPA enforcement, there must be a framework through which they can identify and report wrongdoing without

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[99] U.S. SENT'G COMM'N, GUIDELINES MANUAL §§ 5K1.1, 5K2.16 (2018)

[100] *See* Stanford Law Sch., *Foreign Corrupt Practices Act Clearinghouse: A Collaboration with Sullivan & Cromwell*, http://fcpa.stanford.edu/statistics-analytics.html?tab=1.

[101] Andrew Weissmann & Alixandra Smith, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act*, U.S. Chamber Institute for Legal Reform at 6 (Oct. 2010) ("From the government's standpoint, it is the best of both worlds. The costs of investigating FCPA violations are borne by the company and any resulting fines or penalties accrue entirely to the government. For businesses, this arrangement means having to expend significant sums on an investigation based solely on allegations of wrongdoing and, if violations are found, without any guarantee that the business will receive cooperation credit for conducting an investigation.").

[102] *See* Jessica Tillipman, *SCOTUS To Whistleblowers: Ignore Your Company, Go Directly To The Government*, THE FCPA BLOG (June 11, 2019, 12:08 PM) ("Individuals are now far less likely to report misconduct exclusively to their internal compliance department because they won't have any protections against retaliation under Dodd-Frank. Indeed, this case practically ensures that individuals will either go directly to the government (and bypass their internal compliance programs completely) or report to the company and government at the same time.").

[103] *See generally* 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). Professor Sullivan considered both the contributions that the SEC whistleblower program and the FCA *qui tam* framework could make to FCPA enforcement but did not reach an ultimate determination as to which "private justice" mechanism was preferable. A justified decision, no doubt, given that the SEC whistleblower program was in very early stages at the time of her writing. The four years since her article was published and the *Digital Realty* decision strongly move the needle towards a *qui tam* mechanism.

fear of retribution or retaliation. There is no doubt that blowing the whistle, particularly on your own company, represents a seismic decision, one that often comes at a tremendous personal and professional cost.[104] Whistleblowers, even if not formally retaliated against, may be ostracized and face difficulty in obtaining subsequent employment.[105] For those reasons, the FCPA whistleblowing framework must provide an incentive to report wrongdoing.[106]

The existing framework is inadequate. The federal government does not have the resources to investigate every cursory allegation of misconduct sent its way, particularly when these allegations necessarily implicate conduct occurring around the world. For that reason, the DOJ and SEC rely on and encourage internal disclosures so that potential corporate targets can handle preliminary investigations.[107] That encouragement is explicitly stated in their guidance to corporations.[108] That encouragement is also implicit in their Principles of Federal Prosecution and Federal Sentencing Guidelines, which provide for more lenient treatment of a corporate defendant that voluntarily discloses its misconduct.

Unfortunately, the viability of internal disclosures was undercut by the Supreme Court's decision in *Digital Realty*. Internal disclosures, post-*Digital Realty*, offer no incentives to whistleblowers, as well as no protection from workplace retaliation. As a practical matter, a whistleblower is unlikely to report misconduct internally and to the SEC simultaneously.[109] A statutory scheme that relies upon credible information provided by private actors cannot succeed if those private actors have no incentive to report misconduct internally, and no protections if they do so.

A *qui tam* provision within the FCPA would alleviate both these problems and provide an effective means for thwarting misconduct.[110] A *qui tam* action provides the same financial incentives to whistleblowers, and its success does not depend entirely on government resources. Relators rely on

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[104] Joe Davidson, *Federal Whistleblowers Would Do It Again, Even After Retaliation And Professional Suicide*, WASH. POST (Oct. 4, 2019), https://www.washingtonpost.com/politics/2019/10/04/federal-whistleblowers-would-do-it-again-even-after-retaliation-professional-suicide/.

[105] *Id.*

[106] Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 96-98 (2007).

[107] *See* FCPA Resource Guide at 66.

[108] *Id.*

[109] Blowing the whistle is onerous enough. It's hard to imagine an employee making an internal disclosure with the caveat: "And I've informed the authorities."

[110] In 2019, the federal government recovered $2.8 billion dollars through the False Claims Act. $2.2 billion of that total was through *qui tam* litigation. *See* CIVIL DIVISION, DEP'T OF JUST., FRAUD STATISTICS – OVERVIEW (2019), https://www.justice.gov/opa/press-release/file/1233201/download.

private counsel for their actions and can pursue claims on their own should the DOJ choose not to intervene. Moreover, an increase in the number of *qui tam* actions would reduce the strain on DOJ and SEC enforcement resources. The higher barrier[111] to entry for filing a *qui tam* action would also discourage meritless claims and reduce the overall number of complaints that the SEC receives. Additionally, a *qui tam* provision modeled after the one in the FCA would extend to whistleblowers the same anti-retaliation protections as does Dodd-Frank, but its applicability would not hinge on to whom the whistleblower blows the whistle.

B. Qui Tam *Litigation Would Help to Articulate the Limits of Prosecutorial Discretion and Provide Better Guidance to Covered Entities.*

A *qui tam* provision in the FCPA would benefit not just those who seek to impede misconduct within their organizations. The long-term interests of covered entities would also be well-served by this amendment. FCPA enforcement is often criticized as arbitrary.[112] Few would dispute that the statute is interpreted broadly.[113] A body of *qui tam* jurisprudence would provide case law by which companies can guide their conduct, evaluate reports of misconduct, and judge the propriety of a disclosure to the government.[114]

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[111] While *qui tam* plaintiffs can initially file suit anonymously and under seal, their names are typically revealed when their actions are unsealed. Relators also must hire counsel and bear the financial burden of bringing suit. *See* O'Sullivan, *supra* note 101, at 91-92; Casey & Niblett, *supra* note 57, at 1196-1201. Additionally, the heightened pleading requirements of Fed. R. Civ. P. 9(b), which apply to *qui tam* actions under the FCA, may also apply under the FCPA. ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake . . .").

[112] *See generally* Mike Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907 (2010).

[113] *See* O'Sullivan, *supra* note 104, at 111-14. *See also* Gibson Dunn, *2019 Year-End FCPA Update*, GIBSON DUNN (2020), https://www.gibsondunn.com/2019-year-end-fcpa-update/ ("2019 was, by many measures, the most significant year ever in [FCPA] enforcement . . . international anti-corruption enforcement has never been more robust."); Vinson & Elkins, *Five (Less Predictable) Predictions for FCPA Enforcement in 2020*, VINSON & ELKINS (2020) https://www.velaw.com/insights/five-less-predictable-predictions-for-fcpa-enforcement-in-2020/ ("We join the chorus of others who expect to see the momentum continue with increased global engagement by U.S. authorities leading to more record levels of FCPA enforcement.").

[114] Robert Primoff's words in 1982 still ring true today: "The government has the option of deciding whether or not to prosecute. For practitioners, however, the situation is intolerable. We must be able to advise our clients as to whether their conduct violates the law, not whether this year's crop of administrators is likely to enforce a particular alleged violation. That would produce, in effect, a government of men and women rather than a government of law." Robert Primoff, *The Foreign Corrupt Practices Act: Implications for The Private Practitioner*, 9 SYR. J. OF INTL. LAW AND COMMERCE 325, 329 (1982).

More importantly, companies subject to the FCPA would benefit from more than just statutory clarity.[115] While clarity is helpful, if that clarity sparked more FCPA enforcement and greater legal exposure, that is a trade-off that companies would perhaps eschew. On the contrary, there is reason to believe that *qui tam* litigation would narrow the scope of FCPA enforcement. Courts in recent years have strictly interpreted domestic bribery statutes, limiting their reach. Should an FCPA case arrive in the Supreme Court, the Court's interpretive approach would likely be similarly strict.

1. The DOJ and SEC Interpret "Anything of Value" in the FCPA More Broadly Than U.S. Courts Interpret the Same Phrase in § 201.

There is minimal judicial scrutiny of FCPA enforcement.[116] Companies faced with FCPA investigations typically settle their cases with the government by means of NPA's and DPA's.[117] A Deferred Prosecution

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[115] *See* Aaron G. Murphy, *The Migratory Patterns of Business in the Global Village*, 2 N.Y.U. J.L. & BUS. 229, 245 (2005). Murphy, a partner in Latham & Watkins' White-Collar Defense Group at the time of the writing, described the lack of clarity as such: "The number of published, and therefore precedential, judicial opinions on the FCPA's anti-bribery provisions is ludicrously small for a statute that is nearly 30 years old, which leaves counsel and their clients to read the tea leaves of SEC Litigation Releases, Settlements, and DOJ press releases." Despite the surge in FCPA enforcement over the past fifteen years, those same tea leaves remain the primary means by which counsel advise their clients.

[116] Weissmann & Smith, *supra* note 99, at 3 ("[T]he primary statutory interpretive function is still being performed almost exclusively by the DOJ Fraud Section and the SEC . . . the DOJ effectively serves as both prosecutor and judge in the FCPA context, because it both brings FCPA charges and effectively controls the disposition of the FCPA cases it initiates.").

[117] The propriety of N/DPA's has been extensively debated by commentators over the past decade. Some argue that to subject companies to criminal liability for the acts of rogue employees is to expand the doctrine of respondeat superior, and that the imposition of criminal liability on corporate defendants risks harming many innocent employees. Conversely, others view corporate criminal liability as a necessary deterrent, and criticize the idea that prosecutors, and not the courts, determine whether a violation of the law has occurred. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Without adopting a particular view on the rapid proliferation of N/DPAs, it suffices for the purposes of this Note to observe that they are the norm for FCPA enforcement against companies. This is another problem for whistleblowers, who do not presently receive an award from the SEC's OTW if their information leads to an N/DPA. For a more extensive review of N/DPAs, as well as varied viewpoints, *see generally* Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation through Nonprosecution*, 84 U. CHI. L. REV. 323 (Winter 2017); Wulf A. Kaal & Timothy A. Laci, *The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013*, 70 THE BUSINESS LAWYER 61 (Winter 2014-15); David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295 (2013);

Agreement, or DPA, is a vehicle for resolving a case against a company where the government will bring charges against the company but not move forward on those charges. In exchange, the company must abide by certain conditions that are negotiated between the company and government.[118] A Non-Prosecution Agreement, or NPA, is similar, but no charges are filed against the company. If a company violates the terms of an NPA or DPA, the government can then restart the case and bring charges.

These methods of FCPA claim resolution, and the resulting dearth of FCPA litigation, have led to expansive interpretations of (at least) two statutory sections,[119] interpretations that may ultimately not survive judicial scrutiny if *qui tam* actions were allowed under the FCPA. The first is the prohibition on the tender of "anything of value" to a foreign government official.[120] As noted earlier, the FCPA proscribes the payment of money, a gift, or anything of value.[121] Defining and identifying the payment of money or a gift are relatively straightforward; a "thing of value" less so.

The SEC, in its enforcement action against Schering-Plough, alleged that the company violated the FCPA when its subsidiary in Poland made donations to a charity whose chairman was a government official.[122] And in 2016, JPMorgan Chase and its subsidiary in Hong Kong paid $264.4 million to the DOJ, SEC, and Federal Reserve to resolve FCPA offenses for awarding jobs to relatives and friends of Chinese government officials.[123] In one interpretation, the *JPMorgan* case raises the proposition that FCPA liability may extend to "things of value" provided to family members of foreign government officials. This reading seems facially inconsistent with the terms of the statute, which proscribe payment to "any officer or employee

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Andrew Weissmann et al., *Reforming Corporate Criminal Liability to Promote Responsible Corporate Behavior*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM (October 2008).

[118] If the company abides by the terms of the DPA, the government will drop the charges. Some typical DPA conditions include appointing an independent monitor, making improvements to the corporate compliance program, or firing the employees responsible for the misconduct.

[119] Other commentators have criticized the broad manner in which prosecutors define "foreign official," as well as the gray area between bribes and grease payments. *See, e.g.*, Koehler, *supra* note 110, at 916-17; Nathan Golden, *Conspicuous Prosecution in the Shadows: Rethinking the Relationship Between the FCPA's Accounting and Anti-Bribery Provisions*, 104 IOWA L. REV. 891, 914-16 (2019).

[120] *See* 15 U.S.C. § 78dd-1 to -3.

[121] *Id.*

[122] *See* SEC v. Schering-Plough Corp., Litigation Release No. 18740, 82 SEC Docket 3732 (June 9, 2004).

[123] Richard L. Cassin, *JPMorgan Pays $264 Million To Resolve 'Sons & Daughters Program' FCPA Offenses*, THE FCPA BLOG (Nov. 17, 2016, 4:28 pm), https://fcpablog.com/2016/11/17/jpmorgan-pays-264-million-to-resolve-sons-daughters-program/.

of a foreign government or any department, agency, or instrumentality thereof."[124]

Another reading, more likely correct when considered in conjunction with the *Schering-Plough* enforcement action, is that a thing of value provided to a foreign government official can be both intangible and subjective. In these cases, there was no specific allegation that the Polish government official siphoned funds from the charity, or that the relatives of Chinese government officials kicked part of their JPMorgan salaries back to the government officials. Instead, the value that these officials received can fairly be described as feelings of good will and contentment from seeing their charities funded and their loved ones employed.

Since the phrase "anything of value" is not defined in the FCPA, consideration of treatment of that phrase under the domestic bribery statute, 18 U.S.C. § 201, is instructive.[125] While "anything of value" has been broadly construed by U.S. courts,[126] the phrase's reach may not extend as far as these FCPA resolutions suggest. Sexual favors, loans, and stock (with no commercial value) may be things of value, depending on the subjectivity of the recipient, but they are certainly more tangible than feelings of contentment. Moreover, in these § 201 prosecutions, the "things of value" were provided directly to the government official charged under the statute, not to a separate entity or relative. This strains the government's reading in *Schering-Plough* and *JPMorgan* further, since any "value" received by these officials was an indirect consequence of the provision of a thing of value to a separate party.

None of this is to sanction the conduct at issue. Rather, the question is whether the conduct violates the terms of the FCPA. It is a long-settled rule that penal laws are to be construed strictly because of the "tenderness of the law for the rights of individuals" and on the principle that the power to punish is vested in the legislative branch.[127] The legislature, not the executive nor the judiciary, is empowered under the Constitution to define a crime and

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[124] 15 U.S.C. § 78dd-1.

[125] 18 U.S.C. § 201 ("Whoever directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official . . .").

[126] *See, e.g.*, United States v. Moore, 525 F.3d 1033, 1048 (11th Cir. 2008) (rejecting defendant's objection to jury instruction defining sex as a "thing of value"); United States v. Gorman, 807 F.2d 1299, 1304-05 (6th Cir. 1986) (holding that loans and promises of employment in the future are "things of value"); United States v. Williams, 705 F.2d 603, 622-23 (2d Cir. 1983) (approving jury instruction that stock could be considered a "thing of value" if defendant believed it had value.).

[127] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820).

determine its penalty.[128] If judicial interpretations of "anything of value" under § 201 are any indication, there are legitimate grounds to question whether the actions against Schering-Plough and JPMorgan would constitute violations of the FCPA.

Should Congress amend the FCPA to include a *qui tam* provision, ensuing litigation and judicial scrutiny of FCPA enforcement would set reasonable limits on prosecutorial discretion.[129] As has been noted, *qui tam* actions under the FCA result in litigation (and, as a consequence, judicial review) much more frequently than enforcement actions under the FCPA.[130] Since courts interpret "anything of value" more strictly under § 201 than the DOJ and SEC interpret the same phrase in the FCPA, judicial scrutiny could serve to limit the scope of corporate liability under the FCPA with regard to a critical statutory phrase.

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[128] *Id.* As a juxtaposition, consider the implausibility of a police officer adjudging the sufficiency of a warrant. *See* Johnson v. United States, 333 U.S. 10, 14 (1948) (A warrant must be evaluated by a "neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime"). There is an inherent conflict and logical disconnect when one body performs both the interpretive and enforcement function.

[129] *See* Michael Levy, *Prosecutorial Common Law*, FCPA PROFESSOR (March 16, 2011), http://fcpaprofessor.blogspot.com/2011/03/prosecutorial-common-law.html, (last visited March 28, 2020) ("[S]ettling cases creates very different incentives for the two sides. The government has a long-term interest in developing the law because it is charged with enforcing that law not just against the settling party, but also against other parties in the future. . . . On the other hand, the defendant . . . is not particularly concerned about the scope of the statute as it might be applied to others in the future. The defendant wants the least possible punishment, right now."); *See also* Peter Reilly, *Negotiating Bribery: Toward Increased Transparency, Consistency, and Fairness in Pretrial Bargaining Under the Foreign Corrupt Practices Act*, 10 HASTINGS BUS. L.J. 347, 375-76 (2014) ("Given its enormous leverage in the [N/DPA] negotiation, the DOJ can oftentimes negotiate quite favorable prosecution agreements, whose terms can include large financial penalties, significant internal business reforms, and cooperation in pursuing the company's individually culpable directors, executives, managers, and/or employees.").

[130] No corporations fought their FCPA charges in court in 2019. Part of their hesitation to do so may be an aversion to exposing the company to criminal liability. *See* Reilly, *supra* note 130 at 378 n.174 (citing Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea by Another Name?*, INSIDE LITIG., (Winter 2006) at 4 ("Given the breadth of the corporate criminal liability doctrine and the potentially devastating consequences of a criminal conviction or even indictment, it is the rare corporation today that has a meaningful right to a jury trial in the resolution of its corporate criminal disputes with the government"). Since *qui tam* actions are a civil enforcement mechanism, companies may be more willing to challenge them in court.

2. The Business Nexus Requirement of Bribery Applied in FCPA Cases Should Be Limited in Light of the Supreme Court's Decision in *McDonnell*.

Schering-Plough highlights the risks in making charitable donations to foreign organizations. Surely, the FCPA does not prohibit charitable (or political) donations outright.[131] Rather, the question is whether the donation is made to "obtain or retain business."[132] The causal connection between the "bribe" and the government action is a second source of ambiguity in the statute, and one that has been interpreted more broadly by the DOJ and the SEC than by courts.

There is not a complete absence of case law on this business nexus requirement. In *Kay v. United States*,[133] the Fifth Circuit concluded that bribes paid to foreign officials for purposes of evading customs duties and sales taxes could fall within the purview of the FCPA. As the *Kay* Court noted:

> Bribing foreign officials to lower taxes and customs duties certainly can provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business…[T]he question whether the defendants' alleged payments constitute a violation of the FCPA truly turns on whether these bribes were intended to lower [the defendant's] cost of doing business in Haiti enough to have a sufficient nexus to garnering business there…so as to come within the scope of the business nexus element as Congress used it in the FCPA.[134]

But rather than lay down a bright line rule, the Court merely provided broad guidelines.[135] After *Kay*, some payments to obtain tax benefits may be permissible, and some may be prohibited. Nonetheless, since that decision, there has been a marked increase in enforcement actions against companies for payments involving customs duties, tax payments, government licenses, permits, and certifications.[136]

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[131] *See* Citizens United v. FEC, 558 U.S. 310, 392-93 (2010) (concluding that corporate contributions to political campaigns were both protected speech and not *ultra vires*).
[132] 15 U.S.C. § 78dd-1.
[133] United States v. Kay, 359 F.3d 738, 761 (5th Cir. 2004).
[134] *Id.* at 749.
[135] *Id.* at 761 ("Just as bribes to obtain such illicit tax benefits do not *ipso facto* fall outside the scope of the FCPA, however, neither are they *per se* included within its scope.").
[136] *See* Koehler, *supra* note 113, at 971-73.

Taken to its logical conclusion, any payment made to a foreign government that facilitates business operations or improves the company's bottom line could constitute a violation of the FCPA.[137] Were that the case, the phrase "to obtain or retain business" would be rendered meaningless. Despite this, the *Kay* Court concluded that the business nexus requirement does not go to the core of FCPA criminality.[138] In other words, at least for the purposes of an indictment, the government is not required to draw a causal link between the increased profits and the obtaining or retention of business[139] This reading of the FCPA attenuates the business nexus requirement to a degree not supported by subsequent case law.

In *McDonnell v. United States*,[140] the Supreme Court reviewed a challenge to jury instructions on extortion under color of right and honest services fraud. Former Virginia Governor Robert McDonnell and his wife were indicted related to their acceptance of $175,000 in loans, gifts, and other benefits from Virginia businessman Jonnie Williams while Governor McDonnell was in office.[141] In return, the Governor set up meetings for Mr. Williams so he could try to obtain government studies of a nutritional supplement his company had created.[142] This supplement was made from anatabine, a compound found in tobacco.[143]

At trial, the parties agreed to define honest services fraud with reference to the federal bribery statute.[144] Consequently, "the Government was required to prove that Governor McDonnell committed or agreed to commit an 'official act' in exchange for the loans and gifts from Williams."[145] This exchange of a payment for an official public act is how courts interpret the

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[137] The Court was aware of this and cautioned that its holding should not be interpreted so broadly. *See Kay*, 359 F.3d at 760 ("Indeed, if the government is correct that anytime operating costs are reduced the beneficiary of such advantage is assisted in getting or keeping business, the FCPA's language that expresses the necessary element of assisting is obtaining or retaining business would be unnecessary, and thus surplusage—a conclusion that we are forbidden to reach.").

[138] *Kay*, 359 F.3d at 760-61.

[139] *Id.* at 761. For a more extensive analysis of the *Kay* Court's statutory interpretation, see Tiffany Lu, *The Obtaining or Retaining Business Requirement: Breathing New Life into the Business Nexus Provision of the FCPA*, 18 FORDHAM J. CORP. & FIN. L. (2013) (arguing that "the interpretation of the 'obtaining or retaining business' requirement as held by the Fifth Circuit court in *United States v. Kay* should no longer be followed as it is self-fulfilling and renders the FCPA provision unnecessary.").

[140] McDonnell v. United States, 136 S. Ct. 2355 (2016).

[141] *Id.* at 2357. From 2009-11, Mr. Williams, on various occasions, spent $20,000 on designer clothing for Mrs. McDonnell, contributed $15,000 to the wedding of the McDonnell's daughter, and bought Governor McDonnell a gold Rolex. *Id.* at 2363-64.

[142] *Id.* at 2361.

[143] *Id.*

[144] *See* 18 U.S.C. § 201.

[145] *McDonnell*, 136 S. Ct. at 2365.

business nexus requirement - some showing of a causal link is obligatory.[146] At issue was "whether arranging a meeting, contacting another official, or hosting an event—without more—can be a[n official act]."[147] The Court concluded these were not official acts.[148] In so doing, the Court clarified the scope of the Hobbs Act, holding that an "official act" requires more than merely setting up a meeting, hosting an event, or calling an official to talk about a research study, since those were not official decisions or actions.[149]

The Government had argued for a broad reading of "official act," one which would encompass almost any activity that public officials can take by virtue of their office.[150] The Court rejected this interpretation in favor of a more bounded one covering a "particular resolution of a specific governmental decision."[151] The statutory interpretation in *McDonnell* is much narrower than that in *Kay*, where the Court adopted an expansive reading of "obtain or retain business."[152] Setting up a meeting can be analogized with receiving favorable tax treatment. Setting up a meeting could help Mr. Williams obtain an "official act," namely a government study of his company's supplement. Receiving favorable tax treatment could help a company "obtain or retain business." Despite this, the *McDonnell* Court reasoned that the initial act of setting up a meeting was permissible under the statute, which only proscribed "official acts." The same could be said of the FCPA, the syntactic structure of which mimics that of § 201. Reading the FCPA after *McDonnell*, the prohibition on payments made to obtain or retain business would likely only cover the awarding or retention of a particular contract, or some other concrete transaction that benefits the company.

The business nexus requirement was further clarified when the Second Circuit reversed three of former New York State Assembly Speaker Sheldon Silver's seven convictions.[153] In 2016, Silver was convicted of accepting illegal bribes in violation of the mail and wire fraud statutes and the Hobbs Act.[154] Silver's successful contention on appeal was that the "as the

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[146] *See* United States v. Sun-Diamond Growers of Cal., 526 U.S. 398, 404-05 (1999) (The agreement must include a quid pro quo, "the receipt of something of value in exchange for an official act."); McCormick v. United States, 500 U.S. 257, 273 (1991) (The public official must agree that "his official conduct will be controlled by the terms of the promise or the undertaking."); United States v. Terry, 707 F.3d 607, 613 (6th Cir. 2013) ("The statutory requirement must be met—that the payments were made in connection with an agreement, which is to say 'in return for' official actions under it.").
[147] *McDonnell*, 136 S. Ct. at 2368.
[148] *Id.* at 2355.
[149] *Id.*
[150] *Id.* at 2367.
[151] *Id.*
[152] United States v. Kay, 359 F.3d 738, 761 (5th Cir. 2004).
[153] United States v. Silver, 948 F.3d 538, 575 (2d Cir. 2020).
[154] *Id.* at 546.

opportunities arise" theory of bribery "does not survive *McDonnell*, which, he claims, requires identification of the particular act to be performed at the time the official accepts a payment or makes a promise."[155]

The Second Circuit held that, while *McDonnell* does not require identification of a particular act, it does require identification of a particular matter to be influenced.[156] Put another way, "a public official must do more than promise to take some or any official action beneficial to the payor as the opportunity to do so arises; she must promise to take official action on a particular question or matter as the opportunity to influence that same question or matter arises."[157] The *Silver* Court affirmed that, after *McDonnell*, an official must promise to influence a "focused and concrete…question or matter" that "involv[es] a formal exercise of governmental power."[158]

Silver and *McDonnell* reiterate the point that the critical moment in a bribery scheme is the moment at which the official accepts the bribe.[159] This concept, too, is inconsistent with *Kay's* reasoning that a bribe may be paid to a foreign government official to obtain favorable tax treatment, and then at some later date the company may obtain or retain business as a result of the prior boon to its bottom line.[160] Under *Kay's* reasoning, neither the company nor the government official need be aware of the future business to be obtained or retained by the company. That view would likely be rejected after *McDonnell* and *Silver*.[161]

Adoption of a *qui tam* provision within the FCPA would increase litigation and published court decisions, providing covered entities with clearer rules with which to guide corporate conduct. Moreover, legal challenges to the business nexus requirement of the FCPA are likely to be successful, limiting the scope of future FCPA enforcement. The *Kay* Court's rather generous treatment of this requirement, subsequently adopted and enforced by the DOJ and SEC, would likely not survive judicial scrutiny after the *McDonnell* and *Silver* decisions.

FCA litigation is both extensive and primarily driven by *qui tam* actions. In 2019, 636 of the 782 FCA actions were brought by *qui tam* relators.[162] Those *qui tam* actions resulted in over $2.2 billion in recovery for the federal

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[155] *Id.* at 547.
[156] *Id.* at 552-53.
[157] *Id.*
[158] *Id.* at 553 (citing McDonnell v. United States, 136 S. Ct. 2355, 2369-70 (2016)).
[159] *Id.* at 556; *McDonell*, 136 S. Ct. at 2374.
[160] *See* United States v. Kay, 359 F.3d 738, 749 (5th Cir. 2004).
[161] The holding in *Silver* is, of course, not binding on the Fifth Circuit. But to the extent that *Silver* clarified the holding of *McDonnell*, the court's interpretation of the FCPA in *Kay* is probably no longer valid.
[162] DEP'T. OF JUST., FRAUD STATISTICS 2 (2019).

government, of which nearly $200 million was awarded to relators.[163] Actions brought by *qui tam* relators can also prevent regulatory capture, the notion that cozy relationships between agencies and the industries they regulate result in less than wholehearted enforcement of the law.[164] As the scope of FCPA application is clarified by *qui tam* jurisprudence, companies would also benefit through a reduction in their regulatory compliance costs and an equalization of any relative disadvantage they face with competing foreign companies.[165]

III. PRINCIPAL COUNTERPARTS

A. *The Qui Tam Process Can Be Abused.*

Qui Tam litigation of FCPA cases would arouse some of the same concerns about the practice as currently exist with the FCA. As one of the fastest growing areas of federal litigation due to its distinctive enforcement mechanism, there are many concerns about abuse of the *qui tam* process.[166] As the argument goes, the financial incentives dangled in front of whistleblowers spur meritless lawsuits which in turn impose undue costs on companies.[167] *Qui tam* relators have been likened to the bounty hunters of the Old West.[168] Concern about an abundance of meritless suits is perhaps partially supported by one empirical study that found that between 1987 and 2004, 73% of all *qui tam* actions were ultimately dismissed, including 92% where the DOJ did not intervene.[169]

Unquestionably, many meritless lawsuits have been filed under the FCA. Frivolous litigation, perhaps the antibiotic-resistant bug of our civil justice

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[163] *Id.*

[164] David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1273 (2012); *see also* J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 563-65 (2000) (suggesting that the *qui tam* model would works "as a corrective measure for the Justice Department's unwillingness to enforce the law.").

[165] *See* Peter Jeydel, *Yoking the Bull: How to make the FCPA Work for U.S. Business*, 43 GEO. J. INT'L L. 523 (2012). Although there is no doubt that FCPA compliance imposes significant costs on U.S. businesses, whether overzealous FCPA enforcement puts U.S. companies at a comparative disadvantage in the global marketplace is the subject of some dispute.

[166] *See generally* Joel D. Hesch, *Understanding the "Original Source Exception" to the False Claim Act's "Public Disclosure Bar" in Light of the Supreme Court's Ruling in Rockwell v. United States*, 7 DEPAUL BUS. & COM. L.J. 1 (2008).

[167] Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 334-35 (1992).

[168] David J. Ryan, *False Claims Act: An Old Weapon with New Firepower Is Aimed at Health Care Fraud*, 4 THE ANNALS HEALTH L. 127 (1995).

[169] Christina Orsini Broderick, *Qui Tam Provisions and the Public Interest: An Empirical Analysis*, 107 COLUM. L. REV. 949, 974 (2007).

system, is not unique to FCA litigation.[170] However, that the DOJ intervenes in only 20% of *qui tam* actions is not, on its own, proof that the non-intervened cases are meritless.[171] Drawing causal conclusions from merely descriptive statistics is risky. Other studies argue that FCA abuse is less frequent, and less serious, than its critics allege.[172] Furthermore, critics should at least be partially mollified by the fact that *qui tam* suits can save government resources and prevent regulatory capture, another type of abuse, albeit one with an opposite effect on litigation.

Moreover, concerns about of abuse of *qui tam*, as compared to SEC whistleblower complaints, are perhaps overstated given the higher barrier to entry and screening function of *qui tam* actions.[173] Additionally, given that 81% of FCA actions last year were brought by *qui tam* relators, any prosecutorial abuses are probably counterbalanced by the benefit to the public through the conservation of scarce enforcement resources, due to reliance on whistleblowers for FCA enforcement. Without the protections afforded and incentives provided by the FCA's *qui tam* provision, significantly less fraud perpetrated against the government would be uncovered and punished.[174]

Finally, there are mechanisms in the civil justice system that can be leveraged to deter *qui tam* abuse through vexatious litigation. Federal Rule of Civil Procedure 11,[175] which permits courts to sanction lawyers or parties who present improper submissions, was strengthened in 1983 and could be used to deter meritless *qui tam* suits.[176] Additionally, the DOJ provided False

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[170] Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 191 (2000) (positing that plaintiffs in frivolous litigation have a greater tolerance for risk than the defendants they sue, and thus maintain "psychological leverage" in any settlement negotiations).

[171] *See* United States *ex rel.* Downy v. Corning, Inc., 118 F. Supp. 2d 1160, 1170 (D.N.M. 2000) ("The government may have many reasons for its decision not to intervene in an FCA case, including lack of available Assistant United States Attorneys or respect for the skill of the relator's attorneys.").

[172] David Kwok, *Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation*, 42 PUB. CONT. L.J. 225, 241 (2013) (utilizing a data set to show that very few law firms act as "filing mills," pursuing a high volume of poorly selected cases).

[173] Niblett & Casey, *supra* note 57, at 1186-89.

[174] A 1986 amendment to the FCA that provided the anti-retaliation measures and incentives found in the law today is responsible for the dramatic increase in FCA litigation. In 1987, only 32 suits were filed. By 1997, that number increased to 533. *See* Broderick, *supra* note 170, at 955.

[175] *See* Fed. R. Civ. P. 11.

[176] *id.* advisory committee's note (1983) ("Greater attention by the district courts to pleading and motion abuses and the imposition of sanctions when appropriate, should discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses.").

Claims Act guidance to its attorneys in 2018,[177] which advised that "when evaluating a recommendation to decline intervention in a *qui tam* action, attorneys should also consider whether the government's interests are served…by seeking dismissal pursuant to 31 U.S.C. 3730(c)(2)(A)."[178] Section 3730(c)(2)(A) is the provision of the FCA that permits the DOJ to dismiss the action notwithstanding the objections of the relator, and is one that the DOJ virtually never exercises.[179] This provision could be more frequently utilized by the DOJ. Government attorneys could effectively make a FRCP 12(b)(6)[180] ruling before the matter is ever unsealed.

B. Qui Tam *Suits Are Not Immune from the Impetus to Settle*.

Adding a *qui tam* provision to the FCPA would not guarantee a broad body of clarifying case law. Even if it did, the process would be slow and incremental. Corporate litigation generally entails a careful cost-benefit analysis, and many companies faced with a *qui tam* FCPA suit would likely settle their claims.[181] Despite this, there are at least two reasons to believe that the addition of a *qui tam* provision to the FCPA would lead to an increase in case law.

First, the simple fact is that the FCA has been extensively litigated in the Supreme Court.[182] The Supreme Court has never issued a decision regarding the FCPA, so the statute's ambiguities remain unresolved.[183] Since *qui tam*

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[177] *See* Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, to attorneys of the Commercial Litigation Branch, Fraud Section, *Factors for Evaluating Dismissal Pursuant to 31 U.S.C. § 3730(c)(2)(A),* https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.

[178] *Id. See also* Steven L. Schooner, *False Claims Act: Greater DOJ Scrutiny of Frivolous Qui Tam Actions?*, 32 NASH & CIBINIC REP. 59 (2018).

[179] *id.* at 60. ("[S]ubsequent efforts to study the data have suggested that the DOJ affirmatively moves to dismiss less than 1% of the *qui tam* actions filed each year.").

[180] Fed. R. Civ. P. 12(b)(6) ("Failure to state a claim upon which relief may be granted"). Admittedly, overzealous wielding of this provision would raise some concerns about regulatory capture. Nonetheless, the data suggest that exercise of this authority in more than 1% of matters is warranted.

[181] Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), https://www.nytimes.com/2008/08/08/business/08law.html.

[182] *See, e.g.*, Cochise Consultancy, Inc. v. United States *ex rel.* Hunt, 139 S. Ct. 1507 (2019); State Farm Fire & Cas. Co. v. United States *ex rel.* Rigsby, 137 S. Ct. 436 (2016); Kellogg Brown & Root Servs. v. United States *ex rel.* Carter, 575 U.S. 650 (2015); Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401 (2011); Graham Cty. Soil & Water Conservation Dist. v. United States *ex rel.* Wilson, 559 U.S. 280 (2010); United States *ex rel.* Eisenstein v. City of N.Y., 556 U.S. 928 (2009); Rockwell Int'l Corp. v. United States, 549 U.S. 457 (2007); Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765 (2000).

[183] In one case, the Supreme Court determined that a Nigerian company could not assert the act of state doctrine as a defense to civil RICO claim when the underlying misconduct was

actions are civil, rather than criminal, companies may be more willing to challenge them in court. For many companies, a criminal conviction is viewed as the equivalent of a "death sentence," despite some empirical evidence to the contrary.[184]

Second, to the extent that *qui tam* actions prevent some regulatory capture, the likelihood of litigation and resulting case law is increased.[185] Since *qui tam* relators and their private counsel play a greater role in *qui tam* litigation than whistleblowers to the SEC play in subsequent enforcement actions, there is a reduced probability of regulatory capture. Additionally, relators can pursue their claims independently should the DOJ decline to intervene. Although a *qui tam* provision would not be an instant remedy to the scarcity of case law under the FCPA, it would be a sensible step in the right direction.

C. *Political Realities Render Legislative Solutions Less Certain.*

An obvious practical obstacle to this Note's hypothesis is that it relies upon political consensus in and affirmative action from Congress.[186] Notwithstanding the current gridlock for which Congress is often criticized, there is reason to believe that a *qui tam* amendment to the FCPA might attract bipartisan support. If one accepts the arguments that a *qui tam* provision would provide better protections and more realistic incentives to whistleblowers, more clarity for companies, conserve government resources and inform future enforcement decisions, support for the amendment could be expected from both the corporate sector and good governance groups. In any event, uncertainty about legislative outcomes does not undermine the argument that a *qui tam* provision in the FCPA would address some of the law's deficiencies.

IV. CONCLUSION

Since passage of the FCPA in 1977, the United States has led the global effort against bribery of foreign government officials. To enhance FCPA

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an FCPA violation. *See* W. S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 406 (1990).

[184] Gabriel Markoff, *Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century*, 15 U. PENN. J. BUS. L. 797, 798 (2013) (reviewing database of organizational convictions and finding that no publicly traded company failed because of a conviction between 2001 and 2010).

[185] Casey & Niblett, *supra* note 57, at 1181; *see also* Engstrom, *supra* note 165, at 1285; Jill E. Fisch, *Top Cop or Regulatory Flop?, The SEC at 75*, 95 VA. L. Rev. 785, 785-86 (2009).

[186] *See generally* Pew Research Center, *Political Polarization in the American Public*, https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/; Derek Willis & Paul Kane, *How Congress Stopped Working*, PROPUBLICA & WASH. POST (Nov. 5, 2018), https://www.propublica.org/article/how-congress-stopped-working.

enforcement and achieve the statute's goals, adding a *qui tam* provision to the statute deserves serious consideration. A *qui tam* provision would provide a robust mechanism by which whistleblowers can report wrongdoing, saving government resources. Existing whistleblower mechanisms have proven unsatisfactory, particularly after Digital Realty. Further, the long-term interests of both covered entities and regulators would be served by an increase in FCPA litigation. The resulting case law could more effectively promote and guide responsible corporate conduct and enforcement decisions than the current body of non-binding NPAs and DPAs.