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Whistleblower Reward Laws: Reform or Enhance?

Congressional Civil Caucus Academy Briefing: False Claims Act Reform

NWC | NATIONAL WHISTLEBLOWERS CENTER

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About the National Whistleblower Center

The National Whistleblower Center (NWC) is a non-partisan, non-profit organization based in Washington, DC. Its website is located at *www.whistleblowers.org*. For twenty-five years the NWC has advocated for the protection of employees to lawfully disclose fraud and violations of law to the appropriate authorities.

Stephen M. Kohn serves *pro bono* as the Executive Director of the NWC. He is a partner in the Washington, D.C. law firm of Kohn, Kohn and Colapinto, LLP (www.kkc.com). Mr. Kohn has represented whistleblowers for nearly 30 years. Most recently he successfully represented the first major tax whistleblower, Mr. Bradley Birkenfeld, whose documentation of illegal Swiss banking practices has resulted in the recovery of billions of dollars for the U.S. taxpayers. Mr. Kohn is the author if the first legal treatise on whistleblower law. His seventh book on whistleblowing is, *The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself* (Lyons Press, 3rd ed. 2013). The *Wall Street Journal* highly praised the *Handbook*: "[Y]ou may want to add this book to your Christmas wish list. Just don't let your boss catch you reading it."

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Introduction

The public interest is served by creating policies and procedures that encourage the reporting of suspected violations of law to the appropriate authorities.

This report carefully analyzes the impact of whistleblower reward laws on the willingness of employees to report allegations of fraud or misconduct to the appropriate authorities, including internally to corporate compliance programs and externally to law enforcement.

Upon a careful review of valid statistical studies on employee-reporting behaviors, it is clear that whistleblower reward laws, also known as *qui tam* laws work remarkably well and should be exploited in order to protect individuals and businesses that play by the rules, and do not cheat in order to gain a competitive advantage.

The findings in this report echo prior independent studies that have reached the same conclusion. For example, in 2009 Senate Committee on the Judiciary carefully reviewed the twenty-five year history of the oldest modern *qui tam* law, the False Claims Act. Its conclusions were unanimous, bi-partisan and clear:

- *"The need for a robust FCA cannot be understated."*
- *"[A] great deal of fraud would go unnoticed absent the assistance of qui tam relators"*
- *"qui tam relators" "play" a "critical role" "in uncovering and prosecuting violations."*

Similarly, the University of Chicago Booth School of Economics also conducted an extensive, objective and scientific study of the False Claims Act and concluded as follows:

- *"A strong monetary incentive to blow the whistle does motivate people with information to come forward."*

- *"Having access to information or monetary rewards has a significant impact on the probability a stakeholder becomes a whistleblower."*

- *"[T]here is no evidence that having stronger monetary incentives to blow the whistle leads to more frivolous suits."*

- *"Monetary incentives seem to work well, without the negative side effects often attributed to them."*

Based on the information set forth herein, and the conclusions published by the Senate Committee on the Judiciary and the University of Chicago Booth School of Economics, the Congress of the United States should expand the coverage of whistleblower reward laws and firmly reject any attempt to water-down their provisions.

Summary of Findings

- Employees or "tipsters" are the single most important source of fraud detection.

- Employees are the key source of fraud detection, even in the current environment in which a large plurality of employees refuse to disclose misconduct they observe to *anyone* and direct reports to government regulators are under 2%.

- The existence of a *qui tam* or whistleblower rewards programs are an absolutely essential component for a successful fraud detection program.

- In the marketplace of ideas, whistleblower reward programs have emerged as the vastly superior method to detect fraud. Without strong incentives the vast majority of fraud will neither be detected nor reported to the appropriate authorities. Currently, a plurality of employees fail to disclose misconduct to *anyone*, and less then 2% of employees are willing to disclose misconduct, fraud or violations of law to a government agency.

- Robust whistleblower reward programs remain the safest and most transparent method of ensuring that fraud is reported and properly addressed.

- The existence of employee rewards programs have successfully increased the government's ability to detect and punish fraud. *Qui Tam* programs that potentially pay large rewards have had a remarkably successful deterrent effect on wrongdoers and have stimulated voluntary compliance with key anti-fraud laws.

- The existence of *qui tam* rewards has no detectable impact on the willingness of employees to initially disclose their concerns about fraud to company supervisors, compliance departments or other officials.

- Organizations, such as the Chamber of Commerce, should establish standards for corporate compliance programs consistent with the best practices identified by compliance leaders, and sanction members who fail to follow these policies. The Chamber, through its *amicus brief* program, should take the lead in rebutting the numerous arguments offered by corporations in courts throughout the United States that reports to internal compliance programs are *not* protected under federal law.

- *Qui tam* laws should be expanded in order to address this real crisis in employee-reporting behaviors. Modeled on False Claims Act, rewards should be offered to original sources of information on fraud and violations of law under all federal laws, and the reward should be based on a percentage of monies actually recovered by the United States based on the documented contribution of the whistleblower.

"I robbed the bank because it was my *job!*"

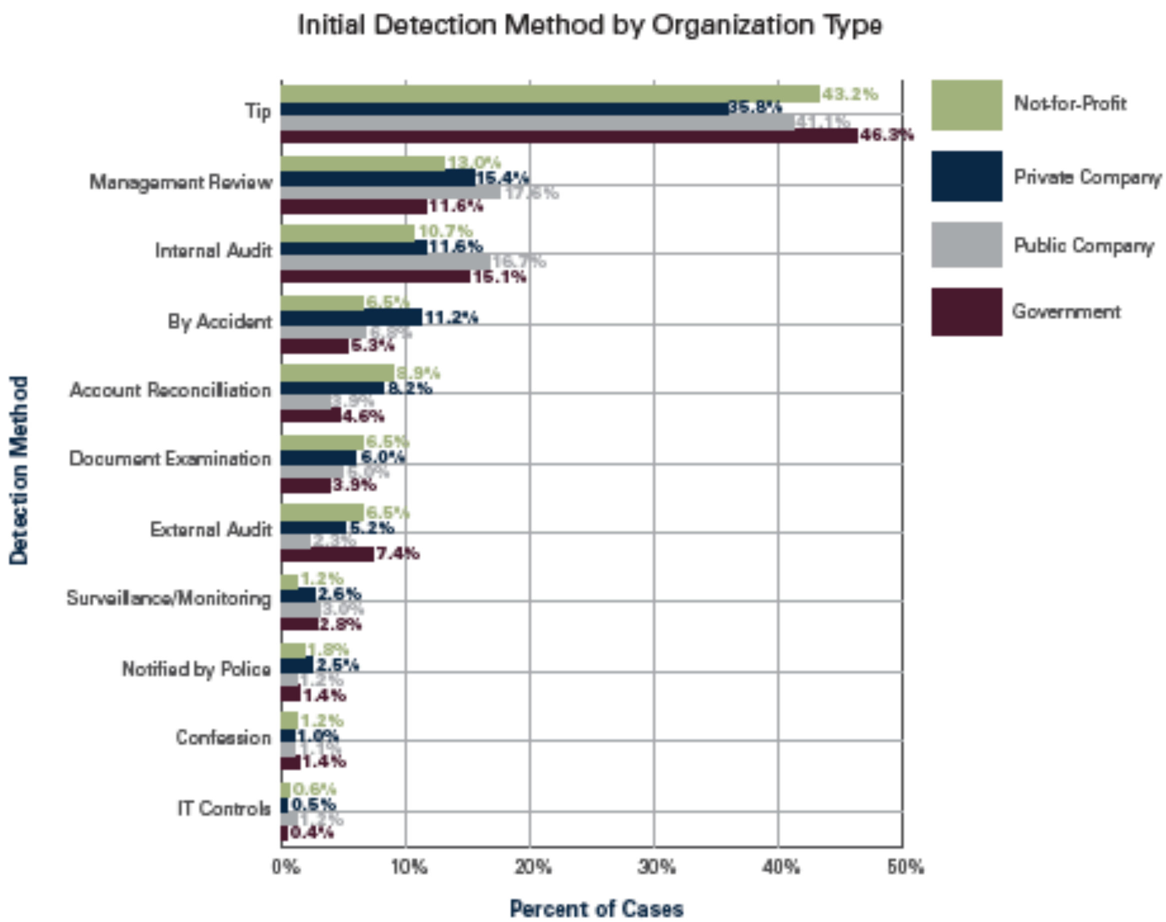
Part I:

Employee Disclosures are Essential for the Detection of Fraud

"While tips have consistently been the most common way to detect fraud, the impact of tips is, if anything, understated by the fact that so many organizations fail to implement fraud reporting systems."

Association of Certified Fraud Examiners, Global Fraud Study 2010

Association of Certified Fraud Examiners Findings: WHO DETECTS FRAUD?



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1 Source: Association of Certified Fraud Examiners, 2010 Global Fraud Study (page 19). The Association's 2012 Global Fraud Study's findings reinforced this point, finding that the "most prevalent trend in the detection data is the ongoing importance of tips, which have been the most common method of initial detection since we first began tracking data in 2002." In the 2012 report the "Tip" accounted for 43.3% of all "initial" fraud detections. ACFE, *Report to the Nations on Occupational Fraud and Abuse*, p. 14.

Part II:

Employees are Reluctant to Report Fraud

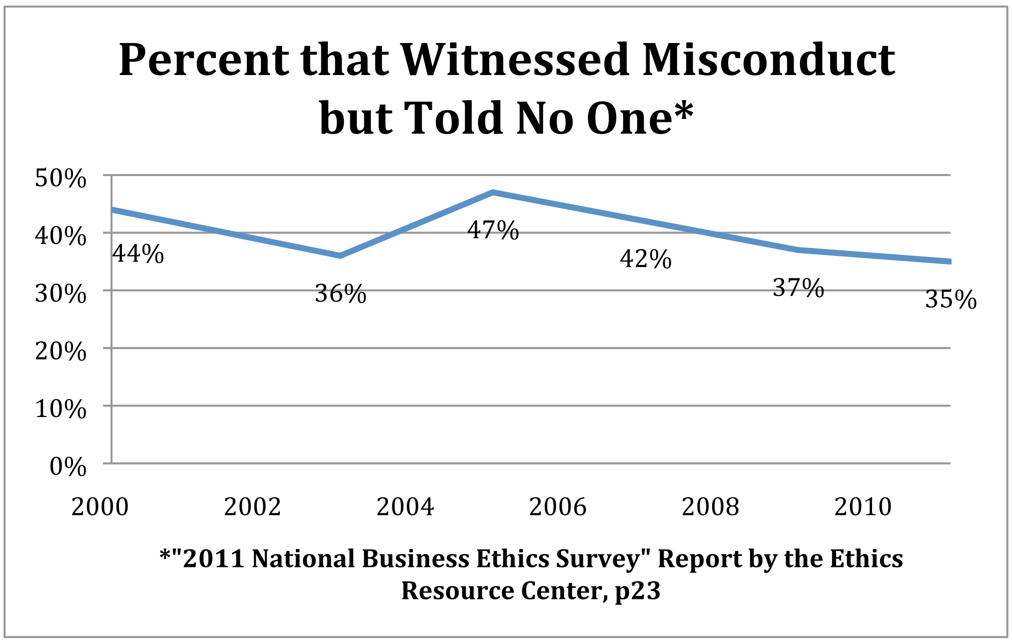
"One of the critical challenges facing both [Enforcement and Compliance] officers and government enforcement officials is convincing employees to step forward when misconduct occurs."

Ethics Resource Center Report "Blowing the Whistle on Workplace Misconduct," December 2010

Employee Reporting Behaviors

The Ethics Resource Center ("ERC") studied employee reporting behavior trends between 2000 and 2011. *See* ERC, "Blowing the Whistle on Workplace Misconduct," (2012).[2]

As set forth in the following chart, over a ten-year average, 40.2% of employees who witness fraud or misconduct *do not report this misconduct to anyone*. T The numbers reported have remained relatively constant, even after the enactment in 2002 of section 301 of Sarbanes-Oxley Act, the law that mandated every publicly traded corporation to establish an employee concerns program that accepted confidential submissions from employees.



[2] The ERC was founded in 1922 and describes itself as "America's oldest nonprofit organization devoted to the advancement of highly ethical standards and practices in public and private institutions". According to its website, ERC is predominantly sponsored by the regulated community including corporations such as BP, Raytheon, Dow, Lockheed, Martin, and Lilly. Many of these companies have been successfully prosecuted under the FCA.

Disclosing Misconduct

The ERC also studied the reporting behavior of the approximately 60% of workers who were willing to report misconduct. Based on these surveys the following picture emerges regarding the actual willingness of employees to report misconduct to *anyone*.

*Based Directly on the 2010 ERC Whistleblowing Report, *See* Exhibit 15

Based on these numbers the Ethics Resource Center concluded that the "critical challenge" facing both "corporate compliance programs" *and* "government enforcement officials" is to "convinc(e) employees to step forward when misconduct occurs."

In other words, the overwhelming majority of employees who detected fraud and misconduct failed to report their observations to hotlines and other internal compliance programs. They also failed to report their concerns to appropriate law enforcement officials.

Failure of Employees to Disclose Misconduct Directly to the Government is a Significant Regulatory Concern

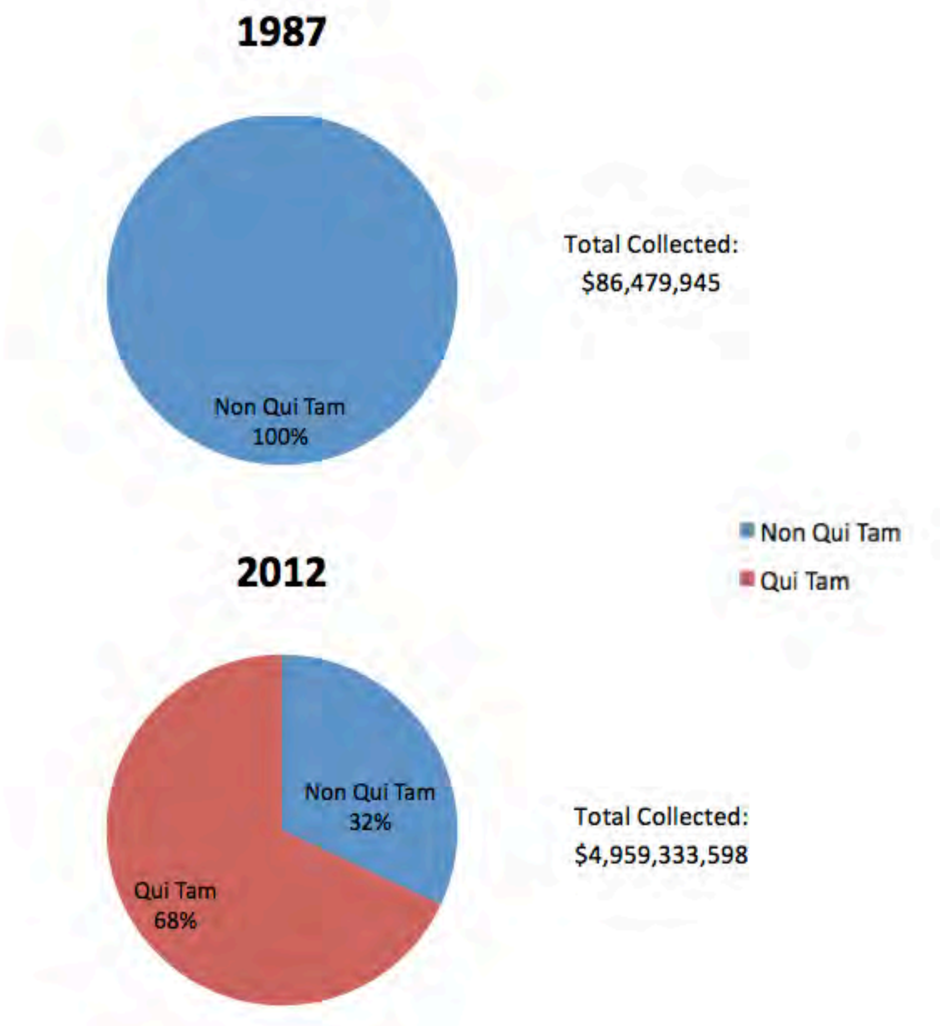
As reported by the ERC, only 2% of all employees who are willing to report misconduct eventually disclose that misconduct "outside" their company. Almost all of those two percent initially reported their concerns to managers or compliance departments. It is unclear from the ERC statistics as to how many of the 2% reported their concerns to the appropriate regulatory agencies, or simply when to non-governmental organizations or employment discrimination agencies.

Part III:
The False Claims Act is a Successful Model for Improving the Disclosure of Fraud

The False Claims Act was originally enacted in 1863. In 1943, it was amended and the ability for employee whistleblowers to utilize the law was effectively eliminated. In 1986, the FCA was amended again, resurrecting the *qui tam* provisions in the original 1863 act. The Act was further strengthened in 2009 and 2010.

Objective statistics published every year by the US Department of Justice Civil Fraud Division[3] unquestionably 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.

Fraud Statistics



As can be seen from the above charts, since the enactment of the FCA, the amount of overall civil recoveries obtained by the United States has dramatically increased from 89 million in 1986 (prior to whistleblower rewards program) to the $4.95 billion dollars in 2012.

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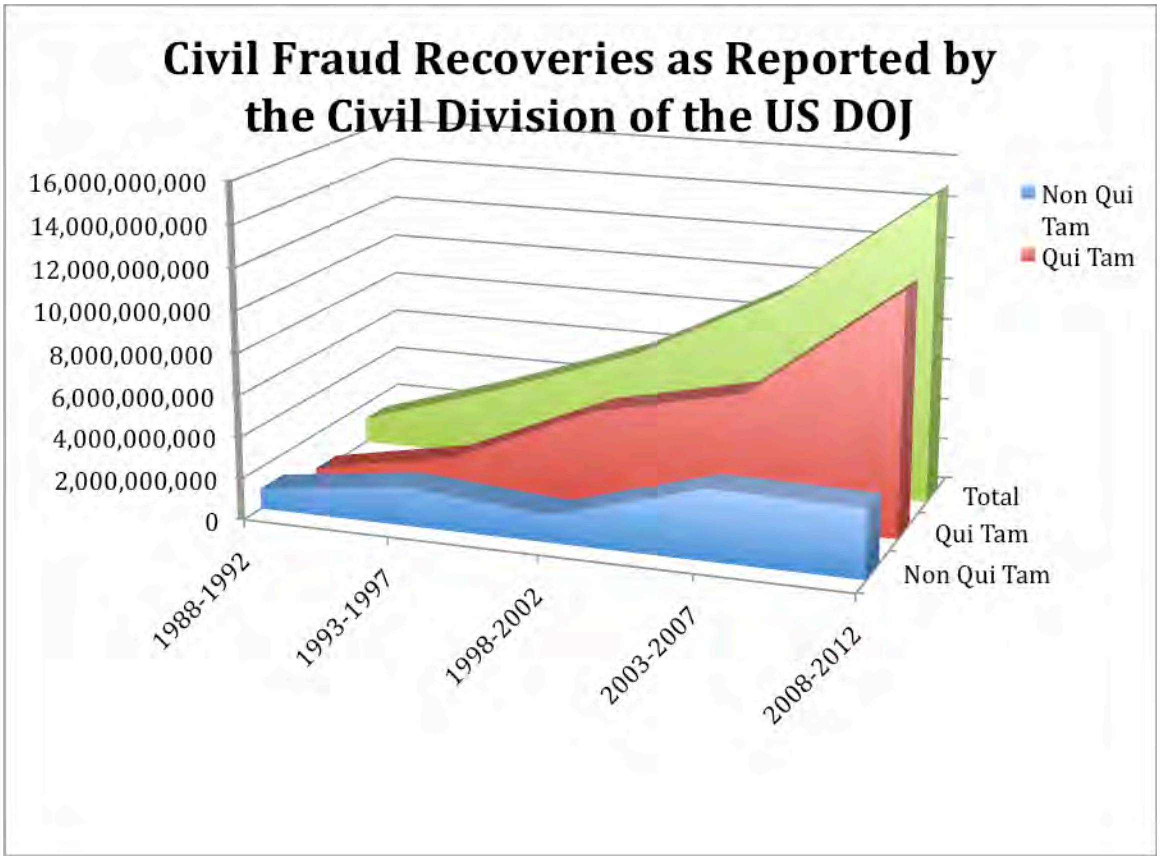
[3] Justice Department Statistics, *See* Exhibit 19

The False Claims Act: It Works



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. Similarly, the threat of detection is a powerful motivation for companies to ensure compliance with the law. The deterrent value of the FCA is not currently subject to objective quantification.

When the DOJ statistics are viewed in relationship with the findings of the ERC and the ACFE, 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.

Part IV:
Monetary Incentives Work

The University of Chicago Booth School of Economics conducted the most comprehensive and objective study into whether whistleblower reward programs work.[4]

The study attempted to "identify the most effective mechanisms for detecting corporate fraud" and was based on an "in depth" study of "all reported fraud cases in large U.S. companies between 1996 and 2004."

There conclusions clear: *Qui tam* laws were key to effective fraud detection.

Employees who Report Fraud Suffer Retaliation

"**Employees clearly have the best access to information**." But: **"[W]e find that in 82 percent of cases, the whistleblower was fired, quit under duress, or had significantly altered responsibilities.** In addition, many employee whistleblowers report having to move to another industry and often to another town to escape personal harassment."

"Not only is the honest behavior not rewarded by the market, but it is penalized."

"***Given these costs, however, the surprising part is not that most employees do not talk; it is that some talk at all***."

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[4] *Who Blows the Whistle on Corporate Fraud,* by professors Alexander Dyck (University of Toronto), Adair Morse (University of Chicago) and Luigi Zingales (University of Chicago).

Despite the threat of retaliation, the False Claims Act works

"A strong monetary incentive to blow the whistle does motivate people with information to come forward."

"Having access to information or monetary rewards has a significant impact on the probability a stakeholder becomes a whistleblower."

"Monetary incentives for fraud revelation seem to play a role regardless of the severity of the fraud."

"[T]here is no evidence that having stronger monetary incentives to blow the whistle leads to more frivolous suits."

"Monetary incentives seem to work well, without the negative side effects often attributed to them."

* * *

Conclusion: Expand the Availability of Qui Tam Rewards to Properly Increase Effective Fraud Detection without Negative Side Effects

"A natural implication of our findings is that the use of monetary rewards providing positive incentives for whistle blowing is the possibility of <u>*expanding the role for monetary incentives*</u>."

"**As the evidence in the healthcare industry shows, such a system appears to be able to be fashioned in a way that does not lead to an excessive amount of frivolous suits**."

"The idea of extending the *qui tam* statue to corporate frauds (i.e. providing a financial award to those who bring forward information about a corporate fraud) is very much in the Hayekian spirit of sharpening the incentives of those who are endowed with information. This proposal is consistent with a recent IRS move, which instituted a form of *qui tam* statue for whistleblowers in tax evasion cases."

Part V:

The FCA Strongly Encourages Effective Compliance Programs

A premise of many of the "reforms" advocated by the Chamber of Commerce are predicated on promoting fraud prevention by having companies institute strong internal compliance programs. The Chamber stated: "*[Businesses] should be incentivized to maintain effective compliance programs*."

This justification is not supportable. One of the core features of the 1986 amendments to the False Claims Act was to incentivize corporations to institute highly effective internal compliance programs.

Unlike the impression given in the Chamber report, the FCA is *not* a negligence or strict liability law. As explained by the Department of Justice in its FCA Primer: "*A person does not violate the False Claims Act by submitting a false claim to the government*.[5]

The point was made perfectly clear in the 1986 Senate Report on the FCA: "*The Committee is firm in its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence.*"

How can a company escape *all* liability under the FCA, even if it submits a false claim to the government?

The answer is simple: create internal controls that prevent or reduce the probability that a business can be accused promoting "deliberate ignorance" of the "falsity" of information provided to the government.

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[5] *See* DOJ, The False Claims Act: A Primer www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf (emphasis added)

The background to this "deliberate ignorance" standard can be found in the legislative history of the FCA. During the hearings on the Act, the two whistleblowers who testified confirmed that they had tried to inform their supervisors and others in the company about the wrongdoing. Instead of their allegations being properly or seriously investigated, they were subjected to retaliation.

Congress ingeniously crafted the FCA to directly address the internal compliance issue disclosed by the whistleblower-witnesses. Companies that negligently or innocently submitted false claims would be immune from liability. But if a whistleblower reported a concern, and the company tried to cover it up, or failed to have proper internal controls, the company could not rely upon its "deliberate ignorance" to escape liability.

This "compromise" in coverage was fully explained in the 1986 Senate Report:

The 1986 Senate Report on the FCA spelled this out clearly:

> "The Committee is firm in its intention that the act not punish honest mistakes or incorrect claims submitted through mere negligence. But the Committee does believe the civil False Claims Act should recognize that those doing business with the Government have an obligation to make a limited inquiry to ensure the claims they submit are accurate."
> * * *
> "While the Committee intends that at least some inquiry be made, the inquiry need only be "reasonable and prudent under the circumstances", which clearly recognizes a limited duty to inquire as opposed to a burdensome obligation. The phrase strikes a balance which was accurately described by the Department of Justice as 'designed to assure the skeptical both that mere negligence could not be punished by an overzealous agency and that artful defense counsel could not urge that the statute actually require some form of intent as an essential ingredient of proof.'"

The "deliberate ignorance" standard was crafted with an eye toward ensuring that companies have strong internal controls and stop retaliating against their own compliance officials. In fact, Congress we well aware that internal corporate inspectors were often the target of retaliation, and endorsed the finding of a 9th Circuit Court of Appeals ruling that held internal inspectors should be fully protected under anti-retaliation laws, even if they never contacted the government.

Unfortunately, as explained below, numerous businesses failed to institute effective compliance programs. Other companies actively went to "war" against their own internal compliance programs, and argued in numerous courts that compliance officials (and employees who contacted internal compliance programs) were not protected under law, and could be fired at will.

The FCA is already well designed to encourage businesses to institute strong, independent and effective compliance programs. As more cases are filed under the FCA, more companies will come to recognize that it is to their advantage to institute effective compliance programs.

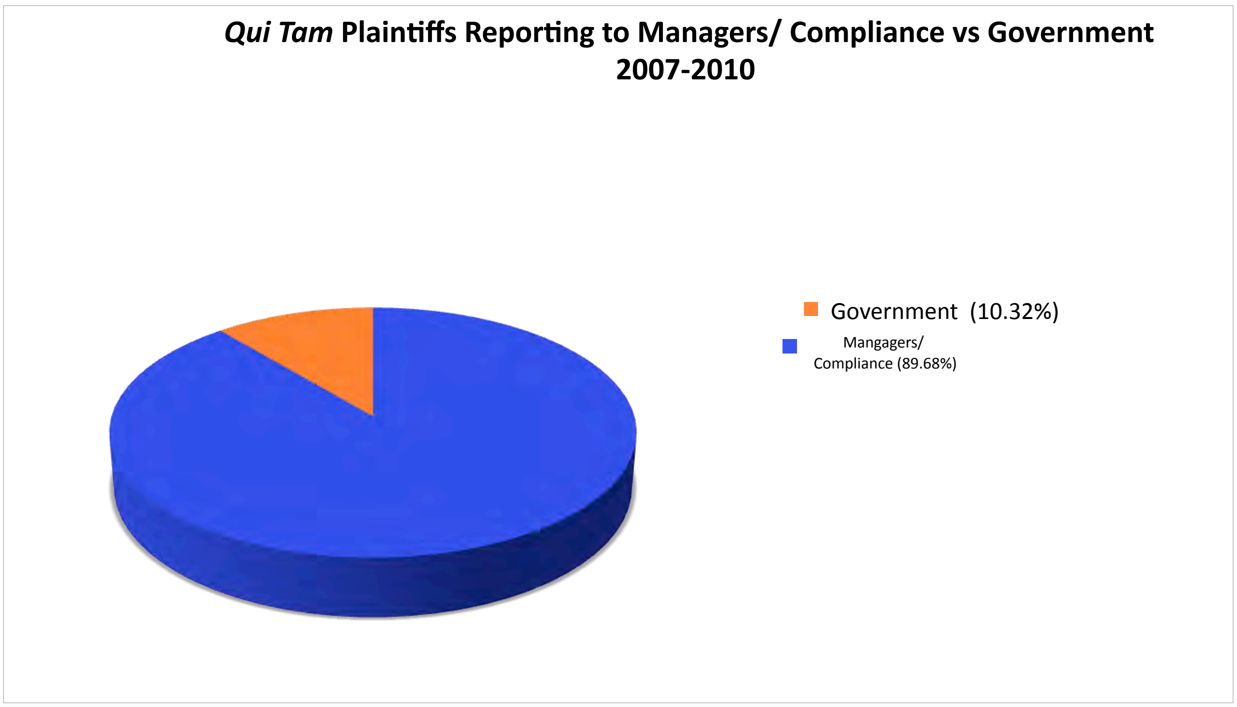
Furthermore, it is incumbent upon corporate trade associations, such as the Chamber of Commerce, to properly educate their members as to the actual requirements in the current FCA, and how these requirements strongly encourage its members to institute real effective internal controls that encourage and protect employees who disclose wrongdoing.

Part VI:

The Impact of *Qui Tam* Laws in Corporate Compliance Programs

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 over a four year period (2007-2010) demonstrates that approximately 90% of all employees who would eventually file a *qui tam* lawsuit initially attempted to resolve their disputes internally.



**See* Exhibit 2

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. *See* Exhibit 2, Special Report. 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.

While legally protecting a direct path to report illegal conduct to the government is necessary, such protections do not thwart internal reporting. 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 25 years and has resulted in numerous large and well-publicized rewards to whistleblowers. However, contrary to the 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 whatsoever to "reform" the False Claims Act to protect the integrity of internal corporate compliance programs.

Part VII: Businesses Must Fix their Compliance Problems

"Do employees trust that they can report suspicious activity anonymously and/or confidentially and without fear of reprisal?"

ACFE,

2010 Global Fraud Study [6]

Employers must Stop Retaliating Against Employees who Disclose Fraud to Supervisors or Compliance Officials

Critical to enforcement of the law is the prohibition of retaliation against employees who raise concerns with internal compliance or managers. Unfortunately, the regulated community has argued for the past 25 years that internal disclosures are not a protected activity.

This argument has undermined internal compliance programs for the past 30 years. As early as 1984, corporations and their attorneys have 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. *See* Exhibit 6, *Brown & Root v. Donovan*.

In that case, President 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 Fifth Circuit explicitly held that to be a whistleblower an employee must contact a "competent organ of government."

Since that case, in court after court, under law after law, corporate attorneys have aggressively argued that contacts with internal compliance programs are *not* protected activities. Even worse, compliance personnel have been targeted for retaliation simply for doing their job "too well." *See Kansas Gas & Electric v. Brock*, 780 F.2d 1505 (10th Cir. 1985).

After the passage of the Dodd-Frank Act corporations have continued to vigorously argue that employees who report securities fraud to internal compliance officials or their supervisors can be fired, at-will. The most recent court to reach this conclusion was the 5th Circuit in *Asadi v. GE Electric*, No. 12-20522 (5th Cir. 2013). The Court's holding was clear:

> *[W]e hold that the plain language of the Dodd-Frank whistleblower-protection provision creates a private cause of action only for individuals who provide information relating to a violation of the securities laws to the SEC. Because Asadi failed to do so, his whistleblower-protection claim fails.*

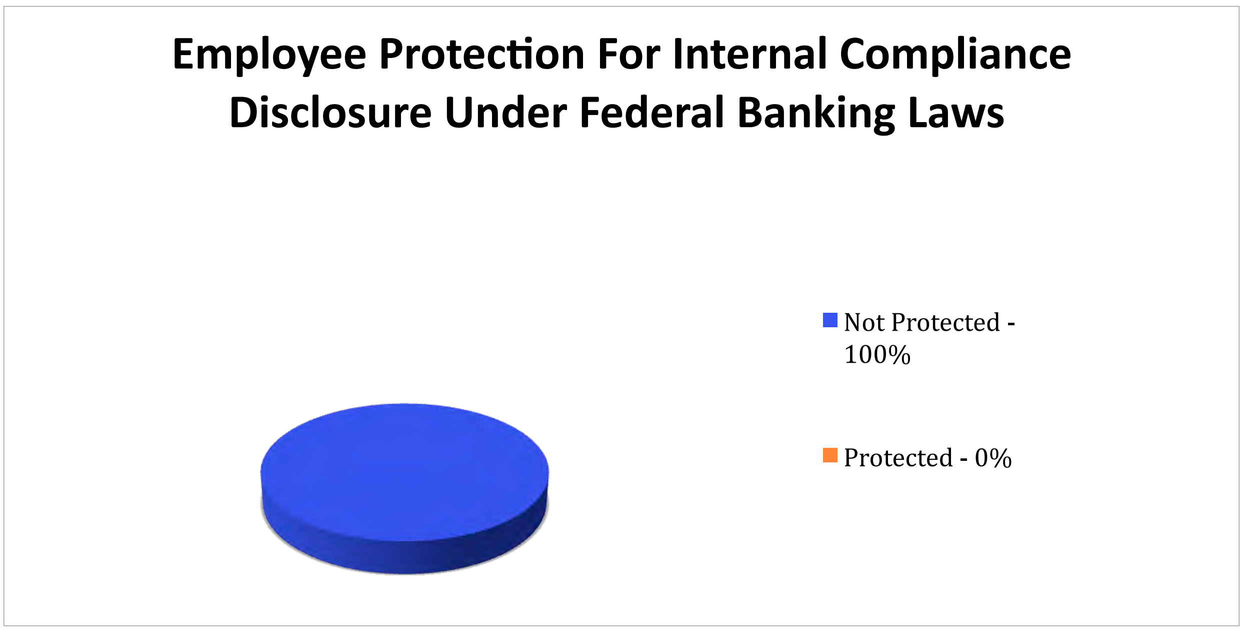
Because employers have successfully argued that anti-retaliation laws should not apply to internal whistleblowers, organizations such as the National Whistleblower Center have consistently urged Congress to amend existing whistleblower laws to ensure that internal reporting is protected, and to include language in new legislation that explicitly protects internal reporting.

To demonstrate this point, we examined two categories of cases that govern major corporate whistleblowers for which corporate counsel have argued that the underlying federal whistleblower protection law did not explicitly protect internal whistleblowers. First are cases under two long-standing federal banking whistleblower protections laws. Second are retaliation cases filed under the 1986 anti-retaliation provision of the False Claims Act.

Banking Law Cases: Whistleblower protection provisions have existed under federal banking laws for over twenty years. These laws do not contain reward provisions and have been very ineffective. Currently, employment attorneys largely ignore them. In a number of key cases filed under these laws employees argued that complaints raised internally within a company were protected. Unfortunately, they lost every such case. The banks successfully argued that internal whistleblowers had no rights and the banks won the day in court against their own employees.

All of the published rulings under the banking whistleblower laws have held 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.

Chart of Cases Under Federal Banking Whistleblower Laws.



False Claims Act Cases: A review of the False Claims Act revealed a similar result. Under the 1986 version of the FCA, in every reported case in which internal whistleblowing was an issue, the employers argued that internal reporting of fraud, standing alone, was not protected activity. There is not one reported case in which a company agued that employees who disclosed allegations to compliance departments should be protected as a matter of law.

Unfortunately, employers' narrow views on protected activity prevailed in the vast majority of court cases filed under the FCA prior to the 2009 FCA amendments which expressly protected internal whistleblowing. Below is a review of Court of Appeals rulings on this issue.

CIRCUIT PRECEDENT	COURT HOLDING
1st Circuit US ex rel. Karvelas v. Melrose-Wakefield Hospital 360 F.3d 220 (2004)	"Conduct protected by the FCA is limited to activities that 'reasonably could lead' to an FCA action…Karvela's statement that he reported his supervisors' destruction of incident reports of medical errors suggests a cover-up of regulatory failures but does not allege investigation or reporting of false or fraudulent claims knowingly submitted to the government"
2nd Circuit Rost v. Pfizer 2010 U.S. App. LEXIS 23787	The Court refused to protect employee under the False Claims Act despite disclosures made to supervisors within Pfizer.
3rd Circuit Hutchins v. Wilentz 253 F.3d 176 (2001)	"Simply reporting [a] concern of mischarging…does not establish that [plaintiff]was acting in furtherance of a qui tam action…He did not communicate that he was going to report the activity to government officials"
4th Circuit US ex rel. Owens v First Kuwaiti 612 F.3d 724 (2010)	"Simply reporting his concern of a mischarging…to his supervisor does not suffice to establish that [an employee] was acting in furtherance of a qui tam action…Any large enterprise depends on communication, so it is hardly surprising that Owens at times reported problems he thought he saw on the site"
5th Circuit Robertson v. Bell Helicopter 32 F.3d 948 (1994)	"Robertson admitted that he never used the terms 'illegal,' 'unlawful,' or 'qui tam action' in characterizing his concerns about Bell's charges…we conclude that Robertson's reporting did not constitute protected activity under the False Claims Act"
5th Circuit Sealed v. Sealed 156 Fed. Appx. 630 (2005)	"Appellant . . . conducted the audit in his capacity as Director of Compliance. . . he informed Appellee's chief compliance officer, as well as corporate managers, of the results of his audit, …plaintiff could not show retaliatory discharge where . . . he never characterized his concerns as involving illegal, unlawful, or false-claims investigations"

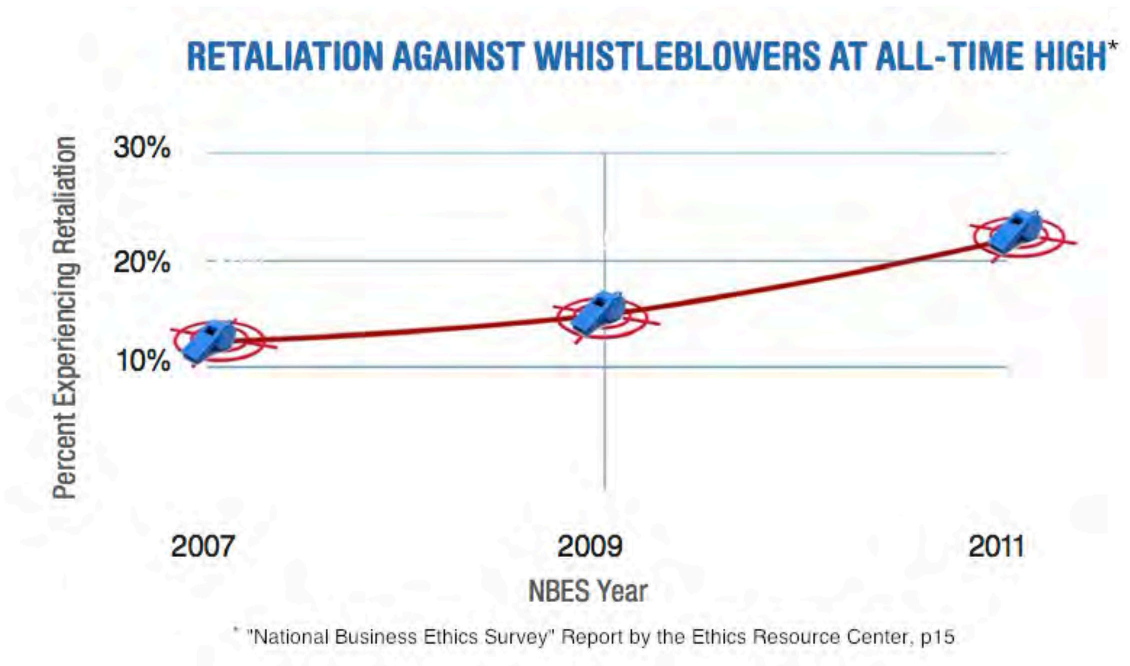
6th Circuit McKenzie v. BellSouth Telecommunications 219 F.3d 508 (2000)	"Reporting concerns of mischarging a government project or investigating an employer's non-compliance with federal or state regulations was insufficient to constitute 'protected activity'…her numerous complaints on the matter were directed at the stress from and pressure to falsify records, not toward an investigation into fraud on the federal government"
7th Circuit Brandon v. Anesthesia & Pain Management 227 F.3d 936 (2002)	"It is true that Brandon used terms like 'illegal,' 'improper,' and 'fraudulent' when he confronted the shareholders about the billing practices…Brandon was simply trying to convince the shareholders to comply with Medicare billing regulations. Such conduct is usually not protected"
9th Circuit US ex rel. Hopper v. Anton 91 F.3d 1261 (1996)	The record quite clearly shows Hopper was merely attempting to get the School District to comply with Federal and State regulations. Her numerous written complaints, seventy letters and over fifty telephone calls were all directed toward this end…she was not whistleblowing"
10th Circuit US ex rel. Ramseyer v. Century Healthcare 90 F.3d 1514 (1996)	"The amended complaint states that plaintiff…regularly communicated to her superiors 'information regarding non-compliance with the required minimum program components…we do not believe plaintiff has satisfied her burden of pleading facts which would put defendants on notice that she was taking any action in furtherance of an FCA action"
11th Circuit US ex rel. Sanchez v. Lymphatx 596 F.3d 1300 (2010)	"If an employee's actions, as alleged in the complaint, are sufficient to support a reasonable conclusion that the employer could have feared being reported to the government for fraud or sued in a qui tam action by the employee, then the complaint states a claim for retaliatory discharge under §3730(h)"
DC Circuit Hoyte v. American Nat'l Red Cross 518 F.3d 61 (2008)	"'An employee's investigation of nothing more than his employer's non-compliance with federal or state regulations' is not enough to support a whistleblower claim"

Part VIII:

Ethics Resource Center: “Retaliation Against Whistleblowers at All-Time High”

The Ethics Resource Center, sponsored three studies in 2011 analyzing employee reporting behaviors and the risks they face at work.

The ERC's conclusion was direct and blunt: ***"Retaliation against whistleblowers at all-time high."***



According to the ERC most recent findings:

"The more an employee persists in reporting a concern, the more likely he/she is to experience retaliation"

"Not only is retaliation on the rise nationally, it is rapidly becoming an issue even at companies with a demonstrated commitment to ethics"

"One of the most common reasons that employees choose not to report misconduct is fear of retaliation"

"40 percent of whistleblowers who go first to the hotline experience retaliation"

"For the first time [since the ERC conducted its surveys) managers are now more likely to experience retaliation then nonmangement employees."

*"Retaliation: When Whistleblowers Become Victims" Report by the Ethics Resource Center, p10

The ERC's studies strongly support a finding that the culture within corporations remains hostile to whistleblowers. The rise in retaliation against managers, and the very high numbers of persons who reported being retaliated after escalating a concern from a supervisor to other programs, such as a corporate "hotline," also reflects that the more serious a concern, the greater the risk of retaliation.

These findings strongly support Congress' efforts to enact and expand whistleblower reward laws.

Whistleblower reward laws address both the short term and long term problems caused by the realistic fear experienced by employees who are considering blowing the whistle:

- Reward laws create an incentive for employees to take a risk and report fraud.

- Reward laws establish safe and federally protected channels for reporting.

- Reward laws place a premium on raising concerns that are valid, well documented and provable. Unlike retaliation laws, the only way to prevail in a rewards law is to be right about the wrongdoing – if you don't have the proof, why take the risk?

- Reward laws give employees a choice: report internally or report through a federally protected channel that can offer real financial security. This choice will breed competition, and provide effective motivation for companies to get their acts together and compete.

Part IX:
"Capping" Whistleblower Rewards would Undermine Public Policy and Interfere with Employee Disclosures

Large whistleblower rewards are key to obtaining voluntary compliance with federal anti-fraud laws, encouraging employees to overcome their well-grounded fears that inhibit reporting, and specifically to encourage highly compensated employees to risk their careers to expose fraud and serve the public interest.

<u>REWARD LAWS PROMOTE VOLUNTARY COMPLIANCE</u>

It is very difficult to quantify the deterrent effect of whistleblower reward laws. However, one such example exists. In 2003 there was no IRS Whistleblower Reward Law and no nationally know IRS whistleblower. In that year, based on enforcement actions undertaken by the government predicated on information obtained from the use of bank cards to access illegal Swiss accounts, the government instituted a voluntary compliance program where U.S. taxpayers who held illegal accounts overseas could turn themselves in and escape criminal prosecution.

In 2003 the government recovered $200 million dollars from 1,321 taxpayers.

Six years later the government instituted a new amnesty program. But two things had changed. First, Congress had enacted a mandatory IRS reward law based on the FCA. Thus, employees of Swiss banks, with knowledge of U.S. clients, could make millions by turning in their banks (and the banks' clients) to the IRS. Second, one such whistleblower stepped forward and received massive attention. This whistleblower, UBS

Swiss banker Bradley Birkenfeld, turned over thousands of pages of documents to the Justice Department and IRS regarding UBS' America's program that had nearly twenty thousand illegal U.S. accounts.

The impact was dramatic. The post-Birkenfeld voluntary reward program was radically more effective than the pre-whistleblower program. The number of individuals who turned themselves in jumped to 20,000, and the amount of taxes and penalties recovered was $4.1 billion dollars (and counting)(the IRS is still in the process of processing all of the persons who participated in this program).

In addition to these proceeds, the U.S. also collected a one-time fine of $780 million dollars from UBS.

But the impact of Birkenfeld's whistleblowing was only beginning. When the IRS paid Birkenfeld a record $104 million dollar reward (more than any individual reward paid in the 25-year history of the FCA), the impact in Switzerland was immediate. Leading bankers and their analysts declared secret Swiss banking dead. Since the Birkenfeld reward, Swiss banks and the government have reached a number of historic agreements that have ended the practice of Swiss banks illegally hiding U.S. wealth.

Simply stated, because of the whistleblower reward law – and the fear it generated – illegal Swiss banking became impractical. Any Swiss banker could become a millionaire simply by turning in his American clients. In the wake of the Birkenfeld disclosures and reward, this risk was too great for both the banks and their clients. It forced change that will benefit U.S. taxpayers for years to come.

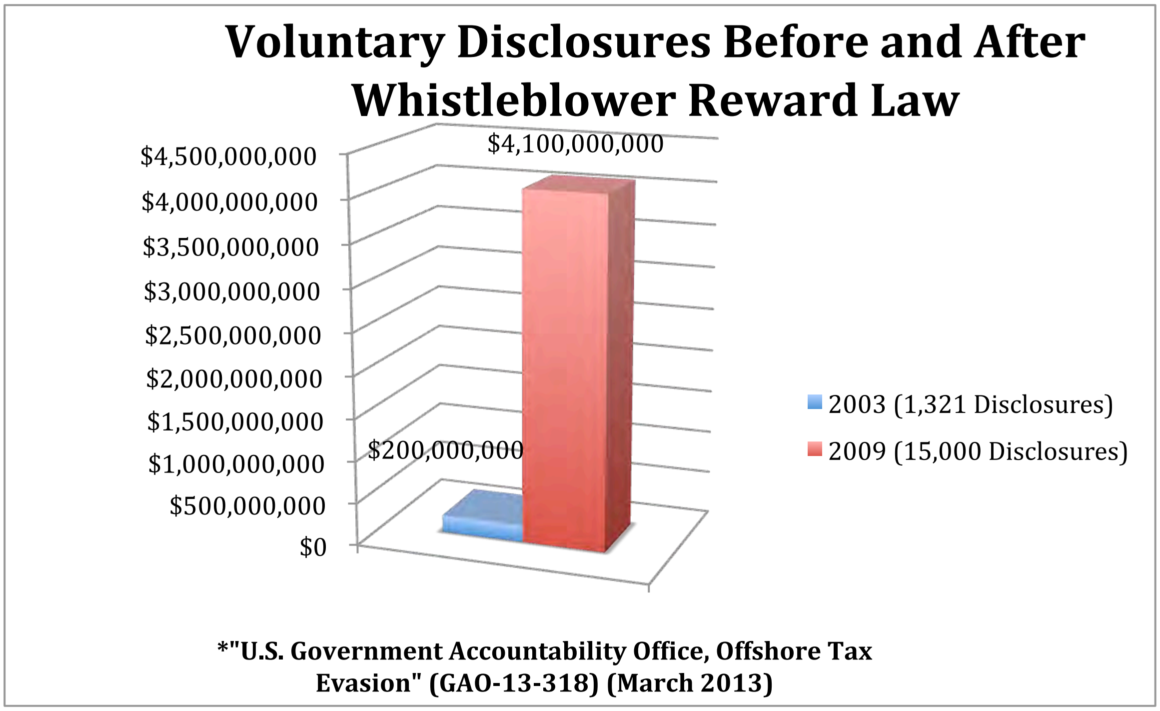
Results of Voluntary Offshore Tax Compliance Prior to Whistleblower Reward Law

2003 Offshore Voluntary Disclosure Program

Trigger: John Doe Summons from Taxpayers who used bankcards to access accounts

Disclosures: 1,321

Recovery: $200 million



Results of Voluntary Compliance After Whistleblower Reward Law went into Effect and International Bank Whistleblower Bradley Birkenfeld Went Public

2009 Offshore Voluntary Disclosure Program

Trigger: Whistleblower Bradley Birkenfeld's disclosures trigger John Doe Summons for UBS accounts; first program after IRS whistleblower rewards became mandatory with no cap

Disclosures: 15,000

Recovery: $4.1 Billion (as of December 31, 2012)

Source: U.S. Government Accountability Office, Offshore Tax Evasion (GAO-13-318)(March 2013)

THERE ARE VERY FEW BIG AWARDS, BUT THESE LARGE AWARDS SERVE A KEY FUNCTION IN *QUI TAM* LAWS

Big rewards are few and far between. Given the paucity of such rewards, there is no problem to fix and Congressional action is not needed. The last study of this issue was a 2006 General Accounting Office Report that found the average relator reward was $1.7 million.

However, large rewards serve the public interest. They trigger significant voluntary compliance, provide positive publicity for the programs and are the cornerstone for inducing reluctant high-placed and well-paid employees with inside knowledge of fraud to step forward. In order to recruit the best and brightest corporate managers, there is no cap on executive compensation. The same is true for the *qui tam* programs. Not every CEO is paid $100 million dollars, but the absence of a cap is an incentive for excellence and permits the free market to do what it does best – motivate positive actions.

Placing "caps" on whistleblower rewards would undermine the FCA. As found by the GAO, there is no problem with relators being overcompensated. However, because the overwhelming majority of *qui tam* rewards are very modest, the government needs to pay very large rewards on major cases in order to induce employees (who, rightly so, are very reluctant to step forward) to provide inside information about major frauds to appropriate officials.

Interestingly, the government does not publicize the fact that most FCA awards are *very modest*. If one looks at the average reward of $1.7 million dollars, and then takes into consideration a 20% chance of any recovery whatsoever, and the requirement to pay attorney fees and costs, the record actually demonstrates that relators are undercompensated, on the average. This is especially true given the tremendous risks employees face if they decide to become a "Relator."

Modest rewards would not motivate the vast majority of reluctant employees to risk their entire career simply to stand a 20% chance of obtaining a small recovery. Large potential rewards will motivate reluctant whistleblowers. One only needs to think of the impact very large potential rewards have on lottery recoveries to understand how the potential for such a reward is often the difference between the government learning about a fraud, or not.

Rewards are designed to incentivize high-risk behavior that serves the government's and the taxpayer's best interest. These rewards have nothing to do with paying out compensation for damages an individual may suffer from a tort. Large rewards have nothing in common with punitive damage awards and are never the result of a runaway jury verdict. The amount of damages owed to the government is carefully set forth in the statute, and readily subject to policing by the courts. The amount of a reward is *not paid* by the taxpayer, but comes out of the profit obtained from the government that can be attributed to the specific contribution of the whistleblower. The payment of the whistleblower reward does not cost the company any additional money since the reward is paid from the total fine or damages paid to the government and the government pays the whistleblower an award between 15-30%.

Capping rewards undermines the entire purpose of the law and serves no public interest, except to discourage some of the most important potential sources of information on fraud against the government. The only beneficiary of caps would be corporate wrongdoers whose fraud would be more likely to go undetected as a result of caps that discourage reporting.

Part X:
Businesses Should Adopt Rules to Enhance Fraud Detection

There is no need to weaken or amend the False Claims Act in order to have the business community implement effective fraud detection programs and strong internal compliance departments. There is no need to establish a government-sponsored agency to "accredit" compliance programs. Compliance professionals and fraud examiners have researched and engaged in the practical implementation of such programs for many years. The specific guidelines that should be followed in establishing such programs are clearly spelled out and all can be voluntarily adopted.

Moreover, without "reforming" anti-fraud laws, all publicly traded corporations and major government contractors are already required to have employee concerns/compliance programs. Even when not required by law, the trend in all major institutions is to voluntarily adopt compliance programs.

The Association of Certified Fraud Examiners has created a highly respected "Fraud Prevention Checklist." This Checklist is based on input from the Association's 60,000 members (most of whom are Certified Fraud Examiners.

The ACFE Checklist consists of eleven general categories of programs, including a total of 28 sub-categories. ACFE, *Report to the Nations on Occupational Fraud and Abuse: 2012 Global Fraud Study*, pp. 70-71. Institutional adoption of the mechanisms set forth in this Checklist has no relationship whatsoever on amending whistleblower protection laws. In fact, any weakening of such laws would be counterproductive, and lessen the incentive that institutions have to self-regulate.

Moreover, *nothing* in the Fraud Prevention Checklist supports a finding that whistleblower protection laws should be weakened. The opposite is true. The ACFE now looks at corporations that voluntarily pay whistleblower rewards as party of a comprehensive "Anti-Fraud Control." Significantly, the ACFE found that corporations in Africa were twice as likely to have "Rewards for Whistleblowers" then those in t he United States. ACFE, *Report to the Nations*, p. 35.

Corporate trade associations, such as the Chamber of Commerce, should play a leading role in urging their members to implement the Checklist.

The ACFE Fraud Prevention Checklist is reprinted in the Appendix to this Report.

In addition to implementing effective programs based on the years of experience generated the current weaknesses in corporate compliance programs have been well documented by leading professionals within the compliance community. 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, a highly respected compliance professional and the former Chief Compliance officer for two multinational corporations, including BP oil. 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." *See* Boehme Paper, http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/boehmereport.pdf

Ms. Boehme recommends a set of specific features that corporations can and should immediately adopt in order to ensure effective compliance programs. These features should include:

Feature #1: Executive and management compensation linked to compliance and ethics leadership

Feature #2: Consistent enforcement of the company's code of conduct and policies, especially at senior levels

Feature #3: Confidential, professional management of the help line, including investigations

Feature #4: Vigorous enforcement of non-retaliation policies

Feature #5: Effective and ongoing compliance and ethics risk-assessment

Feature #6: Integration of clear, measurable compliance and ethics goals into the annual plan

Feature #7: Direct access and periodic unfiltered reporting by the "chief ethics and compliance officer" (CECO) to a compliance- savvy board

Feature #8: Strong compliance and ethics infrastructure throughout all parts of the business

Feature #9: Real compliance audits designed to uncover law breaking

Feature #10: Practical and powerful action (not merely words) by the CEO and management team to promote compliance and ethics

Feature #11: Shared learning within the company based on actual disciplinary cases.

Trade associations, such as the Chamber of Commerce, are perfectly positioned to urge their members to adopt these common sense voluntary reforms. There is no need for government intervention in this process. Under current market conditions, corporations should be encouraged to compete with the government whistleblower rewards programs. It is this competition that will result in effective voluntary reforms, not the weakening of the FCA, or it's repeal-by-technicality.

Part XI:

The FCA Promotes Free and Fair Market Competition

The most comprehensive government review of whistleblower reward programs was undertaken in 2010-11 by the U.S. Securities and Exchange Commission as part of a rulemaking proceeding required by the Dodd-Frank law. The rulemaking solicited comments from all stakeholders in the whistleblower area, and numerous major corporations and corporate trade associations filed detailed comments and personally met with SEC Commissioners. Likewise, whistleblower advocates also presented their case.

The result was the SEC's publication in 2011 of a Final Rule governing every major aspect of a whistleblower reward program. Those rules can and should serve as a model for any subsequent rulemaking by the government. The final rule provides no support whatsoever for the recommendations set forth by the Chamber.

The Chamber raised no criticism of the SEC rules. They did endorse the rules for including "several regulatory incentives to encourage employees to report possible violations . . . to the company." The SEC provided this encouragement *without placing any limits on the right of an employee to report concerns directly to the government*. The Chamber's recommendations are predicated on placing mandatory limits on reward eligibility and requirements that employees first report concerns to their company. The SEC properly rejected those proposals.

At the conclusion of its historic and massive rulemaking proceeding the SEC came to the conclusion that a robust rewards system was essential to protect honest business and promote fair competition:[7]

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[7] SEC Final Rule, Release No. 34-64545; File No. S7-33-10, RIN 3235-AK78, "Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934."

> We do not believe the final rules will impose undue burdens on competition and, indeed, **we believe the rules may have a potential pro-competitive effect. Specifically, by increasing the likelihood that misconduct will be detected, of securities law violations, the rules should reduce the unfair competitive advantages that some companies can achieve by engaging in undetected violations.**

The SEC also evaluated the cost-benefit analysis of "encouraging" internal reporting programs, but *not* "mandating" these programs. The SEC correctly recognized that the competition between internal corporate programs and a well-managed SEC program would strongly encourage companies to institute effective compliance departments. If internal reports became mandatory, the positive pressure caused by competition would be lost. The Commission described this cost-benefit analysis as follows:

> [W]e believe that the final rules, by encouraging internal reporting without mandating it, allows whistleblowers to balance the potential increase in the probability and magnitude of an award by participating in an effective internal compliance mechanism against the particular risks that may result from doing so. By allowing potential whistleblowers to make this assessment and encouraging them to report internally in situations where their tips will be appropriately addressed, the final rule should promote efficiency in how violations are reported and resolved. Furthermore, issuers who previously may have underinvested in internal compliance programs may respond to our rules by making improvements in corporate governance generally, and strengthening their internal compliance programs in particular.

Part XII:

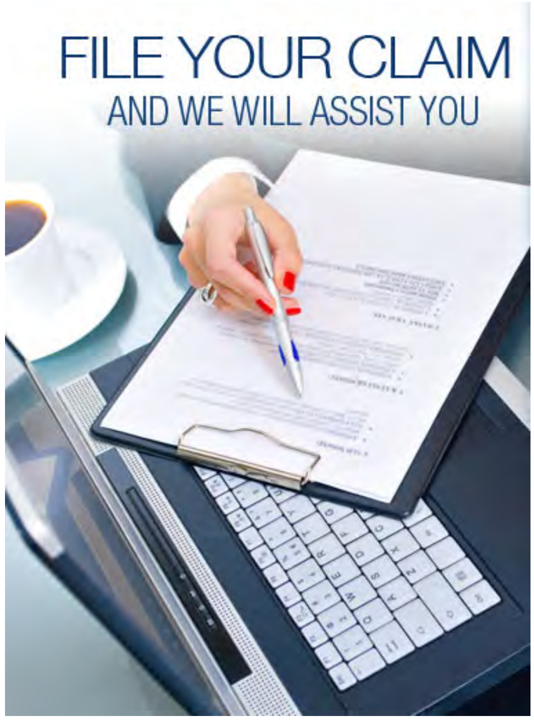
The Filing of Frivolous Complaints is Not an Issue

The Chamber report alleges that the FCA "incentivize(s) the filing of frivolous lawsuits" and "generates unnecessary litigation costs for government and businesses." The report also implies that the overfilling of FCA claims is a problem as "litigation under the FCA has steadily increased."

These claims are completely unsupported.

First, the University of Chicago Booth School of Economics' study debunked any allegation that the FCA increases the filing of frivolous litigation. The opposite is true.

Second, as reflected in the graph, there is no problem with over-filing of *qui tam* lawsuit. Of the over 285,000 civil lawsuits filed in federal courts in 2012, only 647 *qui tam* actions were filed. The increase in the number of *qui tam* lawsuits filed from 2011 to 2012 was a whopping *nine* additional cases.



Part XIII:

Restrictions or Financial Disincentives on Employees who Directly Report Violations of Law to the Authorities Constitute an Illegal Obstruction of Justice

Policies that promote internal reporting of fraud allegations at the expense of direct reporting to federal law enforcement are currently illegal and would constitute a criminal obstruction of justice. It is a fundamental right of citizens to report suspected criminal wrongdoing to laws enforcement. Any incentive to hide or delay the disclosure of illegality from the appropriate authorities is a violation of some of the most important and time-honored public policies in a democratic state.

Consistent with these policies, Federal Law creates a near absolute protection for employees who contact federal law enforcement agencies in order to report suspected violations of law. The federal obstruction of justice statute *criminalizes* any attempt to interfere with the "livelihood" of any person who reports truthful information to a law enforcement agency regarding a potential violation of law. The obstruction of justice statute 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, and they cannot be economically punished for doing so.

The federal Obstruction of Justice law 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).

Conclusion: America Needs a Robust FCA

The need to protect the False Claims Act from hostile "reforms" was best stated in a bipartisan report issued on September 25, 2008 by the U.S. Senate Committee on the Judiciary as a result of hearing on *expanding* coverage under the Act.[8]

Without dissent, the Judiciary Committee wrote in its official report: "*The need for a robust FCA cannot be understated.*" The Committee confirmed that "*a great deal of fraud would go unnoticed absent the assistance of qui tam relators*" and, through its objective review of the law, confirmed "*the critical role that qui tam realtors play in uncovering and prosecuting violations*."

The Committee endorsed and reprinted extensive excerpts from the testimony of Pamela Bucy, the Bainbridge Professor of Law at the University of Alabama School of Law. This testimony completely confirms the experience observed by the NWC lawyers who have represented whistleblowers, including *qui tam* relators, for nearly 30 years:

> "Complex economic wrongdoing cannot be detected or deterred effectively without the help of those who are intimately familiar with it. Law enforcement will always be outsiders to organizations where fraud is occurring. They will not find out about such fraud until it is too late, if at all. When law enforcement does find out about such fraud, it is very labor intensive to investigate. Fraud is usually buried in mountains of paper or digital documents. It is hidden within an organization. Many different people within an organization, in multiple offices, divisions, and corporate capacities, may have participated in the illegality. Because of the complex nature of economic crime and the diffuse nature o business environments, it may not be apparent, perhaps for years, that malfeasance is afoot. By then, victims will have been hurt, records and

[8] Senate Report 110-507 (2d Session), "The False Claims Act Correction Act of 2008, Committee on the Judiciary, September 25, 2008 (legislative day, September 17, 2008).

witnesses will have disappeared, and memories will have faded."

Based on the extensive testimony presented to the Committee, the Judiciary Committee report unanimously concluded as follows:

⇒ "[I]nsiders who are willing to blow the whistle are the only effective way to learn that wrongdoing has occurred."

⇒ "Information from insiders is the only way to effectively and efficiently piece together what happened and who is responsible."

⇒ "Insiders can provide invaluable assistance during an investigation by identifying key records and witnesses, interpreting technical or industry information, providing expertise, and explaining the customs and habits of the business or industry."

⇒ Help from an insider can save time and expense for both law enforcement and putative defendants by focusing the investigation on relevant areas.

⇒ [T]he presence of effective qui tam provisions in the FCA has a deterrent effect on those who seek to defraud the Government.

Michael Hertz, Deputy Assistant Attorney General, Civil Division, of the Department of Justice, also testified at the hearing. His findings speak for themselves: "**Whistleblowers are essential to our operation. Without them, we wouldn't have cases**."

Mr. Hertz also confirmed that the publicity surrounding FCA payouts greatly helps the government enforcement efforts:

"In the wake of well-publicized recoveries attributable to the qui tam cases, those who might otherwise submit false claims to the Federal Government are more aware than ever of the 'watchdog' effect of the qui tam statute. We have no doubt that the Act has had the salutary effect of deterring fraudulent conduct."

Findings and Recommendations

FINDINGS

Finding #1: The False Claims Act has been remarkably successful and its programs should be expanded into other areas of law for which fraud harms the public interest.

Finding #2: The FCA Strongly Encourages Employers to Establish Effective Compliance Programs

Finding #3: The existence of *qui tam* reward programs has no negative impact on internal employee reporting activities.

Finding #4: Capping rewards would undermine the deterrent effect of *qui tam* laws, discourage employee disclosures and severely threaten the ability of the government to induce high-ranking officials to risk their jobs in disclosing fraud.

Finding #5: The "reforms" proposed by the Chamber of Commerce's Institute for Legal Reform would undermine the FCA and should not be implemented.

RECOMMENDATIONS

Recommendation #1: Congress should enact a general False Claims Act to permit whistleblower rewards based on original information that results in major recoveries by the United States in areas that are not covered under current law.

Recommendation #2: Corporate trade associations and their members must aggressively ensure that employee reports to internal compliance programs are fully protected. The decades-long history of regulated companies opposing such protections must end.

Recommendation #3: The False Claims Correction Act's proposal for creating a mechanism for federal employees to utilize the False Claims Act should be adopted by Congress or implemented by Rule by the Department of Justice.

Recommendation #4: The Department of Justice should undertake efforts to stimulate the filing of more FCA cases, as the current number of cases filed each year is dramatically low.

Recommendation #5: Congress should forcefully reject any proposal that would undermine the Obstruction of Justice law, and reject any legislation that would limit or create a financial disincentive on employee reports to federal law enforcement.

APPENDIX

Association of Certified Fraud Examiners

"Check List"

for Effective Anti-Fraud Programs

Fraud Prevention Checklist

The most cost-effective way to limit fraud losses is to prevent fraud from occurring. This checklist is designed to help organizations test the effectiveness of their fraud prevention measures.

1. **Is ongoing anti-fraud training provided to all employees of the organization?**
   - ❑ Do employees understand what constitutes fraud?
   - ❑ Have the costs of fraud to the company and everyone in it — including lost profits, adverse publicity, job loss and decreased morale and productivity — been made clear to employees?
   - ❑ Do employees know where to seek advice when faced with uncertain ethical decisions, and do they believe that they can speak freely?
   - ❑ Has a policy of zero-tolerance for fraud been communicated to employees through words and actions?
2. **Is an effective fraud reporting mechanism in place?**
   - ❑ Have employees been taught how to communicate concerns about known or potential wrongdoing?
   - ❑ Is there an anonymous reporting channel available to employees, such as a third-party hotline?
   - ❑ Do employees trust that they can report suspicious activity anonymously and/or confidentially and without fear of reprisal?
   - ❑ Has it been made clear to employees that reports of suspicious activity will be promptly and thoroughly evaluated?
   - ❑ Do reporting policies and mechanisms extend to vendors, customers and other outside parties?
3. **To increase employees' perception of detection, are the following proactive measures taken and publicized to employees?**
   - ❑ Is possible fraudulent conduct aggressively sought out, rather than dealt with passively?
   - ❑ Does the organization send the message that it actively seeks out fraudulent conduct through fraud assessment questioning by auditors?
   - ❑ Are surprise fraud audits performed in addition to regularly scheduled audits?
   - ❑ Is continuous auditing software used to detect fraud and, if so, has the use of such software been made known throughout the organization?
4. **Is the management climate/tone at the top one of honesty and integrity?**
   - ❑ Are employees surveyed to determine the extent to which they believe management acts with honesty and integrity?
   - ❑ Are performance goals realistic?
   - ❑ Have fraud prevention goals been incorporated into the performance measures against which managers are evaluated and which are used to determine performance-related compensation?
   - ❑ Has the organization established, implemented and tested a process for oversight of fraud risks by the board of directors or others charged with governance (e.g., the audit committee)?

5. **Are fraud risk assessments performed to proactively identify and mitigate the company's vulnerabilities to internal and external fraud?**

6. **Are strong anti-fraud controls in place and operating effectively, including the following?**
   - ❑ Proper separation of duties
   - ❑ Use of authorizations
   - ❑ Physical safeguards
   - ❑ Job rotations
   - ❑ Mandatory vacations

7. **Does the internal audit department, if one exists, have adequate resources and authority to operate effectively and without undue influence from senior management?**

8. **Does the hiring policy include the following (where permitted by law)?**
   - ❑ Past employment verification
   - ❑ Criminal and civil background checks
   - ❑ Credit checks
   - ❑ Drug screening
   - ❑ Education verification
   - ❑ References check

9. **Are employee support programs in place to assist employees struggling with addictions, mental/emotional health, family or financial problems?**

10. **Is an open-door policy in place that allows employees to speak freely about pressures, providing management the opportunity to alleviate such pressures before they become acute?**

11. **Are anonymous surveys conducted to assess employee morale?**

**2012 Report to the Nations on Occupational Fraud and Abuse*, p70-71, Association of the Certified Fraud Examiners

Research Methodology

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 January 24, 2011. 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, by 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 bias 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 January 24, 2011. 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 and Appeals Court cases in which a 3730(h) claim was filed were then extracted from this list, creating a population of 157 cases to be examined. All of the included cases are listed in the following charts published on the NWC web site:

Chart of Employee Reporting: Internal vs. External, http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/employeereportinginternalvsexternal.pdf;
Chart of Compliance Employee Reporting, http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/compliancereportingchartfinal.pdf;
Chart of Cases Under Federal Banking Whistleblower Laws, http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/casesunderfederalbankingwblaws.pdf
Chart of Cases in which Corporations Argued that Internal Reporting was not Protected,
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/casesinternalreporting.pdf

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, 31 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 that were excluded from the study are set forth in the Chart of Non-Applicable Cases Excluded from Survey.

This left a final population of 126 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).