M E M O R A N D U M

To: File No. S7-33-10

From: Stephen L. Cohen
Associate Director, Division of Enforcement

Date: March 31, 2011

Re: Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934

On March 28, 2011, Chairman Mary Schapiro, Chairman's Counsel Matthew Strada, Sean McKessey, Chief of the Whistleblower Office and I met with the following individuals: Stephen M. Kohn (Executive Director, National Whistleblowers Center), Michael D. Kohn (NWC President), Lindsey M. Williams (NWC Director of Advocacy and Development), Gerard M. Waites (O'Donoghue and O'Donoghue LLP) and Randy Defrehn (Executive Director of the National Coordinating Committee of Multi-Employer Plans). The participants discussed the Commission's proposed rules implementing the whistleblower provisions of Section 21F of the Securities Exchange Act of 1934 as reflected in the attached agenda. All of the areas of discussion are covered by the comments already posted to the public comment file or in documents presented at the meeting and posted to the File with this memorandum.

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Agenda for Meeting with Chairman Schapiro

March 28, 2011

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

II. Overview of *qui tam* – Michael D. Kohn, NWC President

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

IV. Overview of concerns from National Coordinating Committee of Multi-Employer Plans (NCCMP) - Gerard M. Waites, O'Donoghue and O'Donoghue LLP and Randy Defrehn, NCCMP Executive Director

V. Recommendations for Rule changes

February 10 | 2011

Special SEC Briefing:

Dodd-Frank Whistleblower Rules and Procedures

The National Whistleblowers Center

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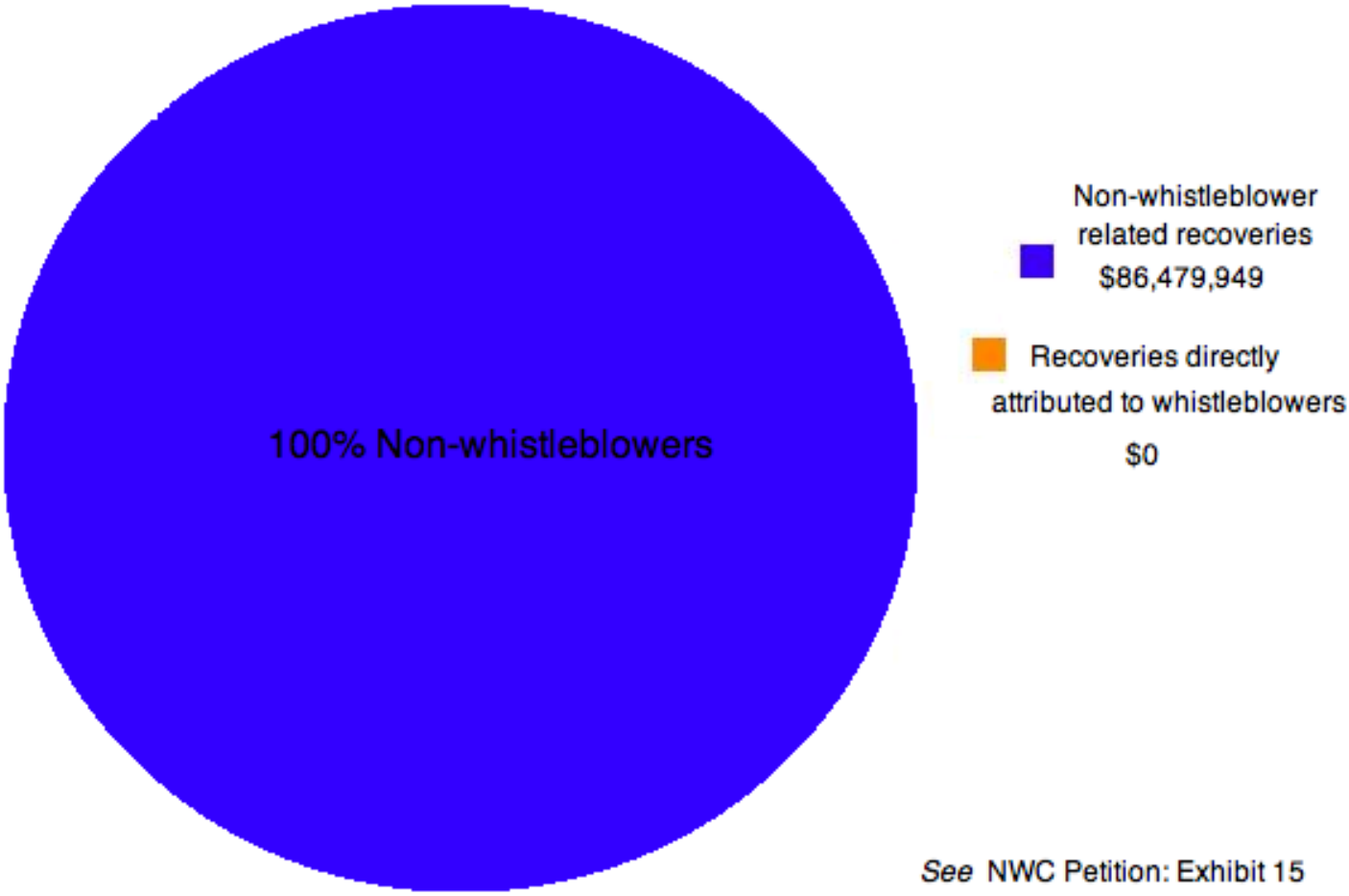
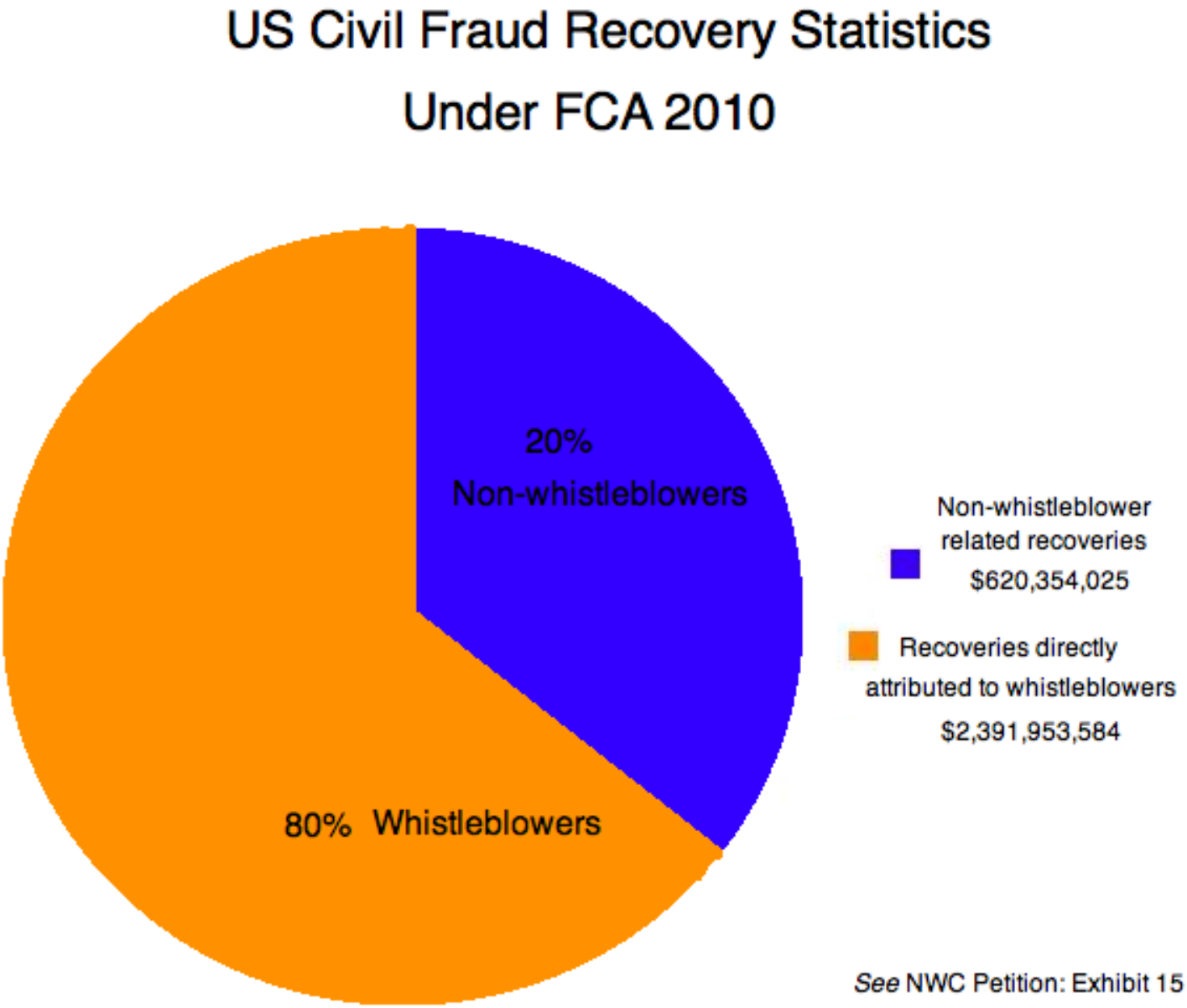
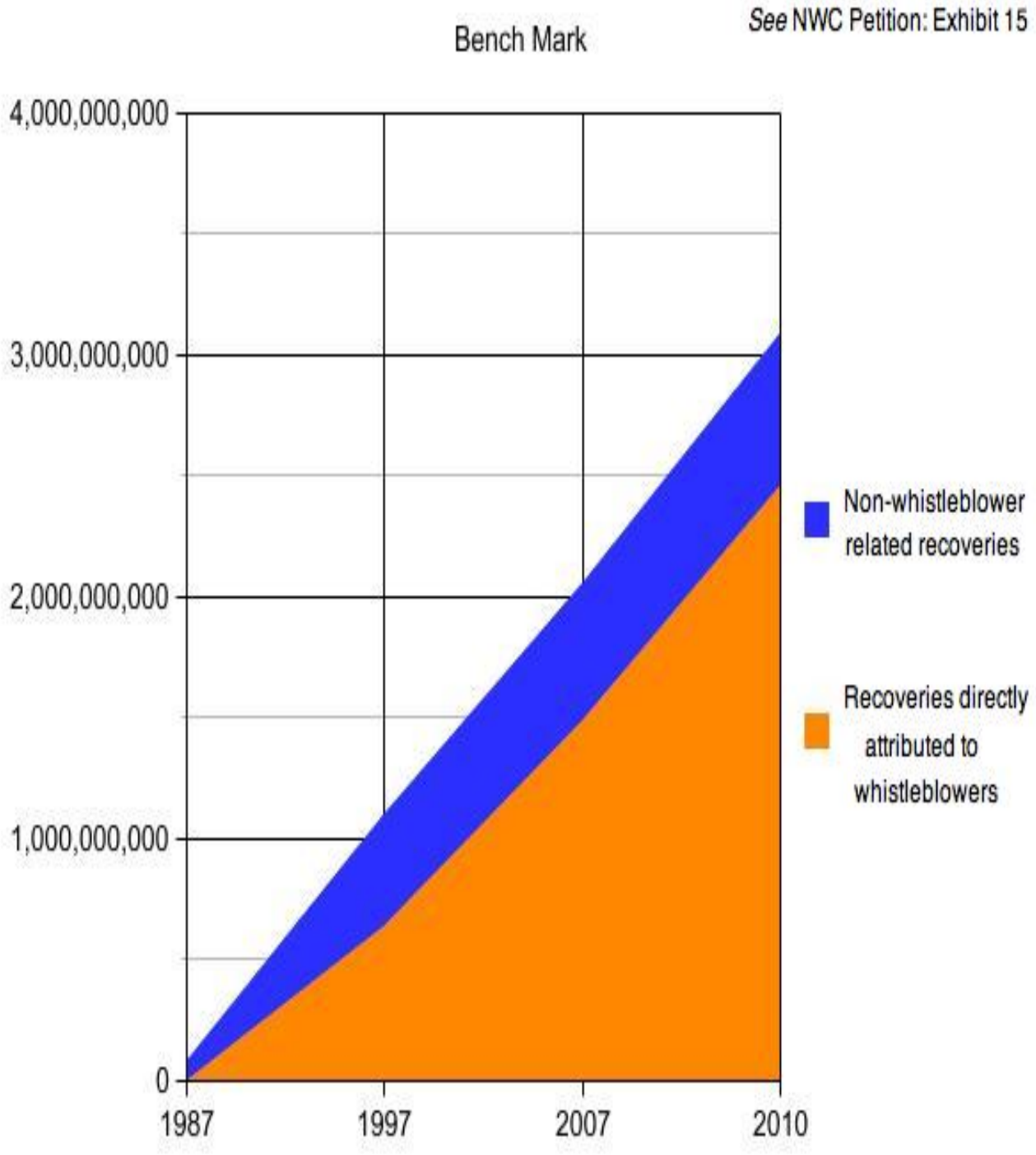
Part I:
The False Claims Act Is the Most Successful Model for Improving the Disclosure of Fraud

US Civil Fraud Recovery Statistics Under FCA 1987



See NWC Petition: Exhibit 15


US Civil Fraud Recovery Statistics
Under FCA 2010
20%
Non-whistleblowers
80% Whistleblowers
Non-whistleblower related recoveries
$620,354,025
Recoveries directly attributed to whistleblowers
$2,391,953,584
See NWC Petition: Exhibit 15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1987
1997
2007
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

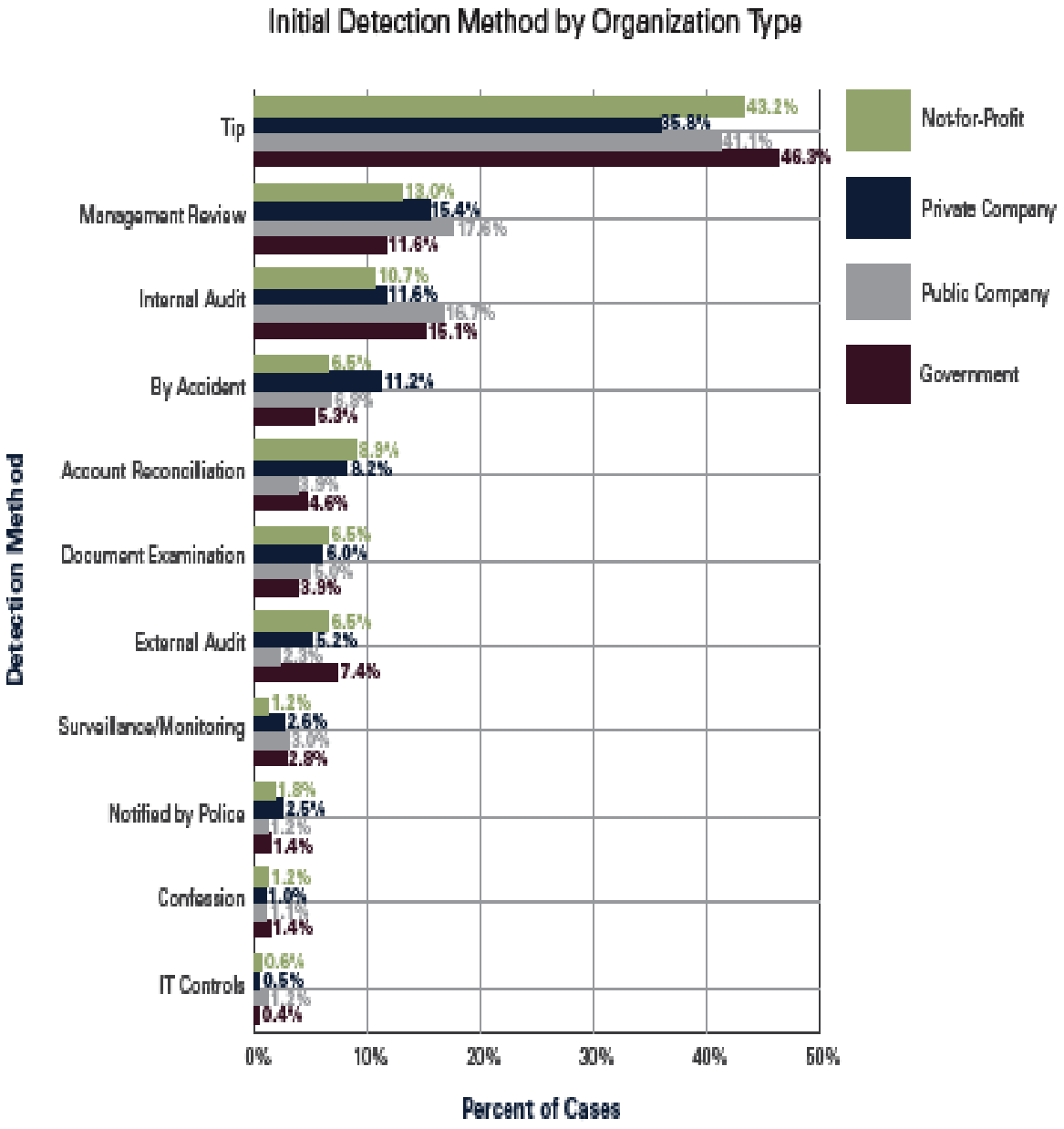
"Incorporate best practices obtained from DOJ and the IRS into the SEC bounty program with respect to bounty applications, analysis of whistleblower information, tracking of whistleblower complaints, recordkeeping practices, and continual assessment of the whistleblower program."

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?



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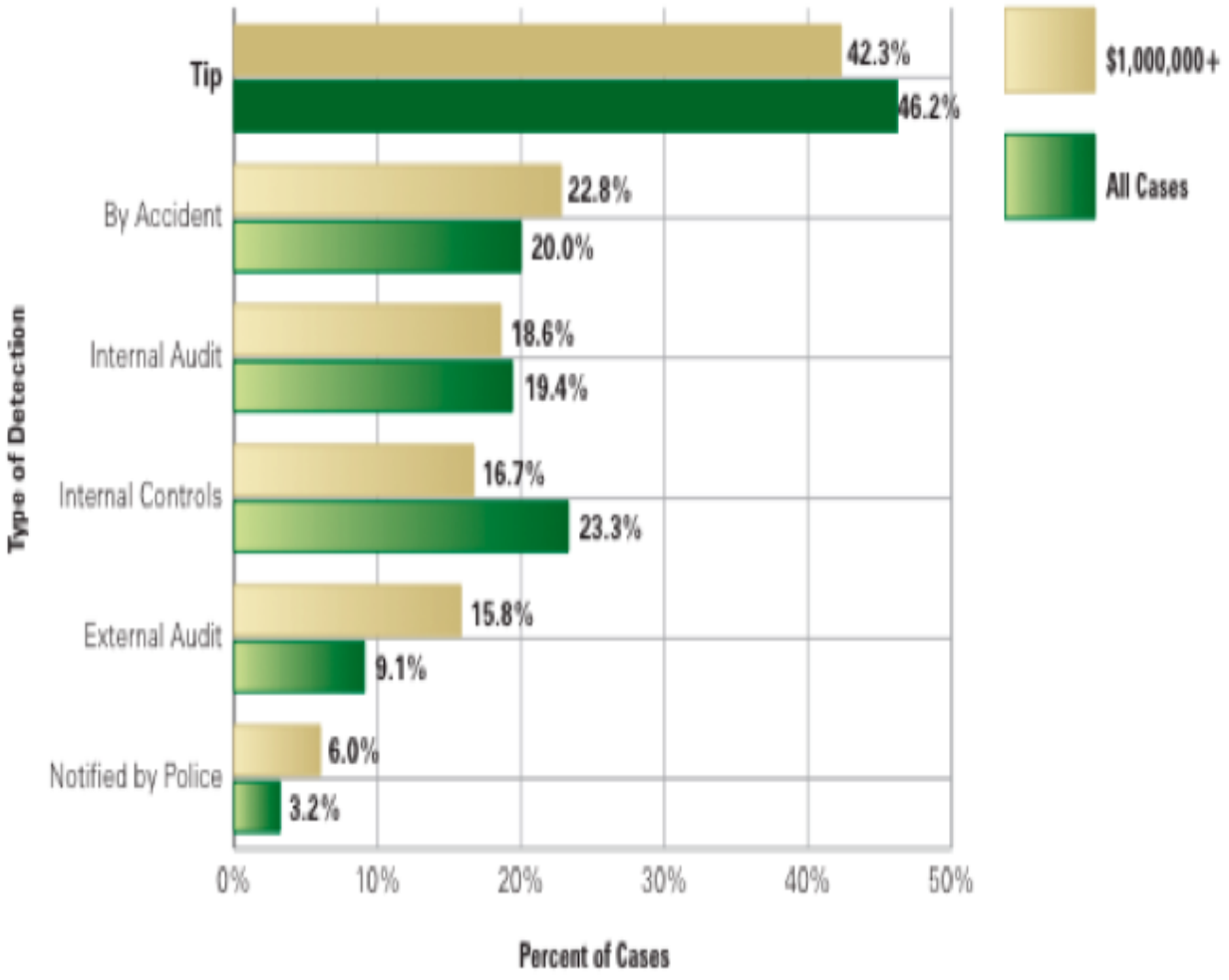
[1] Source: Association of Certified Fraud Examiners, 2010 Global Fraud Study (page 19)

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

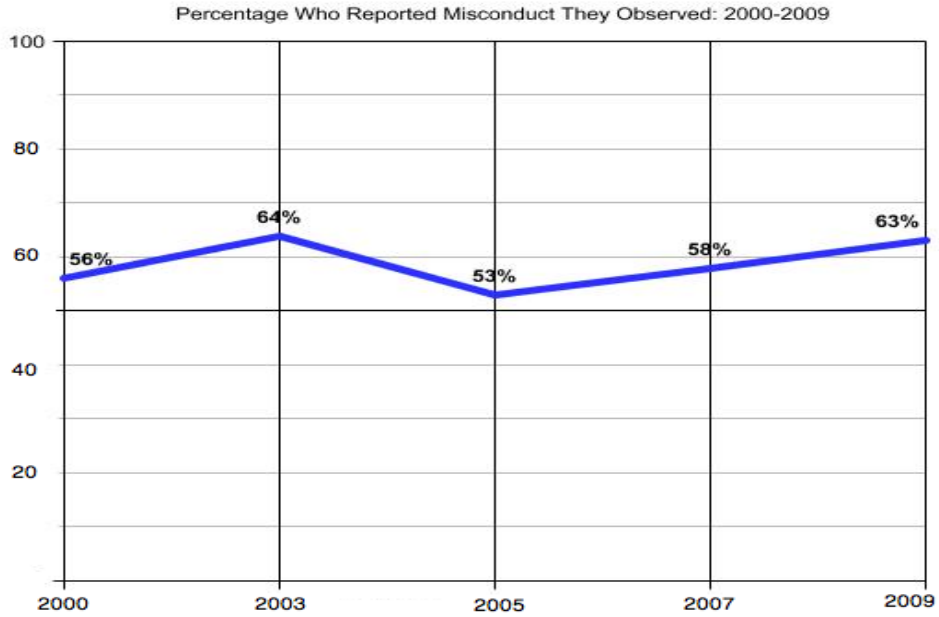
Part III:

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]

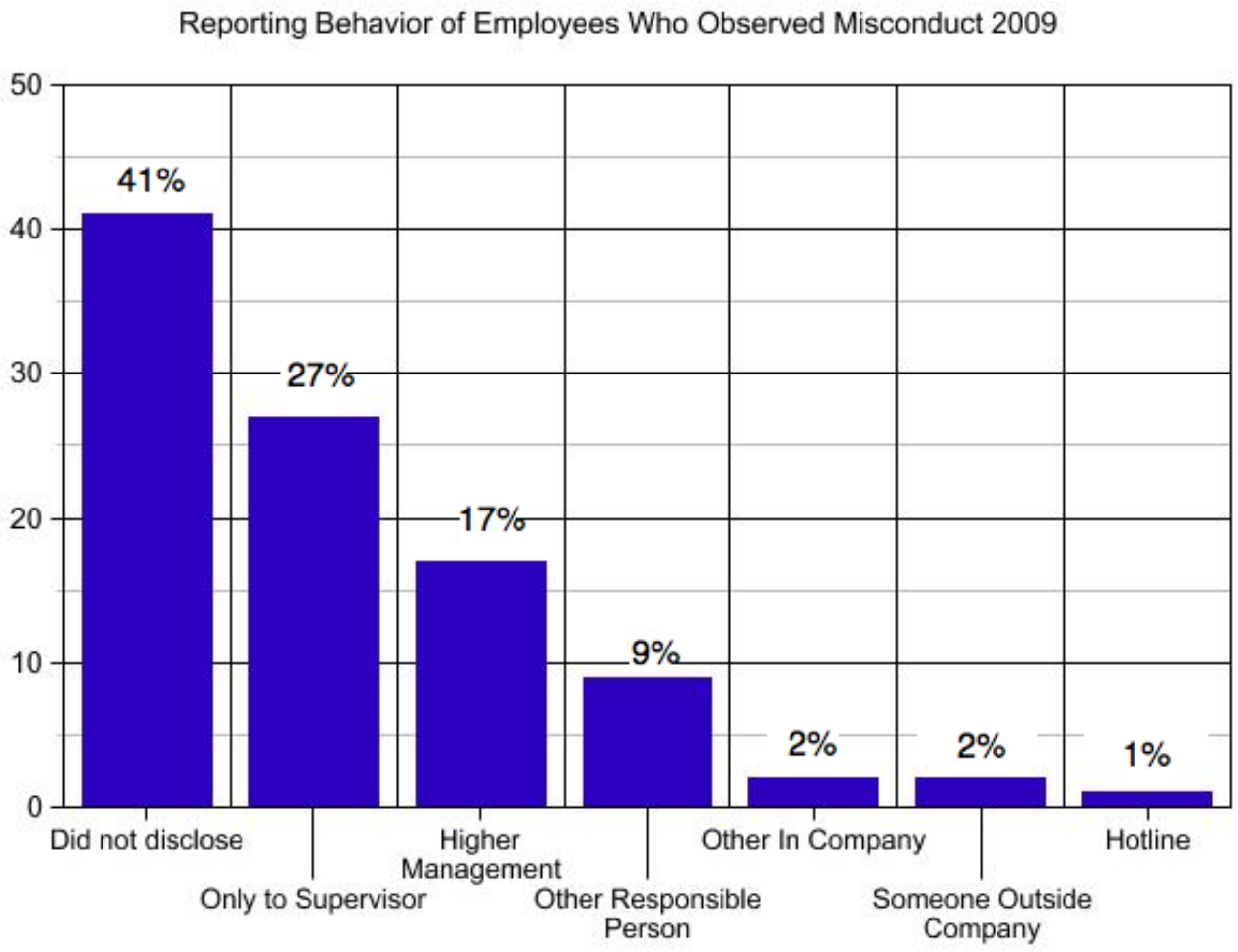
As set forth in the following chart, approximately 40% of employees who witness fraud or misconduct do not report this misconduct to *anyone*. The percentage of employees who report has somewhat fluctuated over the ten year period surveyed by ERC and averages 41% of employees not reporting misconduct 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,

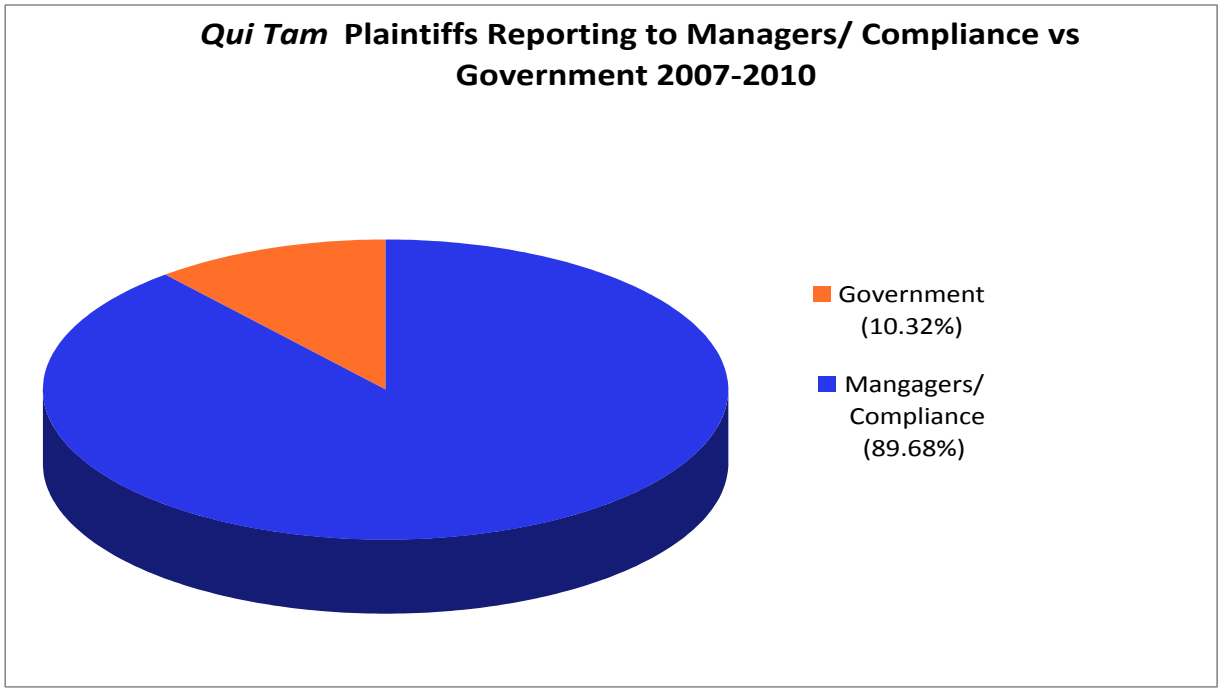
December 2010

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.

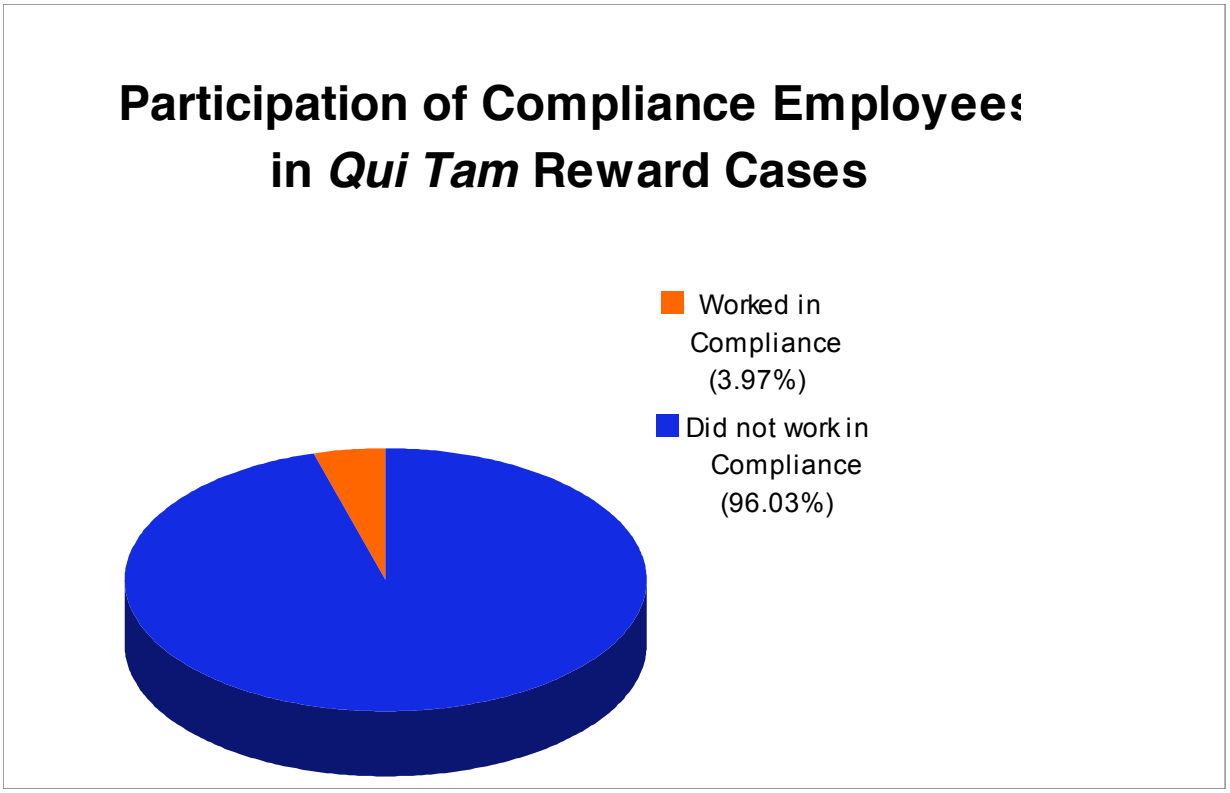
Moreover, many of the cases in the NWC's study where employees reported directly to the government involved very special circumstances. For example, in one case, the initial report to the government was testimony before a Grand Jury. It clearly would have been inappropriate for that employee to discuss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

NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

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December 17, 2010

Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934 [File Number S7-33-10; RIN 3235-AK78]

Dear Ms. Murphy:

On behalf of the National Coordinating Committee for Multiemployer Plans (NCCMP), we submit these comments in response to the Securities and Exchange Commission's ("Commission") Proposed Rule for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934.

The NCCMP is the only national organization devoted exclusively to protecting the interests of the approximately ten million workers, retirees, and their families who rely on multiemployer plans for retirement, health and other benefits. Our purpose is to assure an environment in which multiemployer plans can continue their vital role in providing benefits to working men and women. The NCCMP is a nonprofit organization, with members, plans and plan sponsors in every major segment of the multiemployer plan universe, including in the building and construction, retail food, trucking and service and entertainment industries.

Multiemployer plans are institutional investors that rely heavily on investment returns to provide promised pension and welfare benefits to the millions of workers who rely on those benefits. Single employer plans rely just as heavily on investment returns but those plans have a greater ability to adjust contributions, and to a limited extent benefits, in response to market fluctuations. Contributions to and often benefits of multiemployer plans are collectively bargained in bargaining cycles may be from two (2) to five (5) years. Therefore, multiemployer plans have less ability than single employer plans to adjust to market fluctuations.

Market fluctuations, even extreme fluctuations, are part of the risk of investing. But neither institutional nor individual investors should be subject to additional market risk created by violations of the securities laws. These proposed regulations can provide additional protections to institutional and individual investors and to the pension benefits and health benefits provided by multiemployer plans.

I. The Importance of the Proposed Rulemaking

The recent financial crisis has demonstrated the painful and calamitous effects that are felt by all Americans when the federal securities laws are evaded. These laws play a vital role in protecting the American economy and safeguarding the decision of both large and small investors to place their money into the hands of companies who then use it to create jobs and increase the wealth of its officers and employees, in addition to its shareholders. However, not all companies have played by the rules. The most notable and flagrant examples in recent years have been the widespread accounting fraud that led to the bankruptcy of Enron and the massive ponzi scheme orchestrated by financier Bernard Madoff. Unfortunately, the Enron and Madoff scandals may just be the tip of the iceberg of corporate malfeasance in which almost all Americans have felt the impact.

On July 21, 2010, the *Wall Street Reform and Consumer Protection Act* (also referred to as the "Dodd-Frank" law after its chief sponsors) was enacted into law putting into place a number of new safeguards for policing the financial industry and preventing another economic collapse from occurring.

A key problem with combating acts of theft and fraud is that such conduct is, by nature, conducted in secret, deliberately hidden from government regulators, investors and public view. Without detection, an Enron or Madoff type networks of fraud may be launched, expanded and perpetrated into multi-billion dollar schemes until it is too late. The harm done shakes our financial and economic system to the core and leads to literally tens of billions of dollars of losses to individual and institutional investors, including pension funds created to protect the life-savings of millions of working families. The latest scandals very nearly caused complete economic collapse for many of their victims, including a number of multiemployer pension funds which were heavily invested in them.

One of the few ways to expose such conduct is to motivate individuals with knowledge of it to step forward and speak out. Some will do this simply as a matter of conscience. But those persons are often concerned, and rightfully so, about threats to their jobs and livelihoods, which can be protected by anti-retaliation measures provided under whistleblower protection laws, measures which fortunately were included in the Dodd-Frank Act. In addition, however, experience with the federal False Claims Act, also known as the Qui Tam Act, has demonstrated that to effectively fight serious fraud the indisputably best tool is a provision that provides for a reward to individuals, i.e., whistleblowers, who risk their jobs, future careers and even their lives, by having the courage to detect, expose and report illegal conduct to the proper authorities. Recognizing this reality, the Dodd Frank Act, in another prudent move, provides that substantial financial rewards should be provided to such persons

Thus, the whistleblower protection and reward provisions adopted by Dodd-Frank were envisioned to create a strong, effective, and user-friendly system to combat serious wrongdoing by encouraging whistleblowers to disclose valuable information. Specifically, Section 922 of Dodd-Frank directs the Securities Exchange Commission to establish a new awards program that would provide whistleblowers who voluntarily report original information that leads to a successful enforcement action in which the Commission obtains monetary sanctions of over

$1,000,000 a bounty of between 10-30% of the amount collected. This provides a concrete and tangible award for whistleblowers and will encourage the reporting of valuable information that could stop a securities violation before it escalates into a massive fraud that could cost investors tens of millions of dollars.

The Commission was authorized under Dodd-Frank to issue regulations to implement this new whistleblowers award program. It is essential that the new rules faithfully follow the statute they are intended to serve and that the whistleblower protection features of the law are implemented in the most effective manner possible to fully protect investors and the general public. The recommended reforms to the proposed rules set forth in these comments are designed to help realize these goals. We appreciate the thoughtfulness of the Commission in its proposed rules but also believe that substantial changes need to be made for the final regulations to be true to the requirements specified by the statute and for it to be effectively implemented to protect investors and the American people.

II. Overview of NCCMP Recommendations to Proposed Rulemaking

We suggest that the Commission adopt the seven recommendations below that we believe properly reflect the Congressional intent behind Section 922 of Dodd-Frank. If adopted these recommendations will help to ensure that the newly implemented whistleblower award program is able to most effectively combat serious wrongdoing by the financial industry to protect the hard-earned investment dollars of millions of Americans.

1. **Streamline Whistleblower Application Process:** The Commission should adopt a process similar to the whistleblower process adopted by the Internal Revenue Service, which is more user-friendly and provides an efficient system for rewarding whistleblowers who report tax law violations. The proposed rule currently requires a whistleblower to submit three (3) separate forms and also track the progress of an action that was initiated by the original information that he or she provided in order to claim an award.

2. **Limit Excluded Classifications Per Statute:** In Section 922 of Dodd-Frank, Congress provides a specific list of certain limited categories of individuals who have a legal responsibility to disclose information pertaining to securities violations and excludes them from participating in whistleblower recoveries. (Such persons cannot be considered to be making "voluntary" disclosures as required by the Act). Allowing these exceptions to be expanded in too broad a fashion would undermine the statute's central purpose of uncovering fraud and abuse. Thus, the Commission should not adopt a blanket exclusion of "*other similarly situated persons*" as proposed, but should institute a case-by-case analysis as to whether a potential whistleblower should be precluded from a recovery due to a pre-existing legal duty.

3. **Mandatory Self-Reporting of Violations to the Commission:** The Commission should ensure that the internal compliance programs are as effective as possible by requiring that any violation of the securities laws by an internal compliance program be reported to the Commission. Moreover, companies should be obligated to adopt more stringent internal

compliance programs similar to those required by other federal agencies. In addition, a person who reports a potential violation through an internal compliance program that leads to a successful action by the Commission should be given up to one (1) year from the date of making a report to the internal compliance program to file an application with the Commission to participate in a whistleblower recovery.

4. **Effective Use of Internal Compliance Programs:** A company's internal compliance program is not a surefire method of preventing or uncovering securities violations (which have, in fact, continued to increase even as more companies have adopted such programs). Therefore, the Rule should not unfairly limit recoveries of whistleblowers that bypass an internal compliance program and choose to go directly to the Commission with violation disclosures, but should protect the recovery rights of such persons since there could likely be reasonable grounds for not using an internal compliance program (such as a legitimate fear of retaliation, etc.).

5. **Regulatory Violation for Whistleblower Retaliation:** The Commission should demonstrate its commitment to preventing retaliation against whistleblowers by finding that any company that retaliates against a whistleblower commits *a separate and independent violation* of the securities laws that subjects the company to the maximum penalties for such violation provided for under the law, up to and including a delisting of the company.

6. **Public Disclosure of the Rights of Whistleblowers:** The effectiveness of the Commission's award program is dependent upon all potential whistleblowers knowing that it exists and the benefits that could come from reporting and disclosing violations of the securities laws. The Commission should establish simple and easy to understand materials that companies must distribute to their employees fully informing them of their rights as a potential whistleblower.

7. **Establish Reasonable Whistleblower Appeal Rights:** A whistleblower who provides information that the Commission decides not to pursue should be given the opportunity to appeal the decision declining to pursue the alleged violation to the Commission's Office of Inspector General. Otherwise, wholly legitimate claims that could expose fraud and other serious violations could be dismissed without appropriate investigation.

III. NCCMP Recommendations to Proposed Rulemaking

The reasons why we are suggesting that the Commission adopt these seven recommendations are discussed in greater detail below.

1. **Streamline Whistleblower Application Process:**

The most effective means for the Commission to expand the number of individuals who take advantage of the awards program and disclose information pertaining to potential violations of the securities laws is to make the process as simple as possible. The proposed regulations require the whistleblower to complete "a two-step process" for submitting original information

and making a claim for an award. (Proposed Rule ("P.R.") 60.) The whistleblower must submit to the Commission both a form detailing the original information that led to a successful enforcement action and also a declaration form attesting to the veracity of the information provided and the whistleblower's eligibility for an award. (P.R. 60.)

However, that is not the end of the process for the whistleblower. It becomes particularly onerous when the Commission requires a whistleblower to track on the Commission's website the disposition of the covered action. (P.R. 69.) Within sixty days after a notice is posted on the Commission's website, without any notification by the Commission to the whistleblower that his original information did lead to a successful enforcement action, a third form has to be submitted by the whistleblower to actually request the award that he or she is entitled to under the statute. (P.R. 70.) This is a far too complicated and burdensome process for whistleblowers to file not only a claim but also to make a separate application to receive the award. Successful whistleblower programs provide an easy process to submit a claim and are otherwise user-friendly. Whistleblowers place much at risk when choosing to disclose information of securities violations. Congress understood this when it adopted the award program and knew that it would serve a vital purpose in encouraging whistleblowers to come forward with information.

The Commission must ensure that the process is as simple as possible. There is no administrative reason why each individual who submits original information and submits a declaration form is not assigned a case number. If a claim leads to a successful enforcement action, the Commission should be able to have a record of who submitted the original information thereby eliminating the need for the whistleblower to submit another form later in the process. In particular, the sixty-day period after a notice of covered action has been listed online is far too narrow a window to allow the whistleblower to complete an application for his or her award. It creates the possibility that a whistleblower who courageously reports original information about a securities violation may unintentionally forfeit the award. This would be an absurd result under the clear Congressional mandate of Dodd-Frank. The Commission instead should implement a procedure similar to the whistleblower program established by the Internal Revenue Service for whistleblowers who report an underpayment of taxes. *See* 26 U.S.C. § 7623. In such instances, the whistleblower only has to submit IRS Form 211. *See* IRS Notice 2008-4. It is unnecessary for the whistleblower to file any subsequent forms after the IRS has concluded that he or she is entitled to an award. *Id.* There is no reason why a process that is good enough to protect the interests of taxpayers should not be adopted by the Commission to protect the interests of shareholders and investors.

2. **<u>Limit Excluded Classifications Per Statute:</u>**

Dodd-Frank explicitly excludes an award from being made to "a member, officer, or employee of – (i) an appropriate regulatory agency; (ii) the Department of Justice; (iii) a self-regulatory organization; (iv) the Public Company Accounting Oversight Board; or (v) a law enforcement organization . . . or to any whistleblower who gains the information through the performance of an audit of financial statements required under the securities laws . . . ." 15 U.S.C. § 78u-6(c)(2). Congress sought to establish a delicate balance of the need to encourage whistleblowers to come forward with information versus not wanting to reward individuals who were already required to disclose relevant information. The legislation was enacted with a clear

and definitive list of those individuals who should be excluded from eligibility for an award. Congress made a conscious decision not to include other categories of individuals in that list. It recognized that this would dampen the incentive for whistleblowers to report serious allegations that should be made known to the Commission or other relevant agencies.

The Commission has inappropriately and unnecessarily sought to expand that definition by including "other similarly-situated persons who are under a pre-existing legal duty to report information about violations to the Commission." (P.R. 14.) This is against the clear intent of Congress to provide a set limit on the types of individuals who would be ineligible for an award. The Proposed Rule provides examples of government contracting officers or city employees whose pre-existing duty to report violations would automatically deny them the right to claim an award. (P.R. 14.) There is no limit as to how broadly such a pre-existing duty could be expanded to exclude an untold number of individuals who hold a variety of positions from being able to participate in the award program. This would erode the program's ability to perform the crucial function that Congress intended.

It would be inappropriate for the Commission to adopt a blanket rule that would exclude individuals in "similarly situated positions" from the program. Only Congress can determine what groups of individuals should not be eligible to participate in the program, and no such language was inserted into Dodd-Frank to preclude "other similarly-situated" individuals. While the Commission should not be awarding certain individuals who are legally directed or obligated to turn over pertinent information, the Commission should not base such a determination just on the position the individual holds. The Commission would still have the discretion to determine on a case-by-case basis whether an individual failed to voluntarily disclose information because the person had a preexisting legal duty. It is not necessary for the Commission to a priori decide that the position a person holds precludes him or her from submitting information voluntarily.

All individuals should be encouraged to come forward with information that could be critical for ascertaining whether the securities laws have been violated. The role of the Commission should not be to find ways of denying whistleblowers access to this critical program. Instead, it should respect the careful balance adopted by Congress. Whistleblowers whose positions are not specifically excluded under Dodd-Frank should be eligible for an award.

3. **Mandatory Self-Reporting of Violations to the Commission:**

The Commission must adopt a policy of mandatory self-reporting by companies that violate the securities laws. The information reported must be made available to the public and the investing community. This is especially important in circumstances where a company's internal compliance program has detected and cured a securities violation. A violation of the securities law occurs regardless of whether a company is able to remedy the situation before the Commission has to initiate an action. Investors have to be confident that the companies in which they invest adhere to the securities laws, and the failure of a company to do so is legitimate information for an investor to have. The risk to an investor's portfolio is enormous when a company surreptitiously violates the law and then never discloses it. This only encourages a cycle of violations followed by belated fixes.

This problem has been solved in similar circumstances where it has been taxpayers who were defrauded instead of investors. The "Close the Contractor Fraud Loophole" requires that the Federal Acquisition Regulations include provisions "that require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts." P.L. 110-252, § 6102. The same policy should be adopted for violations of the securities laws. The markets are only able to work properly if investors and the public are aware of securities violations and can take appropriate actions to safeguard their money.

Internal compliance programs should also be bolstered to ensure that they are able to properly perform their role of detecting instances of fraud. The Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67064, provide important guidance as to how company's internal compliance programs should be strengthened to ensure that violations are detected and that appropriate action is taken to prevent their recurrence. This regulation applicable to federal contractors not only provides for stronger internal controls but also requires mandatory self-reporting of violations to an agency's Office of Inspector General. These are reasonable and effective methods of providing a check on the internal compliance programs to ensure that they are actually ensuring proper compliance with the laws and not just rubberstamping dubious company actions. Just as taxpayer should not be forced to bear the brunt of renegade contractors, investors have an equally important interest in ensuring that companies are playing by the rules.

4. **Effective Use of Internal Compliance Programs**

At the same time that the Commission should require stronger and more effective internal compliance programs, whistleblowers should not in any way be obligated to use such programs. Internal compliance programs are just one method to ensure that the federal securities laws are being properly enforced. While the proposed rule notes that "compliance with the federal securities laws is promoted when companies have effective programs for identifying, correcting, and self-reporting unlawful conduct," (P.R. 33), these programs often fail to provide an effective means for employees to feel comfortable about reporting potential violations. Dodd-Frank explicitly envisions that whistleblowers who report information directly to the Commission would be eligible for an award. *See* 15 U.S.C. § 78u-6(a)(6) (defining whistleblower as an individual who provides "information relating to a violation of the securities laws *to the Commission*) (emphasis added).

The proposed rules should not seek to punish employees who choose to bypass an internal compliance program. The Commission should abide by the clear statutory language. The Commission should remove as a consideration for the amount of an award "whether, and to the extent to which, a whistleblower reported the potential violation through effective internal whistleblower, legal or compliance procedures before reporting the violation to the Commission." (P.R. 51.) Although the proposed rule states that "whistleblowers will not be penalized if they do not avail themselves of this opportunity for fear of retaliation or other legitimate reasons," (P.R. 51), this should not be a consideration employed by the Commission at all in determining the amount of an award. It detracts from the overall purpose of the legislation to encourage employees to disclose relevant information to the Commission—not to an internal

compliance program. The Commission is obligated to do whatever it can to ensure that whistleblowers who come forward with valuable information are properly rewarded. Unnecessarily limiting the award that whistleblowers are able to receive provides impediments to the success of the program.

5. **Regulatory Violation for Whistleblower Retaliation:**

Whistleblowers are a critical resource in stopping securities violations. The best means for a crooked company to persist in its illegal actions is to prevent whistleblowers from reporting violations to the authorities. A company that retaliates against a whistleblower sends a clear message to all employees that their jobs and livelihoods are at risk if information is disclosed. The Commission should institute strong penalties against companies that engage in such flagrant violations of the law. Retaliation against an employee whistleblower should be recognized as a separate and independent violation of the securities laws. For instance, the Nuclear Regulatory Commission provides that an employer cannot retaliate against an employee who provides the agency with information about an alleged violation of the law. *See* 10 C.F.R. § 50.7. An employer that takes retaliatory action is found to have committed an independent violation of the law, and there would then be sufficient grounds for the license of that company to be revoked or suspended, in addition to having civil penalties levied against it.

The Commission should send a strong message to employers that taking action against whistleblower employees cannot be tolerated at any level. A company that retaliates against an employee for disclosing information about a potential violation of the securities laws should subject itself to the maximum penalties under the law. These penalties should be mandatory and widely disseminated to all companies. It should be abundantly clear to a company what the consequences are if it retaliates against an employee. When retaliation is combined with a serious infraction of the securities laws, evidenced by monetary sanctions in excess of $1,000,000, the Commission should have the ability to de-list the company from any applicable stock exchange in order to ensure that similar violations are not allowed to reoccur.

6. **Public Disclosure of the Rights of Whistleblowers:**

The Commission should also adopt regulations requiring that information about the whistleblower award program be advertised widely. Employees should realize that disclosure of potential securities violations is not just the right thing to do. The federal government through the Commission should actively encourage the reporting of original information as demonstrated by its willingness to pay significant sums of money to individuals who report potential violations. The Commission has the authority to employ any number of methods to accomplish this task, including the implementation of a notice posting requirement or dissemination of information to newly hired employees. The Commission should also develop a brochure explaining in simple and easy to understand terms the requirements of the new whistleblower awards program and how individuals with original information can submit it to the Commission and file a claim. This is an easy and effective method of ensuring that the awards program can accomplish the purpose intended by Congress.

Prior to the enactment of Dodd-Frank, the SEC had a predecessor bounty program that existed for more than twenty years to award individuals who reported information leading to a recovery of civil penalties for an insider trading violation. A March 29, 2010 Assessment of the SEC's Bounty Program by the Commission's own Inspector General noted serious deficiencies in the program that led to very few payments and an inability of the program to serve its stated function. Office of Inspector General, S.E.C., Assessment of the SEC's Bounty Program at iii (Mar. 29, 2010). In this report, the Inspector General noted that: "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." *Id.* at 4. The Commission must make sure that the whistleblowers award program is not plagued by the same problems. The whistleblower awards program under Dodd-Frank is the best tool available to the Commission to learn about and prevent securities violations. The Inspector General report also noted that while a pamphlet made about the program is "a good tool for marketing [it]," there was "no evidence that staff members are generally aware of the pamphlet and provide it routinely to potential bounty applicants." *Id.* at 7. Even the Commission's staff had varying knowledge about the existence of that program. *Id.* The lack of any discussion in the regulations as to how information about the program would be disseminated to potential whistleblowers and the general public, in addition to the Commission's staff who could assist whistleblowers in submitting original information, must be corrected in the final regulations. The success of the program is dependent upon an awareness of its existence.

7. **Establish Reasonable Whistleblower Appeal Rights:**

The Commission must establish reasonable appeal rights for whistleblowers in instances in which the Commission has determined not to pursue an enforcement action. This process should allow a whistleblower to file an appeal with the Commission's Office of Inspector General after the Commission has decided not to follow through with information of a potential violation. This is a necessary check on the actions of the Commission to maximize its effectiveness in pursuing all credible leads that could demonstrate that a company has violated the securities laws. The risk faced by whistleblowers in disclosing original information about a potential violation of the law is the same regardless of whether the Commission decides to pursue an enforcement action against a company. The possibility of serious repercussions against the whistleblower still exists. The awards program provides an effective incentive to the whistleblower if it is evident that it works fairly. Providing an appeal mechanism overseen by the Commission's Office of Inspector General in instances in which the Commission decides not to pursue a claim provides reassurances to the whistleblower of the integrity of the program and also provides an additional layer of oversight to ensure that all possible violations are properly evaluated and that appropriate administrative action has been taken.

IV. Conclusion

We urge the Commission to adopt the proposed recommendations discussed above. We believe that these measures provide the necessary steps to ensure that all companies are properly adhering to the securities laws and that violators will be exposed. The whistleblowers award program provided for under Dodd-Frank provides an invaluable tool to the Commission to obtain

crucial information to prosecute instances of securities violations, which ultimately safeguards the money of investors and the American public. It is essential that the Commission take the necessary steps now while the program is being developed to allow it to be as effective as possible for years into the future.

Thank you for the opportunity to provide comments on this important proposed rule. We will be pleased to provide any additional information that you might find useful.

Sincerely,

Randy G. DeFrehn
Executive Director

NWC | NATIONAL WHISTLEBLOWERS CENTER

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March 17, 2011

Hon. Mary L. Schapiro
Chairman
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-2736

RE: Provision-by-Provision Analysis of Proposed Rule 240.21F-8 for Implementing Whistleblower Provisions of the Dodd-Frank Act

Dear Chairman Schapiro:

On the behalf of the National Whistleblower Center we would like to thank your fellow Commissioners and your staff for taking the time to meet with us and discuss the Commission's proposed rules regarding the whistleblower provisions of the Dodd-Frank Act.

During some of our meetings it was suggested that we provide a review of the proposed rule and make specific recommendations regarding those portions of the proposed rules that should be changed. Attached please find our line-by-line review regarding a number of the key provisions contained in the proposed rues. We are also providing recommendations for specific changes to proposed rules. These changes are necessary to ensure that the final rule conforms to the specific statutory mandates contained in the Dodd-Frank Act, the requirements of the Administrative Procedures Act and with Congress' intent.

Please feel free to contact us with any questions regarding the attached proposal or any other matter related to the whistleblower rules.

Respectfully submitted,

Stephen M. Kohn
Executive Director
National Whistleblower Center

ATTACHMENT: SEC Proposed Rule/Suggested Revisions

CC:
Commissioner Kathleen L. Casey
Commissioner Elisse B. Walter
Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes
Stephen Cohen, Associate Director, Division of Enforcement
Sean McKessy, Director, Whistleblower Office
Elizabeth Murphy, Secretary, Securities Exchange Commission

SEC Proposed Rule	Suggested Revisions
§240.21F-3(c) "The Commission may seek assistance and confirmation from the authority bringing the related action in making this determination. If the Commission determines that the criteria for an award are not satisfied, or if the Commission is unable to obtain sufficient and reliable information about the related action to make a conclusive determination, the Commission will deny an award in connection with the related action."	**Suggested Revision** *"The Commission may seek assistance and confirmation from the authority bringing the related action,* ***and from the whistleblower,*** *in making this determination. If the Commission determines that the criteria for an award are not satisfied, or if the Commission is unable to obtain sufficient and reliable information about the related action to make a conclusive determination, the Commission will deny an award in connection with the related action."* **Basis for Revision** The Commission regulations should be "user friendly" and should facilitate staff-whistleblower communications on all matters material to a whistleblower claim. Communications between the Commission Staff and the whistleblower should be encouraged where such communications may promote a voluntary resolution of potential issues that may result in the wrongful denial of a claim or in unnecessary litigation expenses incurred by either the Commission or the whistleblower.
§240.21F-4(a) "Your submission of information is made voluntarily within the meaning of 240.21F of this chapter if you provide the Commission with the information before you or anyone representing you (such as an attorney) receives request, inquiry or demand from the Commission, the Congress, any other federal state or local authority, any self-regulatory organization or the Public Company Accounting Oversight Board about a matter to which the information in your submission is relevant. If the Commission or any of these other authorities make a request, inquiry or demand to you or your representative first, your submission will not	**Suggested Revision** This portion of the proposed rules should be cut. **Basis for Change** No such explicit statutory exclusion exists under the FCA or any regulation implementing the FCA. Section 21F of the Securities Exchange Act does not authorize the exclusion of information that is provided voluntarily to the Commission, even if the Commission or a similar organization asks for the information prior to the submission. The proposed regulation will result in the Commission not obtaining invaluable information from persons with direct first hand knowledge of frauds, and will result in the loss of

be considered voluntary, and you will not be eligible for an award, even if your response is not compelled by subpoena or other applicable law."	numerous investigatory leads. Consistent with the practices of the U.S. Department of Justice, the Commission should follow the procedures utilized by DOJ under the FCA in resolving issues concerning how to define "original" information obtained from a whistleblower. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011. **<u>Proposed Compromise</u>** As a matter of law this should be cut, but if it is not cut, NWC proposes the following compromise: *"Your submission of information is made voluntarily within the meaning of 240.21F of this chapter if you provide the Commission with the information before you or anyone representing you (such as an attorney) receives* ***a subpoena or other demand for information for which you are under a legal duty to reply and for which you may not assert a lawful privilege in objecting to the involuntary demand for information*** *~~request, inquiry or demand~~ from the Commission, the Congress, any other federal state or local authority, any self-regulatory organization or the Public Company Accounting Oversight Board about a matter to which the information in your submission is* ***directly*** *relevant. If the Commission or any of these other authorities make* ***such*** *a request, inquiry or demand to you or your representative first, your submission will not be considered voluntary, and you will not be eligible for an award~~, even if your response is not compelled by subpoena or other applicable law~~.* ***Any information provided to the Commission, the Congress, any other federal state or local authority, any self-regulatory organization or the Public Company Accounting Oversight***

	Board about a matter to which the information in your submission is directly relevant, pursuant to a subpoena, an immunity agreement or other similar compelled process, will not be considered voluntary. *"*
§240.21F-4(a)(2) "For purposes of this paragraph, you will be considered to have received a request, inquiry or demand if documents or information from you are within the scope of a request, inquiry, or demand that your employer receives unless, after receiving the documents or information from you, your employer fails to provide your documents or information to the requesting authority in a timely manner."	**Suggested Revision** This portion of the proposed rules should be cut. **Basis for Change** The mere fact that a whistleblower's employer obtained a request for information should have no impact whatsoever on the right of a whistleblower to obtain a reward under Section 21F. The opposite should be true. The SEC has an interest in obtaining original information from employees, and help from employees in understanding that information. An employer's "document dump" on the SEC should not result in the denial of an award that an otherwise qualified whistleblower should obtain. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011. **Proposed Compromise** As a matter of law this should be cut, but if it is not cut, NWC proposes the following compromise: *"For purposes of this paragraph, you will be considered to have received a request, inquiry or demand if documents or information from you are within the* ***direct*** *scope of a request, inquiry, or demand that your employer receives* ***from a federal law enforcement agency (including the Commission), you are aware that your employer has received such a request and you were under a work-related obligation to provide those documents to the company so they could***

	respond to the Commission request, *unless after receiving the documents or information from you, your employer fails to provide your documents or information to the requesting authority in a timely manner."*
§240.21F-4(a)(3) "In addition, your submission will not be considered voluntary if you are under a pre-existing legal or contractual duty to report the securities violations that are the subject of your original information to the Commission or to any of the other authorities described in paragraph (1) of this section."	**Suggested Revision** This portion of the proposed rules should be cut. **Basis for Change** No such explicit exclusion exists under the FCA nor is such an exclusion required under the Dodd-Frank Act. The rule must be narrowed to cover disclosures that are, in fact, involuntary. The clause of the proposed rule related to a "contractual duty" violates § 21F(e)(1) of the SEA and must be cut. Consistent with the practices of the U.S. Department of Justice, the Commission should follow the procedures utilized by DOJ under the FCA in resolving issues concerning the definition of a voluntary disclosure. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011. **Proposed Compromise** As a matter of law this should be cut, but if it is not cut, NWC proposes the following compromise: *"In addition, your submission will not be considered voluntary if you are under a****n explicit and binding*** *pre-existing legal ~~or contractual~~ duty to report the securities violations that are the subject of your original information to the Commission****, and the whistleblower is aware of this requirement*** *~~or to any of the other~~*

	~~*authorities described in paragraph (1) of this section*~~. ***This exclusion does not apply to information covered under general criminal or civil laws, such as 'misprision of felony' laws.***"
§240.21F-4(b)(1)(ii) "In order for your whistleblower submission to be considered original information, it must be not already known to the Commission from any other source, unless you are the original source of the information."	**Suggested Revision** *"In order for your whistleblower submission to be considered original information, it must be not already known to the Commission from any other source, unless you are the original source of the information* ***or unless the Commission has not already docketed a formal investigation and/or proceeding based on such information****."* **Basis for Change** Under the FCA, the 1986 amendments eliminated a blanket "government knowledge" exemption. The mere fact that the information at issue may be filed somewhere within the Commission does not mean that the Commission understands that a violation has occurred, understands the scope of the violation or, based on the data in its possession, will docket an enforcement proceeding. This rule would encourage the filing of documents and materials to the SEC that will overwhelm the Commission, and waste Commission resources. This rule should be activated only when the Commission can demonstrate that it had already opened a formal investigation and/or proceeding -- with a verified docket number -- prior to obtaining the information from a whistleblower that is directly related to the proceeding at issue. Consistent with the practices of the U.S. Department of Justice, the Commission should follow the procedures utilized by DOJ under the FCA in resolving issues concerning how to determine whether a whistleblower is an "original source" of information.
§240.21F-4(b)(4)(iv) "The Commission will not consider	**Suggested Revision** This portion of the proposed rule should be cut.

information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based . . . . Because you were a person with legal, compliance, audit, supervisory or governance responsibilities for an entity and the information was communicated to you with the reasonable expectation that you would take steps to cause the entity to respond appropriately to the violation, unless the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith."	Consistent with the practices of the U.S. Department of Justice, the Commission should follow the procedures utilized by DOJ under the FCA in resolving issues concerning potential improper evidence collection by a whistleblower. **<u>Basis for Change</u>** The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011. Exclusion not recognized under False Claims Act. 31 U.S.C. § 3730(e) nor under the IRS whistleblower rewards law. Empirical data does not support the need for any such exclusion. Senate Report on 1986 FCA amendments does not support exclusion, and cites to case of compliance official in context of employees who need protection under FCA. Additionally, the rule is silent as to who will make a decision that an entity acted in "bad faith" or did not provide information to the Commission within a "reasonable" period of time. Any such decision must be made by a Commission staff member, based on a sworn declaration. The whistleblower must be able to challenge that declaration in an on-the-record proceeding. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. This provision, as set forth in the proposed rule, violates the Administrative Procedure Act. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.

	Proposed Compromise As a matter of law this provision must be cut. However, if the Commission does not cut this exclusion, the NWC suggests the following revision to the last clause of the rule: *". . . unless the* ***whistleblower had a good faith belief that he or she should provide the information directly to the Commission without first using an internal procedures and/or reporting the issue with his or her supervisor, or unless the*** *entity did not disclose the information to the Commission within a reasonable time* ***(not to exceed thirty days)*** *or proceeded in bad faith.* ***Additionally, this exclusion only applies to an entity that has an internal compliance program which is independent and that operates consistent with the requirements of Public Law 110-252, Title VI, Chapter 1, and 48 C.F.R. subpart 3.900, and any other rule of the Commission setting forth requirements for audit or compliance functions.*** *"* Although this proposed compromise will mitigate some of the potential harm caused by this rule, because there is no empirical justification for the rule, and because the rule is not supported either by the language contained in the FCA or the Dodd-Frank Act, the NWC preserves the right to file a judicial appeal to any rule that exempts compliance or audit personnel from the scope of protection and/or eligibility for rewards contained in the Dodd-Frank Act.
§240.21F-4(b)(4)(v) "The Commission will not consider information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based . . . . from or through an entity's legal, compliance, audit or other similar functions or processes for identifying, reporting and	**Suggested Revision** This provision of the Proposed Rules should be cut. **Basis for Change** See comments on § 240.21F(b)(4)(iv) **Proposed Compromise**

addressing potential non-compliance with law, unless the entity did not disclose the information to the Commission within a reasonable time or proceeded in bad faith."	See comments on § 240.21F(b)(4)(iv) The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
<u>§240.21F-4(b)(4)(vi)</u> "The Commission will not consider information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based . . . by a means or in a manner that violates applicable federal or state criminal law."	**<u>Suggested Revision</u>** As written, the exclusion should be cut. Consistent with the practices of the U.S. Department of Justice, the Commission should follow the procedures utilized by DOJ under the FCA in resolving issues concerning potential improper evidence collection by a whistleblower. If the Commission relies upon information provided by a whistleblower to obtain a sanction, the whistleblower is entitled to a reward. If the Commission does not believe that the information was lawfully obtained, then the Commission can either close the inquiry based on the fact that the evidence justifying the proceeding was tainted. But if the information is used in any manner, then the whistleblower must be entitled to a reward. **<u>Basis for Change</u>** No such exclusion exists under the FCA. Under the FCA whistleblowers are required to provide the United States with "substantially all" the evidence they possess. 31 U.S.C. § 3730(b)(2). The term "violates applicable federal or state criminal law" is vague and open to abuse. The commission is not an expert in state criminal laws, and state laws cannot be used as a basis to undermine federal law enforcement authority. Also, the proposed regulation is not clear as to who has the authority to conclude that information was obtained in violation of law. Does the exclusion only apply to cases in which a

	person is convicted of violating the state or federal laws at issue? Any such exclusion should be based on the evidentiary utility of the information provided by the whistleblower. If the Commission as a basis for a penalty uses the whistleblower's information, then a reward must be given. However, if the whistleblower's information is tainted and cannot be used as a basis for initiating an investigation or the payment of a penalty, then the information cannot form the basis for a reward. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011. **Proposed Compromise** *"The Commission will not consider information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based . . . by a means or in a manner that violates applicable federal or state criminal law,* ***resulting in the inability of the Commission to use the information as the basis for initiating an investigation or proceeding or obtaining a penalty****."*
§240.21F-4(b)(4)(vii) "The Commission will not consider information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based: From any of the individuals described in paragraphs (b)(4)(i) – (vi) of this section."	**Suggested Revision** *"The Commission will not consider information to be derived from your independent knowledge or independent analysis if you obtained the knowledge or the information upon which your analysis is based: From any of the individuals described in paragraphs (b)(4)(i) – (vi) of this section* ***and the Commission finds that you are acting as a surrogate for a person who is otherwise disqualified under the Dodd-Frank Act from obtaining a reward****."* **Basis for Change**

	The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. This provision, as set forth in the proposed rule, violates the Administrative Procedure Act. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011. The provision should be eliminated. If not eliminated, it should be made clear that persons who obtain information from a wrongdoer may still be eligible for a reward, if they are not a family member of the wrongdoer. For example, a secretary who works for the wrongdoer may obtain information about the underlying crimes from her boss, but the secretary should not be disqualified from obtaining a reward for turning her boss in, simply because she learned of the violations from an "individual" disqualified under this rule.
§240.21F-4(b)(7) "If you provide information to Congress or any other federal sate, or local authority any self-regulatory organization, the Public Company Accounting Oversight Board, or to any of the persons described in paragraphs (b)(4)(iv) and (v) of this section, and you, within 90 days, submit the same information to the Commission pursuant to 240.21F-9 of this chapter."	**Suggested Revision** Eliminate the 90-day filing requirement. **Basis for Change** There is no authority for the 90-day notification requirement in the Dodd-Frank Act. The False Claims Act has not such requirement, and FCA claims are considered timely filed if they are filed within the time period related to the controlling statute of limitations. The 90-day deadline will result in serious hardship and the denial of rewards to whistleblowers that are otherwise deserving and eligible under the statute. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
§240.21F-4(b)(7)(c)(1) "The Commission will consider that you	**Suggested Revision** *"The Commission will consider that you provided*

provided original information that led to the successful enforcement of a judicial or administrative action in the following circumstances: your information significantly contributed to the success of the action"	*original information that led to the successful enforcement of a judicial or administrative action in the following circumstances: your information significantly contributed to the success of the action* ***or led to the successful enforcement of the law.*** *"* **<u>Basis for Change</u>** No such standard exists under the FCA. This standard is inconsistent with the standard mandated by Congress in the Dodd-Frank Act. Under the law, whistleblowers are entitled to a reward if their disclosures "led to the successful enforcement" of the law. *See* 21F(b)(1) and 23(b)(1). It would be illegal and be inconsistent with the intent of Congress for the Commissions to impose a higher burden of proof. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
<u>§240.21F-4(b)(7)(d)</u> "Action means a single captioned judicial or administrative hearing."	**<u>Suggested Revision</u>** *"Action means a single captioned judicial or administrative hearing* ***or multiple judicial or administrative hearings or proceedings derived from the whistleblower's information****."* **<u>Basis for Change</u>** Under the statute, the whistleblower is entitled to a reward of the total sanctions obtained by the SEC equals one million or more dollars. The administrative or judicial procedures used to "caption" a proceeding or investigation should have no bearing on the Commission's requirement to pay a reward if the total number of all sanctions obtained by the Commission based on the whistleblower's information was equal to or greater then one million dollars.

	The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
§240.21F-7(a) "The law requires that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower, except that the Commission may disclose such information in the following circumstances..."	**Suggested Revision** The following should be added to this provision: *"Prior to the disclosure of any information related to the identity of a whistleblower, the Commission shall give the whistleblower reasonable notice of its intent to disclose the information, and the whistleblower shall have a reasonable opportunity to obtain file an administrative or civil complaint seeking a protective order or other relief that would result in the protection of the whistleblower's identity."* **Basis for Change** The Dodd-Frank Act contains specific rules protecting the confidentiality of whistleblowers. It is in the public interest to ensure the maximum confidentiality for whistleblowers.
§240.21F-8(a) "To be eligible for a whistleblower award, you must give the Commission information in the form and manner that the Commission requires."	**Suggested Revision** The following should be added to this provision: *"Prior to the denial of a reward, the whistleblower shall be given reasonable notice of any technical defect in his or her application, and shall be given a reasonable opportunity to correct the application."* **Basis for Change** The policy that the whistleblower provisions must be "user friendly" and the policy that the Commission should use the payment of rewards as a method to induce and encourage other employees to step forward with credible and useful information.
§240.21F-8(b)(1) "In addition to any forms required by these	**Suggested Revision** *"In addition to any forms required by these rules,*

rules, the Commission may also require that you provide certain additional information. If requested by the Commission, you may be required to: Provide explanations and other assistance in order that the staff may evaluate and use the information that you submitted."	*the Commission may also ~~require~~* ***request*** *that you provide certain additional information. If requested by the Commission, you may be ~~required~~* ***asked*** *to: Provide explanations and other assistance in order that the staff may evaluate and use the information that you submitted.* ***The failure to provide this information may result in a reduction in the size of a reward or a denial of a reward, if the staff is unable to properly determine your eligibility based on the information previously provided.*** " **<u>Basis for Change</u>** The Dodd Frank statute sets forth a minimum threshold for which a whistleblower must meet in order to qualify for a reward. The Commission cannot legally deny a reward to a whistleblower that meets that statutory minimum. Thus, requiring a whistleblower to provide more information then is mandated by the statute would violate the Act. However, the proposed changes would empower the staff to request such additional information, and would authorize the staff to reduce or deny a reward if additional information was not provided, and the staff could not adequately evaluate the whistleblower's eligibility. The NWC would recommend that the Commission rules for filing initial applications mirror the FCA filing requirements. The FCA requires a whistleblower to provide the government with a "written disclosure of substantially all material evidence and information the [whistleblower] possesses" at the time the initial complaint is filed. 31 U.S.C. § 3730(b)(2). Also, under the FCA, if the government initiates a proceeding based on the whistleblower allegations, the whistleblower is not required to take any additional steps to help the government, but does retain the right to participate in the proceeding an aid the government's efforts. 31 U.S.C. § 3730(c)(1).

	The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
<u>§240.21F-8(b)(2)</u> "In addition to any forms required by these rules, the Commission may also require that you prove certain additional information. If requested by the Commission staff, you may be required to: Provide all additional information in your possession that is related to the subject matter of your submission in a complete and truthful manner, through follow-up meetings, or in other forms that our staff may agree to"	**<u>Suggested Revision</u>** See suggested revisions for §240.21F-8(b)(1)
<u>§240.21F-8(b)(4)</u> "Enter into a confidentiality agreement in a form acceptable to the Whistleblower Office, including a provision that a violation may lead to your ineligibility to receive an award."	**<u>Suggested Revision</u>** *"**The staff may request that the whistleblower** ~~E~~enter into a confidentiality agreement in a form acceptable to the Whistleblower Office, including a provision that a violation may lead to your ineligibility to receive an award. **The failure of the whistleblower to enter into any such agreement may result in the whistleblower being denied access to information in the control or possession of the staff, including information concerning the status or progress of any non-pubic investigation or proceeding related to the whistleblower disclosures.**"* **<u>Basis for Change</u>** No such requirement exists in the FCA. These provisions should be modified in a manner consistent with the FCA, 31 U.S.C. § 3730(b)(2) and (c)(1). The whistleblower cannot be required to enter into a confidentiality agreement. However, the

	Commission can request such an agreement in order to obtain access to any information that the Commission may have concerning the underlying investigation, the existence of an investigation and/or other information relevant to the reward and/or any ongoing enforcement proceeding. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
<u>§240.21F-8(c)(1)</u> "The Commission will consider that you provided original information that led to the successful enforcement of a judicial or administrative action in the following circumstances: If you gave the Commission original information that caused the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning new or different conduct as part of a current examination or investigation, and your information significantly contributed to the success of the action"	**<u>Suggested Revision</u>** *"The Commission will consider that you provided original information that led to the successful enforcement of a judicial or administrative action in the following circumstances: If you gave the Commission original information that caused the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed, or to inquire concerning new or different conduct as part of a current examination or investigation, and your information significantly contributed to the success of the action* ***or led to the successful enforcement of the law.****"* **<u>Basis for Change</u>** No such standard exists under the FCA. This standard is inconsistent with the standard mandated by Congress in the Dodd-Frank Act. Under the law, whistleblowers are entitled to a reward if their disclosures "led to the successful enforcement" of the law. *See* 21F(b)(1) and 23(b)(1). It would be illegal and be inconsistent with the intent of Congress for the Commissions to impose a higher burden of proof. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.

§240.21F-8(c)(2)	**Suggested Revision**
"You are not eligible to be considered for an award if you do not satisfy the requirements of paragraphs (a) and (b) of this section. In addition, you are not eligible if . . . . you are, or were at the time you acquired original information, a member, officer, or employee of a foreign government, any political subdivision, department, agency or instrumentality of a foreign government, or any other foreign financial regulatory authority as that term is defined in Section 3(a)(52) of the Exchange Act (15 USC 78c(a)(52)"	The revised rule should state as follows: *"In addition, you are not eligible if you 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 the 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 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"* **Basis for Change** The exclusion contained in the proposed rule is

	not authorized under the Dodd Frank statute. The exclusion would also undermine the enforcement of the Foreign Corrupt Practices Act. Additional basis for this change in the proposed rule is set forth in the *Letter from Kohn/NWC to SEC* posted on the rule-making docket on February 10, 2011. There is no empirical evidence that such a provision is needed. The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
§240.21F-8(c)(7) "In your whistleblower submission, your other dealings with the Commission, or your dealings with another authority in connection with a related action, you knowingly and willfully make any false, fictious or fraudulent statement or representation or use any false writing or document, knowing that it contains false, fictious or fraudulent statement or entry."	**Suggested Revision** *"In your whistleblower submission, your other dealings with the Commission, or your dealings with another authority in connection with a related action, you knowingly and willfully make any false, fictious or fraudulent statement or representation or use any false writing or document, knowing that it contains false, fictious or fraudulent statement or entry,* ***that is material to the application and which constitutes a violation of section 1001 of Title 18 of the United States Code****."* **Basis for Change** The proposed rule provides broad discretion to the Commission staff. The proposed revision moderates that discretion in a manner consistent with federal law on false statements.
§240.21F-9 "The submission of original information to the Commission is a two-step process"	**Suggested Revision** *"Any applicant for a reward shall, at the time of the initial application, provide the government with a written disclosure of substantially all material evidence and information the whistleblower possesses at the time the initial application is filed. The whistleblower may supplement this application, in writing, prior to the Commission's issuance of a reward*

	determination. The failure of an applicant to set forth the all material evidence and information to the Commission in a timely manner may result in the reduction of an award or the denial of a reward as to any sanctions paid to the Commission that were not part of the initial or supplemental application." **Basis for Change** These provisions are inconsistent with the minimum filing requirements set forth in the Dodd-Frank Act. They are not "user-friendly." They will create numerous administrative problems and will result in the denial of otherwise qualified applications. The FCA filing provisions, as set forth in 31 U.S.C. § 3730(b)(2), are a good working model for the SEC rule. This provision of the FCA requires a whistleblower to provide the government with a "written disclosure of substantially all material evidence and information the [whistleblower] possesses" at the time the initial complaint is filed.
§240.21F-10(a) "Whenever a Commission action results in monetary sanctions totaling more than $1,000,000 the Whistleblower Office will cause to be published on the Commission's website a "Notice of Covered Action." A claimant will have sixty (60) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred."	**Suggested Revision** See revision set forth in § 240.21F-9. **Basis for Change** See comments made related to § 240.21F-9. The two-step process set forth herein does not serve the interests of the Commission or the interests of full enforcement. The Commission's rules should require that whistleblowers provide all of the material information they have to the Commission at the earliest possible time, so that the Commission staff can use that information to determine the validity of the allegations, determine whether to initiate an investigation or proceeding based on the allegations and in order to use the information provided to assist, to the

	greatest extent possible, in an enforcement action. Thus, a premium should be set on having the whistleblower make a full and complete initial disclosure and to have the whistleblower supplement the disclosure on a regular basis. Requiring information to be provided to the Commission after a sanction is taken against a wrongdoer does not serve the public interest or the goal of the Act. This two-step process will also result in administrative difficulties; the denial of rewards to otherwise qualified applicants and is not "user-friendly." The statutory language of Section 21F of the Securities Exchange Act does not authorize this procedure. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
§240.21F-10(d) "Once the time for filing any appeals of the Commission's judicial or administrative action has expired, or where an appeal has been filed, after all appeals in the action have been concluded, the Whistleblower Office and designated staff ("Claims Review Staff") will evaluate all timely whistleblower award claims submitted on Form WB-APP."	**Suggested Revision** "*The Whistleblower Office shall docket all applications and ensure that related applications are properly considered. The WO shall, wherever practicable, attempt to reach a stipulated agreement between the Commission and the whistleblower(s) regarding the basis for a reward and the percentage of the reward. After the Commission obtains the initial monetary sanction that constitutes the basis for the reward payment, the WO shall publish to the Commission its recommendation for the payment of the reward and/or shall present to the Commission the signed stipulation. The identity of the whistleblowers shall not be released unless the whistleblowers consent to the disclosure, or the disclosure is otherwise required under law. Any objection to the WO's recommendation and/or to the stipulation of the parties shall be filed with the Commission within 15 working days. If no objection is filed, the recommendation of the WO shall be final, unless three members of the Commission vote to reject or modify the recommendation within 30 calendar days of the*

	WO's filing. Should any person with standing to file said objections file objections to the stipulation and/or the WO's recommendation, the Commission may refer the matter to an administrative judge for review. The Commission shall issue its final order on the payment of whistleblower rewards within 90 days of receipt of the initial sanction." **Basis for Change** The rule should encourage the WO to negotiate a stipulated resolution of the reward payment. If an objection to the WO reward recommendation is filed, the rule should mandate an expeditious resolution of any such dispute. Encouraging the settlement of claims will reduce the administrative costs of operating the program and avoid costly judicial appeals.
§240.21F-10(h) "The Whistleblower Office will then notify the Commission of each Proposed Final Determination. Within thirty 30 days thereafter, any Commissioner may request that the Proposed Final Determination be reviewed by the Commission."	**Suggested Revision** See proposed revisions for §240.21F-10(d). **Basis for Change**
§240.21F-11(a) "If you are eligible to receive an award following a Commission action that results in monetary sanctions totaling more than $1,000,000, you also may be eligible to receive an award based on the monetary sanctions that are collected from a related action (as defined in 240.21F-3 of this chapter)."	**Suggested Revision** *"~~If you are eligible to receive an award following a Commission action that results in monetary sanctions totaling more than $1,000,000, you~~* ***You*** *also may be eligible to receive an award based on the monetary sanctions that are collected from a related action (as defined in 240.21F-3 of this chapter)."* **Basis for Change** Whistleblowers are eligible for a reward based on sanctions obtained pursuant to a "related action" even if the Commission does not institute its own proceeding.

§240.21F-11(b)	**Suggested Revision**
"You must also use Form WB-APP to submit claim for an award in related action."	The filing procedure for such rewards should be modified to be consistent with the procedures set forth in the proposed revisions to § 240.21F-9. **Basis for Change** Whistleblowers should be required and encouraged to provide the maximum amount of information to the government at the earliest time.
§240.21F-13	**Suggested Revision**
"Procedures applicable to the payment of awards."	See comments made related to §§ 240.21F-9 and 10. **Basis for Change**
§240.21F-15	**Suggested Revision**
"In determining whether the required $1,000,000 threshold has been satisfied for purposes of making any award, the Commission will not take into account any monetary sanctions that the whistleblower is ordered to pay, or that are ordered against any entity whose liability is based substantially on conduct that the whistleblower directed, planned or initiated."	This provision should be cut. However, if it is not cut, an additional clause should be inserted into the rule as follows: *". . . directed, planed, or initiated,* ***provided that the whistleblower undertook such actions without approval, knowledge or consent of his or her employer."*** **Basis for Change** No such exclusion exists in the FCA. There is no empirical record that whistleblowers have abused the FCA in a manner reflected in this proposed rule. Regardless, the rule should clearly differentiate wrongdoing engaged in by an employee working at the direction of his or her employer with wrongdoing that an employee engages in on his or her own initiative. This distinction is well recognized in other areas of whistleblower law. *See* 42 U.S.C. § 5851(g) ("[the whistleblower provision] shall not apply with respect to any employee who, *acting without*

	direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter." (Emphasis added). The statutory language of Section 21F of the Securities Exchange Act does not authorize this exclusion or limitation. *See Letter from NWC/Kohn to SEC,* posted on the SEC rule-making docket on January 25, 2011.
Code of Ethics	**Suggested Revision** *See attached Exhibit #1* **Basis for Change** During the rule making proceeding, a number of Commissioners and commentators recognized the importance of internal corporate compliance programs in ensuring that investors are protected from fraud and misconduct. The Dodd-Frank Act does not authorize or permit the Commission to reduce the protections afforded whistleblowers under the Act in order to enhance internal corporate compliance programs. Any such interference with employee rights under Dodd-Frank would constitute a violation of the Administrative Procedure Act. *See* NWC Letter posted on SEC rule-making docket on January 25, 2011. However, the NWC strongly supports the establishment of independent and ethical corporate compliance programs, which are not compromised by any conflicts of interest. Thus, the NWC proposes that the Commission institute a rule based on the FAR rules governing internal corporate compliance programs. These rules will help ensure that corporations operate truly independent and ethical programs, and will protect the interests of employees who utilize the programs, companies that have a real interest in ensuring compliance and the government.

Anti-Retaliation	**Suggested Revision** *See attached Exhibit #2* **Basis for Change** This rule is necessary in order to ensure that corporations do not retaliate against employees who provide information to internal corporate compliance programs. As set forth in various briefing papers filed with the Commission by the NWC, since 1984 corporations have argued in court that employee contacts with internal compliance programs was not a protected activity. The Commission, by rule, can ensure that all such contacts are fully protected. This rule is absolutely necessary if the Commission's goal of promoting the use and development of internal corporate compliance programs will be implemented. Furthermore, the Commission must send a strong message that retaliation against employees will not be tolerated, and will constitute a violation of Commission rules, permitting the Commission to sanction persons or corporations that engage in retaliation. Sound precedent exists for this rule. *See* 10 C.F.R. § 50.7.

EXHIBIT #1
PROPOSED RULE – PROTECTION AND ENCOURAGEMENT FOR CORPORATE COMPLIANCE PROGRAMS

[Note: The proposed rule is based on 48 C.F.R. § 52.203-13. The parts of the current rule that are recommended for being cut are struck out, the new additions to the rule are in bold]

~~48 C.F.R. § 52.203-13~~ Contractor Code of Business Ethics and Conduct.

(a) *Definitions.* As used in this clause—

"~~Agent~~ **Employer**" means any **corporation or publicly traded entity (including subsidiaries) subject to the requirements of section 23 of the Securities Exchange Act.** ~~individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization~~.

"Full cooperation"—

(1) Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information;

(2) Does not foreclose any ~~Contractor~~ **employer** rights arising in law, **or under the Securities Exchange Act** ~~the FAR, or the terms of the contract~~. It does not require—

(i) ~~A Contractor~~ **An employer** to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the ~~Contractor~~ **employer**, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and

(3) Does not restrict a ~~Contractor~~ **employer** from—

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the ~~contract~~ **Securities Exchange Act** or related to a potential or disclosed violation.

"Principal" means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a subsidiary, division, or business segment; and similar positions).

~~"Subcontract" means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.~~

~~"Subcontractor" means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.~~

"United States," means the 50 States, the District of Columbia, and outlying areas.

(b) *Code of business ethics and conduct.*

(1) Within 30 days after contract award, unless the ~~Contracting Officer~~ **CFTC Commission** establishes a longer time period, the ~~Contractor~~ **employer** shall—

(i) Have a written code of business ethics and conduct; and
(ii) Make a copy of the code available to each employee ~~engaged in performance of the contract~~.
(2) The ~~Contractor~~ **employer** shall—
(i) Exercise due diligence to prevent and detect criminal conduct; and
(ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
(3)(i) The ~~Contractor~~ **employer** shall timely disclose, in writing, to the **CFTC Office of Enforcement** ~~agency Office of the Inspector General (OIG)~~, with a copy to the **CFTC Whistleblower Office** ~~Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has~~ credible evidence that a **employer, or any** principal, employee, agent, or subcontractor of the ~~Contractor~~ **employer** has committed—
(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code **or any Federal criminal law enforced by the CFTC or for which a violation may result in civil penalties awarded by the CFTC**; or
(B) A violation of the **Securities Exchange Act, or any other law, rule or regulation enforced by the CFTC** ~~civil False Claims Act (31 U.S.C. 3729-3733).~~
(ii) The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked "confidential" or "proprietary" by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor. The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.
~~(iii) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the Contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract.~~
(c) Business ethics awareness and compliance program and internal control system. ~~This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract or if this contract is for the acquisition of a commercial item as defined at FAR 2.101.~~ The ~~Contractor~~ **employer** shall establish the following within 90 days **of the enactment of this rule** ~~after contract award, unless the Contracting Officer establishes a longer time period~~:
(1) An ongoing business ethics awareness and compliance program.
(i) This program shall include reasonable steps to communicate periodically and in a practical manner the ~~Contractor's~~ **employer's** standards and procedures and

other aspects of the ~~Contractor's~~ **employer's** business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.
(ii) The training conducted under this program shall be provided to the Employer's principals and employees, and as appropriate, the Employer's agents and subcontractors.
(2) An internal control system.
(i) The Employer's internal control system shall—
(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with **any violation of the Securities and Exchange Act or any other law, rule or regulation enforced by the CFTC** ~~Government contracts~~; and
(B) Ensure corrective measures are promptly instituted and carried out.
(C) Ensure that the employer have policies and procedures in place that protect employees from retaliation who provide any information or file allegations of fraud, violations of law or misconduct to the internal control procedures. The Employer shall notify every employee who contacts the internal control system of his or her rights under section 23(h) and provide an employee with a copy of section 23(h).
(ii) At a minimum, the Employer's internal control system shall provide for the following:
(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system. **The Chief Compliance Officer shall report directly to the employer's Chief Executive Officer and/or the employer's Audit Committee.**
(B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Employer's code of business ethics and conduct.
(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Employer's code of business ethics and conduct and the special requirements **of the CFTC** ~~Government contracting~~, including—
(1) Monitoring and auditing to detect criminal conduct;
(2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and
(3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.
(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.
(F) Timely disclosure, in writing, to the **CFTC Office of Enforcement** ~~agency OIG~~, with a copy to the **CFTC's Whistleblower Office** ~~Contracting Officer~~, whenever, ~~in connection with the award, performance, or closeout of any Government contract performed by the Employer or a subcontract thereunder,~~ the Employer has credible evidence that a principal, employee, agent, or subcontractor of the Employer has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. **any law, rule or regulation enforced by the CFTC,** or a violation of the **Securities Exchange Act or any civil law, rule or regulation enforced by the CFTC** ~~civil False Claims Act (31 U.S.C. 3729-3733).~~
~~(1) If a violation relates to more than one Government contract, the Employer may make the disclosure to the agency OIG and Contracting Officer responsible for the largest dollar value contract impacted by the violation.~~
~~(2) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the Employer shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract, and the respective agencies' contracting officers.~~
~~(3) The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.~~
(4) The Government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.
(G) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

(d) **If an employee disclosure resulted in the report identified in subsection (F) above, the employer shall also report to the CFTC Enforcement Division and Whistleblower Office this fact, and shall provide to the CFTC information demonstrating that the employer has not engaged in any retaliation against the employee based on his or her disclosures. The employer shall also inform the employee that a disclosure was made in accordance with subsection (F), and shall inform the employee that the employee may be entitled to a reward under section 23 of the Securities Exchange Act. The employer shall provide the CFTC Office of Enforcement and Whistleblower Office proof that the employee was informed of his or her section 23 rights.**

(e) Within a reasonable period of time from notification from the employer as set forth in subsection (d), but no later then 90 days after the Whistleblower Office provides the employee with written notification of his or her potential eligibility for a reward, the employee who initially contacted the corporate compliance department and/or otherwise made the report that resulted in the referral set forth in subsection (F), may file for a reward under section 23 of the Securities Exchange Act. For purposes of determining the date of filing the 23 claim, that date shall be the date in which the employee can demonstrate that he or she initially contacted the employer's compliance program or otherwise made the report that resulted in the employer's subsection (F) disclosure to the CFTC.

(f) Nothing in this section shall be interpreted as interfering with the employee's right to directly file a section 23 claim with the CFTC at any time. ~~(d)~~
~~*Subcontracts.*~~
~~(1) The Employer shall include the substance of this clause, including this paragraph (d), in subcontracts that have a value in excess of $5,000,000 and a performance period of more than 120 days.~~
~~(2) In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.~~

EXHIBIT #2
PROPOSED RULE - PROTECTING EMPLOYEE WHISTLEBLOWERS

[Note: The proposed rule is based on 10 C.F.R. § 50.7. The parts of the current rule that are recommended for being cut are struck out, the new additions to the rule are in bold]

~~10 C.F.R. § 50.7~~

Employee protection:

(a) Discrimination by ~~a~~ **an employer regulated by the Securities and Exchange Commission (**"Commission"**)** ~~licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant~~ against an employee for engaging in certain protected activities is prohibited. Discrimination includes discharge and other actions that relate to compensation, terms, conditions, or privileges of employment. The protected activities are established in section **21F of the Securities Exchange Act** ~~211 of the Energy Reorganization Act of 1974~~, as amended, and in general are related to the administration or enforcement of a requirement imposed under the **Securities Exchange Act or any other law, rule or regulation enforced by the Commission** ~~Atomic Energy Act or the Energy Reorganization Act~~.

(1) The protected activities include but are not limited to:

(i) Providing the Commission or his or her employer information about alleged violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(ii) Refusing to engage in any practice made unlawful under either of the statutes named in paragraph (a) introductory text or under these requirements if the employee has identified the alleged illegality to the employer;

(iii) Requesting the Commission to institute action against his or her employer for the administration or enforcement of these requirements;

(iv) Testifying in any Commission proceeding, or before Congress, or at any Federal or State proceeding regarding any provision (or proposed provision) of either of the statutes named in paragraph (a) introductory text~~.~~**;**

(v) Providing information to an employer's Audit Committee, compliance department or to an employee's supervisor concerning information about alleged

violations of either of the statutes named in paragraph (a) introductory text of this section or possible violations of requirements imposed under either of those statutes;

(v**i**) Assisting or participating in, or is about to assist or participate in, these activities.

(2) These activities are protected even if no formal proceeding is actually initiated as a result of the employee assistance or participation.

(3) This section has no application to any employee alleging discrimination prohibited by this section who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of the **Securities Exchange Act** ~~Energy Reorganization Act of 1974, as amended, or the Atomic Energy Act of 1954~~, as amended.

(b) Any employee who believes that he or she has been discharged or otherwise discriminated against by any person for engaging in protected activities specified in paragraph (a)(1) of this section may seek a remedy for the discharge or discrimination through an administrative proceeding in the Department of Labor **under the Sarbanes Oxley Act and/or by filing an action in federal court pursuant to section 23(h) of the Securities Exchange Act**. ~~The administrative proceeding must be initiated within 180 days after an alleged violation occurs. The employee may do this by filing a complaint alleging the violation with the Department of Labor, Employment Standards Administration, Wage and Hour Division. The Department of Labor may order reinstatement, back pay, and compensatory damages.~~

(c) A violation of paragraph (a), (e), or (f) of this section by ~~a~~ **an employer regulated by the** Commission **or subject to the requirements of section 23(h) of the Securities Exchange Act,** ~~licensee, an applicant for a Commission license,~~ or a **subsidiary, agent,** contractor or subcontractor of **an employer** ~~a Commission licensee or applicant~~ may be grounds for--

(1) Denial, revocation, or suspension of **listing on an exchange** ~~the license~~.

(2) Imposition of a civil penalty on the **employer, subsidiary, agent** ~~licensee, applicant, or a~~ contractor or subcontractor ~~of the licensee or applicant~~.

(3) Other enforcement action.

(d) Actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds. The prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations.

(e)(1) Each **employer subject to the requirements of section 23 of the Securities Exchange Act, including subsidiaries or agents of such employer,** ~~licensee and each applicant for a license~~ shall prominently post ~~the revision of NRC~~ Form ____ ~~3~~, "Notice to Employees~~,~~." ~~referenced in 10 CFR 19.11(c).~~ This form must be posted at locations sufficient to permit employees protected by this section to observe a copy on the way to or from their place of work. **Form ____ shall inform employee's of their rights under section 23 of the Securities Exchange Act, and shall include a copy of the text of section 23.** ~~Premises must be posted not later than 30 days after an application is docketed and remain posted while the application is pending before the Commission, during the term of the license, and for 30 days following license termination.~~

(2) Copies of NRC Form 3 may be obtained by writing to _____**.** ~~the Regional Administrator of the appropriate U.S. Nuclear Regulatory Commission Regional Office listed in appendix D to part 20 of this chapter, by calling (301) 415-5877, via e-mail to forms@nrc.gov, or by visiting the NRC's Web site at http://www.nrc.gov and selecting forms from the index found on the home page.~~

(f) No agreement affecting the compensation, terms, conditions, or privileges of employment, including an agreement to settle a complaint filed by an employee **under section 23 of the Securities Exchange Act or** with the Department of Labor pursuant to **the Sarbanes Oxley Act** ~~section 211 of the Energy Reorganization Act of 1974, as amended~~, may contain any provision which would prohibit, restrict, or otherwise discourage an employee from participating in protected activity as defined in paragraph (a)(1) of this section including, but not limited to, providing information to the ~~NRC~~ **Commission** or to his or her employer on potential violations or other matters within ~~NRC's~~ **Commission's** regulatory responsibilities.