

**WHY WHISTLEBLOWING WORKS AND
WHAT CONGRESS MUST DO ABOUT IT**

Presented By:

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March 5, 2009

This paper will be blunt and to the point: If federal, state or local governments are serious about detecting or preventing waste, fraud and abuse, laws must be enacted which reward, encourage and protect whistleblowers.

I. Whistleblowers Are The Cornerstone of Fraud/Misconduct Detection and Deterrence

Whistleblowers are the single most important corporate resource for detecting and preventing fraud. That was the finding of the two most recent studies on fraud detection. A third statistically valid study mirrors these findings, and applies them to federal government employees.

The first study was published in 2007, PricewaterhouseCoopers (“PWC”).¹ It was conducted by surveying the chief executive officers, chief financial officers and responsible compliance executives from over 5,400 companies in 40 countries. PWC issued the following findings:

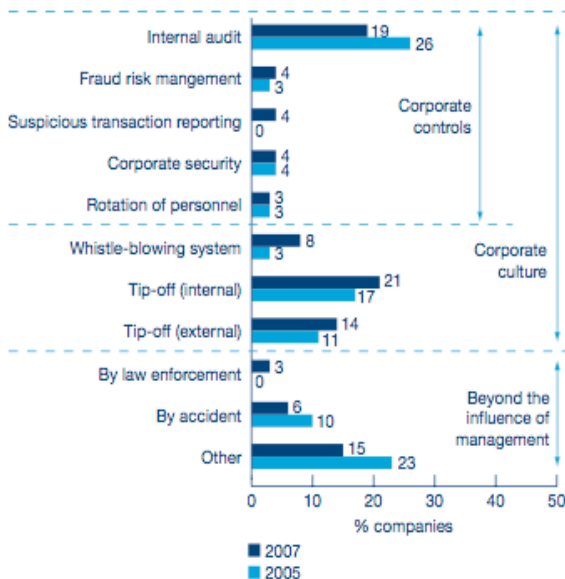
¹ The PricewaterhouseCoopers study can be found at:
http://www.whistleblowers.org/storage/whistleblowers/documents/pwc_survey.pdf

- “Fraud remains one of the most problematic issues for business worldwide” but in order to detect and combat fraud, corporations “cannot” simply “rely on” internal “controls” to “detect and deter economic crimes.”
- “[I]n virtually every region of the world whistle-blowing is playing a role in uncovering the activities of wrongdoers. More and more companies are now promoting whistle-blowing policies as an integral part of their risk management programs.”

The PWC study found that internal “controls” designed to detect fraud were “not enough” and that whistleblowers needed to be encouraged to report wrongdoing. The study found that 43% of corporate fraud was uncovered by whistleblowing related activities:

Our experience from repeated research programmes shows that controls alone are not enough to take full advantage of the detection mechanisms that a pro-active management team can create within its company. We observe, for example, the consistently high response rates from companies showing that the initial means of detection is via a whistle-blowing hotline (8% cases) or tip-off (from an internal source in 21% cases and an external source in 14%).

1.11 Detection methods¹⁰



Detection by corporate controls = 34%

Detection by whistleblower systems or tip-offs = 43%

Detection beyond the influence of management = 21%

Detection by law enforcement – 3%

Based on these findings, PWC recommended that companies change their corporate culture and promote and whistleblowing. They also recommended strict prohibitions against employee-whistleblower retaliation: “*Whistle-blowing Programmes: Best Practice Tips*”:

“Safeguard employees who report misconduct against any form of retaliation (i.e., threats, harassment and demotion)” (Emphasis added)

The PricewaterhouseCoopers findings are supported by similar findings made by the Association of Certified Fraud Examiners (ACFE).² In the ACFE’s *2008 Report to the Nation on Occupational Fraud and Abuse*, the ACFE examined 959 cases of fraud related to American corporations.³ They recognized that “one of the primary characteristics of fraud is that it is clandestine, or hidden; almost all fraud involves the attempted concealment of the crime.” Consequently, insiders (i.e. whistleblowers) were viewed as essential for any effective anti-fraud program.

Like PWC, the ACFE concluded that tipsters were more effective at uncovering fraud than internal corporate controls:

“Despite increased focus on anti-fraud controls in the wake of Sarbanes-Oxley . . . our data shows that occupational frauds are much more likely to be detected by a tip than by audits, controls or any other means.”

ACFE Report, p. 4.

Significantly, the ACFE found that 46% of all frauds were uncovered by tipsters, a statistic remarkably similar to the PWC findings (i.e. 43%).

Not surprisingly, the majority of tipsters were internal corporate whistleblowers. Like PWC, the ACFE recognized their contributions and strongly endorsed corporate cultural changes designed to encourage whistleblowers:

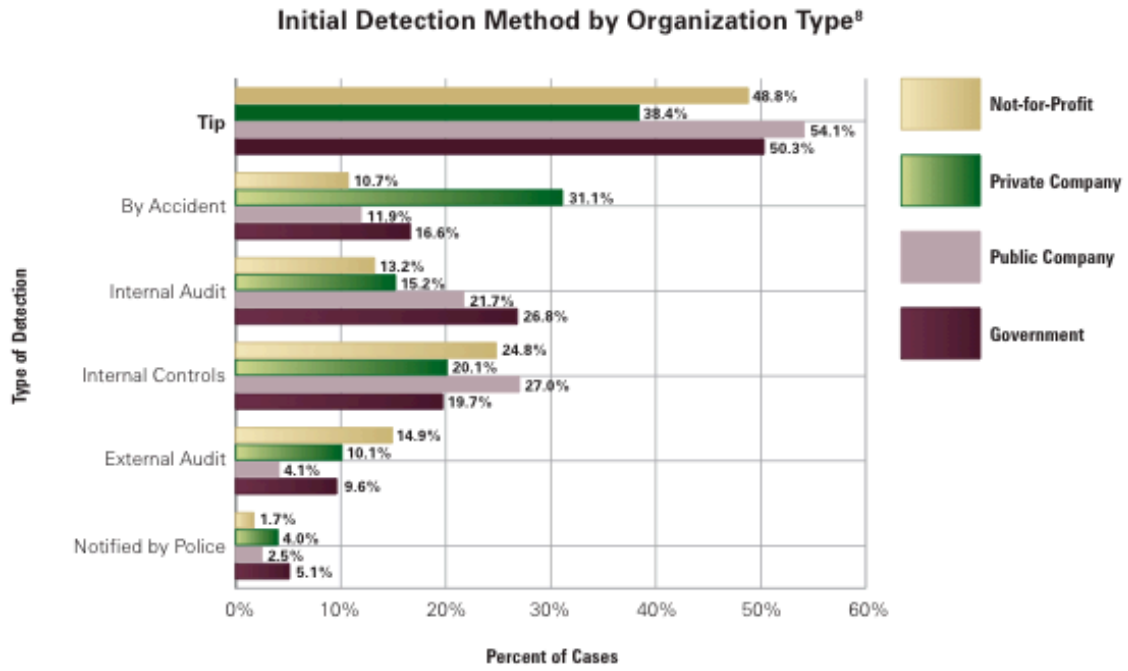
“By far, the greatest percentage of tips came from employees of the victim organization, which is consistent with our findings in 2006. The fact that over half of all fraud detection tips came from employees suggests that organizations should focus on employee education as a key component of their fraud detection strategies. Employees should be trained to understand what constitutes fraud and how it harms the organization. They should be encouraged to report illegal or suspicious behavior, and they should be reassured that reports may be made confidentially and that the organization prohibits retaliation against whistleblowers.

ACFE Report, p.23.

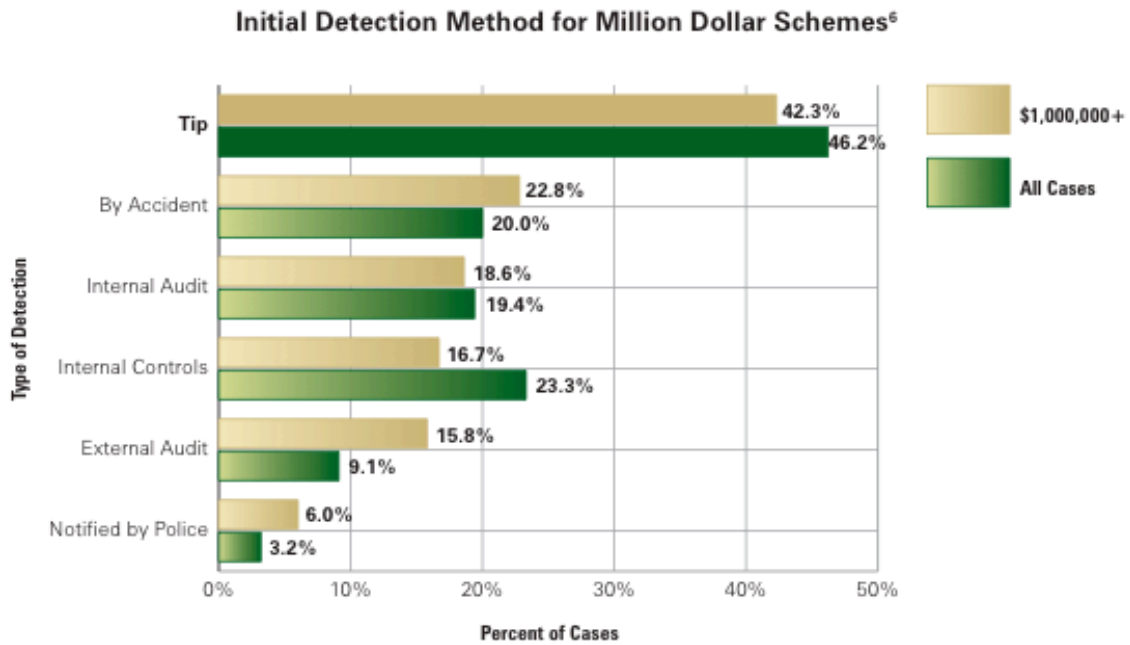
² The Association of Certified Fraud Examiners (ACFE) provides anti-fraud training and education worldwide. The ACFE works to reduce the incidence of fraud and white-collar crime and assists its nearly 50,000 members in fraud detection and deterrence. <http://www.acfe.com/about/about.asp>

³ Association of Certified Fraud Examiners 2008 Report To The Nation On Occupational Fraud & Abuse <http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/acfefraudreport.pdf>

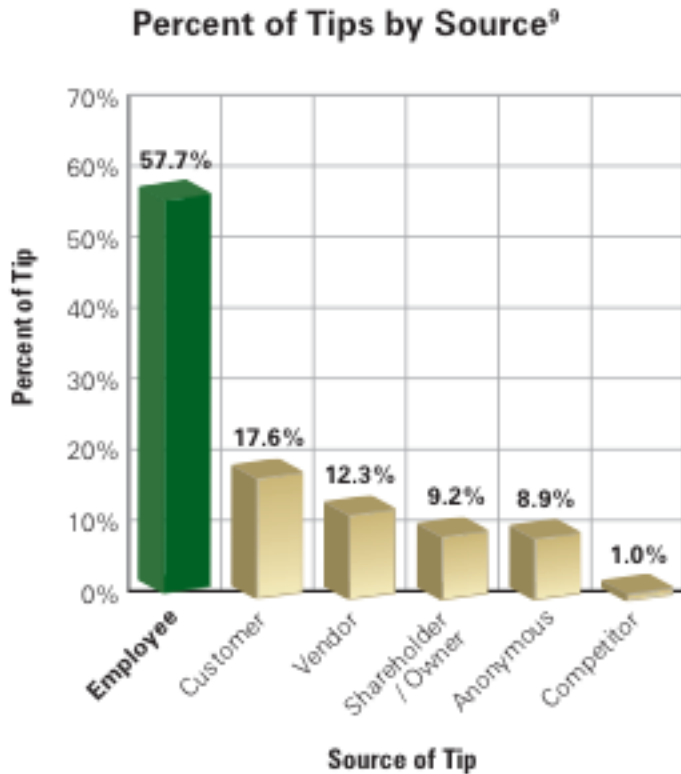
These findings are fully supported in three graphs published by ACFE and set forth below.



⁸The sum of percentages for each organization type in this chart exceeds 100 percent because in some cases respondents identified more than one detection method.



⁶The sum of percentages in this chart exceeds 100 percent because in some cases respondents identified more than one detection method.



⁹The sum of percentages in this chart exceeds 100 percent because in some cases respondents identified more than one source of the initial tip.

The PWC and ACFE reports confirm – with unquestionable scientifically sound clarity, that the debate over whether strong laws, rules and policies should exist to promote and encourage whistleblowers is now over. There is no doubt that whistleblowers objectively help the corporations and the government agencies for which they work. The deep-seated cultural bias against whistleblowers exhibited in many agencies is not only archaic, but also counterproductive. If the government is truly serious about detecting and preventing fraud, waste and abuse, and ensuring that the public safety is protected, effective anti-retaliation laws must be enacted which encourage, reward and protect whistleblowers.

II. THE FINDINGS OF THE ETHICS RESOURCE CENTER DEMONSTRATE THE CRITICAL NEED TO IMMEDIATELY ENACT THE REFORMS TO THE WHISTLEBLOWER PROTECTION ACT PROPOSED BY THE HOUSE OF REPRESENTATIVES

In 2007 the Ethics Resource Center (“ERC”) issued its National Government Ethics Survey. Founded in 1922, the ERC is the “oldest nonprofit, nonpartisan organization

devoted to independent research and the advancement of high ethical standards and practices in public and private institutions.

The ERC conducted a scientifically valid survey of federal employee conduct (95% reliability).⁴ The findings mirror those of PWC and the ACFE. However, in relation to detecting government misconduct, some of the ERC's conclusions are very disturbing. Based on its survey ERC made the following findings:

“Government employees are increasingly working in environments that are conducive to misconduct;”

“Signs point to a future rise in misconduct if deliberate action is not taken;”

“52% of federal employees observe misconduct;”

20% of “federal government employees work in environments conducive to misconduct;”

“Many of those who reported the misconduct they observed were retaliated;”

“24% of federal government employees who observed misconduct but chose not to report it feared retaliation from management;”

“16% of non-reporters within the federal government feared retaliation from their peers;”

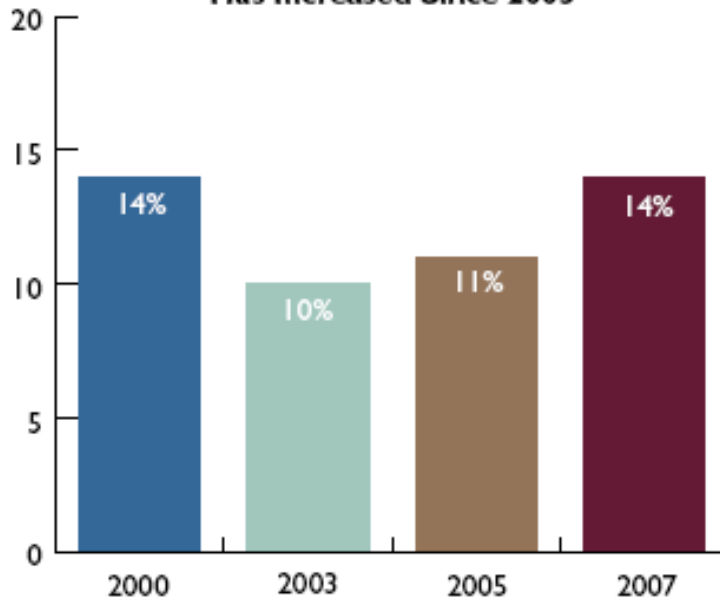
Of those who reported misconduct, 83% only reported it to their supervisor or managers [conduct not protected under the current federal Whistleblower Protection Act];

Only 6% of federal employees who disclosed misconduct were willing to report that misconduct to a “hotline” or outside of their agency.

Based on these findings, the ERC concluded that the ***“Public Trust is at Risk -- Misconduct is High, and Signs Point to Future Rise.”***

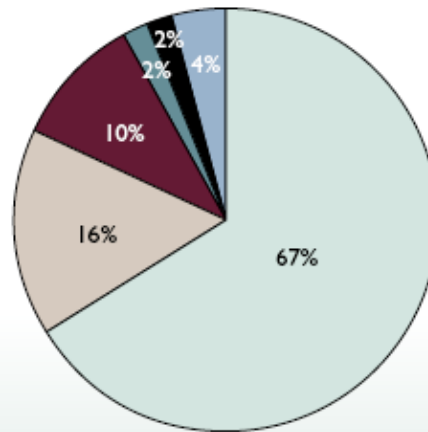
⁴ Ethics Resource Center's 2007 National Government Ethics Survey: An Inside View of Public Sector Ethics Available at: <http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/ethicsresourcecentersurvey.pdf>

**Pressure to Compromise Standards
Has Increased Since 2003**



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**Federal Government Employees Overwhelmingly Chose to
Report Observations of Misconduct to Direct Supervisors**



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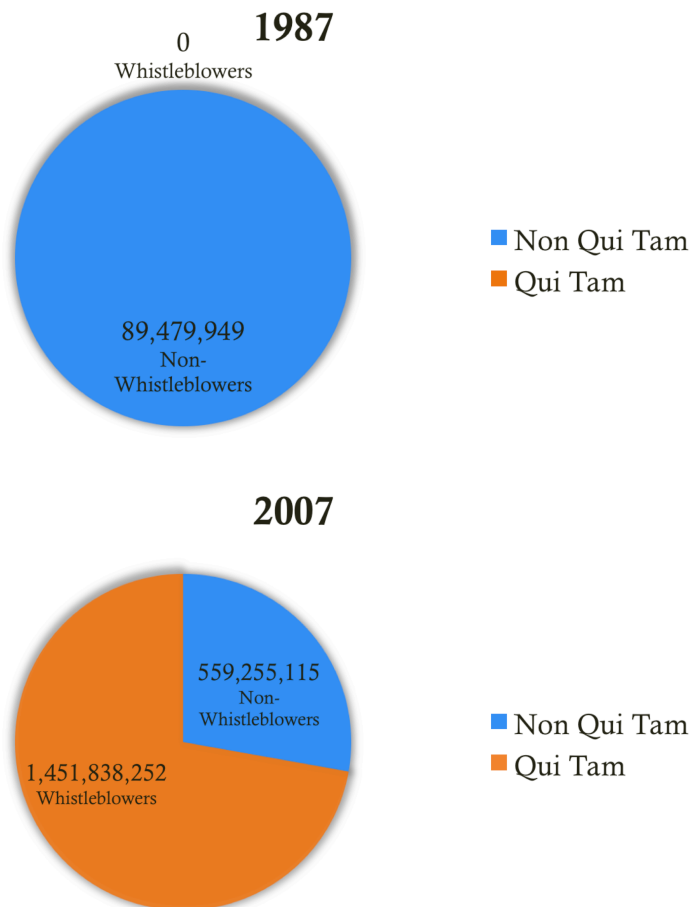
Chosen Method of Reporting:

- Supervisor
 - Higher management
 - Other responsible person (including ethics officer)
 - Someone outside organization
 - Hotline
 - Other
- Due to rounding, totals may not equal 100 percent.

III. THE FALSE CLAIMS ACT AND OTHER WHISTLEBLOWER PROTECTION LAWS

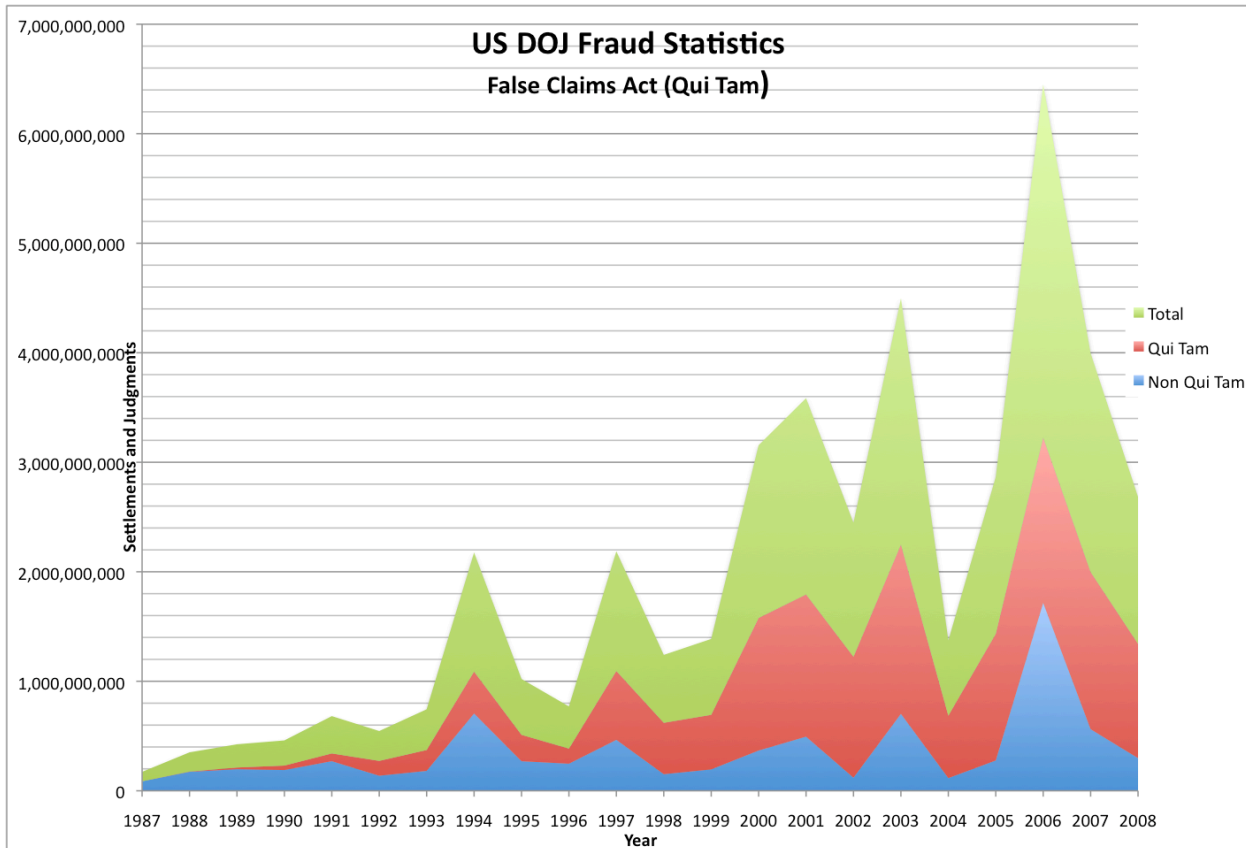
In visionary legislation proposed by the Civil War Congress, and signed into law on March 2, 1863 by President Abraham Lincoln, the US adopted a *qui tam* based whistleblower law to assist in the detection and rooting out of fraud in government contracting. During the Senate debate on the Act in February 1863, Senator Jacob Howard from Michigan explained that this landmark whistleblower law was “based” on the “old fashioned idea of holding out a temptation” to encourage the reporting of improper conduct under the historic *qui tam* rule.⁵ Under the *qui tam* whistleblower reward provision, persons who disclosed the fraud to the government are permitted to obtain a financial reward if the government was successful in recovering money from the government contractor.

The False Claims Act, which has been amended twice since 1863, is the premier whistleblower law. Objective statistics published every year by the US Department of Justice Civil Fraud Division unquestionably demonstrate its success. These objective findings demonstrate that whistleblowers have actually recovered billions of dollars for taxpayers and that whistleblowers are the single most important source of information permitting the United States to recover funds from corrupt contractors.



⁵ *Congressional Globe*, 37th Congress 3rd Session, Feb. 14, 1863 at 952.

As can be seen from the above charts, the amount of overall civil recoveries obtained by the United States has dramatically increased from 1986 (prior to the whistleblower rewards program) to \$ 2 billion in 2007⁶ (after the re-implementation of the program). Moreover, it is also now well documented that whistleblower disclosures are responsible for the *majority* of all federal fraud recoveries from dishonest contractors.



The Act’s statistics actually undervalue the contribution of whistleblowers because they do not quantify the deterrent effect achieved when the law is enforced. When a company is able to pay the penalties mandated under law, the United States usually requires these companies to enter into extensive compliance agreements that help prevent future frauds. Thus the deterrent value of the law is not currently subject to objective quantification.

When the DOJ statistics are viewed in relationship with the findings of PricewaterhouseCoopers and the AFCE, the reason for the success of the False Claims Act is evident. The Act combines the fact that employee whistleblowers are the single most effective force in detecting real-world fraud, with a direct financial incentive to uncover and disclose fraudulent conduct.

⁶ Justice Department Statistics on Fraud Recovery:
<http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/fcastatistics2007.pdf>

The importance of using financial incentives to promote corporate fraud disclosures was underscored in a scholarly study of published in the Boston University Law Journal. This study analyzed several possible methods of incentivizing whistleblowing and concluded that a *qui tam* model provides the greatest incentive for the whistleblower while exposing information that the government would not be able to detect on its own. “*Qui tam* cases bring out important inside information. Potential *qui tam* plaintiffs can offer information about inchoate or ongoing malfeasance of which law enforcement is unaware.” After examining the potential disincentives that *qui tam* whistleblowers may confront, the article notes that “the bounty a relator stands to gain does, in many cases, outweigh the disincentives to being a whistleblower.”⁷

III. RECOMMENDATIONS FOR EFFECTING REAL CHANGE IN WORKPLACE CULTURE

Changing employment culture is not easy, but there is precedent. Before the 1960’s many companies had internal corporate customs hostile to African-American or female employees. In 1964, Congress passed the Civil Rights Act, and many responsible companies aggressively altered their hiring, promotional and human resource practices with an eye toward long-term cultural changes within the workplace. These corporations wanted to promote the full integration of their workplaces, and creates incentives for positive change. Instead of barring African Americans or women from certain jobs, these companies actually promoted affirmative action and publicly bragged about their progress in integrating the workplace.

Similar bold and aggressive action is needed to alter workplace culture concerning whistleblowers. The act of reporting fraud needs to be encouraged in order for internal compliance programs to fully succeed in fully rooting out waste, fraud and abuse within a company. Any effective national whistleblower law needs to contain all of the following provisions:

- A. An inclusive definition of employee and employer;
- B. Co-equal coverage for public and private sector employees;
- C. If federal employees are covered under a separate law, that law must protect all federal workers and provide the same substantive and procedural rights as those covering private sector employees;
- D. A reasonable definition of protected activity;
- E. Procedures which include full access to federal court, with the right to a trial by jury;
- F. Prohibitions against using private contracts to undermine the goals of the whistleblower law;
- G. Full damages – including reinstatement, back pay, compensatory and exemplary damages and attorney fees and costs;
- H. A rewards provision modeled on or incorporating the procedures contained in the False Claims Act (i.e. *qui tam*);
- I. A procedure to facilitate and monitor government investigations of the whistleblower allegations.

⁷ Geoffrey Christopher Rapp, “Beyond Protection: Invigoration Incentives For Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers,” [Boston University Law Review](http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/bulawreviewwb incentives.pdf), Vol. 87, No. 1 (February 2007): 114. <http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/bulawreviewwb incentives.pdf>

** Stephen Martin Kohn is the President of the National Whistleblower Center and a partner in the law firm of Kohn, Kohn & Colapinto, LLP. Since 1984 he has successfully argued numerous precedent settling cases and represented some of America's most important whistleblowers, such as Frederic Whitehurst (who blew the whistle on the FBI crime-lab), Linda Tripp (who suffered retaliation on her job at the Department of Defense after she turned over her infamous tapes to the Office of Special Counsel) and Bunnatine Greenhouse (who blew the whistle on the illegal "no bid" contracts awarded to Halliburton for the "Reconstruction of Iraq"). Mr. Kohn served as co-counsel for the relator in the \$515 Million Dollar False Claims Act settlement against Bristol-Meyers. In 1985 he wrote the first-ever legal handbook on whistleblower rights, and since then he authored or co-authored four additional books on whistleblower law, including *Concepts and Procedures in Whistleblower Law*. Mr. Kohn is the former Director of Corporate Litigation for the Government Accountability Project and between 1984-88 supervised a student law clinic at the Antioch School of Law on whistleblower rights. Mr. Kohn has a J.D. from Northeastern University, an M.A. in Political Science from Brown University and a B.S., *Magnum Cum Laude* from Boston University. In 2006 he was named the Northeastern University School of Law's *Daynard Public Interest Visiting Fellow*.