MEMORANDUM

TO: File No. S7-33-10

FROM: James A. Cappoli
Office of Commissioner Luis A. Aguilar

DATE: February 10, 2011

SUBJECT: Meeting with National Whistleblower Center

On February 10, 2011, Commissioner Aguilar, along with Smeeta Ramarathnam, Chief of Staff for the Commissioner, and James A. Cappoli, Counsel to the Commissioner, met with following representatives of the NWC:

Stephen M. Kohn- Executive Director
Lindsey Willliams- Director of Advocacy and Development
Ardath Griffin- Public Interest Fellow
Dean Zerbe- Special Counsel

The discussion included, among other things, the Commission's Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934. The National Whistleblower Center also provided the attached materials.

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

Agenda for Meeting with Commissioner Aguilar

February 10, 2011

I. Introduction – Stephen M. Kohn, NWC Executive Director

II. Overview – Dean Zerbe, NWC Special Counsel and Former Senior Counsel and Tax Counsel for Senator Grassley

III. Impact of *qui tam* laws on enforcement and compliance – Kohn/Zerbe

IV. Exclusion of coverage/Foreign civil servants – Kohn/Zerbe

V. Recommendations for Rule changes – Kohn

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February 10, 2011

Commissioners
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: SEC Rule Making Proceeding -File Number S7-33-10
Whistleblower Regulations – Dodd-Frank Act
Foreign Corrupt Practices Act

Dear Commissioners:

We are writing to raise a concern over a specific proposed rule set forth in the pending Dodd-Frank whistleblower enforcement regulations. The provision at issue is section 21F-8(c)(2). This provision directly impacts the ability of the United States to enforce the requirements of the Foreign Corrupt Practices Act ("FCPA").

The Dodd-Frank Act contains specific exclusions exempting certain classifications of persons from filing whistleblower claims under § 21F of the Securities Exchange Act. These exclusions do not include any exemption for employees working for foreign governments. However proposed rule 21F-8(c)(2) includes such an exemption.

If foreign government workers (which would also include employees of state-owned companies) are excluded from coverage under § 21F by a broad blanket exemption, the ability of the United States to properly detect violations of the Foreign Corrupt Practices Act will be crippled. The FCPA prohibits corporations from paying or *offering* bribes to foreign government officials. As worded, honest civil servants from countries around the world will be exempted from the protections afforded under Dodd-Frank if they were to expose attempts by covered industries to pay bribes. As worded, the proposed exclusion would also include barring employees of state industries from blowing the whistle on bribery.

The impact on this exclusion is potentially radical. It would exempt not only civil servants who may be the target of bribery attempts, but also employees who work for state-owned industries. It would be troublesome to place international private companies at a severe competitive disadvantage to international state-owned industries by exempting employees of government-owned companies from Dodd-Frank, while at the same time accepting that private sector employees are covered. For example, in the People's Republic of China, which is now a major player in the world economy, many employees working for state-owned companies would now be exempted Dodd-Frank provisions.

Moreover, the proposed rule is in conflict with over ten years of case law developed in the United States concerning foreign government whistleblowers. The United States is a signatory of international anti-corruption treaties that pledge to provide support for employees who blow the whistle on corruption.[1] Stripping all foreign state employees of protection would strike a major blow against the Department of State and Department of Justice's ongoing campaigns to stop corruption in foreign markets, and indirectly undercut the obligation of the United States under international law. It would be inconsistent with the current international policy of the United States.

The United States courts and government recognize that civil servants employed by foreign countries need whistleblower protection, and in fact the United States regularly grants political asylum to foreign civil servants who expose corruption by their governments. For example, since 2000 the United State Courts of Appeal have recognized the legitimacy of political asylum applications from foreign government civil servants who exposed corruption in Albania, Armenia, China, Guatemala, Italy, Philippines, Russia, and Ukraine.[2]

We recommend a modification of the proposed rule that is consistent with the actual statutory mandates of the law and the fundamental purposes of the Dodd-Frank Act. The single most important goal of the Dodd-Frank whistleblower reward provisions is to use the significant deterrence powers contained in *qui tam* to strengthen the ability of the United States Government to detect fraud, obtain witnesses that will help in the successful prosecution of fraud cases and to encourage/protect insiders, with critical information, to step forward and risk their jobs, careers and even their lives, to stop corruption.

In the context of the Foreign Corrupt Practices Act, where many of the witnesses to bribes will be foreign nationals employed by their respective governments, either as state employees working in government owned businesses or civil servants. The ability of these foreign nationals to report bribery committed outside of the geographical jurisdiction of the United States, often by other foreign nationals who work for companies subject to the broad jurisdictional reach of the FCPA, is absolutely essential for the enforcement of that law, and in order for the United States to best fulfill its obligations under international anti-corruption conventions, none of which recognize an exemption for foreign civil servants.

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[1] Article III, 8 Inter-American Convention Against Corruption of 29th March 1996 and Article 33 United Nations Convention against Corruption of 31st October 2003, *UN Treaty Series*, vol. 2349, p. 41.

[2] Aleksanyan v. Gonzales, 246 Fed. Appx. 471 (9th Cir. 2007), Aroyan v. Gonzales, 183 Fed. Appx. 634 (9th Cir. 2006), Bu v. Gonzales, 490 F.3d 424 (6th Cir. 2007), Cao v. AG of the United States, 407 F.3d 146 (3d Cir. 2005), Ghazaryan v. Gonzales, 215 Fed. Appx. 585 (9th Cir. 2006), Glistin v. Mukasey, 284 Fed. Appx. 429 (9th Cir. 2008), Grava v. INS, 205 F.3d 1177 (9th Cir. 2000), Hayrapetyan v. Holder, unpublished (9th Cir. 2010), Harutyunyan v. Ashcroft, 104 Fed. Appx. 86 (9th Cir. 2004), Haxhiu v. Mukasey, 519 F.3d 685 (7th Cir. 2008), Mamouzian v. Ashcroft, 390 F.3d 1129 (9th Cir. 2004), Massetti v. Gonzales, 151 Fed. Appx. 519 (9th Cir. 2005), Pashalyan v. Gonzales, 185 Fed. Appx. 603 (9th Cir. 2006), Rodas Castro v. Holder, 597 F.3d 93 (2d Cir. 2010), Sagaydak v. Gonzales, 405 F.3d 1035 (9th Cir. 2005), Wang v. Mukasey, 259 Fed. Appx. 763 (6th Cir. 2008), Zhu v. Mukasey, 537 F.3d 1034 (9th Cir. 2008).

Thank you in advance for your kind attention to these most important matters. We look forward to an opportunity to discuss these concerns with you.

Respectfully submitted,

Stephen M. Kohn
Executive Director

PROPOSED REVISION TO SEC RULE 21F-8(c)(2)

In order to ensure that SEC Rule 21F-8(c)(2) does not violate the express statutory requirements and/or the Congressional intent behind the Dodd-Frank Act, the exclusion for employees of foreign governments should be modified in the following manner, and limited to persons who: *"are, or were at the time [they] acquired original information, a member, officer or employee of a division of a foreign government which performs the functions of the United States Department of Justice, the Securities Exchange Commission, or the Commodity Exchange Commission. However, any exclusion of a foreign national shall not be undertaken without the consultation of the U.S. Department of State. Where the State Department determines that the employee's disclosures were necessary for the detection of the violations, and protecting or rewarding that employee would be consistent with United States foreign policy and international anti-corruption and/or international human rights conventions, the Department of State shall inform the SEC and/or the CFTC that the foreign government employee should obtain protection and/or a reward, and the exclusion set forth in this provision shall not apply. The United States Department of State shall also be consulted in all cases in which an employee of a foreign government (but not an employee of a state-owned company) applies for a reward under this regulation. For exceptional good cause shown, the SEC or CFTC may deny a reward based on information provided by the Department of State. Exceptional good cause includes documentation that a reward would have a negative impact on U.S. foreign relations, interfere with foreign government cooperation with the United States under existing treaties or otherwise encourage corruption. There shall be no limitation on the right of an employee of a state-owned industry, company or concern to file claims or obtain protections as afforded under the Dodd-Frank Act."*

February 10 | 2011

Special SEC Briefing: Dodd-Frank Whistleblower Rules and Procedures

NWC | NATIONAL WHISTLEBLOWERS CENTER

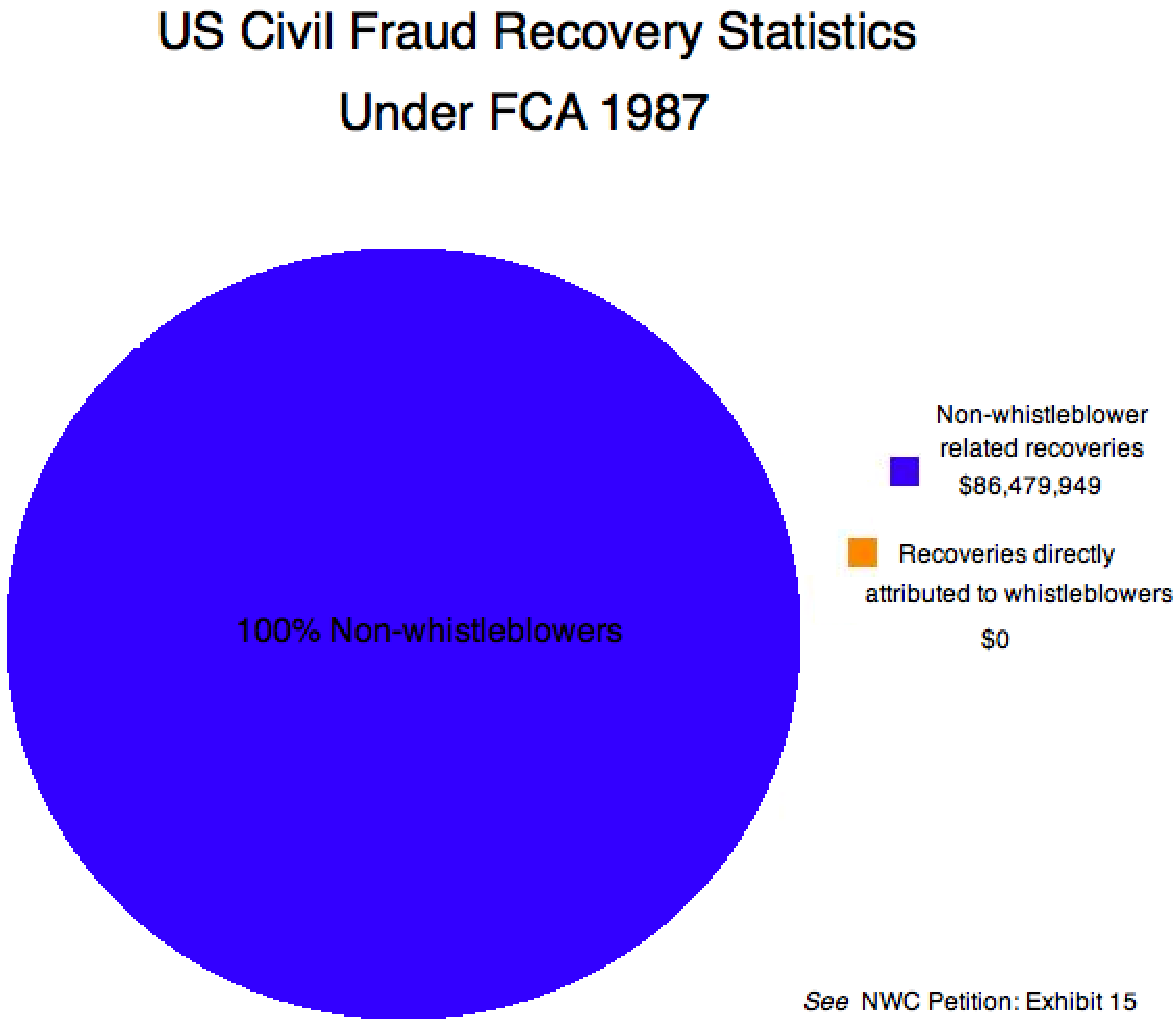
WWW.WHISTLEBLOWERS.ORG

The National Whistleblowers Center

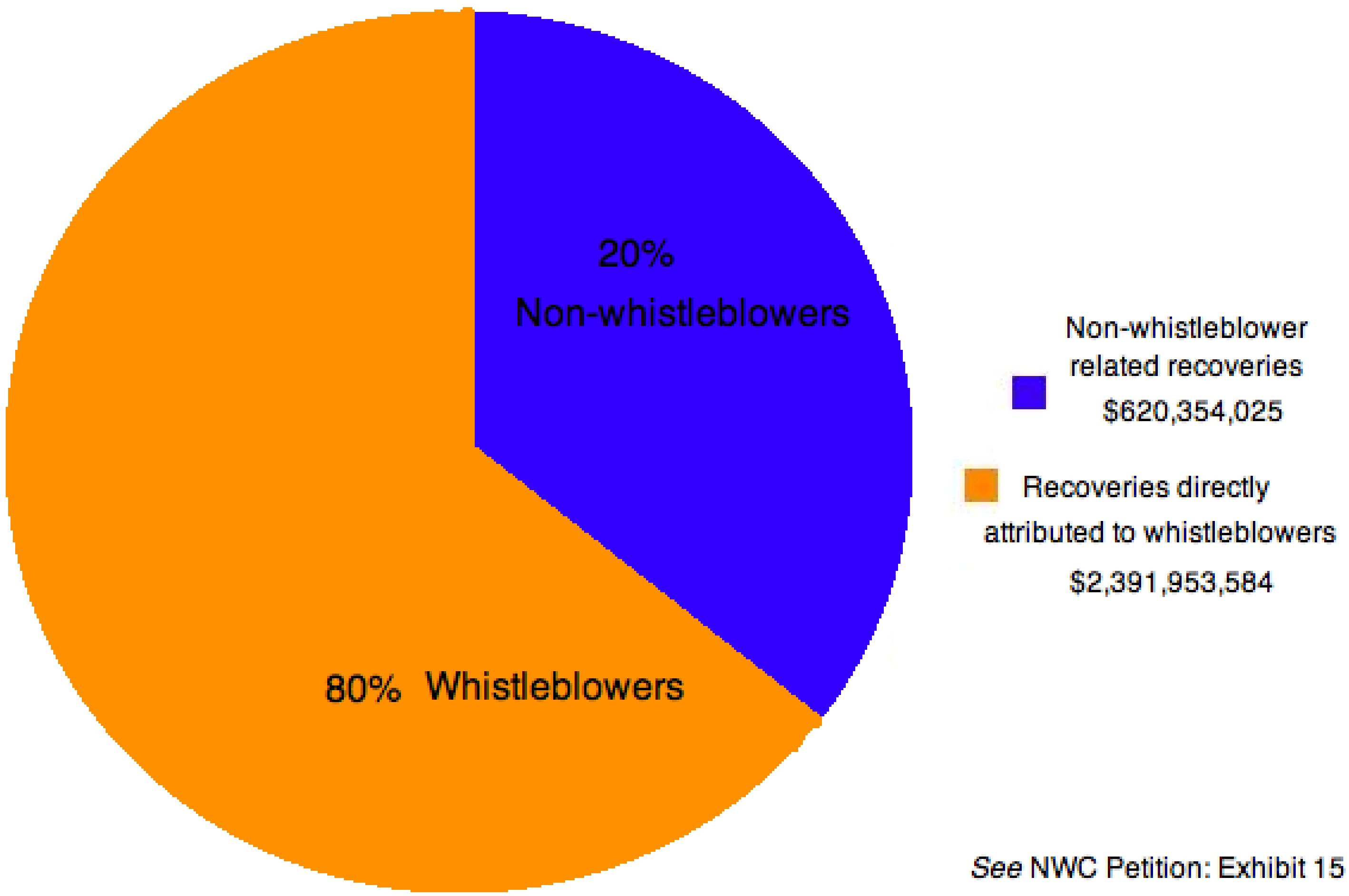
3238 P Street, NW • Washington, DC 20007
Contact@whistleblowers.org • Phone (202) 342-1903

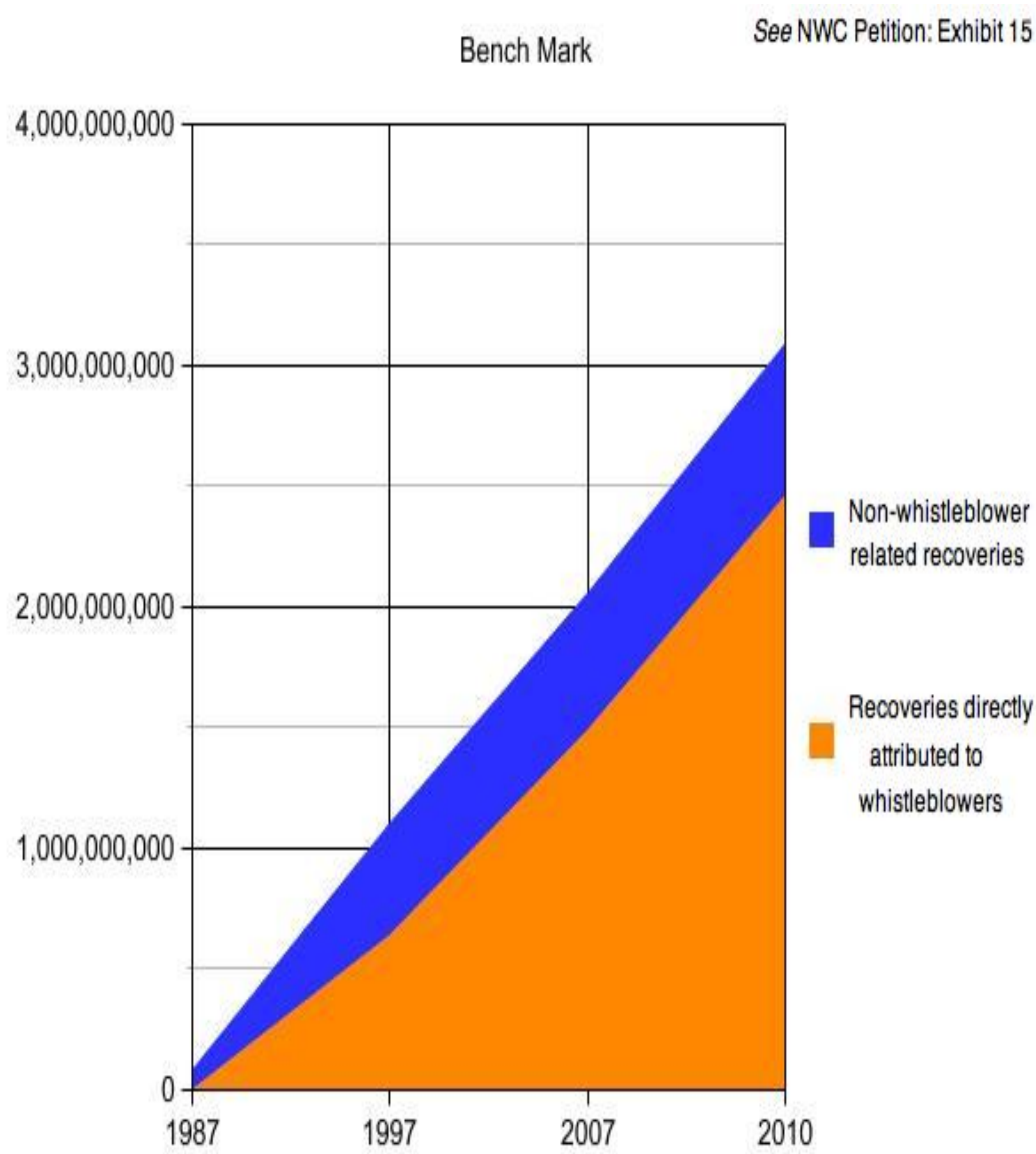
Table of Contents

Part I:
The False Claims Act Is the Most Successful Model for Improving the Disclosure of Fraud


US Civil Fraud Recovery Statistics
Under FCA 1987
100% Non-whistleblowers
Non-whistleblower related recoveries $86,479,949
Recoveries directly attributed to whistleblowers $0
See NWC Petition: Exhibit 15

US Civil Fraud Recovery Statistics Under FCA 2010

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1987
1997
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2010
Non-whistleblower related recoveries
Recoveries directly attributed to whistleblowers

"I have based [the False Claims Act] on the old fashion idea of holding out on temptation and 'setting a rogue to catch a rogue', which is the safest and most expeditious way of bringing rogues to justice."

Senator Howard,

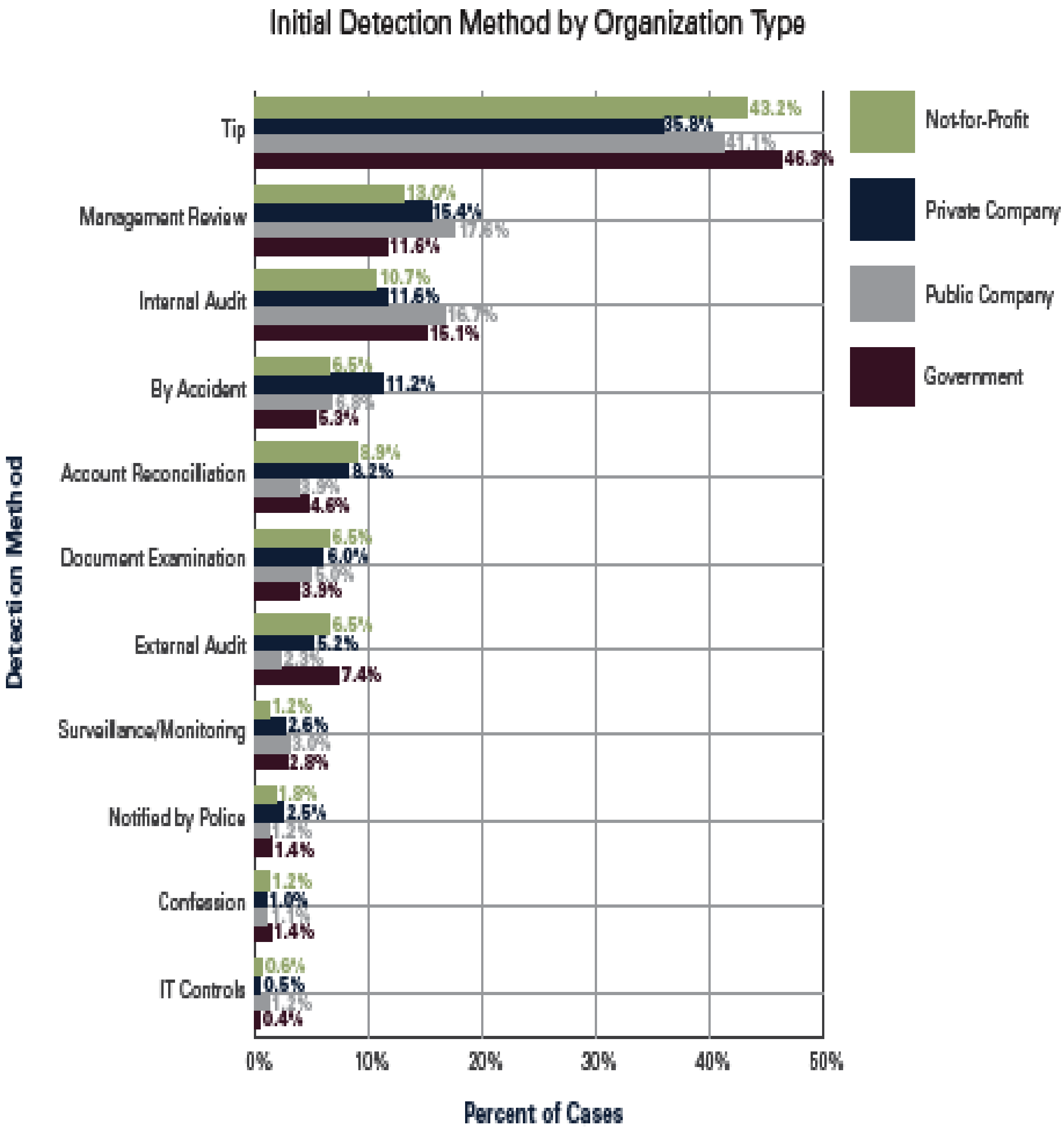
Congressional Globe, March 1863

"Incorporate best practices obtained from DOJ and the IRS into the SEC bounty program with respect to bounty applications, analysis of whistleblower information, tracking of whistleblower complaints, recordkeeping practices, and continual assessment of the whistleblower program."

SEC Inspector General,
OIG Report, March 2010

Part II:
Why *Qui Tam* Works:
Employee Disclosures Are the Most Effective Means to Detect Fraud

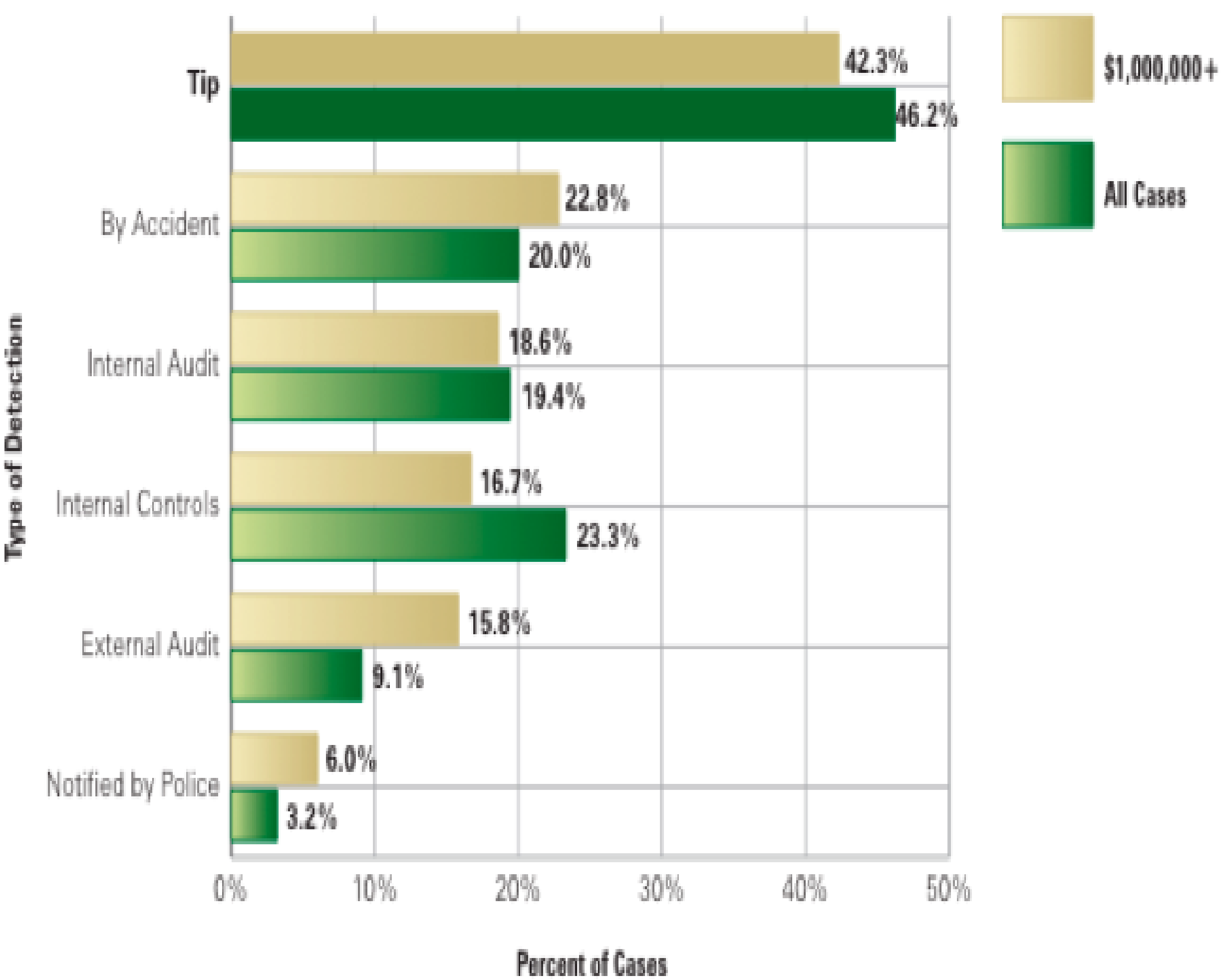
WHO DETECTS FRAUD?



[1]

[1] Source: Association of Certified Fraud Examiners, 2010 Global Fraud Study (page 19)

Initial Detection Method for Million Dollar Schemes[6]



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

"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

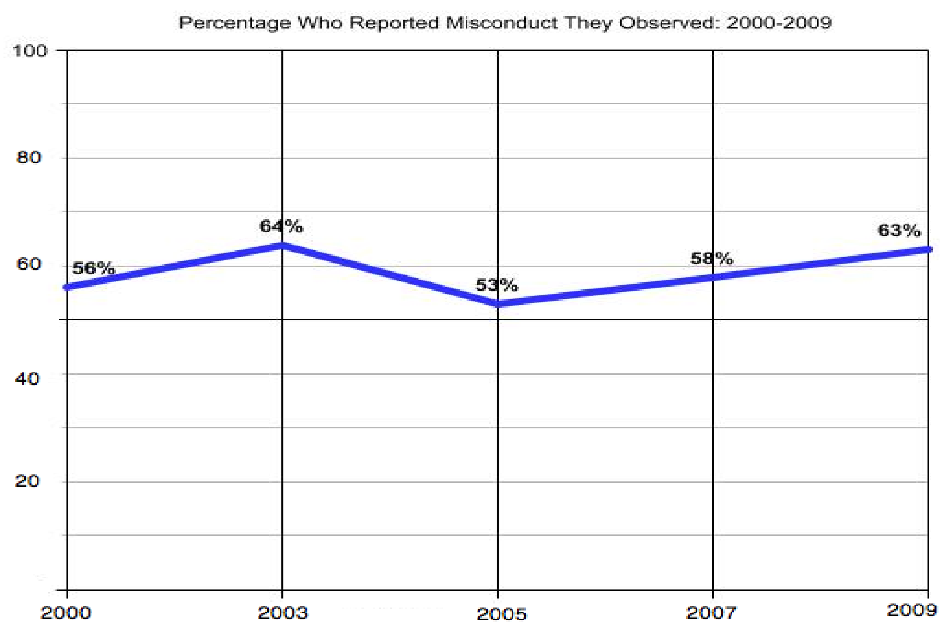
Part III:

Employees Are Reluctant to Report Fraud

Employee Reporting Behaviors

The Ethics Resource Center ("ERC") studied employee reporting behavior trends between 2000 and 2009. *See* ERC, "Blowing the Whistle on Workplace Misconduct," NWC Petition: Exhibit 15. [2]

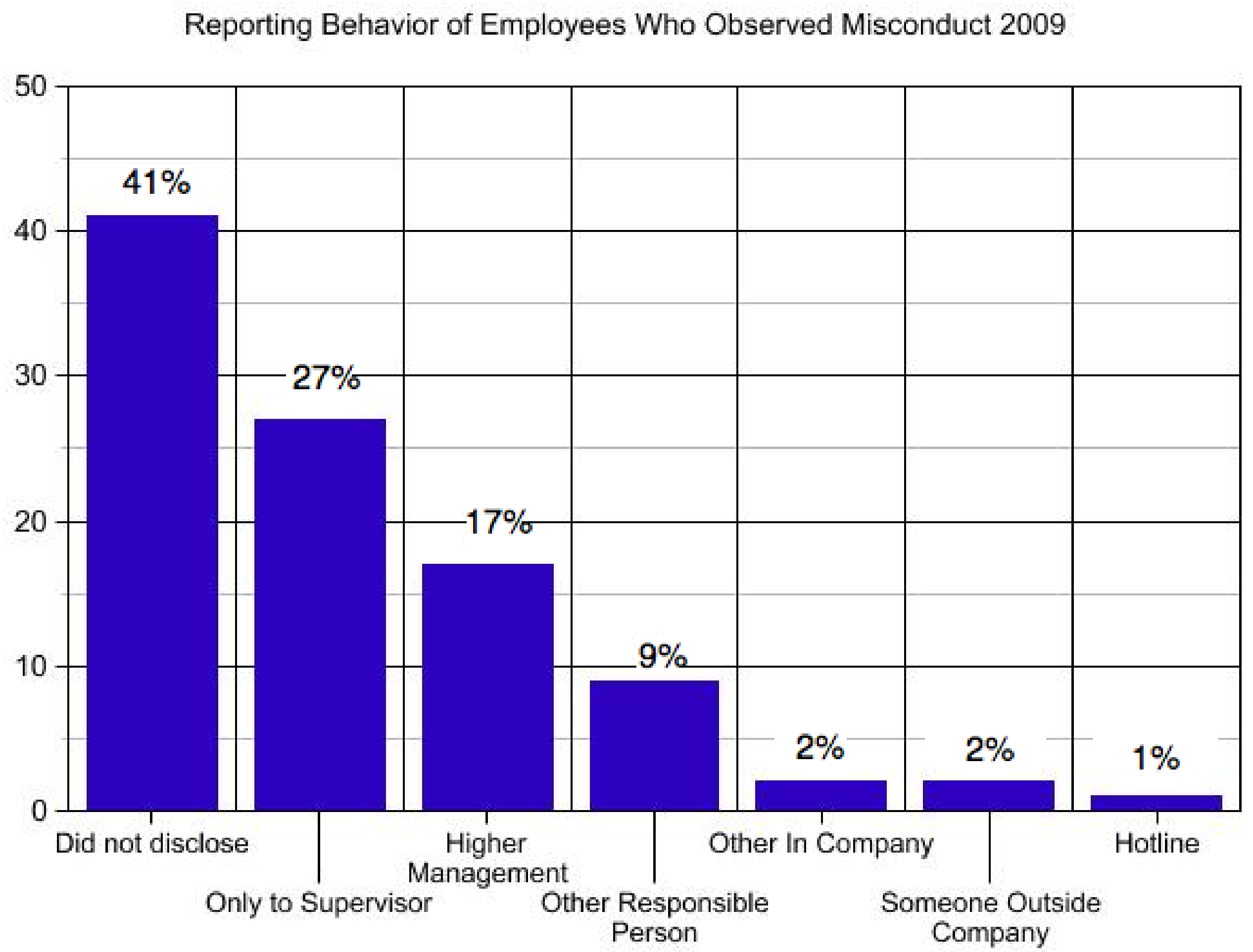
As set forth in the following chart, approximately 40% of employees who witness fraud or misconduct do not report this misconduct to *anyone*. The percentage of employees who report has somewhat fluctuated over the ten year period surveyed by ERC and averages 41% of employees not reporting misconduct to anyone. The numbers reported have remained relatively constant, even after the enactment section 301 of Sarbanes-Oxley Act. Moreover, there is no decline in numbers based on the existence of the False Claims Act and the enactment of the IRS whistleblower law for tax fraud in 2006.



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

[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, Martain, and Lilly. It also receives support from the Ethics and Compliance Officer Association.

Little or No Progress in Voluntary Corporate Efforts to Increase Reporting



*Based directly on the 2010 ERC Whistleblowing Report, See NWC Petition: Exhibit 15

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

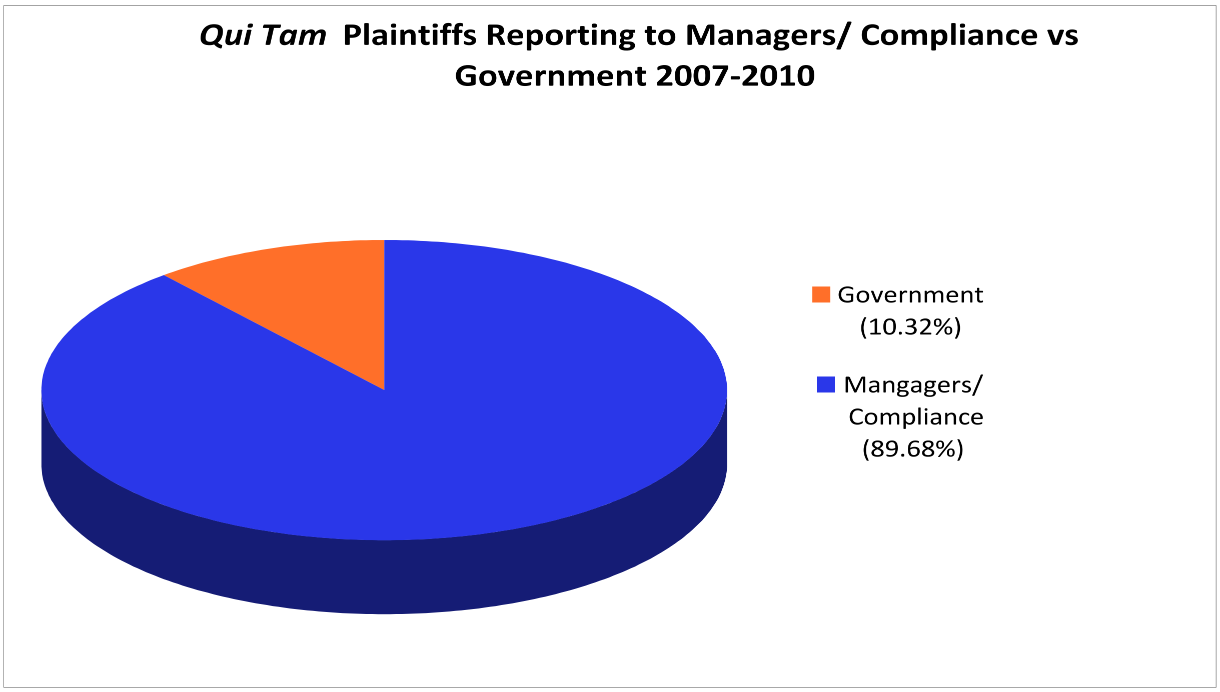
Ethics Resource Center Report, December 2010

Part IV:

Qui Tam Laws Have No Negative Impact on 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 in the past four years demonstrates that approximately 90% of all employees who would eventually file a *qui tam* lawsuit initially attempted to resolve their disputes internally.



**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.

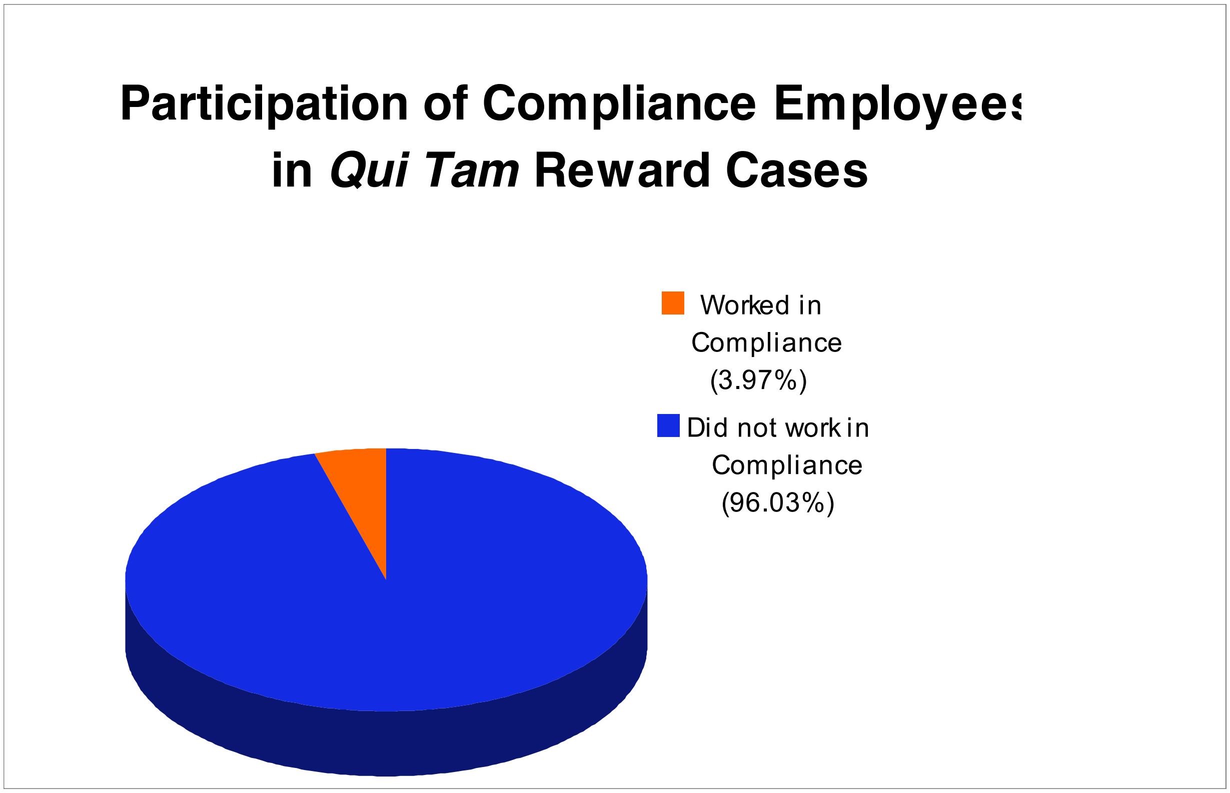
Moreover, many of the cases in the NWC's study where employees reported directly to the government involved very special circumstances. For example, in one case, the initial report to the government was testimony before a Grand Jury. It clearly would have been inappropriate for that employee to discuss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

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

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

Part V:

Qui Tam Laws Have No Negative Impact on the Conduct of Compliance Related Employees



**See* NWC Petition: Exhibit 2

The existence of large *qui tam* rewards did not cause compliance employees to abandon their obligations and secretly file FCA cases and seek large rewards:

- 3.97% of Plaintiff Employees worked in compliance

- Only 1 Plaintiff Employee contacted a Government Agency without first raising the concern within the corporation

The fact that compliance officials could learn of frauds, and file *qui tam* lawsuits to obtain significant monetary rewards had no impact on the reporting processes of employees working in compliance departments. Only 3.97% of *qui tam* relators worked in compliance programs. There was no spike in the number of compliance-associated employees filing *qui tam* cases and there is no reasonable basis to believe that permitting employees who work on compliance to file *qui tam* suits will in any way undermine internal compliance reporting.

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

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

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

Part VI:

The Sarbanes-Oxley Act Prohibits the SEC from Adopting Rules that Require Internal Reporting

The Sarbanes-Oxley Act Prohibits the SEC from Adopting Rules that Require Internal Reporting

"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)

Federal Law creates a near absolute protection for employees who contact any federal law enforcement agency regarding the violation of any federal law. Section 1107 of the Sarbanes-Oxley Act, codified as 18 U.S.C. § 1513 (e) *criminalizes* any attempt to interfere with the right of any person to contact the SEC concerning any violation of law. The section sets forth an overriding public policy, implicit or explicit in every federal whistleblower law, that employees can *always* choose to report concerns directly to law enforcement, regardless of any other program, private contract, rule or regulation. This provision was explicitly included in the Dodd-Frank Act's anti-retaliation provision, section 21F(h)(1)A)(iii) and in other provisions of law.

Part VII:
Conclusions and Recommendations to SEC

Conclusion # 1: The existence of a strong *qui tam* reward program will have no impact on internal employee reporting activities.

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

Conclusion # 3: The systemic problems with corporate internal compliance programs are not related to *qui tam* law rewards and exist regardless of whether employees file whistleblower complaints with the government.

Conclusion # 4: The SEC must ensure, through a formal rule, that reports to internal compliance programs are fully protected. The decades-long history of regulated companies opposing such protections in judicial proceedings must be ended. The definition of protected disclosures should conform to the standards recommended by the Association of Certified Fraud Examiners.

Conclusion # 5: The recommendations of the SEC's Inspector General should be fully implemented in a manner consistent with the requirement that the Dodd-Frank reward provisions be "user-friendly".

Conclusion # 6: Any action by an employer that in any way limits an employee's right or incentive to contact the SEC, regardless of whether or not the employee first utilized a compliance program, is highly illegal and constitutes an obstruction of justice.

Conclusion # 7: The exclusion of employees who work for foreign state-owned industries or government agencies must be modified or eliminated.

Conclusion # 8: All whistleblower rewards must comply with the 10 – 30% range mandated by the statute.

About the National Whistleblowers Center

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

This report was prepared under the direction of Stephen M. Kohn, Executive Director of the National Whistleblowers Center. The National Whistleblowers Center would like to recognize the contributions of Director of Advocacy and Development Lindsey M. Williams and Staff Attorney Erik D. Snyder for his legal research, analysis, and editorial contributions to this Report. In addition, the National Whistleblowers Center would like to thank Law Clerks Zach Chapman, Greg Dobbels, Katie Mee, Andrew Palmer and David Simon for their assistance in reviewing the False Claims Act cases. Finally, the National Whistleblowers Center would like to thank legal interns Marshall Chriswell and Shane Swords for their work on preparing this presentation.

U.S. Securities and Exchange Commission

Office of Inspector General

Office of Audits

Assessment of the SEC's Bounty Program

March 29, 2010

Report No. 474

OFFICE OF
INSPECTOR GENERAL

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

MEMORANDUM

March 29, 2010

To: Robert Khuzami, Director, Division of Enforcement

From: H. David Kotz, Inspector General, Office of Inspector General (OIG) HDK

Subject: *Assessment of the SEC's Bounty Program,* Report No. 474

This memorandum transmits the U.S. Securities and Exchange Commission OIG's final report detailing the results of our assessment of the Commission's bounty program. This review was conducted in accordance with our annual audit plan.

Based on the written comments received to the draft report and our assessment of the comments, we revised the report accordingly. This report contains nine recommendations. Your office concurred with all the recommendations. Management's full comments to this report are included in the appendices.

Within the next 45 days, please provide OIG with a written corrective action plan that is designed to address the recommendations. The corrective action plan should include information such as the responsible official/point of contact, time frames for completing the required actions, milestone dates identifying how you will address the recommendations cited in this report, etc.

Should you have any questions regarding this report, please do not hesitate to contact me. We appreciate the courtesy and cooperation that you and your staff extended to our auditor.

Attachment

cc: Kayla J. Gillan, Deputy Chief of Staff, Office of the Chairman
Diego Ruiz, Executive Director, Office of the Executive Director
Joan McKown, Chief Counsel, Division of Enforcement

Assessment of SEC Bounty Program

Executive Summary

Background. There is evidence that bounty programs are an effective tool to encourage whistleblowers to come forward and provide necessary incentives for outside entities to bring complaints about possible illegal activity.

Section 21A(e) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78u-1(e), authorizes the Securities and Exchange Commission (SEC or Commission) to award a bounty to a person who provides information leading to the recovery of a civil penalty from an insider trader, from a person who tipped information to an insider trader, or from a person who directly or indirectly controlled an insider trader. All bounty determinations, including whether, to whom, or in what amount to make payments, are within the sole discretion of the SEC. However, the total bounty may not currently exceed 10 percent of the amount recovered from a civil penalty pursuant to a court order.

The SEC recently sent to Congress proposed legislation to expand its authority to permit bounties for any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000. The proposed legislation was included in the Investor Protection Act of 2009 (H.R. 3817), which was introduced in the U.S. House of Representatives on October 15, 2009 by Representative Paul Kanjorski (D-Pa.) and referred to the House Committee on Financial Services. Variations of this legislation are being considered by both the U.S. House of Representatives and U.S. Senate.

Objectives. This review was conducted as a result of an issue that we identified during the OIG's investigation into the SEC examination and investigations of Bernard L. Madoff and related entities, OIG's Report of Investigation, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme,* Report No. 509, August 31, 2009.

The primary objectives of the review were to:

- Assess whether necessary management controls have been established and operate effectively to ensure bounty applications are routed to appropriate personnel and are properly processed and tracked; and

- Determine whether other government agencies with similar programs have best practices that could be incorporated into the SEC bounty program.

Results. Although the SEC has had a bounty program in-place for more than 20 years for rewarding whistleblowers for insider trading tips and complaints, our review found that there have been very few payments made under this program. Likewise, the Commission has not received a large number of applications from individuals seeking a bounty over this 20-year period. We also found that the program is not widely recognized inside or outside the Commission. Additionally, while the Commission recently asked for expanded authority from Congress to reward whistleblowers who bring forward substantial evidence about other significant federal securities law violations, we found that the current SEC bounty program is not fundamentally well-designed to be successful.

More specifically, we found that improvements are needed to the bounty application process to make it more user-friendly and help ensure that bounty applications provide detailed information regarding the alleged securities law violations. We also found that the criteria for judging bounty applications are broad and the SEC has not put in place internal policies and procedures to assist staff in assessing contributions made by whistleblowers and making bounty award determinations. Additionally, we found that the Commission does not routinely provide status reports to whistleblowers regarding their bounty applications, even if a whistleblower's information led to an investigation. Moreover, we found that once bounty applications are received by the SEC and forwarded to appropriate staff for review and further consideration, they are not tracked to ensure they are timely and adequately reviewed. Lastly, we found that files regarding bounty referrals did not always contain complete documentation, such as a copy of the bounty application, a memorandum sent to the whistleblower to acknowledge receipt of the application, and a referral memorandum showing the office or division and official to whom the bounty application was referred for further consideration.

We wish to note that the SEC has begun to take steps to correct the deficiencies identified in its whistleblower/bounty program. The SEC has had consultations with the Department of Justice (DOJ), Internal Revenue Service (IRS), and other agencies, as well as the Financial Industry Regulatory Authority, to identify best practices from existing well-defined whistleblower programs. The SEC has also attempted to incorporate some of these best practices into legislation which it is seeking from Congress to include expanded authority to reward whistleblowers for securities law violations. The proposed legislation also takes into account some issues identified in this report in connection with the existing insider trading bounty program.

We believe that it is critical for the SEC to implement the following recommendations to ensure that it has a fully-functioning and successful whistleblower program in place as its authority is potentially expanded.

Summary of Recommendations. Specifically, the review recommends that the Division of Enforcement:

(1) Develop a communication plan to address outreach to both the public and SEC personnel regarding the SEC bounty program. The plan should include efforts to make information available on the SEC's intranet, enhance information available on the SEC's public website, and provide training to employees who are most likely to deal with whistleblower complaints.

(2) Develop and post to its public website an application form that asks the whistleblower to provide information, including, for example:

   a) The facts pertinent to the alleged securities law violation and explanation as to why the whistleblower believes the subject(s) violated the securities laws;
   b) A list of related supporting documentation in the whistleblower's possession and available from other sources;
   c) A description of how the whistleblower learned about or obtained the information that supports the claim, including the whistleblower's relationship to the subject(s);
   d) The amount of any monetary rewards obtained by the subject violator(s) (if known) as a result of the securities law violation, and how the amount was calculated; and
   e) A certification that the application is true, correct, and complete to the best of the whistleblower's knowledge.

(3) Establish policies on when to follow-up with whistleblowers who submit applications to clarify information in the bounty applications and obtain readily available supporting documentation prior to making a decision as to whether a whistleblower's complaint should be further investigated.

(4) Develop specific criteria for recommending the award of bounties, including a provision that where a whistleblower relies partially upon public information, such reliance will not preclude the individual from receiving a bounty.

(5) Examine ways in which the Commission can increase communications with whistleblowers by notifying them of the status of their bounty requests without releasing non-public or confidential information during the course of an investigation or examination.

(6) Develop a plan to incorporate controls for tracking tips and complaints from whistleblowers seeking bounties into the development of Enforcement's tips, complaints, and referrals processes and systems for

other tips and complaints. These controls should provide for the collection of necessary information and require processes that will help ensure that bounty applications are reviewed by experienced Commission staff, decisions whether to pursue whistleblower information are timely made, and whistleblowers who provide significant information leading to a successful action for violation of the securities laws are appropriately rewarded.

(7) Require that a bounty file (hard copy or electronic) be created for each bounty application. The file should contain at a minimum the bounty application, any correspondence with the whistleblower, documentation of how the whistleblower's information was utilized, and documentation regarding significant decisions made with regard to the whistleblower's complaint.

(8) Incorporate best practices obtained from DOJ and the IRS into the SEC bounty program with respect to bounty applications, analysis of whistleblower information, tracking of whistleblower complaints, recordkeeping practices, and continual assessment of the whistleblower program.

(9) Establish a timeframe to finalize new policies and procedures for the SEC bounty program that incorporates the best practices from DOJ and IRS as well as any legislative changes to the program.

Table of Contents

Table

Background and Objectives

Background

There is evidence that bounty programs are an effective tool to encourage whistleblowers to come forward and provide incentives for outside entities to bring complaints about possible illegal activity. We identified two government agencies, the Internal Revenue Service (IRS) and Department of Justice (DOJ), that have well-defined whistleblower functions.

Section 21A(e) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78u-1(e), authorizes the Securities and Exchange Commission (SEC or Commission) to award a bounty to a person who provides information leading to the recovery of a civil penalty from an insider trader,[1] from a person who tipped information to an insider trader, or from a person who directly or indirectly controlled an insider trader. All bounty determinations, including whether, to whom, and in what amount to make payments, are within the sole discretion of the SEC. However, the total bounty may not currently exceed 10 percent of the amount recovered from a civil penalty pursuant to a court order.

Section 21A(e) of the Exchange Act was added by the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSEA), Pub L. No. 100-704. ITSEA embodied a series of statutory changes that Congress viewed as necessary at that time to augment existing methods of detection and punishment of insider trading behavior. Particularly in light of the stock market crash in October 1987, Congress viewed the changes as an essential ingredient to restore the confidence of the public in the fairness and integrity of the securities markets.

The Commission has adopted regulations to provide for administration of the process for making bounty requests. These regulations are included in the Code of Federal Regulations, Title 17: *Commodity and Securities Exchanges, Part 201- Rules of Practice, Subpart C-Procedures Pertaining to the Payment of Bounties Pursuant to Subsection 21A(e) of the Securities Exchange Act of 1934,* Sections 201.61-201.68. The SEC bounty program regulations require that applications be in writing, and that applications be filed within 180 days after the entry of the court order requiring payment of the insider trading penalty from which the bounty is to be paid.[2] An application for a bounty must contain, among

[1] The term "insider trading" refers generally to buying or selling a security, in breach of a fiduciary duty or other relationship of trust or confidence, while in possession of material, nonpublic information about the security. Insider trading violations may also include tipping such information, securities trading by the person tipped and security trading by those who misappropriate such information. (http://www.sec.gov/answers/bounty.htm.)
[2] 17 C.F.R. §§ 201.62 and 201.63.

other things, information concerning the dates and times upon which, and the means by which, information was provided, as well as the identity of the Commission staff to whom the information was provided.[3]

The SEC bounty program is administered by the Division of Enforcement (Enforcement). While the program has been in place for more than 20 years, there have been very few payments by the Commission under the program. Likewise, the Commission has not received a large number of applications from individuals seeking a bounty. The SEC bounty program is limited to insider trading cases and the stated criteria for judging bounty applications are broad, somewhat vague and not subject to judicial review. Moreover, there is no entitlement to a reward even if the whistleblower's information causes the government to recover money from wrongdoers.

In testimony before the House Subcommittee on Financial Services and General Government Appropriations of the House Committee on Appropriations in March 2009, SEC Chairman Mary Schapiro spoke about the possible expansion of the SEC's authority to award whistleblowers.[4] Chairman Schapiro stated that "right now, the main reward for being a whistleblower is the good feeling you get of having done something important, because [the SEC does not] have the authority to pay except where the whistleblowing relates to insider trading."[5] Chairman Schapiro added that "[w]histleblowers tend to do a lot of the work for you, hand you something that is pretty fully baked."[6] She further stated that expanding authority would enable the SEC to "run with that kind of information and to pursue cases in a much more aggressive way."[7]

The SEC recently sent to Congress proposed legislation to expand the authority of the program, in addition to other reforms, to permit bounties for any judicial or administrative action brought by the Commission under the securities laws that result in monetary sanctions exceeding $1,000,000. The proposed legislation was included in the Investor Protection Act of 2009 (H.R. 3817), which was introduced in the U.S. House of Representatives on October 15, 2009 by Representative Paul Kanjorski (D. PA) and referred to the House Committee on Financial Services. Variations of this legislation are being considered by both the U.S. House of Representatives and the U.S. Senate.

[3] 17 C.F.R. § 201.64.
[4] Securities and Exchange Commission Actions Relating to the Financial Crisis: Hearing Before the Subcommittee on Financial Services and General Government of the H. Comm. on Appropriations, 111 Cong. (2010) (testimony of Mary Schapiro, Chairman, Securities and Exchange Commission).
[5] Id.
[6] Id.
[7] Id.

Objectives

This review was conducted in accordance with our annual audit plan, as a result of an issue that we identified during the OIG's investigation into the SEC examination and investigations of Bernard L. Madoff and related entities, OIG Report of Investigation*, Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme,* Report No. 509. The primary objectives of the review were to:

- Assess whether necessary management controls have been established and operate effectively to ensure bounty applications are routed to appropriate personnel and are properly processed and tracked; and

- Determine whether other government agencies with similar programs have best practices that could be incorporated into the SEC bounty program.

Findings and Recommendations

We found that while a bounty program has been in place at the SEC for more than 20 years, there have been very few payments made by the Commission under the program. Likewise, the Commission has not received a large number of applications from individuals seeking a bounty. The program is also not widely recognized inside or outside the Commission. We also found that the SEC bounty program is limited to insider trading cases and the stated criteria for judging bounty applications are broad, somewhat vague and not subject to judicial review.

In addition, we generally found that bounty applications the Commission received were acknowledged in writing and were then forwarded to appropriate senior-level staff in headquarters and the regional offices for further consideration. However, bounty applications were not adequately tracked to ensure timely and adequate handling of the information. We did find that the Commission made formal determinations and notified bounty claimants, accordingly, with respect to all persons the Commission deemed eligible for award in accordance with the statute. We also found that on the few occasions when the Commission has made an award, it has paid the maximum allowed by the statute.

We further identified areas that need increased management controls with regard to the bounty application process, maintenance of files pertaining to bounty applications, and correspondence with whistleblowers regarding the status of their bounty applications.

Lastly, we identified several best practices utilized by agencies with similar programs that should be adopted by the SEC in developing a successful bounty program.

Finding 1: SEC Bounty Program Has Made Very Few Payments and Received a Relatively Small Number of Bounty Applications

> The SEC bounty program has made very few payments to whistleblowers since its inception and received a relatively small number of bounty applications. As a result, the program's success has been minimal and its existence is practically unknown.

Since the inception of the SEC bounty program in 1989, the SEC has paid a total of $159,537 to five claimants as detailed in Table 1 below.

Table 1: Bounty Payments to Whistleblowers

Bounty Claimant	Year	Bounty Amount
1) Claimant 1	1989	$3,500
2) Claimant 2	2001	$18,152
3) Claimant 3	2002	$29,079
4) Claimant 4	2005	$17,500
4) Claimant 4	2006	$29,920
4) Claimant 4	2009	$55,220
5) Claimant 5	2007	$6,166
Total		**$159,537**

Source: OIG Generated

As Table 1 illustrates, Claimant 4 received three payments because the information provided by the claimant led to the filing of three separate insider trading cases. All payments were for the 10 percent maximum amount permitted by statute.

The Commission also formally denied five bounty applications since the inception of the program as summarized below.

- In 1990, the Commission denied a bounty request to Claimant 6 on the grounds that the statute did not authorize payment for information provided prior to its effective date.

- In 1990, the Commission denied a bounty request to Claimant 7 on the same ground asserted in the aforementioned bounty request for Claimant 6.

- In 1996, the Commission denied a bounty request to Claimant 8 because, as with the aforementioned two bounty requests, Claimant 8 had provided information prior to the effective date of the statute. However, Claimant 8 also provided additional information after the effective date of the statute. SEC staff recommended denial of the bounty request on the grounds that the latter information did not result in the addition of any defendants, securities transactions or violations to the complaint.

- In 2001, the Commission denied the bounty request of Claimant 9. The Commission asserted that Claimant 9 had provided fictitious information that resulted in the unnecessary use of staff resources, and falsely claimed to have provided information to the Chicago Board Options Exchange, which had earlier alerted the Commission to suspicious trading.

- In 2004, the Commission denied the joint bounty request of Claimant 10, Claimant 11, and Claimant 12, three brokerage employees. The Commission recommended denial on the grounds that the initial information about insider trading had been provided by the brokerage firm's general counsel's office. The SEC did not seek or obtain any information directly from Claimant 11 or Claimant 12.

In addition to the aforementioned bounty applications that were formally approved or denied by the Commission, we determined that from January 1, 2005 to January 1, 2010, the SEC received approximately 30 other bounty applications, but did not formally take action to approve or deny any of them and did not notify the bounty applicant accordingly. The person responsible for overseeing the SEC bounty program stated that this occurred because the Commission only makes a formal bounty determination and provides notice to an applicant when the bounty information results in the recovery of an insider trading civil penalty in accordance with the Exchange Act. Thus, while the Commission has made formal determinations with respect to all persons that it deemed eligible for award in accordance with the statute, the 30 bounty applicants were never notified of the results of the SEC's review.

Further, we found that while the Commission reported in its 2009 Performance and Accountability Report that only 6 percent of the Commission's Enforcement cases in Fiscal Year 2009 related to insider trading,[8] the SEC filed or initiated 37 insider trading cases in 2009. However, only one payment was approved under the SEC bounty program during Fiscal Year 2009. Additionally, the SEC filed or initiated a total of 204 insider trading cases between Fiscal Years 2005 - 2008, but only approved three payments under the SEC bounty program. Based on the number of insider trading cases initiated by the Commission during the past five years, it would appear that there could have been more utilization of the SEC bounty program.

We believe that the minimal use of the SEC bounty program can be attributed primarily to the fact that the program has not been widely publicized, internally within the agency or externally to the public. We found that general information

[8] http://www.sec.gov/about/secpar2009.shtml, Chart 2.10, at page 34.

on how to apply for a bounty can be found on the SEC's public website, but there is no contact information or e-mail address to which potential bounty claimants can send questions. Also, there is no application form, only instructions on what type of information should be included in a narrative format.[9] The SEC also developed an informational pamphlet for the bounty program that was intended to be used as an educational device to be routinely sent by staff to individuals who provide information that might lead to award of a bounty. While the pamphlet is a good tool for marketing the program, we found no evidence that staff members are generally aware of the pamphlet and provide it routinely to potential bounty applicants. In addition, the SEC has publicly released only limited information on Commission decisions regarding bounty awards and denials. Commission officials provided information showing that with the exception of one payment and one denial, the identity of bounty applicants has not been disclosed publicly, nor has the SEC disclosed that all bounty payments have been for the maximum 10 percent permitted by the statute. The years in which bounties have been awarded and the total amount of the payments, however, have been disclosed.

In addition, based on discussions with various senior Enforcement staff in headquarters as well as the regional offices, we found varying degrees of knowledge regarding the SEC bounty program among Commission staff. Some staff who had received bounty applications for further consideration remarked that they knew nothing about the bounty program, while others had some knowledge of the workings of the program and associated laws and regulations. Therefore, more extensive marketing of the program both internally and externally is necessary to ensure Commission staff, as well as potential whistleblowers, are aware of the program. This holds especially true for staff who are in positions where they evaluate whistleblower information.

We learned through discussions with responsible Commission officials that there has been extensive work performed by the Office of the Chairman, Enforcement, and the Office of General Counsel (OGC) on drafting proposed legislation to revamp the current bounty program in the wake of the Bernard Madoff scandal. The proposed legislation, among other things, would provide expanded authority for the program to permit bounties in connection with any judicial or administrative action brought by the Commission under the securities laws that result in monetary sanctions exceeding $1,000,000. The proposed legislation was included in the Investor Protection Act of 2009 (H.R. 3817), which was introduced in the U.S. House of Representatives on October 15, 2009 by Representative Paul Kanjorski and referred to the House Committee on Financial Services. We are encouraged by the actions the Commission has taken and support the timely passage of the proposed legislation as a necessary step to develop a successful SEC whistleblower/bounty program. Additionally, the SEC

[9] http://www.sec.gov/divisions /enforce/insider.htm.

has begun to explore ways to more extensively market the bounty program in an effort to increase awareness both inside and outside the Commission.

Recommendation 1:

The Division of Enforcement should develop a communication plan to address outreach to both the public and Securities and Exchange Commission (SEC) personnel regarding the SEC bounty program. The plan should include efforts to make information available on the SEC's intranet, enhance information available on the SEC's public website, and provide training to employees who are most likely to deal with whistleblower cases.

Management Comments. Concur. See Appendix V for management's full comments.

OIG Analysis. We are pleased that Enforcement concurred with this recommendation.

Finding 2: Standardized Bounty Application Forms Would Help Make the Bounty Application Process More User Friendly for Whistleblowers

Information on the SEC's public website regarding how an individual may apply for a bounty can be misleading and potentially a deterrent to prospective whistleblowers.

With regard to how and when a prospective whistleblower may apply for a bounty, the SEC's public website currently states in a section entitled, "How and When Do You Apply for a Bounty?" as follows:

> An application must be clearly marked as an "Application for Award of a Bounty," and must contain the information required by the Commission's rules. The application must give a detailed statement of the information that the applicant has about the suspected insider trading.
>
> Any person who desires to provide information to the Commission that may result in the payment of a bounty may do so by any means desired. The Commission encourages

> persons having information regarding insider trading to provide that information in writing, either at the time they initially provide the information to the Commission or as soon as possible afterwards. Providing information in writing reduces the possibility of error, helps assure that appropriate action will be taken, and minimizes subsequent burdens and the possibility of factual disputes. In any event a written application for a bounty must be filed with 180 days after the day on which the court orders payment of the civil penalty.[10]

The SEC's website also includes in a subsequent section entitled, "Statutory and Regulatory Provisions," the Commission rules for bounty applications. Rule 64 Form of application and information required, states that "[e]ach application pursuant to this subpart shall be identified as an Application for Award of a Bounty and shall contain a detailed statement of the information provided by the applicant that the applicant believes led or may lead to the imposition of a penalty."[11] The rule also states that "[w]hen the application is not the means by which the applicant initially provides such information, each application shall contain: the dates and times upon which, and the means by which, the information was provided; the identity of the Commission staff members to whom the information was provided; and if the information was provided anonymously, sufficient further information to confirm that the person filing the application is the same person who provided the information to the Commission."[12]

Based on this language, a bounty applicant may be unclear as to what constitutes an acceptable application, i.e., what level of detail should be provided, if supporting documents should be included or referenced, etc. During our review we found that many bounty applications were essentially generalized tips and complaints about potential insider trading based on public information without any real evidence or actual knowledge that an individual or individuals used material non-public information when purchasing or selling securities.

To illustrate, one bounty application included in our sample that was referred to a senior official in headquarters by the bounty program for further consideration stated:

> Company A doubled in price with extremely high volume prior to the announcement that Company B had loaned them (Company A) millions of $ to help in preventing bankruptcy. This possible insider trading occurred on Tuesday Aug 18.[13]

[10] http://www.sec.gov/divisions/enforce/insider.htm, at p. 2.
[11] Id. at 4.
[12] Id.
[13] Information obtained from SEC bounty file maintained by the Office of Chief Counsel within the Division of Enforcement.

Because the bounty application was vague, the senior official that received it stated that it was not useful or relevant to his ongoing investigation into the subject. Additionally, the senior official dismissed the tip without contacting the bounty applicant to determine if he had further information.

For another bounty application, the bounty applicant alleged the existence of a "wide ranging community of individual investors and investing business entities who willingly participate in, for lack of a better term, a group that trades on selected equities in various ways for the purpose of can't lose investment transactions." [14] The senior-level official who received the bounty application for further consideration stated that the complaint was not specific as to the securities (or even category of securities) in which the alleged insider trading occurred and contained no information on how insider trading information was allegedly shared. Further, the bounty applicant had submitted previous complaints of wide-ranging conspiracies that the official deemed to lack credible support upon which to base an investigation. Therefore, the bounty application was dismissed without further action.

As part of our review, we contacted some bounty applicants to obtain feedback regarding the bounty application process. One individual stated that it would be useful if the SEC had a link on its website to an application form that can be downloaded. Another individual stated that he had additional information to support his bounty application, but that no one from the SEC had contacted him to follow up and ask for supporting information.

To help ensure that bounty applications are complete and the information provided is useful, we believe the Commission should develop a standardized electronic form that can be downloaded. Also, at a minimum, whistleblowers should be asked to provide the following information, in addition to relevant contact information:

- The facts pertinent to the alleged securities law violation and explanation as to why the subject(s) violated the securities laws.

- A list of related supporting documentation in the whistleblower's possession and/or available from other sources.

- A description of how the whistleblower learned about/and or obtained the information that supports the claim, including the whistleblower's relationship to the subject(s).

[14] Id.

- The amount of any monetary rewards reaped by the subject violator (if known) as a result of the securities violation and how the amount was calculated.

- A certification that the application is true, correct, and complete to the best of the whistleblower's knowledge.

Additionally, the Commission should follow up with whistleblowers, where appropriate, regarding their applications to ensure all available information has been obtained in order to effectively evaluate whether the information should result in further investigation.

Recommendation 2:

The Division of Enforcement should develop and post to its public website an application form that asks the whistleblower to provide information, including:

(1) The facts pertinent to the alleged securities law violation and an explanation as to why the subject(s) violated the securities laws;
(2) A list of related supporting documentation in the whistleblower's possession and available from other sources;
(3) A description of how the whistleblower learned about or obtained the information that supports the claim including the whistleblower's relationship to the subject(s);
(4) The amount of any monetary rewards obtained by the subject violator(s) (if known) as a result of the securities law violation and how the amount was calculated; and
(5) A certification that the application is true, correct, and complete to the best of the whistleblower's knowledge.

Management Comments. Concur. See Appendix V for management's full comments.

OIG Analysis. We are pleased that Enforcement concurred with this recommendation.

Recommendation 3:

The Division of Enforcement should establish policies on when to follow up with whistleblowers who submit applications to clarify information in the bounty applications and obtain readily available supporting documentation prior to making a decision as to whether a whistleblower's complaint should be further investigated.

Management Comments. Concur. See Appendix V for management's full comments.

OIG Analysis. We are pleased that Enforcement concurred with this recommendation.

Finding 3: Criteria for Judging Bounty Applications Are Broad and Somewhat Vague

> The criteria for judging bounty applications are broad, somewhat vague and not subject to judicial review. As a result, the criteria may not be consistently applied by Enforcement staff.

Although the Commission adopted bounty program regulations to provide a structure for the orderly administration of the process for making bounty payments, the regulations essentially repeat, instead of clarifying or supplementing, much of the language found in the statute regarding bounty determinations.

The Code of Federal Regulations (CFR), Title 17: *Commodity and Securities Exchanges, Part 201- Rules of Practice, Subpart C - Procedures Pertaining to the Payment of Bounties Pursuant to Subsection 21A(e) of the Securities Exchange Act of 1934*, Section 201.61, *Scope of Subpart*, states as follows:

> Section 21A of the Securities and Exchange Act of 1934 authorizes the courts to impose civil penalties for certain violations of that Act. Subsection 21A(e) permits the Commission to award bounties to persons who provide information that leads to the imposition of such penalties. Any such determination, including whether, to whom, or in what amount to make payments, is in the sole discretion of the Commission. This subpart sets forth procedures regarding applications for the award of bounties pursuant to Subsection 21A(e). Nothing in this subpart shall be deemed to limit the discretion of the Commission with respect to determinations under subsection 21A(e) or to subject any such determination to judicial review.

Additionally, Section 201.68, *No promises of payment,* states as follows:

> No person is authorized under this subpart to make any offer or promise, or otherwise to bind the Commission with respect to the payment of any bounty or the amount thereof.

Because of the use of language such as “information that leads to the imposition of such penalties” and “in the sole discretion of the Commission,” the criteria for a bounty award are broad and subject to interpretation. In addition, Enforcement does not have internal policies and procedures to assist Commission staff in assessing contributions that are made by whistleblowers and recommending bounty award determinations. The Commission should establish internal policies and procedures to provide more specific guidelines for awarding bounties.

Recommendation 4:

The Division of Enforcement should develop specific criteria for recommending the award of bounties, including a provision that where a whistleblower relies partially upon public information, such reliance will not preclude the individual from receiving a bounty.

Management Comments. Concur. See Appendix V for management’s full comments.

OIG Analysis. We are pleased that Enforcement concurred with this recommendation.

Finding 4: More Frequent Communication with Whistleblowers is Needed

> The Commission does not routinely provide status reports to whistleblowers regarding their bounty applications, even if there is an ongoing investigation or examination. This practice could discourage individuals from continuing to utilize the program and from providing useful follow-up information to their bounty applications.

We found that the SEC bounty program only provides written notification to whistleblowers regarding the status of their bounty applications to:

(1) Acknowledge receipt of the applications; and
(2) Notify them if formal determinations are made by the SEC with respect to their bounty applications.

According to Commission officials, a formal determination is made only if the information provided by the whistleblower leads to an insider trading civil penalty being imposed by the court in a Commission civil action, and the penalty has actually been paid by the defendant. Consequently, if a whistleblower's information was never pursued for one reason or another, or was pursued but did not lead to an insider trading penalty being recovered, the whistleblower would typically not receive any correspondence from the SEC regarding the status of his or her bounty request, other than the initial acknowledgement letter. This may result in a whistleblower wondering if the information provided even made it into the right hands. The initial acknowledgement letter sent to whistleblowers includes the following language:

> This is to acknowledge receipt of your Application for Award of a Bounty, dated XX.
>
> You may be assured that the information you have provided will receive full consideration by the Commission's staff. Information from members of the public is an important source of information to the Commission in the conduct of its law enforcement functions.
>
> As a matter of policy, the Commission staff can neither affirm nor deny the existence of any investigation arising from the information you have provided until it files a public enforcement action. This policy is intended to prevent premature disclosure of information that may interfere with the successful completion of an investigation, and to protect the privacy of persons who have not been formally charged with violations of laws.
>
> All determinations with respect to bounties are made at the Commission's discretion and no determinations are made until a civil penalty has been imposed and actually recovered in a Commission enforcement action. Section 21A(e) of the Securities Exchange Act of 1934 [15 U.S.C. 78u-1(e)]. You will be informed of any determination in accordance with our bounty regulations. See 17 C.F.R. 201.61-68.[15]

While we acknowledge that Commission staff cannot release non-public or sensitive information during the course of an investigation, the Commission should examine ways to notify whistleblowers of the status of their bounty

[15] Code of Federal Regulations, Title 17: Commodity and Securities Exchanges, Part 201-Rules of Practice, Subpart C-Procedures Pertaining to the Payment of Bounties Pursuant to Subsection 21A(e) of the Securities Exchange Act of 1934, Sections 201.61-201.68.

requests beyond simply acknowledging receipt of the applications. This is especially needed when a whistleblower's information results in an investigation that may take years to close.

Recommendation 5:

The Division of Enforcement, in consultation with the Office of General Counsel, should examine ways in which the Commission can increase communications with whistleblowers by notifying them of the status of their bounty requests, without releasing non-public or confidential information during the course of an investigation or examination.

Management Comments. Concur. See Appendix V for management's full comments.

OIG Analysis. We are pleased that Enforcement concurred with this recommendation.

Finding 5: Better Tracking of the Use of Whistleblower Information is Needed

> While we generally found that the SEC conducted an initial cursory review of bounty applications and forwarded them to appropriate senior-level program staff in the headquarters and regional offices for further consideration, we found that the recipient offices handled the applications on an individualized, *ad hoc* basis. Consequently, better tracking of bounty applications and related information is needed to ensure that bounty information is timely reviewed by experienced Commission staff and significant decisions are documented.

Bounty applications received by the Commission are either filed after recovery of an insider trading civil penalty or prior to payment of an insider trading civil penalty, in connection with a tip or complaint about alleged insider trading.

When an insider trading civil penalty has already been recovered and a related bounty application is received by the Office of the Secretary, the application is forwarded to the Office of the Chief Counsel (OCC) in Enforcement. OCC then contacts the appropriate staff in the headquarters or regional office responsible for the case in which the insider trading civil penalty was recovered and forwards them a copy of the bounty application. If the applicant's information pertains to a case in which there was recovery of an insider trading civil penalty, the office to whom the bounty application was referred may recommend that the Commission grant a bounty up to 10 percent of the amount recovered as an insider trading penalty. In those cases, the responsible headquarters or regional office, in consultation with OCC and OGC, prepares an action memorandum, which is then provided to the Chairman and Commissioners for final approval. Since inception of the bounty program, formal recommendations have only been prepared in response to 10 bounty applications, where there was recovery of an insider trading civil penalty.

When applications are filed prior to the assessment of an insider trading civil penalty, the Office of the Secretary forwards the application to OCC. OCC then performs a search of the Commission's electronic databases (NRSI,[16] CATS 2000,[17] and the HUB[18]) to determine whether the application relates to conduct that is already the subject of an Enforcement investigation or action. If there is an investigation or action related to the conduct described in the application, the application is referred to the staff responsible for the investigation or action. If the database search does not result in the identification of an ongoing investigation or action, OCC staff determines the appropriate staff to whom the application should be directed. If the application alleges misconduct by officers, directors, or employees of a public company, OCC staff will determine the headquarters location of the issuer. The application will be referred to staff in the Commission office with responsibility for that geographic location. If the application alleges misconduct by individuals who are in a location other than the SEC region in which the issuer is headquartered, the application is referred to staff in the Commission office with responsibility for that geographic location. If the application does not contain information sufficient to identify the location of the alleged insider traders, the application is referred to staff in the Commission office with responsibility for the geographical location in which the whistleblower resides.

Referrals of bounty applications to Commission staff are generally accompanied by a memorandum that states as follows:

> Attached is a copy of a bounty application submitted by X. The claim involves alleged insider trading violation by X company through its X office. The application seeks an insider trading bounty under Section 21A(e) of the Exchange

[16] Name Relationship Search Index (NRSI) provides an index to names contained in various internal and external automated SEC information systems, including filings with the Division of Corporation Finance, and Division of Enforcement inquiries and investigations.
[17] Case Activity Tracking System (CATS 2000) provides case tracking and workflow management for Division of Enforcement offices nationwide.
[18] HUB interfaces with CATS 2000 and provides case management and tracking for Division of Enforcement offices nationwide including the ability to produce various reports.

> Act. I have sent a letter acknowledging receipt of the application. A copy of my letter is attached.
>
> I am referring this matter to your office for such further action as you may consider appropriate.

The whistleblower is also sent an acknowledgement letter, as discussed previously.

During our review, we interviewed responsible Commission staff in Enforcement at headquarters, as well as Enforcement staff from three regional offices to gain an understanding of how offices tracked and utilized bounty application information. We also examined nine out of approximately 30 bounty applications (30 percent) submitted to the Commission between January 1, 2005 and January 1, 2010 (that were neither formally approved or denied by the Commission), to determine if sufficient documentation existed to support timely and appropriate handling of the bounty applications. Further, we reviewed supporting documentation pertaining to five bounty applications that were formally denied by the Commission to determine if adequate documentation was maintained by the Commission to support the denial of the applications.

We found that adequate documentation existed to support the disposition of the five bounty applications that were formally denied by the Commission. However, documentation was not readily available from OCC to show the disposition for the nine bounty applications that were forwarded to Enforcement staff in headquarters and the regional offices for further consideration, but were not formally approved or denied.

We found that once a bounty application is referred by OCC to the appropriate senior-level official in headquarters or a regional office, it is up to that official to take whatever action he or she deems necessary and to document the results of any decisions that are made, according to that office's procedures. Based on our review of available documentation from Enforcement staff in headquarters and three regional offices pertaining to the nine sampled bounty applications, it appears that the bounty applications were generally reviewed timely. However, we found that one application had been referred to a regional office on November 18, 2009, by OCC and was still awaiting review as of January 6, 2009. We also found that Enforcement staff conducted preliminary reviews of the information contained in the bounty applications they received, but did not routinely go back to bounty applicants to clarify information or ask for additional supporting documentation. Rather, general or vague bounty applications were typically dismissed. In addition, for two of the nine bounty applications, we were unable to obtain specific information pertaining to the handling of the applications. We did find that based on information provided by one whistleblower, the responsible regional office filed both criminal and civil actions and also provided assistance to the whistleblower in the preparation of his bounty application. The whistleblower, however, was not awarded a bounty because no insider trading penalty was recovered. Lastly, we found that Enforcement staff documented the results of their reviews of bounty applications and decisions made using different methods, including personal notes and files and/or use of the Commission's electronic complaint handling system (CTR 2009), as well as the HUB case tracking system.

The SEC has recently taken steps to improve its ability to handle and track all tips and complaints. In February 2009, the SEC retained The MITRE Corporation: Center for Enterprise Modernization[19] to complete a comprehensive review of internal procedures for evaluating tips, complaints, and referrals. The OIG has learned that the project is intended to be significant in scope. On August 5, 2009, Enforcement announced the creation of the Office of Market Intelligence (OMI). OMI is Enforcement's liaison to the Agency's Tip, Complaint, and Referral (TCR) process and system, which is responsible for the collection, analysis, risk-weighing, triage, referral and monitoring of the hundreds of thousands of tips, complaints and referrals that the Commission receives each year. By analyzing each tip according to internally-developed risk criteria and making connections between and among tips from different sources, Enforcement hopes to be able to better focus its resources on the tips that have the greatest potential for uncovering wrongdoing. OMI will also utilize the expertise of the SEC's other divisions and offices as well as the newly-created specialized units within Enforcement, to help analyze tips and identify securities law violations.

We believe that the Commission should incorporate necessary management controls in its new TCR process and information technology system to include complaints and tips from whistleblower's who seek a bounty, in addition to other types of tips and complaints. This will help ensure that bounty applications are appropriately and timely evaluated by experienced Commission staff and bounty application information can be linked with other related complaints and tips.

Recommendation 6:

The Division of Enforcement should develop a plan to incorporate controls for tracking tips and complaints from whistleblowers seeking bounties into the development of its tip, complaints and referral processes and systems for other tips and complaints. These controls should provide for the collection of necessary information and require processes that will help

[19] The MITRE Corporation: Center for Enterprise Modernization (www.mitre.org) is a not-for-profit organization that provides systems engineering, research and development, and information technology support to the government.

ensure that bounty applications are reviewed by experienced Commission staff, decisions whether to pursue whistleblower information are timely made, and whistleblowers that provide significant information leading to a successful action for violation of the securities laws.

Management Comments. Concur. See Appendix V for management's full comments.

OIG Analysis. We are pleased that Enforcement concurred with this recommendation.

Finding 6: Bounty Files Did Not Always Contain Complete Information

Some bounty files maintained by OCC were missing key documents.

We obtained and reviewed the hard-copy bounty files maintained by OCC (OCC's primary recordkeeping method for the bounty program) for the nine sampled bounty applications. We found that generally the bounty files maintained by OCC contained a copy of the bounty application, an acknowledgement memorandum that was sent to the bounty applicant to acknowledge receipt of their application, and a copy of a memorandum showing to which senior-level official within the Commission the bounty application was forwarded for consideration. However, for the nine bounty applications the OIG reviewed, we found in some instances that not all these documents were maintained.

Specifically, we found:

- For one of nine bounty files, the actual bounty application was missing.
- For three of nine bounty files, a copy of the acknowledgement memorandum that was sent to the whistleblower was missing. However, there was mention in other documentation in the file that an acknowledgement memorandum was sent.
- For two of nine bounty files, the memorandum showing to which headquarters or regional office that OCC referred the bounty application for further consideration was missing.

We believe that, at a minimum, OCC should maintain copies of pertinent data pertaining to bounty applications, including the application itself, a copy of any correspondence with the whistleblower, and documentation showing the Commission office(s) to which the information was referred for action.

Recommendation 7:

The Division of Enforcement should require that a bounty file (hard copy or electronic) be created for each bounty application. The file should contain at a minimum the bounty application, any correspondence with the whistleblower, documentation of how the whistleblower's information was utilized, and documentation regarding significant decisions made with regard to the whistleblower's complaint.

Management Comments. Concur. See Appendix V for management's full comments.

OIG Analysis. We are pleased that Enforcement concurred with this recommendation.

Finding 7: SEC Bounty Program Should Incorporate Best Practices from other Agencies with Whistleblower Programs

The IRS and the DOJ are two large government agencies that use whistleblower programs to identify cases that would otherwise go undetected. There is some evidence that DOJ's whistleblower program has played a role in the increase of civil recoveries obtained by DOJ over a 10-year period. The IRS also has a system in place under which it provides bounties to individuals who present the IRS with information leading to the collection of federal taxes.

We reviewed documentation related to these whistleblower programs and identified several best practices that the Commission should adopt in developing a successful SEC bounty program. In order to protect the confidentiality of privileged information we obtained during our review, the best practices are summarized and not specifically identified with a particular agency. We identified best practices related to tracking and handling whistleblower-type complaints as follows:

- Establishment of a separate "Whistleblower Office" staffed with experienced officials that handles intake of whistleblower complaints and referral of complaints to other offices as appropriate, while maintaining authority to make award determinations.

- Continual tracking and documentation of the handling of whistleblower complaints through a case tracking system, including information pertaining to the identification of the whistleblower and any representatives, actions taken to assign whistleblower claims to applicable offices and individuals, and the status of significant decisions made and still needed with regard to outstanding whistleblower claims (e.g., whether a claim will be paid and in what amount).

- Use of standardized forms for the intake of whistleblower information as well as recording significant decisions made by operating divisions while processing a whistleblower claim (i.e. operating division assessments on how a whistleblower's information aided in collection of funds pertaining to an examination).

- Initial analysis of whistleblower information by the Whistleblower Office and then by Operating Division subject matters experts to evaluate the information and determine whether it may materially contribute to a case or examination. Additionally, subject matter experts meet with whistleblowers to clarify the whistleblowers' submissions as necessary, gather information about the credibility of the whistleblowers, obtain information regarding legal issues that can affect the use of documents, and obtain possible leads to other sources of information.

- Requirement that routine feedback in the form of status reports be provided to the Whistleblower Office by Operating Divisions regarding the status of cases and examinations that pertain to whistleblower complaints.

- Establishment of a whistleblower award file (created in addition to a regular case file) that is sent by Operating Divisions at the conclusion of an examination to the Whistleblower Office that contains pertinent forms and data to enable the Whistleblower Office to make an award determination.

- Establishment of a requirement that whistleblower complaints be reviewed and pursued, if applicable, within a specified time frame.

- Continual assessment of whistleblower programs through feedback sought from Operating Divisions and others involved in processing whistleblower claims.

Through discussions with Commission officials responsible for drafting the recent proposed legislation to expand the SEC's authority to reward whistleblowers, we learned that the Commission met extensively with representatives from both DOJ and the IRS to identify best practices for revamping the SEC's current bounty program. Commission officials stated they plan to incorporate many of these best practices into implementing regulations and policies and procedures, as appropriate, upon passage of the proposed legislation. Until such time as this legislation may be passed, the Commission should begin to incorporate best practices we identified from DOJ and the IRS.

Recommendation 8:

We recommend that the Division of Enforcement incorporate best practices from the Department of Justice and the Internal Revenue Service into the Securities and Exchange Commission bounty program with respect to bounty applications, analysis of whistleblower information, tracking of whistleblower complaints, recordkeeping practices, and continual assessment of the whistleblower program.

Management Comments. Concur. See Appendix V for management's full comments.

OIG Analysis. We are pleased that Enforcement concurred with this recommendation.

Recommendation 9:

We recommend that the Division of Enforcement set a timeframe to finalize new policies and procedures for the Securities and Exchange Commission bounty program that incorporate the best practices from Department of Justice and the Internal Revenue Service, as well as any legislative changes to the program.

Management Comments. Concur. See Appendix V for management's full comments.

OIG Analysis. We are pleased that Enforcement concurred with this recommendation.

Acronyms and Abbreviations

DOJ	Department of Justice
Enforcement	Division of Enforcement
Exchange Act	Securities Exchange Act of 1934
IRS	Internal Revenue Service
ITSEA	Insider Trading and Securities Fraud Enforcement Act of 1988
OCC	Office of Chief Counsel, Division of Enforcement
OIG	Office of Inspector General
OMI	Office of Market Intelligence
SEC or Commission	U.S. Securities and Exchange Commission
TCR	Tip Complaint and Referral Process

Scope and Methodology

This review was not conducted in accordance with the government auditing standards.

Scope. We examined Enforcement program activities related to the SEC bounty program since its inception in 1989, and assessed whether necessary management controls have been established and operate effectively to ensure bounty applications are routed to appropriate personnel and are properly processed and tracked. We also determined whether other government agencies with similar programs have best practices that could be incorporated into the SEC bounty program. Fieldwork was performed during December 2009 and January 2010.

Methodology. In order to accomplish our audit objectives, we reviewed applicable Commission policies and procedures pertaining to the SEC bounty program; interviewed personnel from the Office of the Chairman, Enforcement and three regional offices to understand how bounty applications are processed; reviewed documentation to support all ten bounty applications that were formally approved or denied; and selected a sample of bounty applications that were not formally approved or denied to determine if sufficient documentation existed to support timely and appropriate handling of bounty applications. We also gathered information regarding the IRS and DOJ whistleblower programs to identify best practices.

Judgmental Sampling. We judgmentally selected a sample of nine out of approximately 30 bounty applications that were received by the Commission, but were not formally approved or denied. We then reviewed applicable files and documentation maintained by Enforcement as well as three of the 11 regional offices to determine whether the bounty applications were tracked, reviewed by experienced Commission staff and appeared to be appropriately handled.

Prior OIG Coverage. This review was conducted as a result of an issue that we identified during OIG's investigation into the SEC examination and investigations of Bernard L. Madoff and related entities, OIG's Report of Investigation, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme,* Report No. 509, August 31, 2009.

Criteria

Section 21A(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u-1(e), as added by the Insider Trading and Securities Fraud Enforcement Act of 1988, Public Law 111-72 (enacted on October 13, 2009). Authorizes the SEC to award a bounty to a person who provides information leading to the recovery of a civil penalty from an insider trader, from a person who tipped information to an insider trader, or from a person who directly or indirectly controlled an insider trader. All bounty determinations, including whether, to whom, or in what amount to make payments, are within the sole discretion of the SEC, however, the total bounty may not currently exceed 10 percent of the amount recovered from a civil penalty pursuant to a court order.

17 C.F.R., Part 201, Subpart C- Procedures Pertaining to the Payment of Bounties Pursuant to subsection 21A(e) of the Securities Exchange Act of 1934. Sets forth procedures regarding applications for the award of bounties pursuant to Subsection 21A(e) of the Securities and Exchange Act of 1934.

List of Recommendations

Recommendation 1:

The Division of Enforcement should develop a communication plan to address outreach to both the public and the Securities and Exchange Commission (SEC) personnel regarding the SEC bounty program. The plan should include efforts to make information available on the SEC's intranet, enhance information available on the SEC's public website, and provide training to employees who are most likely to deal with whistleblower cases.

Recommendation 2:

The Division of Enforcement should develop and post to its public website an application form that asks the whistleblower to provide information, including, for example (1) the facts pertinent to the alleged securities law violation and an explanation as to why the subject(s) violated the securities laws; (2) a list of related supporting documentation available in the whistleblower's possession and available from other sources; (3) a description of how the whistleblower learned about or obtained the information that supports the claim including the whistleblower's relationship to the subject(s); (4) the amount of any monetary rewards obtained by the subject violator(s) (if known) as a result of the securities law violation and how the amount was calculated; and (5) a certification that the application is true, correct, and complete to the best of the whistleblower's knowledge.

Recommendation 3:

The Division of Enforcement should establish policies on when to follow-up with whistleblowers who submit applications to clarify information in the bounty applications and obtain readily available supporting documentation prior to making a decision as to whether a whistleblower's complaint should be further investigated.

Recommendation 4:

The Division of Enforcement should develop specific criteria for recommending the award of bounties, including a provision that where a whistleblower relies partially upon public information, such reliance will not preclude the individual from receiving a bounty.

Recommendation 5:

The Division of Enforcement, in consultation with the Office of General Counsel, should examine ways in which the Commission can increase communications with whistleblowers by notifying them of the status of their bounty requests without releasing non-public or confidential information during the course of an investigation or examination.

Recommendation 6:

The Division of Enforcement should develop a plan to incorporate controls for tracking tips and complaints from whistleblowers seeking bounties into the development of its tip, complaints and referral processes and systems for other tips and complaints. These controls should provide for the collection of necessary information and require processes that will help ensure that bounty applications are reviewed by experienced Commission staff, decisions whether to pursue whistleblower information are timely made, and whistleblowers that provide significant information leading to a successful action for violation of the securities laws.

Recommendation 7:

The Division of Enforcement should require that a bounty file (hard copy or electronic) be created for each bounty application. The file should contain at a minimum the bounty application, any correspondence with the whistleblower, documentation of how the whistleblower's information was utilized, and documentation regarding significant decisions made with regard to the whistleblower's complaint.

Recommendation 8:

We recommend that the Division of Enforcement incorporate best practices from the Department of Justice and the Internal Revenue Service into the Securities and Exchange Commission bounty program with respect to bounty applications, analysis of whistleblower information, tracking of whistleblower complaints, recordkeeping practices, and continual assessment of the whistleblower program.

Recommendation 9:

We recommend that the Division of Enforcement set a timeframe to finalize new policies and procedures for the Securities and Exchange Commission bounty program that incorporate the best practices from Department of Justice and the Internal Revenue Service, as well as any legislative changes to the program.

Management Comments

MEMORANDUM

TO: H. David Kotz, Inspector General, Office of Inspector General

FROM: Robert Khuzami, Director, Division of Enforcement

RE: Enforcement's Response to the Office of Inspector General's Report, Assessment of SEC Bounty Program, Report No. 474

DATE: March 24, 2010

This memorandum is in response to the Office of Inspector General's Draft Report No. 474, entitled *Assessment of SEC Bounty Program*. Thank you for the opportunity to review and respond to this report. We concur in the report's recommendations.

Early last year, Chairman Schapiro directed staff to begin working to establish a world-class whistleblower program. To that end, we conducted an extensive review of whistleblower programs at other governmental agencies and the Financial Industry Regulatory Authority (FINRA) to identify best practices for administering a successful program at the SEC. Our effort resulted in legislation currently under consideration by Congress that would create a new, more-comprehensive whistleblower program related to all securities violations.

As a result of our review, and as noted in your report, Division leadership was aware, prior to the audit, of the issues with the insider trading bounty program raised in your report. The Division's independent findings, and its plans for developing a new whistleblower program, are consistent with those set forth in the report.

In addition, it is not surprising that only a small percentage of insider trading cases have been initiated as a result of tips submitted through the insider trading bounty program. The vast majority of insider trading cases arise from routine surveillance performed by the SEC staff and the Self-Regulatory Organizations (SROs), such as FINRA and the stock exchanges, and not from tips submitted by members of the public. For example, of the 37 insider trading actions brought by the Commission in FY 2009, 31 were the result of surveillance by the SROs or the Division itself. We believe the principal reason that the current bounty program has not yielded more rewards derives more from its relatively narrow scope and the confidential nature of insider trading violations than from the procedural shortcomings we recognize exist. Notwithstanding the program's limitations, the Commission has an excellent track record of paying eligible claimants, as each award has been for the maximum amount allowed by the bounty statute

The proposed whistleblower legislation was drafted principally to broaden the nature of wrongdoing for which whistleblowers could receive a bounty. In our efforts to craft this new program, however, great care was taken to address and avoid problems identified with the insider trading bounty program, including our desire to establish a formal program with dedicated staff and state-of-the-art policies and procedures. If the proposed legislation is enacted, the new whistleblower program would not be an extension of the current insider trading bounty program. Instead, it would subsume the existing program and, thereby, constitute an entirely new program based on the structure and best practices of other successful whistleblower programs.

We also have taken other steps that we believe will address some of the recommendations. As indicated in the Draft Strategic Plan for 2010-2015, the Commission is centralizing the process for receiving, reviewing, and acting upon tips, complaints and referrals (TCRs) so they can be handled consistently and appropriately, including through examinations or enforcement investigations. In connection with this effort, the Commission hired the MITRE Corporation to assist in revamping our intake, triage and analysis of TCRs, and has adopted a new agency-wide policy for handling TCRs, embodied in *Tips, Complaints, and Referrals Intake Policy*, Securities Exchange Commission Regulation 3-2, March 10, 2010 (SECR 3-2). The Division has adopted supplemental guidance to implement this policy. Division of Enforcement, *Interim Policies and Procedures for Handling Tips, Complaints and Referrals (TCRs)* (March 24, 2010).

The Division's new Office of Market Intelligence (OMI) will consolidate the Division's handling of TCRs in accordance with SECR 3-2 and our supplemental guidance. The principal functions of OMI will include coordination, consolidation and management of the Division's processes with respect to TCRs that come to the Division's attention from any internal or external source. Tips received through the insider trading bounty program will be covered by the Commission's new TCR policy, as will the tips and complaints covered by the proposed new whistleblower legislation. We have considered OIG's report in light of these developments.

While we concur with the recommendations, it is our hope that pending legislation before the Congress, as noted above, will create a new program wholly replacing the current one. In such a case, we believe it would be appropriate to address many of the recommendations below through enactment of policies and procedures involving the agency's new authority as opposed to embarking upon modifications of the current insider trading bounty program, which we hope will soon be superseded.

Recommendation 1 relates to communicating information about the bounty program, both externally and internally. We concur and will develop a plan consistent with this recommendation.

Recommendation 2 relates to the development of a form for requesting information from whistleblowers. We concur with this recommendation. In connection with the revamped TCR system, the electronic form in which information is collected will be updated, and we expect to have a form directed specifically to whistleblowers.

Recommendation 3 relates to policies for follow-up with whistleblowers to obtain any additional information they may have. We concur with this recommendation. The Division will be developing processes and procedures for follow up with whistleblowers.

Recommendation 4 relates to the criteria for recommending the award of bounties. We concur with this recommendation. The Division will develop criteria consistent with this recommendation.

Recommendation 5 relates to the examination of ways to provide notice to whistleblowers as to the status of their bounty requests. We concur with this recommendation. The Division will work with the Office of General Counsel to address this recommendation.

Recommendation 6 relates to controls for tracking tips and complaints from whistleblowers. We concur with this recommendation. The Commission's TCR project has already focused on particular capabilities necessary to track whistleblower tips and complaints, and the system currently in development will incorporate controls to ensure that tips are reviewed and track whether timely decisions are made whether to pursue tips.

Recommendation 7 relates to maintenance of whistleblower complaint files. We concur with this recommendation. The Division will adopt procedures for creation and retention of information relevant to a whistleblower complaint.

Recommendation 8 relates to incorporation of best practices from the Department of Justice and the Internal Revenue Service with respect to bounty applications. We concur with this recommendation. As the report notes, the Division has already met with these agencies to identify best practices. The Division will adopt best practices for the existing insider trading bounty program or will incorporate such practices into any new program should the proposed legislation be enacted.

Recommendation 9 relates to formulation of a timeline for policies and procedures for the existing bounty program. We concur with this recommendation. The Division will develop an appropriate timeline.

Office of Inspector General
Response to Management's Comments

We are pleased that Enforcement fully concurred with all nine of the report's recommendations and are encouraged that the SEC has begun to take steps to correct the identified deficiencies.

Enforcement noted in its response that it believes the principal reason that the current bounty program has not yielded more rewards derives more from its relatively narrow scope and the confidential nature of insider trading violations than from procedural shortcomings that it recognizes exists. Enforcement further stated that the newly proposed whistleblower legislation was drafted principally to broaden the nature of wrongdoing for which whistleblowers could receive a bounty.

As we discussed in our report, although we noted the limitations in scope, we also found that the minimal use of the SEC bounty program can be attributed to the fact that the program has not been widely publicized and that information on the SEC's public website was misleading and may have deterred prospective whistleblowers from applying. We also found that more frequent communication with whistleblowers would encourage applications.

We believe it is critical for the SEC to implement the report's recommendations to ensure that it has a fully functioning and successful bounty program in place as its authority is potentially expanded.

Audit Requests and Ideas

The Office of Inspector General welcomes your input. If you would like to request an audit in the future or have an audit idea, please contact us at:

U.S. Securities and Exchange Commission
Office of Inspector General
Attn: Assistant Inspector General, Audits (Audit Requests/Ideas)
100 F Street, N.E.
Washington D.C. 20549-2736

Tel. # 202-551-6061 Freedom of Information Act (FOIA)
Fax # 202-772-9265
Email: oig@sec.gov

Hotline

To report fraud, waste, abuse, and mismanagement at Commission, contact the Office of Inspector General at:

Phone: 877.442.0854

Web-Based Hotline Complaint Form:
www.reportlineweb.com/sec_oig

January 25 | 2011

Impact of the Dodd-Frank *Qui Tam* Laws on Compliance:

A Report and Supplemental Rulemaking to the Staff of the SEC

NWC | NATIONAL WHISTLEBLOWERS CENTER

WWW.WHISTLEBLOWERS.ORG

The National Whistleblowers Center

3238 P Street, NW • Washington, DC 20007
Contact@whistleblowers.org • Phone (202) 342-1903

Table of Contents

Introduction

On November 3, 2010, the Securities and Exchange Commission (SEC) published its Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934. On December 17, 2010, the National Whistleblowers Center (NWC) filed its Formal Submission in accordance with Administrative Procedures Act. This report is a supplemental submission, pursuant to the rulemaking.

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

This supplemental report carefully analyzes the reporting behaviors of employees, with a focus on whether or not laws, such as the Dodd-Frank reward provisions, impact on the willingness of employees to report their concerns internally to managers or compliance officials. This report also utilizes empirical data to evaluate the impact, if any, of *qui tam* reward provisions on employee reporting behaviors In this regard, it also seeks to identify whether *qui tam* laws encourage employees who themselves work in compliance departments to bypass their chains of command and file *qui tam* claims in order to obtain a reward.

Based on the NWC's nearly 25-year track record of supporting legal protections for internal whistleblowers, and the empirical study presented in this report, the NWC makes specific recommendations for the Final Rule.

Summary of Findings

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

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

- Employees are 150% more likely not to tell anyone of any misconduct than they are to report a direct concern to the government;

- 41% of employees misconduct do not disclose information to anyone;

- Only 2% of employees will eventually file a misconduct or fraud claim with the government;

- 89.68% of employees who filed a qui tam case initially reported their concerns internally, either to supervisors or compliance departments;

- Only 3.97% of employees who filed a qui tam case worked in compliance departments;

- In a review of all cases between 2007-2010, only 1 employee who served in a compliance function at work, directly reported the fraudulent activity to the government without first disclosing through an internal procedures;

- 0.27% of employees who filed a qui tam case went directly to the government without first contacting someone inside the company.

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

Summary Response to Major Questions Raised in the SEC Rulemaking

Response # 1: The "potential for monetary incentives provided to whistleblowers by Section 21F of the Exchange Act" has no impact on a company's existing compliance, legal, audit or similar internal processes for investigating and responding to potential violations of the federal securities laws.

Response # 2: In order to achieve the SEC's goal of encouraging "robust compliance programs", it is essential that the SEC ruling fully protect employees who choose to report potential "suspicious activity" or information related to fraud or any violation of law. These employees must be fully protected from retaliation or punishment when their disclosures are made internally to management or compliance. Our data illustrates that since the creation of the False Claims Act, employees will indeed go to their compliance program if given the chance. The Commission's rules should equally protect employees who go to compliance or who go to the SEC and should create procedures for insuring that employees who only report to compliance may obtain a reward.

Response # 3: The existence of a strong *qui tam* reward program shows there is no impact on the "potential for the monetary incentives provided by Section 21F to invite submissions from attorneys, auditors and compliance personnel".

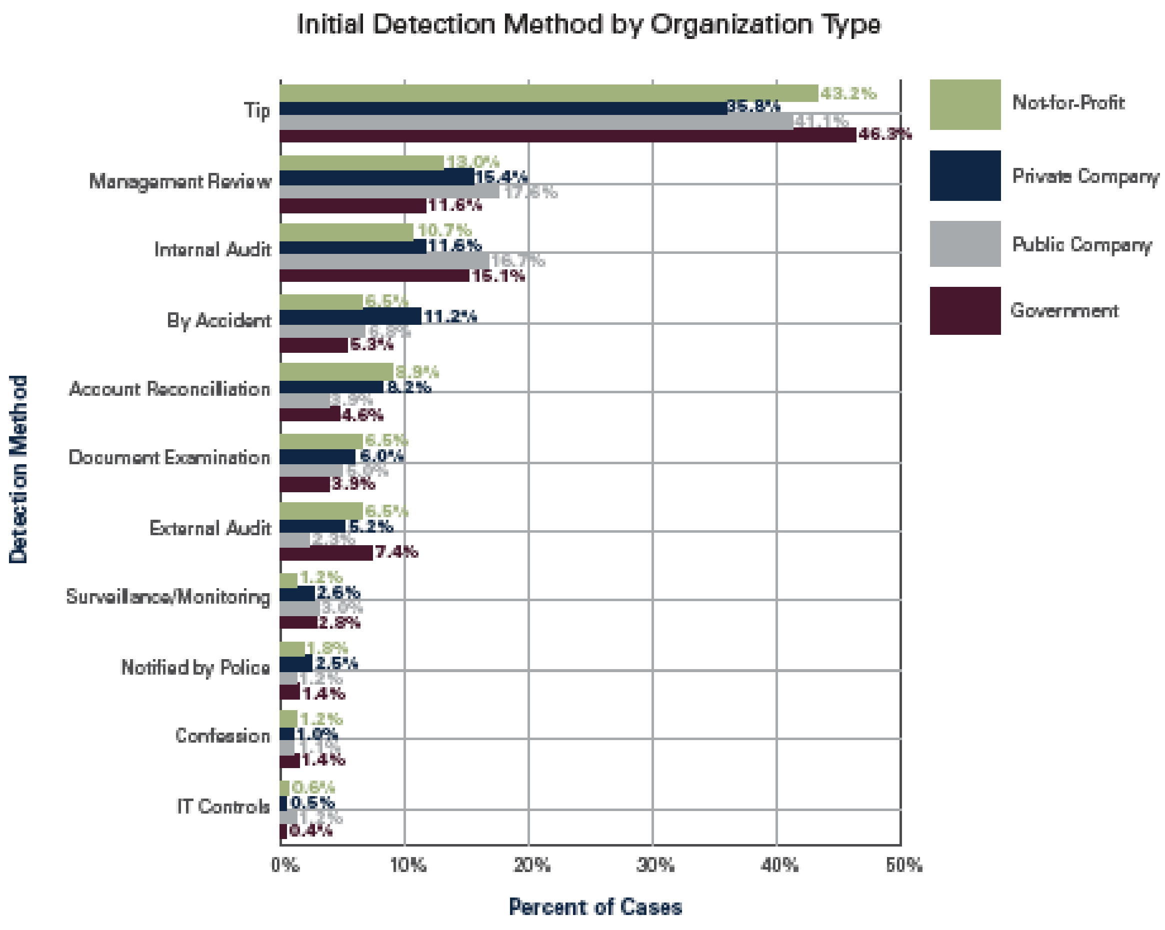
Response # 4: In order to "maximize the submission of high-quality tips and to enhance the utility of information reported to the Commission". rules must be enacted that will further encourage employees to provide information to the SEC. Currently, there are only 0.27% of employees who actually report going to the government first. That fact that it is a 150% times more likely that an employee will not tell anybody of identified misconduct than they would go directly to law enforcement constitutes a direct and ongoing threat to investors and corporations that play by the rules.

Response # 5: Direct-participants in wrongdoing should not be excluded from becoming relators. Any such exclusion would be radically inconsistent with the core purpose of *qui tam* laws.

“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

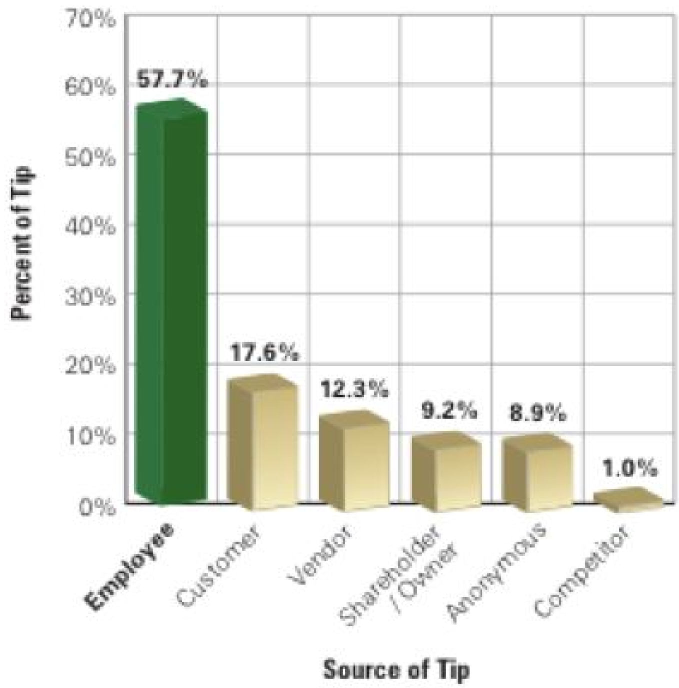
ACFE FINDINGS: WHO DETECTS FRAUD?



[1]

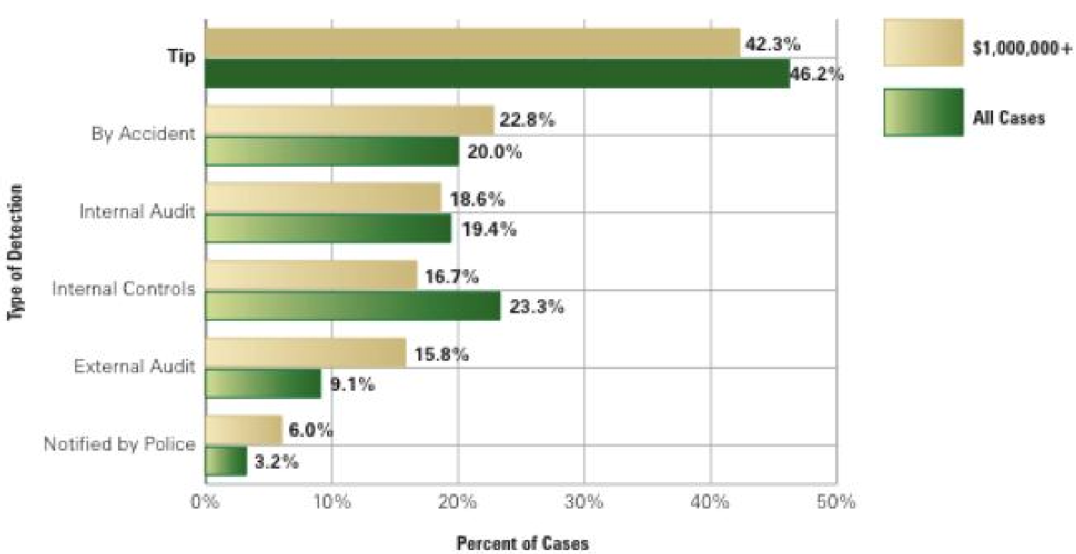
[1] Source: Association of Certified Fraud Examiners, 2010 Global Fraud Study (page 19)

Percent of Tips by Source[9]



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

Initial Detection Method for Million Dollar Schemes[6]

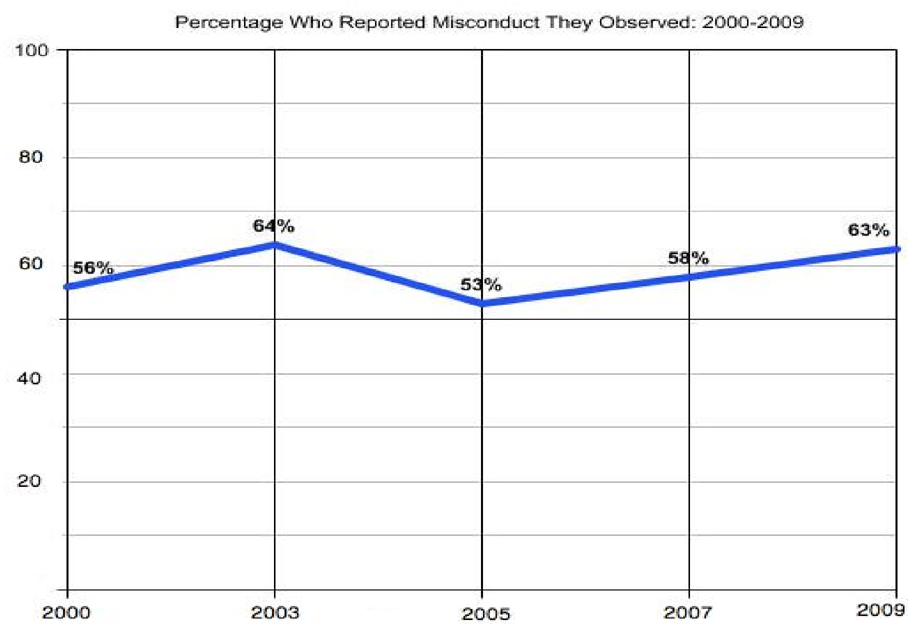


[6]The sum of percentages in this chart exceeds 100 percent because in some cases respondents identified more than one detection method.

Employee Reporting Behaviors

The Ethics Resource Center ("ERC") studied employee reporting behavior trends between 2000 and 2009. *See* ERC, "Blowing the Whistle on Workplace Misconduct," Exhibit 15. [2]

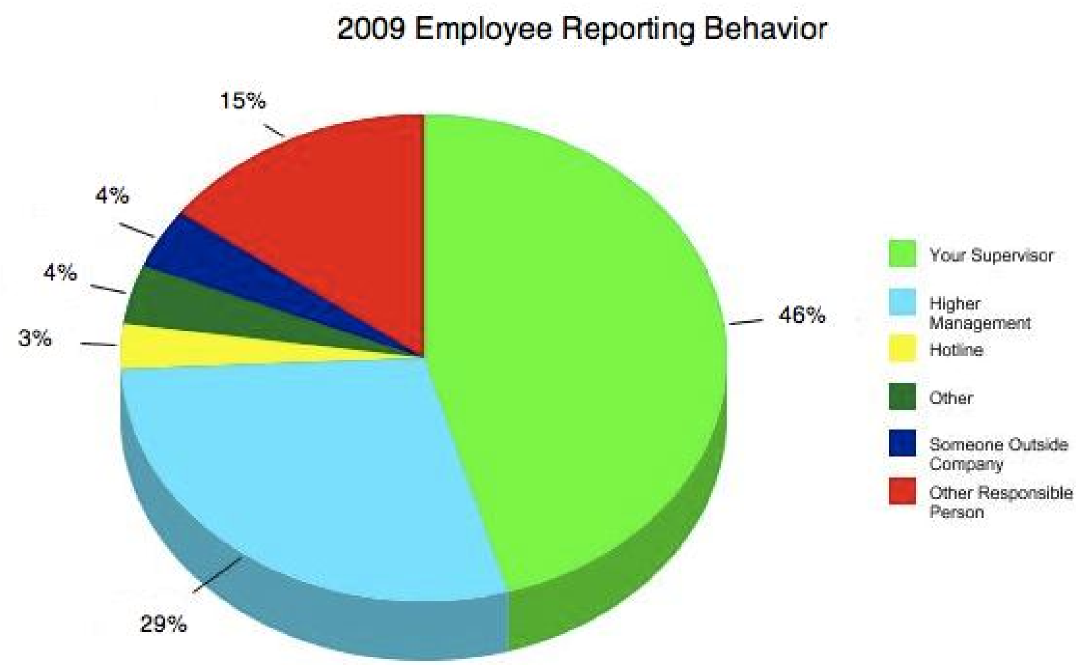
As set forth in the following chart, approximately 40% of employees who witness fraud or misconduct do not report this misconduct to *anyone*. The percentage of employees who report has somewhat fluctuated over the ten year period surveyed by ERC and averages 41% of employees not reporting misconduct to anyone. The numbers reported have remained relatively constant, even after the enactment section 301 of Sarbanes-Oxley Act. Moreover, there is no decline in numbers based on the existence of the False Claims Act and the enactment of the IRS whistleblower law for tax fraud in 2006.



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

[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, Martain, and Lilly. It also receives support from the Ethics and Compliance Officer Association.

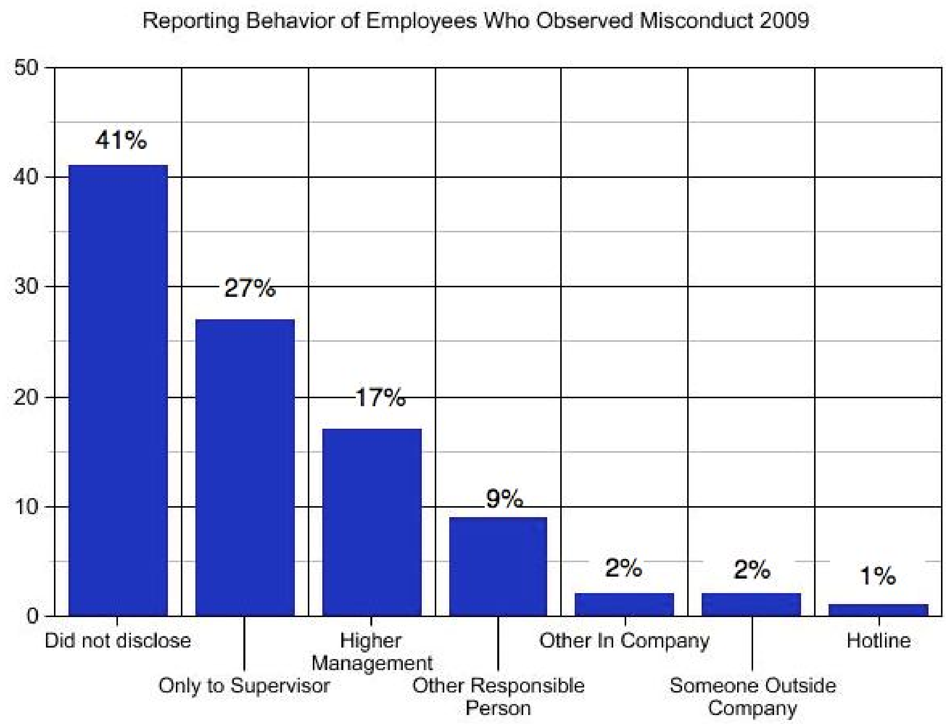
Of the 63% of employees who witnessed and reported misconduct, the following chart explains who they reported to.



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

Disclosing Misconduct

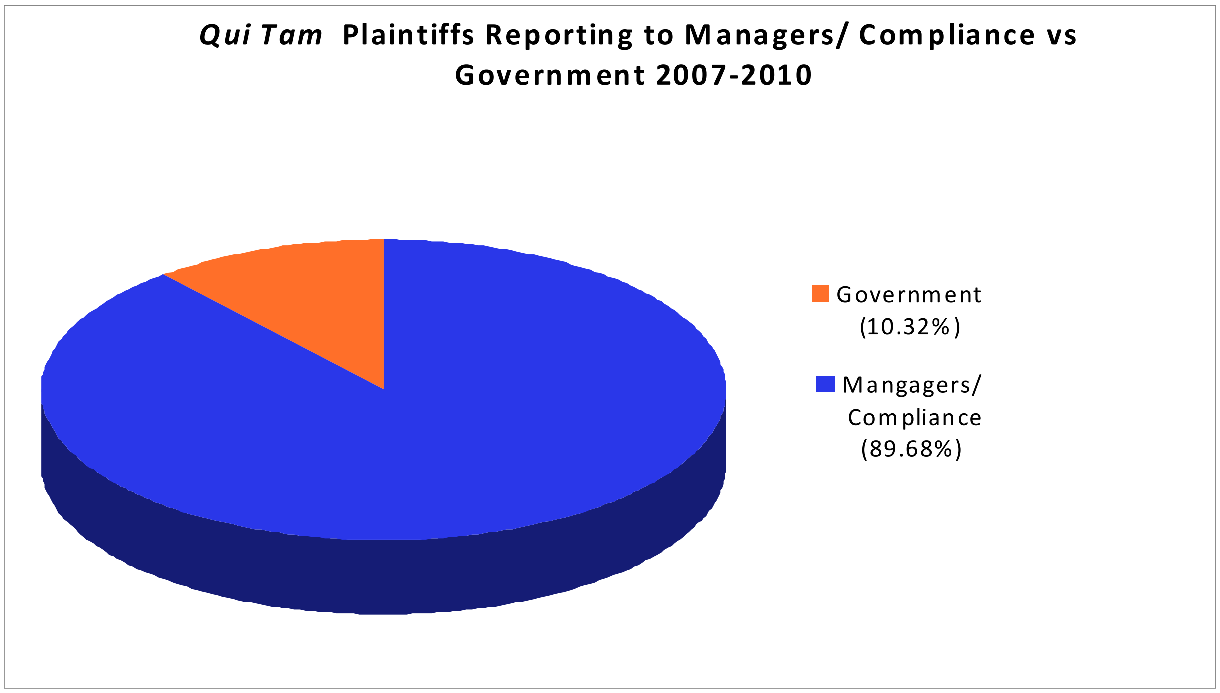
Below are the actual reporting characteristics of all employee reporting behavior.



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

Impact of *Qui Tam* Laws on Internal Reporting

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



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.

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

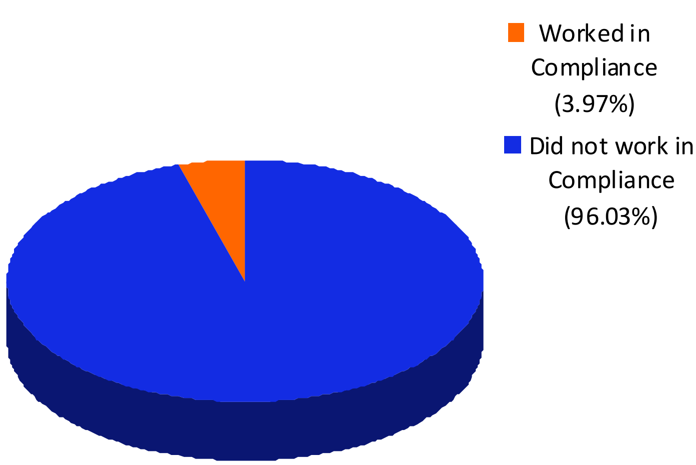
The *qui tam* reward provision of the False Claims Act has existed for more than 20 years and has resulted in numerous large and well-publicized rewards to whistleblowers. However, contrary to the assertions by corporate commenters, the existence of this strong and well-known *qui tam* rewards law has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

Impact of *Qui Tam* Laws on Compliance Reporting

- 3.97% of Plaintiff Employees worked in compliance
- Only 1 Plaintiff Employee contacted a Government Agency without first raising the concern within the corporation

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

Participation of Compliance Employees in *Qui Tam* Reward Cases



The fact that compliance officials could learn of frauds, and file *qui tam* lawsuits to obtain significant monetary rewards had no impact on the reporting processes of employees working in compliance departments. Only 3.97% of *qui tam* relators worked in compliance programs. There was no spike in the number of compliance-associated employees filing *qui tam* cases and there is no reasonable basis to believe that permitting employees who work on compliance to file *qui tam* suits will in any way undermine internal compliance reporting.

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

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

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

"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

Failure of Employees to Disclose Misconduct Directly to the Government Is A Significant Regulatory Concern

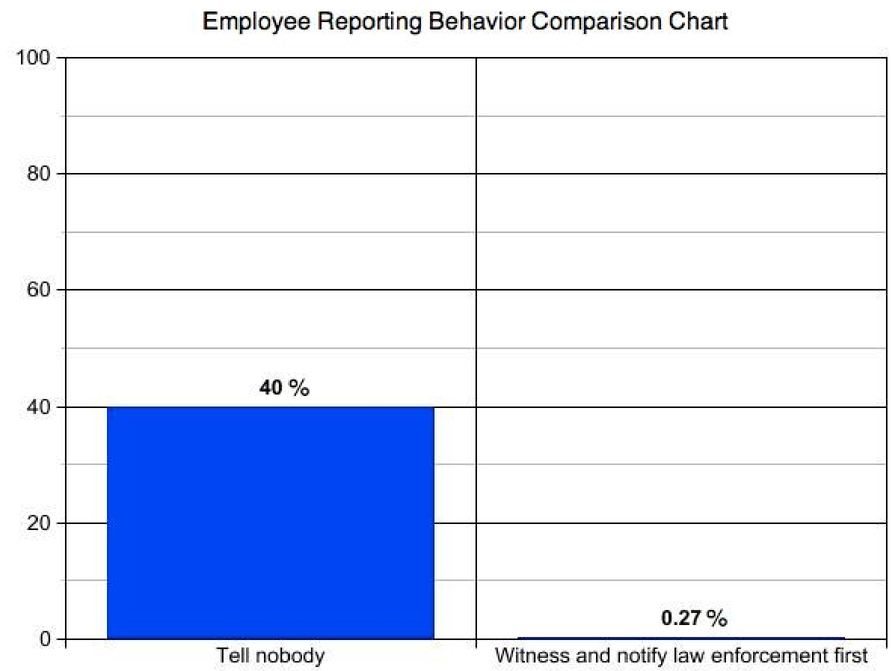
As reported by the ERC, only 2% of all employees who are willing to report misconduct, disclose that misconduct to state or federal law enforcement authorities. However, this number is inflated, as approxtimately 40% of all employees who witness misconduct never report the issues to anyone – even a supervisor.

Furthermore, of the 2% who eventually disclose allegations to federal or state law enforcment, the overwhelming majority of these empoyees initially reported the misconduct to supervisors or internal compliance programs. Specficially, the NWC's statistical review of *qui tam* cases filed under the False Claims Act demonstrated that 90% of *qui tam* relators reported their allegations internally, before contacting federal officials.

Based on these three statistical pictures of employee reporting behaivor (i.e. employees who fail to disclose misconduct to anyone; employees who report misconduct only within the company and employees who first report misconduct wihtin the company and thereafter contact state or federal law enforcement), it is evident that the overwhelming numer of employees who uncover misconduct or fraud either never report the concerns to the government. Only a tiny fraction of employees will disclose misconduct to the government first.

As set forth in the below chart only 0.27% of all employees who witness misconduct or fraud are willing to make a disclosure directly to federal or state law enforcement without alerting the potential wrong doing.

This raises a grave concern for federal law enforcement. Although in many cases it would be appropriate for an employee to work for an through a concern internally but in many other cases there would be a strong need for the federal state law enforcement to learn of these violations, confidentially and in a way to effectuate law enforcement purposes. The fact that so few employees are willing to go directly to the government is demonstrative of the existence of anti-whistleblower culture that is negatively impacting law enforcement on a daily basis.



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

The NWC agrees that "one of the critical challenges facing both E&C officers and government enforcement officials is convincing employees to step forward when misconduct occurs"[3] because 41% of all employees still do not report misconduct to anyone at all. *See* Exhibit 15.

Consequently, it is approximately 150 times more likely that an employee who witnesses misconduct and tell nobody than see misconduct will tell nobody about his or her concerns, rather than tell the appropriate law enforcement authorities first.

[3] *Quote:* Exhibit 15, page 3

"I have based [the False Claims Act] on the old fashion idea of holding out on temptation and 'setting a rogue to catch a rogue', which is the safest and most expeditious way of bringing rogues to justice."

Senator Howard,

Congressional Globe, March 1863

The False Claims Act Data Demonstrates the Importance of Modeling the SEC Program on the DOJ’s FCA Program

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 to resurrecting the *qui tam* provisions in the original 1863 act. The Act was further strengthened in 2009 and 2010 by the same Congress that enacted the Dodd-Frank Act.

The Dodd-Frank Act was modeled on this law and the SEC Inspector General even recommended following the FCA's procedures with regards to rewards programs. Objective statistics published every year by the US Department of Justice Civil Fraud Division[4] 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.

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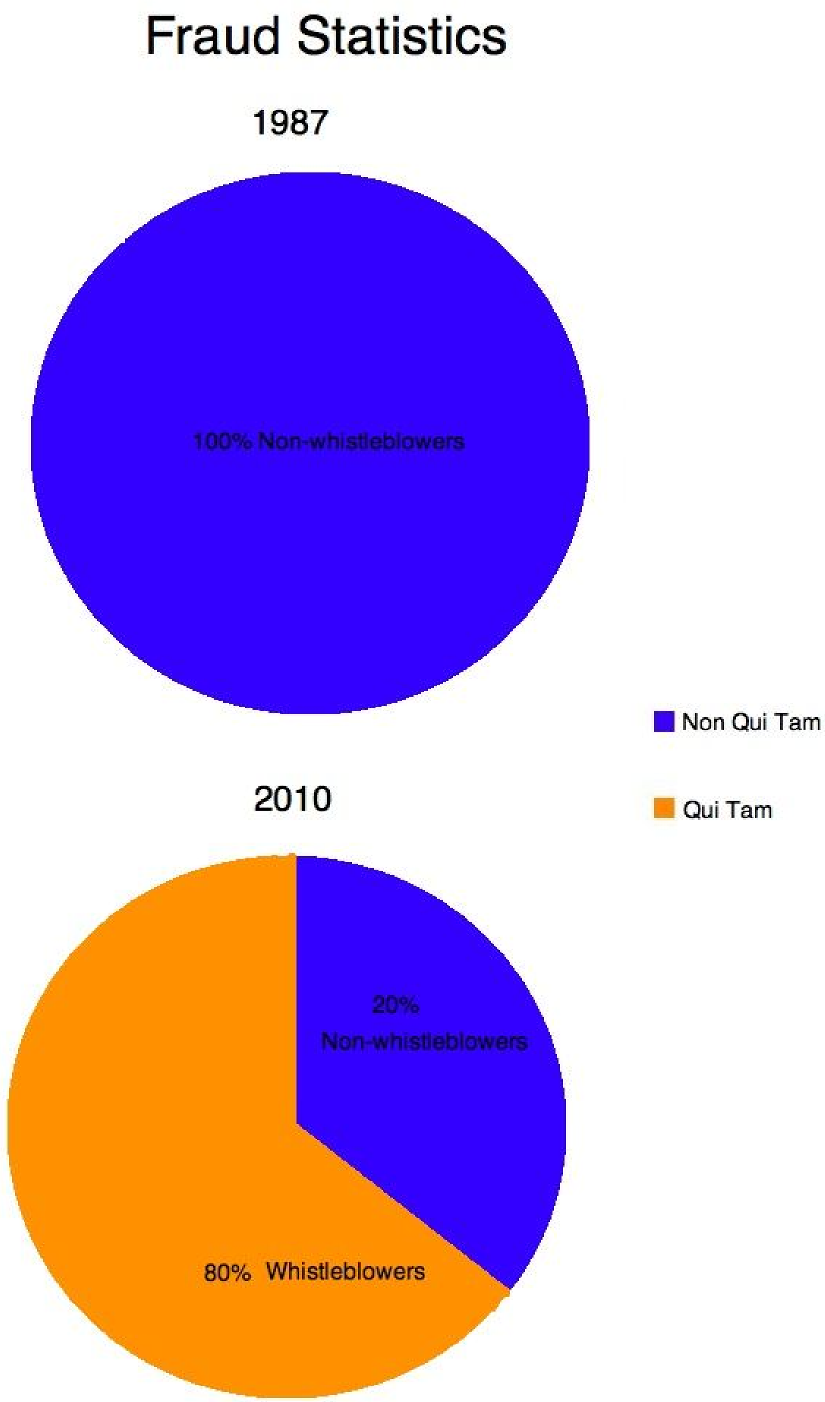
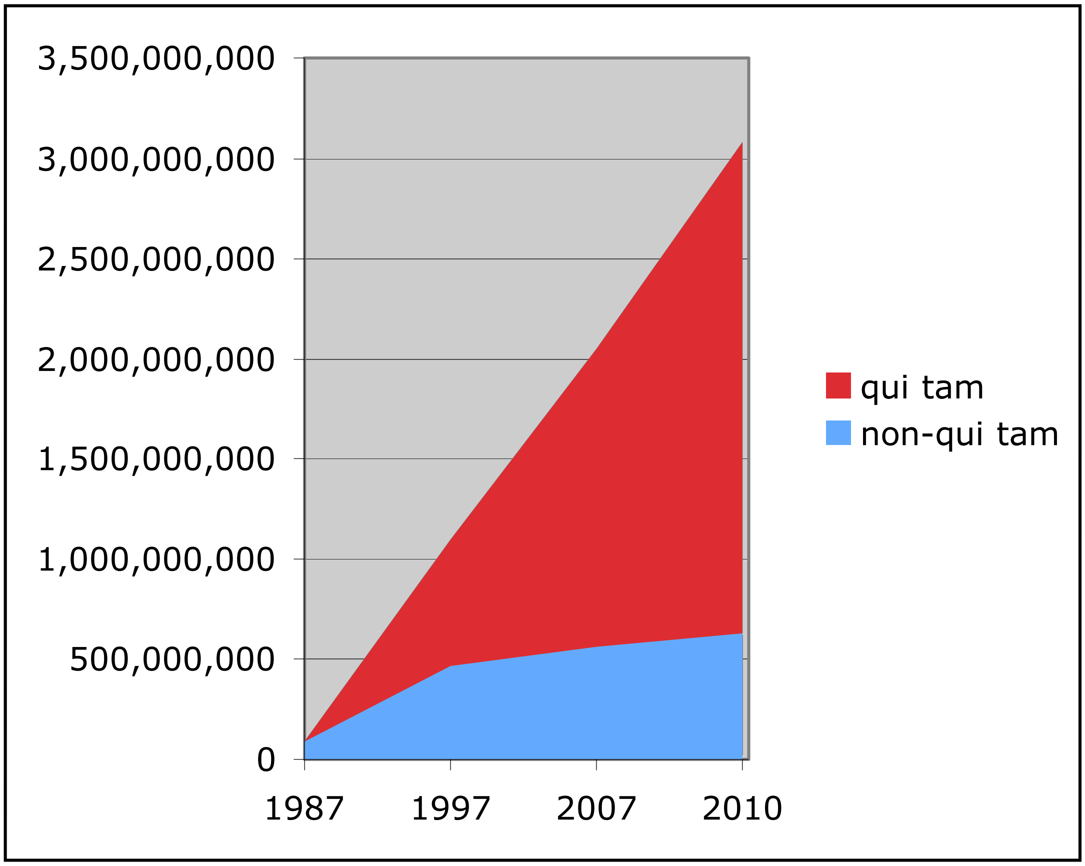
[4] Justice Department Statistics, *See* Exhibit 19



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 $3.08 billion dollars in 2010. Furthermore, it is 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 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.

The importance of using financial incentives to promote corporate fraud disclosures was underscored in a published scholarly study by Boston

University's 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 ta* 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"[5] Similar findings were made at University of Chicago's Booth School of Economics, affirming that a *qui tam* rewards program is indeed the best way to pursue workplace misconduct.

[5] Geoffrey Christopher Rapp, *See* Exhibit 17

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

ACFE,

2010 Global Fraud Study [6]

[6] Exhibit 16, page 80

Reports to Internal Compliance Must Be Fully Protected

In a December 15, 2010, letter the Association of Corporate Counsel ("Association") stated that corporate attorneys "value" "effective corporate internal compliance and repotting systems." *See* Exhibit 5, Association Letter, p. 1. They go further and argue "in-house counsel are the pioneers in establishing and facilitating corporate whistle blowing systems and safeguards." Association p. 3. The evidence does not support this claim. First, there is no support in the record that current "corporate culture" encourages and rewards employees who blow the whistle. That is why Congress enacted § 21F of the Securitas and Exchange Act -- to help create such a new culture.

Moreover, in the area of whistleblowing, in-house counsels have actively and aggressively undermined internal compliance programs for over 25 years. As early as 1984, corporations and their attorneys have consistently argued that employees who report to internal compliance programs are *not* whistleblowers and are *not* protected under whistleblower laws. One of the first such cases was *Brown & Root v. Donovan*, in which a quality assurance inspector was fired after making an *internal* complaint about a violation of law. *See* Exhibit 6, *Brown & Root v. Donovan*.

In that case, 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."

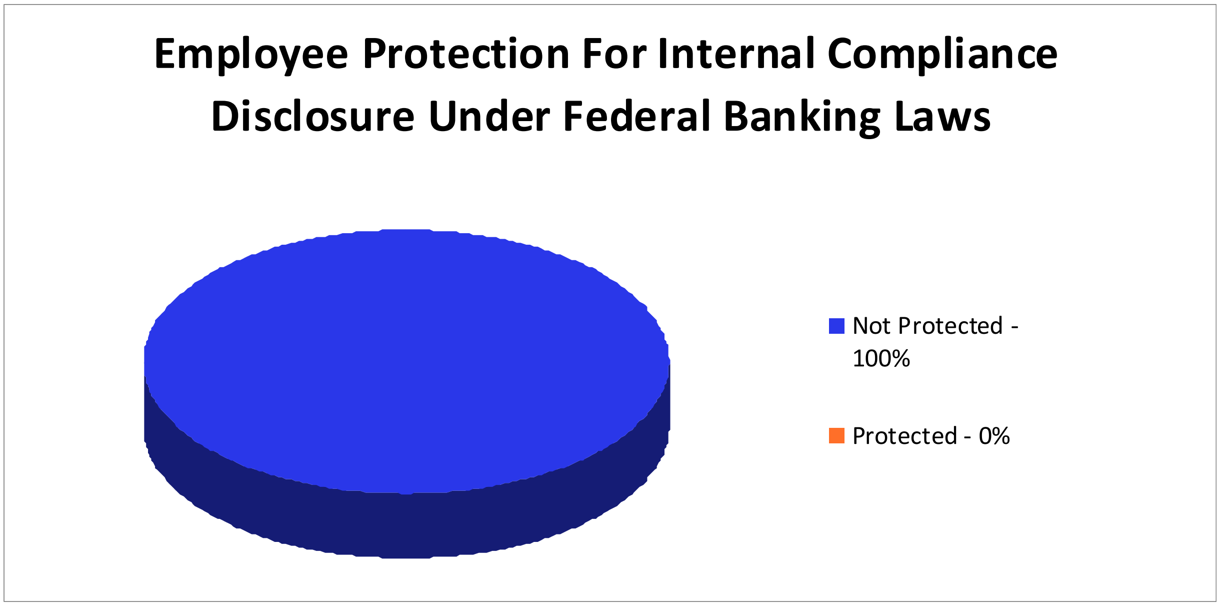
Since that date, in court after court, under law after law, corporate attorneys have aggressively argued that contacts with internal compliance programs are *not* protected activities. This is why organizations such as the National Whistleblowers Center have consistently urged Congress to amend existing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

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

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

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

Under the banking law, numerous cases have examined whether employees who report to managers or compliance departments are protected. All of the surveyed decisions demonstrate that internal disclosures are *not* protected. Banks have successfully urged court after court to undermine internal reporting structures and they have obtained rulings that reports to compliance officials about violations of law are not protected. The only protected disclosures were those made to the government. These findings are set forth in Exhibit 7, Chart of Cases Under Federal Banking Whistleblower Laws.



Our review of the False Claims Act revealed a similar result. In every case employers argued that internal reporting of concerns, 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. In fact, every court of appeals in the United States took a narrow view of protected activity, and *none* fully protected internal complaints to management or compliance programs. Below is a circuit-by circuit review of the controlling rule on internal protected disclosures under the FCA in all twelve applicable federal judicial circuits:

UNDER THE FCA, ALL EMPLOYERS ARGUED SUCCESSFULLY THAT EMPLOYEE COULD BE FIRED FOR RAISING INTERNAL COMPLIANCE CONCERNS: CIRCUIT BY CIRCUIT ANALYSIS

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.	"In his complaint, Appellant alleges he conducted the audit in his capacity as Director of Compliance. He also alleges that, in that capacity, he informed Appellee's chief compliance officer, as well as corporate managers, of his

630 (2005)	signature requirements and the results of his audit, and that he gave a presentation about the problem at the compliance retreat…plaintiff could not show retaliatory discharge where his investigations were part of his job and 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"
8th Circuit Schuhardt v. US 390 F.3d 563 (2004)	"Viable FCA action…we conclude that there is sufficient evidence that Schuhardt's activity was in furtherance of a qui tam action. Specifically, Schuhardt perceived a mass effort to modify patient records months after a procedure had occurred. She explained that doctors signed reports without reviewing files. She advised her supervisor that the activity may be fraudulent and illegal. She also mentioned to the supervisor that a government agency would forbid the practice if it was aware of it. Schuardt complained to the University over its confidential hotline. Then, when the billing practice remained unchanged, she copied files that she believed to be evidence of fraud"
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"

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

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

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

* All regulated companies shall be strictly prohibited from retaliating against any employee who makes a disclosure to an Audit Committee or a compliance program concerning any potential violation of law or any "suspicious activities". This is consistent with the recommended standards of the Association of Certified Fraud Examiners. *See* Exhibit 9, Excerpts from the ACFE's 2010 "Report to the Nations on Occupational Fraud and Abuse";

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

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

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

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

The SEC Should Adopt the Federal Acquisition Regulation Rules for Corporate Compliance

Both the Commission and the regulated community have strongly asserted that effective internal compliance programs are important in guarding against fraud. However, it is well-documented that existing standards for corporate compliance programs are ineffective.

For example, the Rand Center for Corporate Ethics and Governance published "Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds: What the Policy Community Should Know," *Rand Institute for Civil Justice Center* (2009) (Michael D. Greenberg). As part of this program Rand published a paper by Donna Boehme, highly respected compliance executive and the former Chief of Compliance for BP. Ms. Boehme explained many of the problems experienced by compliance programs, and why these programs fail. She understood that the lack of commitment and the failure to create strong policies often resulted in these programs serving as "window dressing." *See* Exhibit 10, Boehme Paper.

Ms. Boehme recommends a set of specific features that the Commission should consider when determining whether or not a company has in place an effective compliance program. 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 lawbreaking

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.

In the context of the False Claims Act, the United States took steps to ensure that compliance programs moved from simply being "window dressing" to becoming more substantive tools in the anti-fraud program. The United States determined that existing compliance programs were not effective, and instituted rulemaking proceedings within the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council to mandate stronger and more ethical compliance programs. While these rulemaking applications were pending, Congress enacted Public Law 110-252, Title VI, Chapter 1, that required the Councils to implement new compliance rules consistent with the applications that had been filed by various federal agencies.

On November 12, 2008, the United States published these final rules, entitled, "Federal Acquisition Regulation; FAR Case 2007-006, Contractor Business Ethics Compliance Program and Disclosure Requirements," *See* Exhibit 18. These rules establish reasonable ethical standards for compliance programs that have responsibility for reviewing compliance with federal contracts. As part of the present rulemaking process, the SEC should adopt these standards and issue a Final Rule requiring the regulated community to implement compliance programs that follow these rules.

Significantly, the FAR Case 2007-006 rules explicitly cover all violations of the False Claims Act. In enacting these rules, the United States did not undermine the *qui tam* provisions of the FCA, and did not place any limits on employees filing FCA complaints. There is no requirement that employees report their concerns to the new mandated compliance programs, and there is no limit on *qui tam* rewards for employees who exercise their right to report concerns directly to the Justice Department.

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

The Sarbanes-Oxley Act Prohibits the SEC from Adopting Rules that Could Interfere with Whistleblower Disclosures

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

In its December 15, 2010 letter to the SEC, the Association of Corporate Counsel raised a concern that the final Dodd-Frank Act rules could "undermine corporate compliance regimes." *See* Exhibit 1, Association Letter, p. 4. The Association pointed to the various internal corporate reporting requirements in the Sarbanes Oxley Act, as a justification for this "principle." *Id.*, p. 2.

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

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

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

18 U.S.C. § 1513(e).

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

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

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

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

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

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

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

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

The SEC Should Adopt the Recommendations Made by the Inspector General

On March 29, 2010, the SEC's Office of Inspector General (OIG) published a comprehensive analysis of the SEC's pre-Dodd-Frank whistleblower rewards program. This report is hereby incorporated in its entirety into this rulemaking submission. *See* Exhibit 11, "Assessment of the SEC's Bounty Program".

The OIG carefully studied the SEC's past practices in processing whistleblower reward-based tips in light of its understanding that proposals were pending in Congress to upgrade the rewards program. The OIG made nine specific recommendations. The SEC Enforcement Division approved all of these recommendations. *See* Exhibit 12, SEC Enforcement Division Memorandum.

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

All of the recommendations of the OIG should be incorporated into the Final Rule.

OIG Recommendation #1: Public outreach concerning the existence of the SEC bounty program. The Final Rule should implement this recommendation. We propose the following: All regulated companies shall be required to prominently post notice of the SEC's § 21F program, informing employees of their right to file claims directly with the SEC, and their right to file such claims anonymously.

Regulated companies shall also be required to conduct annual trainings that inform employees of their rights under §21F, including the anti-retaliation provisions.

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

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

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

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

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

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

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

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

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

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

OIG Recommendation # 8: Incorporate the best practices from the Department of Justice and the Internal Revenue Service. This is perhaps the single most important recommendation. Under the False Claims Act, the Department of Justice has significant experience in working with whistleblowers in a reward-based program. Under the FCA best practices have been developed, and numerous issues have been resolved either by a court or by Congress when it amended the law in 1986, 2009 and 2010. These precedents and policies should form the basis of the SEC program. The Proposed Rule, in many ways, tries to cover old ground already carefully reviewed under the FCA. These precedents should, for the most part, be followed. In regard to the IRS program, the IRS has implemented a "user friendly" application and follow-up procedure. These can serve as further models for the SEC rule.

The SEC Should Adopt the Leahy-Grassley Recommendations

After the enactment of the Sarbanes-Oxley Act, the two principal sponsors of the whistleblower provisions in that law wrote a letter to the then-Chairman of the SEC, Mr. William Donaldson. *See* Exhibit 13, Leahy-Grassley Letter. Senators Patrick Leahy and Charles Grassley set forth specific proposals for SEC action to protect whistleblowers. The Leahy-Grassley recommendations were fully supported under law and policy. Unfortunately, the SEC did not properly respond to these recommendations, and the potential enforcement powers implicit or explicit in the Sarbanes-Oxley Act were lost. This significantly contributed to the failure of the SOX whistleblower provisions over the next six years.

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

Conclusions and Recommendations for Final Rule

Conclusion #1: The existence of a strong *qui tam* reward program will have no impact on internal employee reporting activities.

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

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

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

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

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

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

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

Conclusion #9: The SEC should implement rules consistent with the recommendations made by Chief Compliance Officer Donna Boehme.

Conclusion #10: Any action by an employer that in any way limits an employee's right or incentive to contact the SEC, regardless of whether or not the employee first utilized a compliance program, is highly illegal and constitutes an obstruction of justice.

Conclusion #11: The SEC's rules cannot create any disincentive for employee to contact the SEC or file claims directly with the SEC. The SEC's rules must be neutral in regard to the reporting mechanism an employee uses to report a potential violation. Whether an employee files an anonymous claim with the SEC, a non-anonymous claim directly with the SEC and/or whether an employee utilized an internal compliance program, must have no impact whatsoever on the right of an employee to file a claim and/or the amount of reward given to the employee.

Conclusion # 12: The SEC cannot create any disincentive for reporting, or restrict the class of persons who are eligible for a reward, by creating any form of exclusion for a recovery that is not explicitly authorized under the Act.

Conclusion # 13: The SEC must institute a rule similar to 10 CFR 50.7.

Research Methodology

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

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

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

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

Study Based on Cases Decided After the Existence of Rewards Would be Known Within the Relevant Employee-Employer Markets. The FCA has been actively used by whistleblowers since 1986 (when the Act was amended and modernized). The study limited its review of employee cases to those decided from January 1, 2007 to 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 Exhibits listed throughout this Report.

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 Exhibit 14, 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).

This report was prepared under the direction of Stephen M. Kohn, Executive Director of the National Whistleblowers Center. The National Whistleblowers Center would like to recognize the contributions of Director of Advocacy and Development Lindsey M. Williams and Staff Attorney Erik D. Snyder for his legal research, analysis, and editorial contributions to this report. In addition, the National Whistleblowers Center would like to thank Law Clerks Zach Chapman, Greg Dobbels, Katie Mee, Andrew Palmer and David Simon for their assistance in reviewing the False Claims Act cases.

About the National Whistleblowers Center

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

Exhibit List

Exhibit 1, *Kansas Gas & Electric v. Brock*,
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/kansasgascase.pdf

Exhibit 2, Special Report,
http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/newenglandjournalmedicine.pdf

Exhibit 3, Chart of Employee Reporting: Internal vs. External,
http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/employeereportinginternalvsexternal.pdf

Exhibit 4, Chart of Compliance Employee Reporting,
http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/compliancereportingchartfinal.pdf

Exhibit 5, Association Letter,
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/assoccorpcounselletter.pdf

Exhibit 6, *Brown & Root v. Donovan*,
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/brown&rootv.donovan.pdf

Exhibit 7, Chart of Cases Under Federal Banking Whistleblower Laws,
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/casesunderfederalbankingwblaws.pdf

Exhibit 8, Chart of Cases in which Corporations Argued that Internal Reporting was not Protected,
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/casesinternalreporting.pdf

Exhibit 9, Excerpts from the ACFE's 2010 "Report to the Nations on Occupational Fraud and Abuse", http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/acfe2010selectedpages.pdf

Exhibit 10, Boehme Paper,
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/boehmereport.pdf

Exhibit 11, "Assessment of the SEC's Bounty Program",
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/igreportpriorsecwbprogram.pdf

Exhibit 12, SEC Enforcement Division Memorandum,
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/secenforcementletter.pdf

Exhibit 13, Leahy-Grassley Letter,
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/donaldsonletter11.9.04.pdf

Exhibit 14, Chart of Non-Applicable Cases Excluded from Survey,
http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/non-applicablecasesexcludedfromsurvey.pdf

Exhibit 15, ERC's "Blowing the Whistle on Workplace Misconduct",
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/ercwhistleblowerwp.pdf

Exhibit 16, ACFE's "2010 Report to the Nations",
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/acfe2010report.pdf

Exhibit 17, BU Law Journal's "Beyond Protection: Invigoration Incentives For Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers",
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/bulawreviewwbincentives.pdf

Exhibit 18, FAR Regulations
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/farregulations.pdf

Exhibit 19, Department of Justice Fraud Statistics
http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/falseclaimstats.pdf