On July 21, 2010, when President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), the Securities and Exchange Commission’s (SEC) Whistleblower Program went into effect, entitling “eligible” whistleblowers to an award of 10%-30% of the monetary sanctions collected in actions brought by the SEC. An “eligible” whistleblower is a person who voluntarily provides original information about a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur. If that information leads to a successful SEC action resulting in an order of monetary sanctions over $1 million, the whistleblower(s) can collect their bounty. Over the lifetime of the program, the SEC has addressed more than 390 award claims and has awarded more than $67 million to 29 individuals, known as claimants, in connection with 16 actions.

Neither Dodd-Frank nor SEC regulations prohibit a foreign national or U.S. citizen living or working abroad from being an eligible whistleblower. And as the SEC continues to see an uptick in both the quality and quantity of tips under the Whistleblower Program, those tips are increasingly coming from individuals outside of the United States. With this new increase in whistleblowing tips coming from foreign jurisdictions, companies must be prepared, and must adjust their compliance and monitoring systems to work within this new paradigm.

The SEC’s Success with Foreign Whistleblowers

During the 2015 fiscal year, approximately 10% of tips the SEC received under the Whistleblower Program originated from individuals in foreign countries, including: the United Kingdom (72); Canada (49); China (43); India (33); and Australia (29). Showing the success and reach of the Whistleblower Program, the SEC received whistleblower tips from 65 different countries in 2015. The SEC’s largest ever whistleblower award — over $30 million — was issued in September 2014 and paid in early 2015 to a whistleblower in a foreign country. This was the fourth award to a whistleblower living in a foreign country. In announcing the award, Sean McKessy, Chief of the SEC’s Office of the Whistleblower, explicitly praised the “international breadth of [the] whistleblower program” as a tool to “utilize valuable tips from anyone, anywhere to bring wrongdoers to justice.” Press Release, SEC, SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), 1.usa.gov/1OJdtn4. McKessy added that whistleblowers “from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the U.S. securities laws.” Id.

Besides this largest-ever award, the SEC also issued an award in September 2015 of 20% to two foreign nationals who jointly reported information that allowed the SEC to open an investigation into the underlying activity. In that case, one whistleblower received 11%, while the other received 9%; the SEC based that decision on the “level of assistance” each whistleblower provided.

Will Foreign Whistleblowers Be Deterred By a Lack Of Protection Under Dodd-Frank?

The issuance of awards to foreign nationals has continued despite litigation concerning the Whistleblower Program and Dodd-Frank’s international reach under Morrison v. Nat’l Austl. Bank Ltd., 561 U.S. 247 (2010), which reaffirmed the general presumption against the extraterritorial application of Congressional legislation. Id. at 255. This litigation has focused specifically
on Dodd-Frank’s anti-retaliation provision, which protects whistleblowers from harassment, demotion, discrimination, and discharge, among other protections.

In 2014, the United States Court of Appeals for the Second Circuit decided Liu Meng-Lin v. Siemens AG, finding that foreign whistleblowers are not protected by the anti-retaliation provisions of Dodd-Frank (15 U.S.C. § 78u-6(h)), when that foreign whistleblower is employed abroad by a foreign corporation and all the events related to the whistleblower’s disclosure occurred abroad. Liu Meng-Lin, 763 F.3d 175, 177–78 (2d Cir. 2014). In that case, Liu Meng-Lin, a Taiwanese employee working as a compliance officer for the Chinese subsidiary of Siemens AG, a United States-listed German corporation, reported allegedly corrupt conduct to the SEC. Id. at 177. He claimed that Siemens had violated the Foreign Corrupt Practices Act (FCPA) by making improper payments to certain officials in North Korea and China in connection with the sale of medical equipment. Id. He then alleged that after he undertook efforts to address the corrupt conduct, but prior to reporting it to the SEC, he experienced retaliation through demotions, and then was ultimately fired. Id. After the district court dismissed his claim, the Second Circuit affirmed, holding that the whistleblower anti-retaliation provision does not apply extraterritorially. Id. at 183.

Despite the holding in Liu, the SEC has continued to pay bounties to foreign nationals when there is a “sufficient U.S. territorial nexus.” See Order Determining Award Claim, Exchange Act Rel. No. 73174, File No. 2014-10 (Sept. 22, 2014). The SEC argues that there is a sufficient territorial nexus whenever a claimant’s information leads to the successful enforcement of an action:

1) brought in the U.S.; 2) concerning violations of U.S. securities laws by; 3) the SEC or another U.S. regulatory agency with the proper enforcement authority. Id. While recognizing the Second Circuit’s decision in Liu, the SEC argues that Dodd-Frank’s whistleblower award provisions were drafted to “further the effective enforcement of the U.S. securities laws,” as opposed to the anti-retaliation provisions, which are focused on “preventing retaliatory employment actions and protecting the employment relationship.” In maintaining this position, the SEC has forcefully argued that Liu is not controlling with respect to the bounty provisions.

It is still too early to tell whether Liu will stem the tide of foreign whistleblowers willing to step forward and report to the SEC. Other circuit courts have yet to address this issue, and it is possible that the extraterritorial application of Dodd-Frank’s bounty provisions may be litigated in the future. Regardless, as it stands now, the SEC will continue to pay bounties to eligible foreign whistleblowers when they voluntarily provide original information that leads to a successful SEC action. Although these foreign whistleblowers may not be able to seek refuge under Dodd-Frank from retaliatory behavior, the substantial financial incentives provided by the SEC may outweigh any potential risk.

Whistleblower Programs And Protections in Foreign Jurisdictions

Even if foreign whistleblowers are not covered by Dodd-Frank’s anti-retaliation provision, they may be protected by their own nation’s laws. Looking at the countries of origin for tips received by the SEC during the 2015 fiscal year, many of the countries with the highest tips have their own protections for corporate whistleblowers, including the United Kingdom, Australia, and China. Indeed, the UK, which has been the source of the greatest number of foreign tips to the SEC over the past four years, has some of the most comprehensive and well-regarded legal protections for whistleblowers outside of the United States. Thus, the Liu decision may not have much effect on the decisions by many foreign employees and contractors to provide tips to the SEC.

Foreign jurisdictions appear to be looking at the success and international reach of the SEC’s Whistleblower Program in formulating and shaping their own domestic whistleblower programs. In China, the Supreme People’s Procuratorate, the country’s top prosecuting body, recently issued regulations outlining legal rights for individuals who report corruption and malpractice. These regulations, titled the Rules of the People’s Procuratorates on Whistleblowing Work, give whistleblowers the right to apply for protection if their personal safety or property is threatened, allow whistleblowers to receive rewards in connection with their whistleblowing activity, and also permit the procuratorate to develop a protection plan designed to prevent and punish retaliatory actions. These regulations co-exist with existing Chinese labor law — mainly the Labor Law of the People’s Republic of China and the Regulation on Labor Security Supervision — which allow labor administration bureaus to fine companies that retaliate against whistleblowers.

But not all jurisdictions have agreed with the U.S.-style approach to whistleblower programs, despite their apparent success. In July 2014, the United Kingdom’s Financial Conduct Authority (FCA) and the Bank of England Prudential Regulation Authority (PRA) issued a report titled Financial Incentives for Whistleblowers, which reviewed certain recommendations of the Parliamentary Committee on Banking Standards.
FCA, Financial Incentives for Whistleblowers (July 2014), http://bit.ly/22m8JLK. The FCA is the UK’s independent financial regulatory body and it operates alongside the Bank of England-owned PRA, which regulates individual financial firms. The Parliamentary Committee asked the FCA and PRA to research the impact of financial incentives on encouraging whistleblowing under the U.S. system and to determine if the UK should undertake a similar financial incentive scheme.

After reviewing the SEC’s Whistleblower Program, the UK regulatory agencies found that the incentive systems provide “nothing for the vast majority of whistleblowers,” and that the costs, including legal costs and the costs of maintaining a complex governance structure to manage claims, outweigh the benefits. Notably, the regulators found that there was “no empirical evidence of incentives leading to an increase in the number or quality of disclosures received by regulators.” But the regulators noted that whistleblowers in the UK were already protected through the Public Disclosure Act of 1998, under which an employment tribunal can award unlimited compensation to an employee who has been the victim of retaliation.

Not all jurisdictions, however, have the developed and robust whistleblower protections that the U.S., UK and other countries have or are working toward. In a September 2014 survey of the whistleblower protection laws in G20 countries, the group Transparency International Australia found that whistleblower protections, especially anti-retaliation protections, commonly fall short in G20 countries and need “immediate attention.” Transparency International Australia, Final Report, Whistleblower Protections in G20 Countries: Priorities for Action (Sept. 2014), http://bit.ly/IOSQuv6. The group noted a particular need for laws covering private companies, including penalties for companies and individuals who retaliate against corporate whistleblowers. But, of all of the G20 countries, the group found that the United States scored the highest marks for protecting the anonymity of whistleblowers.

Advice for Companies: Managing Risk in the Global Market

With the SEC actively promoting its success with foreign whistleblowers, companies with international operations must be even more diligent in maintaining robust compliance, anti-corruption, and risk management programs both in the United States and abroad. Companies must not only update and revisit their anti-corruption and anti-bribery programs on a regular basis, but they must also ensure that employees and contractors operating worldwide are properly trained and informed of these policies.

Corporate legal departments and compliance officers should ensure that effective mechanisms are established to encourage internal reporting and to investigate and resolve expeditiously any potential issues prior to an employee going directly to the SEC or other regulator to raise complaints or concerns. To implement best practices, companies may have to work with outside counsel and other consultants both in the U.S. and overseas to ensure compliance and to assist with monitoring. By proving to employees that the company takes tips seriously, it can instill a level of trust in internal reporting and compliance systems.

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