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International whistleblowing legislation and America's False Claims Act

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

In the first of this two-part series, we discussed the success of the United States' federal False Claims Act (FCA),^[1] the rise of international whistleblowers through a study of the Michael Epp case,^[2] and what global companies need to do to prepare. In this follow-up, we review exemplary international whistleblowing laws that have been recently enacted and what they mean for global corporate compliance. Our review is not exhaustive but reflects a fair cross section of non-American whistleblowing laws.

Why aren't international whistleblower laws modeled on the FCA?

Over the last several years, a number of foreign countries have passed whistleblower laws. Implemented purportedly to bolster anti-corruption efforts around the globe, these international whistleblower laws, when compared to the FCA, lack the hallmark elements of a strong and effective whistleblower program.

First, most of these international laws provide no financial incentive to whistleblowers. Of the handful of countries that do provide a monetary award, many cap recoveries at levels that may be deemed inconsistent with the risk taken by whistleblowers. Second, although most laws provide some confidentiality and anti-retaliation protections to whistleblowers, a number require whistleblowers to report in "good faith," "without malice or negligence," and based on a "reasonable suspicion" of misconduct, which are fairly subjective standards. Some actually expose whistleblowers to liability if their reports are deemed untrue or not in the public interest. Although the defense bar and industry welcome these prefiling requirements, these limitations do little to promote whistleblowing outside the United States. Third, very few offer whistleblowers financial compensation for retaliatory actions taken against them. We could only find one, the European Union (EU) Whistleblower Directive, that provides for payment of whistleblowers' attorney fees and costs in litigating retaliation claims. Fourth, unlike the FCA, these laws often lack a clear and distinct

regulatory authority or prosecutorial agency in charge of enforcing specific whistleblower laws.

By comparing a broad cross section of these international whistleblower statutes to the FCA, a clear pattern emerges. These laws lack the teeth and scope of the FCA.

Whistleblowing English style

The United Kingdom (UK) was one of the earliest countries to enact whistleblower protection, defined in the Public Interest Disclosure Act of 1998.^[3] This act includes both confidentiality and anti-retaliation provisions and provides for financial compensation for retaliatory actions. Notably, there is no cap on the amount of retaliation award. But, unlike the FCA, the Public Interest Disclosure Act does not provide any financial incentives solely for whistleblowing. Whistleblowers must demonstrate that they reasonably believe that their disclosures were made in the public interest to receive anti-retaliation protection. The lack of a monetary incentive and the requirement that a whistleblower reasonably believes that disclosure is in the public interest have led to a lack of any meaningful impact.

Whistleblowing Italian style

Italy first enacted protections for whistleblowers in the public sector in 2012. But it was not until 2017 that Italy extended these protections to whistleblowers in the private sector, the first set of whistleblower private-sector protections ever passed in Italian legislative history. Under the Italian whistleblower laws, entities are prohibited from discriminating or retaliating against whistleblowers, and can be sanctioned if they do. Whistleblowers' confidentiality is also protected. Despite this recent revitalization, these laws fail to offer any financial incentives for whistleblowing. In addition, whistleblower protection does not attach to reports that are slanderous, defamatory, or maliciously or negligently unfounded. To date, Italy has not fully embraced the concept of private attorneys general vetting out fraud for profit.

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