“PRIVATE JUSTICE” AND FCPA ENFORCEMENT: SHOULD THE SEC WHISTLEBLOWER PROGRAM Include A QUI TAM PROVISION?

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INTRODUCTION

The most important—and under-recognized—fact about the enforcement of transborder anti-corruption legal regimes is this: governments cannot realistically expect to be able to do it effectively without enlisting the help of whistleblowers and the private bar. Various international conventions that require criminalization of transborder corruption recognize that civil remedies may be effective, but they do not require state parties to implement such remedies. This article posits that “private justice,” defined expansively as private persons initiating, or assisting in the launching, of lawsuits to detect and deter public harms, must be employed in conjunction with governmental criminal enforcement if we are to achieve any real success in containing the contagion of transborder corruption. Not all states’ legal
systems are hospitable to private justice, and the United States is one of the few countries that use it so comprehensively. This may arise from a cultural antipathy toward whistleblowers, a preference for judicial investigations of wrongdoing, or a disinclination to adopt the structural incentives—such as contingency fee arrangements—that make some such mechanisms work. But those states whose legal systems are congenial to the notion ought seriously to consider harnessing the power of private justice in the war against corruption and its many collateral ills.

So what should private justice look like in this context? Private justice can be configured in numerous ways to pursue the public interest. The effectiveness of any particular cause of action or legal device (such as class actions) depends upon the goals identified, which in turn depend on the particular subject-matter of regulation, among other things. For example, one goal of “private justice” regimes in regulatory areas where discrete victims may be identified, such as environmental and civil rights enforcement, is to make individual victims whole. I submit that in the corruption context, identifiable victims (other than competitors) may be difficult to isolate and that the harms sought to be prevented and punished are overwhelmingly social, political, and diplomatic ones in which the ultimate costs of the corruption may be difficult to quantify. This paper begins by summarizing two U.S. private justice regimes that are structured to serve at least some of the goals that should be considered in this context: one that is commonly cited as extraordinarily successful in combating false and fraudulent claims against the U.S. government (the False Claims Act (“FCA”)), and one that is a newer, and more limited, program Congress created to incentivize private persons to disclose information and evidence regarding securities law violations, including those related to transborder corruption, to the U.S. government (the Securities and Exchange Commission’s (“SEC”) Whistleblower Program (“WBP”)).

These mechanisms are designed to: elicit insider information that will jumpstart enforcement efforts; ease the burdens presented by sole reliance on criminal mechanisms; and significantly supplement the ever-decreasing amount of resources committed to public enforcement by allowing citizens to pursue litigation foreign governments’ “[un]willingness and [in]ability to enforce their laws enacted to protect foreign governments”.

4. A nod must go to the United Kingdom, where the *qui tam* action was born. See J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. Rev. 539, 548 (2000).

5. See, e.g., Bucy, supra note 2, passim (describing victim actions, common good, and hybrid models).


7. Thus, for example, as of August 2009, before the sequester went into effect, the head of SEC enforcement, Robert Khuzami, reported that “the SEC has anti-fraud jurisdiction over 30,000 issuers, advisors, broker-dealers, transfer agents and issuers, as well as anyone who commits securities fraud—and yet we have only 1,100 Enforcement staff nationwide.” Robert Khuzami, *Speech by SEC Staff: Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement*, SEC & EXCH. COMM’N (Aug. 5, 2009), http://www.sec.gov/news/speech/2009/spch080509rk.htm.
without the government (FCA) and/or by promoting the more effective and efficient use of public resources (FCA and WBP). A critical footnote to these aims is that the goal cannot be simply to attract whistleblowers; given governmental resource constraints, screening thousands of random tips will be more trouble than it is worth and may indeed be counterproductive from a deterrence standpoint. For this and other reasons, the incentives must also be sufficient to attract entrepreneurial lawyers—often working on a contingency fee basis—to screen, investigate, and present the best and most complete cases to enforcement authorities. A further aim—fighting regulatory “capture” by regulated industries—may also be appropriate in this context and may be served by designing the private justice mechanism to permit private individuals to proceed without government intervention, as does the FCA but not the WBP. Finally, one must consider the law-generating function of private justice and evaluate whether the particular regulatory context will be well served by additional judicial participation in fleshing out the applicable law or whether instead there is an undue risk that private enforcers will drive the law’s boundaries in ways that do not serve the public interest.

Returning to my thesis, I will, in the course of describing how these two regulatory regimes further the public interest, also discuss the circumstances that conspire to make criminal enforcement of transborder anti-corruption norms prohibitively difficult and the reasons that private justice mechanisms, like the FCA or the SEC Program, may cure or at least ameliorate these difficulties. In discussing design features, I do not purport to canvas all the considerations—normative, political, or structural—that may inform this debate, in part because the SEC Program has been in operation only a short time and any conclusions regarding its efficacy or effects (intended and unintended) are premature. I will, however, conduct a limited comparison of the design features of these two mechanisms—and their costs and benefits in this context—to illustrate some of the design decisions that must be made in structuring an anti-corruption private justice vehicle.

In so doing, I would like to reinvigorate the debate over whether Congress should have provided for an FCA-like *qui tam* regime instead of or in addition to the WBP in the FCPA context based on recent empirical work in the FCA space and what we can posit regarding the likely incentives the WBP offers to whistleblowers and the private bar. My preliminary conclusions are that: the current WBP program encourages nearly cost-free tipping, which may incentivize the provision of masses of low-quality information; the SEC’s resource constraints may mean that it does not have the capacity to effectively screen the wheat from the chaff, paradoxically resulting in lower quality enforcement and less deterrence; it may be that only the provision of *qui tam* authority will provide entrepreneurial law firms—who can significantly assist the SEC in triaging tips—the incentives, in terms of the quantity of the awards and the certainty of prevailing, to make the necessary investment in this practice.
I. THE FCA AND SEC WHISTLEBLOWER (OR “Bounty”) PROGRAMS

A. The Civil False Claims Act

The civil False Claims Act\(^8\) contains a number of substantive prohibitions\(^9\) but is most frequently used to recover government monies persons knowingly obtained—or improperly retained\(^10\)—through false claims\(^11\) or false statements.\(^12\) Generally, a person may be liable under the FCA if the defendant presented to the government a claim that he knew to be false or fraudulent or knowingly made or used a false statement material to such a claim.

The FCA, \textit{inter alia}, authorizes the government to bring actions to secure damages for false and fraudulent claims upon the government.\(^13\) Critically, however, it also allows private citizens, known as “relators,” to bring what are known as \textit{qui tam}\(^14\) suits in the name of the government, based on the individual’s knowledge of fraud against the government, and to secure for his trouble a portion of the funds recovered in the suit. Thus, a civil False Claims Act suit may be initiated by either the Attorney General or by private persons.\(^15\)

A private person may initiate a \textit{qui tam} suit “for the person and for the United States Government” in the “name of the Government”\(^16\) by filing a complaint under seal with the court and serving a copy on the Department of Justice (“DOJ”) (but not on the defendant until the court so orders). The relator is also required to provide the DOJ with a “written disclosure of substantially all material evidence and information.”\(^17\) The “relator” does not have to have alleged or suffered any personal harm—the idea is that he is suing on behalf of the harmed government. What the relator must have, however, is information not previously publicly available.


\(^{10}\) Id. § 3729(a)(1)(G) (reverse false claims section). Section 3729(a)(1)(C) imposes liability on those who conspire to violate the FCA.

\(^{11}\) Id. § 3729(a)(1)(A) (rendering liable any person who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval”).

\(^{12}\) Id. § 3729(a)(1)(B) (rendering liable any person who “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim”).


\(^{14}\) The term is derived from the Latin “\textit{qui tam pro domino rege quam pro se ipso},” or “one who pursues this action on behalf of the King and himself.”


\(^{16}\) Id. § 3730(b)(1). Note that a variety of constitutional challenges to \textit{qui tam} actions have been rejected by the courts. See, e.g., Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 777 (1999); Pamela H. Bucy, Private Justice and the Constitution, 69 TENN. L. REV. 939, 941 (2002).

\(^{17}\) 31 U.S.C. § 3730(b)(2).
disclosed unless the relator is the “original source” of the information. A relator cannot file a qui tam action where he has been convicted of criminal misconduct arising from his role in the FCA violation, another qui tam relator alleging the same violation has filed before him, or the government is already a party to a civil or administrative procedure concerning the same conduct.

Where a case is initiated by a private relator, rather than the government, the complaint remains under seal and the action is stayed for sixty days while the government determines whether to intervene—that is, take over the case as its own—or to leave the case to the relator to litigate. The sixty-day seal period permits the government to review the relator’s allegations and evidence, to assess the suit’s impact on any pending criminal investigation, and to prevent alerting potential criminal defendants of an investigation. The statute permits the court to grant the government extensions of the sixty-day period during which the complaint remains under seal. While the government takes over a minority of the qui tam actions brought by relators, it investigates all of them.

If, after investigating the matter, the government declines to intervene, the relator may litigate the case to judgment, although the relator must obtain the government’s approval to settle or dismiss a case. Even if the government intervenes, thus taking over primary responsibility for its prosecution, relators may remain involved.

Relators may, if the suit is successful, recover between fifteen and twenty-five percent of the proceeds of the suit if the government chooses to intervene and conduct the litigation, and twenty-five to thirty percent in a case in which the government does not intervene. The relators’ share may be quite hefty because the FCA authorizes substantial penalties for violations. Thus, those found liable must pay a civil penalty of between $5,000 and $10,000 for each false claim and

18. Id. §§ 3730(e)(4)(A)–(B).
19. Id. §§ 3730(b)(5), (d)(3), (e)(3). A former or present member of the armed forces is also barred from being a relator for matters arising out of her service in the armed forces. Id. § 3730(e)(1).
20. Id. § 3730(b)(2).
21. Id. § 3730(b)(3).
22. As a practical matter, the Attorney General’s investigation may require multiple extensions and the mean decision time is nearly 600 days and the median is 437 days after filing. See David Kwok, Evidence from the False Claims Act: Does Private Enforcement Attract Excessive Litigation?, 42 PUB. CONT. L.J. 225, 247 (2013) (graphing days cases remain under seal); see also David Freeman Engstrom, Private Enforcement’s Pathways: Lessons from Qui Tam Litigation, 114 COLUM. L. REV. 1913, 1993 (2014) (graphing investigation time by year and case type).
24. Id. § 3730(c)(1). In such cases, the government (id. § 3730(c)(2)(C)) and the defendant (id. § 3730(c)(2)(D)) can ask the court to limit the relator’s participation.
25. Id. § 3730(d)(1)–(2). Under certain circumstances, the relator’s award can be reduced to no more than ten percent (id. § 3730(d)(1)) but if the relator planned and initiated the fraud, the court may reduce the award below that floor, and presumably to zero (id. § 3730(d)(3)).
treble the amount of the government’s damages.\textsuperscript{27} In addition, if the suit is successful, the relator is entitled to have the defendant pay the relator’s legal fees and other expenses.\textsuperscript{28} To further incentivize private enforcement, the Act provides relief for whistleblowing relators who are “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against” as a result of their whistleblowing.\textsuperscript{29} The Government obviously also wins in a successful False Claims Act case, obtaining the lion’s share of the recovery whether it elects to intervene or not.

The FCA, measured in terms of collection of falsely or fraudulently obtained government money, has been spectacularly successful. Between October 1, 1987 and September 30, 2013, some 3,000 qui tam suits were filed and $20 billion was recovered.\textsuperscript{30} Recoveries also seem to be escalating; thus, between 2008 and 2013 alone, the DOJ Civil Division recovered approximately $14.5 billion in qui tam actions.\textsuperscript{31} (Note that some criticize these numbers as under-inclusive because they do not include the substantial criminal penalties paid to the DOJ, nor do they include settlement amounts paid to state authorities.)

The overwhelming majority of FCA recoveries stemmed from actions filed by qui tam relators. For example, over the last twenty-five years, the DOJ has recovered a total of approximately $38.9 billion in fraud cases—and qui tam relators are responsible for $27.2 billion of that amount.\textsuperscript{32} These developments are reflected in relators’ awards. From 1988 to 2013, relators were awarded more than $4.2 billion.\textsuperscript{33} And the amount of rewards has been increasing. In fiscal year 1988, qui tam relators received a grand total of $97,188; by fiscal year 2012, relators’ rewards totaled $439 million.\textsuperscript{34}

\textbf{B. SEC Whistleblower (or “Bounty”) Program}

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).\textsuperscript{35} The Act created a new and improved SEC
WBP\textsuperscript{36} bearing some similarities to—and substantial differences from—FCA civil actions.\textsuperscript{37} This new “bounty” program is said to have arisen from the SEC’s failure to prevent and detect crimes committed by Bernard Madoff despite whistleblower Harry Markopolos’ reports to the agency about Madoff’s ponzi scheme.\textsuperscript{38} Reacting to congressional interest in making the SEC more responsive to, and effective in responding to, whistleblowing, the SEC Inspector General recommended that a strengthened and expanded whistleblower bounty program be authorized, and Congress concurred.\textsuperscript{39} When it authorized the WBP, Congress tasked the SEC’s Office of the Inspector General (“OIG”) with studying whether a \textit{qui tam} authorization was also appropriate.\textsuperscript{40} The OIG issued a report, stating that it would be premature to recommend a \textit{qui tam} authorization because the WBP was only in place as of August 2011, and “[a] fundamental change in approach would disrupt the system currently in place.”\textsuperscript{41}

“The goal of the whistleblower program is to create a system that incentivizes individuals to come forward with high quality information to help the Commission expose fraud.”\textsuperscript{42} In sum, the Dodd-Frank Act directs the Commission to make monetary awards to eligible individuals who voluntarily provide original information that leads to successful Commission enforcement actions resulting in the imposition of monetary sanctions of over $1 million. Whistleblower awards must equal between ten and thirty percent of the monetary sanctions collected, as well as of related actions. The tip must relate to violations of U.S. securities laws, including FCPA-related violations.\textsuperscript{43}

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\textsuperscript{36} 15 U.S.C. § 78u-6 (2015). In 1989, the SEC created a program to reward whistleblowers, but it was limited to insider trading tips and was widely viewed, even within the SEC, as ineffective. See, e.g., U.S. SEC. \& EXCH. COMM’N, OFFICE OF INSPECTOR GEN., OFFICE OF AUDITS, REP. NO. 474, ASSESSMENT OF THE SEC’S BOUNTY PROGRAM (2010) (“[T]he program’s success has been minimal and its existence is practically unknown.”).
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\textsuperscript{37} Thus, for example, the ten to thirty percent bounty and the “original information” and “voluntarily provided” requirements largely track FCA provisions.
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\textsuperscript{39} Zarin & Roth, supra note 38.
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\textsuperscript{41} U.S. SEC. \& EXCH. COMM’N, OFFICE OF INSPECTOR GEN., OFFICE OF AUDITS, REP. NO. 511, EVALUATION OF THE SEC’S WHISTLEBLOWER PROGRAM VI (2013).
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The most significant difference between the FCA and the SEC Program is that individuals with information about FCPA violations may “tip” the SEC and will be rewarded if a successful, $1 million plus, enforcement action ensues, but should the SEC refuse to go forward, the tippers are not authorized to bring a private *qui tam* suit as relators to secure a recovery. In this sense it is a much more limited mechanism for “private justice” in that it does not authorize private persons to sue for harms inflicted on the government, but it does enlist private citizens to augment the scope and increase the efficiency of governmental enforcement. As one commentator noted, the Dodd-Frank Act “democratises the global fight against corruption by giving private citizens a true and tangible financial stake in the fight—a monetary reward.”

The SEC Program provides two critical components necessary to attract inside information: potentially large financial incentives for those with knowledge to bring wrongdoing to the SEC’s attention (bounty provisions), and protections that guard the anonymity of whistleblowers and provide relief from retaliation by employers (protection provisions).

1. **Bounty Provisions**

The WBP requires that the “individual” tipper or tippers voluntarily provide “original information.” Original information is defined as information that: is derived from independent knowledge or analysis; is not known to the Commission from other sources unless the whistleblower is the original source of the information; and is not exclusively derived from an allegation made in a judicial or administrative hearing, government report, hearing, audit, or investigation, or from the news media unless, again, the whistleblower is the original source of the information. The SEC has decreed that “original information” does not include information subject to the attorney-client privilege or obtained in connection with legal representation of a client except in narrow circumstances. It also generally excludes information learned through internal investigations or compliance or internal audit responsibilities.

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45. According to SEC regulations, a “whistleblower must be an individual. A company or another entity is not eligible to be a whistleblower.” 17 C.F.R. § 240.21F-2(a) (2015).

46. Whistleblower” is defined as “any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.” 15 U.S.C. § 78u-6(a)(6) (2015).

47. Id. § 78u-6(a)(3)(A)–(C); see also 17 C.F.R. § 240.21F-4(b).

48. 17 C.F.R. § 240.21F-4(b)(4); see also Lawrence A. West, *Can Attorneys Be Award-Seeking SEC Whistleblowers?*, HARV. L. SCH. ON CORP. GOVERNANCE & FIN. REG. (June 17, 2013), http://blogs.law.harvard.edu/corpgov/2013/06/17/can-attorneys-be-award-seeking-sec-whistleblowers/.

The information must relate to a “violation of the Federal securities laws,” including “any rules or regulations thereunder,” that “has occurred, is ongoing, or is about to occur” and must be made to the SEC through its designated processes. The FCPA has two major types of provisions that are subject to SEC civil enforcement: accounting and antibribery. The accounting provisions apply only to “issuers, those companies whose securities are registered with the SEC, or those who are required to file reports with the SEC, pursuant to the Securities Exchange Act of 1934, regardless of whether they have any foreign operations” (hereinafter “issuers”). Under the accounting provisions, all publicly-held companies either registered or required to file reports with the SEC, including companies holding American Depository Receipts, must comply with the record-keeping and internal controls provisions of the FCPA. Issuers of securities must “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets.” Covered companies must establish a system of controls to reasonably assure that transactions are properly authorized. Finally, the antibribery provision states that issuers who take defined actions within the United States in furtherance of the corrupt payments, directly or indirectly, to a foreign official for the purpose of obtaining or retaining business also violate the securities laws.

The Act does not require that tippers be U.S. citizens, nationals, or residents and, indeed, a great many tips to date have come from abroad. (But tippers who obtain the information while employed by a foreign government, or any department, agency, or instrumentality of such government, or by a foreign financial regulatory authority are not entitled to awards.) The Act also does not require that the whistleblower be an employee of the wrongdoing company, although the retaliation protections apply only to employees.

Certain categories of persons, however, may not collect awards for tipping the SEC. They include whistleblowers who obtained the information while a member,

51. See 15 U.S.C. § 78u-6(c)(2)(D). The information may relate to conduct that occurred prior to the effective date of the Act, July 21, 2010, but must be within the applicable five-year statute of limitations.
55. 15 U.S.C. § 78m(b)(2) (2015). The Act broadly defines “records” to include “accounts, correspondence, memorandum, tapes, discs, papers, books, and other documents or transcribed information of any type.” “Reasonable detail” means such level of detail as would satisfy prudent officials in the conduct of their own affairs. There is no materiality requirement for a books and records violation. Tarun, supra note 54, at 19.
officer, or employee of DOJ, the Commission and other appropriate regulatory agencies, a self-regulatory organization, the Public Company Accounting Oversight Board, or a law enforcement organization; who obtained the information while performing an audit of financial statements required under the securities laws; or who failed to submit the information to the SEC as required by SEC rule.

To be eligible for an award, the whistleblowers must voluntarily provide the Commission with original information that leads to successful enforcement by the Commission of a federal court or administrative action in which the Commission obtains monetary sanctions totaling more than $1 million. “Monetary sanctions” include any money, such as penalties, disgorgement, and interest, ordered to be paid. Importantly, if the SEC, on the basis of the information provided, successfully brings an action that yields over $1,000,000 in sanctions, the Commission will also include in the “bounty” amounts collected in “related actions,” which, however, must be based on the same original information that led the Commission’s action. These “related actions” include judicial or administrative actions brought by the DOJ, an appropriate regulatory authority other than the SEC, a self-regulatory organization, or a state attorney general in a criminal case. At present, the most important type of “related action” is a criminal or non-criminal disposition by DOJ. Thus, for example, if the SEC Program had been in effect at the time, and a whistleblower had been the original source of information leading to the DOJ/SEC sanctions in the Siemens case, he would have been eligible for between ten to thirty percent of the combined $800 million in penalties imposed in that case.

59. This would include the Commission, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation (FDIC), the Office of Thrift Supervision (OTS), and any other agency defined as appropriate regulatory agencies under 15 U.S.C. § 78c(a)(34). See 17 C.F.R. § 240.21F-4(f), (g) (2015).
60. A “self-regulatory agency” means any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board, and any other organizations that may be defined as self-regulatory organizations under 15 U.S.C. § 78c(a)(26). See 17 C.F.R. § 240.21F-4(h).
61. 15 U.S.C. § 78u-6(c)(2)(A), (C), (D) (2015); 17 C.F.R. § 240.21F-8(c)(4).
62. To be “voluntary,” the tipper’s submission must be made before “a request, inquiry, or demand that relates to the subject matter of your submission is directed to you or anyone representing you” by the Commission, or in connection with any investigation by the Public Company Accounting Oversight Board, any self-regulatory organization, Congress, any other authority of the federal government, or a state attorney general or securities regulatory authority. 17 C.F.R. § 240.21F-4(a). In addition, a submission is not voluntary if the tipper is required to report the information to the Commission as a result of a pre-existing legal duty, a duty that arises out of a judicial or administrative order, or a contractual duty that is owed to the Commission or any of the other authorities mentioned above. Id.
63. 17 C.F.R. § 240.21F-3(a) (2015).
64. 17 C.F.R. § 240.21F-4(e).
65. 17 C.F.R. § 240.21F-3(b).
66. Id.
If all the conditions are met for a whistleblower award, the tipper must receive no less than ten percent and no more than thirty percent of the monetary sanctions the SEC and others, in related actions, have actually collected. The SEC, in exercising its discretion to determine the amount of the award within the ten to thirty percent range will consider: (1) the significance of the information provided by the whistleblower to the success of the covered judicial or administrative action; (2) the degree of assistance provided by the whistleblower and her lawyer in the action; (3) the “law enforcement” and “programmatic interest[s] of the Commission in deterring violations of the securities laws by making awards to whistleblowers who provide information that lead[s] to the successful enforcement of such laws;” (4) whether, and to what extent, the whistleblower participated in internal compliance programs; and (5) the degree to which the whistleblower has culpability in the violation, unreasonably delayed in reporting the misconduct, or interfered with the company’s internal compliance and reporting systems.

The SEC wrestled with the question whether those complicit in the reported securities violations may benefit from their wrongdoing. Whistleblowers are barred from recovery if they obtained the information by illegal means or are convicted of a criminal violation related to the tipper’s case. A whistleblower is also disqualified if he knowingly and willfully made “any” false or fraudulent statement or used any document that contains false or fraudulent entries. Additionally, in considering whether the $1,000,000 threshold has been reached for purposes of making an award, the SEC will not take into account monetary sanctions the whistleblower is ordered to pay, “or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated.”

The SEC, in determining the amount of the tipper’s “bounty,” will consider his “culpability,” including the tipper’s role in the violation, the “egregiousness” of the fraud committed by the tipper, and his scienter with respect to his or others’ violations. The Commission will also consider whether the whistleblower

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67. 15 U.S.C. § 78u-6(b)(1)(A), (B) (2015); 17 C.F.R. § 240.21F-5(b), (c) (2015). However, the percentage awarded in connection with a Commission action may differ from the percentage awarded in connection with a related action. 17 C.F.R. § 240.21F-5(b). If there is more than one whistleblower, the Commission will determine the appropriate individual percentages, not to total less than ten, or more than thirty, percent. Id. § 240.21F-5(c). The Act provides that these percentages apply to “what has been collected of the monetary sanctions imposed in the action or related actions,” thus disincentivizing tippers where a judgment-proof defendant is the subject of the case. 15 U.S.C. § 78u-6(b)(1)(A), (B); see also 17 C.F.R. §§ 240.21F-14(b), 240.21F-5(b) (2015).

68. 17 C.F.R. § 240.21F-6(a)(3) (2015) (the regulation re-labels “programmatic interest” as “law enforcement interest”).


70. 17 C.F.R. § 240.21F-6(a)(4), (b).


72. 15 U.S.C. § 78u-6(i); 17 C.F.R. § 240.21F-8(c)(7).

73. 17 C.F.R. § 240.21F-16 (2015).

74. 17 C.F.R. § 240.21F-6(b).
obtained any financial benefit from the wrongdoing, whether he is a recidivist, and whether he knowingly interfered with the Commission’s investigation of the violations.75 All the above notwithstanding, the Program does not have a provision, like the FCA, permitting the ultimate bounty to be zero; absent a conviction, illegal means, or the provision of false information, the whistleblower will receive at least ten percent of the amount the government recovers. Note, however, that the SEC reserves the right to bring actions and seek damages recoveries against tippers for their conduct. Whistleblowing, in short, does not confer amnesty.76

Probably the greatest concern articulated by business interests when the SEC’s implementing regulations were under consideration was that, absent a rule requiring internal reporting of problems first, the Program would undermine companies’ compliance efforts—which were undertaken with considerable congressional and SEC pressure. Companies fear that whistleblowers will go straight to the SEC, bypassing internal corporate compliance programs that are designed to give the company a chance to investigate and, if necessary, remediate and self-report so as to head off DOJ and SEC enforcement actions and heavy penalties.77 The SEC declined to adopt a rule requiring whistleblowers within a company to report the potential violation to the company. The head of the WBP explained that, “by not having a reporting requirement, it will cause companies to strengthen their compliance programs, instead of waiting for a whistleblower to come to them.”78

In response to these concerns, however, the SEC regulations attempt to accommodate companies’ legitimate interest in seeing that their compliance programs are given a chance to operate as designed by providing incentives for internal reporting, as well as reporting to the SEC. First, the SEC, in exercising its discretion to determine where, between ten and thirty percent of the government’s

75. Id.

Whistleblowers will run to the SEC whenever there’s a whiff of overseas bribery. They won’t talk about it with their bosses inside the company first. Why should they? That would be like giving away a lottery ticket. And why expose themselves to retaliation? If they go straight to the SEC, they’re immune from corporate discipline. So they’ll go to the feds taking with them as many internal emails, audit documents, and bank records as they can carry.

Id.

78. William McGrath, Chief of the SEC’s Whistleblower Office Speaks at Panel Regarding FCPA Developments, PORTERWRIGHT (Oct. 4, 2011), http://www.fedseclaw.com/2011/10/articles/whistleblower-issues/chief-of-the-secs-whistleblower-office-speaks-at-panel-regarding-fcpa-developments/; see also Robert S. Khuzami, Speech by SEC Staff: Remarks at Open Meeting—Whistleblower Program, U.S. SEC. & EXCH. COM’N (May 25, 2011), http://www.sec.gov/news/speech/2011/spch052511r1k.htm (citing lack of empirical data to support assertion that absence of mandatory reporting would harm compliance efforts; belief that responsible companies will design an effective compliance program regardless of mandatory internal reporting; and noting that Congress’ intent was to incentivize insiders to provide the SEC with high-quality tips and thus that this is a tool designed to increase the effectiveness of the enforcement program, not internal compliance efforts).
recovery the whistleblower’s award should be, may consider the amount of cooperation the whistleblower provided to the company and may indeed lower awards where the whistleblower interferes with the company’s internal processes. Second, the SEC rules provide that a whistleblower can report to the company first and still recover a whistleblower fee if he subsequently reports the wrongdoing to the SEC.79 And, if the whistleblower reports to the SEC within 120 days after reporting the misconduct internally, he is deemed to have reported to the SEC upon the date of the internal report for purposes of privileging his “place in line” as first reporter should other whistleblower tips be lodged regarding the same conduct. Finally, if a whistleblower reports internally and the company then voluntarily discloses to the SEC, the information reported by the company would be attributed to the whistleblower, including additional information uncovered about wrongs not initially identified by the whistleblower.80

The evidence to date indicates these regulations should be sufficient to induce internal reporting. It suggests that corporations’ concerns in this regard may be overblown.81 SEC Associate Director of Enforcement Stephen Cohen stated, that “almost uniformly, the whistleblowers in my investigations have reported internally [and] in most instances repeatedly, and to multiple people. They were either not listened to, or were retaliated against” before they tipped the SEC.82 Research backs up this anecdotal report. For example, the Ethics Resource Center issued a report entitled Inside the Mind of a Whistleblower in which it documented the results of its 2011 National Business Ethics Survey. With respect to “whistleblowers,” it reported:

The current stigma assigned to a “whistleblower” as a rogue and disloyal employee is inaccurate. Only one in six reporters (18 percent) ever chooses to report externally. Of those who do go outside their company at some point, 84 percent do so only after trying to report internally first. Furthermore, many of those who are “whistleblowers”... still try to address the problem within their own company; half of those who choose to report to an outside source initially later report internally as well. Only two percent of employees solely go outside

80. Id.
81. See, e.g., Rose, supra note 6, at 1278–79 (citing the rise in internal reporting in the wake of the Whistleblower Bounty Program).
the company and never report the wrongdoing they have observed to their
employer.83

This dynamic may change, depending how courts read the scope of the SEC
Program’s anti-retaliation provisions. One court of appeals has held that Dodd-
Frank’s protections against retaliation apply only to whistleblowers who report
potential violations to the SEC, rather than only to their employer.84 This ruling
increases whistleblowers’ incentives to go straight to the SEC, informing their
employers, if at all, only after they have lodged the SEC complaint that will
safeguard their statutory whistleblower retaliation protections. If other courts
concur in this ruling, companies would be well advised to assume that the SEC will
know about potential violations much earlier than previously. This realization may,
in turn, affect companies’ calculus in deciding whether to self-report to the SEC
and DOJ, perhaps increasing the incidence of voluntary disclosure.


The first protection afforded whistleblowers is confidentiality. They may even
“tip” anonymously, but only if an attorney submits the information to the SEC
on the tipper’s behalf.85 When a Commission action results in monetary sanctions
totaling more than $1 million, the whistleblower, to secure his bounty, must
disclose his identity to the Commission.86 Until that time, the Commission is
duty-bound, with limited exceptions, to keep confidential the identity of even a
whistleblower who is known to the Commission unless it is required to disclose
this information in connection with a public proceeding.87 The SEC has not named
the tippers in announcing whistleblower awards made in connection with settle-
ments to date. If the Commission determines that it is necessary to its mission, it
may share information that could reasonably be expected to reveal the identity of
the whistleblower, but only with specified state and federal regulatory and criminal
authorities, and these entities also are bound by the statutory confidentiality
requirements.88 Again when necessary to accomplish the purposes of the Ex-

to protect only individuals who report securities laws violations to the SEC). But see Kramer v. Trans–Lux Corp.,
protect a narrow group of individuals in addition to those who report securities laws violations to the SEC);
§ 78u-6 to protect a narrow group of individuals in addition to those who report securities laws violations to the
(construing 15 U.S.C. § 78u-6 to protect a narrow group of individuals in addition to those who report securities
laws violations to the SEC).
85. 17 C.F.R. §§ 240.21F-7(b), 240.21F-9(c) (2015).
86. 17 C.F.R. §§ 240.21F-7(b, 240.21F-10(c) (2015).
88. 17 C.F.R. § 240.21F-7(a)(2).
change Act and to protect investors, the SEC can share the “tipped” information
with foreign securities and law enforcement authorities but will secure such assurances of confidentiality as it deems appropriate in doing so.89

The Act also provides substantial protection against retaliation by employers
against whistleblowing employees who provide the SEC with information relating
to a “possible” violation of the securities laws whether or not the employees
ultimately satisfy the requirements, procedures, and conditions to qualify for an
award.90 Thus, the Act states that “[n]o 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 the
employee’s provision of information to the Commission and assistance in the
Commission’s investigation and any subsequent judicial proceeding.91 If ag-
grieved, a whistleblower may bring an action in federal court for relief under the
Act, which may include reinstatement with the same seniority, twice the amount of
back pay owed, with interest, and compensation for litigation costs, expert witness
fees, and reasonable attorneys fees.92 The Commission may also enforce the
anti-retaliation provisions.93 It is important to note, however, that one district court
has held that the Dodd-Frank Whistleblower anti-retaliation provisions do not
have extraterritorial scope, but the reviewing appellate court chose not to address
this holding on appeal.94 This could have significant ramifications in the FCPA
context, where those closest to the corrupt transborder activity may be overseas.

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89. Id.

90. 17 C.F.R. § 240.21F-2(b) (2015).


92. Id. § 78u-6(b)(1)(B), (C). The action must be brought within six years after the date the retaliation
occurred or three years after the date when the facts material to the retaliation claim are known or reasonably
should have been known. In any case, no claim may be brought more than ten years after the retaliation. Id.
§ 78u-6(b)(1)(B)(iii).

93. 17 C.F.R. § 240.21F-2(b)(2); see also Catherine Foti, Employers Beware: Will the SEC Be A Safety Net for
Terminated Whistleblowers?, FORBES (Oct. 2, 2013), http://www.forbes.com/sites/insider/2013/10/02/employers-
beware-will-the-sec-be-a-safety-net-for-terminated-whistleblowers/.

plaintiff Khaled Asadi, a dual U.S. and Iraqi citizen and U.S.-based employee of GE Energy, agreed to be
“temporarily relocated” to Amman, Jordan, where he had an office. In the course of his work, he discovered an
allegedly corrupt arrangement involving Iraqi officials, and he reported his concerns to a regional executive for
GE and then to others within the company, including GE’s ombudsperson; he never, however, “blew the whistle”
to the SEC. Asadi alleged that GE retaliated against him, ultimately by firing him. He brought suit against GE
under the Dodd-Frank anti-retaliation provisions. GE argued, inter alia, that Asadi was not a “whistleblower”
titled to protection under the Act because he had not reported his suspicions to the SEC. The district court stated
that it did not have to decide whether the plaintiff qualified as a “whistleblower” under the statute because, it held,
the whistleblower provisions of Dodd-Frank did not apply to extraterritorial whistleblowing activity. Thus,
because “the majority of events giving rise to the suit occurred in a foreign country,” the district court dismissed
the complaint for failure to state a claim. Id. at *5. On appeal, the Fifth Circuit affirmed, but declined to opine on
the extraterritorial reach of these protections. Asadi v. G.E. Energy (USA), L.L.C., 720 F.3d 620, 630 n.13 (5th
Cir. 2013). It ruled instead that “the plain language of the Dodd-Frank whistleblower-protection provision creates
a private cause of action only for individuals who provide information relating to a violation of the securities laws
to the SEC.” Id. at 623 (emphasis added).
To avoid corporate attempts, through employment contracts or otherwise, to prevent tippers from contacting the SEC, the regulations further provide that “[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications.”95 Finally, the anti-retaliation provisions of the Sarbanes Oxley Act state that the rights and remedies available to whistleblowers may not be waived by “any agreement, policy form, or condition of employment.”96

II. “PRIVATE JUSTICE” MECHANISMS IN FCPA ENFORCEMENT?

My thesis—that, to be effective, governmental attacks on transborder corruption must be augmented by private justice—rests on the difficulties of investigating and successfully criminally prosecuting transborder corruption cases. The FCA and the SEC WBP illustrate how one might structure a private enforcement regime to serve, to varying degrees, the goals of private justice that are potentially relevant in this context and, in so doing, to address some of the greatest obstacles to effective enforcement of transborder anti-corruption norms.

A. Deterrence Through Accountability

One important difficulty in making criminal anti-corruption cases inheres in the type of proof, and the degree of certainty, required in such cases. To secure a conviction for corruption, prosecutors generally need to prove some degree of scienter and they need to prove that scienter, and the other elements of crime, by a heightened standard of proof—“beyond a reasonable doubt” in the United States and much of the world. The most difficult element for the government to prove in FCPA cases is corrupt intent. “In some investigations the DOJ and SEC cannot establish the payment of a bribe to a foreign official, but they can prove that a related or underlying expense in the books and records of the company is misleading, false, or did not occur, resulting in a ‘false books and records’ charge and resolution.”97 What this means is that the stigma attached to the conduct is diluted, because many criminal cases are settled as “just” accounting offenses rather than the bribery cases they should be.

95. 17 C.F.R. § 240.21F-17(a) (2015). For an evaluation of companies’ abilities to limit their exposure to whistleblowing through use of non-disparagement and confidentiality/nondisclosure agreements in employment and separation agreements, requirements that employees certify that they have internally disclosed any misconduct of which they are aware, and broad, unqualified releases and waivers upon separation, see William McLucas, Laura Wertheimer & Adrian June, Dispatches From the Whistleblower Front: Five Common Pitfalls For Companies To Avoid, 45 SEC. REG. & L. REP. (BNA) No. 29, at 1345 (July 22, 2013).


97. TARUN, supra note 54, at 211. “An SEC books and records consent decree will in virtually all circumstances be preferable to a DOJ indictment or an SEC bribery complaint.” Id. at 237.
Private justice is civil in nature and obviously employs a lesser standard of proof, even if it does not obviate the mens rea requirements. Whether these actions have the same deterrent punch as criminal cases I must leave to another paper. But increased detection flowing from sudden regulatory access to inside information, at least, is likely to change companies’ deterrent calculus.

Recall that deterrence theory counsels that companies will weigh the expected gains from corrupt conduct against the expected costs, taking into account the size of the prospective penalty and the likelihood of sanction. Companies engage in corrupt conduct because the upside, in terms of their bottom line, can be significant. At the same time, preventing violations—implementing anti-corruption compliance programs—is expensive and invasive (from the business side’s point of view), and must be relentlessly pursued to be effective. Criminologists seem to be in agreement that the primary determinant of deterrence is not the extent of the sanction threatened, but rather the certainty of apprehension. Where detection is unlikely, violations are lucrative, and compliance is expensive, firms will be more likely to engage in criminal risk-taking.

In sum, if there is, as the consensus seems to be, very little likelihood that corrupt activities will come to the SEC’s attention absent whistleblowing, it does not matter if criminal sanctions are a theoretical possibility. At the very least, if whistleblowing that results in civil suits or enforcement actions increases the likelihood that corrupt dealings will be exposed, companies’ deterrent cost-benefit analysis may be significantly altered.

B. Securing Inside Information

Professor Pam Bucy, a pioneer in the study of “private justice,” identified as its primary benefit the extraction of “inside information” that regulators would otherwise be unable to access. She asserted that “[w]ithout the key resource of inside information that is available through private justice actions, public regulators cannot effectively detect, prove, or deter complex economic crime or public corruption.” Others concur: “Whistleblowing is the best way to detect fraud.


99. “[S]ubstantial empirical evidence suggests that the deterrent effect of the certainty of punishment is much greater than that of the severity of punishment.” Shamena Anwar & Thomas A. Loughran, Testing a Bayesian Learning Theory of Deterrence Among Serious Juvenile Offenders, 49 CRIMINOLOGY 667, 668 (2011) (citing Klepper and Nagin, 1989; Paternoster, 1987); see also Daniel S. Nagin & Greg Pogarsky, Integrating Celerity, Impulsivity, and Extralegal Sanction Threatens into a Model of General Deterrence: Theory and Evidence, 39 CRIMINOLOGY 865, 865 (2001) (“[P]unishment certainty is far more consistently found to deter crime than punishment severity.”).

100. Cf. Philip Segal, Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act, 18 FLA. J. INT’L L. 169, 170 (2006) (arguing that the FCPA has been “greatly under-enforced since it was enacted”).

101. Bucy, supra note 2, at 8.
Employee disclosures are the most common source of fraud detection.102 And, as one ex-enforcement official explained, “[p]eople within [enforcement] organizations want to do significant cases and want to hold those responsible. The thing that has been lacking, and where the SEC whistleblower law has the potential to help, is actionable intelligence . . . . [T]his actionable intelligence will help change the trajectory103 of SEC enforcement efforts.

Both the FCA and the SEC WBP are explicitly designed to elicit inside information about public harms. The literature substantiates the common sense premise of these statutes: that the provision of whistleblower bounties and anonymity and anti-retaliation protections significantly increases the number of persons willing to take the personal, financial, and social risks of exposing others’ criminal activity.104 The United States’ experience with the FCA provides useful evidence in this respect. As one commentator summarized:

Empirical research on whistleblowing has indicated that financial incentives create a significant motivation to detect and report fraud, which is observable “regardless of the severity of the fraud.” According to one study, in the healthcare industry, where federal payments under the FCA are available to whistleblowers, fraud was detected as a result of an inside tipster in forty-one percent of the cases, compared with just fourteen percent of the cases in all other industries where employees are less likely to be rewarded with whistleblower bounties.105

Prior to 1986, relators filed approximately six qui tam cases a year. After Congress amended the statute in 1986 to increase available penalties from double to treble damages and to substantially increase the relators’ possible percentage recovery for successful suits, the number of suits skyrocketed. Thus, between October 1, 1987 and September 30, 2013, some 3,000 qui tam suits were filed and $20 billion was recovered.106 In fiscal year 1987, only 8% of new FCA cases were filed as qui tam actions but by fiscal year 2000 that number had climbed to 79% and, as of fiscal year 2012, qui tam relator suits represented 82% of new FCA matters filed.107 In 2013, more than 700 FCA suits were filed but only 93 of them were


105. Rapp, supra note 102, at 119 (citing Dyck et al, supra note 102).

106. U.S. DEP’T OF JUSTICE, supra note 30; see also Lemos, supra note 30, at 802.

107. See U.S. DEP’T OF JUSTICE, supra note 30; see also McLucas et al., supra note 34, at 2.
government-initiated.108

This aim of private justice has tremendous relevance to anti-corruption efforts. The first—and perhaps foremost—difficulty in transborder anti-corruption enforcement is uncovering the corrupt scheme. Those involved in bribery attempts will work to keep their plans secret, at least from regulators. The circle of those with knowledge and evidence of the corruption will generally be confined to those complicit in the scheme and others at the company whose loyalty is assumed and whose cooperation is necessary to make, or hide, the wrongful payments.109 Those within the company who object to the conduct will be reluctant to put their careers and livelihoods at risk by sharing the information outside the company absent a significant financial incentive and some measure of anonymity and protection from retaliation. In the transborder bribery context, these difficulties are magnified. Much of the activity will take place overseas and persons within the company who are uncomfortable with what is going on abroad will, in most cases, not think of reporting the conduct to an extraterritorial legal authority where no incentives, including anti-retaliation protections, exist to do so.

For all these reasons, DOJ prosecutors historically relied predominantly on corporate self-reporting and, to a lesser extent, on the press110 to discover FCPA issues.111 The problem with this, of course, is that companies do not come forward “voluntarily” out of guilty conscience or public spiritedness. They come forward if they believe that the scheme has been or shortly will be uncovered, and that they can secure valuable consideration from the government (e.g., a declination or

109. As the DOJ reported to Congress:

By its very nature the bribery of public officials is covert and generally involves consensual parties who go to great lengths to conceal the transaction. When the official involved is a representative of a foreign government and most of the critical acts take place outside of the country, the problems of detection, investigation and prosecution are necessarily compounded.


110. As one ex-enforcement official explained:

It wasn’t uncommon, when I first came to the SEC, for people to go, wake up early in the morning, read the Financial Times or the Wall Street Journal, New York Times, looking for a reporter to break a story and then open an investigation and then the investigation would work its way up to identify misconduct.

SEC’s Cohen Predicts Major Whistleblower Awards Soon, supra note 103.

non-criminal disposition) in return for their perceived cooperation.\footnote{112} Thus, at least in the perception of defense counsel, many “situations exist in which corporations rationally and responsibly choose to remedy bribery conduct internally and not self-report misconduct.”\footnote{113} Some companies will also attempt to limit the scope of internal investigations into alleged misconduct and will try to present their findings in the best possible light: that is, they will not attempt to uncover or reveal the true extent of the wrongdoing. It appears that government regulators are increasingly unhappy with the “superficial” and “mediocre” quality of internal corporate investigations and believe that some companies and their counsel, at least, are using the attorney-client privilege to prevent disclosure of damning facts.\footnote{114} (Defense counsel would respond, of course, that this is all part of zealous advocacy on behalf of their clients). All of the above circumstances strongly counsel that continuing reliance on corporate voluntary disclosure will reveal only a small fraction of corruption that was not otherwise already on enforcement’s radar.

Of late, there appears to have been a shift in this enforcement paradigm in that, although corporate voluntary disclosure is still important, increasingly prosecutors are securing information about corrupt schemes from international colleagues, law enforcement sources, cooperating competitors, and, notably, whistleblowers since the advent of the WBP. In the view of the SEC, whistleblowers will “turbo-charge” SEC enforcement by addressing the “inside information” deficit, and many practitioners agree.\footnote{115} A host of law firms have advised their clients of this

\footnote{112. As Robert Tarun and Peter Tomczak explain: Whether a corporation should undertake a costly internal investigation, self-report its employees or agents’ FCPA bribery conduct and cooperate fully with law enforcement is a highly contextual decision that is not invariably answered in the affirmative. For example, if the underlying FCPA misconduct is egregious, bound to become public (such as through the federal securities laws’ disclosure regime or a whistleblower’s report) and subject to severe sanctions (such as debarment), then a corporate decision-making body comprised of risk-adverse individuals is significantly incentivized under the current legal sanction regime, including the Federal Sentencing Guidelines for Organizations (“Sentencing Guidelines”), to self-report such misconduct and try to seize any possibility of a more lenient sentence. However, if that underlying misconduct is neither systemic nor likely to be independently detected by law enforcement, and the corporation believes that it will receive an insubstantial reduction in the sanction for self-reporting or be required to pay other costs in connection with self-reporting (such as the costs of an internal investigation or those attendant to additional inquiries from law enforcement), then a corporate decision-making body comprised of risk-neutral individuals may decide not to voluntarily report such misconduct. The more difficult self-reporting decisions involve factual scenarios between these two extreme ends of the sanctioning spectrum.}


\footnote{113. Id. at 155.}

\footnote{114. Jessica Nall & Janice Reicher, Achieving Credibility in Internal Investigations: Getting Inside the Enforcer’s Mind, The Champion 24 (June 2013).}

\footnote{115. SEC’s Cohen Predicts Major Whistleblower Awards Soon, supra note 103.}
consensus, urging them to enhance their FCPA compliance programs to, *inter alia*, increase the attractiveness of internal, as opposed to external, whistleblowing.\(^{116}\) It is appropriate to discount these exhortations somewhat given that the bottom line of these firm communications is to induce companies to hire the firms to bolster client companies' compliance efforts. That said, their advice makes sense for a number of reasons.

First, as noted, experience demonstrates that providing individuals a significant financial incentive, as well as assurances of anonymity and protection against retaliation, increases the likelihood that they will expose themselves to the potentially severe negative career and personal repercussions of “blowing the whistle” to authorities outside the company.\(^{117}\) The SEC’s WBP boasts strict anonymity protection, which applies to protect tippers even in public announcements regarding their bounty awards, as well as robust retaliation provisions. These provisions dramatically reduce, or even eliminate, the “cost” of whistleblowing borne by informants, or at least those informants whose information is not sufficiently unique to identify them.

The number of tips received to date supports this forecast. The SEC’s Annual Report on the WBP for the fiscal year 2014 reported that the SEC received 3,001 whistleblower tips in Fiscal Year 2012, 3,238 tips in Fiscal Year 2013, and 3,620 tips in Fiscal Year 2014.\(^{118}\) In 2014, tips came in from all over the United States and from individuals in sixty foreign countries, with the largest number of overseas tips coming from the United Kingdom, India, Canada, China, and Australia.\(^{119}\) Nearly fifty percent of the tips in Fiscal Year 2014 concerned corporate disclosure and financials, offering fraud, and market manipulation; the balance included a variety of alleged wrongdoing, including violations of the FCPA.\(^{120}\) Many lawyers were surprised to learn that FCPA violations were not among the most frequently lodged categories of tips, but the SEC staff asserts that “we are getting a pretty steady number of FCPA whistleblower complaints . . . . These are people who are in the middle of it, people who have the documents, who have good information.”\(^{121}\) Once the word gets out, particularly overseas, practitioners are expecting this category of tips to skyrocket, in part because of the historical, and increasing, size of settlements.


\(^{117}\) See, e.g., Rose, supra note 6, at 1275–77.


\(^{119}\) Id. at 22–23, app. C.

\(^{120}\) Id. at 21, app. A.

\(^{121}\) McLucas et al., supra note 34, at 8 (quoting Kara Brockmeyer, Chief of the SEC’s specialized FCPA unit); see also SEC’s Cohen Predicts Major Whistleblower Awards Soon, supra note 103.
With respect to tipping in FCPA cases, the monetary penalties in these matters tend to be very substantial, and certainly substantial enough to tempt whistleblowers. The top ten corporate FCPA settlements, including criminal fines, civil disgorgement, and prejudgment interest, totaled $4.4 billion, or an average of $440 million per case. As of January 2015, the top ten FCPA recoveries were: Siemens (German): $800 million (2008); Alstom (France): $772 million (2014); KBR/Halliburton (USA): $579 million (2009); BAE (UK): $400 million (2010); Total S.A. (France): $398 million (2013); Alcoa (U.S.): $384 million (2014); Snamprogetti Netherlands BV/ENI S.p.A (Holland/Italy): $365 million (2010); Technip S.A. (France): $338 million (2010); JGC Corporation (Japan): $218.8 million (2011); Daimler AG (Germany): $185 million (2010).

One potential fly in the ointment is the natural fear that the SEC will not exercise its discretion to recognize the contributions of tippers, or will be too parsimonious in its awards. The SEC’s dismal history with its prior insider trading whistleblowing program may reinforce tippers’ concerns in this regard, although that program, to be fair, was constructed differently and was much more targeted in its scope. There is also the natural concern that government employees who take a tip and then invest a great deal of time and energy to pursue it and make a case will undervalue the tipper’s contribution. As Professor James Cox testified before Congress in connection with the SEC’s insider trading bounty program:

The ultimate utility of [the program] . . . will rest upon how its administration is perceived by those in possession of information regarding another’s trading or tipping of material nonpublic information. The provision is unlikely to have any noticeable impact if the SEC is niggardly in both the frequency and amounts of its bounty awards. The fair award of sizeable bounties will surely

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122. See, e.g., SEC Enforcement Actions: FCPA Cases, U.S. SEC. & EXCH. COMM’N, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited Sept. 14, 2015) (listing enforcement actions by calendar year). The SEC’s monetary sanctions include a civil penalty, disgorgement (of ill-gotten gains) and prejudgment interest. In criminal “related actions,” individuals who commit willful violations of the anti-bribery sections can be punished by a fine up to $100,000 and five years’ imprisonment; individuals who willfully violate the FCPA’s accounting provisions may be fined up to $5 million and imprisoned for up to twenty years. Corporations can be fined up to $25 million for each accounting violation and $2 million per anti-corruption violation. Under the Alternative Fines Act, moreover, both individuals and corporations can be fined the greater of the statutory penalty described above or twice the gross gain or loss from the violation. See 18 U.S.C. § 3571 (2015). In practice, some contend that when the DOJ and the SEC together settle an FCPA, the total fines represent a “double-dip” because the advisory sentencing guidelines that help determine the criminal fine amount are also based on the value of the benefit received by the company at issue. See Mike Koehler, Double-Dipping, FCPA PROFESSOR, (June 4, 2013), http://www.fcpaprofessor.com/double-dipping.


not go unnoticed. Against this concern should be weighed the natural perceptions of enforcement personnel who, for a fixed and not substantial salary, devote considerable talent and energies to their cases. Their riches are largely the intangible reward of serving the public interest. It may be too easy for one who has labored on a case for a few years to underappreciate at the case’s end the earlier contribution made by the informant so that the bounty award is withheld or is too small to encourage others to step forward.126

Only time will tell if this dynamic prevails but there are a few reasons why it may not. First, the SEC has made FCPA enforcement a priority127 and its efforts, as well as the DOJ’s, have borne fruit. In calendar years 2011–2014 the SEC finalized more than thirty-five corporate FCPA enforcement actions.128 And as of March, 2015, 108 companies were the subject of ongoing and unresolved FCPA-related investigations by the U.S. government, according to SEC filings, news reports, or both.129 The SEC also recognizes that the FCPA is “a fertile ground for whistleblowers because it’s an area that we don’t have any natural visibility into.”130 Given the SEC’s recognition of how difficult FCPA violations are to uncover and investigate absent “inside” help, the SEC is likely to reward those FCPA tippers who provide the agency with a roadmap to recovery with a generous percentage of the award.

The SEC has a significant incentive to make this high-profile program a success, because a Congress outraged by the SEC’s failure to act on tips regarding Madoff’s Ponzi scheme is watching. The SEC staff has been busy promoting the program. The head of the whistleblower unit—Sean McKessy—was early on quoted as saying that the millions in the SEC’s whistleblower fund were “burning a hole in my pocket.” Stephen Cohen, then Associate Director of the SEC’s Division of Enforcement, asserted that the program will produce “incredibly impactful cases” including some with “extremely significant whistleblower awards.”131 Most recently, the SEC’s Chair, Mary Jo White, described the WPB as “a game changer,” argued that whistleblowers “provide an invaluable public service,” and stressed that “we at the SEC increasingly see ourselves as the whistleblower’s advocate.”132

The SEC realizes that its success depends in large part on the incentives created by healthy whistleblower awards but its awards have not kept pace with its tips. As of April 30, 2015, only seventeen whistleblowers had received individual awards. Payoffs have totaled nearly $50 million and the SEC made three awards in excess

127. See, e.g., McLucas et al., supra note 34, at 7.
128. See SEC Enforcement Actions: FCPA Cases, supra note 122.
130. SEC’s Cohen Predicts Major Whistleblower Awards Soon, supra note 103.
131. Id.
132. Mary Jo White, The SEC as the Whistleblower’s Advocate, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 5, 2015), http://corpgov.law.harvard.edu/2015/05/05/the-sec-as-the-whistleblowers-advocate/.
of $1 million.\textsuperscript{133} The largest award to an individual whistleblower to date is $14 million.\textsuperscript{134} Some lawyers who represent whistleblowers, apparently recognizing that SEC cases can take a great deal of time to investigate and conclude, so far have taken the SEC at its word, asserting that “[w]hen there are defendants with deeper pockets, the awards will be substantial. Now we are waiting for the floodgates to open.”\textsuperscript{135} Whether they do open, and how quickly, will no doubt impact the success of the program.

The final, and most critical, considerations in assessing the WBP are to what degree it is capable of attracting high-quality information, and that the SEC is able to distinguish such information from the “noise of low-quality information.”\textsuperscript{136} As Professor Engstrom succinctly put it:

A basic rational-choice perspective tells us that whistleblowers gamble the personal and professional cost of reporting misconduct against potential payouts. Where rewards are too low or uncertain or retaliation protections too anemic, the system will not generate enough tips. Providing too many incentives or protections, however, risks overloading the system, overwhelming an agency tasked with sifting good and bad tips. Importantly, the concern here is not just higher administrative or other transaction costs that push the social cost of enforcement beyond its benefit. Rather, it is a deeper, and paradoxical, one. A budget-constrained agency that receives additional tips must either ignore some of them, perhaps using a triage approach to focus efforts on a subset of tips, or else allocate fewer investigative resources to each, thus degrading the accuracy of its screening efforts. The perverse result is that by reducing the certainty with which wrongdoing is detected and thus the probability that any given malfactor will be made to internalize the costs of its misconduct, more whistleblowing may actually yield less overall deterrence.\textsuperscript{137}

Professors Anthony J. Casey and Anthony Niblett present a compelling case for the proposition that a \textit{qui tam} mechanism may actually ensure that the SEC receives not just more tips, but also better quality tips. They argue that “increasing the rewards for informing or decreasing the private cost of informing—such as the regime provided for under the [WBP]—dilutes the quality of the information

\textsuperscript{133} Id.

\textsuperscript{134} See SEC Awards More Than $14 Million to Whistleblower, U.S. SEC. & EXCH. COMM’N (Oct. 1, 2013), http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258. Note that the two earlier awards were for far smaller amounts: $50,000 in August 2012 and more than $25,000 each to three whistleblowers in August and September 2013. Id.

\textsuperscript{135} Max Stendahl, SEC’s 2nd Whistleblower Award Is Tip Of The Iceberg, LAW360 (June 14, 2013), http://www.law360.com/articles/450514/sec-s-2nd-whistleblower-award-is-tip-of-the-iceberg.

\textsuperscript{136} Casey & Niblett, supra note 104, at 1169.

\textsuperscript{137} David Freeman Engstrom, Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design, 15 THEORETICAL INQUIRIES IN L. 605, 613 (2014); see also Casey & Niblett, supra note 104, at 1175.
brought forward."\textsuperscript{138} This is because the potential rewards for tipping are great under the WBP and "[i]f the rewards are too high, then whistleblowers with weak signals [, that is, tippers with low quality information or who are poorly informed,] will be incentivized to come forward."\textsuperscript{139} The principal cost to tipping—the negative personal and professional repercussions that may flow from the exposure of the whistleblower's identity—are very low because of the WBP's strict anonymity provisions and the strength of its anti-retaliation provisions (as least for tippers in the United States). As Casey and Niblett put it, "[i]f the government can guarantee . . . that there will be no retaliation against the employee, then the costs may . . . fall to zero . . . . [R]eward schemes that allow whistleblowers to anonymously report information to the regulator, such as that under the [WBP], may merely dilute the quality of the information and consequently fail to deter fraud."\textsuperscript{140}

By contrast, a \textit{qui tam} model imposes certain costs on the whistleblower, which Casey and Niblett believe are helpful in deterring those with weak or faulty information from going forward. \textit{Qui tam} mechanisms present a number of screening opportunities that are likely to result in only those with the strongest information and evidence actually pursuing \textit{qui tam} litigation. First, are the private personal and professional costs that the \textit{qui tam} plaintiff must bear, subject only to anti-retaliation provisions. The WBP provides tippers anonymity through the investigation and even during the award process. Their identities may never be known. By contrast, while the relator’s identity is protected during the sealing period, that is, while the DOJ is investigating the case, \textit{qui tam} relators are usually unable to proceed anonymously once the suit goes forward.\textsuperscript{141} Their names will generally be in the caption: United States ex rel. the relator.

Relators must also bear the costs of bringing suit, which include the costs of hiring lawyers and the like. As will be explored in much greater depth below, relator’s counsel generally take these cases on a contingency fee basis and so have every incentive to vigorously screen cases before taking them on. The relator will need to spend a great deal of time and effort to bring the lawyers up to speed, and the lawyers will need to put together enough information to clear pleading and other barriers. The relator must bear the costs of trying to persuade the DOJ to intervene and the costs of going forward with the case if the DOJ elects not to intervene. "[T]hese additional costs of bringing a \textit{qui tam} action are more likely to be borne by parties who have weak information" because the FCA includes a

\begin{itemize}
\item \textsuperscript{138} Casey & Niblett, \textit{supra} note 104, at 1186.
\item \textsuperscript{139} Id. at 1196.
\item \textsuperscript{140} Id. at 1201.
\end{itemize}
provision that permits defendants in non-intervened FCA cases to secure from the plaintiff reasonable attorneys’ fees and expenses if the defendant prevails and the court concludes that the claim was clearly frivolous, vexatious, or brought primarily for purposes of harassment. In short, relators bear many costs that ought to ensure that only the best tips proceed. This is not true of the WBP.

There are many who would take issue with this analysis. Indeed, one hears a great many objections to what is asserted to be the widespread incidence of frivolous FCA qui tam cases. For example, the SEC’s OIG, in assessing for Congress whether a qui tam action was advisable in this context, took particular note of the possibility that such suits “could attract unscrupulous bounty hunters” and “may result in undesirable outcomes such as frivolous litigation.” The case for overuse of qui tam litigation depends on statistics, but a highly contested reading of those statistics. It is clear that the government intervenes in only (roughly) twenty to twenty-five percent of the cases brought to it by qui tam relators. One study of government-supplied statistics showed that, from roughly 1986 through 2009, “95% of the intervened qui tam cases resulted in a settlement or judgment for the Government, and only 9% of the nonintervened cases generated such a result.” In terms of numbers, this means that, from October 1987 through September 2013, the DOJ Civil Division secured judgments and settlements of approximately $26.2 billion in qui tam cases in which the U.S. intervened or which it otherwise pursued, as opposed to approximately $991 million in private action qui tam cases where the U.S. declined to intervene.

These numbers, qui tam critics would assert, prove that the DOJ has been effective in screening for meritorious cases and that permitting private qui tam relators to proceed where DOJ has declined a case is unnecessary and potentially abusive. Such litigation, they argue, imposes substantial costs on companies defending non-meritorious actions, on federal regulators who must continue to monitor and sometimes advise relators, and on judges who are called upon to

142. 31 U.S.C. § 3730(d)(4) (2015); see also Casey & Niblett, supra note 104, at 1205–06.
143. Casey & Niblett, supra note 104, at 1206.
144. See U.S. SEC. & EXCH. COMM’N, OFFICE OF INSPECTOR GEN., OFFICE OF AUDITS, supra note 41, at 28.
145. See False Claims Act Cases: Intervention in Qui Tam (Whistleblower) Suits, U.S. DEP’T OF JUSTICE, http://www.justice.gov/usao/pae/Civil_Division/InternetWhistleblower%20update.pdf (last visited Sept. 14, 2015) (“Fewer than 25% of filed qui tam actions result in an intervention on any count by the Department of Justice.”); Marshall Walker, Diving into Department of Justice False Claims Act Statistics: A Look at FCA Filings from 1987 to Today, Nat’l WHISTLEBLOWER (June 24, 2013), http://www.nationalwhistleblower.com/blog/2013/06/diving-doj-fca-statistics/ (“Despite the government only intervening in 20% to 25% of cases, the amounts recovered when the government did intervene accounted for nearly 97% of the total money recovered over the last four years.”); see also Kwok, supra note 22, at 238–39 (finding 27% of cases brought by qui tam relators resulted in government intervention).
146. Kwok, supra note 22, at 240; see also id. at 237; Professor Bucy obtained the following from the DOJ: as of 2002, only 2.1% (12 out of 570) qui tam suits in which the government intervened were dismissed compared with 71.1% (1357 of 1907) cases in which the government declined to actively participate. Bucy, supra note 2, at 51 n.290.
referee disputes between relators and the DOJ, as well as between the parties.148

Critics’ objections to FCA *qui tam* actions, though weighty, are not fatal. Certainly one can take issue with critics’ claims that the department is an effective “merits” screener. “There are numerous factors that may impact the DoJ’s [sic] willingness to take on a particular case, including, but not limited to, the harm of the offense, the precedential value of the case, the defendant’s liability under other statutes, agency resources, and perhaps political sensitivities.”149 In short, the DOJ in not necessarily judging cases solely on whether they are meritorious, as the (at least) nine percent of non-intervened, but successful, cases indicate. Moreover, the evidence demonstrates that the number of relator victories in cases in which the DOJ has declined to intervene is increasing and that the DOJ, perhaps in recognition of this reality, is increasingly refusing to take a position on intervention and intervening later in the prosecution of the cases.150

More important, the claims that there has been a gold rush of frivolous *qui tam* litigation—which Casey and Niblett’s work proves would be unlikely as a matter of economic theory—has also been proved incorrect by careful empirical work by Engstrom, among others. “[A]long numerous dimensions—from filing counts to more complicated measures, such as per-filing recovery amounts—the findings reject the notion that recent growth in *qui tam* litigation constitutes a ‘gold rush’ of [inefficient] enforcement activity or is otherwise out of control.”151

Critics also focus on the coordination issues that may arise where, after the DOJ declines a case, relators proceed with a case and, in so doing, potentially interfere with government priorities and policy.152 Or, in economics speak, “[a] standard critique holds that profit-driven private enforcers will overenforce by suing whenever it pays to do so, even where the *social* costs incurred—e.g., total

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148. Compare, e.g., Lt. Col. Charles T. Kirchmaier, *Treating the Symptoms But Not the Disease: A Call to Reform False Claims Act Enforcement*, 209 MIL. L. REV. 186 (2011) (concluding that there is litigation abuse that must be addressed) and Christina Orsini Broderick, Note, *Qui Tam Provisions and the Public Interest: An Empirical Approach*, 107 COLUM. L. REV. 949, 949 (2007) (concluding that “while *qui tam* provisions lead to frivolous suits, they still serve the public interest through both enhanced detection and deterrence,” but proposing means of reducing meritless *qui tam* suits), with Kwok, supra note 22, at 248 (concluding, after empirical analysis, that, contrary to critics’ assertions, most firms do not follow a “low-effort, high-volume” case filing strategy, that “repeat player firms typically maintain good track records as to intervention percentages,” and that these firms “seem to understand government enforcement interests”) and Engstrom, supra note 22, at 1913 (concluding, after empirical analysis, that contrary to critics’ assertions, *qui tam* litigation is not dominated by a cadre of repeat, “professional,” plaintiff-relators and that an increasingly specialized *qui tam* plaintiffs’ bar plays a positive role); see also Bucy et al., supra note 8, at 1532–33.

149. Kwok, supra note 22, at 236.

150. See infra notes 209–12 and accompanying text.

151. Engstrom, supra note 22, at 1922; see also id. at 1951, 1956, 1963, 1996.

152. See, e.g., Bucy et al., supra note 8, at 1532–33; Kwok, supra note 22, at 231–32 (noting that private enforcement of public policies may “disrupt legitimate, democratic trade-offs” and may result in “excessive enforcement;” further, private parties may not consider “all of the costs and trade-offs in making litigation decisions,” “may not understand the wider implications of undertaking enforcement litigation,” and the disparity between public and private incentives may be a concern).
litigation and other transaction costs, or the costs imposed on affected communities—exceed any benefit.”153 To the extent that there are litigation excesses, or that there are serious coordination issues, they certainly could be addressed by tweaking the specifics of a regulatory regime or, as in the FCA, by enforcing the provisions that exist.

For example, the SEC Program’s requirement that whistleblowers must bring substantial violations to the SEC’s attention—that is, those that can result in more than $1 million in recoveries—might well deter filings where the alleged conduct is borderline or causes insignificant harm. The FCA’s “dual-plaintiff” mechanism, which permits the government to intervene and control the litigation of qui tam suits, provides “potentially powerful quality control on FCA private actions.”154 If the government concludes that a qui tam action is frivolous or not in the public interest, it has the power under the FCA to dismiss it over the relator’s objection.155 (Note that the DOJ historically has exercised this power in only approximately four percent of non-intervened qui tam filings, but the cause of the DOJ’s disinclination to dismiss cases is unclear.)156 The DOJ may also settle qui tam suits, again over the relator’s protest, so long as the relator is heard and the court concludes that the settlement is fair.157 Finally, as noted above, the FCA provides for fee shifting where the relator’s case is frivolous. Thus, if there is frivolous and abusive litigation, the FCA provides a number of remedies; they need only be employed more aggressively.

Private justice mechanisms hold enormous promise in bringing to light corrupt conduct that would otherwise remain hidden or difficult to prosecute. The problem is that it may hold too much promise: that is, the WBP as currently constructed may incentivize tippers to provide the SEC with masses of low quality information because the cost of tipping is so low. A qui tam mechanism creates incentives to tip but also imposes costs that often will deter all but those with high quality information from proceeding. In short, if the goal is to secure the best quality tips, a qui tam provision may work better than the WBP is currently structured.

C. Roadmap to Evidence

Enhancing regulators’ access to “insider information” may also address, at least to some degree, another signal difficulty in transborder anti-corruption cases: securing sufficient admissible evidence.158 These difficulties are endemic to the

153. Engstrom, supra note 22, at 1925.
154. Bucy, supra note 2, at 53.
156. Kwok, supra note 22, at 245.
158. The DOJ has asserted that “[o]ur experience in combating domestic political corruption, coupled with our own recent efforts to develop prosecution[s] involving the bribery of foreign officials amply demonstrates the difficulties of gathering sufficient credible and admissible evidence to support prosecution.” Cassin, supra note 109 (quoting 1977 letter from the DOJ to Hon. Harley O. Staggers, Chair, House Interstate and Foreign
practice, both because of the type of criminal conduct at issue and the transborder character of enforcement. First, as the FBI has advised, “FCPA cases are often complicated and difficult to prosecute” in part because “[o]verseas bribes are typically well hidden in complex contracts and other procurement processes. The days of someone ‘accidentally’ leaving a briefcase full of money sitting on the floor after a business meeting to help grease the skids are long gone.” In short, proof is buried within the “black box” of a transnational corporation, hidden in masses of documents and electronic data that shield complex transactions, concealed by false entries and documentation, and protected by hostile witnesses.

Second, the problems faced by enforcement authorities in timely securing competent and admissible evidence across borders are serious and difficult to “solve.” “Because most conduct in an FCPA investigation has taken place in a foreign country, and many relevant witnesses and documents are not in the United States, the DOJ’s ability to secure reliable, admissible evidence before a U.S. grand or petit jury is usually difficult.” Obviously, traditional notions of sovereignty prohibit nations from freely investigating cases within the borders of another nation. Seeking evidence from a foreign jurisdiction is expensive and slow, but relying on foreign enforcement officials to provide the needed evidence may present its own problems. In general, countries do not find it congenial to be seen as enforcing other states’ laws in their territory. Where the extraterritorial jurisdiction upon which enforcement authorities are relying is perceived as excessive, these cooperation problems are exacerbated.

It is true that the more efficient mechanisms made available through Mutual Legal Assistance Treaties (MLATs), where applicable, ease prosecutors’ burden. But an MLAT (or similar devices) may not have been concluded with the country at issue, and in any case fulsome cooperation under the treaty is not guaranteed. Domestic political concerns about a case—or its repercussions for domestic industries—in the country whose assistance is sought may derail or at least

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Commerce Comm.). And defense counsel know and exploit these problems: “[The DOJ] rarely has the ability to obtain the testimony of foreign witnesses. It is difficult to obtain foreign documents. Defense lawyers should put the government to its burden of proof and not confess without a trial.” Id. (quoting Joel Androphy, defense counsel). But defense counsel are subject to many of the same difficulties. Robert Tarun asserts that FCPA inquiries “are the most challenging of all corporate investigations because the potential misconduct is serious, many countries in which most misconduct may have occurred are distant and tolerant of corruption, interviewees are frequently hostile and indifferent to U.S. laws, and, in limited cases, there is personal risk to investigating counsel.” ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK 210 (3d ed. 2013).


160. TARUN, supra note 54, at 211.

161. See, e.g., U.S. SEC. & EXCH. COMM’N, RESPONSE OF THE UNITED STATES, QUESTIONS CONCERNING PHASE 3, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) WORKING GROUP ON BRIBERY 52 (May 3, 2010) (stating that the United States has “experienced the gamut of cooperation” in respect to MLA requests, “from full-scale sharing of domestic investigative files on short notice to outright non-compliance”).
significantly delay required cooperation. Even if prosecutors obtain evidence from abroad, and in a timely way, they may find the evidence is not a form that is admissible due to the reality that evidence that is competent in one jurisdiction will not be in another. Finally, many countries have privacy and bank secrecy laws that protect personal information and government and bank records that would, for example, be readily available to law enforcement within the United States with a subpoena or other legal investigative devices.162 A number of countries, reacting to aggressive U.S. assertion of extraterritorial jurisdiction and what are perceived to be exorbitant discovery requests, have enacted “blocking statutes” that criminalize the very act of exporting information requested in the course of a foreign legal proceeding.163

The FCA rewards whistleblowers for the degree to which they assist the government in making a successful case. Whistleblowers, then, are ultimately rewarded not only for “tipping” the government to misconduct, but also for independently gathering internal documents and other proof to support the relator’s qui tam claim. Generally, U.S. courts do not sanction whistleblowers for revealing and using non-privileged but otherwise confidential business documents:

While an employee owes a general duty of loyalty to his or her employer, this duty is qualified as the law offers a “safe-harbor” exception, so to speak, where the employee has a good faith reason to believe that the employer is engaged in fraudulent or illegal conduct. This exception is codified by the FCA and ensures that an employee cannot be retaliated against for exposing the employer’s fraudulent or illegal activity.164

Whether this protection will extend to SEC whistleblowers has not been tested in court. To the extent that such whistleblowers hale from jurisdictions with blocking, privacy, or bank secrecy statutes, they may be faced with additional legal issues and exposure—not encountered in the usual FCA case—for providing evidence to the SEC. Such persons are, of course, well counseled to seek expert legal advice before proceeding. That said, even if foreign tippers are barred by domestic statutes from providing actual evidence—in the form of physical documentation or electronic records—to the SEC, they may, again with counsel’s expert guidance, provide the SEC with invaluable insights regarding where evidence may (or may

163. See, e.g., Law 80-538 of July 16, 1980, Act relating to the communication of economic, commercial, industrial, financial or technical documents or information to foreign individuals or legal persons (amending French law 68-678, commonly known as the “French Blocking Statute,” which prohibits French individuals and entities from communicating certain categories of information to foreign public officials and further prohibits requesting, investigating, or communicating such information for use in foreign judicial or administrative proceedings).
not) be found. Thus, for example, Stephen Cohen, Associate Director of the SEC’s Enforcement Division has asserted that “[w]e are receiving information from individuals much closer in time to the misconduct, in some instances during the misconduct, and these individuals [who] are often insiders, which is very unusual, are in position to point us precisely to where the useful information is and save us extraordinary resources.”

He went on to explain:

There are people out there . . . who are not employed by the SEC who are in a position to do a fair amount of work and bring us information that is either too costly or impossible to obtain. The net effect of this is that whistleblowers and in some instances counsel are putting together information for us, . . . sometimes a roadmap, sometimes a starting place for us to do an investigation, at least pointing us in the right direction—sometimes helping us all along the way to the end.

In short, this “roadmapping” function could provide authorities with significant assistance in narrowing, shortening, and focusing the search for competent evidence.

One might object that, as difficult as it is for governments to obtain evidence abroad, it may be even more difficult for private parties to do so. Thus, one consideration that ought to inform the construction of any private justice mechanism in this context is whether—even were a private qui tam suit available where government enforcement authorities have declined to pursue a case—such suits could be effectively pursued given the challenges discovery presents in the transborder context. Given that these cases are most likely to target issuers who have some presence in the United States by virtue of their regulation by the SEC, however, this difficulty may not be prohibitive.

D. Supplementing Government Enforcement by Attracting Expert Lawyers and Investigators to the Whistleblower Practice

A principal goal commonly identified for private justice mechanisms is adding to the public resources available to prevent and detect crime through public prosecutions. This is of critical significance in the transborder corruption

165. SEC’s Cohen Predicts Major Whistleblower Awards Soon, supra note 103.
166. Id.
167. See supra note 44 and accompanying text.
168. See, e.g., Lemos, supra note 30, at 788 (“Private enforcement can supplement public efforts, picking up the slack where agency resources run out.”); Kirchmaier, supra note 148, at 189 (“Qui tam relators appear to offer an attractive, low-cost alternative to increased public spending for improved oversight capabilities.”); Catherine R. Albinson & Laura Beth Nelson, The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General, 54 UCLA L. REV. 1087, 1094 (2007) (“Private enforcement avoids the need for a large governmental enforcement apparatus . . . .”); Richard B. Stewart & Cass R. Sunstein, Public Programs and Private Rights, 95 HARV. L. REV. 1193, 1214 (1982) (“Public enforcement is . . . frequently inadequate because of budget constraints; private actions can be a useful supplementary remedy by providing additional enforcement resources.”).
context where, despite the huge costs of this type of criminal activity, government-enforcement efforts are hampered by competing enforcement priorities and resource constraints.

And one of the most important difficulties of transborder anti-corruption enforcement is the reality of scarce resources. Bribery is conservatively estimated to be at a $1 trillion dollar industry on an annual world-wide basis.\textsuperscript{169} As former UN Secretary-General Kofi Anan once explained, “[c]orruption is an insidious plague that has a wide range of corrosive effects on societies”; in addition to undermining government’s ability to provide basic services, feeding inequality, and discouraging foreign aid and investment, and hampering economic growth, “[i]t undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish.”\textsuperscript{170} As pernicious as corruption is, it must be recognized that governments have a variety of important enforcement priorities and ensuring that other governments’ public officials do not serve corruptly may not be at the top of many nations’ list of pressing concerns.

Then, too, governments do not have unlimited resources with which to surmount the unique enforcement challenges present in transborder crime in a large number of cases. In the United States, recent budget cuts (the so-called sequestration, among other belt-tightening measures) have had a significant impact on the SEC’s staffing levels and its ability to make cases. Reportedly, the DOJ and SEC together have only about sixty lawyers dedicated to the investigation and prosecution of FCPA cases. Even with the additional resources the DOJ and SEC can enlist from, for example, U.S. Attorney’s Offices or the SEC’s Enforcement Division, this staff—no matter how dedicated or hardworking—is unlikely to make a dent in transborder corruption.\textsuperscript{171}

Private justice of some sort, then, offers a significant opportunity in the fight against corruption to augment governmental enforcement efforts. The only real question is what type of private justice regime would best serve this end. There are a great many ways that private justice mechanisms can be constructed. In the FCPA context, calls have been made for a purely private enforcement regime: that is, the recognition of a private cause of action for harms caused by transborder corruption.\textsuperscript{172} Courts have resisted calls for recognition of a private cause of


\textsuperscript{171} It should be noted that the FBI recently trebled (from ten to thirty) the number of agents focused on transborder bribery. See Joel Schectman, FBI to Bulk Up Foreign Bribery Efforts, WALL ST. J. (Jan. 14, 2015), http://blogs.wsj.com/riskandcompliance/2015/01/14/fbi-to-bulk-up-foreign-bribery-efforts/.

\textsuperscript{172} Mark, supra note 1, at 486–87; Daniel Pines, Amending the Foreign Corrupt Practices Act to Include a Private Right of Action, 82 CALIF. L. REV. 185 passim (1994).
action and, given Congress’s decision to pursue only a bounty program in the SEC context, it seems unlikely that such an entirely private regime will be imposed by legislative mandate. I will therefore restrict my discussion to the two case studies discussed thus far: the FCA’s hybrid private-public enforcement model and the primarily public model, reflected in the WBP, in which the tipper may prompt an investigation but is largely auxiliary to it. I will discuss these programs as they now exist, although readers should recognize that their current structures are not inevitable and they could be amended or adapted to better serve the aims identified. Some of the variables that affect their effectiveness in achieving defined goals include the threshold eligibility conditions; the size of bounties; the certainty of defined rewards; the degree of agency discretion involved and the possibility for judicial review; the source of bounties; and the availability of guarantees of anonymity and protection against retaliation.

As the GAO recognized in its report to Congress, it is premature to arrive at any judgment on the success of the WBP. We simply do not have sufficient information regarding critical variables that will affect the WBP’s contribution to enforcement efforts, such as the perceived willingness of the SEC to recognize whistleblower contributions with substantial bounties, its ability to safeguard anonymity, and the effectiveness of the anti-retaliation provisions. That said, it is worth revisiting the decision to employ a primarily public enforcement bounty system, as opposed to a hybrid model such as the FCA, given recent empirical evidence garnered from studies of the qui tam model and the recent and existing literature on likely incentives created by these private justice models.

In addition to stimulating the provision of otherwise unavailable “inside” information to the government, the principal means that these programs augment governmental resources is by enlisting—through a variety of financial incentives—entrepreneurial private legal and investigative talent to do the screening and case development for overtaxed government personnel. Bucy claimed that, of the advantages of private justice, bringing to regulatory efforts “entrepreneurial legal talent” was second only to the revelation of “insider information” in value.

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174. See Ferziger & Currell, supra note 125, at 1145–46.
175. See, e.g., Protess & Popper, supra note 82.
177. See, e.g., Casey & Niblett, supra note 104; Dyck et al., supra note 102; Robert M. Bowen et al., Whistle-Blowing: Target Firm Characteristics and Economic Consequences, 85 THE. ACCT. REV. 1239 (2010); Ferziger & Currell, supra note 125.
178. Bucy, supra note 2, at 8.
Creating this well of expert, private talent is absolutely central to the ultimate success of private justice in this context. As explained above, whistleblowers are incentivized under the WBP to provide masses of information. Given governmental resource constraints, it is unlikely that investigators will be able to effectively screen the low quality cases from the most promising. As a result, the WBP may actually impair the government’s enforcement efforts and result in less, rather than more, deterrent punch for their efforts. And efficient screening is particularly important in the transborder corruption context. As discussed above, these transborder cases are particularly difficult and resource intensive to conclude successfully. The government can bring only so many actions, even assuming that it receives, and recognizes, righteous tips. It is critical, then, that tips are sufficiently fleshed out and developed to facilitate discerning choices regarding case selection.

The FCA demonstrates very clearly the advantages of incentivizing the creation of an expert, repeat-player bar through a *qui tam* mechanism. Engstrom’s careful and comprehensive empirical study of the operations of the FCA showed that the return to specialization and expertise among the plaintiff bar, as measured by DOJ intervention and larger impositions of culpability, is significant and “undermines any claim that more experienced firms are serving as ‘filing mills.’”179 Instead the top repeat-player firms “are roughly 4% more likely to win DOJ intervention and 3% more likely to win impositions, and also achieve impositions that are roughly $12 million and $4 million larger on a per-win and per-filing basis, respectively, with all results significantly significant.”180 Thus, contrary to the claims of the FCA’s critics, “specialized relator-side firms appear to play a positive role in the system, enjoying higher litigation success rates and surfacing larger frauds compared to less experienced firms.”181

The contributions of this bar in the FCA area is nothing short of phenomenal. Note that all *qui tam* suits are launched by represented relators; courts regularly reject pro se relators’ filings because non-lawyers cannot adequately represent the interests of the U.S. government.182 The evidence indicates that whistleblowers, represented by expert counsel, are effectively bringing to the DOJ the majority of its best fraud cases. Thus, from October 1987 through September 2013, the DOJ’s Civil Division reported that it had 4,522 new fraud matters in non-*qui tam* cases compared with 9,244 new *qui tam* matters.183 The total non-*qui tam* fraud recoveries in this period totaled approximately $11.7 billion, less than half the amount the DOJ garnered through *qui tam* settlements and judgments (approxi-

179. Engstrom, *Harnessing*, supra note 176, at 1313; see also Kwok, *supra* note 22, at 248 (“Despite the opportunity for firms to proceed with a low-effort, high-volume case strategy, most firms do not seem to be following such an approach.”).
180. Engstrom, *Harnessing*, supra note 176, at 1313; see also Kwok, *supra* note 22, at 244, 248 (“Instead, the repeat player firms typically maintain good track records as to intervention percentages.”).
mately $27.2 billion). And the number of FCA cases brought by whistleblowers, rather than being initiated by the government, continues to grow. Thus, in fiscal year 2013, of the 846 new FCA matters opened, 753 (89%) were matters initiated by *qui tam* relators—and relators earned more than $387 million in that year alone.

In some industries, it appears that the inside information provided by FCA relators is critical to surmount investigatory barriers. Thus, in fiscal year 2013, only about 4.2% of FCA suits in the healthcare context were initiated by DOJ, meaning that 95.8% came from *qui tam* relators. And the DOJ recovered $2.7 billion in cases involving health care fraud in fiscal year 2013 alone. Thus, most of the approximately $11 billion the DOJ secured in fiscal years 2008 through 2013 can be attributed primarily to whistleblowers and their lawyers. Certainly, these cases could not be made—and these results achieved—in the first instance without the whistleblowers. But equally important were the lawyers who screened, investigated, and presented their cases to DOJ. As one lawyer noted, “the core purpose of *qui tam* is not only to encourage whistleblowers, but to outsource the heavy lifting of carrying a lawsuit through to recovery.”

In the FCPA space, properly incentivized counsel can make a number of contributions to enforcement efforts. First, the bar will work, probably more effectively than the resource-constrained government, on getting word of this Program out to potential whistleblowers around the world. One of the reasons practitioners believe that whistleblower complaints are likely to rise in the coming years is that “a sophisticated plaintiffs’ bar, which has been lauded by SEC officials for efforts in assisting whistleblowers in documenting their complaints, continues its efforts to identify potential whistleblowers and persuade them to file complaints with the SEC.” In particular, the FCA bar, which has become expert in making and “selling” cases to the government, appears to have invested in creating a SEC whistleblowing practice.

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184. Id.
185. Id.
189. See, e.g., Ferziger & Currell, supra note 125, at 1160–62 (noting that the publicity of a program is an element in its success).
190. McLucas et al., supra note 34; see also SEC’s Cohen Predicts Major Whistleblower Awards Soon, supra note 103 (including one practitioner who asserted that “[t]he SEC whistleblower law has extraordinary potential, particularly in the international area” and noting that his firm had launched a private global anti-fraud and corruption unit focusing on international whistleblower cases).
191. See, e.g., McLucas et al., supra note 34, at 1.
Second, and most important, the bar’s assistance will be critical in making the SEC staff more efficient and effective in addressing reported wrongdoing. The SEC itself recognizes the critical problem identified above: the possibility that the Program, as presently structured, might be too effective in eliciting information of dubious value. Some SEC Commissioners cited as a “fundamental failure” of the final whistleblower regulations the alleged fact that they “overestimate[] the ability of the Division of Enforcement to triage and manage incoming tips and complaints.”

Commission Kathleen L. Casey asserted that the volume of whistleblower tips “will surely grow as we begin writing some very large checks to successful whistleblowers, which has been the experience of the Justice Department in the False Claims Act area.” She concluded that the necessary triage process “will be challenging, and a high-volume flow of information will strain our existing triage resources.” The SEC, which says it fields dozens of tips a week, “ramped up” its Whistleblower Office in 2013 to include eleven lawyers and three paralegals. They assuredly will need help given that, in 2014 alone, the office received 3,620 whistleblower tips.

A related issue is whether the Whistleblower Office personnel have the requisite experience and expertise to separate good tips from bad. The lack of SEC staff experience was a constant theme in the congressional hearings into the Madoff debacle. Congress, and the SEC’s own Inspector General, did not find evidence of corruption or wrongdoing in the Madoff affair. Rather, it was incompetence and inexperience that led the agency to ignore, over the course of sixteen years, “more than ample information in the form of [at least 6] detailed and substantive complaints over the years [that] warrant[ed] a thorough and comprehensive examination and/or investigation” of Madoff. Indeed, the SEC did not find “significant red flags” regarding Madoff’s ponzi scheme even after three examinations and two investigations, in part due to the inexperience of investigators.

If properly incentivized, private counsel can do much of the “triaging,” and do it with legal and business sophistication born of the possibility of a significant return.
on an investment in such expertise. They can screen cases to eliminate dubious theories or claims that are unlikely to result in substantial recoveries—a requisite under the SEC Program given its $1 million recovery floor. If expert counsel decide to invest in a case, they will attempt to ferret out as much information as possible, perform any legal research, and put together a comprehensive and easily exploitable roadmap to recovery. In the words of one expert: “If a whistleblower is going to counsel with a case, before the case gets to the SEC, it has gone through a distillation, vetting and work up process that presents the SEC with a far different package than would be the case if it were just someone calling up on a hotline and providing a tip.”

SEC staff members have commented that, since the advent of the SEC Program, the quality of information provided pursuant to the SEC has “greatly improved” in part because of the participation of such firms. Former Enforcement Division Director Rob Khuzami explained that the “quality of tips has increased with more detail and greater supporting documentation” due to “the fact that a greater percentage of tipsters are hiring lawyers to help them out.” Indeed, George Canellos, while Deputy Director of the SEC’s Enforcement Division, noted that whistleblower tips now consist of “multipage reports complete with supporting evidence and proffers of assistance from company insiders.” Chuck Duross, Deputy Chief of the DOJ’s FCPA team, asserted in connection with the SEC Program that “[w]e are receiving information through lawyers—and getting that information is a force multiplier for us. It will have a significant impact.”

These comments indicate that whistleblowers’ lawyers are already assisting SEC staff, but the jury is still out on whether private counsel and investigators will make the same contribution to the success of the SEC Program as they have in the FCA space. Given that the structure of the WBP is likely to result in an overabundance of tips—and thus a lot of “noise” that requires expert and time-consuming screening—the contribution of counsel is likely to be central to the success of any private enforcement scheme in this context. A critical question in deciding whether to add a *qui tam* mechanism to the SEC Whistleblower Program, then, is whether it will better promote the development of an expert, entrepreneurial bar and incentivize counsel to invest more in the screening and development of cases to present to the government.

The development of the kind of expert and committed bar one wishes to focus its energy on screening tips and bringing fully developed cases to the SEC presupposes that firms are willing to accept the costs and the risks of such a practice. The applicable costs include the need to make expensive investments in

197. SEC’s Cohen Predicts Major Whistleblower Awards Soon, supra note 103.
198. McLucas et al., supra note 34, at 3–4 (quoting Interview with Rob Khuzami, Thomson Reuters News and Insights (Apr. 27, 2012)).
199. Id. at 3 (quoting Deputy Director George Canellos).
200. Id. at 8 (quoting Deputy Chief Chuck Duross).
personnel and subject-specific expertise. Firms, as economic entities, are value-maximizers. They will not make the necessary investment unless they believe that it will pay off handsomely. Firm expertise is necessary but not sufficient if one truly wishes to efficiently leverage the newly acquired access to insider information and evidence to secure recoveries and deter wrongful conduct. The extent of effort that counsel are willing to expend in effectively screening, investigating, and formulating their cases is also critical.

Tippers most often do not have, or are unwilling to risk, the necessary funds to recompense their lawyers on an hourly basis. Both WBP and FCA cases are overwhelmingly likely to proceed on a contingency fee basis. FCA counsel, then, most often take these cases on a bet: that the above-described resources investment will be worthwhile because, if successful, they will receive a combination of court-awarded attorneys fees and the contingent fee they negotiate with their client that guarantees them a percentage of the client’s recovery.201 These costs, it must be remembered, can be not only substantial but also long-term. FCA cases—and apparently FWB cases—can take years to investigate and resolve. Recent evidence suggests a steady increase in the amount of time DOJ is taking to make an intervention decision. As of 2011 the average election decision time was two years, which is roughly twice the average investigation time in earlier years.202 Thus, the firm must bear the costs of the investigations and case development for potentially lengthy periods prior to seeing a return.

In the context under discussion, one also has to account for another cost: the reality that many firms have highly lucrative practices defending or advising companies in FCPA matters. Undertaking a tipper/plaintiffs’ side FCPA-directed WBP practice may well alienate large existing clients or conflict a firm out of defense or advisory opportunities. The returns of such a practice would have to be sufficiently large and certain to induce them to take this business risk. And if large firms are unwilling to do so, those mid-size or small firms—which may not be able to count on other litigation or corporate business to cover costs—will, again, require substantially large and certain recoveries to sustain them in between victories.

The risk component of the equation should be obvious: firms cannot know with any certainty whether they will be successful in recouping their costs, let alone a profit. The willingness to undertake this risk will depend on a judgment that the likelihood of seeing a very healthy return is high.

It must be acknowledged that even without the incentives created by the FCA, that is, even in the WBP context, firms will still have some screening incentives,

201. See Kennerly, supra note 188; see also Engstrom, Harnessing, supra note 176, at 1281–82 (noting that most “relator-side practice proceeds on a contingent fee basis with the lawyer’s cut often set at 40%”); United States ex rel. DePace v. Cooper Health System, 940 F. Supp. 2d 208, 218 (D.N.J. 2013) (upholding 41% contingency fee and award of attorneys fees under the FCA).
particularly if they have invested in developing an expertise in the area. First, if they are repeat players, they will not want to lose the signaling function—the trust—that regulators have in the value of their tips. If regulators know that a certain firm passes on any random tip that comes its way, they are likely to pay less attention to those tips than if the firm has some credibility regarding the effectiveness of its screening. Second, the firms only recoup their investment if the SEC actually brings an enforcement action and the flood of tips means that the firms’ client is essentially competing with other tippers for attention. Firms, then, will want their tips to be sufficiently well developed that a regulator will take them more seriously than others. To do this, firms will have to make a case that the tip is credible and its legal basis is firm; that is, they need to persuade the regulator that she does not need to expend a great deal of work to determine that the case has legs.

That said, firms are very unlikely to make the necessary investment in screening FWB tips and making airtight cases that they would in the _qui tam_ context for two principal reasons: lesser upside and more risk. The WBP means that firms entering this arena will necessarily receive less in compensation even if they are successful due to the lack of a fee-shifting provision. Firms will expend only that work necessary to maximize their returns. In the context of contingency fee litigation, if we accept the economic assumption that actors engage in self-interested utility maximization, one expects that lawyers have an incentive to invest less work than their clients prefer—or in this context, than the optimal contribution to government enforcement efforts would demand—because the lawyer only receives a fraction of the possible return. In short, at least in theory, lawyers will work only as much as necessary to maximize their return, which will often be at a point less than maximization of the client’s (or in this case, the government’s) return is reached.203

The fee-shifting authorized in FCA _qui tam_ actions, if translated to the SEC context, would blunt this dynamic. Firms will have at least the possibility of recouping the full extent of their resource commitment in addition to the contingency payoff. In other words, the contingency award does not have to be discounted by the amount expended to secure it, at least where the firm makes the right screening choices. In short, if the SEC wishes to attract the kind of expert bar that has developed in the FCA area absent fee-shifting, it will have to make awards sufficiently immense to merit law firms’ investments in cases and the uncertainty of recovery.

Perhaps more importantly, the WBP increases the risk firms must undertake because of the lack of control they have over the conduct of the case and its conclusion. Uncertainty is perhaps the biggest reason that one can expect firms to

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203. The incentive to “shirk” may be reinforced in the whistleblower context, where there will be no public scrutiny of a firm’s efforts on a client’s behalf because of the statutorily-mandated confidentiality regime under which the program operates. See Robert E. Thomas, *Psychological Impact of Scrutiny on Contingent Fee Attorney Effort*, 101 W. Va. L. Rev. 327, 330 (1998).
make a lesser investment in the WBP context: WBP counsel simply have very little control over their fates or the fates of their clients. The SEC, like the DOJ, will not be able to take on all the meritorious cases brought to it by whistleblowers. Given the current deluge of tips, the SEC will have to decline cases that may yield recoveries but present novel theories, relate to industries that are not at present the focus of enforcement, concern types of fraud that institutional forces believe are less dangerous or politically saleable than others, have lesser potential penalties, or simply require too much work. In the FCPA context, the resource-intensive nature of the investigations may counsel against going forward with a tip, as may political or diplomatic considerations.

Even if a tipper is successful in prompting the SEC to launch an enforcement action—itself a gamble—the amount the tipper’s counsel will earn, presumably in a contingent fee arrangement, is solely dependent on what type of action the SEC decides to pursue (injunctive relief only, or an action for damages) and how much the SEC, given its pronounced proclivity to settle cases, decides to accept as a monetary recovery. Tippers can appeal the denial of an award once a qualifying enforcement action has succeeded, but they cannot appeal the amount for which the SEC settles or the percentage of the recovery the SEC decides to award to the whistleblower.\footnote{15 U.S.C. § 78u-6(f) (2015).} Although the whistleblower will have made a not insubstantial investment in the initiation of the case, it is the lawyer who will be forced to eat the hours and expenses expended on the case. At some point, she will have to explain to her partners not just these losses, but also justify the opportunity costs occasioned by her continued efforts in this practice area.\footnote{See Rose, supra note 6, at 1295 (Having a qui tam “option would, in turn, strengthen whistleblowers’ ex ante incentives to report by affording them greater control over their probability of recovery.” Additionally, “the qui tam option would make whistleblower representation more attractive, thus aiding in the development of a robust whistleblower bar—which . . . might have the laudable effect of helping the SEC in its administration of the WBP”).} The SEC Program, then, presents much longer odds of a meaningful return on counsel’s investment absent the \textit{qui tam} safety valve.

In the FCA context, counsel recognize that they are also competing for government attention. FCA counsel understand, given the government’s extraordinary recovery rate in intervened cases, the substantial advantages to be gained from DOJ intervention—both in terms of added litigation resources and more positive judicial perspectives on the worth of their cases. FCA counsel are well aware that “[s]ince 1986, roughly ninety percent of \textit{qui tam} suits in which the DOJ exercises its statutory authority under the FCA to intervene in and take over control of the litigation go on to achieve a positive-dollar recovery, while only ten percent of suits in which the DOJ declines to intervene do so.”\footnote{Engstrom, supra note 22, at 1991.} To quote one practitioner, “[w]hen evaluating a case and during the beginning stages of representing a
whistle blower never forget your initial mission: persuade the government to pursue the case.”

to do so, counsel must investigate and formulate a coherent case sufficiently both to file a complaint and to give the DOJ a thoroughly documented, complete, and persuasive brief for intervention. done right, this requires an extraordinary amount of time and effort—for which, again, counsel are generally not paid unless the case is successful.

Counsel also know that, with the large volume of qui tam filings, the DOJ (like the SEC in the WBP context) may decline to take over meritorious cases for a variety of reasons, including lack of resources and judgments that the declined suit is more difficult to prove or not as potentially remunerative as others the DOJ is considering. Recall that the DOJ dismisses very few non-intervened qui tam cases. this may well stem from a belief that many of the private qui tam cases have merit and that the DOJ just does not have the resources to pursue them. But whatever the reason, qui tam counsel have a fail safe if the DOJ does not intervene: they can pursue the case to judgment even if the DOJ declines to intervene.

Although recoveries in non-intervened cases traditionally are a long-shot, “empirical work shows a clear uptick in recoveries in nonintervened cases.”

Perhaps more importantly, rather than making an up or down intervention decision, DOJ is increasingly advising courts that it is “not intervening at this time.” According to Engstrom, “[t]he DOJ’s use of these ‘notices of no election,’ as it terms them, appears to be substantial and increasing. Indeed, the data show that the DOJ has taken this position in at least 261 cases, beginning with only a handful of such elections in 2004 and growing to more than fifty per year in 2008 and 2009.”

The DOJ is also intervening later in the proceedings, after the relator has demonstrated through litigation that the case has merit. This dynamic means that qui tam counsel have an incentive to screen carefully and invest substantially in cases they conclude are winners and pursue the case even if the DOJ decides, at the inception of the case, not to intervene (yet). It also means that counsel have a longer period, and more opportunities, to interest the government in the case on the merits. And if the SEC wishes to exploit the potential value added by such counsel—resulting in more successful cases with less government effort—it should adopt the kind of cooperative attitude that DOJ fraud personnel employ in working with qui tam counsel. Rather than employing a “file and die” approach—where whistleblower counsel provide their tip and accompanying work to the SEC only to be met with prolonged silence—the SEC should permit “the whistleblower and . . . counsel to make themselves indispensible from the standpoint of providing information, analytics, bodies on the ground, and a back office to support whatever action is being taken on the government level.”

207. Bucy, supra note 2, at 51 n.291.

208. Engstrom, Public Regulation, supra note 176, at 1717–18 (finding the DOJ exercises its termination authority in only a negligible percentage of cases).


210. Id. at 1994.

211. And if the SEC wishes to exploit the potential value added by such counsel—resulting in more successful cases with less government effort—it should adopt the kind of cooperative attitude that DOJ fraud personnel employ in working with qui tam counsel. Rather than employing a “file and die” approach—where whistleblower counsel provide their tip and accompanying work to the SEC only to be met with prolonged silence—the SEC should permit “the whistleblower and . . . counsel to make themselves indispensible from the standpoint of providing information, analytics, bodies on the ground, and a back office to support whatever action is being taken on the government level.” SEC’s Cohen Predicts Major Whistleblower Awards Soon, supra note 103.
In sum, viewed from the perspective of properly incentivizing counsel to weed out the gems from the “noise”—a critical issue given the mass of tips and limits on governmental resources—a *qui tam* mechanism may well be necessary to make the SEC Program effective.\(^{212}\) It is only with a *qui tam* authorization that counsel will have the potential rewards and control that will make them invest sufficiently in case development to fulfill the goal of augmenting governmental resources through private justice.

### E. Neutralizing Regulatory Capture

Another goal of private justice regimes is to allow private persons to pursue legal actions to neutralize the “capture” of regulatory agencies by the industries they regulate.\(^{213}\) The standard definition of “regulatory capture” is the “process by which policy is directed away from the public interest and toward the interests of a regulated industry.”\(^{214}\) Private parties may, through private justice judicial mechanisms like *qui tam* actions, force change unlikely to be adopted by government regulators who have become far too cozy with those they are supposed to oversee, or who have been corrupted by them. Another way of stating this goal is that private enforcement better reflects societal preferences, particularly where a course of regulatory action is politically unpopular with a dominant minority in the government. Thus, as David Kwok put it, “to the extent that there are differing beliefs regarding the proper level of enforcement of a particular public policy, private persons who value a higher level of enforcement can directly participate in making this goal a reality, without their preferences being diffused through the” political system and without reference to the “political pressures [that] may result in distorted levels of public enforcement by government agencies.”\(^{215}\)

This is a principal goal of other types of private justice mechanisms such as citizen suits against regulatory officials for failing to enforce their non-discretionary duties.\(^{216}\) The SEC’s Program cannot serve this goal because it does not permit private parties to proceed on their own and relies only regulatory enforcement; something in the nature of a *qui tam* provision is necessary to serve this goal.

At least in the context of U.S. transborder anti-corruption efforts, “capture” may not seem a real concern. There is no evidence that the DOJ or the SEC have ever been sympathetic to such corruption, or even to business claims that the FCPA

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212. Rapp, *supra* note 102, at 142.
213. The extent to which such “capture” is truly at issue is question by a number of commentators. See, e.g., Engstrom, *supra* note 137, at 617–18; Casey & Niblett, *supra* note 104, at 1174–76, 1179–85.
214. David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. & PUB. POL’Y 31, 31 (2013). Engstrom is correct that the term “regulatory capture” ought to be more specifically defined and used in various contexts. My own belief is that, no matter the definition, “capture” is generally not a problem in FCPA enforcement except in the softest sense of regulatory inertia.
216. See Bucy, *supra* note 2, at 36, 43.
inhibits sales and disadvantages U.S. companies in jurisdictions where corruption is said to be endemic.\textsuperscript{217} Some may view DOJ’s current willingness to engage in civil settlements pursuant to so-called “Deferred Prosecution Agreements” (DPA) or “Non-Prosecution Agreements” (NPA), rather than pursuing criminal cases, as evidence of industry “capture.” Both NPAs and DPAs—referred to collectively as deferred prosecution agreements (DP)—are, quite simply, contracts between the government and the targeted company through which the company agrees to admit wrongdoing and take identified steps to remedy the harm it caused and put in place systems to prevent further wrongs. If the company satisfies the terms of the agreement, criminal charges that have already been filed against it in court will be dismissed (DPA) or no formal charges will be filed (NPA). Examined closely, however, the use of these mechanisms stems primarily from the DOJ’s fear of the collateral consequences that will be visited on innocent third parties if it demands that the company plead guilty to a crime, triggering potential debarment from business, licensing issues, and perhaps the demise of the company.\textsuperscript{218} It is also explained by the fact that, as noted above, most cases, until fairly recently, came to the DOJ’s attention through corporate self-reporting. Thus, to maintain incentives for such corporate voluntary disclosure, the DOJ has rewarded self-reporters by using deferred prosecution agreements rather than criminal indictments.

\textit{Qui tam} provisions, then, are not necessary to combat the most pernicious types of regulatory “capture” in the FCPA context. They may be helpful, however, in combating something Congress was clearly troubled by in the hearings on the whistleblower legislation: a perceived SEC inability to effectively respond to important tips, whether through incompetence, inexperience, or a hostility toward

\textsuperscript{217} See TARUN, supra note 54, at 234. For example, in 2012, Lanny Breuer, then Assistant Attorney General, spoke out against calls from businesses to amend the FCPA, asserting that “watering down the Act . . . would send exactly the wrong message” because “we may together have no greater mission than to work toward eradicating corruption across the globe.” Lanny. A. Breeuer, Assistant Attorney General Lanny A. Breuer Speaks at the 26th National Conference on the Foreign Corrupt Practices Act, U.S. DEP’T O F JUSTICE (Nov. 8, 2011), http://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-26th-national-conference-foreign-corrupt.

FCPA defense counsel Robert Tarun advises that, when making a presentation to the SEC or DOJ aimed at securing a declination of charges or sanctions, one should not attempt to communicate that which in-country managers often assert: “the company conducted business in a foreign country where corrupt practices are routine and long established, and there is no other practical way to do business and compete.” TARUN, supra note 54, at 234–35. He states:

This argument simply will not succeed with either the DOJ or the SEC. The uniform government response is that Congress was fully aware of foreign customs and practices where bribery payments were the norm when it enacted the FCPA three and half decades ago, and it sought to establish ethical business practices for U.S. companies doing business overseas. Foreign policy or national security considerations may in limited circumstances be relevant, persuasive, or mitigating.

\textit{Id.}

whistleblowing.\textsuperscript{219} Engstrom has noted that regulatory capture may be most troubling at the micro-levels of agency decision-making where discretion is often invisible to the public and unreviewable by courts, for example decisions not to enforce in discrete cases.\textsuperscript{220} A \textit{qui tam} provision may be helpful here in addressing what appears to be the softest form of “capture,” if it is “capture” at all, and that is in combating regulatory inertia or a culture of discounting outside information and expertise. As Professor Amanda Rose expressed it:

\begin{quote}
[Adding a \textit{qui tam} feature to the WBP would help to sustain the program even if the SEC proved grossly incapable of sorting through whistleblower tips. It would ensure that tips not actively being pursued by the SEC, or affirmatively judged thereby to be insubstantial, could be pursued in private litigation by eligible whistleblowers, and thereby publicly exposed.\textsuperscript{221}
\end{quote}

This analysis is United States-centric and may not apply in all jurisdictions. In fact, this may be a hugely important aspect of private justice in other nations. Professor Paul D. Carrington, who also contends that the private enforcement of international law, and in particular anti-corruption norms, is necessary, suggests that the issue of “capture” may well be problematic in many jurisdictions. He argues, in part, that:

\begin{quote}
[While the commitment to prevent and deter the corruption of foreign governments is almost universal, few governments have demonstrated a willingness and ability to enforce their laws enacted to protect foreign governments . . . . [F]ew governments accountable to voters are aggressive enforcers of laws depriving their citizen-investors and workers of the benefits of contracts with foreign governments merely to prevent the bribery of foreign officials.\textsuperscript{222}
\end{quote}

It was just such a political disability, he argues, that gave rise to the American system of private enforcement of public law. If this is a real concern in a particular jurisdiction, a \textit{qui tam} mechanism, or authorization of citizen suits, may be the appropriate response.

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\textsuperscript{219} See, e.g., Hearing, supra note 195, at 7 (“The SEC is also captive to the industry it regulates, and it is afraid of bringing big cases against the largest, most powerful firms.”); id. 14–15 (describing the SEC as “captive”); id. at 17 (“[I]t was a combination of incompetence and an unwillingness to take on a major player like Mr. Madoff. They fear the big cases.”); id. at 30 (describing the SEC as unresponsive to whistleblower tips).
\textsuperscript{220} Engstrom, supra note 214, at 36.
\textsuperscript{221} Rose, supra note 6, at 1295; see also Rapp, supra note 102, at 134 (“[T]he SEC may continue to be unresponsive to whistleblower tips, with reporting leading to relatively little enforcement action. A \textit{qui tam} structure would provide a sort of escape valve, under which a whistleblower could pursue a claim—and a bounty—even if the SEC remains inactive.”).
\textsuperscript{222} Carrington, supra note 3, at 37–38.
\end{flushright}
F. Lawmaking Function

Engstrom has offered “concrete evidence that a *qui tam* regime may, relative to a cash-for-information approach, prove more susceptible to statutory ‘drift’ that is largely outside of public control as private enforcers rush to exploit regulatory ambiguities rather than merely surfacing information about obviously illegal conduct.” ²²³ In search of increasing payouts, *qui tam* relators and their counsel may push the law to obtain recoveries in marginal cases using “creative” theories to stretch the possibilities for profit. Pushing legal boundaries can, of course, be a good, socially-positive force. One “example is the successful campaign by private lawyers (and law professors) in the 1970s to develop a theory of sexual harassment as cognizable sex discrimination under Title VII’s open-ended antidiscrimination mandate.” ²²⁴ But it can also be socially inefficient and potentially democratically illegitimate. ²²⁵ Thus, some critics contend that “bounty-hunting privateers have driven the law in politically unaccountable directions, exploiting ambiguous regulatory mandates to assert claims that agencies and prosecutors are unwilling to embrace or tethering the FCA’s open-ended antifraud mandate to violations of separate statutes for which Congress did not provide a private right of action.” ²²⁶

There are a number of responses to these concerns, one being that the governmental gatekeeper (the DOJ in the FCA context) has the tools to contain such excesses. It need only intervene and assume control of the case, or use its power to dismiss actions. This response is probably too facile, however, as the evidence from the FCA area is that DOJ, in its intervention decisions, “does not place much of a premium on policing legislative fidelity at all—and, indeed, may exhibit something akin to the profit motivation that is presumed to drive private enforcers.” ²²⁷ The DOJ also exercises its power to terminate *qui tam* cases in very few cases. Empirical evidence suggests that “DOJ oversight may suffer from a type of ‘bailout effect’ because of the agency’s ability to shift the cost of case termination, both actual and reputational, to the courts.” ²²⁸ DOJ’s willingness to exercise control over the shape of the law is likely, if anything, to further diminish as its resources are overwhelmed by the number of filings requiring review. ²²⁹

The more compelling rebuttal lies in the dynamics of modern FCPA enforcement. As Engstrom correctly points out, “existing efforts to model the use of private enforcement as a regulatory tool take a surprisingly static view,” when they are in fact “highly dynamic in nature.” ²³⁰ “[A] litigation regime at each . . . stage[

²²⁴. *Id.* at 1932.
²²⁵. *Id.* at 1917.
²²⁶. *Id.* at 1916–17.
²²⁷. *Id.* at 1992.
²²⁸. *Id.*
²²⁹. *Id.*
²³⁰. *Id.* at 1999.
of development will generate very different regulatory outputs, with important implications for the degree of public control within the system.”

The FCA, it is fair to say, is at a fully mature stage; it is in “full-scale retail mode.” Thus, entrepreneurial lawyers may be looking to stretch the bounds of the law because businesses are, after years of litigation, better aware of what conduct will violate the FCA and more ready to do the compliance necessary to reduce FCA liability risks. The reality of FCPA enforcement is different for three principal reasons.

First, in the FCPA context, we are not as concerned with private litigants pushing the edge of the envelope because the envelope is, at present, largely unspecified. Indeed, one could argue that a huge potential advantage of allowing private persons to proceed in the event of an SEC declination is the judicial review and interpretation that would flow from increased civil litigation. Commentators have long complained that, given current FCPA enforcement trends—which focus on achieving settlements with corporate wrongdoers—there is little public litigation on the scope of the statute. As Bob Tarun, an expert FCPA practitioner has noted, “[t]he FCPA is one of the most convoluted statutes in the federal criminal code and one that in three decades has had remarkably little judicial interpretation. For this reason, there are more untested defense arguments for clients facing FCPA charges than with many other federal statutes.” This is important because “[t]he FCPA is one of the most feared statutes for U.S. businesses operating overseas . . . due in large part to perfect FCPA compliance being extremely difficult or unlike due to the statute’s expansive language, the absence of available judicial and administrative guidance, and the inherent realities involved in generating business globally.”

Which leads to the second circumstance that distinguishes the FCPA. Because there is no private right of action under the FCPA, its “development,” such as it can be said to have occurred, has taken place entirely in the criminal enforcement realm. And because of the DOJ’s power to force criminal dispositions, many believe that it is the DOJ that is forcing upon companies inappropriately broad constructions of the statute. It is exceedingly difficult to conceive of the criminal process that applies to corporations today as truly “adversarial.” As I have discussed in prior writings, the capacious standard of criminal liability created over a century of common law adjudication, the vagueness and malleability of

231. Id.
232. Id.
233. See Mark, supra note 1, at 487–88 (arguing for an implied private right of action under the FCPA).
234. See, e.g., TARUN, supra note 54, at 210.
235. Id.
criminal statutes,\textsuperscript{238} the many and onerous criminal penalties that can be visited upon corporations,\textsuperscript{239} the crippling collateral consequences (such as delicensing or debarment from government contracting) that may follow conviction, among other factors,\textsuperscript{240} generally mean that corporations have no choice but to beg for mercy when the government comes calling. Plea and cooperation rates in corporate criminal cases bear out this reality. As a result, “the FCPA often means what the enforcement agencies say it means.”\textsuperscript{241} According to Professor Mike Koehler, “[b]ecause of the ‘carrots’ and ‘sticks’ relevant to resolving a government enforcement action, FCPA defendants are nudged to accept resolution vehicles notwithstanding the enforcement agencies’ untested and dubious enforcement theories or the existence of valid and legitimate defenses.”\textsuperscript{242}

Third, the DOJ’s preferred vehicles for resolving FCPA claims are DPAs and NPAs. NPAs will never be subject to routine judicial oversight; DPAs are generally given little, if any, judicial scrutiny. As Koehler concludes:

[T]he reality is that the majority of corporate FCPA enforcement actions in this new era are based on aggressive and controversial enforcement theories, yet resolved via non-prosecution and deferred prosecution agreements . . . not subjected to any meaningful judicial scrutiny by risk-averse business organizations mindful of the adverse consequences of putting the enforcement agencies to its burden of proof in an adversarial proceeding.\textsuperscript{243}

Thus, these negotiated settlements actually create a de facto legal regime. Koehler argues that this breeds expensive and inefficient overcompliance by risk-averse businesses.\textsuperscript{244} While even Koehler concedes that not every DOJ enforcement action constitutes legal overreaching, his concerns about the DOJ’s arguable legal aggression is sufficiently common that it must be taken seriously.\textsuperscript{245}

\textsuperscript{239}. See U.S. SENTENCING GUIDELINES MANUAL ch. 8 (U.S. SENTENCING COMM’N 2012).
\textsuperscript{240}. O’Sullivan, supra note 218, at 35.

Although not every conviction is in essence a corporate death sentence, the company will certainly suffer . . . in a variety of ways: (1) the restitution, fine, and corporate probation provisions of the Federal Sentencing Guidelines applicable to organizations; (2) potential suspension and debarment from government contracting; (3) possibly ruinous regulatory or licensing repercussions; (4) collapse of share prices; (5) being found in default on loan covenants; (6) severe reputational harm; (7) loss of employees, customers, and financing; and (8) the application of collateral estoppel to foreclose the entity from resisting the civil damages demands of any number of potential civil regulators and private plaintiffs.

\textsuperscript{242}. Id.
\textsuperscript{244}. Koehler, supra note 241, at 907.
\textsuperscript{245}. See also, e.g., Juneja, supra note 236, at 295 (discussing the controversy about the definition of a “foreign official” in the context of state owned entities, noting that the “DOJ has [brazenly] admitted that ‘it is entirely
To the extent that the DOJ is engaging in overly aggressive theories of FCPA liability that are unchecked by the courts and corporations have not the stomach to resist, there are real overdeterrence costs. “[S]ettlement amounts in an actual FCPA enforcement action are often only a relatively minor component of the overall financial consequences that can result from FCPA scrutiny or enforcement . . . .” In addition to such settlement amounts, firms must bear the costs of pre-enforcement professional fees and expenses. These can be astronomical. Siemens reportedly paid lawyers over half a billion dollars in attorneys fees just for the internal investigation into its FCPA wrongdoing. Then there are post-enforcement professional fees and expenses that may result from enhanced monitoring or compliance requirements that are imposed as part of the settlement. Finally:

FCPA scrutiny and enforcement can . . . negatively impact a company’s business operations and strategy in a variety of ways from: market capitalization; to cost of capital; to merger and acquisition activity; to impeding or distracting a company from achieving other business objectives; to private shareholder litigation; to offensive use of the FCPA [by a competitor or adversary] to achieve a business objective or to further advance a litigating position.

Given this context, one has to think that the addition of a civil cause of action, in which defendants may be better able to put plaintiffs to their burden, may mean that judges will be in a position to “check” prosecutorial legal overreaching. This may constitute a significant social gain. It also may promote salutary transparency in the context of settlements. As Rapp has noted,

[T]he qui tam structure provides a greater possibility that a whistleblower’s complaints will be resolved in an open, public forum. To the extent that nonmonetary incentives play a role in motivating whistleblowing, Dodd-Frank’s structure may be a poor policy choice precisely because it leaves possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country will involve a ‘foreign official’ within the meaning of the FCPA”); Russ Ryan, Former SEC Enforcement Official Throws the Red Challenge Flag, FCPA PROFESSOR (Feb. 10, 2014), http://www.fcpaprofessor.com/former-sec-enforcement-official-throws-the-red-challenge-flag. But see Joseph W. Yockey, Choosing Governance in the FCPA Reform Debate, 38 J. CORP. L. 325 passim (2013) (discussing debate over whether the FCPA is overenforced, determining that there is a risk that the FCPA is underenforced, and positing fixes).

249. See Mike Koehler, Second Circuit—“There Is No Private Right Of Action Under The Antibribery Provisions Of The FCPA”, FCPA PROFESSOR (Sept. 25, 2014), http://www.fcpaprofessor.com/second-circuit-there-is-no-private-right-of-action-under-the-antibribery-provisions-of-the-fcpa (“At the very least, this much should be undisputed: if there were an FCPA private right of action, there would be substantially more case law of precedent concerning the FCPA’s provisions than currently exists and that, I submit, would be a good thing.”).
resolution of cases solely in the hands of the SEC, which has a history of preferring settlements over open enforcement proceedings.250

CONCLUSION

Private justice mechanisms offer an important means by which governments may supplement their efforts to combat transborder corruption. Properly designed, they can incentivize persons with knowledge of the corruption to report it to enforcement authorities, provide a roadmap to otherwise hard-to-find evidence, stimulate the creation of an entrepreneurial private bar that will screen and develop the best cases for prosecution, combat regulatory “capture” or inertia, and allow the judiciary to participate in the specification of anti-bribery standards. It is too early to definitively resolve the question of whether the SEC’s WBP will offer all these advantages. The literature and evidence in the FCA context, however, strongly suggest that a qui tam authorization may be necessary to create the proper incentives for the private bar to participate fully in supplementing governmental enforcement efforts.

250. Rapp, supra note 102, at 134–35.