Why Dodd–Frank's Whistleblower Provision Blows: Its Failure to Protect Overseas Whistleblowers

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I. INTRODUCTION

In July 2010, President Barack Obama signed into law the Dodd–Frank Wall Street and Consumer Protection Act (Dodd–Frank).[1] Dodd–Frank's purpose was "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices."[2] One way that Dodd–Frank aims to promote accountability and transparency in the financial system is to incentivize and protect whistleblowers that report violations of the securities laws.[3]

As Congress debated the bill, Dodd–Frank's whistleblower provision received little notice.[4] Despite initial obscurity, the provision has gained a lot of attention particularly because it allows whistleblowers to receive monetary awards for tips they report to the Securities Exchange Commission (SEC).[5] In fiscal year 2012, the SEC received 3001 tips from whistleblowers.[6] In fiscal year 2013, the number of tips the SEC received increased to 3238.[7] These tips concerned corporate disclosures and financials, fraud, and manipulation.[8] In both 2012 and 2013, tips came from all 50 U.S. states.[9] In 2012, tips came from 49 countries outside the United States, and in 2013, tips came from 68 countries outside the United States.[10] This Note is concerned with the whistleblower tips that come from outside the United States, particularly the anti-retaliation protection Dodd–Frank offers to these overseas whistleblowers. In this Note, the term overseas whistleblowers describes U.S. citizens who work for American controlled companies in foreign countries and who disclose any violations of the securities laws by those companies to the SEC.

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1. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010), *available at* http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.

2. *Id.* at 1376; Charles W. Murdock, *The Dodd–Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd–Frank Prevent Future Crises?*, 64 SMU L. REV. 1243, 1249 (2011).

3. 15 U.S.C. § 78u-6(b) (2013).

4. Recent Legislation, *Congress Expands Incentives for Whistleblowers to Report Suspected Violations to the SEC*, 124 HARV. L. REV. 1829, 1831 (2011), *available at* http://cdn.harvardlawreview.org/wp-content/uploads/pdfs/vol124_recentlegislation05152011.pdf [hereinafter *Congress Expands Incentives for Whistleblowers*].

5. *See* Jeffrey S. Klein et al., *Whistleblower Protections Under the Dodd–Frank Act*, WEIL (Feb. 7, 2011), http://www.weil.com/articles/whistleblower-protections-under-the-Dodd-Frank-act (explaining that Dodd–Frank's reward program has gained more media attention than the anti-retaliation protection).

6. U.S. SECURITIES AND EXCHANGE COMMISSION, ANNUAL REPORT ON THE DODD–FRANK WHISTLEBLOWER PROGRAM FISCAL YEAR 2012 4–5 (2012), *available at* http://www.sec.gov/about/offices/owb/annual-report-2012.pdf (stating that the SEC receives the tips through facsimile, mail, or through the SEC's online Tips, Complaints, and Referrals System's questionnaire portal) [hereinafter 2012 WHISTLEBLOWER REPORT].

7. U.S. SECURITIES AND EXCHANGE COMMISSION, ANNUAL REPORT TO CONGRESS ON THE DODD–FRANK WHISTLEBLOWER PROGRAM 8 (2013), *available at* http://www.sec.gov/about/offices/owb/annual-report-2013.pdf [hereinafter 2013 WHISTLEBLOWER REPORT].

8. *Id.*; 2012 WHISTLEBLOWER REPORT, *supra* note 6, at 4–5.

9. 2013 WHISTLEBLOWER REPORT, *supra* note 7, at 9; 2012 WHISTLEBLOWER REPORT, *supra* note 6, at 5.

10. 2013 WHISTLEBLOWER REPORT, *supra* note 7, at 10, 22; 2012 WHISTLEBLOWER REPORT, *supra* note 6, Appendix C. For both years, whistleblowers in the United Kingdom, Canada, and China reported the most tips. 2012 WHISTLEBLOWER REPORT, *supra* note 6, Appendix C; 2013 WHISTLEBLOWER REPORT, *supra* note 7, Appendix D.

This Note is organized as follows: Part II describes who is a whistleblower, as defined by the common law, the Sarbanes–Oxley Act of 2002 (SOX) and Dodd–Frank. It then addresses the theories that favor applying U.S. law extraterritorially and discusses extraterritorial application of U.S. federal employment law, focusing on the Age Discrimination in Employment Act of 1967 (ADEA), Title VII of the Civil Rights Act of 1964 (Title VII), the Fair Labor Standards Act of 1938 (FLSA), the Equal Pay Act of 1963 (EPA), and the whistleblower provisions in SOX and Dodd–Frank. Finally, Part II introduces cases interpreting the extraterritorial application of Dodd–Frank's whistleblower provision.

Part III analyzes how U.S. courts use the presumption against extraterritoriality to determine whether U.S. law applies to conduct or people outside U.S. territory. It discusses *Morrison v. National Australia Bank*, the most recent Supreme Court case rejecting extraterritorial application of U.S. anti-fraud regulations. Part III then analyzes how the district courts used the *Morrison* opinion to evaluate the extraterritorial application of Dodd–Frank's anti-retaliation protection. It analyzes court reasoning in the cases that determined that the ADEA and Title VII did not have extraterritorial reach, and how, in response to these decisions, Congress amended the ADEA and Title VII to ensure their extraterritorial application. Finally, Part III analyzes why Congress decided that certain U.S. laws, such as the FLSA, should not have extraterritorial application.

Part IV recommends that Congress pass an amendment to explicitly extend Dodd–Frank's anti-retaliation protection to overseas whistleblowers. It is up to Congress to change the law because the presumption against extraterritorial application of congressional legislation prevents the courts from reaching a different interpretation. Finally, Part IV argues that Congress should pass such an amendment because the protection against retaliation will encourage overseas whistleblowers to report employer securities misconduct to the SEC.

II. BACKGROUND

A. Who is a Whistleblower?

The general definition of a whistleblower in the employment context is "an employee [who] reports, exposes or protests, either publicly or within the organization, either the employer's or a fellow employee's criminal, immoral or otherwise improper activity."[11] In many common law jurisdictions, when an employer discharges a whistleblower employee in retaliation for reporting misconduct, the employee can sue his employer for wrongful discharge.[12] This right exists even in an at-will employment relationship.[13] It is contrary to public policy for an employer, even in an at-will relationship, to discharge a

11. STEPHEN P. PEPE & SCOTT H. DUNHAM, AVOIDING AND DEFENDING WRONGFUL DISCHARGE CLAIMS §1:7 (2013).

12. Gregory G. Sarno, Annotation, *Federal Pre-emption of Whistleblower's State-Law Action For Wrongful Retaliation*, 99 A.L.R. Fed. 775 § 2 (1990).

13. *Id.* (explaining that the at-will doctrine provides that an employer may legally discharge an employee "for good cause, for no cause, or even cause morally wrong").

whistleblower employee.[14] A number of state and federal statutes, including SOX and Dodd–Frank, have codified the common law whistleblower protections.[15]

B. Sarbanes–Oxley and Its Whistleblower Provision

Corporate accounting fraud, exemplified by Enron's collapse, drove SOX's passage.[16] In passing SOX's whistleblower provision, Congress recognized that if whistleblowers were reassured they would be protected against termination or adverse treatment, they would come forward and expose unlawful activity, and therefore, play an important role in preventing unlawful activity like fraud.[17] SOX provides that no company which has registered securities pursuant to the Securities Exchange Act of 1934, including any subsidiary or affiliate whose information is included in the company's consolidated financial statements, may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee," if the employee provides information or assists in an investigation that the employee believes is a legal violation or fraud against shareholders.[18] Eligible investigations include those conducted by a federal agency, Congress, or internally by a person with supervisory authority within the company.[19] If the employer retaliates against the whistleblower employee, the employee can seek relief by first filing a complaint with the Department of Labor (DOL).[20] If the DOL does not provide a decision within a specified time-period, the employee may file a claim against the employer in federal district court.[21]

C. Dodd–Frank and Its Whistleblower Provision

Dodd–Frank's whistleblower provision departs from SOX's whistleblower provision in two ways. First, while SOX allows internal reporting, Dodd–Frank requires whistleblowers to report violations to the SEC, specifically defining a whistleblower as

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14. PEPE & DUNHAM, *supra* note 11, at §1:7.

15. *Id.*; *see also* MICHAEL D. GREENBERG, FOR WHOM THE WHISTLE BLOWS: ADVANCING CORPORATE COMPLIANCE AND INTEGRITY IN THE ERA OF DODD–FRANK 37 (2011) (stating that "[e]very state other than Alabama provides some form of whistleblower protection. Twenty-five states have enacted their own false claim statutes. Moreover, 46 states have enacted statutory or common-law courses of action for whistleblower claims that provide for punitive damages").

16. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1758 (2007).

17. *See* Matt A. Vega, *The Sarbanes–Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 482 (2009) (explaining Senator Leahy's belief that the SOX whistleblower provision aims to protect people like Sherron Watkins, who had been fired for reporting Enron's accounting irregularities); *see also* GREENBERG, *supra* note 15, at 33 (discussing that "policymakers became particularly interested in employee whistleblowing, given the context of executive whistleblower Sherron Watkins's warning of Enron's likely demise. Some in Congress asked probing questions about the potential for insider whistleblowing and the role that it might have played in preventing or mitigating the Enron meltdown. Could the disaster have been averted if Ms. Watkins spoke up sooner? Why didn't she speak up sooner? And why did others at Enron not blow the whistle?").

18. 18 U.S.C. § 1514A(a) (2013).

19. 18 U.S.C. § 1514A(a)(1)(A), (B), (C).

20. 18 U.S.C. § 1514A(b)(1).

21. *Id.*; *see* Vega, *supra* note 17, at 485–86 (discussing that before the employee can bring a civil suit, he must first file a complaint with the Secretary of Labor, who then refers it to the Occupational Safety and Health Administration for investigation).

"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."[22] Second, Dodd–Frank departs from SOX by providing whistleblowers a monetary incentive.[23] Dodd–Frank entitles whistleblowers to bounties of at least 10% but not more than 30% of the funds the SEC obtains from sanctions it imposes on company violators.[24] Like SOX, Dodd–Frank prohibits employer retaliation against whistleblower employees.[25] An employer may not "discharge, demote, suspend, threaten, harass, directly or indirectly or in any manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower" when providing the SEC with information, testifying for an administrative action, or making disclosures required or protected under SOX, Dodd–Frank, or any other law that the Commission regulates.[26] If an employer retaliates against an employee, Dodd–Frank gives a whistleblower the right to bring a cause of action directly in federal district court, without having to first file a complaint with the DOL.[27]

D. The Principles of Extraterritorial Application

Two employees, who worked abroad, have sued their employers under Dodd–Frank's anti-retaliation provision in U.S. district courts, prompting the courts to determine if the provision applies extraterritorially.[28] Extraterritorial application means that a state is able "to hold a party accountable for conduct that has occurred beyond its borders."[29] The extension of a state's law outside its territory is based on four principles.[30] The most common is the territoriality principle, which is the right of a state to regulate people and occurrences within its borders.[31] An extension of this principle is regulating conduct, regardless of the location, if the conduct has an effect within the territory.[32] The other three principles for extraterritorial application are: a state's ability to regulate its citizens' conduct outside its borders, its ability to regulate conduct outside its borders that could hinder vital state interests, and its ability to regulate conduct by foreigners outside its territory that violate fundamental norms of international law.[33] The Supreme Court has

22. 15 U.S.C. § 78u-6(a)(6); *see* GREENBERG, *supra* note 15, at 1 (explaining Dodd–Frank requires whistleblowers provide information to the SEC, whereas SOX advocated internal whistleblowing and championed internal compliance programs).

23. *Congress Expands Incentives for Whistleblowers*, *supra* note 4, at 1830.

24. 15 U.S.C. § 78u-6(b)(1).

25. 15 U.S.C. § 78u-6(h)(1)(A).

26. 15 U.S.C. § 78u-6(h)(1)(A).

27. 15 U.S.C. § 78u-6(h)(1)(B); *Congress Expands Incentives for Whistleblowers*, *supra* note 4, at 1834.

28. Asadi v. G.E. Energy (USA), LLC, No. 4:12-345, 2012 WL 2522599 (S.D. Tex. June 28, 2012); Meng-Lin Liu v. Siemens A.G., 978 F. Supp. 2d 325 (S.D.N.Y. 2013).

29. Eric C. Surette, *Exercise of Extraterritorial Jurisdiction*, *in* 48 C.J.S. INTERNATIONAL LAW § 19 (2014).

30. INTERNATIONAL BAR ASSOCIATION, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 11–16 (2009), *available at* http://www.ibanet.org/Article/Detail.aspx?ArticleUid=597D4FCC-2589-499F-9D9B-0E392D045CD1.

31. *Id.* at 11.

32. *Id.* at 12.

33. *Id.* at 13–16.

held that there is a presumption that congressional legislation has domestic application, unless Congress has expressed otherwise.[34]

E. Extraterritorial Application of U.S. Employment Law

In the current era of globalization, it is common for American companies to conduct business outside of U.S. borders and employ American workers in their overseas operations.[35] This phenomenon has generated a question of whether U.S. employment laws govern the relationship between an American worker employed overseas by an American company .[36] To provide insight to this question, this section will discuss the extraterritorial application of the ADEA, Title VII, the FLSA, the EPA, SOX's whistleblower provision, and Dodd–Frank's whistleblower provision.

1. Extraterritorial Application of the Age Discrimination in Employment Act

In *Cleary v. U.S. Lines*, the Third Circuit entertained whether the ADEA afforded protection against age discrimination to a U.S. citizen employee working abroad for an American company.[37] The employee was a 64-year-old American working in England for United States Lines Operations, Inc., a subsidiary of United States Lines, Inc.[38] He claimed his employer discharged him because of his age, in violation of the ADEA.[39] The Third Circuit decided that under the statute's language, the ADEA "does not apply to Americans employed outside the United States by American employers."[40] In response to the ruling, Congress amended the ADEA to protect U.S. citizens employed by American controlled companies in a foreign country.[41]

2. Extraterritorial Application of Title VII

In *E.E.O.C. v. Arabian American Oil Co.* (referred to as *Aramco*), the U.S. Supreme Court had to decide whether Title VII, which prohibits employers from discriminating against employees on the basis of race, color, religion, sex and national origin,[42] applied extraterritorially.[43] The employee in the case was a naturalized U.S. citizen, and the employer was a Delaware corporation.[44] The employer initially employed the employee in the United States but transferred him to work in Saudi Arabia, where the employer eventually fired him.[45] The employee then brought a wrongful discharge suit under Title

34. E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991); Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 255 (2010).

35. Stephen B. Moldof, *The Application of U.S. Labor Law to Activities & Employees Outside the U.S.*, 17 LAB. LAW. 417, 417 (2002).

36. *Id.*

37. Cleary v. U.S. Lines, 728 F.2d 607, 607 (3d Cir. 1984).

38. *Id.*

39. *Id.*

40. *Id.* at 610.

41. 29 U.S.C. § 630(f) (2013); 29 U.S.C. § 623(h) (2013); *see also* Denty v. SmithKline Beecham Corp., 109 F.3d 147, 149–50 (1997) (discussing how Congress responded to the *Cleary* holding by amending the ADEA to redefine employee and employer).

42. 42 U.S.C. § 2000e-2(a)(1) (2013).

43. E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 246 (1991).

44. *Id.* at 247.

45. *Id.*

VII in U.S. district court.[46] When the case reached the Supreme Court, the Court decided that the plaintiff did not have a claim and held that "Title VII does not apply extraterritorially to regulate employment practices of United States employers who employ United States citizens abroad."[47] In response to this ruling, Congress enacted the Civil Rights Act of 1991, which amended Title VII to provide discrimination protection for U.S. citizen employees working abroad for corporations incorporated in the United States or a foreign subsidiary owned or controlled by a U.S. company.[48]

3. Extraterritorial Application of the Fair Labor Standards Act and the Equal Pay Act

The FLSA, which governs minimum wage and overtime pay,[49] and the EPA, which prohibits sex-based wage discrimination,[50] do not have extraterritorial application.[51] The FLSA explicitly contains a provision that states it "shall not apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country."[52] Because the EPA is an amendment to the FLSA, it too does not apply extraterritorially.[53]

4. Extraterritorial Application of SOX's Whistleblower Provision

The First Circuit determined that SOX's whistleblower provision does not have extraterritorial application in *Carnero v. Boston Scientific Corp*.[54] The plaintiff, an Argentinian citizen, was employed in Brazil by a subsidiary of the defendant, a Delaware corporation with headquarters in Massachusetts.[55] He allegedly told his supervisors that the defendant's subsidiaries engaged in accounting misconduct, including the inflation of sales figures.[56] He claimed his employer terminated him in retaliation for reporting the accounting misconduct.[57] The First Circuit concluded that Congress did not intend for SOX's whistleblower provision to apply extraterritorially because the statutory language was silent on extraterritorial application, and the legislative history did not indicate that Congress ever considered applying the provision abroad.[58]

46. *Id.* at 244.

47. *Id.*

48. 42 U.S.C. § 2000e(f) (2013); Ericka C. Collins, *Extraterritorial Application of U.S. Employment Law*, *in* INTERNATIONAL EMPLOYMENT LAW 2013, 57–58 (Philip M. Berkowitz, Chair, Practicing Law Institute, 2013) (noting that the Civil Rights Act of 1991 also amended the Americans with Disabilities Act, which prohibits employers from discriminating against otherwise qualified employees with a disability, to protect U.S. citizen employees working for U.S. controlled employers in a foreign country).

49. 29 U.S.C. §§ 206(a), 207(a) (2013).

50. 29 U.S.C. § 206(d) (2013).

51. POLICY GUIDANCE, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N (Apr. 24, 2003), http://www.eeoc.gov/policy/docs/extraterritorial-adea-epa.html [hereinafter POLICY GUIDANCE].

52. 29 U.S.C. § 213(f) (2004).

53. POLICY GUIDANCE, *supra* note 51.

54. Carnero v. Boston Scientific Corp., 433 F.3d 1, 7 (1st Cir. 2006).

55. *Id.* at 2.

56. *Id.* at 2–3.

57. *Id.* at 3.

58. *Id.* at 9.

5. Extraterritorial Application of Dodd–Frank's Whistleblower Provision

Two district courts have ruled that the anti-retaliation protection Dodd–Frank provides to whistleblowers does not apply extraterritorially.[59] In *Asadi v. G.E. Energy*, the plaintiff was a U.S. citizen who started working for G.E. Energy, a U.S. Corporation, in the United States.[60] G.E. Energy eventually transferred him to work in Jordan.[61] While he was working in Jordan, he became concerned that certain company activity violated the Foreign Corrupt Practices Act[62] and reported his concerns to his supervisor.[63] Soon after, his supervisor gave him a negative performance review and terminated him, which he alleged happened because he was a whistleblower.[64] The district court ruled in favor of G.E. Energy and dismissed Asadi's claim.[65]

The claim in *Liu v. Siemens* was similar to the claim in *Asadi*, except that the employee involved was not a U.S. citizen.[66] Rather, the employee was a Taiwanese citizen working in China for a subsidiary of Siemens A.G., a German corporation that has ADRs[67] traded on an American Exchange.[68] The employee alleged that while in China, he informed Siemens' Chief Financial Officer for Healthcare that the company was paying bribes to Chinese officials to further the sale of multi-million dollar medical imaging equipment to Chinese and North Korean public hospitals, and that Siemens employees went along with this scheme by submitting bids to Chinese public hospitals that were higher than the amount Siemens expected to earn.[69] The employee also alleged that Siemens retaliated by firing him.[70] The district court found "there is simply no indication that Congress intended the Anti-Retaliation Provision [in Dodd–Frank] to apply extraterritorially" and dismissed the employee's claim.[71]

59. Asadi v. G.E. Energy (USA), LLC, No. 4:12-345, 2012 WL 2522599 (S.D. Tex. June 28, 2012); Meng-Lin Liu v. Siemens A.G., 978 F. Supp. 2d 325 (S.D.N.Y. 2013).

60. *Asadi*, 2012 WL 2522599, at *1.

61. *Id.*

62. *See Foreign Corrupt Practices Act: An Overview*, THE UNITED STATES DEPARTMENT OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/ (last visited Nov. 8, 2014) (stating that the Foreign Corrupt Practices Act "was enacted for the purpose of making it unlawful for certain classes of persons and entities to make payments to foreign government officials to assist in obtaining or retaining business").

63. *Asadi*, 2012 WL 2522599, at *1; *see infra* note 133 (explaining that Asadi was not a whistleblower as defined by Dodd–Frank because he did not report his concerns to the SEC).

64. *Asadi*, 2012 WL 2522599, at *2.

65. *Id.* at *7.

66. Meng-Lin Liu v. Siemens A.G., 978 F. Supp. 2d 325, 329 (S.D.N.Y. 2013).

67. JEROLD A. FRIEDLAND, UNDERSTANDING INTERNATIONAL BUSINESS AND FINANCIAL TRANSACTIONS 31 (2d ed. 2005) (explaining that ADRs is an acronym for American Depository Receipts which are a "negotiable certificate, issued by a U.S. bank representing a specified number of shares of a foreign corporation" that trade on a U.S. stock market like other securities).

68. *Liu*, 978 F. Supp. 2d at 329.

69. *Id.* at 326.

70. *Id.* at 327.

71. *Id.* at 329.

III. ANALYSIS

A. The Presumption Against Extraterritoriality

When courts decide whether a statute has extraterritorial application, the starting point is the presumption against extraterritoriality.[72] This principle presumes that congressional legislation does not apply extraterritorially unless Congress expressed that it intended otherwise.[73] In *Morrison v. National Australia Bank*,[74] the Supreme Court's most recent decision on extraterritorial application, Justice Scalia explained that the presumption against extraterritoriality was a cannon of statutory construction.[75] It was in no way a limitation on Congress's ability to regulate conduct outside U.S. borders.[76] *Morrison* went on to say that if "a statute gives no clear indication of extraterritorial application, it has none."[77]

Furthermore, *Morrison* rejected the effects test and the conduct test approach (alternative approaches to the presumption against extraterritoriality principle) that the Second Circuit had often used to evaluate the extraterritorial application of a statute that was silent on the matter.[78] The effects test evaluated "'whether the wrongful conduct had a substantial effect in the United States or upon United States citizens,'" and the conduct test evaluated "'whether the wrongful conduct occurred in the United States.'"[79] The Court found that the effects test and conduct test required judges to speculate too much about what Congress would have wanted, and such tests were too unpredictable and inconsistent in application.[80]

B. Asadi *and* Liu *Relied on the* Morrison v. National Australia Bank *Analysis*

The *Asadi* and *Liu* courts cited *Morrison* and used the presumption against extraterritoriality to evaluate Dodd–Frank's anti-retaliation whistleblower provision.[81] In *Asadi*, the court determined that Dodd–Frank's anti-retaliation whistleblower provision was silent regarding its extraterritorial effect.[82] The court agreed that Dodd–Frank's definition of a whistleblower and the language concerning an individual eligible to bring a cause of action for being discharged on account of being a whistleblower was "broad enough to include overseas whistleblowers."[83] However, broad language was not enough

72. Moldof, *supra* note 35, at 418.

73. E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

74. *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 251–53 (2010) (identifying whether the Securities Exchange Act's antifraud provision entitled Australian citizen shareholders of the National Australia Bank to relief because the defendant bank knowingly purchased a company—with headquarters in the United States—that manipulated their financial earning models).

75. *Id.* at 255.

76. *Id.*

77. *Id.*

78. *Id.* at 257–61.

79. *Morrison*, 561 U.S. at 257 (quoting SEC v. Berger, 322 F.3d 187, 192–93 (2nd Cir. 2003)).

80. *Id.*

81. Asadi v. G.E. Energy (USA), LLC, No. 4:12-345, 2012 WL 2522599, at *4 (S.D. Tex. June 28, 2012); Meng-Lin Liu v. Siemens A.G., 978 F. Supp. 2d 325, 328 (S.D.N.Y. 2013).

82. *Asadi*, 2012 WL 2522599, at *5.

83. *Id.* at *4 n.38; 15 U.S.C. § 78u-6(a)(6) (defining a whistleblower as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission").

to overcome the presumption against extraterritoriality because *Morrison* said, '"[w]e have repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad.'"[84] The *Liu* court cited both *Asadi* and *Morrison* to reach the same conclusion.[85]

Also, *Morrison* held that if a statute provides for the extraterritorial application of a specific provision, the rest of the statute does not apply extraterritorially.[86] It would be odd for Congress to specifically provide extraterritorial application for one provision of a statute if it intended for other provisions of the statute that are silent about extraterritoriality, to also apply abroad.[87] Dodd–Frank's Section 929P specifically grants federal courts extraterritorial jurisdiction for claims that the SEC or the United States bring on antifraud violations involving conduct in the United States or if the violations have an effect in the United States.[88] Both *Asadi* and *Liu* relied on *Morrison*, and the courts determined that Section 929P "strengthens the conclusion that the Anti-Retaliation Provision does not apply extraterritorially" because there would be no need to provide Section 929P with explicit extraterritorial effect if all of Dodd–Frank applied extraterritorially.[89]

C. The Standard of Extraterritorial Application Under the ADEA and Title VII

In reaffirming the presumption against extraterritoriality,[90] the *Morrison* court also clarified that this presumption does not prevent Congress from passing legislation that has extraterritorial application.[91] Congress's 1984 ADEA amendment in response to *Cleary*, which held the ADEA did not have extraterritorial application, illustrates an approach to extraterritorial application of U.S. employment law.[92] The ADEA aims to "promote employment of older persons based on their ability rather than age; to prohibit age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment."[93] Congress recognized the global economic reality—U.S. companies conducted business abroad and foreign companies merged with American ones—and decided that American workers transferred abroad also needed age discrimination protection.[94]

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84. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 262–63 (2010) (citing E.E.O.C v. Arabian Oil Co., 499 U.S. 244, 251 (1991)).

85. *Liu*, 978 F. Supp. 2d at 328–29.

86. *Morrison*, 561 U.S. at 265 (discussing that "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms").

87. *Id.* at 264.

88. 15 U.S.C. § 78aa(b).

89. Asadi v. G.E. Energy (USA), LLC, No. 4:12-345, 2012 WL 2522599, at *4 (S.D. Tex. June 28, 2012); *Liu*, 978 F. Supp. 2d at 328–29.

90. The Court reaffirmed because other Supreme Court decisions like *Aramco* also asserted this presumption. E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

91. *Morrison*, 561 U.S. at 255.

92. Cleary v. U.S. Lines, 728 F.2d 607, 610 (1984); Matthew H. Hawes & W. Scott Hardy, Morelli v. Cedel*: Ignoring Jurisdictional Limits and Outflanking Congress Through the Internationalization of the ADEA*, 65 U. PITT L. REV. 507, 516–17 (2004) (discussing Congress's reaction to the Supreme Court's ruling in *Cleary*, and Congress's extension of the ADEA to include employees working in foreign countries).

93. 29 U.S.C. § 621(b).

94. Hawes & Hardy, *supra* note 92, at 516–17.

Congress changed the ADEA's definition of employee to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country."[95] In addition, Congress specified the kind of foreign employer required for ADEA protection;[96] the employee must be working for an employer who is controlled by an American company.[97] Courts must consider four factors to determine sufficient control by an American employer: interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control.[98]

The 1991 amendments Congress enacted for extraterritorial application of Title VII are very similar to the ADEA amendments.[99] Title VII's definition of employee contains the following language: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States."[100] The type of employer that a U.S. citizen must work for abroad, to be entitled to Title VII protections, mirror those of the ADEA.[101] That is, for the U.S. citizen working abroad to be protected by Title VII, he or she must be working for an employer controlled by an American corporation.[102]

D. What Happens When U.S. Laws That Have Extraterritorial Application Conflict With Local Laws in the Foreign Territory

The *Aramco* Court was reluctant to apply Title VII extraterritorially because the law might conflict with foreign laws.[103] Chief Justice Rehnquist wrote: "Absent clearer evidence of congressional intent, this Court is unwilling to ascribe to Congress a policy which would raise difficult international law issues by imposing this country's employment-discrimination regime upon foreign corporations operating in foreign commerce."[104] Citing *Aramco*, Justice Scalia echoed the same concern in applying securities regulations abroad in *Morrison*.[105]

Congress addressed this potential conflict to include a foreign law defense under the ADEA and Title VII.[106] A foreign law defense provides that an American-controlled employer does not have to adhere to the ADEA or Title VII requirements while conducting business in a foreign country if doing so would force the American-controlled employer to

95. 29 U.S.C. § 630(f).

96. 29 U.S.C. § 623(h).

97. 29 U.S.C. § 623(h)(2).

98. 29 U.S.C. § 623(h)(3).

99. *See* Torrico v. Int'l Bus. Machines Corp., 213 F. Supp. 2d 390, 399 (2002) (discussing Congress's dissatisfaction with the *Aramco* decision, including the amendment to Title VII "in much the same way it had amended the ADEA in 1984").

100. 42 U.S.C. § 2000e(f).

101. 42 U.S.C. § 2000e-1(c).

102. 42 U.S.C. § 2000e-1(c)(2).

103. E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 245 (1991).

104. *Id.*

105. *See* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 268 (2010) ("Like the United States, foreign countries regulate their domestic securities exchanges and securities transactions occurring within their territorial jurisdiction. And the regulation of other countries often differs from ours as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters.").

106. Collins, *supra* note 48, at 62.

violate the laws of the foreign country where business is conducted.[107] The foreign law defense aims to avoid placing overseas employers in an impossible situation where they have to obey two contradictory legal regimes, one imposed by U.S. law and the other by the foreign country where they are doing business.[108]

1. An Example of the Foreign Law Defense: The Mahoney v. RFE/RL, Inc. *Case*

In *Mahoney*, U.S. citizen employees working in Germany for the defendant, RFE/RL, Inc., a Delaware non-profit corporation, sued under the ADEA.[109] RFE/RL had entered into a collective bargaining agreement with unions representing workers in Germany that required employees to retire at age 65.[110] The ADEA, on the other hand, permitted employers to enforce mandatory retirement once employees reached age 70.[111] Unsure of whether the ADEA or the collective bargaining agreement determined when its U.S. citizen employees working in Germany had to retire, the RFE/RL raised the issue to the German Labor Court for guidance.[112] The German Labor Court held that RFE/RL had to uniformly apply the bargaining agreement retirement age to both U.S. citizen workers working in Germany and German workers because otherwise, it would be discriminating against German workers.[113] Furthermore, it would be illegal for RFE/RL to retain any workers over age 65.[114] Accordingly, RFE/RL discharged the plaintiffs when they reached age 65.[115] The district court found that RFE/RL was not liable for discharging the plaintiffs under the ADEA because RFE/RL was complying with German law.[116]

E. Why the FLSA Does Not Have Extraterritorial Application

The FLSA contains an explicit provision stating it does not apply extraterritorially.[117] This begs the question, if U.S. citizen workers are entitled to protections against discrimination when working abroad for American-controlled employers, why are they not

107. *See* 29 U.S.C. § 623(f)(1) (the ADEA provides that "[i]t shall not be unlawful for an employer, employment agency, or labor organization (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located."); *see* 42 U.S.C. § 2000e-1(b) ("It shall not be unlawful under section 2000e-2 or 2000e-3 of this title for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.").

108. Mahoney v. RFE/RL Inc., 47 F.3d 447, 450 (D.C. Cir. 1995).

109. *Id.* at 448.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Mahoney*, 47 F.3d at 448.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Supra* Part II(E)(3).

ensured a minimum wage and overtime wages while working abroad, as U.S. law prescribes? In looking at FLSA's legislative history, the Third Circuit answered the question, stating: "Congress noted that the Act was obviously 'designed to apply to a United States economy, [and its application] to overseas areas is usually inconsistent with local conditions of employment, the level of the local economy, the productivity and skills of indigenous workers, and is contrary to the best interest of the United States and the foreign areas.'"[118] Such an answer supports *Morrison*; Congress is best suited to determine which U.S. laws should have extraterritorial application, and the courts should not speculate whether a law should have extraterritorial application.[119]

IV. RECOMMENDATION

A. The Implications of Dodd–Frank's Whistleblower Provision Not Having Extraterritorial Application

In *Asadi* and *Liu*, the district courts held that the language of Dodd–Frank's whistleblower anti-retaliation provision does not provide for extraterritorial application.[120] Specifically, this means that overseas whistleblowers are not entitled to anti-retaliation protection and thus are left at the mercy of whistleblower protection laws in the foreign country where they are working (assuming that they exist and are enforced). This raises concerns about the impact of Dodd–Frank's whistleblower anti-retaliation provision in promoting transparency and accountability in the financial system. Consider the following scenario: An American company employs a U.S. citizen in the United States, and after some time, transfers her to work in a foreign country. While working in the foreign country, the employee learns the company engaged in fraudulent activity that could jeopardize the company's financial integrity. The employee may want to report the fraudulent activity to the SEC in hopes the SEC investigation would mitigate any consequences of the company's fraudulent activity. Yet, the employee might decide to remain silent because the company may terminate her employment for being a whistleblower, and she would not be able to assert a wrongful discharge claim in U.S. jurisdiction. Thus, the company's fraudulent activity might remain hidden.

The law also raises concerns of inconsistent application of Dodd–Frank's whistleblower provisions as a whole. While employer anti-retaliation protection does not apply extraterritorially, the SEC does accept tips from individuals outside of U.S. territory.[121] Presumably because the SEC accepts tips from individuals who report from abroad, these individuals are eligible for bounty awards.

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118. Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218, 226 (3d Cir. 1991) (citing Senate Rep. No. 987 (1957), *reprinted in* 1957 U.S. Code Cong. & Admin. News 1756–57).

119. Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 261 (2010).

120. Asadi v. G.E. Energy (USA), LLC, No. 4:12-345, 2012 WL 2522599, at *7 (S.D. Tex. June 28, 2012); Meng-Lin Liu v. Siemens A.G., 978 F. Supp. 2d 325, 329 (S.D.N.Y. 2013).

121. 2012 WHISTLEBLOWER REPORT, *supra* note 6, at 4–5; 2013 WHISTLEBLOWER REPORT, *supra* note 7, at 8.

1. Why Dodd–Frank Should Protect Overseas Whistleblowers

Dodd–Frank aims to prevent another financial crisis.[122] Dodd–Frank's whistleblower provision plays a crucial role in accomplishing that goal. Whistleblower tips of securities violations can help the SEC figure out where to investigate, to gather evidence to confirm violations, and then to stop the violations, which could otherwise have dire consequences for investors (or if the violations are serious enough, threaten the financial system as a whole). While the exact number of U.S. citizens working abroad for American controlled companies is unknown, these particular U.S. citizens are more likely to come forward and report company misconduct if they know they can sue their employers, if the employer adversely treats them for reporting. Furthermore, anti-retaliation protections deter employer corporations from engaging in illegal activity in the first place because they know employees will feel safe enough to report their illegal activity.

Reassurances and incentives are necessary because, in general, a significant number of employees are reluctant to report employer misconduct.[123] A study by the Ethics Resources Center (ERC), which studied employee reporting from 2000 to 2009, found that about 40% of employees did not report witnessed fraud or misconduct.[124] For overseas whistleblowers, the reluctance to report misconduct might be even greater since they are not entitled to anti-retaliation protection under U.S. law.[125]

2. Extraterritorial Application of Bounty Awards

While the anti-retaliation provision does not extend to protect overseas whistleblowers, it seems that overseas whistleblowers are nevertheless eligible for bounty awards because the SEC accepts tips about violations from individuals outside the United States. For the 2012 fiscal year, the SEC received 324 tips from abroad, constituting 10.8% of the total tips received for the year.[126] In 2013, this number increased to 404, constituting 11.77% of the total tips received for the year.[127] The SEC does not reveal the whistleblowers' identity, so it is unclear if the SEC has made any awards to whistleblowers who reported from outside U.S. territory.[128] However, the SEC has indicated it is prepared to work with the Internal Revenue Service to address the tax implications of providing bounty awards to foreign nationals,[129] which further supports the assumption that the

122. Murdock, *supra* note 2, at 1249.

123. GREENBERG, *supra* note 15, at 8.

124. *See id.* at 42 (discussing the ERC's conclusion that employee failure to report misconduct was a major problem impacting the effectiveness of both internal corporate compliance programs and government law enforcement: "One of the critical challenges facing both E&O [enforcement and compliance] officers and government enforcement officials is convincing employees to step forward when misconduct occurs").

125. *See* Kevin LaCroix, *Dodd–Frank Anti-Retaliation Provisions Don't Protect Overseas Whistleblower*, THE D&O DIARY (Oct. 24, 2013), http://www.dandodiary.com/2013/10/articles/securities-litigation/dodd-frank-anti-retaliation-provisions-dont-protect-overseas-whistleblower/ (speculating that upon learning that Dodd–Frank's anti-retaliation protections do not apply to whistleblower reports from outside the U.S., "the volume of whistleblower reports from outside the U.S. might well decline").

126. 2012 WHISTLEBLOWER REPORT, *supra* note 6, Appendix C.

127. 2013 WHISTLEBLOWER REPORT, *supra* note 7, at 22.

128. Press Release, Sec. Exch. Comm'n, SEC Awards More Than $14 Million to Whistleblower (Oct. 1, 2013), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258 [hereinafter Press Release].

129. Securities Whistleblower Incentives & Protections, 76 Fed. Reg. 34300-01 n.370 (June 13, 2011), *available at* 2011 WL 2293084.

bounty award provision does apply extraterritorially. Applying the bounty award provision extraterritorially and applying the anti-retaliation provision only domestically is inconsistent.[130] Furthermore, a bounty award might not be incentive enough for an overseas whistleblower. After all, the Commission has only granted six whistleblower awards since the Commission began the whistleblower program in 2011.[131]

B. It Is Very Unlikely that the Courts Will Provide a Different Interpretation

So far, no cases have gone to any circuit court on the extraterritorial application of the anti-retaliation provision. Even if the question does go up for appeal, the courts would likely rule that the Dodd–Frank whistleblower anti-retaliation provision only applies to whistleblowers in the United States. The courts would rule this way because they would have to adhere to the presumption against extraterritorial application that *Morrison* reaffirmed.[132]

C. Congress Should Amend Dodd–Frank to Protect Overseas Whistleblowers

Due to the presumption against extraterritoriality, it is unlikely that a court will hold that Dodd–Frank's whistleblower anti-retaliation provision has extraterritorial effect. Thus, Congress must act. As it has done before, Congress should amend the whistleblower provision and afford overseas whistleblowers anti-retaliation protection. When the courts ruled that the language of the ADEA and Title VII failed to protect U.S. citizens working abroad for American-controlled companies, Congress responded by amending those statutes to expand protection to U.S. citizens.

Congress decided that protection against employment discrimination on account of age, race, color, religion, sex, and national origin were important enough to extend to U.S. citizens working outside U.S. territory for American controlled companies. Retaliation for being a whistleblower is equally important and deserves the same extraterritorial reach. True, being an overseas whistleblower is not an immutable characteristic like age or sex, but overseas whistleblowers provide an important benefit in uncovering illegal conduct that could have grave consequences in the United States.

1. Applying the Proposed Dodd–Frank Amendment to the Facts of Asadi *and* Liu

If Congress amended Dodd–Frank the way it amended Title VII and the ADEA, Asadi may have had a claim for relief, whereas Liu would not. Ignoring the fact that Asadi did not fit Dodd–Frank's definition of a whistleblower,[133] he was a U.S. citizen working

130. Mike Kohler, *The Odd Dynamic Persists*, FCPA PROFESSOR (Oct. 22, 2013), http://www.fcpaprofessor.com/the-odd-dynamic-persists.

131. 2013 WHISTLEBLOWER REPORT, *supra* note 7, at 14. Granted, the SEC did award a $14 million bounty to a whistleblower, but other reported amounts are more modest: $50,000, and $25,000 divided among three whistleblowers. Press Release, *supra* note 128.

132. *Supra* Part III.A.

133. *See* Asadi v. G.E. Energy, 720 F.3d 620, 622–23 (5th Cir. 2013) (explaining why the Fifth Circuit granted an appeal of the district court decision in *Asadi*, but not on the extraterritoriality question. The court granted an appeal to answer whether Asadi was a whistleblower as defined by Dodd–Frank. The Fifth Circuit ruled that he was not a whistleblower as defined by Dodd–Frank because he reported the alleged violation internally and not to the SEC. The district court had not found it necessary to rule on whether Asadi was a

abroad for a wholly owned, direct subsidiary of General Electric Company, a company incorporated in New York.[134] Liu on the other hand, was not a U.S. citizen and is immediately disqualified as an overseas whistleblower. In addition, the opinion is not entirely clear whether an American employer controlled Siemens China Ltd., a subsidiary of Siemens A.G. (a German corporation).[135]

V. CONCLUSION

Dodd–Frank's whistleblower provision contains a monetary incentive and retaliation protection for whistleblowers to report companies engaging in security law violations. However, while the bounty award provision seems to apply extraterritorially, the anti-retaliation provision does not. Based on the rulings issued against a U.S. citizen whistleblower and a non-U.S. citizen whistleblower working abroad, who filed claims for anti-retaliation protection, the law is clear enough that the courts will not provide anti-retaliation protection extraterritorially. It is up to Congress to pass an amendment to Dodd–Frank's whistleblower anti-retaliation provision and protect U.S. citizens working abroad for American-controlled companies, as it did to the ADEA and Title VII.

Because financial markets are interconnected and multinational corporations are numerous, it is necessary for the SEC to know about unlawful company activity, even if it occurs abroad. The unlawful activity that occurs abroad may have serious consequences on U.S. markets. Overseas whistleblowers will be more likely to report violations of the securities laws that occur abroad if they have anti-retaliation protection. Extending Dodd–Frank's anti-retaliation provision extraterritorially to cover overseas whistleblowers will likely alert the SEC of more violations, which it can address, in hopes of preventing threats to the financial system.

whistleblower under Dodd–Frank because it dismissed Asadi's claim on the basis that the whistleblower provision did not apply extraterritorially).

134. Asadi v. G.E. Energy (USA), LLC, No. 4:12-345, 2012 WL 2522599, at *7 n.4 (S.D. Tex. June 28, 2012); General Electric Company, *Certificate of Incorporation of General Electric* 2 (2014), https://www.ge.com/sites/default/files/GE_certificate_of_incorporation.pdf.

135. Meng-Lin Liu v. Siemens A.G., 978 F. Supp. 2d 325, 326 (S.D.N.Y. 2013).