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The impact of international whistleblowing on global corporate compliance

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This is the first part of a two-part article.

Over the last 33 years, whistleblowers have enjoyed historic success advancing claims under the United States' False Claims Act (FCA). The United States government has recovered more than \$62 billion as a result of both the FCA and the efforts of mostly domestic whistleblowers. Although the great majority of whistleblowers have been US citizens, that trend is changing. The rise of international whistleblower laws and the global notoriety of the FCA have sparked global interest. Specifically, an increase in non-US citizens filing and obtaining recoveries under the FCA is a new but growing phenomenon. Interestingly, these whistleblowers are not taking advantage of their own countries' whistleblower laws, most likely because international whistleblower laws, unlike the FCA, generally do not provide a monetary financial incentive to whistleblowers. Nor do most offer the robust whistleblower protections provided by the FCA. Lastly, experienced attorneys are disincentivized to pursue these claims, as none of these laws provide for the payment of counsel fees or costs on successful claims. These laws purportedly help to minimize government corruption and fraud, but they will fail without financial incentives and strong protections to whistleblowers.

In this first part of a two-part article, we discuss the success of the FCA, the rise of international whistleblowers through a study of the Michael Epp case, and what global companies need to do to prepare. In the concluding part, we review exemplar international whistleblowing laws that have been recently enacted and what we predict will be their impact.

The FCA has set the global standard

The FCA has become the most successful fraud, waste, and abuse statute in the world, with recoveries in excess of \$62 billion, largely due to whistleblowers.^[1] American whistleblowers had a watershed year in 1986. The US Congress amended the FCA to provide for individual whistleblowers (also called relators) to file claims on behalf of the US government and, if successful, receive anywhere from 15% to 30% of any recovery or settlement. These 1986 amendments, which added the "qui tam" provisions, catapulted the FCA from a little-known and rarely used aging anti-fraud statute into the muscular tool that it is today. Since the FCA provides for "treble damages" and civil monetary penalties for each false claim, a whistleblower's award may be quite significant. Whistleblowers have filed the vast majority of all FCA cases. In fiscal year 2018, for example, whistleblowers initiated 84% of new FCA cases, and cases initiated by whistleblowers accounted for 75% of the government's \$2.9 billion in recoveries that year.

At its heart, the FCA has five key elements driving its success:

1. The FCA provides whistleblowers the statutory right to bring a claim in the name of the government and
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receive 15% to 30% of any recovery. This financial incentive has single-handedly made the FCA the most successful anti-fraud statute ever passed by any legislature in the world.

2. The FCA includes a strong anti-retaliation provision to protect whistleblowers who come forward by providing robust remedies such as reinstatement, back pay, and double damages.
3. The FCA provides prevailing whistleblowers the right to have their attorney fees and costs paid by the defendants.
4. There are active government agencies and devoted prosecutorial professionals enforcing the FCA. These government entities have broad powers to investigate and prosecute claims.
5. The FCA allows standing to bring a qui tam action to a broad class of persons with appropriate knowledge, including entities, and does not require a claim to be reported internally first. Importantly, a whistleblower does not have to be an employee of the target company. Whistleblowers often have been customers, vendors, former employees, and, increasingly, competitors. Many also do not realize that whistleblowers do not have to be US citizens, or even residents of the United States, to bring an FCA action.

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