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Tim Bakken

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Dodd-Frank's Extension of Criminal Corporate Liability through the Foreign Corrupt Practices Act: Enabling Whistleblowers and Monitoring Conflict Minerals

Tim Bakken

I. Introduction: New Crimes and Proving Old Crimes

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")[1] has been characterized as the most significant financial reform legislation since the Great Depression,[2] when the nation adopted the Securities Act of 1933[3] and the Securities Exchange Act of 1934.[4] The Dodd-

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* The views expressed in this article are those of the author and do not reflect the official policy or position of the Department of the Army, the Department of Defense, or the U.S. government.

1. *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter Dodd-Frank Act].

2. As one commentator has suggested:

> Dodd-Frank represents the most sweeping changes to the financial regulatory environment in the United States since the Great Depression. While its enactment was important, it is seriously flawed. It does not deal with regulatory fragmentation, sidesteps international coordination, and is overly optimistic in dealing with too-big-to-fail. Going first doesn't mean you get it right.

Edward F. Greene, *Dodd-Frank and the Future of Financial Regulation*, 2 HARV. BUS. L. REV. ONLINE 79, 79 (2011), http://www.hblr.org/wp-content/uploads/2011/10/HBLR-Greene_Symposium1.pdf.

3. *See generally* Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (2012)).

4. *See generally* Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78pp (2012)).

Frank Act makes so many changes and leaves so much rule-making to the Securities and Exchange Commission ("SEC") that a generation will probably pass before its implications are understood. In the criminal area, the Dodd-Frank Act creates new crimes[5] – twenty-two by one estimate[6] – and also makes recklessness the mens rea for several crimes,[7] creating greater liability for lesser culpability when compared to crimes whose mens rea element is intent or willfulness.

Specifically, the Dodd-Frank Act provides lucrative financial incentives for corporate agents who reveal

5. *See e.g.*, Dodd-Frank Act §§ 723, 124 Stat. at 1675 (to be codified at 7 U.S.C. § 2) (clearing), 724, 124 Stat. at 1682, 1684 (to be codified at 7 U.S.C. §§ 6s, 6d) (swaps, segregation, and bankruptcy treatment), 725, 124 Stat. at 1685 (repealed 2015) (derivatives clearing), 728, 124 Stat. at 1697 (to be codified at 7 U.S.C. § 24a) (swap data repositories), 730, 124 Stat. at 1702 (to be codified at 7 U.S.C. § 6t) (large swap trader reporting), 731, 124 Stat. at 1703 (to be codified at 7 U.S.C. § 6s) (registration and regulation of swap dealers, and major swap participants), 741, 124 Stat. at 1730-31 (to be codified at 7 U.S.C. § 6b-1) (enforcement), 745, 124 Stat. at 1735 (repealed 2015) (enhanced compliance by registered entities), 746, 124 Stat. at 1738 (to be codified at 7 U.S.C. § 6c) (insider trading), 747, 124 Stat. at 1739 (to be codified at 7 U.S.C. § 6c) (antidisruptive practices authority), 749 (to be codified at 7 U.S.C. § 6d) (conforming amendments), 753, 124 Stat. at 1750 (to be codified at 7 U.S.C. § 9) (anti-manipulation authority), 763, 124 Stat. at 1762, 1768-69, 1774, 1777-79, 1781 (to be codified at 15 U.S.C. §§ 78c-3, 78c-4, 78c-5, 78f, 78i, 78j-2, 78m) (amendments to the Securities Exchange Act), 764, 124 Stat. at 1785 (to be codified at 15 U.S.C. § 78o-10) (registration and regulation of security-based swap dealers and major security-based swap participants), 768, 124 Stat. at 1800-01 (to be codified at 15 U.S.C. § 77b) (amendments to the Securities Act and treatment of security-based swaps), 929, 124 Stat. at 1852 (to be codified at 15 U.S.C. § 78g) (unlawful margin lending), 929l, 124 Stat. at 1861 (to be codified 15 U.S.C. §§ 78i, 78j, 78o) (enhanced applications of antifraud provisions), 929x, 124 Stat. at 1870 (to be codified at 15 U.S.C. § 78) (short sale reforms), 975, 124 Stat. at 1916 (to be codified at 15 U.S.C. § 78o-4) (regulations of municipal securities and changes to the board of the Municipal Securities Rulemaking Board), 1031, 124 Stat. at 2005 (to be codified at 12 U.S.C. § 5531) (prohibiting unfair, deceptive, or abusive acts or practices), 1036, 124 Stat. at 2010 (to be codified at 12 U.S.C. § 5536) (prohibited acts), 1472, 124 Stat. at 2187, 2190 (to be codified at §§ 1604, 1639e) (appraisal independence requirements).

6. *See generally* Tiffany M. Joslyn, *Criminal Provisions in the Dodd-Frank Wall Street Reform & Consumer Protection Act,* FEDERALIST SOC'Y, (Dec. 10, 2010), http://www.fed-soc.org/publications/detail/criminal-provisions-in-the-dodd-frank-wall-street-reform-consumer-protection-act.

7. *See* Dodd-Frank Act § 745, 124 Stat. at 1735 (repealed 2015); *see also id.* §§ 746, 753, 124 Stat. at 1738, 1750 (to be at codified at 7 U.S.C. §§ 6c(a), 9).

wrongdoing within corporations.[8] Also, the Act's conflict minerals provision requires companies to issue reports that describe their production of valuable minerals in several African nations, where the rule of law is often not observed.[9] The new provisions in the Dodd-Frank Act provide the government with new methods of monitoring corporations and finding what might be the vastly understated and largely concealed practice of corporations rewarding foreign officials for access to markets in foreign nations.[10]

The Dodd-Frank Act creates and criminalizes a new kind of insider trading, in which federal employees are prohibited from releasing *government information*,[11] an intangible kind of interest similar to the property interest in some insider trading cases.[12] This provision may raise significant questions, even First Amendment constitutional questions, in that it criminalizes the release and/or use of government information, always a suspect proposition in a democracy.[13] This newly protected *government information* elevates, in essence, not only government documents but also discussions undertaken by government employees about public companies and other business entities to the level of classified information, which is also criminalized.[14] Moreover, unlike insider trading involving corporate information, where generally only the fiduciary and his tippee are liable,[15] anyone who trades on government information, regardless of how far removed from the tipper, is liable.[16]

The extraterritorial provisions[17] of the Dodd-Frank Act appear to expand jurisdiction over foreign corporations and

8. *See id.* § 922, 124 Stat. at 1841 (codified at 15 U.S.C. § 78u-6 (2012)).

9. *See id.* §§ 1502(p), 1504(p), 124 Stat. at 2213, 2220, *invalidated by* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014).

10. See generally Mike Koelher, Archive for the 'Dodd-Frank' Category, FCPA Professor (Nov. 22, 2013), http://www.fcpaprofessor.com/category/dodd-frank.

11. Dodd-Frank Act § 746, 124 Stat. at 1738.

12. *See* Carpenter v. United States, 484 U.S. 19 (1987).

13. Dodd-Frank Act § 746, 124 Stat. at 1738.

14. *Id.*

15. *See* United States v. O'Hagan, 521 U.S. 642 (1997).

16. *See* Dodd-Frank Act § 746, 124 Stat. at 1738.

17. *See id.* § 746, 124 Stat. at 1738.; *see also id.* § 929P(b), 124 Stat. at 1864-65 (to be codified at 15 U.S.C. §§ 77v, 78aa, 80b-14).

thus negate *Morrison v. National Australia Bank*, in which the United States Supreme Court held that securities must be listed in the United States or the activities at issue in the case must have occurred in the United States before a federal court may assert jurisdiction.[18] Despite its focus on new and old crimes, the Dodd-Frank Act pays little attention to the Foreign Corrupt Practices Act ("FCPA"),[19] the epitome of extraterritorial jurisdiction, which remains intact. As will be discussed below, however, the effect of the Dodd-Frank Act is to expand the reach of the FCPA, not through new statutes or rules directly focused on the FCPA, but rather through new provisions that indirectly enhance the ability of the Justice Department to prosecute bribery and the SEC to enforce the accounting, books, and records requirements of the FCPA.

One key, compelling component that produces a more potent FCPA is the Dodd-Frank Act's creation of rewards for whistleblowers,[20] who are usually insiders and who possess the requisite information about illegal corporate activity to make prosecutions of the FCPA possible. A second key component in the Dodd-Frank Act is its requirement that firms make specific disclosures about their payments to governments in regard to "conflict minerals"[21] in Africa, the trade of which has fostered regional warfare for decades. The additional information obtained from such disclosures will support bribery prosecutions. Where Dodd-Frank Act disclosures are not made, lied about, or covered up, the government will be in a better position to enter into cooperation agreements with witnesses and investigate bribery in an alternative way.

In a sense, through its whistleblower provision, the Dodd-Frank Act has enabled the government to use corporate employee whistleblowers to support criminal prosecutions. That position finds agreement in this article, but the conclusion reached is that the results to be obtained from the

18. 561 U.S. 247 (2010).

19. *See generally* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 [hereinafter FCPA] (codified as amended at 15 U.S.C. §§ 78dd-1-78dd-3 (2012)).

20. *See* Dodd-Frank Act § 922, 124 Stat. at 1841 (noting that the whistleblowing provision permits a recovery of 10-30% for the whistleblower).

21. *See* Dodd-Frank Act § 1502, 124 Stat. at 2215-17, *invalidated by* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014).

whistleblower provision will be positive. Through an analysis of the Dodd-Frank Act, this article discusses further the new reach of the FCPA, particularly in light of the whistleblower and conflict-minerals provisions in the Dodd-Frank Act. Finally, this article concludes that although the new provisions can be costly, the provisions are beneficial. The traditional corporate model is now more open, as firms and individuals are required to act with greater care and, in effect, the FCPA has greater vitality.

II. Dodd-Frank's Whistleblower and the Foreign Corrupt Practices Act

Section 922 of the Dodd-Frank Act[22] is titled "Whistleblower Protection" and defines a whistleblower as "any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."[23] The provision provides a compelling incentive to individuals to report securities violations because it offers a reward of 10-30% "of the monetary sanctions imposed in the action or related actions."[24] On May 25, 2011, the SEC issued final rules to implement the whistleblower statute.[25] Under the rules, "[t]o be considered for an award, the SEC's rules require that a whistleblower must voluntarily provide the SEC with original information that leads to the successful enforcement by the SEC or a federal court or administrative action in which the SEC obtains monetary sanctions totaling more than $1 million."[26] In explaining the rationale for the whistleblower statute and rules, former SEC Chairman Mary L. Shapiro

22. *Id.* § 922, 124 Stat. at 1841.
23. *Id.* § 922(a)(6), 124 Stat. at 1841.
24. *Id.* § 922(b)(1)(A)-(B), 124 Stat. at 1841.
25. *See* Press Release, SEC, SEC Adopts Rules to Establish Whistleblower Program (May 25, 2011) (on file with author), http://www.sec.gov/news/press/2011/2011-116.htm ("The new SEC whistleblower program, implemented under Section 922 of the Dodd-Frank Act, is primarily intended to reward individuals who act early to expose violations and who provide significant evidence that helps the SEC bring successful cases.").
26. *Id.*

suggested that "[f]or an agency with limited resources like the SEC, it is critical to be able to leverage the resources of people who may have first-hand information about violations of the securities laws."[27] The government concedes that it does not have the resources to regulate securities markets and will rely on whistleblowers, who in the main will be the employees of corporations who possess the first-hand information that will lead to rewards.

A. *Dodd-Frank and Corporate Culture*

The new whistleblower statute could change workplace dynamics. If firms are concerned during the hiring process about which employee might become a whistleblower, they may investigate job candidates' prior activities more thoroughly and differently. Trust inside companies could be diminished if fellow employees of a potential whistleblower fear their innocent activities will be misconstrued and reported to government regulators. Especially regarding the FCPA, companies' pursuit of promising leads in developing markets overseas may be restrained if the companies believe their activities could be misconstrued. It is the unleashing of private agents to do government work for a reward that concerns the business community, corporate compliance officers, and white-collar criminal lawyers.

In perhaps grudging acknowledgement of the reach of the Dodd-Frank Act, one prominent law firm, Fried Frank, pronounced the whistleblower statute a "sleeper bounty provision" and predicted "that this new whistleblower program may end up playing a key role in identifying and prosecuting violations of the FCPA."[28] From a criminal defense perspective, the whistleblower statute and rules will give additional force to the FCPA, which even today is murky for lack of judicial interpretation. Indeed, the two essential parts of the FCPA,

27. *Id.*

28. Memorandum from Fried Frank to the Friends and Clients of Fried Frank (July 16, 2010) [hereinafter Fried Frank] (on file with author), http://friedfrank.com/siteFiles/Publications/A97331BB3E441A079E01314A968EECD7.pdf.

requiring certain books and records to be maintained[29] and prohibiting bribery of foreign officials,[30] have led to significant judicial construction. Most relevant to this article is the bribery provision, which states:

> It shall be unlawful for any issuer . . . or for any officer, director, employee, or agent of such issuer or any stockholder . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official for purposes of . . . influencing any act or decision of such foreign official in his official capacity.[31]

Agreeing with the defense bar, one commentator finds the elements of the FCPA lacking in specificity[32] and recommends that the SEC or the Department of Justice define more precisely the meaning of "foreign official;" what constitutes an "agency or instrumentality of a foreign government;" whether "anything of value" includes charitable contributions or payments made to people other than the foreign official; and "to what extent . . . securing an overall business advantage constitute[s] 'obtaining or retaining business' for purposes of the Act."[33]

Especially with whistleblower incentives so high,[34] most seem to believe that prosecutions under the FCPA and other

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29. *See* FCPA, Pub. L. No. 95-213, § 102(b), 91 Stat. at 1494, *invalidated by* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014).

30. *See id.* § 103(a), 91 Stat. at 1494 (codified as amended at 15 U.S.C. § 78dd-1(a) (2012)).

31. *Id.* § 103(a)(1)(A)(i), 91 Stat. at 1494.

32. *See generally* Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489 (2011).

33. *Id.* at 576.

34. Dodd-Frank Act, Pub. L. No. 111-203, § 922(b)(1)(A)-(B), 124 Stat. 1376, 1841 (2010) (permitting a 10-30% of recovery for whistleblowers).

statutes will increase.[35] "One anticipated result of the new whistleblower program may be an increase in the number of investigations and prosecutions under the Foreign Corrupt Practices Act . . . which at the same time raises concerns that corporate employees may be tempted to forego their own internal compliance programs."[36] In fact, the Dodd-Frank Act does not require whistleblowers to climb any ladder, go up any chain of command, or report to any supervisor. They may go directly to the SEC.[37] Under the Dodd-Frank Act:

> In any covered judicial or administrative action . . . the Commission . . . shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to . . . not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and . . . not more than 30 percent, in total.[38]

In response, corporate and defense attorneys argue that the Dodd-Frank Act should have required employees to report their perceived violation to corporate compliance officers before they could report to the SEC and recover a reward, which would permit corporations to make corrections at a low cost.

This view is slightly optimistic, even whimsical, in that prior to the Dodd-Frank Act, there were virtually no whistleblower reports whatsoever. "Since its inception in 1989, the SEC's existing whistleblower program has paid out less

35. *See generally* Henry Klehm III et al., *Securities Enforcement Has Crossed the Border: Regulatory Authorities Respond to the Financial Crisis with a Call for Greater International Cooperation, But Where Will That Lead?*, 13 U. PA. J. BUS. L. 927 (2011).

36. *Id.* at 936.

37. *See* Dodd-Frank Act § 922, 124 Stat. at 1841.

38. *Id.* § 922 (b)(1)(A)-(B), 124 Stat. at 1841.

than $160,000 to just five whistleblowers."[39] From this minimal whistleblower activity, one could conclude that corporate compliance programs were effective, in that whistleblowers had little about which to complain. Further, from the firms' perspectives, if potential whistleblower employees did have a complaint, compliance officers could address it and, if needed, find a remedy inside the firm. However, argued differently, the corporate *compliance* programs deterred whistleblowers through assimilation, conformity, and fear. No employee will step forward without significant protection or incentives. Without a Dodd-Frank Act-type whistleblower law and little prospect of compensation for reporting even verified securities law violations, whistleblower employees had no incentive to report violations. And they did not, except for only five over twenty years.[40]

B. *Cooperating Witnesses and Whistleblowers*

The government at all levels has long used cooperating witnesses to initiate and support criminal prosecutions, providing to the cooperator leniency in charging and sentencing.[41] Almost always less reliable, at least on the surface, and far more culpable than whistleblowers,[42]

39. Fried Frank, *supra* note 28 (citing S. REP. NO. 111-176, at 111 (2010) (Conf. Rep.)). Continuing:

> In response to those statistics — which may have resulted from would-be whistleblowers weighing harsh reprisals against the prospect of low rewards for raising concerns about wrongdoing in a corporation — Congress included in the Dodd-Frank Act a minimum cash reward of 10% of any monetary sanctions recovered by the government to encourage individuals "to take the enormous risk of blowing the whistle in calling attention to fraud." The government's failure to detect Bernie Madoff's fraud also spurred the SEC to endorse a more expansive whistleblower program.

Id. (citations omitted).

40. *See id.*

41. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2011).

42. Whistleblowers may have no culpability. They cannot receive a financial award for a criminal conviction related to their whistleblowing. *See*

cooperators are pervasive in the criminal justice system. The government formally recognizes and rewards their participation in ways far more important than the receipt of money. Cooperation usually results in significantly less time in prison. Under the Federal Sentencing Guidelines:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines. . . . The appropriate reduction shall be determined by the court for reasons stated that may include . . . the significance and usefulness of the defendant's assistance . . . the truthfulness, completeness, and reliability of any information or testimony provided by the defendant . . . the nature and extent of the defendant's assistance . . . any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance . . . the timeliness of the defendant's assistance.[43]

A whistleblower normally should be met with far less alarm than a cooperator. The cooperator is by nature a criminal. If not, there would be no need for a cooperation agreement in which the cooperator agrees to testify for a benefit. For all other persons, the government can simply subpoena them to testify, assuming they do not have a Fifth Amendment or common law privilege not to testify.

It is far more difficult for a whistleblower to obtain a financial reward than for a cooperating criminal to obtain leniency. There is no statutory limit on the cooperators that the government may use, nor the leniency they may receive.[44] Sammy "the Bull" Gravano received immunity from prosecution for nineteen murders and five years' imprisonment

Dodd-Frank Act § 922, 124 Stat. at 1841.

43. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2011).

44. *See id.*

in satisfaction of all his crimes in return for his testimony against John Gotti and other members of organized crime.[45] In contrast, the Dodd-Frank Act denies an award to:

> [A]ny whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award under this section . . . [and] to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require.[46]

The SEC goes even further. In its rule[47] implementing the whistleblower provision of the Dodd-Frank Act,[48] the SEC prevents whistleblowers from recovery "if he or she obtained the information by a means or in a manner that is determined by a United States court to violate applicable Federal or state criminal law."[49] This rule will doubtlessly eliminate some whistleblowers, but it requires that the whistleblowers who do survive the rule to have relatively clean hands, unlike those of cooperators.

It is likely that a cooperator will have, at some point, withheld information from the government, but he may, nonetheless, enter into a cooperation agreement. In contrast, under the Dodd-Frank Act, a whistleblower "who fails to submit information to the Commission" will not receive an award.[50] By nature, a whistleblower is more reliable than a cooperator and is unlikely to have any criminal convictions. He is not blowing the whistle to avoid imprisonment on a current criminal case where, because of the travails of imprisonment,

45. *See* James Ridgway de Szigethy, *J. R.'s Mafia Year in Review – 2000*, AM. MAFIA (Jan. 2001), http://americanmafia.com/feature_articles_111.html.

46. Dodd-Frank Act § 922(c)(2)(B), 124 Stat. at 1841.

47. 17 C.F.R. § 240.21F-4(b)(1)(iv) (2015).

48. Dodd-Frank Act § 922, 124 Stat. at 1841.

49. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Dodd-Frank Act Release No. 34-64545, at 79-80 (May 25, 2011), https://www.sec.gov/rules/final/2011/34-64545.pdf.

50. *Id.* at 133 n.293.

the cooperator has more incentive to fabricate and lie than probably any person in society.

Unlike the cooperator, who executes a binding contract with the prosecution detailing the terms of the cooperation and benefits, the whistleblower has no assurance that the SEC will pursue his leads or charges or award him any financial benefit for providing "information relating to a 'material' violation of the securities laws."[51] Cooperators pervade the criminal justice system. Under the Dodd-Frank Act, they may not recover if they are convicted of a crime related to their whistleblowing.[52] Under SEC rules, they may not recover if they obtained their information through criminal means.[53] So long as there are reasons for the government to use cooperators, there will be a greater rationale to use whistleblowers.

C. *A Place for Whistleblowers*

Recent history and cases support the view that whistleblowers are needed if the government is to effectively enforce the FCPA. The Department of Justice enforces the bribery component of the FCPA, and the SEC enforces the accounting and records component:

> The accounting and record-keeping provisions of the FCPA are essentially a re-enactment of established accounting procedures for publicly traded companies. As such the accounting and record-keeping provisions of the FCPA are enforced by the Securities Exchange Commission (SEC). Penalties for violating the accounting and record-keeping provisions of the FCPA are the same penalties that apply to most other violations of the securities laws. These penalties include monetary fines but no criminal penalties.[54]

51. *Id.* at 9 (citations omitted).
52. Dodd-Frank Act § 922(c)(2)(B), 124 Stat. at 1841.
53. *Id.* § 922(c)(2)(C), 124 Stat. at 1841.
54. Margaret Gatti et al., *Foreign Corrupt Practices Act* (Mar. 26, 2008), *available at* http://library.findlaw.com/1997/Jan/1/126234.html.

As things stand now, the government, either the Department of Justice or the SEC, may be plucking only a few prominent cases at the top point of a pyramid that has a huge base. In 2009, the SEC created a unit devoted to enforcement of the FCPA,[55] and in 2011 the SEC for the first time indicated the number of FCPA enforcement actions that the agency brought, which had been previously subsumed within another category.[56] The number was fifteen.[57] The number of enforcement actions in 2012, 2013, and 2014 were ten, eight, and eight, respectively.[58]

These seem like relatively few enforcement actions in light of the significant FCPA cases that have been brought by the Justice Department or SEC in just one year, for example:

> In 2010, the U.S. Department of Justice . . . and the U.S. Securities and Exchange Commission . . . agreed to settle charges against: (1) the Dutch construction company Snamprogetti Netherlands B.V. for $ 365 million; (2) the French construction and engineering firm Technip SA for $ 338 million; (3) U.K. defense contractor BAE Systems PLC for $ 400 million; (4) German automaker Daimler AG for $ 185 million; and the global freight forwarding company Panalpina World Transport (Holding) Ltd., along with six other companies in the oil services industry, for a total of $ 236.5 million.[59]

Also in 2010, Citigroup and Blackstone were among the ten firms that the SEC was reportedly investigating in connection

55. Robert Khuzami, Director, Div. of Enf't, SEC, Remarks Before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), http://www.sec.gov/news/speech/2009/spch080509rk.htm.

56. *See* SEC Enforcement Actions: FCPA Cases, SEC, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last visited July 28, 2015) [hereinafter SEC Enforcement Actions].

57. *Id.*

58. *Id.*

59. Westbrook, *supra* note 32, at 492-94.

with a FCPA bribery inquiry concerning officials and sovereign wealth funds.[60] Unless human nature has improved suddenly and bribery has been cut in half, the declining numbers of enforcement actions – just eight in 2014 – may indicate that the SEC has been overwhelmed by the Dodd-Frank Act.[61]

Just previous to 2010, in 2008 and 2009 FCPA cases, Seimens AG agreed to pay the government a fine of over $800 million and Halliburton settled with the government for $579 million.[62] From 2008 to 2010, at least forty-one persons were arrested, indicted, or convicted of violating the FCPA.[63] One was sentenced to eighty-seven months, "the longest prison term ever imposed for an FCPA violation."[64] Companies and individuals endure significant costs in violating the FCPA. But, if the costs are high, this leads to the question of why the violations occur in the first place. Indeed, the corporate violations occurred within established business structures and were pervasive.[65] The most plausible reason that firms take great risks in violating the FCPA is that the risk of getting caught is low.

The concerns that the Dodd-Frank Act will adversely affect corporate compliance programs, if true, seem less relevant and slightly misplaced in light of the large recoveries obtained recently from very large, established firms.[66] Perhaps the compliance programs should be affected. Compliance programs are not preventing significant violations of the FCPA and extensive liability for the firms that the programs are designed to protect. Moreover, the SEC is not bringing a large number of cases under the FCPA, with only twenty brought in 2010.[67] It is fair to ask whether many corporations do not have effective compliance programs or whether their programs exist

60. Dionne Searcey & Randall Smith, *SEC Probes Banks, Buyout Shops Over Dealings With Sovereign Funds*, WALL ST. J. (Jan. 14, 2011, 12:01 AM), http://online.wsj.com/article/SB10001424052748704307404576080403625366100.html.

61. *See* SEC Enforcement Actions, *supra* note 56.

62. *See* Westbrook, *supra* note 32, at 556.

63. *See id.* at 526-29.

64. *Id.* at 527

65. *See generally id.*

66. *See generally* Fried Frank, *supra* note 28.

67. *See* SEC Enforcement Actions, *supra* note 56.

as a means to shield them from liability by permitting them to disclaim the mens rea of intent, knowledge, and/or willfulness if the government brings prosecutions or enforcement actions against them. "The FCPA prohibits not only direct payments to foreign officials, but also payments to third parties if they are made 'while knowing' that some or all of the payment will be used for bribery in contravention of the FCPA."[68] Compliance programs may relieve firms from having knowledge imputed to them in FCPA cases, even though the corporate culture may not deter violations of the FCPA.

There is some evidence that corporations attempt to shield themselves from FCPA liability by working through intermediaries. Prior to the Dodd-Frank Act, "[l]iability for the acts of intermediaries [was] at an all-time high in terms of importance: all eleven enforcement actions against companies in 2009 involved some type of foreign-agent conduct."[69] If operating in bad faith, corporations could try to avoid liability by claiming they could not anticipate that rouge employees who received FCPA compliance training would engage in bribery. However, the Dodd-Franks Act's explicit recognition of recklessness as a basis for criminal liability may force compliance programs to foster a corporate culture of greater oversight.[70]

The concern that the Dodd-Frank Act's whistleblower provision will lead employees to complain amok seems overstated. Regardless of legal protection for whistleblowers, for personal and professional reasons, almost no employee wants to be a whistleblower. Being a whistleblower is emotionally taxing and can be financially harmful. Even if a firm cannot terminate a whistleblower, the firm's other employees will understand from management's subtle, un-provable signals that their association with the employee-whistleblower will be costly. The whistleblower will work in silence. The whistleblower's opportunities within the firm, as well as firms in the same industry, not to mention elsewhere, will likely be non-existent. Without a reward for

68. Westbrook, *supra* note 32, at 544.

69. *Id.* at 545.

70. *See* Dodd-Frank Act, Pub. L. No. 111-203, § 745, 124 Stat. 1376, 1735 (2010) (repealed 2015); *see also id.* §§ 746, 753, 124 Stat. at 1738, 1750.

whistleblowers like that in the Dodd-Frank Act, few employees would come forward to complain.

To corporations, general counsel, and outside defense attorneys, the Dodd-Frank Act's whistleblower provision[71] may seem potent now only because there is virtually no enforcement stemming from whistleblowers in the past against which to compare. The SEC called fiscal year 2014 "historic" because it made awards to nine whistleblowers, the highest of which was $30 million, compared to only five previous such awards.[72] The SEC also reported that the number of tips it received from 2011 through 2014 increased from 334 to 3,620.[73] This is a significant increase in reporting, but still the number of whistleblower awards is very low given the number of reports. The influence of the Dodd-Frank Act remains to be seen because the SEC might have too few resources to properly enforce the statute's provisions.

Thus, given the scarcity of complaints, at least until the Dodd-Frank Act, and the relatively few enforcement actions and recoveries, a fear of false whistleblower complaints would seem overstated. Moreover, a corporation and its employees should have no internal conflict among employees if the whistleblower stays at or returns to a firm because the Dodd-Frank Act prohibits retaliation.[74] Protection against retaliation did not exist in the past, an absence that almost certainly deterred virtually every employee in the twenty years prior to the Dodd-Frank Act from stepping forward as a whistleblower.

D. *Whistleblowers Serving as Cooperating Witnesses*

Some of the largest and most prestigious companies are implicated in FCPA violations, but only when discovered.[75] There is no evidence to show that without substantial, new

71. *See id.* § 922, 124 Stat. at 1841.

72. OFFICE OF THE WHISTLEBLOWER, SEC, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, at 1 (2014), http://www.sec.gov/about/offices/owb/annual-report-2014.pdf.

73. *Id.* at 20.

74. Dodd-Frank Act § 922(h)(1), 124 Stat. at 1841.

75. *See* Searcey & Smith, *supra* note 60.

whistleblower activity, violations of the FCPA will subside. Further, in their treatment and relations with employees and insiders who blow the whistle or cooperate with the government, corporations will have to evolve. In addition to rewarding whistleblowers, the Dodd-Frank Act also protects them. This is not to say that a whistleblower will want to retain his job given the atmosphere he might experience back among fellow employees, but he will have that option, which is necessary for the Dodd-Frank Act's whistleblower provision to be successful. That is, the SEC will not pursue the allegations of all whistleblowers, in which case they will have to return to work, sometimes identified as a whistleblower.

Accordingly, in authorizing private civil actions, section 922 of the Dodd-Frank Act creates significant liability for firms and its agents who retaliate against a whistleblower:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower . . . in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information . . . An individual who alleges discharge or other discrimination. . .may bring an action . . . in the appropriate district court of the United States for. . . reinstatement with the same seniority status that the individual would have had, but for the discrimination . . . 2 times the amount of back pay otherwise. . .owed to the individual, with interest; and compensation for litigation costs, expert witness fees, and reasonable attorneys' fees.[76]

The Act does not indicate that a whistleblower's remedy is limited to section 922.

76. Dodd-Frank Act § 922(h)(1)(A)(ii), (B)(i), (C), 124 Stat. at 1841.

Perhaps more significantly, because the whistleblower is reporting to a federal agency, the retaliating firm or agent could face criminal liability for its retaliation, such as for obstruction of justice.[77] The applicable obstruction statute provides that "[w]hoever corruptly, or by threats . . . influences, obstructs, or impedes . . . the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . [s]hall be fined . . . [or] imprisoned not more than 5 years."[78] The statute would protect employees from retaliation as long as the government pursued the complaint. Firms with any sophistication would not punish a whistleblower during a pending case; they would punish later. In this event, courts would have to stretch minimally to apply the obstruction statute in the whistleblower context because most firms probably would not try to punish a whistleblower while the SEC is engaged in "any investigation or judicial or administrative action of the Commission based upon or related to such information."[79] They would wait until the action is complete.

In trying to avoid liability for punishing whistleblowers, firms could argue that obstruction and tampering statutes do not apply because the firms' retaliation occurred after the administrative or judicial action. The obstruction statute, relating to "any pending proceeding,"[80] contemplates only pending actions. In response, courts might graft onto § 1505, a provision similar to that in 18 U.S.C. § 1512.[81] Under § 1512 (e)(1), an official proceeding need not be pending or about to be instituted at the time of the offense. Still, § 1505, the tampering statute, does not contain a similar statutory provision providing criminal liability for retaliation after the action or proceeding has been completed. Even if § 1512 applied only to tampering instituted before and during an action, not after, the government could argue that the

77. *See* 18 U.S.C. § 1505 (2012).

78. *Id.*

79. Dodd-Frank Act § 922(h)(1)(A)(ii), 124 Stat. at 1841.

80. 18 U.S.C. § 1505.

81. 18 U.S.C. § 1512 (2012) (tampering with a witness, victim, or an informant).

retaliation against the whistleblower was undertaken to discourage future whistleblowers and future SEC actions.

Regardless, in most instances involving a whistleblower under the Dodd-Frank Act, a firm and its agents could be liable criminally under 18 U.S.C. § 1513 for retaliating against a witness, victim, or an informant following a criminal action or investigation.[82] Section 1513(e) reads:

> Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including *interference with the lawful employment or livelihood of any person*, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.[83]

Conceivably, a Dodd-Frank Act whistleblower's information might not relate to a *criminal* offense or, if provided to the SEC, be provided to a *law enforcement officer*, and thus § 1513(e), if interpreted strictly, would not apply. In practice, however, the SEC will almost surely coordinate with the Justice Department in any significant enforcement action.

Moreover, it is likely that most whistleblower information would "relat[e] to the . . . possible commission of any Federal offense."[84] In close cases, where there is a question about whether the whistleblower reported to a law enforcement agent about a possible criminal offense, and where the whistleblower returned to work and experienced retaliation, the Justice Department might read § 1513(e) broadly and initiate a prosecution to promote the whistleblower provision in the Dodd-Frank Act. Regardless of criminal statutes, through its rulemaking authority, the SEC has determined that it will have enforcement authority over retaliation claims. "Because the anti-retaliation provisions are codified within the Exchange

82. 18 U.S.C. § 1513 (2012).
83. *Id.* § 1513(e).
84. *Id.*

Act, [the SEC] agree[s] with commenters that [it has] enforcement authority for [sic] . . . employers who retaliate against employees for making reports in accordance with Section 21F."[85] The whistleblower provision of the Dodd-Frank Act[86] will probably result in a larger number of cases being brought under the FCPA.

E. *Extraterritoriality of Bribery Law*

But the *larger* number of FCPA cases is only in relation to the paltry number of cases brought by the SEC prior to the Dodd-Frank Act. From 2004 to 2010, the number ranged from three to twenty-three.[87] Commentators have complained that U.S. regulators take a broad view of the elements of the FCPA and thus make enforcement of it easier.[88] They argue that the FCPA's "domestic concerns" sweep up "[a]ny non-U.S. company with a subsidiary incorporated under U.S. law;" that "issuer" "means that any non-U.S. companies with stock traded on U.S. stock exchanges or with securities subject to filing requirements with the SEC" and is thus very inclusive; that firms can be liable not only for officers, directors, and employees but also for agents; and that, "possibly most troubling, the FCPA applies to any person or entity, regardless of whether it fits into any of the definitions described above, that violates the FCPA within the territory of the United States."[89] Indeed, the global criminal jurisdiction of the United States continues to expand. The Dodd-Frank Act provides the

85. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Dodd-Frank Act Release No. 34-64545, at 18 (May 25, 2011), https://www.sec.gov/rules/final/2011/34-64545.pdf (section 21F being the SEC rule regarding whistleblowers).

86. Dodd-Frank Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841 (2010).

87. Leslie R. Caldwell et al., *The Foreign Corrupt Practices Act (FCPA) & The Dodd-Frank Act*, MORGAN LEWIS (March 8, 2011), http://www.morganlewis.com/pubs/FCPAWebinar_Dodd-FrankAct_08march11.pdf.

88. David W. Simon & Alex Kramer, *The US DOJ & SEC – Give'm an inch and they take a mile*, THEBRIBERYACT.COM (August 11, 2011, 2:32 PM), http://thebriberyact.com/2011/08/11/the-us-doj-sec-givem-an-inch-and-they-take-a-mile.

89. *Id.*

model. For example, § 929P(b) defines extraterritorial jurisdiction of the "antifraud provisions of the federal securities law."[90]

The concept of the extraterritorial jurisdiction of domestic law was advanced further when the United Kingdom's Bribery Act took effect on July 21, 2011.[91] The FCPA will have a counterpart in Europe, thus reducing firms' opportunity to engage in regulatory arbitrage. Probably stronger than the FCPA, the Bribery Act[92] "has both a broader scope and jurisdictional reach"[93] than the FCPA and, according to the UK Foreign Office, "will be relevant to any organization that does business in the U.K. or with U.K. counterparties."[94] The Bribery Act's crimes include:

1. Active bribery: promising or giving a financial or other advantage.[95]
2. Passive bribery: agreeing to receive or accepting a financial or other advantage.[96]
3. Bribery of foreign public officials.[97]
4. The failure of commercial organisations to prevent bribery by an associated person (corporate offence).[98]

The Bribery Act provides for 10 years imprisonment and an unlimited fine.[99] Regardless of whether the FCPA or the Bribery Act has greater extraterritorial jurisdiction, the provisions together sweep broadly. Probably, almost every large firm engages in some business in the UK or the U.S. and would fall within at least one of the anti-bribery provisions in

90. Dodd-Frank Act § 929P(b), 124 Stat. at 1864-65.
91. Klehm III, *supra* note 35, at 943.
92. Bribery Act 2010, ch. 23 (Eng.).
93. Westbrook, *supra* note 32, at 933.
94. Klehm III, *supra* note 35, at 943.
95. Bribery Act 2010, § 1 (promising or giving a financial or other advantage).
96. *Id.* § 2 (agreeing to receive or accept a financial or other advantage).
97. *Id.* § 6.
98. *Id.* §§ 7, 8.
99. *Id.* § 11(1)(b).

the FCPA or the Bribery Act.

With the moral force of the Organisation for Economic Co-operation and Development ("OECD") Anti-Bribery Convention[100] providing "a broad definition of bribery. . . [and] requiring countries to impose dissuasive sanctions and committing them to providing mutual legal assistance,"[101] the days of deducting bribes from income tax obligations have ended.[102] The global reach of national statutes is growing longer and bribery is becoming more unacceptable. The whistleblower provision in the Dodd-Frank Act extends the reach of the FCPA to almost any of a firm's employees who are in positions to discover and report a securities violation. The Dodd-Frank Act has a long arm.

III. The Foreign Corrupt Practices Act, Bribery Act, and Conflict Minerals

Through its whistleblower[103] and conflict minerals[104] provisions, the Dodd-Frank Act contains a pinch of foreign policy[105] that is seemingly outside financial regulation, but is consistent with the FCPA, although such is not mentioned in the Dodd-Frank Act.[106] Section 1504 of the Dodd-Frank Act

100. *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* Org. for Econ. Co-operation & Dev., http://www.oecd.org/corruption/oecdantibriberyconvention.htm (last visited September 12, 2015).

101. Stan C. Weeber, *Anticorruption Litigation, in* ENCYCLOPEDIA OF TRANSNATIONAL CRIME AND JUSTICE 15 (Margaret E. Beare ed., Sage Publications, Inc. 2012).

102. *Id.*

103. Dodd-Frank Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841 (2010).

104. Dodd-Frank Act, *supra* note 9, at § 1504(p) (disclosure of payments by resource extraction issuers).

105. *See generally* John Burchill, *Out of the Heart of Darkness: A New Regime for Controlling Resource Extraction in the Congo*, 10 ASPER REV. INT'L BUS. & TRADE L. 99 (2010) (discussing the history of conflict in the Congo).

106. As one commentator has noted:

> The Congo Conflict Minerals Act (CCMA), introduced on April 23, 2009 by Senator Sam Brownback (R-KS) (and passed as part of the Dodd-Frank bill in July 2010), seeks to intervene in the ongoing civil conflict in the eastern part

requires "disclosure of payments by resource extraction issuers."[107] The outward purpose of § 1504 is to require oil, natural gas, and mining companies to reveal to the SEC payments made to foreign governments for extraction of the particular commodity.[108] Its deeper purpose is to prevent companies, through investing in oil, gas, and minerals, from fostering on-going conflicts in Africa, mainly those originating in the Congo, by paying for commodities controlled by the combatants, and by bribing them.

The conflicts in Africa are supported by rival groups trading in oil, gas, and minerals. The Foreign Office of the United Kingdom reports that, in the Congo, non-state armed groups and rogue brigades within the Congolese national army are reportedly involved in the production and trade of conflict minerals.[109] With serious allegations of mining companies and

> of the Democratic Republic of Congo (DRC) by mandating disclosure to the SEC of chain-of-custody information related to the extraction and processing of columbite-tantalite (coltan), cassiterite and wolframite. These so-called 'conflict minerals' are mined in the eastern DRC, and the proceeds from their eventual sale to electronics manufacturers have been traced back to armed bands operating in the region.

Daniel M. Firger, Note, *Transparency and the Natural Resource Curse: Examining the New Extraterritorial Information Forcing Rules in the Dodd-Frank Wall Street Reform Act of 2010*, 41 GEO. J. INT'L L. 1043, 1069 (2010).

107. Dodd-Frank Act, *supra* note 9, at § 1504(q).

108. *See* Robert Percival, *Global Law and the Environment*, 86 WASH. L. REV. 579, 632-33 (2011).

> The Foreign Corrupt Practices Act . . . has been a major force in spreading respect for the rule of law in developing countries. Enforcement of the FCPA makes it easier for companies to resist solicitations for bribes and spreads respect for legal norms throughout the supply chain of multinational enterprises. The transparency provisions in the Dodd-Frank Act are likely to bolster efforts by NGOs and private companies to green supply chains and to spread respect for legal norms such as the FCPA's prohibition on bribery.

Id.

109. *Conflict Minerals*, FOREIGN AND COMMONWEALTH OFFICE, (Jun. 19, 2013), https://www.gov.uk/guidance/conflict-minerals.

traders directly dealing with armed groups in eastern DRC, "international attention has been brought to bear on how armed groups' involvement in the production and trade of minerals and other natural resources has become one of several important financing sources sustaining conflict, insecurity and human rights violations in parts of eastern DRC [Congo]".[110] The Dodd-Frank Act's conflicts minerals provision requires specific disclosures, such as a statement in an annual report indicating payments made "to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals."[111]

Section 1502(a)[112] provides the rationale for the conflicts minerals provisions: "It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence. . .particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein."[113] A "conflict mineral" is "columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives . . . or . . . any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country."[114] The countries adjoining Congo are Central African Republic, Sudan, Uganda, Rwanda, Burundi, Zambia, and Angola.[115]

The Dodd-Frank Act and the FCPA are being used by Congress to address problems far deeper and more serious than bribery[116] and books and records violations.[117] The laws are the

110. *Implications of Conflict Mining,* http://computingissuescomp1220uwi.weebly.com/implications-caused-by-conflict-minerals.html (last visited Oct. 4, 2015).

111. Dodd-Frank Act, *supra* note 9, at § 1504(q)(2)(a).

112. *Id.* § 1502(a).

113. *Id.*

114. *Id.* § 1502(e)(4)(A)-(B).

115. Advisory, New Corporate Social Responsibility Requirements: Dodd-Frank Act Mandates Disclosure to SEC of Payments to Foreign Governments and Use of Minerals from the Democratic Republic of the Congo, Arnold & Porter L.L.P., (Aug. 2010), http://www.arnoldporter.com/resources/documents/Advisory-New_Corporate_Social_Responsibility_Requirements_081310.pdf.

116. FCPA, Pub. L. No. 95-213, § 103(a), 91 Stat. 1494 (1977).

levers to lift the lid off corporate payments for conflict minerals to warring factions who use the payments to purchase weapons. It is true that under the Dodd-Frank Act issuers have to keep records beyond those required by the FCPA, although the requirement does not seem overly burdensome. In an annual report, companies must include:

> [I]nformation relating to any payment made by the resource extraction issuer, a subsidiary of the resource extraction issuer, or an entity under the control of the resource extraction issuer to a foreign government or the development of oil, natural gas, or minerals, including. . .the type and total amount of such payments made for each project.[118]

Central Africa is a relatively undeveloped region, where Congo has great quantities of natural resources, "including large deposits of gold, copper, zinc, tantalum (extracted from coltan), tin, cobalt, and diamonds," and a staggering estimate of $24 trillion in total mineral wealth.[119] "Notwithstanding the country's vast natural resources and mineral wealth, the DRC is one of the poorest countries in the world, with [a] per capita . . . income of . . . $171 in 2009."[120] In such a relatively unregulated, rich environment, bribery and corruption can be endemic.

A sober question is whether the FCPA's prohibitions on

117. Securities Exchange Act of 1934, ch. 404, 48 Stat. 881, § 13, *invalidated by* Nat'l Ass'n Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014).

118. Dodd-Frank Act, *supra* note 9, at § 1504(q)(2)(A).

119. John Burchill, *supra* note 105, at 99-100 (2010). Also adding that:

> Currently 74% of all cobalt mined in continental Africa (49% of all production worldwide) comes from the DRC; 69% of tin; roughly 50% of all tantalum; 17% of all copper; 11% of zinc; and 2% of all gold also comes from the DRC. Exports in these minerals from the DRC were estimated to be $ 6.59 billion in 2008, up significantly from 2006.

Id.

120. *Id.* at 108-09 (citations omitted).

bribery, as well as the requirements of the FCPA and Dodd-Frank to keep books and records and to disclose payments regarding conflict minerals, can make significant headway into the violence in Africa. Militias fight over such conflict minerals as copper, gold, zinc, tantalum, tin, cobalt, and diamonds, and they work to control "mines and taxation points inside Congo – estimated to be in the hundreds of millions of dollars in 2008 alone."[121] The challenges in the Congo stem from a century of unremitting violence.

> From 1885 until 1908 King Leopold II of Belgium ran the 'Congo Free State' as his own private business interest, turning the local inhabitants into slaves to harvest rubber and ivory for his personal benefit. Pursuant to vast and exclusive concessions issued to business interests controlled solely or jointly by the King. . .the inhabitants were subject to sadistic beatings, dismemberment, and torture in order to extract these resources with little or no compensation. It has been estimated that as many as ten million died under Leopold's rule and that the population of the Congo was reduced from '20-30 million. . . at the beginning of the colonial era to 8.5 million [by] 1911' (citations omitted).[122]

Today, life is not much better. It is estimated that five million people have died from conflict and forty-five thousand more die each month in the Congo.[123] The Dodd-Frank Act and the FCPA may have some, albeit small, salutary effect on limiting the violence that is, in part, impelled by payments from outside the country.

IV. Conclusion: Finding and Proving Bribery

National regulatory regimes in the United States and

121. *Id.* at 108.
122. *Id.* at 104-05.
123. *Id.* at 108.

United Kingdom have begun to exert additional, significant extraterritorial jurisdiction, with an enhanced and sharper focus on specific financial functions of corporations, firms, and individuals. While not specifically broadening the FCPA, the Dodd-Frank Act's whistleblower-reward and conflict-minerals-reporting-requirement provisions will increase the likelihood of bribery prosecutions and books-and-records enforcements actions under the criminal and civil provisions of the FCPA.[124] The SEC has not yet implemented the conflicts minerals provisions of the Dodd-Frank Act[125] – and, like the accounting and records provision in the FCPA,[126] the conflict minerals provision provides no criminal sanction for companies that use the minerals .[127]

But the conflict minerals provision's disclosure-of-payments requirement permits greater public scrutiny, allowing "nam[ing] and sham[ing]" of companies that use conflict minerals.[128] Significantly, the conflict-minerals disclosure mandates a trail of documents whose creation depends on corporate conversations and investigations.[129] These can provide compelling evidence of bribery in FCPA prosecutions. The Dodd-Frank Act's whistleblower provision greatly increases the likelihood that some person in what is now a much longer train of documents and conversations will come forward and provide information. More people will create more information and additional people will have access to it. In sum, a disclosure requirement and rewards for whistleblowers make bribery convictions more likely through the addition of evidence and through the liability and subsequent cooperation that may occur when witnesses and insiders lie about[130] or cover up[131] matters related to an

124. *See* FCPA, Pub. L. No. 95-213, § 103(a), 91 Stat. 1494 (1977).

125. Dodd-Frank Act, *supra* note 9, at §§ 1502(p), 1504(p).

126. *See* FCPA, *supra* note 29.

127. Dodd-Frank Act, *supra* note 9, at §1504(p).

128. Marcia Narine, *Dodd-Frank and Conflict Minerals- Can a Governance Disclosure Eliminate Rape, Corruption and Child Slavery in the Democratic Republic of Congo- Part 1*, CONGLOMERATE, (Dec. 6, 2011), http://www.theconglomerate.org/2011/12/dodd-frank-and-conflict-minerals-can-a-governance-disclosure-eliminate-rape-corruption-and-child-sla.html.

129. *See* Dodd-Frank Act, *supra* note 9, at §§ 1502(p), 1504(p).

130. *See* 18 U.S.C. §§ 1001, 1621 (2012) (regarding false statements and

investigation.

Where the FCPA's accounting and records provision requires more general information for investors, such as "books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer,"[132] the conflict-minerals provision is aimed at more specific disclosures. An issuer must disclose payments "to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals, including . . . the type and total amount of such payments."[133] Perhaps the greatest utility of the Dodd-Frank Act's whistleblower[134] and conflict-minerals[135] provisions is that they buttress the criminal bribery provisions in the FCPA[136] and the United Kingdom's Bribery Act.[137] The bribery provisions in the FCPA[138] and the Bribery Act[139] are similar in that they prohibit improper quid pro quo agreements. However, the Bribery Act's provisions are considerably broader and more detailed than the prohibited agreements in the FCPA, which generally prohibits bribing foreign officials, but does not prohibit "bribing" foreign private citizens.[140]

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perjury, respectfully).

131. *See* 18 U.S.C. § 1510 (2012) (regarding obstruction of criminal investigations).

132. FCPA, *supra* note 29.

133. Dodd-Frank Act, *supra* note 9, at §1504(q)(2)(A).

134. *See* Dodd-Frank Act § 922(a), 124 Stat. at 1841.

135. Dodd-Frank Act, *supra* note 9, at §§ 1502(p), 1504(p).

136. Which states:

> It shall be unlawful for any issuer . . . to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official for purposes of . . . influencing any act or decision of such foreign official.

FCPA § 103(a), 91 Stat. 1494.

137. *See* Bribery Act 2010, ch. 23, § 2(1)-(8) (Eng.).

138. *See* FCPA §103(a), 91 Stat. 1494.

139. Bribery Act 2010, §§ 2(2), 4(1).

140. *See* FCPA §103(a), 91 Stat. 1494.

The Bribery Act prohibits improper quid pro quo agreements[141] relating to "foreign public officials"[142] and, broadly, bribery where the "function or activity relates" to "(a) any function of a public nature, (b) any activity connected with a business, (c) any activity performed in the course of a person's employment, [and] (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate)."[143] Under the Bribery Act, it is questionable whether even the payment of "grease" – permitted under the FCPA as a payment to a government official to expedite a routine government action[144] – would be permissible. But from the United Kingdom's perspective on the Dodd-Frank Act, "[g]iven the current lack of Government capacity to enforce/monitor systems in countries like the DRC [Congo], it is likely that effective maintenance and oversight of these schemes will, in practice, become the responsibility of companies that have an interest in maintaining them."[145] Thus, a broad bribery statute is more justified given the difficulty of regulating corporations in foreign nations.

The United Kingdom's rationale for the Bribery Act, a lack of resources and the difficulty of monitoring corporate behavior in foreign nations, is perhaps the primary justification for the Dodd-Frank Act's reward system for whistleblowers and conflict-minerals disclosure requirement for firms. Firms will have greater costs because they will have to improve their compliance culture and defend against even erroneous whistleblower complaints. It will also be more costly to investigate and disclose information about payments regarding conflict minerals. But, without compulsion, the FCPA prosecutions and enforcement actions have been few. In the

141. Bribery Act 2010, § 6(1)-(8).

142. *Id.*

143. *Id.* § 3(1)-(7).

144. FCPA § 103(a), 91 Stat. 1494 ("[T]his section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.").

145. Adrian Ladbury, *Supply chain risk in spotlight as new SEC rules target central Africa-analysis*, COMMERCIAL RISK EUR. (Nov. 29, 2011), http://www.commercialriskeurope.com/cre/1077/63/Supply-chain-risk-in-spotlight-as-new-SEC-rules-target-central-Africa-analysis/.

end, the heavy government thumbs in the United States and United Kingdom are represented by the bribery provisions in the Bribery Act and FCPA. Corporations and their employees want to keep a safe distance from these statutes. The safest response is for firms to work harder to eliminate bribery.