December 20, 2010

Ms. Elizabeth M. Murphy, Secretary
United States Securities and Exchange Commission
Division of Corporation Finance
100 F Street, N.E.
Washington, D.C. 20549-1090

RE: File No. S7-33-10 Release No. 34-63237 Proposed Rules for Implementing the Whistleblower Provisions of Section 21 F of the Securities Exchange Act of 1934

Dear Ms. Murphy:

I appreciate the opportunity to comment on the SEC's proposed rules. My comments are limited to the rules pertaining to the anti-retaliation provisions of Section 21F(h)(1). Unfortunately, the Commission has not revealed much regarding its interpretation of the new private right of action and very few comments have been submitted discussing its scope. Considering the tenuous history of the whistleblower protections of Section 806 of the Sarbanes-Oxley Act, I believe that the SEC needs to take a firm stance on whether the protections of Section 21F(h)(1) extend to foreign whistleblowers overseas.

As explained in my position paper, the First Circuit Court of Appeals and Department of Labor have repeatedly refused to extend the protections of Section 806 to foreign whistleblowers overseas, arguing that Congress never intended the provision to have extraterritorial reach. In order to avoid a similar battle over the protections of Section 21F(h)(1), my commentary explores the issues regarding the extraterritorial application of its protections.

Importantly, the SEC can resolve some of the inherent ambiguousness of the anti-retaliation provisions by addressing whether they cover overseas employees who aid the SEC in enforcement. Although my commentary urges the SEC to affirm the extension of Section 21F(h)(1) to cover foreign employees overseas, I believe that regardless of the Commission's position, it is critical to take a stance on this issue because of the disarray caused by similar ambiguity on the extraterritorial application of SOX Section 806.

I hope to avoid the same Congressional and agency equivocations on this issue, which led to the needless waste of time and resources by litigants (both employees and employers), courts, and U.S. agencies who battled over the scope of SOX's whistleblower protections.

Sincerely,

James S. Lessard-Templin
Customs and Int'l Trade Attorney

Confronting the Sky Together: Affirming the Application of the Whistleblower Protections of the Dodd-Frank Act to Foreign Employees Abroad

I. Introduction:

This summer Congress repealed Section 21(A)(e) of the Securities Exchange Act of 1934 by passing the Dodd-Frank Wall Street Reform and Consumer Protection Act (hereinafter ''Dodd-Frank Act'').[1] The whistleblower protections of Section 922 of the Dodd-Frank Act, codified as 21F of the Exchange Act, are somewhat controversial because of the spectacular failure of similar programs in existence, notably the protections found in Section 806 of the Sarbanes-Oxley Act. Specifically, it is unclear whether the whistleblower protections contained in paragraph (h)(1) of Section 21F of the Exchange Act extend to overseas employees. Despite the broad protections offered whistleblowers by the new legislation, neither the Act nor the legislative history directly address whether these rights will extend to foreign employees of foreign affiliates and subsidiaries. However, the courts and Department of Labor have expressed reluctance in the past to extend the current whistleblower protections of § 806 of the Sarbanes-Oxley Act extraterritorially. The Department of Labor's dismissal of Thomas Beck's whistleblower claim in 2006 personifies the vulnerability faced by foreign employees who have decided to become whistleblowers.

Thomas Beck was a former investment banker for a subsidiary of Citigroup, Inc., based in Frankfurt Germany.[2] On March 9, 2005, Citigroup fired Beck for reporting what he reasonably believed to be fraudulent conduct to the company's' executives. Although Beck had reported his concerns as early as February 1, 2005, Citigroup terminated him one day before he was scheduled to inform Citigroup's head of European investments of the alleged malfeasance. Beck filed a claim with the Department of Labor against Citigroup under the whistleblower protections of § 806 of the

[1] Public Law 111–203, 124 Stat. 1376 (July 21, 2010).
[2] *Beck v. Citigroup, Inc.,* Case No. 2006-SOX-00003 (U.S. Dept. of Labor Aug. 1, 2006).

Sarbanes-Oxley Act, alleging unlawful retaliation. However, the Department of Labor dismissed Beck's claim for lack of jurisdiction, despite the fact that he regularly traveled to the U.S. for business, communicated daily with Citigroup's New York headquarters, and generated nearly 60% of his business outside of Germany. Moreover, his compensation included stock options in Citigroup, and Beck's termination was made, or ratified by officials of Citigroup in New York. Daniel Hurson, former Assistant Chief Litigation Counsel of the SEC, warns that the sad history of whistleblowing laws may be repeated with § 21F(h)(1): "good intentions followed by regulations and court decisions which substantially restrict the law's effectiveness."[3]

This paper will examine Section 922 of the Dodd-Frank Act in detail and discuss its jurisdictional limits; specifically, whether its whistleblower protections extend abroad. After examining the Act's statutory language, this paper will address whether Congress intended its whistleblower protections to apply extraterritorially and to what extent there application abroad would conflict with existing foreign laws. Next, it will examine the role of foreign employees in achieving the policy goals of the Foreign Corrupt Practices Act (hereinafter, "FCPA"), while pointing out the significant barriers that prevent overseas employees from readily assisting the U.S. government in FCPA enforcement. This paper concludes by advocating that the extraterritorial application of the whistleblower protections materially aids FCPA enforcement and helps fully realize the policy objectives of the Act.

II. Background: Examining the Scope of the Dodd-Frank Act's Whistleblower Protections

On July 21, 2010, President Obama signed into law the Dodd-Frank Act, which, among other things, provides new financial incentives and protections for whistleblowers who report violations of the securities laws to the Securities Exchange Commission, including violations of the FCPA. While the whistleblower reward program itself constitutes a significant change to the securities regulatory

[3] Letter from Daniel Hurson, to Elizabeth Murphy, Sec'y, Sec. & Exch. Comm'n (Nov. 26, 2010) *at* http://www.sec.gov/comments/s7-33-10/s73310-23.pdf.

regime, this paper focuses specifically on the protections afforded whistleblowers under Section 21F(h) of the Act. The Dodd-Frank Act provides robust legal protections for whistleblowers who report violations of the securities laws, including: identity protection;[4] extension of the Sarbanes-Oxley Act cause of action for retaliation to employees of consolidated subsidiaries and affiliates;[5] and a new private cause of action for persons alleging retaliation for protected whistleblower activity.[6] According to Section 21F(h)(1)(C), successful plaintiffs are entitled to reinstatement with equal seniority, two times the amount of back pay owed plus interest, and compensation for litigation costs, expert witnesses, and reasonable attorneys' fees. Clearly, Section 21F(h)(1) of the Exchange Act significantly enhances an employee's ability to fight retaliation for undertaking whistleblower activities.

The prohibitions of Section 21F(h)(1) extend to a broad range of discriminatory actions by an employer, including discharge, demotion, suspension, threats, harassment, and direct or indirect discrimination.[7] Prohibitions on unlawful retaliatory conduct are limited to employer actions against a whistleblower concerning the "terms and conditions of [the employee's] employment."[8] The conduct must also be in retaliation for a "lawful act done by the whistleblower," in order to be prohibited.[9] Taken together, Section 21F(h)(1)(A) protects whistleblowers from a broad range of discriminatory actions taken by the employer, so long as they pertain to the whistleblower's employment and are in response to the employee's engagement in lawful activities. However, this general prohibition has two, seemingly innocuous, conditions, which further complicate the rather straightforward language of the preceding section.

---

[4] Sec. Exch. Act of 1934, § 21F(h)(2)(A).
[5] Dodd-Frank Act, § 929A, amending § 806 of Sarbanes-Oxley Act.
[6] Sec. Exch. Act of 1934, § 21F(h)(1).
[7] *Id.* at § 21F(h)(1)(A).
[8] *Id.*
[9] *Id.*

Section 21F(h)(1)(A)(i-ii) establish the parameters of a retaliatory action by limiting claims to discrimination directed against whistleblowers due to the provision of "information to the Commission in accordance with subsection (b); or in assisting in any investigation or judicial or administrative action…based upon or related to such information."[10] Subsection (b) of the Act establishes the qualifying rules for receiving an award under the whistleblower reward program; and in order to be considered eligible for an award, the whistleblower must "voluntarily" provide "original information" leading to the "successful enforcement" of the judicial or administrative action, among other requirements (such as a monetary threshold).[11] If the statute is read as extending protection only to whistleblowers who are eligible for an award, the protections of Section 21F(h)(1) will be extremely limited. Nonetheless, the SEC have issued proposed rules, pursuant to its rulemaking authority, which reject such a narrow reading. The rules explain that the protections apply regardless if the whistleblower is eligible for an award.

While the prohibition on whistleblower retaliation does not explicitly mention overseas employees, the statute, when read in its entirety, evinces very broad language implicating its application to all whistleblowers, both foreign and domestic. Section 21F(h)(1)(A) specifically states that *any* "individual who alleges discharge or other discrimination in violation of subparagraph (A) may bring an action under this subsection in the appropriate district court of the United States for the relief provided in subparagraph (C)." Still, some experts continue to question whether the new private cause of action applies to foreign employees of overseas subsidiaries and affiliates.[12]

---

[10] *Id.* at § 21F(h)(1)(A)(i-ii).
[11] *Id.* at § 21F(b)(1)
12 *See* Steptoe Int'l Client Advisory, *Whistleblower Provisions in Dodd-Frank Legislation Provide Further Impetus to Increased FCPA Investigations and Enforcement* (Jul. 26, 2010), at http://www.steptoe.com/public ations-7066.html; *also*, McKenna, Long, & Aldridge Advisory, *Fin. Reform Bill Includes FCPA Whistleblower Provision* (Jul. 26, 2010), at http://www.mckenna long.com/news-advisories-2357.html.

III. Extending § 21F(h)(1) Abroad is Consistent with the Intent of Congress, Will Not Conflict with Foreign Laws, & Encourages Persons Vital to FCPA Enforcement

Decisions of the First Circuit Court of Appeals and Department of Labor regarding the anti-retaliation provisions of SOX § 806 have led to the confusion concerning the application of Section 21F(h)(1) to overseas employees. In 2006, the First Circuit refused to extend SOX § 806 to overseas employees absent clear congressional intent, citing *E.E.O.C. v. Arabian Am. Oil Co.*, 449 U.S. 244 (1991).[13] The *Carnero* court emphasized that § 806 was silent on extraterritorial application. Similarly, two Department of Labor decisions dismissed the anti-retaliation claims of foreign employees, relying on reasons similar to those articulated in *Carnero*.[14] Signifying a departure from these decisions, recent developments have resulted in a congressional amendment extending the anti-retaliation protections of SOX § 806 to all "employees of consolidated affiliates and subsidiaries,"[15] and a district court decision ruling that SOX § 806 applies to a foreign employee in a foreign country if the alleged misconduct took place within the United States' territory.[16] These developments and the broad language contained in the anti-retaliation provisions of § 21F(h)(1) indicate that Congress intends for whistleblower protections to reach overseas employees.

1. SEC's Interpretation of § 21F(h)(1) Does Not Preclude Application Abroad

The scope of the whistleblower protections contained in Section 21F(h)(1) are broad. In the SEC's Proposed Rules for Implementing the Whistleblower Provisions of § 21F of the Sec. Exch. Act of 1934, the commission emphasized that "[t]he Whistleblower Program aims to motivate those with

---

[13] *Carnero v. Boston Scientific Corp*., 433 F.3d 1 (1st Cir. 2006).
[14] *Ede v. Swatch Group,* DOL ALJ No. 2004-SOX-000068, 00059 (Jan. 14, 2005); *Concone v. Capital One Fin. Corp.,* DOL ALJ No. 2005-SOX-0006 (Dec. 3, 2004).
[15] Dodd-Frank Act, § 929A, amending § 806 of Sarbanes-Oxley Act.
[16] *See O'Mahony v. Accenture, Ltd*., 537 F. Supp. 2d 506 (S.D.N.Y. 2008) (finding that the alleged fraudulent conduct took place within the United States by executives located in the United States, while the plaintiff was sill employed by the United States subsidiary (even though she was working abroad at the time)).

inside knowledge to come forward and assist the Government; affording broad anti-retaliation protections to whistleblowers furthers this legislative purpose."[17] The SEC's second proposed rule, "21F-2 – Definition of a Whistleblower," interprets the term "whistleblower" from Section 21F(a)(6) of the Exchange Act as an individual who "provides information to the Commission relating to a potential violation of the securities laws."[18] The emphasis on "potential violation" is critical when considering the scope of the anti-retaliation protections of the Dodd-Frank Act. By defining whistleblowers in such a way, the Commission makes clear that the anti-retaliation protections of Section 21F(h)(1) "do not depend on an ultimate adjudication, finding or conclusion that conduct identified by the whistleblower constituted a violation of the securities laws."[19] This interpretation mirrors the policy goal expressed in the Senate Report accompanying the legislation.

The SEC took a step further to ensure that whistleblowers are adequately protected by further clarifying that Congress intended whistleblower protections to extend beyond those who qualify for awards.[20] While at first glance the statutory language of 21F(h)(1)(i-ii) appears to restrict the application of anti-retaliation provisions to award-eligible whistleblowers, according to the Proposed Rules, whistleblower protections apply "irrespective of whether a whistleblower satisfies all the procedures and conditions to qualify for an award under the Commission's whistleblower program."[21] The SEC "believes [that] the statute extends the protections against employment retaliation in Section 21F(h)(1) to any individual who provides information to the Commission about potential violations of the securities laws regardless of whether the whistleblower fails to satisfy all the requirements for

---

[17] *See* U.S. Sec. & Exch. Comm., Rel. No. 34-63237, 17 CFR Parts 240 and 249, *Proposed Rules for Implementing the Whistleblower Provisions of § 21F of the Sec. Exch. Act of 1934* (2010) [hereinafter "Proposed Rules"], *see also,* S. Rep. No. 111-176 at 110 (2010).
[18] *Id.*
[19] *Id.* at 7.
[20] *Id.*
[21] *Id.*

award consideration set forth in the Commission's rules."[22] Paragraph (d) of Proposed Rule 21F-8 further demonstrates the broad scope of the employment retaliation protections.[23] The SEC reiterates in 21F-8 that an individual is not deprived of the anti-retaliation protections of Section 21F(h)(1) if that person is ineligible to receive an award for any reason.[24] This last rule is extremely important because despite the various reasons that a person can be determined ineligible for an award (and there are many!),[25] the Act will still protect whistleblowers.

In addition to extending anti-retaliation protections to whistleblowers that may be ineligible for awards, the Act defines "whistleblower" quite broadly, as any individual who provides information relating to a violation of the securities laws.[26] The Act then makes certain types of whistleblowers ineligible for the award program.[27] It is critical to note that none of these clearly defined groups excludes foreign nationals, nor does the Act in any way contain language limiting the application of protections to United States citizens. While "[a] whistleblower must be a natural person," there are many other significant limiting criteria, which importantly, do not include tests of citizenship.[28]

In fact, the Department of Labor was recently accused of violating the "spirit and goals" of the whistleblower protection provisions of SOX § 806 when it refused to apply protections to foreign

---

[22] *Id.*
[23] Proposed Rule 21F-8 clarifies the eligibility criterion for a whistleblower award by cataloguing the different types of people who are ineligible for an award. *Id.* at 56.
[24] *Id.* at 59.
[25] *See* Letter from Daniel Hurson, supra note 4 (arguing that the complex and convoluted Proposed Rules are clearly contrary to what Congress intended and will serve only to discourage and thwart many potential whistleblowers).
[26] Section 21F(a)(6) of the Exch. Act.
[27] Persons ineligible for awards include members of regulatory agencies, any person willfully making false statements in submissions to the SEC, and any person who is convicted of a criminal violation related to the SEC action for which the person otherwise could receive an award, among others. *Id.* at 58.
[28] *Id.*

employees.[29] In a strongly worded letter from the authors of the SOX whistleblower provisions, Senators Leahy and Grassley expressed frustration and dismay over the "executive branch's overly restrictive interpretation" of SOX § 806.[30] The Senators were no doubt concerned with the Department of Labor's dismissal of more than 1000 of the approximately 1600 cases filed under this law.[31] Many of these cases dealt with foreign whistleblowers alleging retaliation under the law whose claims were dismissed on the theory that they were employees of non-public subsidiaries of publicly traded parent companies, leaving them uncovered by the Act.[32] To be clear, SOX never contained a "subsidiary-exclusion rule," and for the Department of Labor to invoke one contradicts the clear intent of Congress.[33] The senators also pointed out that the whistleblower provision was a "direct response to fraud perpetrated by Enron Corp., through the misuse and abuse of its shell corporations and subsidiaries."[34] Congress officially ended the "subsidiary-exclusion rule" with the passage of Section 929A of the Dodd-Frank Act.[35] Section 929A amends SOX § 806 to protect employees of "any subsidiary or affiliate whose financial information is included in the consolidated financial statements" of a publicly traded company.[36]

2. False Conflict of Laws

---

[29] Letter from Grassley and Leahy, U.S. Senate, to Elaine Chao, Sec'y., Dep't of Labor (Oct. 8, 2008) at http://commerce.wsj.com/auth/login?mg=inert-secaucussj&url=http%3A%2F%2 Fonline.wsj.com%2Fdocuments%2FGrassley-Chao-SOX-0909.pdf.
[30] *Id.*
[31] Press Rel., *Leahy, Grassley Press for update on Labor Dep't Handling of Whistleblower Cases* (Oct. 7, 2010) at http://grassley.senate.gov/news/Article.cfm?RenderForPrint=1&customel_dataPageID_1502=2.
[32] The "subsidiary-exclusion rule" has been used to dismiss complaints against Siemens AG, WPP Group PLC, ING of the Netherlands, Torchmark, UBS AG and Raymond James Financial.
[33] Letter from Grassley and Leahy, U.S. Senate, to Hilda Solis, Sec'y. of Labor, U.S. Dep't of Labor (Oct. 6, 2010) at http://grassley.senate.gov/news/Article.cfm?RenderForPrint=1&custom.
[34] Jennifer Levitz, *Senators Protest Whistleblower Policy*, WALL STREET JOURNAL (Sep.10, 2008).
[35] *See* Comm. Rep., 111th Congress (2009-2010), Senate Rep.111-176.
[36] Sec. Exch. Act of 1934, § 78o(d).

Upon close examination, the anti-retaliation protections of Section 21F(h)(1) reflect the standard positions of many foreign governments on whistleblower protection and, often, they reinforce the preexisting legal norms in such countries. The employment and labor laws in many European states are much more protective of employees than the laws protecting U.S. employees. The heavy influence of employment-at-will on U.S. labor law is one reason for this apparent discrepancy. Unlike the U.S. approach, most states in the EU do not acknowledge the employment-at-will regime and regard employment as a natural right or partially owned by the employee. Additionally, many states have passed legislation outlawing transnational corruption and actively enforce anti-bribery provisions. Furthermore, several international conventions and instruments have begun to harmonize the fight against global corruption and states are increasingly more cooperative in transnational enforcement efforts. These developments directly contradict the claims made by the Department of Labor and First Circuit that an extension of whistleblower protections abroad presumably conflicts with foreign laws.

a. Harmonization Established by the International Movement to Combat Corruption and Protect Whistleblowers

Since the passage of the FCPA, a number of international conventions and other instruments prohibiting transnational corruption have entered into force. The first multilateral effort to establish guidelines for combating international corruption was the Inter-American Convention Against Corruption, which was adopted by the Organization of the American States.[37] Since then, the world has seen a burgeoning of anti-bribery conventions and instruments, most notably the OECD Convention, the Council of Europe Civil and Criminal Law Conventions on Corruption, and the United Nations Convention Against Corruption. These conventions have led to the harmonization and adoption of widely accepted international anti-bribery standards across a number of states, and

[37] Inter-American Convention Against Corruption, opened for signature Mar. 29, 1996, *35 I.L.M. 724.* To date, there are thirty-four signatories, *available at* http://www.oas.org/juridico/english/Sigs/b-58.html.

importantly, have emphasized the protection of whistleblowers as a critical component of the international anti-bribery regime.[38] The whistleblower protections contained in these conventions, having been adopted by a vast numbers of states, reveal how Section 21F(h)(1) is wholly consistent with the approaches adopted by many foreign nations.

The UNCAC is the most comprehensive convention to date, with 140 signatories.[39] Article 33, entitled "Protection of Reporting Persons," affords broad protection from discrimination for whistleblowers, which is consistent with the goal of Section 21(h)(1) of the Exchange Act. Specifically, Article 33 mandates signatories to consider adopting domestic legal measures that "provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this convention."[40] Additionally, the UNCAC provides a private right of action for persons damaged by acts of corruption. Article 35 states that each signatory shall take such measures as may be necessary, "in accordance with the principles of its domestic law, to ensure that entities or persons who have suffered damages as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation." The UNCAC also has provisions that protect witnesses, experts, and victims from retaliation or intimidation if they

---

[38] While not specifically addressing anti-bribery, the Conv. of the Int'l Labor Org. on Termination of Employment broadly protects employees who assist authorities in enforcement of domestic laws or regulations. *See* ILO Conv. on Termination of Employment, *at* http://www.ilo.org/ilolex/cgi-lex/convde.p l?C158. Article 5(c) prohibits the termination of employees who file complaints or otherwise participate in "proceedings against an employer involving alleged violation(s) of laws or regulations." *Id.* Nor may an employee be terminated for choosing to report alleged violations of the law or regulations to competent administrative authorities. *Id.*

[39] U.N. Conv. Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/422 (Dec. 11, 2003).

[40] *Id.*, Article 33.

decide to testify in an anti-bribery proceeding, and promotes cooperation in fighting transnational corruption through cross-border technical assistance.[41]

The Civil Law Convention on Corruption,[42] like the UNCAC, contains a provision specifically aimed at protecting whistleblowers from retaliatory discrimination. Article 9 of the Convention mandates that each member state provide appropriate domestic legal protection for employees who report their suspicion of corruption to responsible persons or authorities. However, Article 9 qualifies its protections by prohibiting any "unjustified sanction" in retaliation for such reports, so long as the employee has "reasonable grounds to suspect corruption" and that they report their suspicion "in good faith." The Criminal Law Convention on Corruption also has a whistleblower protection provision, but does not qualify them in the same way as the Civil Law Convention. Article 22(a) mandates each member state to adopt "such measures as may be necessary to provide effective and appropriate protection for: those who report the criminal offences established in accordance with Articles 2 to 14 or otherwise co-operate with the investigating or prosecuting authorities."[43] Likewise, "witnesses who give testimony concerning these offences," are also protected.[44]

Although the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions does not reference whistleblower protections in its main text,[45] the OECD Council has adopted a number of significant recommendations for combating bribery and protecting whistleblowers. The recommendations establish broad mandates for reporting public bribery, including whistleblower protection. Similar to the EU Criminal Law Convention, the Council recommends that member states adopt appropriate measures to "protect from discriminatory or

---

[41] *Id.,* Preamble, Article 1(b), Article 33(1), and (4).
[42] Civil Law Conv. on Corruption, Europ. T.S. No. 174. The Convention currently has 42 signatories.
[43] Criminal Law Conv. on Corruption, Europ. T.S. No. 173. The Convention has 49 signatories.
[44] *Id.,* Article 22(b) – Protection of collaborators of justice and witnesses.
[45] Conv. on Combating Bribery of Foreign Pub. Officials in Int'l Bus. Transactions, opened for signature on Dec. 18, 1997, and has thirty-eight signatories to date. *37 I.L.M. 4.*

disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials."[46]

b. Presumption Against Extraterritoriality is Inapplicable to § 21F(h)(1)

Since the passage of the Dodd-Frank Act, little has been written on the applicability of its whistleblower protections to overseas employees, nor is it addressed in the SEC's Proposed Rules. This is surprising considering the significant body of scholarship dedicated to examining the extraterritorial reach of whistleblower protections of SOX § 806. However, analysis of recent federal court decisions determining the scope of SOX § 806 provides significant insight into the inevitable arguments that will arise regarding extraterritorial application of the Dodd-Frank whistleblower protections.[47] The first of these cases, *Carnero v. Boston Scientific Corp.*, concerns the dismissal of an Argentine national working for the Latin American subsidiary of Boston Scientific for reporting to headquarters that his branch had inflated its sales figures and created false invoices. The district court dismissed Carnero's complaint for retaliation, stating that he was not entitled to sue Boston Scientific because Section 806 of SOX does not have exterritorial effect. The First Circuit affirmed the lower court's judgment and the Supreme Court denied Carnero's Writ for Certiorari. Citing a well-established principle of statutory interpretation, which was first articulated in *Foley Bros., Inc. v. Filardo*, *336 U.S. 281* (1949), the *Carnero* court ruled that neither the text of Section 806 of SOX explicitly extended its application abroad, nor was there any indication of Congress's intent to extend it abroad. However, a number of scholars disagree with the court's decision.[48]

---

[46] Recommendation of the Council for Further Combating Bribery of Foreign Pub.Officials in Int'l Bus. Transactions, Section IX. *See* http://www.oecd.org/dataoecd/11/40/44176910.pdf.
[47] *See Carnero v. Boston Scientific Corp.*, 433 F.3d 1, 18, n.17 (1st Cir. 2006), *cert. denied*, 548 U.S. 906 (2008); and *O'Mahony v. Accenture Ltd.*, 537 F. Supp. 2d 506 (S.D.N.Y 2008).
[48] *See* Jisoo Kim, *Confessions of a Whistleblower: Need to Reform the Whistleblower Provisions of SOX*, 43 J. Marshall L. Rev. 241 (2009) (criticizing the First Circuit for neglecting to consider both "conduct" test and "effects" test in assessing extraterritoriality); Matt A. Vega, *The Sarbanes-Oxley Act*

Whether the provisions of Section 21F(h)(1) are viewed as regulating labor and employment, or alternatively, securities and transnational corruption, the underlying conflict of laws relied on by the court in *Carnero* and those that reject extraterritorial application of Section 21F(h)(1), are demonstrably false conflicts. First, few if any of the United States' major trading partners permit the type of discriminatory retaliation proscribed in Section 21F(h)(1). As examined above, many states are signatories to one of the many international conventions or instruments banning employers from retaliating against whistleblowers. These conventions demonstrate the existence of a widely-shared international norm denouncing whistleblower retaliation. Second, many of the major trading partners of the United States view discrimination against whistleblowers as reprehensible and have adopted (or are adopting) measures appropriate to eradicate such corporate practices. As the only major employment-at-will jurisdiction in the world, the United States does not maintain the type of domestic legal protections afforded by most EU states. A number of EU states provide a private right of action for unfairly terminated employees or significant pre-termination notice periods.[49] While these broad employee protection laws may adequately protect foreign nationals from termination by companies located in that country, they may afford little protection for those who are terminated by a U.S. parent company while working for a foreign subsidiary. When termination is in retaliation for whistleblowing, the foreign national may have no choice but to rely on the whistleblower provisions of § 21F(h)(1), despite broad domestic legal protections. Asserting a cause of action under § 21F(h)(1) in

---

and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees, 46 Harv. J. on Legis. 425, 434 (2009) (finding that the court's contextual analysis of legislative intent appears suspect); and Daniel A. Cohn, *Carnero v. Boston Scientific Corporation: An Analysis*, 6 J. Int'l Bus. & L. 203 (2007) (arguing that the conflict of laws relied on by the court to refuse extension was a fallacy).

[49] In Luxembourg, notice of dismissal may not be given until after a pre-dismissal interview for enterprises employing 150 or more people. *See* the European Employment and Industrial Relations Glossaries (EMIRE), which explain the national industrial relations systems of the EU member states *at* http://www.eurofound.europa.eu/emire/LUXEMBOURG/Index-R-FR-LX.htm.

these circumstances is appropriate because the retaliatory discharge has a substantial effect within the territory of the United States. As one scholar has noted, "[t]he purpose of applying whistleblower protection abroad has almost nothing to do with America imposing its labor and employment values on other countries, and everything to do with America protecting its legitimate interest in the integrity of its own domestic securities markets."[50]

3. Tips From Overseas Employees Remain Vital to FCPA Enforcement

By incentivizing those with inside knowledge to assist the SEC, the Dodd-Frank whistleblower program demonstrates that Congress understands the critical role that employees play in detecting and preventing corporate fraud. In fact, empirical studies have confirmed that whistleblowers are in the best position to discover fraud by corporations. This is significant considering the rapid growth and expansion of multi-national corporations abroad and their correspondingly creative efforts to insulate themselves from far-reaching laws like the FCPA. Furthermore, reliance on foreign whistleblowers is now more important than ever considering the limited resources of the Department of Justice and SEC, as well as the likelihood of transnational bribery of foreign nationals to occur abroad.

Testifying before the Senate Banking Committee, Harry Markopolos defended the creation of strong whistleblower programs by citing statistics on the efficiency of whistleblower programs:

> [W]histleblower tips detected 51% of uncovered fraud schemes in public companies. External auditors, and the SEC exam teams [who] would certainly be considered external auditors, detected a mere 4.1% of uncovered fraud schemes. Whistleblower tips were 13 times more effective than external audits, hence my recommendation to the SEC to encourage the submission of whistleblower tips.[51]

---

[50] Daniel A. Cohn, *Carnero v. Boston Scientific Corporation: An Analysis*, 6 J. Int'l Bus. & L. 203 (2007).

[51] Testimony before the U.S. Senate Comm. on Banking, Housing, and Urban Affairs, 111th Congress, 1st session, p.33 (2009) (testimony of Mr. Harry Markopolos).

SEC Inspector General, David Kotz, has also advocated for the creation of a strong whistleblower program, recognizing that whistleblowers are inadequately protected from retaliation.[52]

A 2008 report published by the Association of Certified Fraud Examiners confirms that whistleblowers are the single largest source for fraud detection. According to the report, tips were the source of detection in over 54% of the public company fraud cases, and exceeded all other forms of detection combined.[53] The second highest source of detection of fraud in public companies was internal controls at 27%.[54] Moreover, whistleblowers are an extremely cheap source of inside information. Not surprisingly, whistleblowers are the best and cheapest source of fraud detection and that with adequate assurances of protection from retaliation, whistleblowers could significantly assist FCPA enforcement.

Whistleblower protections like Section 21F(h)(1) are necessary today more than ever because the SEC and DOJ have limited resources to regulate the burgeoning number of transnational corporations and their subsidiaries and affiliates. As with all enforcement agencies, the SEC and DOJ rely on risk-based enforcement and prosecutorial discretion due to budgetary constraints, which only allows them to investigate and prosecute the most egregious corporate malfeasance. While enforcement has rapidly increased in recent years – with sixteen DOJ prosecutions in 2008 (compared to twenty-four between 2003 and 2007)[55] – there are approximately 15,000 publicly held companies in the U.S. alone, not including all of the foreign companies subject to the FCPA.[56] Moreover, enforcement abroad requires significant specialized resources, including forensic accountants, anti-money laundering

---

[52] Letter from David Kotz, Inspector Gen., Sec. and Exch. Comm'n, to Chris Dodd, Senator, US Senate (Oct. 29, 2009). *See* Comm. Rep., 111th Congress (2009-2010), Senate Report 111-176.
[53] Ass'n of Certified Fraud Examiners, 2008 Report to the Nation on Occupational Fraud and Abuse 22, at http://www.acfe.com/rttn/2010-rttn.asp.
[54] *Id.*
[55] *See* Shearman & Sterling LLP, *Recent Trends and Patterns in FCPA Enforcement* at 3 (2008), *available at* http://www.shearman.com/files/upload/FCPA Trends.pdf.
[56] For a comprehensive overview of FCPA enforcement actions, *see* Vega, supra note 52, 434.

experts, and attorneys who are familiar with mutual-legal assistance procedures. With the SEC and DOJ facing such constraints, it is vital to ensure active whistleblower participation, especially among foreign employees, in order to effectively detect and prosecute corporate fraud abroad.

Despite lacking the requisite specialized resources necessary to combat bribery abroad, a significant number of FCPA violations occur overseas. Indeed, one of the negative consequences of the United States leading the fight against transnational corruption is that corporations are more likely to circumvent the FCPA by channeling bribery through countries who do not take enforcement as seriously. In a 2005 interview, the sales agents, executives, and marketing personnel from nine transnational corporations admitted to routinely bribing Chinese foreign officials abroad in order to secure business contracts.[57] According to one businessman, "[i]t's normal industry practice;"[58] and despite international efforts to combat the spread of transnational bribery, the World Bank estimates that the total value of bribes paid each year rose between 1994 and 2004 from $50 billion to over $1 trillion.[59] Since the occurrence of bribery and fraud is likely to occur on foreign soil, employees positioned in the foreign subsidiaries and affiliates of companies subject to the FCPA are uniquely situated to identify prohibited conduct and assist with regulatory enforcement. However, without the assurance of adequate whistleblower protections, foreign employees may find themselves extremely vulnerable to retaliation and would often be wise to remain quiet.

4. Section 21F(h)(1) Offsets the Barriers Discouraging Foreign Whistleblowers

---

[57] Peter S. Goodman, *Common in China, Kickbacks Create Trouble for U.S. Companies at Home,* WASHINGTON POST *(*Aug. 22, 2005) at http://www.washingtonpost.com/wp-dyn/content/article/2005/08/ 21/AR2005082101068.html.

[58] *Id.*

[59] World Bank, Press Rel., *The Costs of Corruption* (Aug. 8, 2004), *available at* http://go.worldbank.org/LJA29GHA80. In 2010, potential global fraud loss was estimated at $2.9 trillion. *See* Certified Fraud Examiners, *2010 Rep. to the Nations on Occupational Fraud & Abuse, available at* http://www.acfe.com/ rttn/2010-rttn.asp.

While foreign whistleblowers are vital in promoting corporate accountability and transparency under the FCPA, they are also extremely vulnerable to retaliation. As Senators Grassley and Leahy noted, "[whistleblowers] need and deserve the protection of the law, and they should be able to rely on vigilant application of the law."[60] Although the financial rewards of the Dodd-Frank Act are attractive, foreign employees may yet be reticent to assume the risks of whistleblowing when it is still unclear how difficult it would be to qualify for the bounty or avail themselves of its anti-retaliation protection. Overseas whistleblowers must deal with the uncertainty of transnational litigation which requires considerable investments of money and time. Moreover, the enforceability of foreign judgments or awards can be difficult and give rise to litigation on its own. Considering the confusion between the scope of whistleblower protections in one's own home country and the U.S., employees overseas will be further discouraged to volunteer information to U.S. regulatory officials. Absent an unequivocal application of its protections to whistleblowers overseas, foreign employees will not prove to be the source of whistleblowing contemplated by the drafters of Section 21F(h)(1).

The prevailing attitude and domestic treatment of whistleblowers abroad can pose a significant risk to employees overseas who might otherwise wish to cooperate with U.S. authorities.[61] In the United Kingdom whistleblower protection is limited to those who offer information to authorities, "in good faith," and who are not reporting for purposes of individual financial gain. In parts of continental Europe (especially Germany, France, and the Netherlands), there is a wide distaste for anonymous employee reporting, government-mandated reporting, and secretly assisting government authorities. According to the Chairman of the EU's Article 29 Working Party (an EU-level advisory body made up of data privacy officers from the EU member states), anonymous hotlines and mandatory denunciations "evoke some of the darkest times of recent history on the European continent, whether during World

---

[60] *See* Letter from Senators Grassley and Leahy, supra note 37.
[61] This paper limits discussion to the barriers that exist in the largest trading partners of the US.

War II or during more recent dictatorships in Southern and Eastern Europe. This [explains] a lot of the reluctance of EU Authorities to allow anonymous [whistleblower hotline] schemes." [62] While the Chairman raised his concerns in response to the extension of SOX § 301, which mandates the establishment of anonymous hotlines to report fraud, foreign employees that choose to cooperate with the U.S. government may implicate EU privacy/data protection laws, especially when an employee's assistance involves the transmission of confidential information beyond national borders.[63]

Although whistleblower protection laws of EU member states may differ only slightly from those contained in the Dodd-Frank Act, there are substantial risks for whistleblowers outside of Europe (particularly China, India, and Russia), due to inadequate enforcement of anti-retaliation protections. Poor enforcement of whistleblower protections in these states have resulted in employer retaliation, harassment and discrimination extending beyond the workplace, and, in rare instances, grave bodily harm.[64] Consequently, whistleblowers from these states exhibit a fear of severe victimization and are reluctant to assist U.S. enforcement efforts, regardless of the financial incentive offered by the SEC. While states around the world, including India, have recently passed stronger legislation in order to address these problems, it remains unclear whether their governments will have the resources or political will to enforce robust whistleblower protections. Unless the uncertainty over extending the whistleblower protections of Section 21F(h)(1) to employees overseas is resolved, it is unlikely that the

---

[62] Letter from Peter Schaar, Chairman, EU Data Protection Working Party to Ethiopis Tafara, Dir., US Sec. & Exch. Comm'n Office of Int'l Affairs (Jul. 3, 2006) *available at* http://www.sec.gov/about/offices/oia/oia_rulemaking/schaar_letter_092906.pdf.

[63] *See* Don Dowling, *SOX Whistleblower Hotlines Across Europe: Directions through the Maze*, 42 The Int'l Lawyer 1 (2008) (examining the conflict between § 301 mandatory hotlines and EU privacy laws).

[64] P. Collins, L. Stein, & C. Trombino, *Consider the Source: How Weak Whistleblower Protection Outside the United States Threatens to Reduce the Impact of the Dodd-Frank Reward Among Foreign Nationals*, *available at* http://www.perkinscoie.com/files/upload/10_25 Article.pdf.

SEC's bounty program would, in itself, provide enough incentive to overcome the very human costs whistleblowers in certain countries face when their identity is put at risk.

Moreover, the uncertainty of transnational litigation and the personal sacrifices faced by foreign whistleblowers act as a further deterrence to international cooperation with U.S. authorities.[65] Previous anti-retaliation lawsuits brought by foreign employees under SOX § 806 have spectacularly failed at both the administrative and district court level. In fact, some experts have calculated that under 4% of *all* whistleblowers filing for relief under Section § 806 have succeeded at the initial administrative level.[66] Considering the reluctance of federal courts to extend the protections of Section 806 to foreign employees, one can assume that the success rate for overseas whistleblowers would be below that. The dismal success rate of whistleblowers in court is further compounded by the costs incurred by foreign citizens litigating employment disputes in the U.S. Not only will the foreign worker need to arrange for appearances in U.S. court, but they may also require translation services, local counsel familiar with the U.S. legal system, and expert witnesses, among other expenses. Litigation will almost always last for a few months, if not more, and with the prospect of multiple appeals, the foreign worker can expect long-term commitments of time and money.[67] Even if the worker is fortunate enough to secure a favorable

---

[65] A study found that twenty-nine of thirty-five whistleblowers surveyed experienced stress related symptoms, while nearly half of the employees began taking prescription medicines that they had not taken before whistleblowing and considered suicide. *See* Pamela H. Bucy, *Information as a Commodity in the Regulatory World*, 39 Hous. L. Rev. 905, 951 (2002).

[66] Richard Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65, 67 (2007) (stating that only 3.6% of whistleblowers won relief at the initial administrative process conducted by OSHA in the first 3 years).

[67] Valerie Watnick, *Whistleblower Protection Under the Sarbanes-Oxley Act: a Primer and a Critique,* 12 Fordham J. Corp. & Fin. L. 831, 860-61 (2007). As litigation drags on, the employee is forced to continue paying legal fees while no longer receiving a paycheck. *See* Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: a Tale of Reform Versus Power*, 76 U. Cin. L. Rev. 183, 209 (2007) (noting, in 2006, the median time to litigate a civil case in federal court was 8.3 months).

judgment against their employer, there is no absolute certainty that the award will be enforced at home.[68]

IV. Conclusion: Confronting the Sky Together

The whistleblower protections contained in Section 21F(h)(1) of the Exchange Act are critical components of a comprehensive regulatory regime aimed at ending transnational bribery and corruption. In order to be effective, the SEC must rely on foreign whistleblowers to detect corporate corruption and expose violations of the FCPA abroad. Assuring that foreign employees overseas are entitled to the protections of Section 21F(h)(1) will significantly facilitate the overseas enforcement of the FCPA by mitigating the severe risks that foreign whistleblowers face. The SEC should use its rulemaking authority to align its interpretation of Section 21F(h)(1) with what Congress intended in passing the provision – to ensure the robust participation of whistleblowers, both domestic and abroad, in enforcing the FCPA by providing broad protections against retaliatory discrimination. Such a regulation would materially advance the policy goals of the FCPA, while remaining harmonious with the laws and efforts of foreign nations to combat transnational corruption and protect whistleblowers.

Furthermore, a proposed rule affirming that Section 21F(h)(1) protections apply to foreign whistleblowers abroad is consistent with the recent district court decision in *O'Mahony* and the new amendment to SOX § 806 ending the "subsidiary-exclusion rule." It would also reinforce several international conventions and instruments, which have emphasized the protection of whistleblowers as a critical component of the international anti-bribery regime. Considering that transnational corruption is occurring increasingly abroad and the significant costs of conducting overseas investigations, it is vital to ensure active whistleblower participation, especially among foreign employees who are

---

[68] Arbitration awards are routinely enforced abroad because they are consensual and governed by treaty (the New York Convention). However, the recognition and enforcement of foreign judgments is not always a foregone conclusion and increasingly subject to long appeals. *See* Julius Melnitzer, *Canadian Supreme Court Limits Collection of Arbitration Awards*, Inside Counsel Magazine (2010).

uniquely situated to detect and report corporate fraud abroad. Without the SEC's assurance of anti-retaliation protection, it is unlikely that foreign employees abroad will come forward on their own considering the significant risks whistleblowers in foreign countries face. By affirming the application of whistleblower protections under Section 21F(h)(1) to overseas employees, the SEC can begin to confront the sky together with vulnerable whistleblowers who risk much to assist U.S. enforcement.