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December 17, 2010

Mary L. Schapiro
Chairman
Securities and Exchange Commission
1 00 F Street, NE
Washington, DC 20549-2736

RE: Comments on Proposed Rules under Dodd-Frank Wall Street Reform and Consumer Protection Act, File No. S7-33-10, RIN 3235-AK78

Dear Chairman Schapiro:

Thank you for the opportunity to comment on the proposed regulations to implement the whistleblower provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act. Thank you, also, for the helpful memorandum issued with the proposed regulations. We notice that the Commission's memorandum finds that the proposed regulations "would limit the pool of eligible whistleblowers and thereby reduce the number of potentially useful informants." Proposed Rule, p. 112. They would "discourage potential whistleblowers from coming forward" by "heightening the standards for eligibility." Proposed Rule, p. 117. They would further "discourage some whistleblowers from submitting potentially useful information." Proposed Rule, p. 118. They could "result in instances in which the Commission does not receive important information regarding potential violations," Proposed Rule 118, and "cause those persons not to come forward with information in their possession about securities law violations." Proposed Rule, p. 118. Finally, they would "result in . . . forgone opportunities for effective enforcement action." Proposed Rule, p. 118. The proposed procedures for filing a claim will be "burdensome and confusing" for many whistleblowers. Proposed Rule, p. 116.

As noted on page 7 of the Commission memorandum and in the Senate Report accompanying the legislation, “[t]he Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government;” affording broad anti-retaliation protections to whistleblowers furthers this legislative purpose. S. Rep. No. 111-176 at 110 (2010). The staff comments above show that the proposed regulations fail a cost-benefit analysis. NWC urges rejection of the proposed rules on grounds that they are contrary to the purposes of the Act. It is time to make rules that are consistent with the remedial purposes of the legislation.

Unlike some other laws, the Dodd-Frank Act does not give the Commission authority to make substantive changes to the law. All regulations must be consistent with the purposes of the Act. The purpose of the Act is to motivate whistleblowers to come forward with information that will assist in the detection of fraud and the prosecution of violations. It is not to encourage internal corporate compliance programs, although that remains one of the avenues through which fraud can be detected. The regulations must carry forward the purpose of protecting and encouraging

employees in all activities that detect fraud, through all lawful means.

A. Introduction

The National Whistleblowers Center submits these comments to the proposed regulations at 17 CFR Parts 240 and 249. I am the Executive Director of the National Whistleblowers Center (NWC). With these comments, we are submitting a report explaining in further detail the empirical data available to assist the Commission accomplish the remedial goal of the Act.

Established in 1988, the **National Whistleblowers Center (NWC)** is a non-profit tax-exempt public interest organization. The Center regularly assists corporate employees throughout the United States who suffer from illegal retribution for lawfully disclosing violations of federal law. NWC maintains a nationwide attorney referral service for whistleblowers, and provides publications and training for attorneys and other advocates for whistleblowers. NWC has consistently advocated for the same level of protection for employees who raise concerns internally as for those who raise concerns with government agencies. NWC has participated as *amicus curiae* in the following cases: *English v. General Electric*, 110 S.Ct. 2270 (1990), *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (1985); *EEOC v. Waffle House*, 534 U.S. 279 (2002); *Haddle v. Garrison*, 525 U.S. 121 (1998); *Vermont Agency Of Natural Resources v. United States ex rel. Stevens*, (98-1828) 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000).

In 2002, the Center worked closely with the Senate Judiciary Committee and strongly endorsed its efforts to “prevent recurrences of the Enron debacle and make similar threats to the nation’s financial markets.” 148 Cong. Rec .S. 7420 (daily ed. July 26, 2002) (remarks of Senator Leahy, quoting from letter signed by the Center as well as the Government Accountability Project).

Senator Leahy recognized the role of NWC in the enactment of SOX:

> This “corporate code of silence” not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied. …
>
> Unfortunately, as demonstrated in the tobacco industry litigation and the Enron case, efforts to quiet whistleblowers and retaliate against them for being “disloyal” or “litigation risks” transcend state lines. This corporate culture must change, and the law can lead the way. That is why S. 2010 is supported by public interest advocates, such as the National Whistleblower Center, the Government Accountability Project, and Taxpayers Against Fraud, who have called this bill “the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial

markets."

S. Rep. 107-146, at 10.

NWC advocates on behalf of whistleblowers because these truth-tellers uncover and rectify grave problems facing our federal government and our society at large. Whistleblowers are a bulwark of accountability against those who would corrupt government or corporations. Therefore aggressive defense of whistleblowers is crucial to any effective policy to address wrongdoing or abuse of power. Conscientious employees who point out illegal or questionable practices should not be forced to choose between their jobs and their conscience.

Whistleblowers who take an ethical stand against wrongdoing often do so at great risk to their careers, financial stability, emotional well-being and familial relationships. Society should protect and applaud whistleblowers, because they are saving lives, preserving our health and safety, and protecting vital fiscal resources.

In this vein, the Commission would benefit from the regulatory experience of the Nuclear Regulatory Commission (NRC). NRC has a long-standing whistleblower protection program. See, for example, 10 CFR 50.7 and 29 CFR Part 24.

B. Other whistleblower protection programs provide models for encouraging employees.

The purpose of employee protections is to afford protection for those who help to protect the environment, assist the government in obtaining compliance, and participate in other activities that promote the statutory objectives. In enacting SOX, Congress looked to the legislative history of the environmental and nuclear whistleblower protections. Congress intended that the courts and the SEC broadly construe the employee protection, just as courts and the Department of Labor have broadly construed previous employee protections. Congress expressed the same intention with the amendments to the False Claims Act, 31 U.S.C. § 3729, et. seq.

Employees can play an important role in protecting the public from corporate fraud, just as they do for environmental and nuclear safety dangers. They can keep managers and government officials honest by exposing attempts to cover up dangers. Discrimination against whistleblowers obviously deters such employee efforts on behalf of the public purposes. Accordingly, the federal statutes prohibit such discrimination. To achieve the ends of eliminating discrimination, and protecting complainants from retaliation, the law mandates that "employees must feel secure that any action they may take" furthering "Congressional policy and purpose, especially in the area of public health and safety, will not jeopardize either their current employment or future employment opportunities." *Egenrieder v. Metropolitan Edison Co./GPU*, 85-ERA-23, Order of Remand by SOL, pp. 7-8 (April 20, 1987). The whistleblower protection laws were passed in order to "encourage" employees to report safety violations and protect their reporting activity. *English v. General Electric Co.*, 496 U.S. 72, 110 S.Ct. 2270, 2277 (1990); *Wagoner v. Technical Products, Inc.*, 87-TSC-4, D&O of SOL, p. 6 (November 20, 1990)(the "paramount purpose" behind the whistleblower statutes is the "protection of employees"). Accord, *Hill, et al. v. T.V.A.*, 87-ERA-23/24, D&O of Remand by SOL, pp. 4-5 (May 24, 1989). Consequently, there is a need for "broad construction" of the statutes in order to effectuate their purposes. *DeFord v. Secretary of Labor*, 700 F.2d 281,286 (6th Cir. 1983). In *Passaic Valley Sewerage Comm. v. Department of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993), the Third Circuit stated:

> . . . from the legislative history and the court and agency precedents . . . it is clear that Congress intended the 'whistleblower' statutes to be broadly interpreted to achieve the legislative purpose of encouraging employees to report hazards to the public and protect the environment by offering them protection in their employment.

C. Internal and external whistleblowing should receive the same protection and encouragement.

On page 4, the Commission's memorandum discusses a potential concern about the effect of rewards on internal corporate compliance programs. This subject is addressed by the attached report. It shows that the similar reward program in the False Claims Act (FCA) has not deterred conscientious employees from raising concerns internally. There is no data to support the concern that the reward program would discourage employees from raising concerns through established corporate programs. NWC strongly urges that the Commission rules be revised and implemented consistent with this principle and treat employees equally whether they choose to make their disclosures internally, externally, or both. The purpose of the law is to encourage the disclosures that help detect fraud, and all such disclosures deserve protection and encouragement.

D. No additional exclusions can or should be made by regulation.

The Dodd-Frank Act sets out its own exclusions from the whistleblower reward program. The Commission has no jurisdiction to alter or expand this set of exclusions. Nor should it attempt to do so. Any such attempt would invite perpetrators of fraud to structure corporate organization and employment contracts to maximize the number of persons who would be denied encouragement to report fraud. Any exclusion from the reward program that is not required by the Act would discourage employees from coming forward. Expanding the exclusions reduces the number of frauds that will be detected.

The purpose of the Act is to detect fraud. It is not to better define the scope of professional obligations. For example, to the extent that attorneys have privileged information that would assist in the detection of fraud, the established law on the scope of the attorney-client privilege should determine if that information can be used as evidence. To the extent that the information is not privileged and can be used in evidence, then attorneys should be encouraged to come forward with that information. If it cannot be used in evidence, then there is no purpose to providing any reward for its disclosure. The Commission should defer to the existing and evolving body of law on the admission of evidence to determine the scope of the information that can support a reward.

E. Forms should be simple and facilitate adjudication on the merits.

The Commissions proposed forms are too complex. NWC urges the Commission to make clear that use of the form is not required and submissions can be made without the form. See 29 CFR § 24.103 for an example of a rule that does not require a form for submission. Rules requiring a form of submission invite adjudication on technicalities rather than the merits. Corporate defense counsel never like to receive the bad news of a claim against the company and they will look for technicalities to avoid the merits whenever possible. The public policy calls for adjudication on the merits.

F. All submissions should be encouraged.

The Commission memorandum, p. 5, states that the Commission is looking for “high-quality tips” and wants to deter “false submissions.” Fraud detection depends on getting the initial report of suspicious activity. Employees may see only the tip of an iceberg and they would have no way of knowing the full scope of the fraud they detected. Therefore, effect fraud detection programs will encourage the submission of all reports of suspicious activity.

There is no data suggesting that employees would risk jeopardy to their careers to submit claims they could not prove. There is no data of employees submitting false claims under the False Claims Act. The Commission should base its regulatory policy on facts and data, not speculation and hypotheticals.

Any provisions that discourage the submission of “low-quality” or other tips will reduce the actual number of frauds detected and thereby work against the legislative purpose. The Commission should remove from the proposed regulations all provisions that would punish whistleblowers or their attorneys. Any fear or apprehension of penalty would work against the public purpose of encouraging employees to come forward with information about suspicious activity.

The False Claims Act protects employees who are collecting information about possible fraud "before they have put all the pieces of the puzzle together." See, *e.g., U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 739-40 (D.C. Cir. 1998). The same doctrine should apply to the Dodd-Frank Act to encourage employees to report any observation of even a portion of suspicious activity.

G. No exclusion should apply for participation in a violation.

The Act contains its own exclusion for those who initiating a violation without direction from a superior. No other exclusion is necessary or desirable. Since the False Claims Act was first adopted in 1863, it was understood that “it takes a rogue to catch a rogue.” Perpetrators of fraud often need the assistance of others to accomplish their plans for ill-gotten gains. This is an inherent weakness of criminal conspiracies that the law wisely seeks to exploit. When perpetrators involve others in their crimes, they should forever face the risk of any of their

cohorts might turn state's evidence against them. The state needs to catch these opportunities, and encourage participants to come forward, even if they themselves had been employed in the commission of the violations. Who else would better understand the inner workings of the fraud? The attached report reviews empirical evidence of the value of reports for all manner of employee who may have knowledge of suspicious activity.

H. No exclusion for CFTC proceedings.

On page 8, the Commission seeks comment on proposed rule 21F-3(d) which would prohibit rewards if the CFTC has issued or denied a related reward. The doctrine of res judicata should apply only to the final outcomes of due process hearings. No automatic rule should bar rewards to whistleblowers. The interaction of the SEC and CFTC programs can be adjudicated on a case-by-case basis to avoid double recoveries. The CFTC process can be evidence, but it should not be a bar.

NWC encourages the SEC to enter into a Memorandum of Understanding (MOU) with the CFTC, and with other law enforcement programs that have overlapping jurisdiction. These could include the DOJ (both civil fraud and criminal), Department of Labor and IRS. Other whistleblower programs have similar MOUs. See for example, Notice of Signing of a Memorandum of Understanding Between the Federal Aviation Administration (FAA) and the Occupational Safety and Health Administration (OSHA), 08/30/2002, 67 FR 55883. How else will the SEC enforcement personnel have access to information in sealed cases handled by DOJ? It is clearly beneficial for the Commission to act strategically to maximize the amount of information available to its staff.

I. No exclusion for receipt of a subpoena or imposition of a duty.

The public interest will gain nothing from an exclusion that prohibits rewards to whistleblowers who make disclosures have receiving a subpoena. To the opposite, it is in the public interest to encourage everyone to make voluntary disclosures up to the minute when they are testifying under the compulsion of legal process. The first-to-file rule adequately protects the public fisc from multiple claims on the same fraud. The public interest is served by receiving multiple reports from a variety of employees so that enforcement personnel can have a wider view of the available information. NWC urges against the proposed rule 21F-4(a)(1). The IRS reward program has no exclusion from rewards for persons served with a subpoena. By adopting this proposed rule, the commission will be giving up one of the most valuable tools available: the opportunity to turn a witness from a hostile witness to a cooperating witness. Commission staff should not feel any pressure to refrain from pursuing lawful subpoenas. Adoption of this proposed rule would mean that once they serve a subpoena, they could no longer make a viable offer of legal rewards for turning state's evidence.

Similarly, the public interest is not served by denying rewards for those who have a legal duty to report information. Just because a person has a legal duty to disclose does not mean that the person would be free from supervisory pressure to conceal a fraud. The statute sets out its own exclusion at Section 21F(c)(2), and this Commission should not seek to expand the exclusion.

The Commission should not tempt fraudsters into establishing contracts or corporate duties that would deny certain witnesses from receiving lawful rewards for reporting frauds. NWC urges against the proposed rule 21F-4(a)(2).

J. "Independent knowledge" should follow FCA standards

On page 18, fn 21, the Commission memorandum acknowledges that Congress amended the False Claims Act to remove the "direct and independent knowledge" requirement. Congress recognized that the requirement worked against the public interest of maximizing the detections of fraud. This Commission should follow suit and adopt rules that reflect the current standards under the FCA. NWC urges the Commission to reject proposed rule 21F-4(b) as it would work against the public policy of the Act. This proposed rule also expands the exclusion for attorneys and accountants. The Commission has no need to tinker with the statutory exclusions, and any attempt to expand them works against the remedial purpose of the law.

K. Internal reporting should not be required, should be treated equally with direct reports to government, and should not be constrained with time limits.

NWC's report submitted with these comments documents the prevalence of employee reports of fraud as the primary source for detecting fraud. The Commission's memorandum appreciates the value of effective internal compliance programs, but the proposed regulations contain flaws that undermine the remedial purpose of the law.

First, it is contrary to the public policy established by the Act to require internal reporting. Giving whistleblowers a greater reward when they report internally would also be contrary to the Act. The public purpose is served by encouraging all routes of disclosure and all such routes should lead to the same opportunity for rewards. The IRS reward program has no exclusion or limitation on rewards for persons based on whether or not they participating in internal compliance programs.

The Act specifically permits anonymous disclosures. This provision excludes any idea that the Act would want to require internal reporting or encourage internal reports with higher rewards. Internal reports create the greatest risk of disclosure of identity. Anonymous reporters will naturally prefer to make reports directly to the government. It would be consistent with the law to provide such anonymous reports the same opportunity to receive the same reward.

Second, time limits for reporting should be no more strict than what is provided by law. NWC urges the Commission to reject the 90-day time limit to file with the SEC after an internal report. The added time limit will just add to the procedural hurdles for whistleblowers. If corporate defense counsel can defeat or lessen a reward on technicalities, then the cause of fraud detection will suffer.

L. The Commission should not restrict attorney's fees.

It is not the Commission's role to regulate contingent attorney fee agreements. Every state and

the District of Columbia have their own agencies to regulate attorney conduct. Contingent fee agreement are helpful in expanding access to legal service for those who could not otherwise afford market rates. In assessing the propriety of attorney fee awards, government should look to those market rates and not the contract between attorney and client. See *United Slate, Tile & Composition Roofers, Damp & Waterproof Workers Ass'n. Local No. 307 v. G&M Roofing Sheet Metal Co*., 732 F.2d 495, 504 (6th Cir. 1984). State authorities are the proper authorities for policing against excessive attorney fee agreements. Bar rules prohibit excessive fees, and either the SEC or a client can file a compliant with Bar Counsel.

M. The Commission should not threaten attorneys with sanctions.

The Commission should encourage whistleblowers to retain counsel, and should endeavor to expand the pool of available counsel for whistleblowers. Requiring attorneys to be registered with the SEC is counterproductive. Attorneys do not need specialization in securities law to handle employee claims. Moreover, the threat of sanctioning attorneys with SEC enforcement actions serves as a discouragement and is contrary to the goal of encouraging whistleblower disclosures through the available pool of employment attorneys.

A monetary sanction against an attorney is “an extreme sanction, and must be limited to truly egregious cases of misconduct.” *Jones v. Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986). A contrary approach would have a chilling effect on plaintiffs seeking to vindicate rights and further the public policies underlying the laws they help enforce. The Supreme Court made this clear in *Christiansburg*, noting that assessing attorney’s fees against non-prevailing civil rights plaintiffs “simply because they do not finally prevail would substantially add to the risks inherent in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement [of Title VII];” therefore, such awards should be permitted “not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.” *Christiansburg*, 434 U.S at 421, 422. In *Christiansburg*, the Supreme Court explained that the plaintiff in a Title VII case is “the chosen instrument of Congress to vindicate ‘a policy that Congress considered of the highest priority.’” *Id.* at 418 (quoting *Newman v. Piggie Park Enterprises,* 390 U.S. 400, 402 (1968)). Under Dodd-Frank, attorneys serve a similar function in assisting the government in fraud detection and encouraging whistleblowers to come forward with disclosures.

Imposing sanctions through SEC enforcement actions has an undeniable chilling effect. In *Riddle v. Egensperger*, 266 F.3d 542, 547, 551-52 (6th Cir. 2001), the Court said:

> A potential plaintiff’s fear of an increased risk of being assessed attorney fees . . . would create a disincentive to the enforcement of civil rights laws and would have a chilling effect on a plaintiff who seeks to enforce his/her civil rights, especially against a government official. . . . [T]he District Court cannot engage in *post hoc* analysis based on their findings in favor of Defendants . . .. This type of hindsight analysis discourages individual citizens from bringing suits to enforce their civil rights.

NWC urges this Commission to eliminate any provision for sanctions against whistleblowers and

their attorneys. Even the suggestion of such sanctions can have a deterrent effect against the very reports the law seeks to encourage.

The SEC is not powerless to police attorneys who appear before it. The SEC, like other agencies, can and should refer any attorney who violates appropriate standards to their Bar Counsel for discipline.

N. The Commission's rulemaking authority under § 21F is limited and must ensure that rules encourage employees to report potential violations to the SEC.

As previously noted, on page 7 of the Commission memorandum and in the Senate Report accompanying the legislation, "[t]he Whistleblower Program aims to motivate those with inside knowledge to come forward and assist the Government." S. Rep. No. 111-176 at 110 (2010). This clear statement of legislative intent, combined with the explicit and detailed statutory language, sets forth strict parameters on the Commission's rulemaking discretion. The rules cannot be used to create exclusions from coverage or impediments to rewards. As set forth in § 21F(j), the Commission's rulemaking authority is limited to "implementing" the program dictated by Congress, and this implementation must be "consistent with the purposes of the section."

O. No *per se* restrictions can be placed on employees who perform compliance, audit or legal functions.

On page 27 of the Proposed Rue the Commission staff recommended that employees who learn of "information through" a company's "legal, compliance, audit or similar functions" should be excluded from obtaining a reward. This exclusion is not based on the statute, in which Congress carefully carved out specific statutory exemptions.

The report filed today by the NWC also demonstrates that the existence of a *qui tam* program will not have any negative impact on a company's compliance and audit functions.

These employees can serve a vital role in providing information to the SEC. In fact, compliance and audit officials are often subject to retaliation for doing a good job, and are often the targets of pressure to water-down findings or ignore issues. In fact, the 1986 legislative history of the False Claims Act referenced a case in which a corporate compliance-related employee was the prototypical whistleblower. *See Mackowiak v. University Nuclear Systems Inc.*, 735 F.2d 1159 (9th Cir. 1984), *cited in* S. Rep. No. 99-345 (analysis of section 6).

P. The "hearsay" exception has no basis in law

The Proposed Rules create a "hearsay" exception for reporting. If a person learns

of a violation from someone employed in one of the "excluded" rule-created excluded categories, said person cannot file a claim.

This rule has not basis in the statute and is counter-productive to the legislative intent. The goal of Dodd-Frank is to ensure effective and efficient detection of potential frauds, and the immediate communication of those frauds to an appropriate authority. This proposed rule is creates absurd results. For example, assume someone worked for Bernie Madoff, and overhead a conversation in which a compliance officer admitted to the Ponzi scheme. Unquestionably Congress would want this person to quickly report the fraud to the SEC, and Congress would expect that this person would be rewarded.

Q. The Commission's Concern over Obtaining Improper Evidence is Easily Resolved

On page 31 of the Proposed Rule the Commission raises the issue of how it should handle information provided to it that may have been produced in violation of judicial or administrative orders. Similar concerns were raised concerning attorney-client information.

This concern should be easily resolved. If information provided by a whistleblower is subject to a legitimate privilege that would exclude its use as evidence in administrative or judicial enforcement/criminal actions, then the information could not be considered the basis for a reward. The information is simply not usable. However, if information provided to the Commission can be used in enforcement proceedings, then that information should be considered part of the basis for a reward.

R. The 90 day rule should be not be approved

On page 32-33 of the Proposed Rule the Commission staff recommended a 90 day time period for employees who file information with "another authority" to file claims with the SEC.

There is no basis for this 90 day rule. First, the Commission should establish mechanisms for sharing information between all agencies that may obtain information concerning violations of law within the jurisdiction of the SEC. Joint task forces should be standard operating procedures, and the Whistleblower Office should assist in this process. Second, there is no reason to place such a limitation on employee-whistleblowers. The statute sets forth a statute of limitations for filing claims, and that statue of limitations should be controlling regardless of whether an employee files a similar or related claim with another agency, with internal compliance or as part of any other adjudication or lawsuit.

S. There is no public policy requiring companies to receive reports

concerning potential violations of law prior to law enforcement learning of these violations

Throughout the Proposed Rule, and specifically on page 34 of the proposal, Commission staff references a public policy that encourages whistleblowers to give "employers an opportunity to address misconduct before" allegations are filed with the Commission.

No such policy exists under federal law. All whistleblower laws strongly protect and encourage employees to make disclosures directly to law enforcement. This policy creates a double standard. One for white collar criminals employed on Wall Street, and another for other classes of criminals. Why should a company be given a "heads up" on its official misconduct? Why should a company be given information about potential criminal activity, and provided an opportunity to cover-up the problem, warn the wrongdoer, or create a defense? If an employee witnesses a crime, public policy mandates that the employee report that crime immediately to the police.

There can be no double standard in the obligation to report criminal activity to law enforcement. Section 1107 of the Sarbanes-Oxley Act established the actual federal policy on this issue. Under §1107, every person has the right to report suspected crimes to federal law enforcement, and *any interference* with that right not only is prohibited as a matter of federal law, it is criminally prohibited. Dodd-Frank created a civil cause of action for violations of § 1107. Thus, the existence of a compliance program does not create a policy that in any manner justifies a delay in reporting crimes to law enforcement. Furthermore, if a company or government agency used the pretext of a compliance program as a justification for retaliating against an employee, or denying an employee a monetary benefit, such conduct is criminalized under § 1107.

The attempt to use compliance programs as an excuse to delay reporting potential criminal activity to the police (including the SEC) reveals a cultural basis which both the Sarbanes-Oxley Act and the Dodd-Frank Act were intended to eliminate. A crime is a crime. It must be promptly reported to the authorities. No criminal has a right, direct or indirect, to get a "heads up" that their wrongdoing was discovered. No criminal has a right to cover-up or take evasive action because of an early-warning system implemented by a corporation with an interest in either preventing t he detection of the crime, downplaying the significance o the crime or creating an early-bird defense to the crime.

T. The "essential information" standard is not supported under the law

In various sections of the Proposed Rule, and directly on page 38 of the staff's proposal, the Commission proposed that high standards be placed on certain employees. For example, the standard for obtaining a reward set forth on page 38

is an “essential information that the staff would not have otherwise obtained” standard. *See also e.g.*, “principal motivating factor” standard; “high quality” standard; “significantly contributed” standard; “essential to the success” standard, the “essential” standard, set forth on pages 39 and 41 of the Proposed Rule.

These are not the standards established under the law. Section 21F sets forth the informational standard. The Commission cannot selectively or otherwise increase that standard. These standards may come into play when the Commission is determining the level of a reward, but they cannot be used to exclude a person from eligibility to obtain a reward.

U. The “single captioned action” rule should not be adopted

For calculating monetary sanctions, the Commission is proposing a “single captioned” action standard. Proposed Rule, p. 43. This rule should not be adopted. It places form over essence, and permits the SEC to deny claims based solely on the procedures used to administratively process information provided by a whistleblower. A reward must be based on the aggregate of all recoveries obtained by information provided to the SEC by the whistleblower. This aggregate should be based on recoveries related to any and all SEC proceedings, and to related proceedings instituted by other agencies based on the information provided by the whistleblower. It is the intent of Congress to pay these rewards to encourage employees to step forward. The rules should be drafted so as to encourage the payment of rewards and thereby induce other employees to step forward and file claims.

V. Whistleblowers must be notified and be provided an opportunity to oppose the disclosure of their identifies

On page 53 of the Proposed Rules the Commission anticipates that there may be circumstances in which the “identify of a whistleblower” must be revealed. First, this provision cannot apply to whistleblowers that file anonymously. In other words, the Commission cannot under any circumstances have the authority to compel the attorney for the anonymous whistleblower to identify his or her client.

Second, in cases in which the Commission knows the identify of the whistleblower, the Commission should be required to give timely notice to the whistleblower that his or her identify may be revealed, and the whistleblower must be given an opportunity to seek a protective order preventing such disclosure.

W. Whistleblowers should have an opportunity to correct their filings

The law does give the Commission the authority to deny a reward if a request is not filed in the proper manner. This is a procedural rule, not a substantive rule.

Regardless, because the goal of the law is to encourage disclosures by paying rewards, the Commission should establish by rule a procedure in which if a whistleblower's submission was defective, the whistleblower would receive notice of the defect and be provided a reasonable opportunity to correct the mistake.

X. The Commission cannot require confidentiality agreements

The Commission is proposing to give its staff the authority to require whistleblowers execute confidentiality requirements. Proposed Rule, p. 57. Such confidentiality requirements must be voluntary.

First, the standards established by Congress for determining the amount of a reward (i.e. whether a reward should be 10%, 30% or somewhere in between) contain a factor related to the amount of cooperation the whistleblower provides to the office. Under the law, a whistleblower can simply file his or her request and go home. They are under no duty to work for free for the SEC, and they cannot be required to provide any additional assistance. Most employees will want to cooperate with the SEC, in order to be eligible for a higher reward and/or to ensure that the SEC understands their allegations.

If an employee does not cooperate with the SEC in its investigation (including declining to execute a reasonable non-disclosure agreement), the Commission can use that as a reason to limit the size of a reward, but cannot use that factor as grounds for disqualifying a whistleblower from eligibility for a reward.

Second, the whistleblower may want to inform various persons of the underlying misconduct, including investors or clients.

Third, under the First Amendment, the whistleblower has a constitutional right to communicate matters of public concern to Congress or the press. The Commission cannot establish rules that require an employee to give up his or her First Amendment rights in order to qualify for participation in a whistleblower program.

Fourth, a whistleblower may need to file a complaint against Commission staff, and his or her right to file such a complaint cannot be compromised.

Y. There is no justification for a blanket exemption on the eligibility of foreign officials

On page 58 of the Proposed Rule, Commission Staff recommend a blanket exclusion against foreign officials filing claims. Again, such a blanket exclusion has not basis in law. Such exclusions may be considered on a case-by-case basis, and thereafter subject to judicial review.

This blanket exclusion may significantly interfere with the enforcement of the Foreign Corrupt Practices Act.

Z. The SEC should use the standard "sworn" statement utilized by the IRS and other agencies

The Proposed Rule, on page 60, creates a complex and expansive "swearing" statement. This expansive statement is designed to deter "false or spurious allegations." There is no factual basis to conclude that the Commission need worry about "false or spurious allegations" being filed under § 21F. In any event, these allegations are not filed in open court, they are filed with the Commission staff, who should be able to determine the validity of the claims. If a whistleblower publicly releases information that is defamatory, they can be held accountable.

The IRS has a swearing statement that is consistent with similar statements used by other federal agencies. The SEC should adopt that statement.

AA. The administrative Process is To Complex

On page 69 of the Proposed Rule, the Commission sets forth a graph of the administrative process designed to adjudicate reward requests. On the face of that graph, it is clear that the procedures are far too complex. A whistleblower should be required to fill out a simplified form, consistent with the form recommended by the Inspector General. For there, the process should be "user-friendly," and focused on a process designed to facilitate a final settlement between the SEC and the employee, in which both sides can reach an agreement on the basis for a reward, and the percentage amount. If an agreement cannot be reached, there should be an appeal process. If that process does not fully resolve the dispute, the whistleblower can obtain judicial review.

BB. The requirement that whistleblowers re-file their claim within a sixty day period is unworkable

The sixty day re-filing requirement identified on page 70 of the Proposed Rule must be eliminated. It is complex, not "user friendly," and presupposes that the whistleblower and the SEC will not have a cooperative relationship. The recommendations of the Inspector General should be followed in this regard. There should be regular communications between the whistleblower and SEC staff. A claim should be given a number, and monitored from beginning to end. Whistleblowers should be given regular notice as to the status of their claims, including a formal written notice every 90-180 days. This will prevent allegations from falling through the cracks. A settlement process should be built into the process. Once the SEC determines that monetary sanctions etc. may be collected on the basis of a whistleblower's claim, the whistleblower should be included in a

process designed to establish the basis (if any) for a reward, and the percentage amount. The SEC and the whistleblower should be encouraged to reach a consent agreement. This agreement would be binding on the agency and the whistleblower, and reduce the time and expense for litigating appeals.

CC. Relief if SEC Wrongfully Denies a Reward

The Final Rule should permit a whistleblower who is wrongfully denied a reward to obtain, as a matter of course, attorney fees from the SEC under the Equal Access to Justice Act, if the denial is reversed either through an administrative appeal or through judicial review.

DD. Interest

Interest should be paid on any reward effective the date the SEC obtains the monetary sanction etc. from the wrongdoer.

EE. Amnesty

On page 82 of the Proposed Rule, the staff discusses amnesty for whistleblowers. There should be no firm rule on this matter. If an employee engaged in misconduct, and then want to blow the whistle, a process should be established in which the employee can come forward with the information, and the Commission (in conjunction with other relevant agencies, such as the Department of Justice) can reach a decision as to whether amnesty or immunity should be given. Similar to the process used in criminal proceedings, information provided by the whistleblower should not be able to be used against the whistleblower in a criminal or civil proceeding, assuming that no agreement is reached.

FF. The disqualification set forth on page 83 is not justified as a matter of law

The sole goal of § 21F is to encourage whistleblowers to provide information to the SEC for the detection, prevention and elimination of fraud and other misconduct. Section 21F permits any person not statutorily prohibited from obtaining a reward, to file a claim. On page 83 o the rule the SEC replaces its "common understanding" of who a whistleblower is, with the statutory mandates. This is not supported as a matter of law.

Furthermore, *qui tam* laws do not share all of the characteristics of other whistleblower laws. They are designed to encourage participants in criminal activity to turn in their co-conspirators. As understood by the Civil War Congress, the goal of the *qui tam* is to use a "rouge" to catch a "rouge." The Commission cannot substitute its own moral standards for the standards of Congress.

This aspect of the Proposed Rule only violates the law, but challenges one of the most important underpinnings of the law. As stated by the author of the False Claims Act on the floor of the Senate in 1863:): "The old-fashioned idea of holding a temptation, and setting a rough to catch a rouge, which is the safest and most expeditious way . . . of bring rouges to justice." *See,* Cong. Globe, 37th Cong., 3rd sess., pp. 955-56 (1863) (remarks of Senator Howard). This is the primary intent of *qui tam* laws, such as the FCA and Dodd-Frank. This was the understanding of the authors of the original FCA, and of President Abraham Lincoln who approved and signed the False Claims Act.

The SEC must establish rules that, from top to bottom, understand that the primary purpose of this law is to induce wrongdoers, with direct knowledge of criminal activity, to risk their jobs and careers (and perhaps their freedom) to serve the public interest and turn in their follow rouges. The law demands the "expeditious" reporting of criminal activity, not to the wrongdoing company, but to the police or law enforcement.

We request an opportunity to meet with your staff to discuss these proposed regulations further. If Commission personnel or other interested parties have any questions about our comments, they are welcome to call on us.

Sincerely,

/s/

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Enclosure: "Impact of Qui Tam Laws on Internal Compliance: A Report to the SEC."

December 17 | 2010

Impact of *Qui Tam* Laws on Internal Compliance:

A Report to the Securities Exchange Commission

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Introduction

On November 3, 2010 the Securities and Exchange Commission (SEC) published its Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934. This report constitutes a formal submission to the SEC in accordance with the Administrative Procedure Act on behalf of the National Whistleblowers Center (NWC), a non-profit, tax-exempt public interest organization, along with the numerous whistleblowers to whom the NWC provides assistance.

The SEC explicitly requested comments on the potential impact of the Dodd-Frank Wall Street Reform Act's whistleblower reward provisions on internal corporate compliance programs. The SEC expressed interest in obtaining empirical data on this issue.

Based on this request, the NWC has undertaken a comprehensive study of the impact that other *qui tam* reward programs have had on employee reporting behaviors. As set forth in this report, the objective data demonstrates that whistleblower reward laws have *no impact whatsoever* on the viability of internal corporate compliance programs or the willingness of employees to report suspected violations to their employers. The concerns raised by numerous corporate commentators are not in any way supported by the actual underlying data.

Issues created by the overlap of corporate compliance programs and whistleblower disclosures are not new issue.

As early as 1984 the current Executive Director of the NWC worked directly with whistleblowers who raised internal complaints within their corporate structures, and attempted to develop a strong legal analysis ensuring that employees who worked within compliance programs would be protected. In 1985 he co-authored an *amicus* brief filed with the U.S. Court of Appeals for the Tenth Circuit on this issue, urging the Court to fully protect compliance employees who raised concerns within the corporate structure. *See*, Kansas City Gas Case.

The NWC has assisted in drafting and advocating for legislation that

explicitly provides legal protection for employees who raise concerns within their corporate structures. The NWC participated in the drafting of both the Dodd-Frank and Sarbanes-Oxley anti-retaliation provisions to ensure that those laws protected employees who chose to work internally with their employers.

Based on its many years of public policy and legal advocacy experience, the NWC is well-versed in all of the major issues concerning internal reporting, and remains fully committed to supporting rules and laws that fully protect employees who raise whistleblower concerns within their corporate structure. The NWC has always maintained that employees should be protected regardless of whether they choose to report concerns internally or externally.

The position of the NWC stands in stark contrast with the numerous corporations now petitioning the SEC and claiming that they want to protect and encourage internal whistleblowing. Since 1984, when counsel for the NWC first engaged on this issue, we are not aware of any corporation in the United States that has ever urged any federal court to protect employees who chose to file their whistleblower claims internally. This issue has been addressed in hundreds of cases. Even before 1984, in the early infancy of whistleblower protections, publicly traded companies and their agents aggressively attempted to convince the courts that internal complaints were not a protected activity and only those whistleblowers who made disclosures to government agencies were protected from retaliation. These arguments stretch back to 1971.

Tragically, a significant number of courts have agreed with the strained and tortured legal analysis that the regulated community has advocated for more than a generation, and have ruled that disclosures to internal compliance programs are not protected. It is deeply troubling that the same lawyers and corporations who have spent nearly forty years arguing for their right to retaliate against employees who report their concerns internally to compliance programs, would now argue that these programs would be harmed if whistleblowers are given protection for disclosures made directly to the government. Their new-found faith in the protection that whistleblowers who make such reports will receive is disingenuous.

The law mandates that both internal and external whistleblowing be equally protected. The better line of legal cases make no distinction between the legal rights of an employee who chooses to work within the corporate structure and the employee who chooses to report his or her concerns directly to the government. The SEC rules should support this policy, and should not limit the rights of employees who disclose fraud or violations of law to the government based on the office or program to which that employee feels comfortable contacting.

The public interest is served by creating policies and procedures that encourage the reporting of suspected violations to the appropriate authorities, regardless of whether those authorities are simply a first-line supervisor, a hot-line, the SEC, a state attorney general, Congress or the Attorney General of the United States.

This report carefully analyzes the impact *qui tam* whistleblower reward laws have on the reporting behaviors of employees, with a focus on whether or not laws, such as the Dodd-Frank reward provision, impact on the willingness of employees to report their concerns internally to managers or compliance officials. The report also seeks to identify whether *qui tam* laws encourage employees who themselves work in compliance departments to bypass their chains of command and file *qui tam* claims in order to obtain a reward.

In addition, this report discusses other factors related to the compliance issue, and other important questions raised by the SEC in its Proposed Rules. Based on the NWC's 25-year track record of supporting legal protections for internal whistleblowers, and the empirical study presented in this report, the NWC makes specific recommendations for the Final Rule.

Summary of Findings

The existence of a *qui tam* or whistleblower rewards program has no negative impact whatsoever on the willingness of employees to utilize internal corporate compliance programs or report potential violations to their managers.

Based on a review of *qui tam* cases filed between 2007-2010 under the False Claims Act (FCA), the overwhelming majority of employees voluntarily utilized internal reporting processes, despite the fact that they were potentially eligible for a large reward under the FCA. The statistics are as follows:

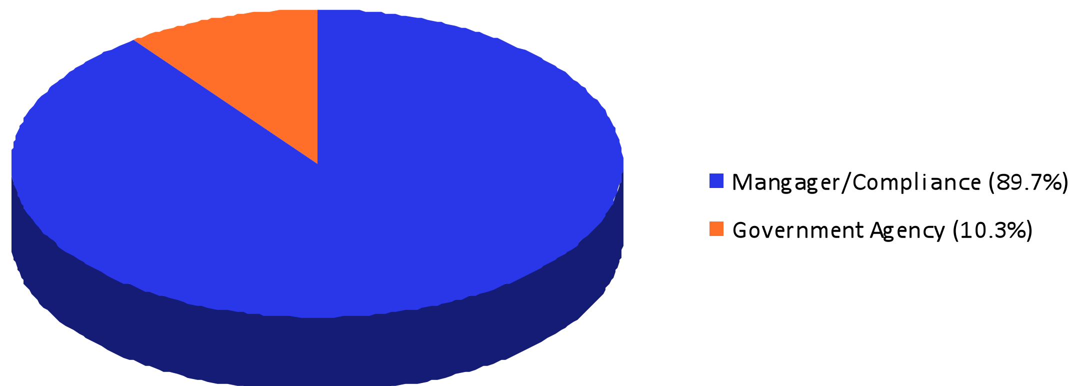
- 89.7% of employees who would eventually file a qui tam case initially reported their concerns internally, either to supervisors or compliance departments.
- 10.3% of employees who would eventually file a qui tam case reported their concerns directly to the government.
- 4.7% of employees who would eventually file a qui tam case worked in compliance departments.
- 0.9% of employees who would eventually file a qui tam case worked in compliance, and did not initially contact their supervision prior to contacting the government.

The methodology of our study is explained at the conclusion of this report.

Impact of *Qui Tam* Laws on Internal Reporting

The existence of a *qui tam* whistleblower reward program has no impact on the willingness of employees to internally report potential violations of law, or to work with their employer to resolve compliance issues. Our statistical study of *qui tam* cases decided in the past four years demonstrates that approximately 90% of all employees who would eventually file a *qui tam* lawsuit initially attempted to resolve their disputes internally.

***Qui Tam* Plaintiffs Reporting to Manage**
Compliance vs Government 2007-2010



These statistical findings are consistent with other reviews. For example, in its May 13, 2010 issue, the New England Journal of Medicine published a "Special Report" examining the behaviors of *qui tam* whistleblowers who won large False Claims Act judgments against the pharmaceutical industry. This report also found that "nearly all" of the whistleblowers "first tried to fix matters internally by talking to their superiors, filing an internal complaint or both." In fact, 18 of the 22 individuals in the control group initially attempted to report their concerns internally. The four individuals who reported their concerns to the government were not employees of the defendant companies (i.e. they were "outsiders" who "came across" the frauds in the course of their business), and therefore had no "internal" avenues through which to voice their concerns. It would thus be fair to say that every *qui tam* whistleblower who had the opportunity to report internally in fact did so.

Moreover, many of the cases in the NWC's study where employees reported directly to the government involved very special circumstances. For example, in one case, the initial report to the government was testimony before a Grand Jury. It clearly would have been inappropriate for that employee to discuss confidential Grand Jury testimony with his or her employer.

The Journal's conclusion that "nearly all" of the whistleblowers try to report their concerns internally is entirely consistent with the larger study conducted by the NWC and stands squarely contrary to the baseless concerns raised by industry that "greedy" employees will avoid internal compliance programs in pursuit of "pie in the sky" rewards. The truth is that the overwhelming majority of employees who eventually file *qui tam* cases first raise their concerns within the internal corporate process.

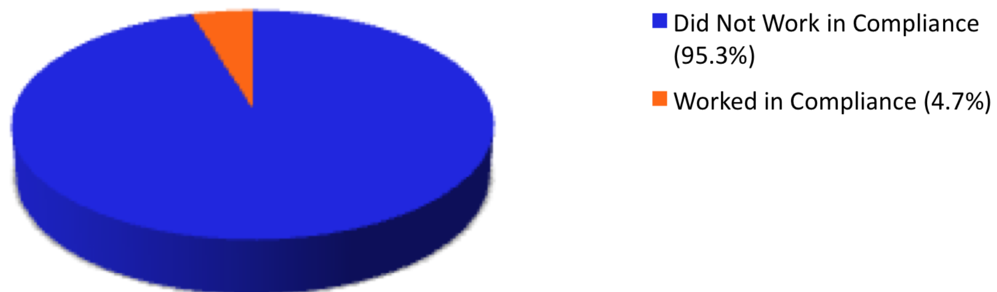
The *qui tam* reward provision of the False Claims Act has existed for more than 20 years and has resulted in numerous large and well-publicized rewards to whistleblowers. However, contrary to the disingenuous assertions by corporate commenters, the existence of this strong and well-known *qui tam* rewards law has had *no effect whatsoever* on whether a whistleblower first brings his concerns to a supervisor or internal compliance program. There is no basis to believe that the substantively identical *qui tam* provisions in the Dodd-Frank law will in any way discourage internal reporting. See, Employee Reporting: Internal vs. External.

Impact of *Qui Tam* Laws on Compliance Reporting

- 4.7% of Plaintiff Employees worked in compliance
- Only 1 Plaintiff Employee contacted a Government Agency without first raising the concern within the corporation.

The existence of large Qui Tam rewards did not cause compliance employees to abandon their obligations and secretly file FCA cases and seek large rewards.

Participation of Compliance Employees in *Qui Tam* Reward Cases



The fact that compliance officials could learn of frauds, and file *qui tam* lawsuits to obtain significant monetary rewards had no impact on the reporting processes of employees working in compliance departments. Only 4.5% of *qui tam* relators worked in compliance programs. There was no spike in the number of compliance-associated employees filing *qui tam* cases and there is no reasonable basis to believe that permitting employees who work on compliance to file *qui tam* suits will in any way undermine internal compliance reporting.

Of those compliance-relators, only *one case* concerned an employee who reported his concerns directly to the government, without first trying to resolve the issues internally.

This one case is clearly an exception. In that case, *Kuhn v. Laporte County Comprehensive Mental Health Council*, the Department of Health and Human Services Inspector General was conducting an audit of the company's Medicaid billing. During the audit, the whistleblower learned that the company's internal "audit team" was altering documents to cover-up "numerous discrepancies," including a "forged" signatures and so-called "corrections" to "billing codes." The employee reported this misconduct directly to the United States Attorney's Office. The disclosures to the government were *not* provided as part of a *qui tam* lawsuit. Instead, the employee believed that these disclosures would help "protect" the employer from "federal prosecution" based on the voluntary disclosures.

Indeed, this case highlights exactly why it is important to permit compliance employees to report directly to the government. When the compliance department itself is engaged in misconduct, where else could this whistleblower have gone? *See*, Compliance Employee Reporting.

Reports to Internal Compliance Must be Fully Protected

In a December 15, 2010 letter the Association of Corporate Counsel ("Association") stated that corporate attorneys "value" "effective corporate internal compliance and repotting systems." Association, p. 1. (Letter). They go further and argue "in-house counsel are the pioneers in establishing and facilitating corporate whistle blowing systems and safeguards." Association p. 3. The evidence does not support this claim. First, there is no support in the record that current "corporate culture" encourages and rewards employees who blow the whistle. That is why Congress enacted § 21F of the Securitas and Exchange Act -- to help create such a new culture.

Moreover, in the area of whistleblowing, in-house counsels have actively and aggressively undermined internal compliance programs for over 25 years. As early as 1984, corporations and their attorneys have consistently argued that employees who report to internal compliance programs are *not* whistleblowers and are *not* protected under whistleblower laws. One of the first such cases was *Brown & Root v. Donovan*, in which a quality assurance inspector was fired after making an *internal* complaint about a violation of law. Ronald Reagan's appointed Secretary of Labor ruled that such internal disclosures were protected and ordered the whistleblower to be reinstated. Brown & Root disagreed, and appealed the case to the U.S. Court of Appeals for the Fifth Circuit. That court agreed with Brown & Root and upheld the termination. The employee's career was ruined because he failed to raise his concerns to government officials. The 5th Circuit explicitly held that to be a

whistleblower an employee must contact a "competent organ of government."

Since that date, in court after court, under law after law, corporate attorneys have aggressively argued that contacts with internal compliance programs are *not* protected activities. This is why organizations such as the National Whistleblowers Center have consistently urged Congress to amend existing whistleblower laws to ensure that internal reporting is protected, and to include language in new legislation that explicitly protects internal reporting.

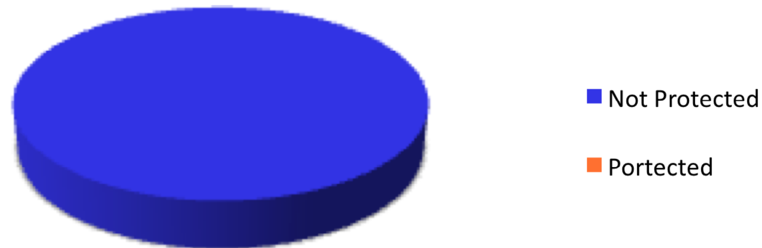
The statements filed by the Association are disingenuous and misleading. Their clients and attorneys have for years and years argued against protecting internal whistleblowers. In contrast, the NWC and its attorneys have championed these protections for over 25 years, and have succeed in fixing many whistleblower laws to prevent corporate counsel from undermining their own programs. In fact, shortly after the *Brown & Root* decision was issued, the current Executive Director was the co-author if a 1985 amicus brief filed in the U.S. Court of Appeals for the Tenth Circuit urging that Court not to follow *Brown & Root*.

Since the *Brown & Root* ruling, courts have been divided over whether contacts with managers or compliance programs are protected activities. All courts have ruled that contacts with government agents are protected.

To demonstrate this point, we examined two categories of cases. First are cases under the banking whistleblower protections laws. Second are retaliation cases filed under the False Claims Act.

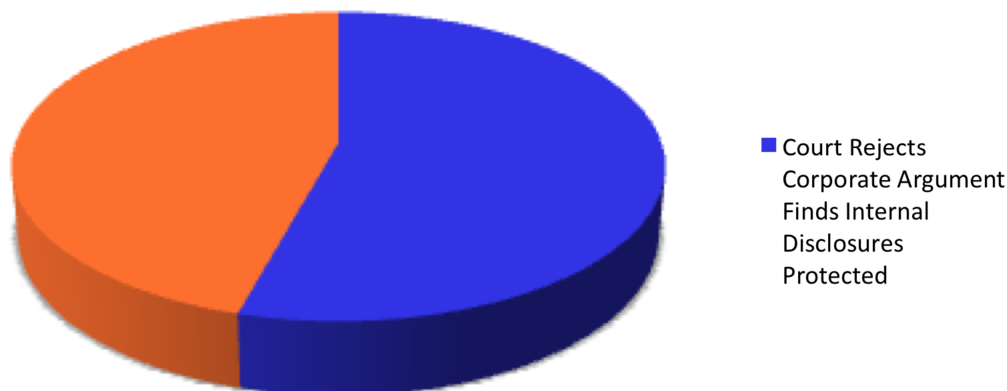
Under the banking law, numerous cases have examined whether employees who report to managers or compliance departments are protected. All but one of the published decisions demonstrates that internal disclosures are *not* protected. Banks have successfully urged court after court to undermine internal reporting structures and they have obtained rulings that reports to compliance officials about violations of law are not protected. The only protected disclosures were those made to the government. These findings are set forth in Chart---.

Employee Protection For Internal Compliance Disclosure Under Federal Banking Laws



Our review of the False Claims Act revealed a similar result. Reviewing published retaliation cases from 2007-2010 demonstrate that, in all but two cases, corporate attorneys and their clients argued that internal disclosures were *not* protected. The court rulings are evenly split as to whether a *qui tam* relator is protected for disclosures made to internal compliance, but the position of corporate counsel is uniformly against protection. Again, every court and every corporate counsel agree that contacts with the government are protected. Chart --- sets forth the results of this survey:

Cases Corporate Argued Internal Disclosures Not Protected Under FCA



Given the Commission's stated commitment to fostering effective internal compliance programs, and the new-found faith that corporate commenters like the Association have expressed in the protection that employees will receive in when making reports to such programs, the Commission should establish a rule that contacts with internal compliance departments and employee supervisors have the same protection as contacts with the SEC. Given the corporate track record on these issues, this mandate must be established by a formal rule.

If the regulated communities and the SEC are truly interested in promoting internal compliance programs, we hereby recommend that the SEC adopt and make the following rules final:

* All contacts with an Audit Committee or any other compliance program shall be considered, as a matter of law, an initial contact with the SEC;

* All regulated companies shall be strictly prohibited from retaliating against any employee who makes a disclosure to an Audit Committee or a compliance program concerning any potential violation of law or any "suspicious activities. This is consistent with the recommended standards of the Association of Certified Fraud Auditors.

* All regulated companies shall be required to track all internal complaints, and demonstrate how such complaints have been resolved;

* Consistent with 48 C.F.R. Chapter 1, all audit committees and compliance programs shall be required to "timely disclose" to the SEC "credible evidence of a violation" of law or SEC rules. *See* 73 *Federal Register* 67064, 67065 (November 12, 2008). When making these disclosures, if the information originated with a whistleblower, the identify of that whistleblower shall be provided to the SEC, and that submission shall be deemed to qualify as an application for a reward under § 21F;

* Should an internal complaint result in a finding of a violation, and lead to the Commission issuing a fine, penalty or disgorgement, the employee whose application was submitted through the internal complaint process shall be fully eligible for a reward.

With these rules in place, corporations would be free to develop and utilize their internal compliance programs to encourage employees to report problems within the company without undermining an employee's unequivocal statutory right to file a claim directly with the Commission. *See NLRB v. Scrivener*, 405 U.S. 117 (1972) ("Which employees receive statutory protection should not turn on the vagaries of the selection process").

Impact of the Federal Acquisition Regulation on Dodd-Frank Compliance Whistleblowers Rulemaking

Both the Commission and the regulated community have strongly asserted the importance of effective internal compliance programs in guarding against fraud. However, it is well documented that current mandates for corporate compliance programs are ineffective. For example, the Rand Center for Corporate Ethics and Governance published "Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds: What the Policy Community Should Know," *Rand Institute for Civil Justice Center* (2009) (Michael D. Greenberg). As part of this program Rand published a paper by Donna Boehme highly respected compliance executive and the former Chief of Compliance for BP. Ms. Boehme explained many of the problems experienced by compliance programs, and why these programs fail. She understood that the lack of commitment and the failure to create strong policies often resulted in these programs serving as "window dressing." *The Boehme paper is linked here*.

In the context of the False Claims Act, the United States took steps to ensure that compliance programs moved from simply being "window dressing" to becoming more substantive tools in the anti-fraud program. The United States determined that existing compliance programs were not effective, and instituted rulemaking proceedings within the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council to mandate stronger and more ethical compliance programs.

While these rule making applications were pending, Congress enacted Public Law 110-252, Title VI, Chapter 1, that required the Councils to implement new compliance rules consistent with the applications that had been filed by various federal agencies.

On November 12, 2008 the United States published these final rules, entitled, "Federal Acquisition Regulation; FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements," *See* 73 *Federal Register* 67064, 67065 (November 12, 2008). These rules establish reasonable ethical standards for compliance programs that have responsibility for reviewing compliance with federal contracts. As part of the present rulemaking process, the SEC should adopt these standards and issue a final rule requiring the regulated community to implement compliance programs that follow these rules.

Significantly, the November 12th rules explicitly cover all violations of the False Claims Act. In enacting these rules, the United States did not undermine the *qui tam* provisions of the FCA, and did not place any limits on employees filing FCA complaints. There is no requirement that employees report their concerns to the new mandated compliance programs, and there is no limit on *qui tam* rewards for employees who exercise their right to report concerns directly to the Justice Department.

The SEC should adopt rules to ensure that compliance programs are effective. These rules should in no way limit whistleblower rights under § 21F, and must ensure that employees have the freedom to confidentially and effectively report misconduct within their own corporations. The rules should explicitly mandate the application of the FAR Case 2007-006 rules to all companies regulated by the SEC. Moreover, the SEC should require compliance programs to implement the proposals set forth in the Boehme-Rand paper.

Impact of Section 1107 of the Sarbanes Oxley Act on DFA Rules

Neither the regulated community nor the SEC can lawfully create any rule that would create a financial disincentive or otherwise discourage a person from filing a complaint with the SEC or disclosing potential criminal conduct to law enforcement.

In its December 15, 2010 letter to the SEC, the Association of Corporate Counsel raised a concern that the final Dodd-Frank Act rules could "undermine corporate compliance regimes." Association to SEC, p. 4. ***Letter Linked Here***. The Association pointed to the various internal corporate reporting requirements in the Sarbanes Oxley Act, as a justification for this "principle." *Id.* P. 2.

The Association is incorrect. The Sarbanes Oxley Act creates near absolute protection for employees who contact any federal law enforcement agency regarding the violation of any federal law. This part of the statute is not a mere "principle." Section 1107 of the Sarbanes Oxley Act *criminalizes* any attempt to interfere with the right of any person to contact the SEC concerning any violation of law. The section sets forth an overriding public policy, implicit or explicit in every federal whistleblower law, that employees can *always* choose to report concerns directly to law enforcement, regardless of any other program, private contract, rule or regulation.

If other sections of Sarbanes-Oxley raised an issue as to whether or not any person could take concerns directly to the government, section 1107 answered those questions. Section 1107 is explicit, clear and unequivocal:

"Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense shall be fined under this title or imprisoned not more then 10 years, or both."

18 U.S.C. § 1513(e).

Significantly, section 1107 of SOX is a criminal statute that applies to "any person," including government employees. Thus, if a public sector employee (federal or state) took "any action" that was "harmful to any person" including actions that may harm any person's "livelihood," that public employee would be guilty of a crime. Section 1107 demonstrates the great importance Congress placed on the right of employees to report any reasonably suspected violation of federal law to any law enforcement agency.

The application of Section 1107 of the Sarbanes-Oxley Act to disclosures under the Dodd-Frank Act was made explicit in the statute, ensuring that there would be no mistake about the application of this very important legal policy, rule and principle in the implementation of Dodd-Frank both by government employees and regulated industries.

Section 21F(h)(1)(A)(iii) explicitly incorporates section 1107 of Sarbanes-Oxley into the Dodd-Frank Act. The definition of a Dodd-Frank protected disclosure includes "any lawful act done by the whistleblower . . . in make disclosures that re required or protected under . . . section 1513(e) of title 18, United States Code . . .." Section 1513(e) of the Code is where section 1107 of the Sarbanes-Oxley Act was codified.

No Commission rule can interfere, directly or indirectly with the right of employees to disclose any potential violation of law to the SEC, and no rule or regulation of the Commission can interfere with the "livelihood" of any person who makes such a disclosure. Disclosures to law enforcement are among the most cherished forms of protected activity, and must be safeguarded not only by the Commission, but the regulated community.

The rulemaking authority of the SEC under Dodd-Frank is limited. Rules are permitted that simply "implement the provisions" of section 21F. All such implementing regulations are required to be "consistent with the purposes" of the Act. Since one of the core purposes of the Act is to permit the free and unfettered communication of information from employees to law enforcement agencies, it is incumbent upon the SEC to strongly reaffirm this right.

It would constitute an illegal contract and a potential obstruction of justice for any employer to implement a rule that directly or indirectly restricted an employee's right to communicate with federal law enforcement. If a company initiated a program that based eligibility for financial incentives on whether or not an employee first communicated his or her concerns to a company, before going to federal law enforcement, any such policy would be void. If such a program were used against a whistleblower who choose to make a protected disclosure under section 1107 of Sarbanes Oxley and/or section 21F(h)(1)(A)(iii), it would constitute an adverse employment action under both of these laws, and could subject the company to severe criminal penalties.

Obviously, the SEC cannot implement any rules that would permit corporations to violate sections 1107 of SOX or 21F(h) of Dodd-Frank. Any impediment contained in the Proposed Rule published by the SEC must be struck. The request by various industry groups to authorize such restrictions on protected disclosures are not only misplaced as a matter of law, they are troubling as a matter of policy.

Any final rule published by the SEC must fully, clearly and unequivocally reaffirm an employee's right to contact the SEC (or any other federal law enforcement agency) and raise concerns about any violation of any federal law (including, but not limited to, violations of the Securities and Exchange Act). Furthermore, the final rule should require every regulated company to inform their employees of this right, and ensure that no employment contract or work rule interferes with this right. Finally, there can be no financial disincentive on any employee who exercises his or her right to contact federal law enforcement. The final rule must ensure that an employee's decision to report his concerns directly to the government, as opposed to his or her management and/or compliance program will have no impact whatsoever on eligibility and/or the calculation of the amount of reward for which an employee may obtain.

Impact of SEC Inspector General Recommendations on DFA Rule

On March 29, 2010 the SEC's Office of Inspector General published a comprehensive analysis of the SEC's pre-Dodd-Frank whistleblower rewards program. This report is hereby incorporated in its entirety into this rulemaking submission. The report is *linked here*.

The OIG report carefully studies the SEC's past practices in processing whistleblower reward-based tips, in light of its understanding that proposals were pending in Congress to upgrade the rewards program. The OIG made nine specific recommendations. The SEC Enforcement Division approved all of these recommendations. Enforcement Memorandum Linked Here.

The Proposed Rule did not reference the OIG recommendations, nor did it reference the fact that the Enforcement Division reviewed these recommendations and concurred.

All of the recommendations of the OIG should be incorporated into the final rule.

OIG Recommendation #1: The OIG recommended public outreach concerning the existence of the SEC bounty program. The Final Rule should implement this recommendation. We propose the following: All regulated companies shall be required to prominently post notice of the SEC's § 21F program, informing employees of their right to file claims directly with the SEC, and their right to file such claims anonymously. Regulated companies shall also be required to conduct annual trainings that inform employees of their rights under §21F, including the anti-retaliation provisions.

In order to encourage employees to utilize internal compliance programs, the SEC should, by regulation, mandate that contacting an internal compliance program or a supervisor is a protected disclosure, and will be treated the same as if an employee had contacted the SEC.

The requirement to post notice of employee rights is a common feature in various whistleblower laws, and is mandated by the Nuclear Regulatory Commission under its safety regulations. 10 C.F.R. § 50.7.

<u>OIG Recommendation # 2</u>: Post notice and information on the SEC's public web site of the SEC's reward program. This recommendation should be implemented into the final rule, as it is key to ensuring that the filing procedures for whistleblowers are not complicated or discouraging. The filing procedures set forth in the Proposed Rule are far to complex, and have terms and requirements that would both confuse employees, and may make them fearful of even filing a claim.

The OIG set forth four categories of information that a whistleblower would have to file with the SEC on a form. These categories are reasonable, and the initial filing form for the whistleblower should only require this information. The current proposal is too complex.

Additionally, the OIG recommendation included a standard certification that the whistleblower assert that his or her information was "true, correct and complete," etc. This is standard language. The Proposed Rule's oath provision is far to complex, and may intimidate a layperson from signing the form.

Implicit in the OIG recommendation is the fact that the reward process is initiated by the filing of an initial claim. There is no requirement to file follow-up forms. This should be followed in the Final Rule. The multi-form process contained in the Proposed Rule is costly, complex and will result in mistakes. A claim should be initiated with a simple form and request for information.

<u>OIG Recommendations #s 3, 5-7</u>: Establish follow-up policies for processing claims, tracking claims, facilitating communications between the SEC and whistleblowers and creating a case file. These recommendations are common sense, and should be implemented in a "user friendly" manner.

Once the application is filed, the Whistleblower Office should follow-up and carefully track all filings. If additional information is needed, the Office should facilitate communications between the responsible SEC officials and the whistleblower, so that the whistleblower can work directly with the government to ensure that all violations are detected, and that the final enforcement is complete. The case should have a file number. The employee should be provided regular updates on the status of the case. We propose 90-day notice letters.

When the SEC believes that they will obtain a fine, penalty or disgorgement, discussions should be initiated with the whistleblower to determine the nature of his or her contribution to the final penalties that will be imposed, and, if possible, the reward amounts should be part of the final resolution of a case. The SEC should work with the whistleblower and attempt to reach a consent agreement as to the proper basis for the reward, and the percentage of reward. There should be a strong policy goal that the Whistleblower Office and the whistleblower reach an agreement and voluntarily establish the amount of a reward. This will eliminate administrative costs, facilitate cooperation between the SEC and the whistleblower and expedite the payment of rewards. Only if there is a disagreement and a settlement is not reached should the issues related to the reward to forwarded to the Commission for a final determination, and ultimately potential judicial review.

<u>OIG Recommendation # 4</u>: Criteria for rewards. Congress established the criteria, and the Commission should strictly follow that criteria. The Commission does not have the legal authority to substantively change this criteria. The implementation of the criteria must be consistent with the "purpose" of § 21F, which is to encourage employees to report violations and provide generous financial rewards and incentives for these reports. § 21F(j). The Commission cannot use its rulemaking authority to reduce the scope of the Act, or create criteria that could discourage employees from fully and aggressively utilizing the programs established in § 21F.

<u>OIG Recommendation # 8</u>: This is perhaps the single most important recommendation. Under the False Claims Act, the Department of Justice has significant experience in working with whistleblowers in a reward-based program. Under the FCA best practices have been developed, and numerous issues have been resolved either by a court or by Congress when it amended the law in 1986, 2009 and 2010. These precedents and

policies should form the basis of the SEC program. The Proposed Rule, in many ways, tries to cover old ground already carefully reviewed under the FCA. These precedents should, for the most part, be followed. In regard to the IRS program, the IRS has implemented a "user friendly" application and follow-up procedure. These can serve as further models for the SEC rule.

The Commission Should Adopt the Leahy-Grassley Recommendations

After the enactment of the Sarbanes-Oxley Act, the two principal sponsors of the whistleblower provisions in that law wrote a letter to the then-Chairman of the SEC, Mr. William Donaldson. *Letter Linked Here*. Senators Patrick Leahy and Charles Grassley set forth specific proposals for SEC action to protect whistleblowers. The Leahy-Grassley recommendations were fully supported under law and policy. Unfortunately, the SEC did not properly respond to these recommendations, and the potential enforcement powers implicit or explicit in the Sarbanes-Oxley Act were lost. This significantly contributed to the failure of the SOX whistleblower provisions over the next six years.

Under Dodd-Frank there are even stronger policy and legal justifications for the Commission to implement the Leahy-Grassley recommendations. We hereby request the SEC incorporate these recommendations into the Final Rule.

Conclusions and Recommendations for Final Rule

Conclusion #1: The Existence of *Qui Tam* Laws will have No Impact on Internal Employee Reporting Activities.

Conclusion #2: the Evidence does not support employer concerns that Dodd-Frank will interfere with existing compliance programs.

Conclusion #3: There is no factual basis to justify any restrictions on an employee's right to obtain monetary rewards based on whether or he utilized an internal compliance program.

Conclusion #4: The systemic problems with corporate internal compliance programs are not related to *qui tam* law rewards and exist regardless of whether employees file whistleblower complaints with the government. The SEC should adopt the FAR rule governing corporate compliance programs, and should mandate that these programs operate in a manner consistent with the Rand report.

Conclusion #5: The SEC must ensure, through a formal rule, that reports to internal compliance programs are fully protected. The decades-long history of regulated companies opposing such protections in judicial proceedings must be ended. The definition of protected disclosures should conform to the standards recommended by the Association of Certified Fraud Auditors.

Conclusion #6: The Recommendations of the SEC's Inspector General should be fully implemented in a manner consistent with the requirement that the Dodd-Frank reward provisions be "user-friendly".

Conclusion #7: By formal rule, the SEC must establish that disclosures submitted to internal compliance programs be afforded the same level of protection as direct disclosures to the SEC. In this regard, the SEC should establish, by rule, that it will consider a claim or disclosure filed internally within a company to constitute a formal request for a reward under SEC § 21F. The SEC should establish rules to adjudicate these claims and require that the regulated companies establish procedures for timely notification of such employee filings.

Conclusion #8: The SEC should implement rules consistent with the recommendations filed with the Commission in by Senators Leahy and Grassley.

Conclusion #9: Any action by an employer that in any way limits an employee's right or incentive to contact the SEC, regardless of whether or not the employee first utilized a compliance program, is highly illegal and constitutes an obstruction of justice.

Conclusion #10: The SEC's rules cannot create any disincentive for employee to contact the SEC or file claims directly with the SEC. The SEC's rules must be neutral in regard to the reporting mechanism an employee uses to report a potential violation. Whether an employee files an anonymous claim with the SEC, a non-anonymous claim directly with the SEC and/or whether an employee utilized an internal compliance program, must have no impact whatsoever on the right of an employee to file a claim and/or the amount of reward given to the employee.

Conclusion # 10: The SEC cannot create any disincentive for reporting, or restrict the class of persons who are eligible for a reward, by creating any form of exclusion for a recovery that is not explicitly authorized under the Act.

Research Methodology

The Securities and Exchange Commission, in its Notice of Proposed Rulemaking, requested empirically based proposals and comments on key aspects of its rule.

Study Based on Similar Qui Tam Law. This study focused on cases filed under the False Claims Act, 31 U.S.C. § 3730(h). This law was chosen for three reasons. First, it is the longest standing qui tam law in the United States and the Dodd-Frank Act's reward provisions are modeled on this law. Second, the current version of the law has been in effect since 1986, and consequently provides a sufficiently large sample of cases to draw statistically-significant conclusions. Third, given the duration of the law, and the fact that its reward provisions have been the subject of numerous news articles, the law is well known in the relevant job markets. Fourth, given the similarities in the reward features, the long-standing existence of the Act, and the fact that rewards under this law have been well publicized, cases studies under the FCA represent the most reliable indicator of the potential impact the Dodd-Frank Act will have on employees eligible for rewards under its provisions.

Study Based on Cases in which Employee Reporting Behaviors are Discussed. In order to obtain data on employee behaviors, the study focused on FCA cases that included a "subsection (h)" claim. Subsection (h) is the anti-retaliation provision of the FCA. Subsection (h) cases were selected because these cases offered the best opportunity for an objective discussion of employee behavior. Under the law, the employee must demonstrate what he or she did in order to engage in protected activity under the Act. This is only one element of a case, but generally it must be discussed in each case, as the court must determine whether or not an employee established his or her *prima facie* case.

Because filing an FCA case directly with the United States government is considered a protected activity, subsection (h) cases offered an opportunity to study employee-reporting behaviors. Most of the cases contained a brief factual recitation of how the employee "blew the whistle," and ultimately came to be a *qui tam* relator.

Study Based on Cases Decided After the Existence of Rewards Would be Known Within the Relevant Employee-Employer Markets. The FCA has been actively used by whistleblowers since 1986 (when the Act was amended and modernized). The study limited its review of employee cases to those decided from January 1, 2007 to the present. The modern cases were selected in order to best duplicate employee behaviors once a *qui tam* law has been in existence for a sufficient amount of time for employees to learn about its potential usage. In other words, be limiting the review to modern cases the study could focus on employee behaviors based on the fact that the law had been in active use for over 20 years, and numerous newspaper and television stories had been published making the public aware of the large multi-million dollar rewards potentially available under the FCA.

Using a Standardized and Objective Method to Locate Cases Eliminated Bias in the Sample. In order to eliminate basis from the case selection process, the NWC reviewed *all* cases in which a 31 U.S.C. 3730(h) case was decided at the district court level from January 1st, 2007 until December 15th, 2010. These cases were found by Shepardizing "31 U.S.C. 3730" in the LexisNexis online database under the index "31 U.S.C. sec. 3730 (h)", and restricting the results to those cases filed after 2007. This search method produced a list of all cases filed since 2007 that contained a citation to 31 U.S.C. 3730(h). United States District Court cases in which a 3730(h) claim was filed were then extracted from this list, creating a population of 128 cases to be examined.

All of the located cases are listed at www.whistleblowers.org/

The Objectively Identified Cases in the Sample were Reviewed in order to Determine Employee Reporting Behaviors. Once located, each case was separately reviewed. In some cases it was impossible to determine the reporting history of the employee. Other cases did not concern legitimate *qui tam* filings. In the cases where it was unable to determine the method used by the employee to initially reported the alleged fraud, the full appellate history of the case was then examined. Despite this further review, ------ 21 cases proved impossible to determine the status of internal reporting or were otherwise clearly inapplicable based on the factual statements set forth in these cases.

The cases where excluded from the study are set forth at:
www.whistleblowers.org/.

This left a final population of 107 cases that were then analyzed to determine if the employee-plaintiff reported the alleged fraud internally before filing a lawsuit, whether or not they worked in a compliance or quality assurance related position for their former employer, and if the Plaintiff engaged in a “protected action” under 31 U.S.C. 3730(h).

These cases are listed (and the classification of the case provided by the NWC is set forth) in the chart published at:
www.whistleblowers.org/.

The National Whistleblowers Center would like to thank Greg Dobbels for his assistance in the compilation of this study

The National Whistleblowers Center

About Us

Mission:

The National Whistleblowers Center (NWC) is an advocacy organization with a 20-year history of protecting the right of individuals to speak out about wrongdoing in the workplace without fear of retaliation. Since 1988, NWC has supported whistleblowers in the courts and before Congress, achieving victories for environmental protection, nuclear safety, government ethics and corporate accountability. NWC also sponsors several educational and assistance programs, including an online resource center on whistleblower rights, a speakers bureau of national experts and former whistleblowers, and a national attorney referral service run by the NWC's sister group the National Whistleblower Legal Defense and Education Fund (NWLDEF). The National Whistleblowers Center is a non-partisan, non-profit organization based in Washington, DC.

CONGRESSIONAL INTENT CONCERNING INTERNAL COMPLIANCE

Dodd-Frank does not create a public policy favoring internal reporting over reporting to the government

The most recent Congressional statement on compliance programs was enacted in light of the False Claims Act, the most long-standing whistleblower rewards law.

That law rejected every type of advice now urged by the regulated community, and rejected any law, rule or regulation that promoted internal over external reporting.

Instead, the law targeted the numerous problems within compliance programs, and by statute ordered the Federal Acquisitions Counsel, to create rules that would require such programs to be more ethical, transparent and effective.

These rules should be incorporated into the final SEC Dodd-Frank rules.

It makes no sense for corporate compliance programs to have a double standard. One standard when taxpayer dollars are at issue, and a second standard when shareholder dollars are at issue.

The key of ultimate success of corporate compliance programs is not to limit the rights of employees in a manner inconsistent with law, but to mandate that these programs operate in a ethical, impendent and transparent manner, thereby changing the corporate culture by example.

Main Dodd-Frank Rulemaking Page (under Advocacy) We can change even after send and won't affect the link:
http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1167&Itemid=1167

Donaldson letter:
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/donaldsonletter11.9.04.pdf

Association letter (with all your markings on it):
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/assoccorpcounselletter.pdf

SEC IG report:
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/igreportpriorsecwbprogram.pdf

Enforcement memo:
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/secenforcementletter.pdf

Donna Boehme report:
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/boehmereport.pdf

ACFE Report selected pages:
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/acfe2010selectedpages.pdf

KansasGas case:
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/kansasgascase.pdf

Brown and Root case:
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/brown&rootv.donovan.pdf

List of cases that corps argued against internal:
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/casesinternalreporting.pdf

Charts from Ardie

http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/casesunderfederalbankingwblaws.pdf

http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/employeereportinginternalvsexternal.pdf

http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/complianceemployeereporting.pdf

http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/non-applicablecasesexcludedfromsurvey.pdf