

**MORE OPPORTUNITIES, MORE CONCERNS: A LOOK AT THE  
REACTIONARY NATURE OF WHISTLEBLOWER PROTECTIONS IN A  
GROWING GLOBAL ECONOMY**

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**I. INTRODUCTION**

I am incredibly nervous that we will implode in a wave of accounting scandals . . . . My 8 years of Enron work history will be worth nothing on my resume, the business world will consider the past successes as nothing but an elaborate accounting hoax.

Sherron Watkins, Former Vice President of Corporate Development for Enron.<sup>1</sup>

In the 1990s, few companies were a better representation of the “New Economy” in the United States than Enron.<sup>2</sup> Enron’s stock value was rising to new heights, but that valuation was driven by artificially increased profits that resulted from market-to-market accounting in which they would forge unmaterialized future profits from some trading contracts into their current income statements.<sup>3</sup> They were committing fraud. By 2001, Enron had filed for Chapter 11 bankruptcy.<sup>4</sup> Multiple executives faced various criminal charges for their actions.<sup>5</sup> At the end of the day, no one individual came forward to release information to the public about Enron’s fraud.<sup>6</sup> The quote above was not released to the media until five months after it was authored.<sup>7</sup> Even when it was penned, it was not addressed to the public, telling them of Enron’s illegal activities, but rather in a letter of warning to Ken Lay, the CEO of Enron.<sup>8</sup> The whole US economy was affected by Enron’s foul play, especially Enron’s competitors in the energy field.<sup>9</sup>

If a whistleblower from inside Enron had come forward with information, the negative effects the fraud had on the economy could have been mitigated.<sup>10</sup> A whistleblower’s purpose “is to expose secret and wrongful acts by those in power in order to enable reform” from within the organization they are exposing.<sup>11</sup> The Enron scandal ended Enron, but led to the US analyzing its whistleblower protections so a scandal of this scale would not happen again.<sup>12</sup> Over the course of the last 20 years there have been large amounts of changes in whistleblower protections across the world, but as of right now, there is no clear uniformity among nations.

This Note will compare and analyze past and present whistleblower protections in the US, Germany, and Australia. It will thoroughly examine how reactions to major corporate criminal acts affected each country. Part II will examine the past and present whistleblower protections for workers in the US while

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1. Frank Pellegrini, *Person of the Week: ‘Enron Whistleblower’ Sherron Watkins*, TIME (Jan. 18, 2002), <http://content.time.com/time/nation/article/0,8599,194927,00.html> (emphasis added).

2. Peter Bondarenko, *Enron scandal*, ENCYCLOPEDIA BRITANNICA (Dec. 2, 2001), <https://www.britannica.com/event/Enron-scandal>.

3. *Id.*

4. *Id.*

5. *Id.*

6. Pellegrini, *supra* note 1.

7. *Id.*

8. *Id.*

9. James Flanigan, *Enron is Proving Costly for the Economy*, L.A. TIMES (Jan. 20, 2002), <https://www.latimes.com/archives/la-xpm-2002-jan-20-mn-23790-story.html>.

10. See Richard Moberly, *Sarbanes-Oxley’s Whistleblower Provisions: Ten Years Later*, 64 S.C. L. REV. 1, 3 (2012).

11. Glenn Greenwald, *Edward Snowden’s worst fear has not been realised – thankfully*, THE GUARDIAN (Jun. 14, 2013), [https://www.theguardian.com/commentisfree/2013/jun/14/edward-snowden-worst-fear-not-realised\\_](https://www.theguardian.com/commentisfree/2013/jun/14/edward-snowden-worst-fear-not-realised_)

12. Bondarenko, *supra* note 2.

also exploring how and why those changes occurred. Part III will focus on German whistleblower protections and how the anti-anonymity attitudes of a post-World War II Germany led to the signing of the new European Union Bill, ushering in a new wave of whistleblower protections in Europe. Part IV will focus on Australian whistleblower protections and how its recent change in whistleblower protections in the private sector goes directly against their fears of espionage in the public sector. Part V will compare the current states of these three countries and address how there should be an international standard for private sector whistleblower protections that adapts to compliance issues found across the world.

## II. WHISTLEBLOWER PROTECTION LAWS IN THE UNITED STATES

Prior to the more formalized whistleblower protection laws in the US, there was the Freedom of Information Act of 1966 (FOIA).<sup>13</sup> FOIA led to an increase in government transparency because it allowed the documents being compiled by US agencies to be more open and accessible to the public.<sup>14</sup> From its enactment, FOIA has been viewed as a weak and ineffective law and has provided no real transparency because of slow turnaround time in providing requested documents and significant document redactions causing a lack of real transparency.<sup>15</sup> Another weakness is that FOIA is restricted to public agencies exclusively; this meant news media companies often still had to fight for the release of certain documents to the public.<sup>16</sup> The law pertaining to these releases has been updated throughout the years, but these changes have mostly been reactionary. For example, after Watergate, Congress updated FOIA by applying sanctions to any agency that wrongfully withholds documents after the documents have been requested.<sup>17</sup>

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13. Andrew McGill & Christopher I. Haugh, *Can the Freedom of Information Act Be Fixed? President Obama signs into law a much-needed update. But will it change anything?*, THE ATLANTIC (Jun. 30, 2016), <https://www.theatlantic.com/politics/archive/2016/06/foia-gets-a-makeover/489137/>.

14. *Id.*

15. David McCraw, *How the Times Uses FOIA to Obtain Information the Public Has a Right to Know*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/02/reader-center/foia-freedom-of-information-public-records.html> (explaining the redactions themselves are required by the FOIA, but rather other statutes that limit the amount and type of information that can be released to the public).

16. *Id.*

17. McGill & Haugh, *supra* note 13.

## **A. History of Whistleblower Protections in the United States**

### **1. Public Sector Whistleblower Protections**

Updates to FOIA after the Watergate incident first include the Ethics in Government Act of 1978 (EIGA).<sup>18</sup> Secondly, they include the Civil Service Reform Act of 1978.<sup>19</sup> The EIGA works like FOIA in that its ultimate goal is government transparency; instead of releasing government documents, however, it requires the release of financial and employment history of public officials and their immediate families.<sup>20</sup> The Civil Service Reform Act provides whistleblower protections for all federal employees by creating the U.S. Office of Special Counsel (OSC) which deals with reporting issues.<sup>21</sup> The EIGA and the Civil Service Reform Act are still used today.

The OSC continued to grow in the late 1980s, and public sector whistleblower protections along with it with the passing of the Whistleblower Protections Act of 1989 (WPA).<sup>22</sup> Prior to the WPA, there was much resistance to whistleblowing at the federal level: common objections included the undermining of agency managers, the possible displacement of jobs for larger agencies, and the possibility of abuse when whistleblowers use their reporting as bargaining chips when negotiating with bosses and supervisors.<sup>23</sup> The WPA served to expand protections for employees from discrimination and retaliation, giving them the right to report “any violation . . . of any law, rule, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.”<sup>24</sup> This was a vast change from the specific reporting power given to employees through agency specific provisions.<sup>25</sup>

The new millennium saw two new updates to public sector whistleblower protections: The No-Fear Act of 2002, and the Whistleblower Protection Enhancement Act of 2012 (WPEA). No-Fear was created after the Environmental

18. Delaney Marsco, *At 40 Years Old, The Ethics in Government Act is in Need of a Tune-up*, CAMPAIGN LEGAL CTR. (Oct. 26, 2018), <https://campaignlegal.org/update/40-years-old-ethics-government-act-need-tune>.

19. Charles S. Clarke, *After 40 Years, A Look Back at the Unlikely Passage of Civil Service Reform The Carter Era law tackled problems that sound very familiar under Trump*, GOV'T EXEC. (Jul. 3, 2018), <https://www.govexec.com/management/2018/07/after-40-years-look-back-unlikely-passage-civil-service-reform/149458/>.

20. Marsco, *supra* note 18.

21. Clarke, *supra* note 19.

22. *See generally*, Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978).

23. Bruce D. Fisher, *The Whistleblower Protection Act of 1989: A False Hope For Whistleblowers*, 43 RUTGERS L. REV. 355, 361-62 (1991).

24. 5 U.S.C. § 2302(b)(8)(B)(i)-(ii).

25. *See, e.g.*, 15 U.S.C. § 2622(a) (giving employees protection from retaliation for reporting violations specifically regarding industrial chemicals); 15 U.S.C. § 2651 (giving employees protection from retaliation for reporting uses of asbestos in public or private non-profit school systems).

Protection Agency (EPA) was found guilty of violating Dr. Marsha Coleman-Adebayo's civil rights.<sup>26</sup> In 1996, Coleman-Adebayo complained about a U.S. company's use of vanadium pentoxide, a deadly chemical, in South Africa, but the EPA did not respond to her reporting.<sup>27</sup> Coleman-Adebayo then reported the issue to multiple non-governmental interest groups.<sup>28</sup> After this, Coleman-Adebayo became subject to worsened evaluations and racist remarks.<sup>29</sup> Suffering from health conditions, Coleman-Adebayo was forced to work at home and, when she did not return, she had her pay revoked.<sup>30</sup> In reaction, Congress and President Bush signed the No-Fear Act,<sup>31</sup> which was designed to stop employers from abusing their "authority to take or fail to take, or threaten to take or fail to take, a personnel action against an employee or applicant because of disclosure of information by that individual that is reasonably believed to be evidence of violations of law."<sup>32</sup> The WPEA was not created in response to a scandal, but rather to increase enforcement of the WPA.<sup>33</sup>

## 2. Private Sector Whistleblower Protections

Historically, whistleblower protections for private sector employees were made up of a "patchwork of more than a dozen federal laws."<sup>34</sup> Two examples of these laws include the National Environmental Policy Act, which helped create the EPA,<sup>35</sup> and the Occupational Safety and Health Act, which created the Occupational Safety and Health Administration (OSHA).<sup>36</sup> Neither of these acts were designed

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26. Darryl Fears, *Coming Soon: A Tale of Whistle-Blowing at the EPA Film to Portray Long Legal Battle With the Agency*, WASH. POST, Jul. 16, 2006, at A15.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Dr. Marsha Coleman-Adebayo Biography*, THE NO FEAR INST., <https://thenofearinstitute.wordpress.com/about/dr-marsha-coleman-adebayo-biography/> (last visited Oct. 2, 2020).

32. *No Fear Act*, U.S. BUREAU OF LAB. STAT., [https://www.bls.gov/bls/no\\_fear\\_act.htm](https://www.bls.gov/bls/no_fear_act.htm) (last modified May 12, 2010).

33. *Whistleblower Protection Enhancement Act*, U.S. DEP'T JUST., <https://www.justice.gov/pardon/whistleblower-protection-enhancement-act#:~:text=> (last updated Mar. 9, 2018).

34. *What Happens To Whistleblowers?*, CBS NEWS (Feb. 5, 2002, 5:18 PM), <https://www.cbsnews.com/news/what-happens-to-whistleblowers/>.

35. Alexis C. Madrigal, *Gallery: Why Nixon Created the EPA*, THE ATLANTIC (Dec. 2, 2010), <https://www.theatlantic.com/technology/archive/2010/12/gallery-why-nixon-created-the-epa/67351/>.

36. See generally Lloyd Meeds, *A Legislative History of OSHA*, 9 GONZ. L. REV. 327 (1974).

with the sole intent of providing whistleblowers with anti-retaliation rights. Rather, those rights were byproducts of their goals of promoting public health and safety.<sup>37</sup>

The National Environmental Policy Act was penned in the aftermath of the 1969 Santa Barbara oil spill, which caused 21,000 gallons of crude oil to spill into the ocean just off the coast of Santa Barbara.<sup>38</sup> The spill was caused by the use of a drilling hole 61 feet shorter than the federal minimum requirement at the time; while Union Oil's use of the drilling hole should have been corrected prior to the spill, the company had acquired a waiver from the U.S. Geological Survey.<sup>39</sup> The National Environmental Protection Act was soon followed by other environmentally focused acts, including the Federal Water Pollution Control Act and the Safe Drinking Water Act, both of which provided private and public sector employees remedies for wrongful discharge related to reporting violations to the EPA.<sup>40</sup> This meant that employees could and were now required by law to report violations relating to these two acts without the fear of facing retaliation from their employers. While some employers still fired employees in retaliation, those employees could now sue in civil court for their job, backpay, damages, or any combination of the three.<sup>41</sup>

OSHA was created to stop the millions of injuries that would occur through American jobs annually, but more importantly, it was created as a way for the government to save billions of dollars each year.<sup>42</sup> OSHA soon gained further power as the need for stronger federal health and safety standards became more apparent in the late 1960s and early 1970s, when “[i]t was estimated that a new and

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37. See generally Daniel P. Westman, *The Significance of the Sarbanes-Oxley Whistleblower Provisions*, 21 LAB. LAW. 141 (2005) (prior to the Sarbanes-Oxley Act, these were the two government agencies in which people were supposed to report violations to unrelated to federal work); see also 42 U.S.C. § 4321 (“To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.”).

38. Christine Mai-Duc, *The 1969 Santa Barbara Oil Spill That Changed Oil and Gas Exploration Forever*, L.A. TIMES (May 25, 2015, 6:38 PM), <https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-htmlstory.html>.

39. *Id.*

40. See 42 U.S.C. § 300j-9(i) (1994); see also 33 U.S.C. § 1367 (1972).

41. See, e.g., *Passaic Valley Sewerage Comm’rs v. U.S. Dep’t of Labor*, 992 F.2d 474 (3d Cir. 1993) (The court here reasoned that a district court in Minnesota had recognized oral agreements pertaining to job security as being part of the employment contract).

42. See Meeds, *supra* note 36, at 327 (“In 1969, as in previous years, it could be predicted that some 14,500 workers in the United States would die as a result of accidents at the workplace; that some 2.2 million workers would be injured or disabled on the job . . . that lost wages as a result of these injuries and deaths would approximate \$1.5 billion, with a loss to the gross national product of over \$8 billion.”).

potentially toxic chemical was being introduced into industry every 20 minutes.<sup>43</sup> Soon, the Occupational Safety and Health Act of 1970 was enacted which formalized anti-retaliation protections.<sup>44</sup> Private and public sector employees that reported violations regarding health and safety standards to OSHA were now protected from discharge or discrimination.<sup>45</sup>

Even with these patchwork whistleblower protection laws concerning the health and safety of Americans, easily avoidable incidents continually persisted in the private sector.<sup>46</sup> Many non-union private sector employees at the time only had oral agreements of non-retaliation or promises of job security to protect them and while some jurisdictions recognized these as enforceable contract terms, many jurisdictions did not.<sup>47</sup> A company could take note of the whistleblower's report, make changes according to that report, and subsequently fire that employee for undermining their employer.<sup>48</sup> One punishment whistleblowers could face, besides termination, was job enlargement.<sup>49</sup> Job enlargement occurs when an employer continually overloads the whistleblower with excessive amounts of work, causing his or her normal responsibilities to suffer; thus, creating an excuse for termination unrelated to the whistleblower's disclosure of information.<sup>50</sup>

Until the early 2000s, there was no financial reason for the government to enact new whistleblower protection laws for private employees because, unlike the Civil Service Reform Act and the Whistleblower Protections Act of 1989, the new laws would not bring the same benefit of saving billions for the government.<sup>51</sup>

## **B. The Sarbanes-Oxley Act**

It was in the wake of major economic scandals in the early 2000s involving large corporations, like WorldCom and Enron, that Congress took larger steps to create whistleblower protections for employees of publicly traded private

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43. *Id.* at 331.

44. *See* 29 C.F.R. § 1977.3.

45. *Id.*

46. *See, e.g.,* Keith Schneider, *Bomb Plant Flaws Known to Du Pont and U.S. For Years*, N.Y. TIMES (Jan. 16, 1989), <https://www.nytimes.com/1989/01/16/us/bomb-plant-flaws-known-to-du-pont-and-us-for-years.html> (reporting that multiple workers at Du Pont were aware of the critical structural flaws that could lead to a massive cleanup, but did nothing to fix the issue until it had already occurred); *see also* Geary v. U. S. Steel Corp., 456 Pa. 171 (1974).

47. *See* Novosel v. Nationwide Ins. Co., 721 F.2d 894, 902 (3d Cir. 1983).

48. *See, e.g.,* Geary, 456 Pa. at 181-84 (finding an employee fired after raising concerns over his new product did not have reasonable grounds to sue because no law or statute had been violated, meaning there was no cause for wrongful termination).

49. *See* Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor, 992 F.2d at 474 (3d Cir. 1993).

50. *Id.*

51. Fisher, *supra* note 23.

corporations in the US economy.<sup>52</sup> These scandals included fraudulent activity in the form of “complicated accounting schemes that arterially inflated the companies’ value, resulting in the largest bankruptcy in US history.”<sup>53</sup> Congress held a hearing to determine how the government failed in stopping these companies from committing fraud on this scale and found that, while some employees reported the wrongdoings to their supervisors, the majority of employees did not.<sup>54</sup> This non-reporting was likely the result of companies having “corporate codes of silence,” which highly discouraged the reporting of business actions, both internally and externally.<sup>55</sup> While codes discouraging reporting are illegal now, at the time all federal and state whistleblower protections relating to financial abuse stemmed from the public interest in avoiding waste of taxpayer funds and did not apply to the private sector.<sup>56</sup> Congress reacted to their findings with the Corporate and Criminal Fraud Accountability Act, also known as the Sarbanes-Oxley Act or SOX.<sup>57</sup> Congress believed encouraging private-sector employees to report these types of financial and fraudulent misconduct would lower the possibility of future economic scandals.<sup>58</sup>

SOX labelled fraud against shareholders “an issue of public concern,” a clear shift in how the government addressed corporate fraud.<sup>59</sup> For the first time in US history, whistleblower protections went beyond the patchwork of laws focusing on the categories of public health and safety and focused on concerns of financial matters.<sup>60</sup> The information covered for disclosure in this Act went beyond the different forms of fraud that led to the WorldCom and Enron scandals (securities, shareholder, bank, mail, and wire frauds) by including any violation of the US Securities and Exchange Commission (SEC) rules or regulations, or any provision of federal law relating to fraud against shareholders.<sup>61</sup> When used for investigative purposes, these disclosures were not limited in who they could be reported to; the whistleblower could report to any federal regulatory agency (e.g., the SEC), law enforcement agencies, members or committees of Congress, an employee with supervisory authority over the whistleblower, or a person “working for the employer with authority to investigate, discover, or terminate the alleged misconduct.”<sup>62</sup>

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52. See Moberly, *supra* note 10, at 2.

53. *Id.*

54. *Id.* at 3 (Enron had multiple corporate codes of silence designed to stop employees from alerting other employees and government agencies of their business malpractices).

55. John K. Mickles, *If There's Something Strange in Your Workplace, Who Ya Gonna Call? The Second Circuit Expands Whistleblower Protection in Berman v. Neo@ogilvy LLC*, 62 VILL. L. REV. 357, 366 (2017).

56. Westman, *supra* note 37, at 142.

57. See Moberly, *supra* note 10.

58. *Id.* at 6.

59. See Westman, *supra* note 37, at 142.

60. *Id.*

61. See 18 U.S.C § 1514A(a)(1).

62. *Id.*



The civil protections for whistleblowers under this Act are not just in name. The Act protects whistleblowers from experiencing demotion, termination, suspension, threat, harassment, or any other manner of discrimination as a result of their reporting.<sup>63</sup> When pursuing civil proceedings, an employee need only raise an inference that his protected whistleblowing was a contributing factor to his termination to the Department of Labor (DOL) within 90 days; if successfully completed, an investigation of the claim will commence.<sup>64</sup> Complaints are dismissed if the employer can show through clear and convincing evidence that the whistleblower's actions were not a part of their firing<sup>65</sup> or if the employee "fails to make a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."<sup>66</sup> If a court determines the whistleblower was wrongfully terminated, the Act states that "[a]n employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole."<sup>67</sup> While "all relief necessary" does not include punitive damages, courts have found it includes reputational damages for any future loss of earnings the employee may face from being unable to find employment due to stigma.<sup>68</sup>

SOX also worked to reignite international litigation through a greater enforcement of the Foreign Corrupt Practices Act of 1977 (FCPA).<sup>69</sup> The FCPA was designed to bolster the publicity and integrity of American companies in the wake of the Watergate scandal but, for much of its existence, it was a rarely enforced law.<sup>70</sup> The FCPA was designed to stop American companies from bribing international businesses or officials and did so by forcing those companies to keep accurate accounting and record keeping.<sup>71</sup> SOX led to an increase in companies voluntarily disclosing FCPA violations, with 44 of the 68 FCPA violations filed between 2005-2007 being voluntary disclosures.<sup>72</sup> The issuing of SOX has not only influenced and effected American businesses; many foreign companies added bylaws to comply with the Act as they too are more likely to be held accountable for FCPA violations now.<sup>73</sup> While SOX keeps multinational corporations accountable by making them subject to whistleblowers in the US, the Department

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63. See 18 U.S.C. § 1514A(a).

64. Valerie Watnick, *Whistleblower Protections under the Sarbanes-Oxley Act: A Primer and a Critique*, 12 FORDHAM J. CORP. & FIN. L. 831, 836-37 (2007).

65. *Id.* at 838.

66. Procedures for Handling of Discrimination Complaints Under the Sarbanes Oxley Act, 69 Fed. Reg. at 52, 104, 106.

67. 18 U.S.C. § 1514A(c)(1).

68. See *Hanna v. WCI Cmty., Inc.*, 348 F.Supp.2d 1332, 1334 (S.D. Fla. 2004) (finding that Hanna experienced a delay in finding her next employer due to the stigma of her being wrongfully terminated for being a whistleblower at her previous job).

69. See Laura E. Kress, *How the Sarbanes-Oxley Act has Knocked the "SOX" Off the DOJ and SEC and Kept the FCPA on its Feet*, 10 PITT. J. TECH. L. & POL'Y 2 (2009-2010).

70. *Id.* at 1, 3.

71. *Id.* at 1.

72. *Id.* at 18-19.

73. *Id.* at 20-25.

of Labor has not extended the Act's protections to foreign workers working overseas, regardless of whether the company they are reporting on has business in the US or not.<sup>74</sup>

SOX and actual enforcement of the FCPA created radical change in the private sector. President Bush, when signing the SOX into law, went so far to say “[t]he era of low standards and false profits is over,” and “[n]o boardroom in America is above or beyond the law.”<sup>75</sup> While this was a big change for the private sector, not all of Washington felt as triumphant as President Bush; some Democratic members of Congress found the law to be a step in the right direction, but not enough.<sup>76</sup> Although scandals on a WorldCom or Enron scale stopped for close to a decade, these reforms did not stop an even bigger problem coming down the line: the housing market bubble and stock market crash of 2008.

### **C. The Dodd-Frank Wall Street Reform and Consumer Protection Act**

A large contributing factor to the global economic crash in 2008 was the excessive use of sub-prime mortgages and other risks taken by banks in the US housing market.<sup>77</sup> This crash led to the era known as the Great Recession, which was the greatest economic downturn since the 1930s.<sup>78</sup> While, theoretically, SOX should have prevented this type of business practice from happening, it failed to do

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74. International Labor Group, *SOX Whistleblower Provision Does Not Apply to Employee Working Overseas, Says the Department of Labor*, PROSKAUER (Jan. 2, 2012), <https://www.internationalallaborlaw.com/2012/01/02/sox-whistleblower-provision-does-not-apply-to-employee-working-overseas-says-the-department-of-labor/>.

75. Elisabeth Bumiller, *CORPORATE CONDUCT: THE PRESIDENT; Bush Signs Bill Aimed at Fraud in Corporations*, N.Y. TIMES (July 31, 2002), <https://www.nytimes.com/2002/07/31/business/corporate-conduct-the-president-bush-signs-bill-aimed-at-fraud-in-corporations.html>.

76. *See id.* (“The ink was scarcely dry by the time Senator John Edwards, the Democrat from North Carolina who is thinking of running for president, issued a statement later today calling for corporate executives to disclose their pay voluntarily. Representative Richard A. Gephardt of Missouri, the House minority leader who is also considering a run for president, also issued a statement, calling for enactment of a broader set of initiatives and declaring that Congress and the White House had to do more.”).

77. *See generally* ATIF MIAN & AMIR SUFI, *HOUSE OF DEBT: HOW THEY (AND YOU) CAUSED THE GREAT RECESSION, AND HOW WE CAN PREVENT IT FROM HAPPENING AGAIN* (2014) (an extensive analysis of the housing market, its crash, and the subsequent international, social, and economic impact); *see also* Brian Montopoli, *Obama On Fixing “Culture of Irresponsibility,”* CBS NEWS (June 17, 2009, 11:45 AM), <https://www.cbsnews.com/news/obama-on-fixing-culture-of-irresponsibility/> (analyzing the risk-taking practices of banks prior to the market crash and describing them as irresponsible and reckless).

78. Robert Rich, *The Great Recession*, FED. RES. HIST. (Nov. 22, 2013), [https://www.federalreservehistory.org/essays/great\\_recession\\_of\\_200709](https://www.federalreservehistory.org/essays/great_recession_of_200709).

so.<sup>79</sup> The US responded to this crisis by providing massive bail-outs to some of the very banks that had created the crash in order to stop the global economy from caving in.<sup>80</sup> Enacted in 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) was a direct reaction to the financial crisis of 2008.<sup>81</sup>

Unlike SOX, which only provided *protections* against retaliation, Dodd-Frank actively provides whistleblowers with *incentives* as a way to increase reporting to the SEC.<sup>82</sup> Any whistleblower who “voluntarily provide[s] original information about violations of securities or commodities laws could be awarded between 10% and 30% of any monetary sanctions above \$1 million” placed on the company on which they are providing information.<sup>83</sup> The final amount awarded is determined by the SEC according to how important the whistleblower’s information was to the enforcement’s success.<sup>84</sup> This incentivization was added “in an attempt to promote financial stability by improving transparency and accountability in the financial system.”<sup>85</sup>

Overall, Dodd-Frank was designed as a more streamlined and user-friendly process for whistleblowers to claim protection under, compared to SOX. Other benefits Dodd-Frank provides to whistleblowers include the possibility of double back-pay, unlike SOX which only provides standard back-pay, and a three-

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79. Katie Benner, *Is Sarbanes-Oxley a failure?*, ARCHIVE FORTUNE (Mar. 24, 2010, 11:00 AM), [https://archive.fortune.com/2010/03/23/news/economy/sarbanes\\_oxley.fortune/index.htm](https://archive.fortune.com/2010/03/23/news/economy/sarbanes_oxley.fortune/index.htm) (speaking why SOX failed to prevent the 2008 crash, Congressman Oxley said, “it is very difficult to regulate a relatively free market with a lot of innovations and some folks who don't necessarily want to play by the rules. But that doesn't mean we should stop trying to regulate and prosecute wrongdoers.”).

80. *See generally* Emergency Economic Stabilization-Energy Improvement and Extension-Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (known as the Emergency Economic Stabilization Act, this statute gave the US government the authorization and funding to purchase toxic assets from banks and established the Troubled Asset Relief Program to minimize the impact on the national economy); *see also* James Felkerson, *\$29,000,000,000,000: A Detailed Look at the Fed's Bailout by Funding Facility and Recipient* (Levy Econ. Institute of Bard C., Working Paper No. 698, 2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1970414](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1970414) (an explanation of the estimated federal costs of the government bailout in the wake of the market crash).

81. *Dig. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 773 (2018) (stating that the Dodd-Frank Act was written in response to the stock market crash).

82. John Wilson & Doreen Lilienfeld, *Implications of the Dodd-Frank Act on Corporate Governance Preparation for IPO Issuers*, CORP. BOARD MEMBER 1, 6, [https://www.shearman.com/~media/Files/NewsInsights/Publications/2010/12/Implications-of-the-DoddFrank-Act-on-Corporate-G\\_\\_Files/View-full-article-Implications-of-the-DoddFrank-\\_/FileAttachment/CM120310ImplicationsofDoddFrankonCorpGovforIPOs\\_.pdf](https://www.shearman.com/~media/Files/NewsInsights/Publications/2010/12/Implications-of-the-DoddFrank-Act-on-Corporate-G__Files/View-full-article-Implications-of-the-DoddFrank-_/FileAttachment/CM120310ImplicationsofDoddFrankonCorpGovforIPOs_.pdf).

83. *Id.*

84. Jennifer B. Poppe & Joe K. O’Connell, *Whistleblower Protection under the Dodd-Frank Wall Street Reform and Consumer Protection Act*, 45 No. 4 SEC. REG. L. J.ART 2 (2017).

85. *Somers*, 138 S. Ct. at 773.

to-six-year statute of limitations depending on when the violation was discovered, expanding greatly from the 180-day statute of limitations found in SOX.<sup>86</sup> When pursuing a claim, Dodd-Frank is heavily streamlined compared to SOX. Dodd-Frank gives the whistleblower direct access to US district courts to file the complaint; SOX requires the whistleblower to file a claim under OSHA and then wait to see if the claim was accepted and moved to a civil court for proceedings.<sup>87</sup>

While these benefits may incentivize and encourage more whistleblowers to come forward, there is one large drawback to consider when choosing Dodd-Frank protocols over SOX protocols:<sup>88</sup> the definition of who is a whistleblower is more limited in Dodd-Frank. Dodd-Frank defines a whistleblower as “any individual who provides, or [two] or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.”<sup>89</sup> While this definition has been debated by district courts since 2010<sup>90</sup> when Dodd-Frank was enacted, the US Supreme Court settled the debate in 2018 with *Digital Realty Trust, Inc. v. Somers*.<sup>91</sup> In *Somers*, a former employee sued his past employer upon being fired shortly after notifying his senior management about suspected securities law violations within the company.<sup>92</sup> At no point did he communicate these violations to the SEC.<sup>93</sup> He claimed to be protected under Dodd-Frank, but the Court disagreed.<sup>94</sup> The Court reasoned the statute was unambiguously referring to reports made to the SEC only because of its repeated use of “whistleblower” instead of employee and its repeated use of “Commission” referring to the SEC.<sup>95</sup> While he had no claim under Dodd-Frank, the Court did point out how this could have been correctly argued if this was brought under SOX protections. Whistleblowers must report directly to the SEC as referenced in the language of the statute in order to claim protection under Dodd-Frank.<sup>96</sup> Overall, this one drawback has not had much of a negative effect on the goal Dodd-Frank seeks to achieve: 2013 alone saw 3,600 whistleblower tips come into the SEC and 2014 had over \$30 million given out to whistleblowers as rewards.<sup>97</sup>

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86. Caroline E. Keen, *Clarifying What is ‘Clear’: Reconsidering Whistleblower Protections Under Dodd-Frank*, 19 N.C. BANKING INST. 215, 218-19 (2015).

87. *Id.* at 219.

88. *See Somers*, 138 S. Ct. at 778.

89. 15 U.S.C. § 78u-6(a)(6).

90. *See generally* Keen, *supra* note 86 (The note, written prior to *Dig. Realty Tr., Inc.* argues how most state level courts and circuit courts have had the more expansive definition of whistleblower under the Dodd-Frank Act, where the employee can contact their employer or OSHA prior to SEC but does recognize that the 5th Circuit viewed the definition more limited in that the whistleblower must contact the SEC first).

91. *See Somers*, 138 S. Ct. at 782.

92. *Id.* at 776.

93. *Id.*

94. *Id.*

95. *Id.* at 777.

96. *See Somers*, 138 S. Ct. at 777.

97. Keen, *supra* note 86, at 216.

Like SOX, Dodd-Frank also helps strengthen enforcement of the FCPA.<sup>98</sup> Dodd-Frank has also extended the financial incentives to foreign nationals reporting on issues dealing with American businesses and stocks.<sup>99</sup> One report led to a sanction so large, the foreign national reporting the issue received a 30 million USD award.<sup>100</sup> Although Dodd-Frank has contributed to the enforcement of the FCPA, it suffers from a similar problem that SOX does: its whistleblower protections do not extend to overseas workers reporting on companies' business outside of the US, regardless of whether that company has major business in the US or not.<sup>101</sup>

These two Acts do not counteract one another, rather they provide future whistleblowers with different means of protection depending on the factors of their employment and the wrongdoings of their employer. While Dodd-Frank may be more appealing to whistleblowers, there is still large public sector whistleblowing happening under SOX.<sup>102</sup>

Ultimately, both acts have their positives and their negatives as whistleblower protection laws. SOX has a more inclusive definition of what makes a whistleblower, but it is a much longer process that demands more work and patience from the whistleblower. On the other hand, Dodd-Frank is streamlined for the whistleblower and allows the whistleblower to be rewarded for coming forward with their employer's misconduct, but fails to include employees who approached their employers prior to approaching the SEC. Both provide whistleblower protections above and beyond the standards created specifically for the EPA and OSHA.

#### **D. Edward Snowden, Public Sector Whistleblower Protections in US Today**

While the US has experienced massive advancements in whistleblower protections in the private sector over the course of the 21st century, it has experienced shortcomings in the public sector. In 2013, Edward Snowden downloaded over a million files related to US practices and gave an undetermined

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98. John McKnight, Whistleblowing Under Dodd-Frank and the Foreign Corrupt Practices Act, SANDFORD HEISLER SHARP, LLP: BLOG (Dec. 8, 2017), [https://sanfordheisler.com/whistleblowing-under-dodd-frank-and-foreign-corrupt-practices-act/?fbclid=IwAR3xo3r9y-JGMPc\\_Kn2Ik5Q9ZFg8pGvEzvFirTynWglrCHQLowsnGGQ9w8A](https://sanfordheisler.com/whistleblowing-under-dodd-frank-and-foreign-corrupt-practices-act/?fbclid=IwAR3xo3r9y-JGMPc_Kn2Ik5Q9ZFg8pGvEzvFirTynWglrCHQLowsnGGQ9w8A).

99. *Id.*

100. *Id.*

101. *See generally* Liu Meng-Lin v. Siemens AG, 763 F.3d 175 (2d Cir. 2014) (finding a Chinese worker for Siemens was fired after reporting issues relating to a Chinese subsidiary of Siemens. The Second Circuit dismissed the case stating that Dodd-Frank does not offer its whistleblower protections extraterritorially).

102. Poppe & O'Connell, *supra* note 84 (referencing the Wells Fargo Bank fraud scandal that cost the company \$5.4 million just for wrongful termination of an employee who had been a whistleblower under Sarbanes-Oxley protection).

amount of the files downloaded to three different journalists.<sup>103</sup> These documents contained information that dealt with how the National Security Agency (NSA) was using the Patriot Act and the 2008 amendments to the Foreign Intelligence Surveillance Act to spy on and collect data from American and non-US citizens.<sup>104</sup> The NSA collected information from phone calls, emails, and text messages, along with using back doors from major US tech companies such as Facebook and Google.<sup>105</sup> The level of information being gathered was so vast that Rep. James Sensenbrenner, one of the authors of the Patriot Act, called the information revealed “incredibly troubling,” and “an overbroad interpretation of the Act.”<sup>106</sup>

Once the journalists released the information from Snowden to the public through *The Guardian* and *The Washington Post*,<sup>107</sup> Snowden was accused of and charged with treason under the Espionage Act.<sup>108</sup> Then-President Obama argued Snowden should have approached his officials about the issues he saw with the NSA’s collection of data and “[i]f the concern was that somehow this was the only way to get this information out to the public, I signed an executive order well before Mr. Snowden leaked this information that provided whistle-blower protection to the intelligence community for the first time.”<sup>109</sup> There are two issues with Obama’s argument: first, Snowden claims to have approached his officials multiple times about his issues before leaking the information;<sup>110</sup> and second, Snowden did not qualify for the whistleblower protections President Obama claims.<sup>111</sup> While Snowden asserts he brought his claims forward to his superiors, there are no sources validating his claim other than a single email the NSA released from Snowden asking to clarify which laws govern the agency.<sup>112</sup> Regardless, President Obama’s executive order only applied to intelligence employees.<sup>113</sup> During his time working for the NSA, Snowden was not an NSA employee, but a contract worker, and thus most likely did not qualify for whistleblower protections.<sup>114</sup> Some have argued that

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103. Paul Szoldra, *This is everything Edward Snowden revealed in one year of unprecedented top-secret leaks*, BUS. INSIDER (Sept. 16, 2015, 5:00 AM), <https://www.businessinsider.com/snowden-leaks-timeline-2016-9>.

104. Michael German, *Edward Snowden is a Whistleblower*, ACLU (Aug. 2, 2013, 12:00 AM), <https://www.aclu.org/blog/national-security/secretcy/edward-snowden-whistleblower>.

105. Szoldra, *supra* note 103.

106. German, *supra* note 104.

107. *Id.*

108. The Editorial Board, *Edward Snowden, Whistle-Blower*, N.Y. TIMES (Jan. 1, 2014), <https://www.nytimes.com/2014/01/02/opinion/edward-snowden-whistle-blower.html>.

109. *Id.*

110. Jon Greenberg, *Hillary Clinton Claims Edward Snowden had Whistleblower Protections, Didn't Use Them*, POLITIFACT (Oct. 14, 2015), <https://www.politifact.com/factchecks/2015/oct/14/hillary-clinton/clinton-says-nsa-leaker-snowden-failed-use-whistle/>.

111. The Editorial Board, *supra* note 108.

112. Jon Greenberg, *supra* note 110.

113. The Editorial Board, *supra* note 108.

114. *Id.*

Snowden fell under the WPA and WPEA definition of a whistleblower because the information he leaked dealt with abuse of authority,<sup>115</sup> but neither of those two cover employees within the intelligence community.<sup>116</sup> Snowden's actions, regardless of whether they constitute treason, showcase current shortcomings in US whistleblower protections in the public sector.

Recently, there have been multiple public sector employees who have blown the whistle, but the government agencies they work for have not reacted to the whistleblowers' actions. In 2019, an intelligence employee blew the whistle over concerns of a possible call President Trump made to the president of Ukraine in which he asked for Ukraine to investigate former Vice President Joe Biden.<sup>117</sup> Here, unlike with Snowden, the Intelligence Community's Inspector General deemed the information "urgent and credible," but when he tried to pass the complaint on to Congress in accordance with the law, it was blocked by President Trump and his administration.<sup>118</sup>

Similarly, six former government scientists from the EPA, National Parks Services, and Department of the Interior have recently come out to discuss the issues facing their work relating to climate change being down-played, or simply disregarded, by the Trump Administration.<sup>119</sup> While they have reported their issues within their respective departments, none saw positive changes to their departments' actions.<sup>120</sup> All three departments issued a statement about their whistleblowers' claims, each stating that they work to ensure scientific integrity above all.<sup>121</sup>

This politicizing on when to act on public sector whistleblowing is "precisely the reason so many [whistleblowers] go to the press."<sup>122</sup> Even when a whistleblower is legally protected and able to report the violation their department is committing, they now know that it may not change or even be acted on.<sup>123</sup> While government transparency may be the goal of whistleblower protections in the public sector, public sector whistleblowers face a unique challenge: they have to report wrongdoing to those most responsible for it.<sup>124</sup>

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115. German, *supra* note 104.

116. Jessica Blusiewicz, *The Case of Edward Snowden: A Different Path*, 8 CORNELL INT'L AFF. REV. 18, 27 (2014).

117. Nick Baumann, *The Trump Whistleblower Scandal Is Proving Edward Snowden Right*, HUFFINGTON POST (Sept. 24, 2019, 3:16 PM), [https://www.huffpost.com/entry/trump-whistleblower-edward-snowden\\_n\\_5d893bf8e4b0938b5932cde0](https://www.huffpost.com/entry/trump-whistleblower-edward-snowden_n_5d893bf8e4b0938b5932cde0).

118. *Id.*

119. Oliver Milman, *The silenced: meet the climate whistleblowers muzzled by Trump*, THE GUARDIAN, <https://www.theguardian.com/environment/2019/sep/17/whistleblowers-scientists-climate-crisis-trump-administration> (last updated Sep. 24, 2019).

120. *Id.*

121. *Id.*

122. Baumann, *supra* note 117.

123. *Id.*

124. *Id.*

### III. GERMAN WHISTLEBLOWER PROTECTION LAWS

Unlike the US, Germany is not currently a solo actor in all its large-scale legislation changes. As a member of the European Union (EU), Germany did not have much of a say in its most recent change in whistleblower legislation.<sup>125</sup> Prior to the 2019 EU changes, German whistleblower protections were not designed to make anonymous reporting easy.<sup>126</sup>

#### **A. German Whistleblower Protections of the Past**

The reporting system for companies in Germany, prior to the 2019 EU bill, mostly applied to businesses with large international trade and employment complying with non-German laws, such as SOX.<sup>127</sup> There were only four enacted laws in Germany that explicitly protected Germans' reporting rights and provided them protection from retaliation when whistleblowing under specific circumstances.<sup>128</sup> Germany itself had no specialized legislation focused on whistleblower protections like the United States' Whistleblower Protections Act of 1989,<sup>129</sup> making these four laws closer in scale to the smaller clauses found in the National Environmental Policy Act and the Occupational Safety and Health Act. The only place prior to 2016 where the general principles of whistleblower protections could be found in Germany was in case law.<sup>130</sup> Who has the ability to

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125. *EU gives 'high-level' protection to whistleblowers*, BBC NEWS (Apr. 16, 2019), <https://www.bbc.com/news/world-europe-47936682>.

126. Donald C. Dowling, Jr., *Sarbanes-Oxley Whistleblower Hotlines Across Europe: Directions Through the Maze*, 42 INT'L LAWYER 1, 12 (2008).

127. *See generally id.* (talking about the complexities of EU countries complying with the Sarbanes-Oxley Act and the discontent many EU countries experience when they have to comply due to culture clashes).

128. *See* Norton Rose Fulbright, *Whistleblowing – What Protections do Employees have in Germany*, GLOBAL WORKPLACE INSIDER (May 15, 2014), <https://www.globalworkplaceinsider.com/2014/05/whistleblowing-what-protection-do-employees-have-in-germany/> (“the German Data Protection Act allowing the data protection officer to report possible violations of the data protection rules to the authorities; the German Labour Protection Act which allows employees to report possible threats of safety and health protection to the authorities if an employer has not remedied previous internal complaints; the German General Equal Treatment Act providing for the employees' right to report possible discrimination to their employers and/or the Federal Anti-Discrimination Agency; and the German Works Constitution Act allowing employees to complain about unfair treatment to their employers and/or the works council.”).

129. *Id.*

130. Jannis Breitschwerdt, “*What are the Latest Developments in Whistleblowing in the Workplace in Germany?*”, GLOBAL WORKPLACE INSIDER (June 20, 2016), <https://www.globalworkplaceinsider.com/2016/06/what-are-the-latest-developments-on-whistleblowing-in-the-workplace-in-germany/>.



report or what the act of whistleblowing looked like was not even defined in German law.<sup>131</sup>

The 2010s saw multiple attempts to increase whistleblower protections within Germany.<sup>132</sup> In 2013, the junior partner center-left Social Democrats and the ruling conservative Christian Democrats stipulated in their coalition agreement that the two parties would look into whether Germany should adopt international whistleblower protection standards.<sup>133</sup> However, no progress came from this agreement prior to the 2019 EU change.<sup>134</sup> In 2016, the ministers of justice of the German federal states did call for more unified whistleblower protections to be implemented.<sup>135</sup> Ultimately, this call only served as a sign of what was to come with the 2019 EU change, because it failed to garner support in Germany's parliament.<sup>136</sup>

According to the German non-governmental organization Whistleblowing Netzwerk, there is no reliable data on how whistleblowers are perceived in Germany.<sup>137</sup> The concept of confidentiality and anonymity in Germany has not been looked at fondly, as it had brought up fears and flashbacks to darker times in the country's history.<sup>138</sup> Stemming from WWII and the Cold-War era, and continuing through today, Germans have had a "social aversion to whistleblower hotlines [that] can strike some on a surprisingly visceral level and can spark fierce push-back."<sup>139</sup> This is especially true for the older generations in Germany.<sup>140</sup> Other countries in the EU have not had this resistance to whistleblowers; in fact, in 2005 the United Kingdom, among others, implemented the last EU commission recommendation for "anonymous" whistleblower protection lines.<sup>141</sup>

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131. *Germany – Whistleblower Protections, Briefing*, BLUEPRINT FOR FREE SPEECH, <https://blueprintforfreespeech.net/document/germany-briefing/> [hereinafter *Germany Whistleblower Protections*] (last visited Jan. 13, 2020).

132. *Id.*

133. Matthias von Hein, *Whistleblowers in Germany: Loved, Hated, Poorly Protected*, DW (May 1, 2016), <https://www.dw.com/en/whistleblowers-in-germany-loved-hated-poorly-protected/a-19228525>.

134. *Id.*

135. *Germany Whistleblower Protections*, *supra* note 131.

136. Hein, *supra* note 133.

137. *Germany Whistleblower Protections*, *supra* note 131.

138. *See* Dowling, *supra* note 126 ("[I]n the specific European context... anonymous [whistleblower] reporting evokes some of the darkest times of recent history on the European continent, whether during World War II or during more recent dictatorships in Southern and Eastern Europe. This historical specificity [explains] a lot of the reluctance of EU Data Protection Authorities to allow anonymous [whistleblower hotline] schemes being advertised as such in companies as a normal mode of reporting concerns.").

139. *See* Dowling, *supra* note 126.

140. *Germany Whistleblower Protections*, *supra* note 131.

141. *See* Dowling, *supra* note 126.

### 1. Germans Whistleblowing in Germany

Workers in both the German private and public sectors have been the subject of whistleblower retaliations.<sup>142</sup> In 2006-07, up to 160 tons of tainted meat was transported from Bavaria to Berlin.<sup>143</sup> After passing through Berlin, the rotten meat was transported across eight different states where it was served in fast-food restaurants.<sup>144</sup> It was not until Mirosław Strecker, a truck driver who worked for the company delivering the rotten meat, gave police information about the meat's transportation that the use of the tainted meat stopped.<sup>145</sup> Understanding the importance of the driver's whistleblowing, the Federal Minister for Agriculture presented Strecker with the Golden Badge for Moral Courage.<sup>146</sup> Although the government recognized the importance of his actions by giving him a medal, they did nothing to offer him support from his employers, and Strecker was fired for reporting the tainted meat.<sup>147</sup>

Even when employees are not fired for their reporting, they are often subjected to various forms of discrimination.<sup>148</sup> In 2002, it was revealed through an audit that multiple job centers in Germany had been "systematically massaging statistics."<sup>149</sup> As a result of this information being made public, Bernhard Jagoda, the head of the Federal Labor Office, was forced to resign.<sup>150</sup> As a result of his actions, Erwin Bixler, the auditor who reported the statistical fallacies, was harassed at his work place to the point of becoming ill and taking an early retirement.<sup>151</sup>

In 2008, Rainer Moormann blew the whistle on general criticisms and possible harms that might come from pebble bed nuclear reactors, which were designed and advertised as being "free from catastrophe" and "walk away safe."<sup>152</sup> While Moormann was celebrated for his works and given the 2011 Whistleblower Award from International Association of Lawyers against Nuclear Arms and the Association of German Scientists,<sup>153</sup> he was also subject to criticism and harassment

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142. Hein, *supra* note 133.

143. *Rotten Meat Scandal Raises Stink in Germany*, DW (Aug. 31, 2007), <https://www.dw.com/en/rotten-meat-scandal-raises-stink-in-germany/a-2760787>.

144. *Id.*

145. Hein, *supra* note 133.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. Hein, *supra* note 133.

151. *Id.*

152. AAAS, *Experts Voice Safety Concerns About New Pebble-bed Nuclear Reactors*, EUREKALERT! (Aug. 23, 2018), [https://www.eurekalert.org/pub\\_releases/2018-08/cp-evs081618.php](https://www.eurekalert.org/pub_releases/2018-08/cp-evs081618.php).

153. *Exhibition: Rainer Moormann*, WHISTLEBLOWER NETZWERK E.V., <https://www.whistleblower-net.de/whistleblowing/fall-beispiele-fur-whistleblowing/ausstellung/ausstellung-rainer-moormann/> (last visited Jan. 13, 2020) [hereinafter *Rainer Moormann*].

at his work.<sup>154</sup> After his reporting, his working group dissolved and he was forced to move departments where he was told to stop his “anti-nuclear activities.”<sup>155</sup>

Ultimately, each of these examples show that whistleblowers were not protected from retaliation when reporting their employer’s wrongdoings. Also, unlike the Enron scandal, 2008 financial crisis, or even the 1969 Santa Barbara oil spill, none of these German scandals had massive effects on Germany’s economic climate, nor did they cause massive repercussions in other parts of German life.

## 2. Siemens Scandals and International Whistleblowing

Whistleblower scandals in Germany did not cause legislation to change, and scandals in general did not cause Germany to adjust their whistleblower protections the same way the US did in the aftermath of Enron or the 2008 financial crisis.<sup>156</sup> Even in the wake of the Siemens Aktiengesellschaft (“Siemens”) worldwide bribery scandal discussed below, Germany did not respond by creating whistleblower protections.<sup>157</sup> This is largely in part due to the fact that Germany created an environment that caused this scandal to develop and the country did not financially suffer from the actions taken by Siemens.<sup>158</sup>

Siemens is a multinational conglomerate headquartered in Munich, focused in various businesses ranging from medical technologies<sup>159</sup> to clean energy sources.<sup>160</sup> The origins of the company stem all the way to 1847, almost 150 years prior to the reunification of West and East Germany.<sup>161</sup> For a large part of Siemens’s history bribery was standard business.<sup>162</sup> This practice was not

154. *Id.*

155. *Id.*

156. *See generally Germany Whistleblower Protections, supra* note 131.

157. *Exhibition: Rainer Moormann, supra* note 153.

158. *See generally* Carter Dougherty, *Germany Takes Aim at Corporate Corruption – Business – International Herald Tribune*, N.Y. TIMES: INT’L BUS. (Feb. 14, 2007), <https://www.nytimes.com/2007/02/14/business/worldbusiness/14iht-scandal.4596099.html> (in 1997, the OECD Anti-Bribery Convention endorsed the sanctioning of bribery, Germany was one of the signing countries, and thus ended their tax deductions towards foreign officials).

159. *About Siemens Healthineer USA*, SIEMENS HEALTHINEERS, <https://www.siemens-healthineers.com/en-us/about> (last visited Jan. 13, 2020).

160. *About Us*, SIEMENS, <https://new.siemens.com/global/en/company/about.html> (last visited Jan. 13, 2020).

161. Siemens AG History, *Profile and Corporate Video*, COMPANIES HISTORY.COM, <https://www.companieshistory.com/siemens/> (last visited Sept. 7, 2020).

162. *See* Siri Schubert & T. Christian Miller, *At Siemens, Bribery Was Just a Line Item*, N.Y. TIMES (Dec. 20, 2008), <https://www.nytimes.com/2008/12/21/business/worldbusiness/21siemens.html> (“World War II left the company shattered, its factories bombed, and its trademark patents confiscated, according to American prosecutors. The company turned to markets in less developed countries to compete, and bribery became a reliable and ubiquitous sales technique.”); Bertrand Venard, *Lessons from the Massive*

inherently bad behavior on Siemens's part, but rather a product of the country in which they were headquartered: until 1997, bribes made by German companies to foreign officials were tax deductible.<sup>163</sup> However, from 2001 to 2007, Siemens spent \$1.4 billion in illegal bribes across its various subsidiaries to score business deals across the globe.<sup>164</sup> No employee of Siemens stepped forward during this time, even though an anti-corruption clause was written into the Siemens bylaws before the reporting of the incident to comply with the American SOX Act.<sup>165</sup> An investigation did not begin until the spring of 2003, when Liechtenstein bank auditors noticed an "unusual flurry of money transfers" to a small firm called Martha Overseas Corporation, a subsidiary of Siemens.<sup>166</sup> Ultimately, Siemens was subject to multiple sanctions in Germany and the US, with the US sanction being the largest FCPA fine to date.<sup>167</sup> No changes in whistleblower protections were created to combat issues of massive international bribery rising again in Germany.<sup>168</sup> In an ironic twist, however, Germany, a country that once held an adverse view on whistleblowing, became one of the largest, most important countries in advancements in whistleblower protections in 2020.

## **B. German Whistleblower Protections in 2020**

In 2019, the EU signed the Whistleblower Protection Directive, which created "safe channels" for whistleblowers to report to across the entire EU.<sup>169</sup> Whistleblowers may report violations internally to their employers or directly to their respective governments.<sup>170</sup> After choosing to report to one of these bodies, in cases where the whistleblower feels no action has been taken, the whistleblower

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*Siemens Corruption Scandal One Decade Later*, THE CONVERSATION (Dec. 13, 2018, 7:26 AM), <https://theconversation.com/lessons-from-the-massive-siemens-corruption-scandal-one-decade-later-108694>.

163. See generally Dougherty, *supra* note 158.

164. Schubert, *supra* note 162 ("In Argentina, a different Siemens subsidiary paid at least 40 million USD in bribes to win a \$1 billion contract to produce national identity cards. In Israel, the company provided \$20 million to senior government officials to build power plants. In Venezuela, it was \$16 million for urban rail lines. In China, \$14 million for medical equipment. And in Iraq, \$1.7 million to Saddam Hussein and his cronies.").

165. Venard, *supra* note 162.

166. David Crawford & Mike Esterl, *Inside Bribery Probe of Siemens*, WALL ST. J. (Dec. 28, 2007, 12:01 AM), <https://www.wsj.com/articles/SB119879170772353601>.

167. Kress, *supra* note 69 ("The standing largest FCPA fine occurred in December 2008, when Siemens AG paid \$350 million in disgorgement fees and a 450 million USD criminal fine to the DOJ. These amounts are in addition to a 569 million USD fine to the Office of the Prosecutor General in Munich, Germany.").

168. Hein, *supra* note 133.

169. *EU gives 'high-level' protection to whistleblowers*, BBC NEWS (Apr. 16, 2019) [hereinafter '*high-level' protections*].

170. *Id.*

also has the right to disclose to the media the violations they reported.<sup>171</sup> These choices effectively create a “three-tier reporting system.”<sup>172</sup>

This change in legislation was created in the wake of online privacy scandals including the Luxemburg Leaks, Cambridge Analytica, and Paradise Papers, which all transcended national borders.<sup>173</sup> The Luxemburg Leaks scandal revealed that there had been an eight-year scheme involving over 340 companies aiming to reduce their tax payments through insight into Luxembourg tax rulings.<sup>174</sup> Similarly, the Paradise Papers listed out both individuals and hundreds of multinational corporations, such as Apple and Nike, that invested money in offshore accounts or businesses to avoid taxes.<sup>175</sup> Cambridge Analytica, on the other hand, was a scandal involving the non-consensual collection of millions of Facebook users’ information to be used for political advertising purposes.<sup>176</sup> All of these scandals, as well as others, were initially brought to the public’s attention through the actions of whistleblowers.<sup>177</sup> Due to the role whistleblowers played in bringing these scandals to light, changes were made to the protections afforded to whistleblowers within the EU to encourage further whistleblowing in the future.<sup>178</sup>

Prior to this update in legislation, only ten countries in the EU had comprehensive whistleblower protection laws.<sup>179</sup> Germany was not one of these

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171. *Id.*

172. *See EU protects whistleblowers with new directive*, DEUTSCHE WELLE (Mar. 12, 2019), <https://www.dw.com/en/eu-protects-whistleblowers-with-new-directive/a-47865249> (The directive will establish a three-tier reporting system encompassing internal reporting channels, reporting to competent authorities and channels for reporting fraud to the media in case “no appropriate action” is taken, or in case of “imminent or clear danger to the public interest or irreversible damage.”).

173. *Protecting whistle-blowers: new EU-wide rules approved*, NEWS: EUROPEAN PARLIAMENT (Apr. 16, 2019, 12:41), <http://www.europarl.europa.eu/news/en/press-room/20190410IPR37529/protecting-whistle-blowers-new-eu-wide-rules-approved> [hereinafter *EU-wide rules*].

174. Leslie Wayne & Kelly Carr, ‘Lux Leaks’ Revelations Bring Swift Response Around World, INTERNATIONAL CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Nov. 7, 2014), <https://www.icij.org/investigations/luxembourg-leaks/lux-leaks-revelations-bring-swift-response-around-world/>.

175. Nick Hopkins & Helena Bengtsson, *What are the Paradise Papers and what do they tell us?*, THE GUARDIAN (Nov. 5, 2017), <https://www.theguardian.com/news/2017/nov/05/what-are-the-paradise-papers-and-what-do-they-tell-us>.

176. Kevin Granville, *Facebook and Cambridge Analytica: What You Need to Know as Fallout Widens*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html>.

177. *See, e.g.*, Carole Cadwalladr et al., *Cambridge Analytica whistleblower: ‘We spent \$1m harvesting millions of Facebook profiles’-video*, THE GUARDIAN (Mar. 17, 2018, 10:01 AM), <https://www.theguardian.com/uk-news/video/2018/mar/17/cambridge-analytica-whistleblower-we-spent-1m-harvesting-millions-of-facebook-profiles-video> (whistleblower Christopher Wylie addresses how Facebook collected profile information to generate political data).

178. *‘high-level’ protections*, *supra* note 169.

179. *EU-wide rules*, *supra* note 173.

ten countries.<sup>180</sup> Now whistleblower protections are required for all Member States to establish safe reporting systems for both public and private employees so long as the employees report information on breaches in a work-related context.<sup>181</sup> These reporting systems will be split between two systems: government reporting systems and company-specific reporting systems.<sup>182</sup>

The Directive is designed to be proactive in stopping companies from working around the whistleblower protections.<sup>183</sup> Sanctions on retaliation against whistleblowers as well as protection for whistleblowers from liability related to reporting are two ways of tackling the issue.<sup>184</sup> Another way to tackle the issue is the Bill's requirement for the organization's implementation of secure channels for receiving reports, which maintain the confidentiality of the whistleblower and any third party, and allow for written, oral, or physical reporting mechanisms.<sup>185</sup> The Directive also provides a rigid timeline for both whistleblowers and investigators to follow,<sup>186</sup> as well as imposing penalties on employers who hinder reporting, take legal action against whistleblowers or otherwise retaliate against them, or reveal the identity of whistleblowers.<sup>187</sup> Threats or attempts of such conduct are also prohibited.<sup>188</sup> The only variable of the Bill that works in favor of the attitudes of former German whistleblower protections is that the new EU regulation leaves it up to the individual Member States to accept and follow-up with anonymous reports of breaches.<sup>189</sup>

#### IV. AUSTRALIAN WHISTLEBLOWER PROTECTION LAWS

Like the EU, Australia has also had a massive overhaul of the whistleblower protections in the private sector.<sup>190</sup> However, unlike the EU or the US, Australia's change is not a direct reaction to any one large-scale scandal or

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180. *Id.* (listing the ten countries: France, Hungary, Ireland, Italy, Lithuania, Malta, Netherlands, Slovakia, Sweden and United Kingdom).

181. Karin Henriksson, *New Whistleblower Protection Directive Approved. What you can do now*, WHISTLE BLOG (Apr. 16, 2019), <https://whistleb.com/blog-news/new-eu-whistleblower-protection-directive/>.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* (explaining that while confidentiality must be enforced, it is up to the individual Member States to choose whether they will follow up with anonymous reports).

186. Henriksson, *supra* note 181. (no more than seven days to acknowledge receipt of report and no more than three months to provide a follow-up to the whistleblower regarding the investigation).

187. *Id.*

188. *Id.*

189. *EU-wide rules*, *supra* note 173.

190. Dennis Gentilin, *It's a New Era for Australia's Whistleblowers—in the Private Sector*, THE CONVERSATION (July 18, 2019, 10:43 PM), <http://theconversation.com/its-a-new-era-for-australias-whistleblowers-in-the-private-sector-119596?>

occurrence, but rather is the result of a state-funded research project.<sup>191</sup> The changes in laws are mostly in response to the Whistling While They Work 2 (WWTW2) project.<sup>192</sup> Even today, WWTW2 is the largest research project on whistleblowers in the world.<sup>193</sup> Over its three years, the WWTW2 was conducted at Graham University and was the result of a collaboration between the Australian Securities and Investment Commission (ASIC), and other professional organizations like CPA Australia.<sup>194</sup> One of WWTW2's most indicative statistics supporting the need to change whistleblower protections was that of the close to 18,000 people they surveyed, only "21% said they were treated well by both management and colleagues" after reporting a violation within their company.<sup>195</sup> These findings, along with others relating to the mistreatment of whistleblowers, led the Australian Parliament to completely rewrite their whistleblower protection laws for private sector employees.<sup>196</sup> Before this rewrite, whistleblower protections in Australia lagged behind international standards and failed to provide whistleblowers with adequate protection in the private sector.<sup>197</sup>

### **A. Australian Whistleblower Protections of the Past**

Before the change in legislation, whistleblower protections for workers in the private sector were located in the Corporations Act 2001.<sup>198</sup> While the Act did give whistleblowers some remedies if they were fired for reporting issues, such as the right to seek reinstatement, the Act failed to make companies incorporate their

191. *Id.*

192. Lachlan Colquhoun, *Australia Has New Whistleblowing Laws. Now for the Governance*, INTHEBLACK (Oct. 3, 2019), <https://www.intheblack.com/articles/2019/10/03/australias-new-whistleblowing-laws-now-governance>.

193. See Griffith University, *Whistling While They Work 2: Improving Managerial Response to Whistleblowing in Public and Private Organizations* (2016), <https://www.publicgood.org.nz/wp/wp-content/uploads/2016/06/Att-2-Whistling-While-They-Work-ARC-Linkage-Project-Griffith-Univers....pdf>.

194. See Colquhoun, *supra* note 192; CPA AUSTRALIA, <https://www.cpaaustralia.com.au/> (last visited Jan. 13, 2020) (CPA stands for Certified Practising Accountant).

195. See Gentilin, *supra* note 190 (additionally, over 12% said they were treated poorly by both management and colleagues after filing a report within their company).

196. *Id.*

197. Lucas Ryan Gaicd, *Why Australia Needs Better Protection for Whistleblowers*, AUSTRALIAN INST. OF COMPANY DIRECTORS (Feb. 22, 2017), [https://aicd.companydirectors.com.au/membership/membership-update/why-australia-needs-better-protection-for-whistleblowers?fbclid=IwAR3egQcz0ScToIS8PQYSIIyNdlHP\\_bM6ZplGlXsGw1DtMS-9bnWKwY5f-tc](https://aicd.companydirectors.com.au/membership/membership-update/why-australia-needs-better-protection-for-whistleblowers?fbclid=IwAR3egQcz0ScToIS8PQYSIIyNdlHP_bM6ZplGlXsGw1DtMS-9bnWKwY5f-tc).

198. Jeanette Van Akkeren & Julie-Anne Tarr, *Troublemakers and Traitors – it's No Fun Being a Whistleblower*, THE CONVERSATION (Nov. 18, 2015, 2:10 PM), <https://theconversation.com/troublemakers-and-traitors-its-no-fun-being-a-whistleblower-50755>.

own reporting channel within their business.<sup>199</sup> On top of no internal reporting channels being required by the Act—in fact only 33% of businesses had any form of reporting systems<sup>200</sup>—the Act also failed to protect whistleblowers who reported to Parliament or the media.<sup>201</sup> Additionally, private-sector whistleblowers were only protected if they were “motivated by wanting to bring corporate wrongdoing to light,” and they could not receive protection under the law if they had any other form of motivation.<sup>202</sup> This strict motivation has barred some whistleblowers from being able to obtain protections and had never been the subject of any legal questioning under the courts in Australia, even though it had been recognized as difficult to apply.<sup>203</sup>

Whistleblower protections in the public sector were more structured. While there had been individual laws protecting whistleblowers from different forms of retaliation across Australia, the Commonwealth of Australia did not have formal whistleblower protections until the enactment of the Public Interest Disclosure Act of 2013 (PID).<sup>204</sup> PID was enacted to help facilitate the reporting of wrongdoings by public officials in the Commonwealth public sector.<sup>205</sup> The Act was designed in response to the 2009 House of Representatives Standing Committee on Legal and Constitutional Affairs report: *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*.<sup>206</sup> This report found “[t]hose willing to speak out against what they consider to be improper conduct in the workplace might put at risk their personal wellbeing and professional standing . . . . Yet they can play a valuable role in exposing wrongdoing and promoting integrity in government administration.”<sup>207</sup> While enforcement of this Act has decreased in recent years, it still served as a talking point and signaled Australia’s recent overhaul in private sector whistleblower perceptions.<sup>208</sup>

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199. *Id.*

200. A.J. Brown, *Despite Business’ Best Efforts Whistleblowers Still Lack Protection Under Australian Law: New Research*, THE CONVERSATION (Nov. 7, 2016 2:06 PM) <https://theconversation.com/despite-business-best-efforts-whistleblowers-still-lack-protection-under-australian-law-new-research-66910>.

201. Gaicd, *supra* note 197.

202. *Id.*

203. *Id.*

204. *Public Interest Disclosure Act 2013* (Cth) (Austl.).

205. *Id.*

206. *Id.*

207. G20 Anti-Corruption Action Plan, *Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation* (2011), <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>.

208. HOUSE OF REPRESENTATIVES STANDING COMM. ON LEGAL AND CONST. AFFS., *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector* 1 (2009).



## **B. Australian Whistleblower Protections in 2020**

On July 1, 2019, the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill was enacted.<sup>209</sup> This Act allows whistleblowers in the private sector to report to various channels, including officers and senior managers of the company in question, auditors, or regulators.<sup>210</sup> If the whistleblower reasonably believes after 90 days the company has not acted to remedy the reported issue, then the whistleblower may make an emergency disclosure by approaching and reporting to a member of Parliament or a journalist.<sup>211</sup> This provides whistleblowers with a similar reporting system to the “three-tiered reporting system” created by the EU bill.

The changes in protection are so radically different than ones prior that Australia had granted businesses until January 1, 2020 to implement the new whistleblower protections into their compliancy protocols.<sup>212</sup> For reference, this Act marked the first time “whistleblower” was formally defined in Australian law.<sup>213</sup> Two of the largest changes for whistleblower protections stemming from this Act are the ability to stay anonymous and that reports only need to be made based on reasonable grounds, not made in “good-faith.”<sup>214</sup> Like SOX in the US, this Act marked the first time in Australian history that an employee in the private sector had stronger whistleblower protections than employees in the public sector.<sup>215</sup>

Despite the large increase in whistleblower protections in the private sector, Australia is facing massive backlash for its outdated public sector protections.<sup>216</sup> In fact, the timing of the Treasury Laws Amendment Bill is ironic

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209. Jamie Lombard, *Australian Whistleblowing Legislation: Are You Prepared?*, NAVEX GLOBAL: RISK & COMPLIANCE MATTERS (Jul. 23, 2019), <https://www.navexglobal.com/blog/article/australian-whistleblowing-legislation-are-you-prepared/>.

210. *See* Gentilin, *supra* note 190.

211. Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (cCth) sch. 1 pt. 1 sec. 1317AAD(1)(b) (Austl.) (explaining that prior to reporting to a member of Parliament or a journalist, the whistleblower must give the original body notice that the whistleblower intends to make an emergency disclosure.).

212. Lombard, *supra* note 209.

213. *See* Abigail McGregor & David Cross, *A New Era for Whistleblowers in Australia*, NORTON ROSE FULBRIGHT (Mar. 2019), <https://www.nortonrosefulbright.com/en/knowledge/publications/63b0f230/update-on-new-whistleblower-protection-laws-in-australia> (whistleblowers include “Employees and officers; Contractors, suppliers and their employees; An individual who is an associate (as defined in the Corporations Act) of the entity; and Spouses and relatives of any of the above.”).

214. *See generally* Lombard, *supra* note 209.

215. *See* Gentilin, *supra* note 190.

216. Christopher Knaus, *‘Too Many Loopholes’: Christian Porter Urged to Go Further on Whistleblower Protections*, THE GUARDIAN (Jun. 21, 2019, 12:43 AM), <https://www.theguardian.com/australia-news/2019/jun/21/too-many-loopholes-christian-porter-urged-to-go-further-on-whistleblower-protections>.

given “Australia’s federal police launched raids on journalists and media outlets who received and published disclosures from public sector whistleblowers” within the same year.<sup>217</sup> These raids are a part of Australia’s larger movement to restrict and combat foreign government interference in the wake of Chinese and Russian espionage in the US and European countries.<sup>218</sup> There is a suppression to free speech in Australia when the subject matter deals with government secrets; it even extends to “doctors in overseas detention camps facing jail for talking about conditions there.”<sup>219</sup> This reaction by the Australian government reflects the views on whistleblowers in post-WWII Germany; the government is choosing secrecy over their workers’ rights.<sup>220</sup>

While private-sector whistleblowers are given multiple channels through which to report violations, the whistleblowers in the public sector are stuck with laws that are too “technical, obtuse, and intractable.”<sup>221</sup> This is not a result of having antiquated laws from past decades, as the most recent change in public sector whistleblower protections was in 2013 with PID, but rather the result of the Australian government’s current priority regarding secrecy.<sup>222</sup> While private sector employees are now encouraged to pursue reporting to journalists, especially in cases dealing with public emergencies, members of the Australian military can face jail time for reporting misconduct in their workplace to journalists.<sup>223</sup> The Border Force Act of 2015 also makes it an offence for an Australian Border Force employee to report violations that fall under “protected information.”<sup>224</sup> Of course, this type of

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217. See Gentilin, *supra* note 190.

218. This movement also stems back to fear of terrorist attack after 9/11. See Damien Cave, *How Australia’s Espionage Laws Could Silence Whistle-Blowers and Activists*, N.Y. TIMES (Jan. 30, 2018), <https://www.nytimes.com/2018/01/30/world/australia/australia-espionage-law.html> (explaining that the heightened determination to prevent terrorist attacks in the wake of the Sept. 11 attacks found its way to Australia from the United States, with the government of the prime minister at the time, John Howard, passing increasingly invasive legislation, including a terrorism financing bill, a telecommunications interception bill, and an anti-hoax law that carried a 10-year imprisonment for offenders).

219. See Jamie Tarabay, *Australian Media Redact Their Front Pages to Protect Secrecy Laws*, N.Y. TIMES (Oct. 21, 2019), <https://www.nytimes.com/2019/10/21/world/australia/news-media-protest-secrecy-government-right-to-know.html>.

220. *Id.*

221. Knaus, *supra* note 216.

222. The Associated Press, *Australian Whistleblower to Represent Himself at Trial*, N.Y. TIMES (Nov. 6, 2019), <https://www.nytimes.com/aponline/2019/11/06/world/asia/ap-as-australia-whistleblower.html>.

223. See Rob McQuirk, *Australian whistleblower to represent himself at trial*, ABC News (Nov. 6, 2019, 7:01 PM) <https://abcnews.go.com/International/wireStory/australian-whistleblower-represent-trial-66806919> (reporting an Australian army whistleblower charged with leaking secret documents alleging misconduct in Afghanistan said on Thursday he would defend himself at trial next year rather than face potential delays by hiring a lawyer with a security clearance).

224. Peter Roberts, *Fact Check: Could a Whistleblower Go Public Without Fear of Prosecution Under the Border Force Act*, THE CONVERSATION (July 12, 2015, 4:24 PM), <https://theconversation.com/factcheck-could-a-whistleblower-go-public-without-fear-of->

contradiction is not unheard of in the US,<sup>225</sup> but the US does not offer the same level of whistleblower protections for its private sector employees as Australia.<sup>226</sup>

## V. RECOMMENDATIONS FOR GLOBAL PREEMPTIVE ACTION

Laws protecting whistleblowers across the world have, more often than not, been in reaction to large scandals. Most recently, these scandals have been occurring on the global stage.<sup>227</sup> The EU's new changes in whistleblower protections serve to help mitigate this for the future in Europe. Australia has recently demonstrated that a country does not need to experience a massive scandal to increase their protections for whistleblowers in the private sector. The rest of the world should follow suit. Massive compliance issues like Cambridge Analytical, the Paradise Papers, and even the Siemens bribery scandal, are not confined to a single county but impact a large part of the world.<sup>228</sup>

While the EU changed its whistleblower protections in reaction to Cambridge Analytical, the US's decision to not implement future protections in the wake of this scandal leaves them vulnerable to future issues. As seen with the Siemens bribery scandal, even when a company has reporting streams implemented to comply with foreign laws,<sup>229</sup> they may not enforce them unless their own country makes them. Most major companies found across the world contribute to the global economy; national borders and whistleblower protections are currently limiting how an employee of a global company can report global issues. If the US does not increase their whistleblower protections to match those of the EU or Australia, then multinational companies based in the US will continue to commit crimes, such as fraud, at a higher level regardless of changes in whistleblower protections across the world.

A solution to this would be an implementation of universal whistleblower protections for workers in the private sector. The EU has shown that standardized protections can be laid out across multiple countries regardless of what their system was prior.<sup>230</sup> On a global scale, members of the United Nations can work in conjunction with one another to create similar standards across the globe. This could work similar to countries in the UN agreeing to combat climate change

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prosecution-under-the-border-force-act-44467.

225. See generally Garance Franke-Ruta, *Meet Edward Snowden, the NSA Whistleblower*, THE ATLANTIC (June 9, 2013), <https://www.theatlantic.com/politics/archive/2013/06/meet-edward-snowden-the-nsa-whistleblower/276688/> (reporting that after releasing documents as a whistleblower that showed the extensive levels of NSA surveillance, Edward Snowden had to leave the US to avoid punishment.).

226. See *supra*, Section II.D.

227. See *supra* Section III.B.

228. See *supra* Section III.B; *supra* Section III.A.2.

229. See *supra* Section III.A.2.

230. See *supra* Section III.B.

together with the Paris Agreement.<sup>231</sup> While past changes in whistleblower protections suggest future scandals will arise,<sup>232</sup> with a global standard, all countries participating can react in unison to limit similar issues in different parts of the world after it.

While whistleblower protections should be standardized for private sector employees, it is more difficult to make the same argument for public sector employees. First, although not unheard of,<sup>233</sup> the issues being reported by public sector employees are less likely to influence the global economy the same way massive corporations do. Second, each country's government is going to have a different focus on how they want to handle information getting out to the public. While the EU has shown with their new law that they want transparency, Australia's enforcement of the PID Act shows that government's current focus is on secrecy. In the last decade, the US had multiple Acts that allowed for whistleblowers to come forward but has not shied away from retaliating against certain types of information getting released to the public.<sup>234</sup>

Currently, there is no defined answer on how to solve this problem of having weaker protections for public sector employees, but governments should not shy away from looking towards new developments, nor should they use that as a reason to not standardize their private sector whistleblower protections. While they may not be able to implement the same standards the EU has, other governments should still look towards the EU. Other countries should create a standard for private sector whistleblower protections similar to the EU and see how the EU handles public sector whistleblowers in the future when possibly changing their own protections.

## VI. CONCLUSION

Transparency is not too much to ask for. As large companies continue to grow exponentially, the move towards a global economy is happening faster than ever. With companies doing business across the world, the need for standardized whistleblower protections across the globe is higher now more than ever. While different countries have varied histories of dealing with whistleblowers, one thing can be seen when looking at the US, Germany, and Australia: all three seem to agree that changes to whistleblower protections mean *increases* in whistleblower protections. The US housing market crash triggered a world-wide economic disruption; country-specific economic downturns caused by illegal business practices are becoming rarer in an increasingly global world. Issues that used to effect one country now affect a large part of the world. Individuals are more likely

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231. Melissa Denchak, *Paris Climate Agreement: Everything You Need to Know*, NRDC (Dec. 12, 2018), <https://www.nrdc.org/stories/paris-climate-agreement-everything-you-need-know>.

232. *See supra* Section II.C.

233. *See supra* Section II.D.

234. *See supra* Section II.D.

to report the violations that lead to those issues when they feel safer from the possibility of retaliation from their employer. Although countries may be unable to agree on standardizations for public sector employees, as companies continue to grow across borders, there should be a standardization for whistleblower protections in the private sector.

