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3238 P STREET, N.W. WASHINGTON, DC 20007 | 202-342-1902 (tel) 202-342-1904 (fax) | WWW.WHISTLEBLOWERS.ORG

December 13, 2010

Senator Joseph I. Lieberman
Chairman
Committee on Homeland Security & Governmental Affairs

Senator Susan M. Collins
Ranking Member
Committee on Homeland Security & Governmental Affairs

Senator Daniel K. Akaka
Principal Sponsor, Whistleblower Protection Enhancement Act (WPEA)

Rep. Edolphus Towns
Chairman
Committee on Oversight and Government Reform

Rep. Darrell Issa
Ranking Member
Committee on Oversight and Government Reform

Rep. Chris Van Hollen
Principal Sponsor, WPEA

Rep. Todd Platts
Principal Sponsor, WPEA

RE: URGENT MATTER – Mistake in S. 372/WPEA

Dear Senators and Members of the House of Representatives:

We are writing to call your attention to a grave mistake made in the Whistleblower Protection Enhancement Act (WPEA), S. 372. This mistake threatens to significantly undermine the ability of federal employees to report fraud in taxpayer spending. It constitutes a significant "roll-back" in current employee rights.

The provision in question is § 101(a) [and related provisions] of S. 372.[1] This section re-defines the scope of a protected disclosures permitted under the WPEA, and *permits* managers and political appointees to fire career civil servants who disclose violations of law. This is the first (and only) federal whistleblower law that contains such an exemption, and runs counter to the specific conclusions of the

[1] The offending language is first contained in § 101(a), but is repeated in other sections that define protected disclosures.

highly respected Association of Certified Fraud Examiners ("ACFE") and statutorily reverses a critical mandates of Executive Order 12731, "Standards of Ethical Conduct for Employees of the Executive Branch." It also statutorily reverses one of the very few decisions of the Federal Circuit that actually ordered corrective action for a whistleblower.

Remarkably, in the legislative history of S. 372, the Senate Homeland Security Committee endorsed § 101(a) by asserting that it was based on current Federal Circuit legal precedent, and specifically cited to the case of *Drake v. Agency for International Development,* 543 F.3d 1377 (Fed. Cir. 2008). *See* Senate Report 111-101, p. 7, n. 19. We have reviewed the *Drake* case. Your legislative report is completely incorrect. *Drake* did not hold what your report concluded. In fact, it held the complete opposite. *Drake* reaffirmed the very important precedent common to *all* federal whistleblower laws: that employees must be protected from retaliation if they expose conduct that they reasonably believe may constitute any violation of "law, rule or regulation." Under *Drake* employee concerns are protected even if they are demonstrated, at a later date, have been based on a "minor" violation of law. Employees are encouraged to report *potential* violations, and are not held to a higher standard.

The reason why no federal whistleblower law contains the restrictions set forth in § 101(a) and related provisions of S. 372, and why such restrictions were *rejected* by the U.S. Court of Appeals for the Federal Circuit, is absolutely clear. As concluded in the highly respected study published by the ACFE, and reinforced by Executive Order 12371, the *key* to a successful fraud detection program are laws and rules that *protect and encourage* employees to report "suspicious activities," regardless of the motives of those who engage in such activities and regardless of whether, after an investigation, those activities constituted only "minor" or "inadvertent" violations of laws or regulation. *See* ACFE, *Report to the Nations on Occupational Fraud and Abuse: 2010 Global Fraud Study* ("Fraud reporting mechanisms are a critical component of an effective fraud prevention and detection system. . . .employees should encouraged to report suspicious activity without fear of reprisal.").

The ACFE position is consistent with the authoritative interpretation given to Executive Order 12731 by the United States Office of Government Ethics. This E.O simply states that "employees shall disclose waste, fraud, abuse and corruption to appropriate authorities." During the rulemaking process a number of executive agencies wanted to restrict this vital principle. The Ethic Office summarily rejected these demands, and stated that concerns over "frivolous reporting" by federal civil servants were not well taken: "The Government's interest in curbing waste, fraud, abuse and corruption is better served by over reporting, and the authorities to whom such disclosures are to be made can best determine the merits of the allegations . . . the purpose of the principle is to elicit disclosures of improprieties. . . " Office of Government Ethics, "Standards of Ethical Conduct for Employees of the Executive Branch," 57 *Federal Register* 35006 (August 7, 1992).

The Senate Committee on Homeland Security and Governmental Affairs concluded that § 101(a) was based on current Federal Circuit case law. That finding constitutes a material and grave mistake that will create a chilling effect on the willingness of employees to lawfully disclose frauds (even to their own supervisors) and constitutes a grave threat to the ability of federal employees to prevail in future whistleblower cases. If S. 372 becomes law as it is written, federal agencies can fire employees even when they make disclosures in good faith, and even when their disclosures in fact demonstrate that a law, rule or regulation was violated.

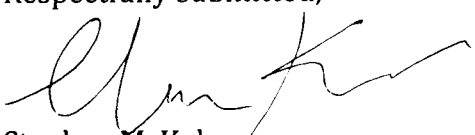
We certainly do not believe this was your intent in drafting and passing the Whistleblower Protection *Enhancement* Act. We hope that the mistake in your legislative history was just a mistake, and not an intentional effort to undermine federal employee rights and undercut the ability of law abiding, honest civil servants to report potential violations of law without fear of reprisal. However, if this mistake becomes law it will set back current rights and will legalize the firing by federal agencies of whistleblowers that report violations of law.

Although we have other concerns with S. 372, the Congressional reversal of the *Drake* decision will constitute a tragic setback for taxpayers. It will have significant adverse consequences on the ability of employees to report violations of law and political corruption. We understand that those in high-ranking political offices are reluctant to support whistleblowers, but stripping employees of their *current* right to blow the whistle on any violation of law is simply intolerable.

We call upon the Senate to immediately pass, by Unanimous Consent (or any other legislative means) a technical correction to S. 372 and eliminate this dangerous and unprecedented rollback on current federal employee rights. We call upon the House to amend S. 372 and ensure that *Drake* is not reversed by the Enhancement Act.

Thank you in advance for your prompt attention to this matter.

Respectfully submitted,



Stephen M. Kohn
David K. Colapinto
Lindsey M. Williams
National Whistleblowers Center

CC:
Senator Charles Grassley
Senator Patrick J. Leahy
Senator Carl Levin
Speaker Nancy Pelosi