UNITED STATES HOUSE OF REPRESENATIVES
COMMITTEE ON THE JUDICARY
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

"Hearing: Oversight of the False Claims Act"

Testimony of Stephen M. Kohn[1]
Executive Director
National Whistleblower Center
www.whistleblowers.org

July 30, 2014

Chairman Franks, Vice Chairman Jordan, and Members of the Subcommittee:

Thank you for this opportunity to submit written testimony regarding the False Claims Act ("FCA" or "Act") and the validity of "reforms" to the FCA proposed by the U.S. Chamber of Commerce.[2] As outlined in the National Whistleblowers Center's report, *"Saving America's 'Most Important Tool to Uncover and Punish Fraud:' 25 Facts that Rebut the Chamber of Commerce's Proposals to Undermine the False Claims Act*," the Chamber's proposals, taken together, would cripple a key "tool" for uncovering and punishing fraud against the taxpayers.

According to the Chamber, Congress should amend the FCA to create incentives for companies to enhance corporate internal compliance programs. However, the Chamber's vision of a compliance program is highly misleading.

The Chamber does not use the term "compliance" as it is ordinarily understood. Instead, the "compliance" programs advocated by the Chamber are merely part of a company's law department, and they are designed to protect the company from liability. The Chamber's vision of a "compliance" program increases the ability of a company to cover up fraud from government investigators. Chamber-backed compliance programs operate in secret and are permitted to use information obtained from the compliance investigation to discipline or discredit the very whistleblowers that raise concerns within the company.

THE CHAMBER'S POSITION ON CORPORATE COMPLIANCE PROGRAMS

Most members of the public are unaware that the structure for compliance programs advocated by the Chamber of Commerce would ensure that the program operate in secrecy and have as its

[1] Stephen M. Kohn is the Executive Director of the National Whistleblowers Center and a partner in the law firm of Kohn, Kohn and Colapinto, LLP. He is the author of seven books on whistleblower law, including, *The Whistleblower's Handbook: A Step-by-Step Guide to Doing the Right Thing and Protecting Yourself* (Lyons Press 2013, 3rd ed.). Since 1984 Mr. Kohn has represented numerous whistleblowers in a nonpartisan manner.

[2] These proposals have been widely publicized by the Chamber in its report: *Fixing the False Claims Act: The Case for Compliance-Based Reforms*.

goal the protection of the company from liability. Under this structure, compliance programs report through or to a company's Office of General Counsel and are, effectively, arms of the law department.

Just this year, the Chamber of Commerce had the opportunity to clarify its position on such programs in a major court case decided by the U.S. Court of Appeals for the District of Columbia Circuit. In that case, a major Iraq defense contractor, Kellog-Brown & Root ("KBR") operated a compliance program. A whistleblower had provided information to the compliance program, but later alleged that the company had covered up the instances of fraud. The company claimed that all its compliance records were secret simply because the program was supervised by a lawyer.[3]

The Chamber of Commerce supported KBR's position on secrecy and strongly urged the court to recognize that compliance programs, such as the KBR program, were simply arms of a corporation's legal department. The Chamber aggressively argued that documents created as part of a corporate compliance program are "attorney-client privileged," even if no attorney ever interviewed the whistleblower and no legal advice was requested or received. The Chamber, which filed an *amicus* brief in support of KBR, successfully argued that even if a company is required, under federal law, to operate a compliance program, that program is still an arm of its corporate attorneys.

Chamber-supported compliance programs are not designed to independently investigate internal whistleblower concerns. Instead, as a matter of law, they serve as investigators for the company's legal department and serve the "best interests" of the executives who manage the company. These compliance programs are under no duty whatsoever to protect whistleblowers, and, in fact, companies are fully permitted to use these programs to obtain evidence that can be used as a basis to discredit or terminate the whistleblower.

Corporate compliance programs advocated by the Chamber are so anti-whistleblower that persons who work within such departments are required to give "warnings" to any employee who contacts them. These warnings are required because of the built-in conflicts of interest between the corporation's interest in protecting itself and its executives, and the interests of whistleblowers/employees who reported the fraud and who thought that the compliance department was required to do its job.

Given these conflicts, Chamber-supported compliance programs are required under many local attorney ethics rules to give warnings to employees that: (a) the program was in fact run by the corporate attorneys, not some independent ethics or compliance office; (b) because the corporate lawyers ran the program, there existed potential conflicts of interest between the whistleblower, who reported the misconduct, and the compliance program that served the interest of the corporation and its executives; (c) the compliance program did not represent the employee and that

---

[3] *In re Kellogg Brown & Root, Inc.*, No. 14-5055 (D.C. Cir. June 27, 2014) (reversing *United States ex rel. Barko v. Halliburton Co.,* 2014 U.S. Dist. LEXIS 36490, at 10 n. 33 (D.D.C. March 6, 2014). Cases reprinted at *http://bit.ly/2014-06-27Opinion*. Petition for en banc review filed on July 28, 2014, and available at *http://bit.ly/PetitionEnBanc*.

information provided to the compliance program could be used against the employee/whistleblower.[4]

The anti-whistleblower/anti-independent nature of the Chamber-endorsed compliance programs was highlighted in a paper delivered to the ABA Section of Litigation Corporate Counsel for which Senior Counsel for General Electric co-authored. The paper advised corporate lawyers who managed compliance programs to provide strong warnings to employees who contacted these programs:

> *What is clear is that counsel who fail to give the warnings . . . expose themselves to criticism by the courts, professional discipline and even civil liability. Given these realities, it is imperative that all counsel – internal and external – scrupulously inform employees at all levels of the organization of the potential conflicts of interest and do so in a way where the warnings cannot be contested. Warnings are a time for plain language.*

"Avoiding the Perils and Pitfalls of Internal Corporate Investigations: Proper Use of *Upjohn* Warnings," ABA Section of Litigation (Feb. 11-14, 2010).

The compliance programs advocated by the Chamber are so riddled with conflicts of interest, that the New York State Bar Association published guidance for attorneys who worked for such programs. *See* New York Ethics Op. 650, a copy of which is available at *http://bit.ly/NYbarEthicsOp650*.[5] The guidance was not intended to ensure that the programs were independent or provided protection against fraud. Instead, the guidance focused on the need for attorneys who worked in such programs to give very explicit warnings to employees in order to avoid being disbarred for unethical activity.

The "warning" upheld by the New York Bar stated as follows:

> "'I want to caution you that I am an attorney for the Company and not for you or other employees. Therefore, while I can record your complaint, I cannot and will

[4] These warnings were commonly known as "corporate Miranda" warnings or *Upjohn* warnings. *See U.S. v. Int'l Broth. Of Teamsters*, 119 F.3d 210, 217 (2nd Cir. 1997) ("attorneys in all cases are required to clarify exactly whom they represent, and to highlight potential conflicts of interest to all concerned as early as possible"); *In re Grand Jury Subpoena*, 415 F.3d 333, 336 (4th Cir. 2005)(court noted that an *Upjohn* warning stated "We represent the company. These conversations are privileged, but the privilege belongs to the company and the company decides whether to waive it. If there is a conflict, the attorney-client privilege belongs to the company"); *Sandra T.E. v. S. Berwyn*, 600 F.3d 612, 620 (7th Cir. 2009)("*Upjohn* warnings" emphasized that the attorney represented the School Board "and not the employee and that the School Board had control over whether the conversations remained privileged"); *Admiral Ins. v. U.S. Dist. Ct.*, 881 F.2d 1486, 1492 (9th Cir. 1989), quoting with approval *U.S. v. Nicholas*, 606 F.Supp.2d 1109, 1117 (2009)("An *Upjohn* warning is given to advise the employee that he is not communicating with his personal lawyer, no attorney-client relationship exists, and any communication may be revealed to third parties if disclosure is in the best interest of the corporation.").

[5] Also see, ABA WCCC Working Group, "Upjohn Warnings Recommended Best Practices when Corporate Counsel Interacts with Corporate Employees," a copy of which is available at *http://bit.ly/ABAbestpractices*.

> not give you legal advice, and you should not understand our conversation to consist of such advice. I do advise you to seek your own counsel, however, as your interests and the Company's may differ. Having said this, I would be happy to listen to your complaint, etc.'"

As these warnings make clear, the compliance programs advocated by the Chamber are an alternative to a strong False Claims Act. Given the ability of the company to keep the whistleblower's disclosures secret from government inspectors and to use the information obtained from whistleblowers to discredit the whistleblower, these programs are often traps for employees.

The compliance program upheld at the urging of the Chamber also required employees who provided information to the program to sign broad nondisclosure statements.[6] This Chamber-endorsed nondisclosure agreement was aimed only at silencing employees. It threatened the employees with termination if they discussed their concerns outside of the compliance investigation. Employees were threatened with termination if they provided "anyone" with information related to the frauds for which they were reporting. Employees were not informed of their right to inform federal authorities that fraud had been committed in government-sponsored programs.

The compliance program for which the Chamber of Commerce aggressively defended in the 2014 *In re KBR* court case also permitted the company to classify evidence of fraud as confidential attorney-client materials. The information could be kept secret from whistleblowers and government investigators. Even a criminal Grand Jury subpoena could not force the disclosure of the "compliance" materials. This right to secrecy, in the corporate context, was upheld in *In re KBR*, even though the lower court judge who reviewed the documents *in camera* had determined that the compliance documents contained strong evidence of fraud, including double billing, failure to complete work, and bid-rigging.

As reflected in the Chamber's report, *Fixing the False Claims Act*, these programs usually appear on their face to be "independent." For example, in the case for which the Chamber defended the compliance program, the company's internal corporate compliance program never publicly mentioned that the corporate lawyers ran the program, and that these lawyers could keep secret from the government the evidence of fraud reported by the whistleblowers. The program was marketed as if it was designed to promote integrity and ethics. Its true nature was hidden.

The False Claims Act creates a safe, effective, and highly successful method for employees to disclose fraud in government programs to the appropriate authorities. Compliance programs advocated by the Chamber of Commerce do not provide a reasonable substitute for this law.

---

[6] The broad nondisclosure agreement upheld by the Court in the *KBR* decision was reprinted in full in *United States ex rel. Barko v. Halliburton Co.,* 2014 U.S. Dist. LEXIS 36490, at 10 n. 33 (D.D.C. March 6, 2014). *See* http://bit.ly/kbrPrivilegeOrder.