Qui Tam and Whistleblower Laws in Latin America

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"[F]raud flourishes where incentives encourage it. If our interest is in saving taxpayer dollars through decreasing fraud, our emphasis should be on ensuring that cheating the Government does not pay."

Legislation to Combat the Growth of Fraud Against the Federal Government: Hearing Before the U.S. Senate Committee on the Judiciary, 99th Cong. (1986) (Statement of Sen. Charles Grassley)

Introduction: Fraud Against the Government

Governments are particularly susceptible to fraud and abuse because of their size, the volume and kinds of programs they fund, and the tendency, at least in the United States—and increasingly in Latin America—to outsource functions, including government program administration.[1] Governments pay private companies all the time, but they are not particularly well-suited to discover and combat fraud that these companies may engage in at the governments' expense. This is the vacuum whistleblowers fill.

Basic economic theory only underscores this reality: rational economic actors will engage in behavior where the gain from that behavior is greater than the cost.[2] This, however, assumes an equal playing field; in fact, the government is not equal to fraudsters in terms of access to information or, in some cases, resources. This is where whistleblowers come in. Fraud against the government is hard to prevent, discover, and address; whistleblowers, through well-designed *qui tam* statutes or bounty programs, shift the balance. They can draw the government's attention to a fraud that would otherwise go unchecked, and statutes that allow for, incentivize, and reward this behavior make fraudulent behavior more costly than it would otherwise be.

The United States' oldest and most successful whistleblower statute, the False Claims Act, confers a private right of action on whistleblowers who bring allegations of fraud on the government to the government's attention. The success of this public-private partnership, however, may well be at least partially a function of features unique to former-Commonwealth countries, including the ability to hire counsel on a contingent basis. A bounty-style program, like the SEC's Dodd-Frank Whistleblower Program, may strike a better balance in civil law countries between incentivizing and protecting whistleblowers and containing their expenses, and may translate better in a civil-law system.

The False Claims Act: Background

The False Claims Act (hereinafter "FCA"), 31 U.S.C. § 3729 *et seq*., authorizes private citizens not only to bring fraud allegations to the government, but also to prosecute the action in

[1] *See* Claire M. Sylvia, *The False Claims Act: Fraud Against the Government* § 1:2 (2d ed. 2010).
[2] *Id.* at § 1:3.

place of the government in certain circumstances. This "concept of using private citizens to recover money due to the Government is deeply imbedded in English and American law."[3] Statutes like the FCA authorize *qui tam* actions,[4] and they have—by American legal standards—near ancient origins: Since about the 14th century, "*[q]ui tam* actions were common in England and were often, but not always, based on a private citizen's statutory right to share in the Government's recovery from wrongdoers."[5]

The United States' *qui tam* history dates back to the First Continental Congress, which enacted several statutes containing *qui tam* provisions.[6] *McCulloch v. Maryland*,[7] a famous early United States Supreme Court case, for example, was a *qui tam* action brought by a private citizen against an officer of the Bank of the United States. The Maryland law under which the informer brought suit entitled him to half of the statutory penalty.[8]

The FCA was enacted under President Abraham Lincoln in 1863.[9, 10] A direct attempt to address procurement fraud that was prevalent during the Civil War, its stated purpose was to "prevent and punish Frauds upon the Government of the United States."[11] According to the early statute, "[s]uch suit may be brought and carried on by any person, as well for himself as for the United States,"[12] and "the person bringing said suit and prosecuting it to final judgment shall be entitled to receive one half the amount of such forfeiture, as well as one half the amount of the

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[3] James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation* § 2-1 (5th ed. Top Gun Publ'g 2007); *see also* Sylvia, *supra*, at § 1:11.

4 "*Qui tam*" is short for *qui tam pro domino rege quam pro si ipso in hac parte sequitur*, "who as well for the king as for himself sues in this matter." Black's Law Dictionary 1282 (8th ed. 2004); *see also Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000) (discussing the phrase). "An action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will also receive." Black's Law Dictionary 1282 (8th ed. 2004).

[5] Helmer, *supra*, at § 2-1.

[6] *Id.*

[7] 17 U.S. (4 Wheat) 316, 317, 321-322 (1819).

[8] *See* Brief of Respondent United States, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 n.21 (1999) (No. 98-1828), 1999 WL 988268 (noting the same).

[9] *Vermont Agency of Natural Res.*, 529 U.S. at 769 "Abraham Lincoln recognized both the danger of government contractor profiteering and the need for private persons to become involved in its prevention when he signed into law the Federal False Claims Act. That act came in response to Civil War era horror stories that sound all too familiar, contractors selling boxes of sawdust in place of boxes of muskets, and reselling horses to the cavalry two and three times." 131 Cong. Rec. S10853 (daily ed. Aug. 1, 1985) (Remarks by Sen. Grassley) (Discussing the False Claims Reform Act of 1985).

[10] Aside from the FCA, there are at least three other *qui tam* statutes on the books, and each were enacted over 100 years ago. *Vermont Agency of Natural Res*,, 529 U.S. at 768 n.1 (2000) (discussing 25 U.S.C. §§ 81, 201; 35 U.S.C. § 292(b)); *see also* Sylvia, *supra*, at § 1:4, n. 4 (describing other federal bounty statutes, including the Clean Air Act, 42 U.S.C.A. § 7413(f), without *qui tam* provisions).

[11] Act of March 2, 1863, ch. 67, 12 Stat. 696.

[12] *Id.* at § 4, 698.

damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award[.]"[13]

The False Claims Act: Process and Procedure

The False Claims Act prohibits presenting a false claim for payment or approval; making a false record or statement material to a false or fraudulent claim; making a false record or statement material to an obligation to pay or transmit money or property to the government, or concealing or avoiding or decreasing an obligation to transmit money or property to the government; or conspiring to do any of the foregoing.[14] The plaintiff in an FCA action must prove that the defendant submitted the false claims to the government with knowledge of their falsity. Knowledge under the FCA means actual knowledge; deliberate ignorance of the truth or falsity; or reckless disregard of the truth or falsity.[15] Defendants found to have violated the FCA are liable for both civil penalties and treble damages. Civil penalties range from $5,500-$11,000 for each false claim; and the government may collect "3 times the amount of damages which [it] sustains because of the action of" the defendant.[16]

Qui tam Provisions and Procedures

The FCA "allows an individual knowing of fraudulent practices to bring suit on behalf of the government and receive a portion of the recovery if the action is successful."[17] "A person" may bring a civil FCA action "for the person and for the United States Government[,]" in the name of the government.[18] The person must file the complaint under seal, allowing the government to investigate the allegations before deciding to intervene or, increasingly, to attempt to settle before unsealing, and must serve "all material evidence and information the person possesses" on the government.[19]

An individual who brings a case under the FCA is called a "relator." Relators may proceed with the action even if the government declines to intervene.[20] If the government intervenes, the relator may receive 15-25% of the amount recovered as an award; if the relator proceeds alone, the relator may receive between 25-30%.[21] The FCA contains provisions to

[13] *Id.* at§ 6, 698.
[14] 31 U.S.C. § 3729(a)(1).
[15] *Id.* at § 3729(b)(1).
[16] *Id.* at § 3729(a)(1).
[17] 131 Cong. Rec. S10853 (daily ed. Aug. 1, 1985) (Remarks by Sen. Grassley) (Discussing the False Claims Reform Act of 1985).
[18] 31 U.S.C. § 3730(b)(1).
[19] *Id.* at § 3730(b)(2).
[20] *Id.* at § 3730(c)(3).
[21] *Id.* at § 3730(d).

ensure that whistleblowers have true "inside information." If "substantially the same allegations or transactions" as alleged by the relator have also been publicly disclosed in a federal hearing, federal report, or by the news media, the case may be dismissed, or the relator may receive no more than 10% of the recovery as an award.[22] If the relator is the "original source" of the information in the complaint—that is, if he or she either voluntarily disclosed the information to the government before the public disclosure, or if he or she has knowledge that is independent of and materially adds to the publicly-disclosed information, and if this information was provided to the government before the relator filed suit—the relator's suit cannot be dismissed.[23] The court may reduce the award of a relator who planned or initiated the violations.[24]

The Benefits of the False Claims Act

The FCA has been incredibly successful in returning taxpayer money to the public fisc. Between January 2009 and September 30, 2013, the U.S. Department of Justice recovered $17 billion from FCA cases, which represents almost half of total recoveries since 1986.[25] Of the $3.8 billion recovered in 2013, $2.9 were recovered in *qui tam* cases.[26] The return on investment of FCA cases is estimated at a 20:1 benefit-to-cost ratio.[27] In other words, for every $1 invested in these cases, the government sees a $20 return.

The FCA is so successful because its design and effect is to incentivize private individuals with knowledge of fraud to come forward. "The main purpose behind the enactment of the False Claims Act of 1863 [is] to encourage individuals to ferret out fraud against the government[.]"[28] Of course, the bounty provided to successful whistleblowers is the main incentive to individuals who may lose their livelihood due to blowing the whistle. But the FCA contains other incentives, including anti-retaliation provisions. Section 3730(h) of the Act prohibits anyone from retaliating against an individual "because of lawful acts done by the [individual] . . . in furtherance of an action under this section or other efforts to stop 1 or more violations" of the FCA.[29]

[22] *Id.* at §§ 3730(d)(1), (e)(4)(A).
[23] *Id.* at § 3730(4).
[24] *Id.* at § 3730(d)(3).
[25] Department of Justice, "Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013" (Dec. 20, 2013), *available at* http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html (last visited May 5, 2014).
[26] *Id.*
[27] Taxpayers Against Fraud, *Return on Investment Report* (Oct. 2013), *available at* http://www.taf.org/TAF-ROI-report-October-2013.pdf (last visited May 5, 2014).
[28] 131 Cong. Rec. S10853 (daily ed. Aug. 1, 1985) (Remarks by Sen. Grassley) (Discussing the False Claims Reform Act of 1985).
[29] 31 U.S.C. § 3730(h)(1).

The FCA is also successful, according to some economists, because it addresses the government's lack of information and "increase[s] the likelihood that those who violate the law would be caught and improve deterrence by reducing the potential gain from violating the law."[30] And, importantly, the FCA also maintains safeguards to discourage frivolous suits.[31]

One period in the FCA's history emphasizes the importance of its current balance between incentivizing relators and preventing them from bringing unmeritorious claims. In 1943, "defense contractors became concerned that [the FCA] may be used more frequently, and persuaded the Attorney General to push through Congress a *qui tam* revision that vested almost all discretion in the Justice Department."[32] Thus, although the FCA was originally designed to incentivize whistleblowers, it was once amended to essentially counteract these incentives with incredibly burdensome procedural requirements.

Under the 1943 amendments, the government could "take over the case and then sit on it or seek to have it dismissed."[33] A court could dismiss a case that was based on evidence or information "somewhere in the hands of some Government official," even if the government did not even know that it possessed the information.[34] Finally, under that version of the law, whistleblowers had no guarantee that they could share in the damages recovered (and could only share up to 10% in intervened actions, or up to 25% in unintervened cases), and had few legal protections against retaliation.[35]

The effect was substantial: "the Amendments eliminated the *qui tam* suit as an effective weapon in combating fraud against the Government."[36] Defendants were almost always able to

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[30] Sylvia, *supra,* at § 1:12. The balance, however, is important: where the incentives are too low, whistleblowers may not take the risk; where it is too high, there are incentives for abuse. *Id.*

[31] For example: the prevailing defendant is awarded costs if the suit is brought by the United States, 31 U.S.C. § 3730(g) (*citing* 28 U.S.C. § 2412(d)), or where brought by a private party and found to be frivolous, clearly vexatious, or brought primarily for purposes of harassment, 31 U.S.C. § 3730(d)(4). The government has to consent to dismissal, *id.* at § 3730(b), or settlement, so the defendant and relator cannot collude; and, as discussed *supra,* a relator's award may be reduced if he/she was culpable, and he or she may be ineligible if convicted of an offense related to the fraud, *id.* at § 3730(d)(3). *See Sylvia, supra,* at § 1:14.

[32] *False Claims Amendments Act of 1986*, 132 Cong. Rec. H6474-02, 1986 WL 785922 (1986) (Remarks by Rep. Glickman) (noting "the one legitimate objection raised at the time" was that the law could encourage "parasitic" *qui tam* suits.) Relators were filing suits that merely restated allegations in public documents such as, for example, criminal indictments. *See* S. Hrg. No. 99-976, 99th Cong., 2d Sess. 44 (1986) (Statement of Richard K. Willard, AAG, Civil Division). The then-Attorney General attempted to challenge the *qui tam* provisions in court, but lost. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 539 (1943).

[33] 132 Cong. Rec. H6474-02, 1986 WL 785922 (1986) (Remarks by Rep. Glickman). Where, however, the government declined to intervene, the relator could proceed in the name of the United States.

[34] *Id.*

[35] *Id.*; Helmer, *supra,* at § 2-5.

[36] Helmer, *supra,* at § 2-5.

point to some iota of government knowledge within the meaning of the jurisdictional bar, and legal challenges were decided in their favor. Indeed, courts even held that the government's knowledge was an absolute jurisdictional bar *even when the government's knowledge came from information the relator provided before filing suit.*[37]

By the 1980s, however, fraud on the government was again flourishing, and the government was hearing about the allegations—like the government being charged $660 apiece for ashtrays—in the media.[38] As a result, in 1986 the FCA was again amended to remove some of the previous amendment's constraints on *qui tam* actions, as well to set out the burden of proof, lower the knowledge requirement, modify the statute of limitations, and increase damages and penalties.[39] Significantly, these amendments also adopted provisions aimed at addressing the U.S. Department of Justice's concerns related to *qui tam* suits, including a 60-day seal period to allow the government to investigate before the allegations are made public.[40]

These amendments reinvigorated the FCA's *qui tam* provisions and underscore the importance of incentivizing and enabling whistleblowers to come forward with allegations of fraud. Indeed, since these amendments were enacted, the government has recovered more than $30 billion in FCA judgments and settlements.[41]

SEC Whistleblower Program

Beyond the FCA, the United States has implemented other whistleblower protection and enabling statutes. One of the newest, and perhaps most promising, is the Securities and Exchange Commission's (hereinafter "SEC") Dodd-Frank Whistleblower Program. Enacted in 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act amended the Securities Exchange Act of 1934 to establish, among other things, a whistleblower program within the SEC.[42] Under this program, individuals who voluntarily provide original information about U.S. securities law violations to the SEC are eligible to receive an award when that information leads to a successful

[37] *Id.* (*citing*, *inter alia*, *United States ex rel. Wisconsin Department of Health & Social Services v. Dean*, 729 F.2d 1100, 1103 (7th Cir. 1984)).
[38] Helmer, *supra*, at § 2-6 (*citing* Fred Hiatt, *Navy Pays $660 Apiece for Two Ashtrays*, N.Y. Times, May 29, 1985, A-14)
[39] *False Claims Amendments Act of 1986*, S. Rep. No. 99-345 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266.
[40] *Id.* at 1986 U.S.C.C.A.N. 5266, 5281.
[41] Taxpayers Against Fraud, *The 1986 False Claims Act Amendments*, *available at* http://www.taf.org/public/drupal/TAF-fca-25anniversary_12(1).pdf (last visited May 8, 2014).
[42] Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (2010) (adding Section 21F to the Securities Exchange Act of 1934).

SEC action resulting in monetary sanctions of $1,000,000 or more.[43] Dodd-Frank also protects whistleblowers from retaliation,[44] and allows them to file their complaints anonymously.[45]

Importantly, Dodd-Frank does not include a *qui tam* provision; instead, whistleblowers submit their information to the SEC on a specific form, and the SEC reviews and investigates the information contained therein.[46] If, in its discretion, the information supports an enforcement action, and if the Commission takes such an enforcement action and recovers $1 million or more, the whistleblower is eligible for a 10-30% share of the recovery as an award.[47] While a whistleblower may appeal the award determination, he or she does not have the right to litigate the case on behalf of the SEC.[48]

The differences between a bounty-style program like the SEC's and a *qui tam* statute like the FCA are significant. Under a *qui tam* statute, for example, the relator has a place at the table, and can litigate the case should the government decline to do so; under the SEC's program, the SEC is responsible for investigating and potentially litigating the claims, and whistleblowers have little influence and almost no control over whether and how that happens. On the other hand, FCA cases are expensive to litigate and resource intensive at every stage; SEC whistleblower cases may require resources to investigate and bring to the SEC, but are relatively inexpensive thereafter. Finally, *qui tam* cases are generally filed in the name of the individual bringing the action as well as in the name of the United States; anonymity beyond the period during which the case is under seal is never guaranteed and usually not possible. Under the SEC Whistleblower Program, however, whistleblowers may file anonymously so long as they have retained counsel to do so, and while they must disclose their identity if and when the Commission determines they are eligible for an award, the Commission will not disclose the whistleblower's identity publicly.[49]

Whistleblower-like Laws in Latin America

There is increasing momentum both internationally and regionally towards protecting whistleblowers from retaliation, but these protections are almost always limited to cases in which the whistleblower reports instances of government corruption. In 1996, for example, the Organization of American States (hereinafter "OAS") adopted the Inter-American Convention

[43] 17 C.F.R. § 240.21F-1 *et seq*.
[44] *Id.* at § 240.21F-2.
[45] *Id.* at § 240.21F-7(b).
[46] 17 C.F.R. § 240.21F-9; Form TCR *available at* http://www.sec.gov/about/forms/formtcr.pdf (last visited May 5, 2014).
[47] *Id.* at § 240.21F-10.
[48] *Id.* at § 240.21F-13.
[49] *See* U.S. Securities and Exchange Commission, *2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 2, *available at* http://www.sec.gov/whistleblower/reportspubs/annual-reports/annual-report-2013.pdf (last visited May 8, 2014).

Against Corruption (IACAC), which requires signatories to agree to "create, maintain, and strengthen . . . [s]ystems for protecting public servants and private citizens who, in good faith, report acts of corruption[.]"[50] The IACAC, however, only defines "corruption" in terms of corrupt government officials or private parties in connection with public corruption; it does not touch upon private parties who defraud the government without the government's knowledge.[51] Similarly, the UN Convention Against Corruption requires parties to "take measures . . . to prevent corruption involving the private sector," and requires that parties "consider" adopting whistleblower protections.[52]

In Argentina, for example, bribery and public corruption are criminalized, but private corruption is not specifically regulated.[53] Witnesses and reporting persons are not explicitly protected under a statute; they are instead protected by norms.[54] Peru, however, prohibits bribery in the public *and private* sector, and witnesses and victims are protected by, for example, "provision of a change of address, the withholding of identity and economic measures to enable a witness to change his or her residence or place of work."[55] Government employees and other persons are also protected for reporting "illegal acts in any public entity[,]" but employment protection is limited to government employees.[56]

The OAS also has a model statute implementing whistleblower protection, which is modeled in part on the FCA.[57] Called "The Citizens Enforcement Act Model Law," this model

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[50] Organization of American States, Inter-American Convention Against Corruption Art. III (Mar. 29, 1996), *available at* http://www.oas.org/juridico/english/treaties/b-58.html (last visited May 8, 2014).
[51] *Id.* at Article VI.
[52] UN General Assembly, United Nations Convention Against Corruption Arts. 12, 33, Doc. A/58/422 (Oct. 31, 2003), *available at* http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (last visited May 5, 2014). *See also id.* at Art. 21 (on establishing criminal offenses for "Bribery in the private sector"). All but two continental Central and South American countries are state parties. (Suriname and Belize.) United Nations Office on Drugs and Crime, United Nations Convention Against Corruption Signature and Ratification Status as of 2 April 2014, *available at* https://www.unodc.org/unodc/en/treaties/CAC/signatories.html (last visited May 8, 2014).
[53] UN Convention Against Corruption Implementation Review Group, Executive Summary: Argentina § 2.1 (Dec. 10, 2013), *available at* https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1388719Ae.pdf (last visited May 5, 2014).
[54] *Id.*
[55] UN Convention Against Corruption Implementation Review Group, Executive Summary: Peru § 2.1 (Dec. 30, 2013), https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/ExecutiveSummaries/V1383902e.pdf (last visited May 5, 2014).
[56] *Id.*
[57] S*ee* Robert G. Vaughn, Thomas Devine, and Keith Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 Geo. Wash. Int'l L. Rev. 857 (2003).

statute "approves the use of financial incentives" to encourage disclosures.[58] "The purpose of the Model Law is to protect freedom of expression for individuals who bear witness against betrayal of the public trust by challenging corruption."[59] It also protects whistleblowers from retaliation.[60]

Importantly, Part 2, Article 28 of the model law contains a "Citizens Enforcement Act." This allows any party to "file an action to challenge corruption exposed by a protected disclosure under this Law. . . the court may order injunctive relief, actual and punitive damages, and treble damages for repayment of the national Treasury in an *action against fraud in a government contract*, in which case the party filing the action shall receive 25% of the recovery." *Id.* The model defines "corruption," however, by reference to the Inter-American Convention Against Corruption, *supra.*[61] While "fraud in a government contract" is mentioned in the Citizens Enforcement Act,[62] this is not actually conduct prohibited by the IACAC or the Model Law.[63, 64]

Roadblocks to Successful *Qui Tam* Statutes in Latin America

The common law tradition has, in part, enabled *qui tam* statutes to succeed: as set out above, *qui tam* actions originated around the 14th century in England, and go back to the early days of the American colonies. Even in countries that share a common law tradition, however, new *qui tam* statutes have not been enacted and have, in many cases, been repealed.[65] Enacting a new *qui tam* statute at all, let alone in a country with a civil law tradition would, therefore, be highly unusual. In any event, however, other factors have contributed to the success of the FCA's

[58] *Id.* at 872; *see also* OAS, *Model Law Protecting Freedom of Expression Against Corruption*, *available at* http://www.oas.org/juridico/english/model_law_whistle.htm (last visited May 8, 2014).
[59] *Id.*
[60] The model law protects whistleblowers from discrimination; payment of compensation "necessary to neutralize all direct and indirect consequences of discrimination[;]" relocation or protection against identification; and attorneys fees and costs. *Id.*
[61] *Id.* at Part One, Chapter I, Art. 2(a).
[62] *Id.* at Part Two, Art. 28.
[63] Note: Art. VI Sec. 1(d) of the IACAC does prohibit "fraudulent use or concealment of property derived from" acts of corruption. Because "corruption" requires a government official to solicit or accept a bribe, a private party to offer or grant a bribe or benefit, or a government official to act or omit to do a duty for the purpose of illegally obtaining benefits for himself or a third party, this would only potentially encompass some "fraud in a government contract."
[64] *See also* General Secretariat of the Organization of American States, Executive Order no.05-8 (Apr. 14, 2005), *available at* http://www.oas.org/legal/english/gensec/ExecutiveOrder05-08.pdf (last visited May 12, 2014) (adopting Rule 101.11 to protect whistleblowers who report to OAS); Transparency International, *International Principles for Whistleblower Legislation* (Nov. 5, 2013), *available at* http://www.transparency.org/whatwedo/pub/international_principles_for_whistleblower_legislation (last visited May 8, 2014).
[65] *See supra*, *Vermont Agency of Natural Res.*, 529 U.S. at 768 n.1; Sylvia, *supra*, at § 2:3 (noting that Great Britain repealed all *qui tam* laws in 1951).

qui tam provisions, and the absence of these factors may weigh against implementing *qui tam* statutes in Latin American countries.

The balance of government and private resources, for example, affects the success of the FCA's *qui tam* provision. *Qui tam* statutes that enable relators to independently investigate and prosecute civil fraud cases are one way to address lack of fraud enforcement on the part of resource-strapped governments, but this only works to the extent that the whistleblower is able to marshal enough resources to assist the government and litigate the case on her own. Whistleblower resources are especially important as compared to defendant resources: where "perpetrators of large-scale frauds [are] able to devote significant resources to a single case brought against them," the government and private whistleblowers "simply may be outmatched."[66]

One way the playing field between the whistleblower and the defendant is leveled under the FCA is through cost- and fee-shifting, which are common both in the United States and in Latin America.[67] Most FCA relators, however, are unable to initially finance the investigation and litigation of their case, and instead enter into contingency fee agreements with their attorneys so that they do not have to absorb the costs of the litigation up front. Contingency fee agreements, however, have traditionally been prohibited in most civil law jurisdictions so as to limit the parties to a lawsuit and ensure that only those affected by the conduct at issue initiate litigation.[68]

The risks whistleblowers face in coming forward are also an important consideration. Central America, for instance, has higher rates of organized crime and violence than the U.S., and whistleblowers have suffered as a result.[69] Any whistleblower program—*qui tam* or otherwise—will fail if it cannot anticipate and protect whistleblowers from these risks.

Focus: Brazil

Brazil has been at the center of several recent public corruption and bribery stories, including those concerning Alstom,[70] Wal-Mart,[71] and Siemens.[72] Recently, however, Brazil

[66] Sylvia, *supra*, at § 1:5.
[67] *See* John Henry Merryman, David S. Clark, and John O. Haley, *The Civil Law Tradition: Europe, Latin America, and East Asia* 1026 (Michie 2000).
[68] *Id.*
[69] *See* Eleanor Kennedy, *Blowing the Whistle in Central America: Not As Easy As It Sounds*, Transparency International (Jan. 12, 2012), *available at* http://blog.transparency.org/2012/01/12/blowing-the-whistle-in-central-america-not-as-easy-as-it-sounds/ (last visited May 5, 2014) (providing an example of a whistleblower who reported violations of Guatemala's anti-nepotism law and was kidnapped at gunpoint as a result.
[70] *See* David Crawford, Antonio Regalado, and David Gauthier-Villars, *Bribe Probe Exposes Alstom Network in Brazil*, The Wall Street Journal, June 19, 2008, *available at* http://online.wsj.com/news/articles/SB121382391422986053 (last visited May 5, 2014) (including allegations that

enacted the new Law to Combat Corruption, Law 12846/13 of August 1, 2013, which became effective on January 28, 2014.[73] The law is not a *qui tam* or FCA-style statute, but instead is more akin to the U.S. FCPA[74] and the UK Bribery Act: it prohibits companies from promising, offering, or giving, directly or indirectly, any undue advantage to a public servant or a third person related to him, or funding third parties to do the same.[75] The law also prohibits committing fraud in connection with submitting a public bid (*i.e.*, bid rigging). Accordingly, it targets bribery and corruption in government contracting, but it does not explicitly prohibit false claims, and does not contain provisions that would incentivize or allow whistleblowers to report and prosecute violations, share in an award, or that protects them from retaliation.[76]

The extent to which the law will be interpreted to prohibit false claims for payment of government funds is significant in light of the high volume of government contracts with private industry in Brazil.[77] Upcoming sporting events alone account for a huge number of contracts as

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the French company employed a middleman to funnel bribes to Brazilian government officials in exchange for public contracts),

[71] *See* Stephanie Clifford and David Barstow, *Wal-Mart Inquiry Reflects Alarm on Corruption*, N.Y. Times, Nov. 15, 2012, *available at* http://www.nytimes.com/2012/11/16/business/wal-mart-expands-foreign-bribery-investigation.html?_r=0 (last visited May 8, 2014).

[72] *See* J.P., *Brazil's New Anti-Corruption Law: Hard to Read*, The Economist Blog (Jan. 29, 2014), *available at* http://www.economist.com/blogs/schumpeter/2014/01/brazil-s-new-anti-corruption-law (last visited May 12, 2014) (*citing* Andreas Knobloch, *Siemens Bribery Case Spreads to Brazilian Politics*, Deutsche Welle, Mar. 12, 2013, *available at* http://www.dw.de/siemens-bribery-case-spreads-to-brazilian-politics/a-17268276 (last visited May 5, 2014)).

[73] Lei No. 12.846, de 1º de agosto de 2013.

[74] The FCPA targets issuers on U.S. stock exchanges who make unlawful payments to foreign officials to gain or retain business; improperly record these transactions on its books and records; and/or fail to devise and maintain an adequate internal accounting. 15 U.S.C. §§ 78dd-1 *et seq.*, § 78m. The FCPA has been used to great success in the United States to ferret out fraud in Latin America. In 2013, for example, the US Securities and Exchange Commission and the Stryker Corporation settled charges that Stryker's subsidiaries in Argentina and Mexico, among others, paid bribes totaling more than $2 million (USD) to win or keep lucrative contracts with governments. The bribes were paid by local Stryker subsidiaries, through third-party agents, to government officials. An October 2013 order requires Stryker to disgorge $7.5 million in profits the company realized as a result of the corrupt payments to foreign government officials, as well as $2.3 in pre-judgment interest and $3.5 in a civil monetary penalty. *In the Matter of Stryker Corp.*, Exchange Act Release No. 3-15587 (Oct. 24, 2013); Order *available at* http://www.sec.gov/litigation/admin/2013/34-70751.pdf (last visited May 12, 2014).

[75] *See also* J.P., *Brazil's New Anti-Corruption Law: Hard to Read*, *supra.*

[76] The law does, however, consider whether entities or persons that have violated the act have whistleblowing or other systems in place in determining the amount of sanctions. Law 12846/13, Chapter III, Article 7(VIII).

[77] The U.S. FCA explicitly prohibits false claims, and has been applied to prohibit overcharging the government, mischarging the government, and providing substandard work or products. In fact, a case in which "a private company overcharges under a government contract" is the "archetypal *qui tam* False Claims action." *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006) (*citing U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261 (9th Cir. 1996)); *see also, e.g.*, Department of Justice, "Lockheed Martin Corporation Reaches $15.85 Million Settlement with U.S. to Resolve False Claims Act Allegations," *available at* http://www.justice.gov/opa/pr/2012/March/12-civ-367.html (last visited May 12, 2014) (announcing the settlement

the government relies on private companies to shore up infrastructure, build stadiums, and even provide sports equipment, for example, for the World Cup and 2016 Summer Olympics. More significant is Law 12846/13's failure to incentivize, protect, and reward informants who come forward to the government with information about violations of the statute. In the United States, *qui tam* relators have filed False Claims Act complaints alleging that government contractors defrauded the government in connection with government contracts by, for instance, knowingly failing to disclose commercial pricing policies and practices, and knowingly failing to abide by contract terms.[78] These kinds of complaints, however, would not be possible under Brazil's Law 12846/13.

As it stands, a whistleblower with knowledge of corruption in violation of Law 12846/13 may well choose to file a complaint with the SEC instead of coming forward in Brazil without any protection or anonymity. As set out above, assuming that the conduct violates the U.S. Foreign Corrupt Practices Act[79] or other U.S. securities laws, the whistleblower would be entitled to an award of up to 30% of the SEC's recovery in the matter. Further, while retaliation protection does not apply to whistleblowers outside of the U.S.,[80] the SEC allows complaints to be filed anonymously, and protects the identities of its whistleblowers once the award is announced. In other words, the Brazilian whistleblower could maintain his anonymity in Brazil while reaping a bounty for reporting fraud in the U.S., even though that same fraud occurred in and also violates the laws of Brazil. This leads to a rather undesirable situation in that it does not make Brazil's taxpayers nor the Brazilian government whole.

Conclusion

The United States' False Claims Act has been a great success in terms of ferreting out and discouraging fraud on the government and returning funds to the public fisc. The incentives

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of allegations involving "mischarg[ing] perishable tools used on numerous government contracts" by, among other things, inflating the costs of the tools), and *United States v. Bornstein*, 423 U.S. 303 (1976) (holding that in FCA cases where the government received a product of lesser quality than the one it contracted for the measure of damages is the difference between the market value of the product the government received and the market value of the product it contracted and paid for).

[78] *See, e.g.*, Department of Justice, "Oracle Agrees to Pay U.S. $199.5 Million to Resolve False Claims Act Lawsuit" (Oct. 6, 2012) *available at* http://www.justice.gov/opa/pr/2011/October/11-civ-1329.html (announcing a $199.5 million settlement in *United States ex rel. Frascella v. Oracle Corp.*) (last visited May 5, 2014).

[79] *See supra*, at n.74. In 2012, for example, prior to the implementation of the SEC's Whistleblower Program, the SEC settled allegations that Biomet's subsidiaries and agents violated the FCPA by bribing public doctors in Brazil to induce them to purchase Biomet devices and falsely labeling these as legitimate "commissions" in its books and records. U.S. Securities and Exchange Commission, "SEC Charges Medical Device Company Biomet with Foreign Bribery," *available at* https://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487958#.U2v48vldW3g (last visited May 8, 2014). If this same conduct were to occur today, it may violate both the U.S. Securities laws and Law 12846/13.

[80] *Liu v. Siemens AG*, No. 13-cv-317, 2013 WL 5692504 (S.D.N.Y. Oct. 21, 2013).

built into the statute are strong: the government is provided with high-quality, usually inside information, and is incentivized to investigate the allegations; would-be defendants are incentivized to comply with the law when dealing with the government, and to avoid retaliating against would-be whistleblowers. Most important, individuals with inside information about the fraud are incentivized to come forward. They are protected from retaliation, they may proceed to prosecute the action even if the government declines to intervene in the case, and they receive a portion of the government's recovery in the case. The newer SEC Whistleblower Program is similarly promising, and its model may be better suited to countries without a history of *qui tam* or contingency fee statutes.

Countries in Latin America have begun penalizing corruption and, in some cases, protecting whistleblowers who come forward with evidence of it. The next step is to incentivize these whistleblowers to come forward with information about fraud on the government. One way to do so would be to adopt *qui tam* statutes akin to the False Claims Act, which would maximize enforcement and deterrence potential by getting whistleblowers involved in prosecuting the actions and shifting fees when they are successful in doing so. Another option is bounty-style programs like the SEC's Whistleblower Program, which may be more effective in incentivizing the reporting of fraud, protecting whistleblowers, and combating corruption in light of Latin America's civil law tradition and the risks to those who speak out publicly against corruption. Whichever may be the better fit in each country, legislators ought to be encouraged to consider these options when passing anti-fraud and anti-corruption statutes. Indeed, only with incentives and protections for whistleblowers can anti-fraud programs ensure that fraud will be reported, the state will be protected, and perpetrators punished.