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

Formal Rule Making Comments to the Commodity Futures Trade Commission

NWC | NATIONAL WHISTLEBLOWERS CENTER

WWW.WHISTLEBLOWERS.ORG

The National Whistleblowers Center

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

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Introduction

On December 6, 2010, the Commodity Futures Trading Commission (CFTC) published its Proposed Rules for Implementing the Whistleblower Provisions of Section 23 of the Commodities Exchange Act. The National Whistleblowers Center (NWC) hereby files its Formal Submission in accordance with Administrative Procedures Act. This report is a supplemental submission, pursuant to the rulemaking.

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

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

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

As early as 1984, the Executive Director of the NWC strongly supported legal protections for employees who chose to raise their concerns internally to their chain of command or corporate compliance programs. In 1985, he co-authored an *amicus* brief filed with the U.S. Court of Appeals for the Tenth Circuit on this issue, urging the Court to fully protect

compliance employees who raised concerns within the corporate structure. *See* Exhibit 1, *Kansas Gas & Electric v. Brock* (all Exhibits are available online at our website, please see the addresses listed at the conclusion of this document). In the mid-1980s he also wrote one of the first law journal articles explicitly advocating legal protections for employees who choose to blow the whistle only within corporate structures.

The NWC has assisted in drafting and advocating for legislation that explicitly provides legal protection for employees who raise concerns only within their corporations. The NWC participated in the drafting of both the Dodd-Frank and Sarbanes-Oxley anti-retaliation provisions to ensure that those laws protected employees who effectively blew the whistle internally to their employers or externally to the government.

Based on its many years of public policy and legal advocacy experience, the NWC is well-versed in all of the major issues concerning internal reporting, and remains fully committed to supporting rules and laws that fully protect employees who raise whistleblower concerns within their corporate structure. The NWC has always maintained that employees should be protected regardless of whether they choose to report concerns internally or externally.

This report carefully analyzes the impact *qui tam* whistleblower reward laws have on the reporting behaviors of employees, with a focus on whether or not laws, such as the Dodd-Frank reward provision, impact on the willingness of employees to report their concerns internally to managers or compliance officials.

The report also seeks to identify what reforms should be instituted in order to ensure that corporate compliance programs are effective and properly serve the public interest. Finally, the report addresses the specific questions raised by the Commodity Futures Trading Commission in its December 6th notice of proposed rules.

Summary of Findings

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

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

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

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

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

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

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

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

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

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

Based on these above findings and our careful review of the proposed rules, we hereby make the overarching recommendations and observations:

1. The proposed rules do not adequately take into account the positive deterrence effect of a properly administered *Qui Tam* program. We recommend that additional rules be included concerning notice and training for employees, so all individuals fully understand that if they engage in wrongdoing, they can be reported for a significant monetary reward

2. The recommendation of the SEC Inspector General that the SEC's reward program be administered consistently with the False Claims Act is equally applicable to the CFTC's rules.

3. The rules as currently proposed are not "user friendly" and modifications must be made to both procedures and forms to facilitate disclosures. This will minimize the risks that otherwise qualified applicants will be denied based on a technicality

4. The exclusion to coverage, set forth in the proposed rules, whether based on a direct exclusion of a classification of persons or indirect exclusion based on definitional terms such as "original source" or "independent knowledge" must be revised. Any such exclusion must be tailored to the specific language in the Dodd-Frank Act or the explicit exclusions in the False Claims Act which are clearly applicable to the Dodd-Frank Act.

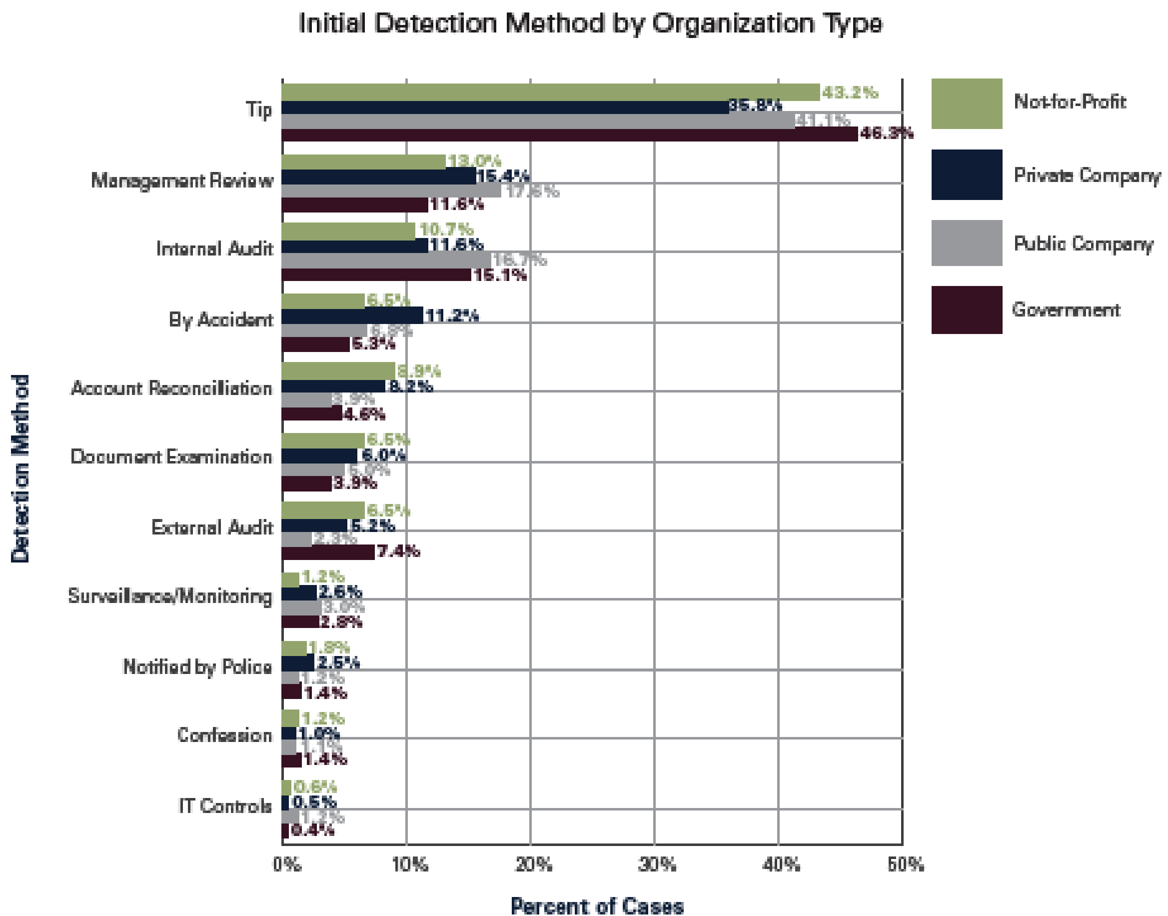
In addition, we also call the Committees attention to all other recommendations set forth in this rulemaking proposal.

Part I: Employee Disclosures are Essential for the Detection of Fraud

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

– *Association of Certified Fraud Examiners, Global Fraud Study 2010*

Association of Certified Fraud Examiners Findings:
WHO DETECTS FRAUD?



[1]

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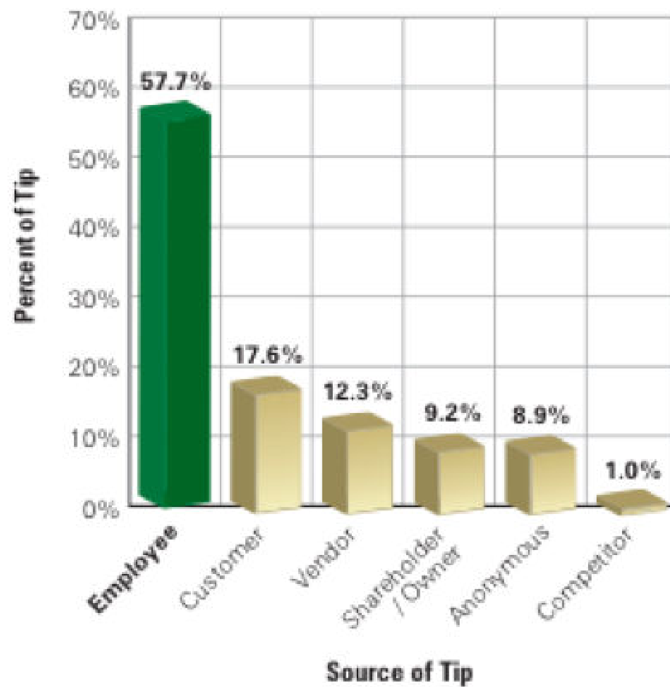
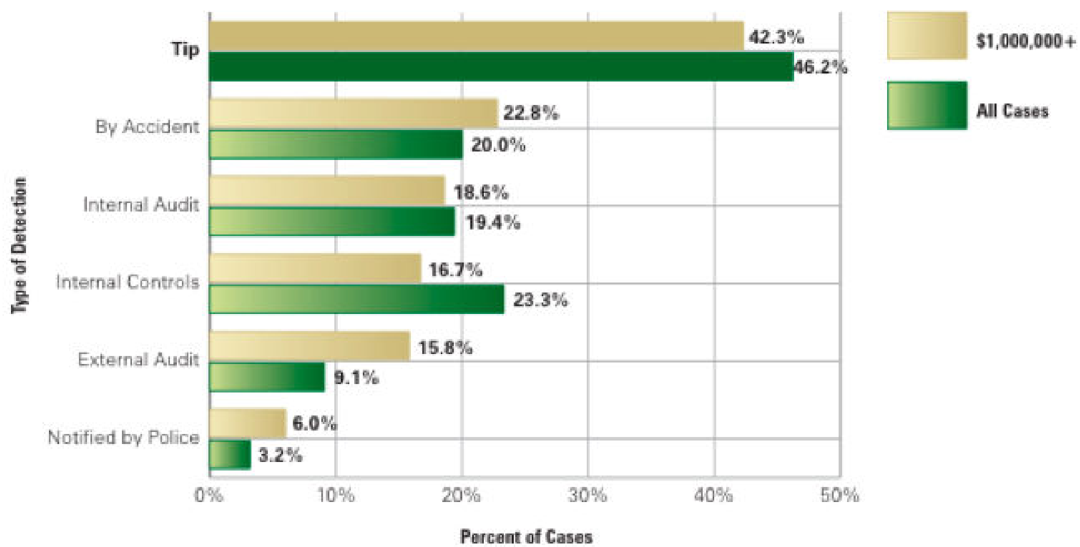
[1] Source: Association of Certified Fraud Examiners, 2010 Global Fraud Study (page 19)

Percent of Tips by Source[9]



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

Initial Detection Method for Million Dollar Schemes[6]



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

Part II: Employees are Reluctant to Report Fraud

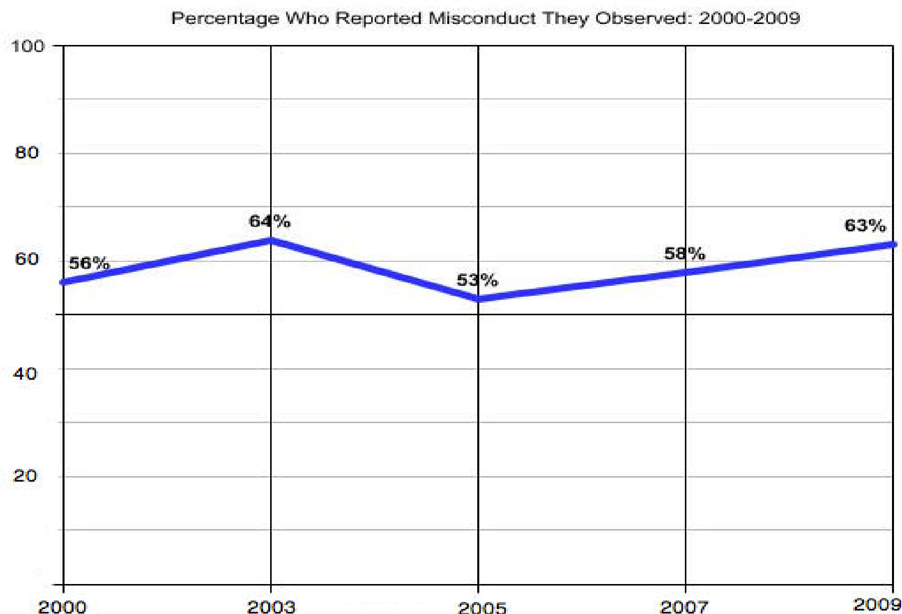
“One of the critical challenges facing both [Enforcement and Compliance] officers and government enforcement officials is convincing employees to step forward when misconduct occurs.”

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

Employee Reporting Behaviors

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

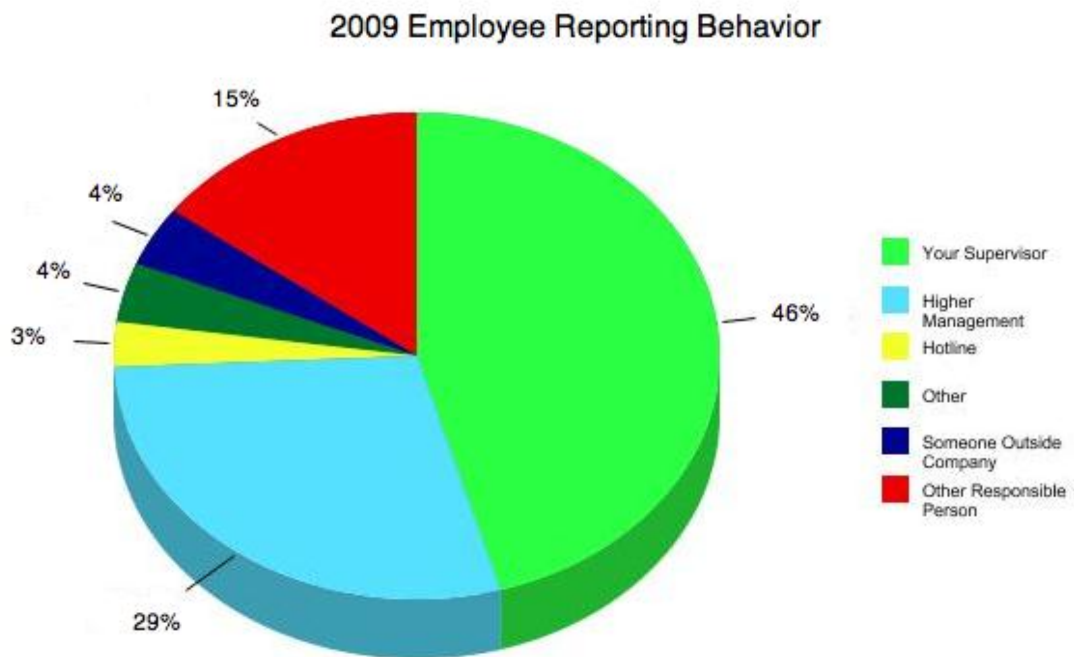
As set forth in the following chart, approximately 40% of employees who witness fraud or misconduct do not report this misconduct to *anyone*. The percentage of employees who report has somewhat fluctuated over the ten year period surveyed by ERC and averages 41% of employees not reporting misconduct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



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

[2] The ERC was founded in 1922 and describes itself as "America's oldest nonprofit organization devoted to the advancement of highly ethical standards and practices in public and private institutions". According to its website, ERC is predominantly sponsored by the regulated community including corporations such as BP, Raytheon, Dow, Lockheed, Martain, and Lilly. It also receives support from the Ethics and Compliance Officer Association.

Of the 63% of employees in 2009 who witnessed AND reported misconduct, the following chart explains who they reported to.



Disclosing Misconduct

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

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

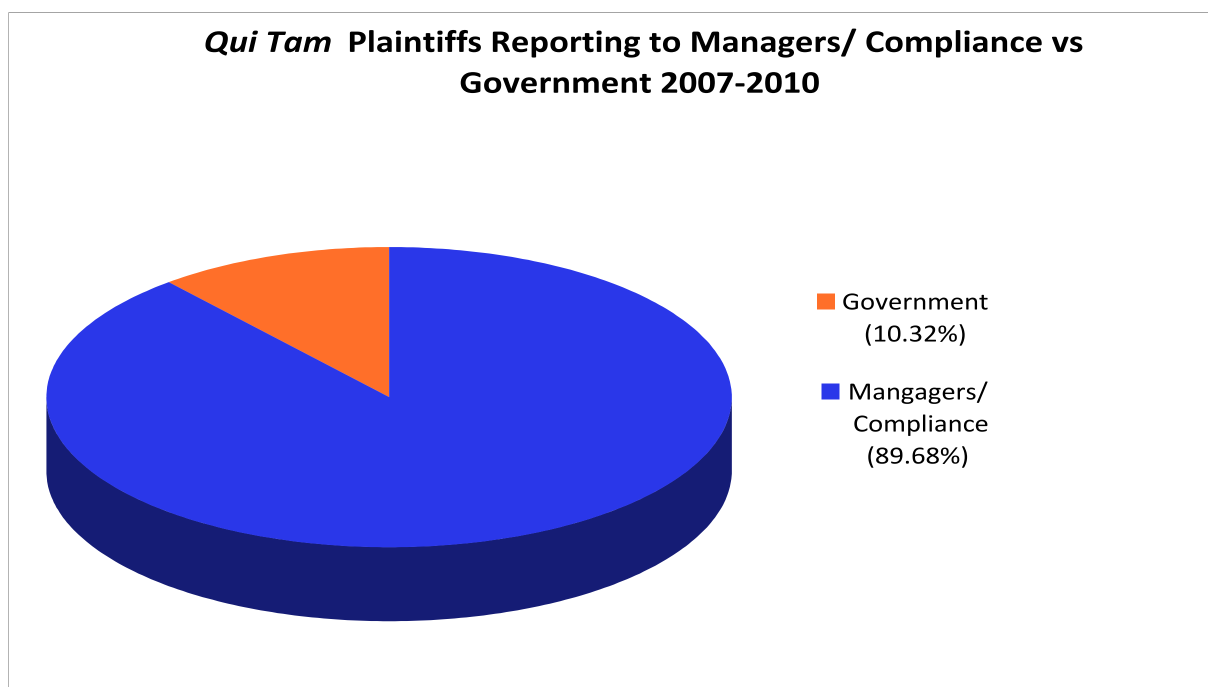
The Ethics Resource Center, after carefully studying employee reporting, over a ten year period concluded that the "critical challenge" facing both "corporate compliance programs" *and* "government enforcement officials" is to "convinc(e) employees to step forward when misconduct occurs."

In other words, under pre-Dodd Frank compliance and legal regimes the overwhelming majority of employees who detected fraud and misconduct failed to report their observations to hotlines and other internal services. They also failed to report their concerns to appropriate law enforcement officials.

Part III: The Impact of *Qui Tam* Laws in Corporate Compliance Programs

Impact of *Qui Tam* Laws on Internal Reporting

The existence of a *qui tam* whistleblower reward program has no impact on the willingness of employees to internally report potential violations of law, or to work with their employer to resolve compliance issues. Our statistical study of *qui tam* cases decided 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.

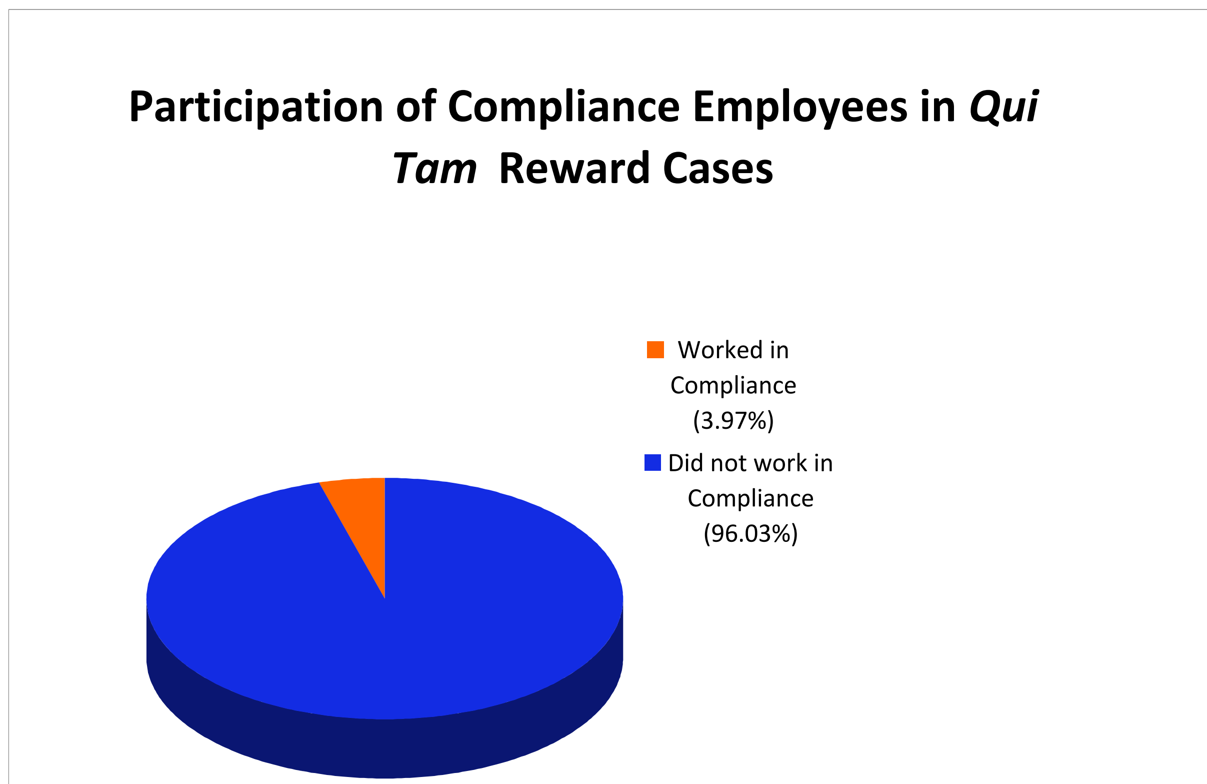
The Journal's conclusion that "nearly all" of the whistleblowers try to report their concerns internally is entirely consistent with the larger study conducted by the NWC and stands squarely contrary to the baseless concerns raised by industry that "greedy" employees will avoid internal compliance programs 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.

Impact of *Qui Tam* Laws on Compliance Reporting

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

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



**See* Exhibit 2

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 IV: Employees Who Observe Fraud and Misconduct are Very Reluctant to Report their Concerns to Federal Law Enforcement

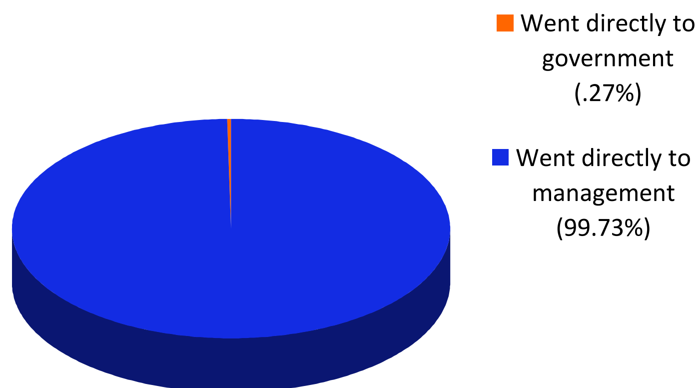
Failure of Employees to Disclose Misconduct Directly to the Government is a Significant Regulatory Concern

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

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

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

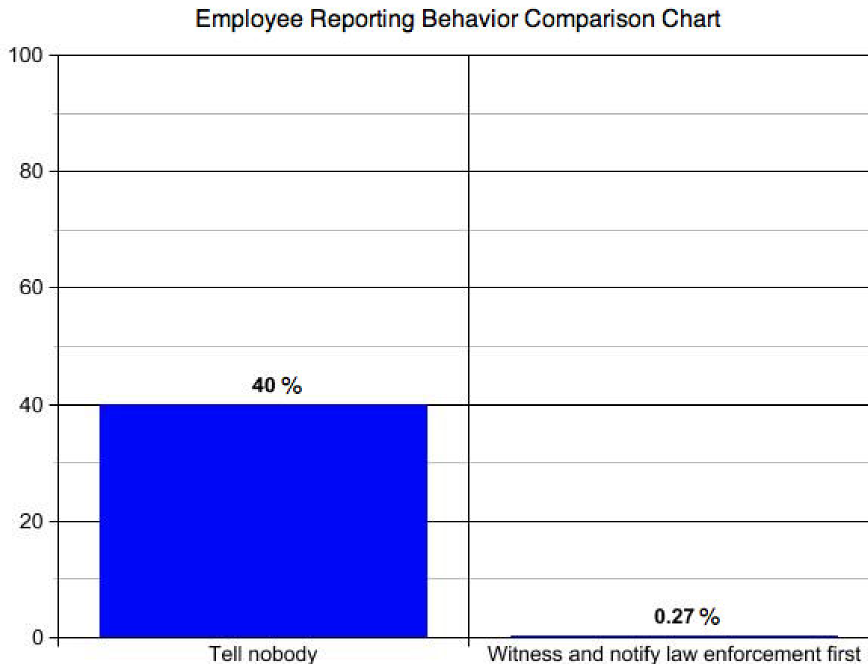
Percentage of Employees Who Witness Misconduct and Report Allegation Directly to the Government



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

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

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



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

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

In order to address the extreme reluctance of employees to report fraud and misconduct to Federal Law Enforcement, the rule should contain explicate training and notification requirements. This will help ensure that all employees in CFTC markets are fully trained and receive notice of Dodd-Frank rules prohibition of retaliation and employees to file for awards.

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

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

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

Senator Howard,

Congressional Globe, March 1863

The Commission's Rules Should be Modeled on the FCA Practice and Procedures

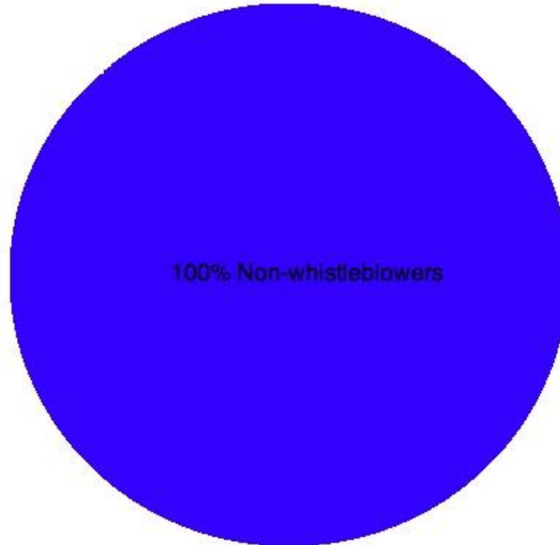
The False Claims Act was originally enacted in 1863. In 1943, it was amended and the ability for employee whistleblowers to utilize the law was effectively eliminated. In 1986, the FCA was amended again to resurrecting the *qui tam* provisions in the original 1863 act. The Act was further strengthened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

The Dodd-Frank Act was modeled on this law and the SEC Inspector General even recommended following the FCA's procedures with regards to rewards programs. Objective statistics published every year by the US Department of Justice Civil Fraud Division[4] unquestionably demonstrate that whistleblowers have actually recovered billions of dollars for taxpayers and that whistleblowers are the single most important source of information permitting the United States to recover funds from corrupt contractors.

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

Fraud Statistics

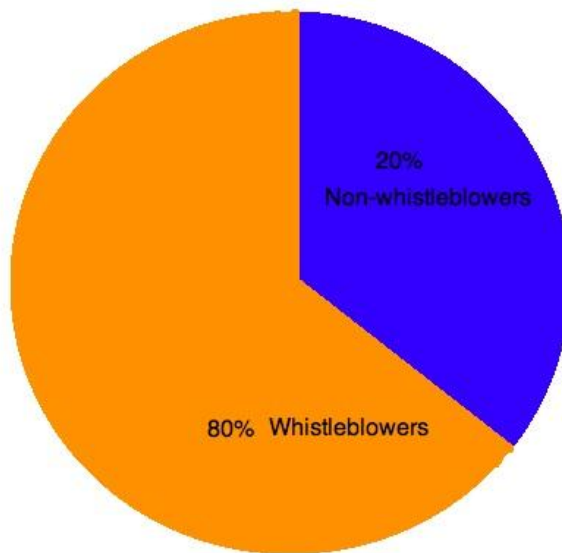
1987



■ Non Qui Tam

■ Qui Tam

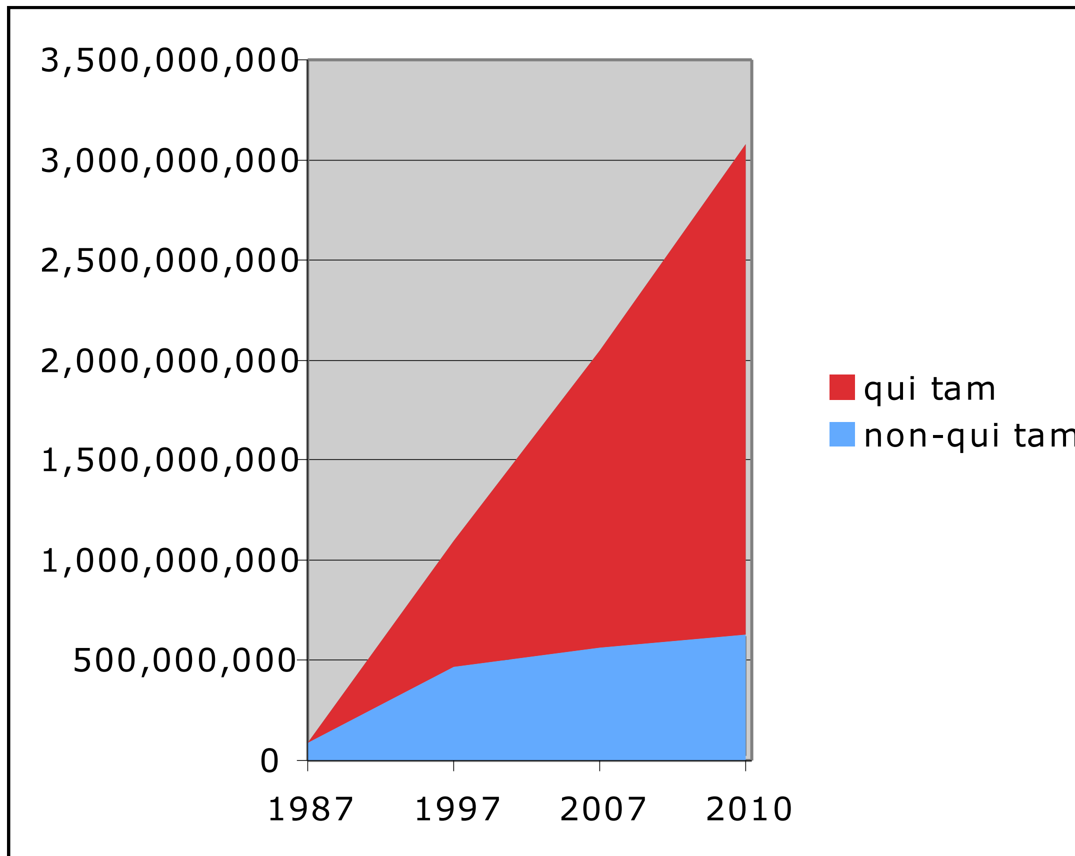
2010



**See* Exhibit 19

As can be seen from the above charts, since the enactment of the FCA, the amount of overall civil recoveries obtained by the United States has dramatically increased from 89 million in 1986 (prior to whistleblower rewards program) to the $3.08 billion dollars in 2010. Furthermore, it is

now well documented that whistleblower disclosures are responsible for the *majority* of all federal fraud recoveries from dishonest contractors.



*See Exhibit 19

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

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

The importance of using financial incentives to promote corporate fraud disclosures was underscored in a published scholarly study by Boston University's Law Journal. This study analyzed several possible methods of incentivizing whistleblowing and concluded that a *qui tam* model provides the greatest incentive for the whistleblower while exposing information that the government would not be able to detect on its own. "*Qui ta* cases bring out important inside information. Potential *qui tam* plaintiffs can offer information about inchoate or ongoing malfeasance of which law enforcement is unaware." After examining the potential disincentives that *qui tam* whistleblowers may confront, the article notes that "the bounty a relator stands to gain does, in many cases, outweigh the disincentives to being a whistleblower"[5] Similar findings were made at University of Chicago's Booth School of Economics, affirming that a *qui tam* rewards program is indeed the best way to pursue workplace misconduct.

The Dodd-Frank Act was directly modeled on False Claims Act and the Inspector General of the SEC recommendations that the SEC rewards law be modeled on the False Claims Act. Given the twenty-five year history of the False Claims Act, combined with the overwhelming empirical evidence that the False Claims Act has worked, the Commission should model its rules on the Flase Claims Act wherever practiable. The Commission should also use the False Claims Act rules as guidance, as set forth in parts ten and eleven of this report.

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

Part VI: Employers must be Prevented from Retaliating Against Employees who Disclose Fraud or Misconduct to Internal Compliance Officials

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

ACFE,

2010 Global Fraud Study [6]

[6] Exhibit 16, page 80

Reports to Internal Compliance must be Fully Protected

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

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

In that case, Ronald Reagan's appointed Secretary of Labor ruled that such internal disclosures were protected and ordered the whistleblower to be reinstated. Brown & Root disagreed, and appealed the case to the U.S. Court of Appeals for the Fifth Circuit. That court agreed with Brown & Root and upheld the termination. The employee's career was ruined because he failed to raise his concerns to government officials. The Fifth Circuit explicitly held that to be a whistleblower an employee must contact a "competent organ of government."

Since that date, in court after court, under law after law, corporate attorneys have aggressively argued that contacts with internal compliance programs are *not* protected activities. This is why organizations such as

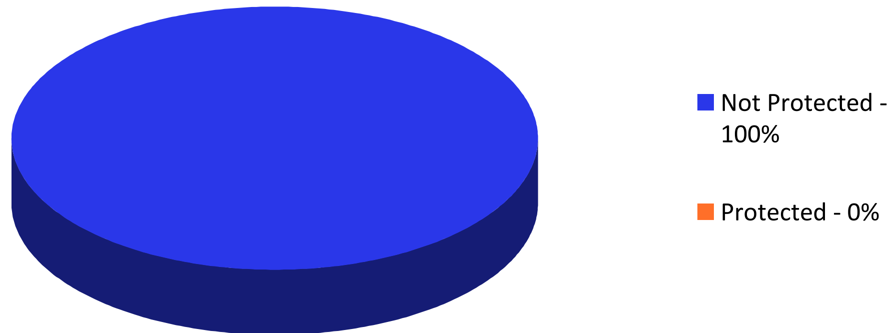
the National Whistleblowers Center have consistently urged Congress to amend existing whistleblower laws to ensure that internal reporting is protected, and to include language in new legislation that explicitly protects internal reporting.

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

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

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

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



Our review of the False Claims Act revealed a similar result. In every case employers argued that internal reporting of concerns, standing alone, was not protected activity. There is not one reported case in which a company agued that employees who disclosed allegations to compliance departments should be protected as a matter of law.

Unfortunately, employers' narrow views on protected activity prevailed in the vast majority of court cases filed under the FCA. In fact, every court of appeals in the United States took a narrow view of protected activity, and *none* fully protected internal complaints to management or compliance programs. Below is a circuit-by circuit review of the controlling rule on internal protected disclosures under the FCA in all twelve applicable federal judicial circuits:

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

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

630 (2005)	signature requirements and the results of his audit, and that he gave a presentation about the problem at the compliance retreat…plaintiff could not show retaliatory discharge where his investigations were part of his job and he never characterized his concerns as involving illegal, unlawful, or false-claims investigations"
6th Circuit McKenzie v. BellSouth Telecommunications 219 F.3d 508 (2000)	"Reporting concerns of mischarging a government project or investigating an employer's non-compliance with federal or state regulations was insufficient to constitute 'protected activity'…her numerous complaints on the matter were directed at the stress from and pressure to falsify records, not toward an investigation into fraud on the federal government"
7th Circuit Brandon v. Anesthesia & Pain Management 227 F.3d 936 (2002)	"It is true that Brandon used terms like 'illegal,' 'improper,' and 'fraudulent' when he confronted the shareholders about the billing practices…Brandon was simply trying to convince the shareholders to comply with Medicare billing regulations. Such conduct is usually not protected"
8th Circuit Schuhardt v. US 390 F.3d 563 (2004)	"Viable FCA action…we conclude that there is sufficient evidence that Schuhardt's activity was in furtherance of a qui tam action. Specifically, Schuhardt perceived a mass effort to modify patient records months after a procedure had occurred. She explained that doctors signed reports without reviewing files. She advised her supervisor that the activity may be fraudulent and illegal. She also mentioned to the supervisor that a government agency would forbid the practice if it was aware of it. Schuardt complained to the University over its confidential hotline. Then, when the billing practice remained unchanged, she copied files that she believed to be evidence of fraud"
9th Circuit US ex rel. Hopper v. Anton 91 F.3d 1261 (1996)	The record quite clearly shows Hopper was merely attempting to get the School District to comply with Federal and State regulations. Her numerous written complaints, seventy letters and over fifty telephone calls were all directed toward this end…she was not whistleblowing"

10th Circuit US ex rel. Ramseyer v. Century Healthcare 90 F.3d 1514 (1996)	"The amended complaint states that plaintiff…regularly communicated to her superiors 'information regarding non-compliance with the required minimum program components…we do not believe plaintiff has satisfied her burden of pleading facts which would put defendants on notice that she was taking any action in furtherance of an FCA action"
11th Circuit US ex rel. Sanchez v. Lymphatx 596 F.3d 1300 (2010)	"If an employee's actions, as alleged in the complaint, are sufficient to support a reasonable conclusion that the employer could have feared being reported to the government for fraud or sued in a qui tam action by the employee, then the complaint states a claim for retaliatory discharge under §3730(h)"
DC Circuit Hoyte v. American Nat'l Red Cross 518 F.3d 61 (2008)	"'An employee's investigation of nothing more than his employer's non-compliance with federal or state regulations' is not enough to support a whistleblower claim"

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

We hereby recommend that the CFTC adopt and make the following rules final:

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

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

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

* Consistent with 48 C.F.R. Chapter 1, all audit committees and compliance programs shall be required to "timely disclose" to the CFTC "credible evidence of a violation" of law or CFTC rules. *See* 73 *Federal Register* 67064, 67065 (November 12, 2008). When making these disclosures, if the information originated with a whistleblower, the identify of that whistleblower shall be provided to the CFTC, and that submission shall be deemed to qualify as an application for a reward under § 23;

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

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

Part VII: The Rules Governing Internal Corporate Compliance must be Strengthened

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

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

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

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

<u>Feature #1:</u> Executive and management compensation linked to compliance and ethics leadership

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

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

Feature #4: Vigorous enforcement of non-retaliation policies

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

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

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

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

Feature #9: Real compliance audits designed to uncover lawbreaking

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

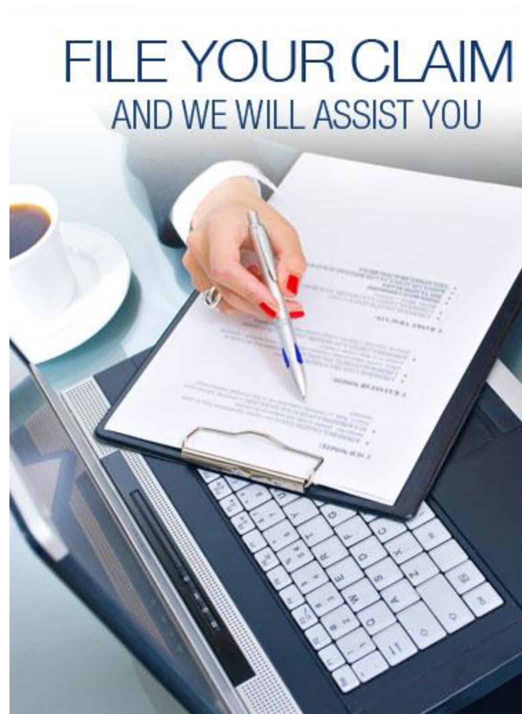
Feature #11: Shared learning within the company based on actual disciplinary cases.

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

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

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

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



Part VIII: Employees who File Claims or Raise Concerns Directly to the Commission must be fully Protected

The Sarbanes-Oxley Act Prohibits the CFTC from Adopting Rules that could Interfere with Whistleblower Disclosures

Neither the regulated community nor the CFTC can lawfully enact any rule that would create a financial disincentive or otherwise discourage a person from filing a complaint with the CFTC.

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 *criminalizes* any attempt to interfere with the right of any person to contact the CFTC concerning any violation of law. The section sets forth an overriding public policy, implicit or explicit in every federal whistleblower law, that employees can *always* choose to report concerns directly to law enforcement, regardless of any other program, private contract, rule or regulation.

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

"Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any

person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense shall be fined under this title or imprisoned not more then 10 years, or both."

18 U.S.C. § 1513(e).

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

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

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

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

The rulemaking authority of the CFTC under Dodd-Frank is limited. Rules are permitted that simply "implement the provisions" of section 21F. All such implementing regulations are required to be "consistent with the purposes" of the Act. Since one of the core purposes of the Act is to permit the free and unfettered communication of information from employees to

law enforcement agencies, it is incumbent upon the CFTC to strongly reaffirm this right.

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

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

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

Part IX: The CFTC should Carefully Review and Implement the SEC's OIG's Recommendation for the Establishment of a Whistleblower Reward Program

The Commission Should Adopt the Recommendations made by the SEC's Inspector General

The SEC's OIG carefully studied the SEC's past practices in processing whistleblower reward-based tips in light of its understanding that proposals were pending in Congress to upgrade the rewards program. The OIG made nine specific recommendations. *See* Exhibit 11,"Assessment of the SEC's Bounty Program". The SEC Enforcement Division approved all of these recommendations. *See* Exhibit 12, SEC Enforcement Division Memorandum. These recommendations are equally applicable to the CFTC and should be incorporated into the Final Rule.

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

All of the recommendations of the OIG should be incorporated into the Final Rule of the CFTC. The OIG recommendations are as follows:

OIG Recommendation #1: Public outreach concerning the existence of the bounty program. The Final Rule should implement this recommendation. We propose the following: All regulated companies shall be required to prominently post notice of CFTC § 23, informing employees of their right to file claims directly with the CTFC, and their right to file such claims anonymously. Regulated companies should also be required to conduct annual trainings that inform

employees of their rights under §21F and §23, including the anti-retaliation provisions.

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

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

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

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

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

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

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

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

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

OIG Recommendation # 4: Criteria for rewards. Congress established the criteria, and the Commission should strictly follow that criteria. The Commission does not have the legal authority to substantively change this criteria. The implementation of the criteria must be consistent with the "purpose" of § 23, which is to encourage employees to report violations and provide generous financial rewards and incentives for these reports. The Commission cannot use its rulemaking authority to reduce the scope of the Act, or create criteria that could discourage employees from fully and aggressively utilizing the programs established in § 23.

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

Part X: Additional Specific Rulemaking Comments

Compliance Officials Cannot be Excluded

§ 165.2(g)(4) and (5): There is no statutory justification for these exclusions. There is no empirical evidence that these exclusions would serve the public interest. The statistical data under the False Claims Act does not support any finding that the existence of a *qui tam* award would have any negative impact on the willingness of employees to report allegations of misconduct to internal compliance programs. Also, the evidence does not show any negative impact on the willingness of compliance-related personnel to work, in good faith, to investigate and resolve the allegations of wrongdoing.

The opposite is true. Compliance personnel have been targeted for retaliation simply for doing their job "too well." *See Kansas Gas & Electric v. Brock*, 780 F.2d 1505 (10th Cir. 1985). Compliance-related personnel need full protection and rights under Dodd-Frank. In this regard, the original legislative history of the 1986 False Claims Act amendments directly cited to the case of a compliance professional who was retaliated against for doing a good job. This is an example of the type of employee intended to be protected and rewarded under the False Claims Act. *Mackowiak v. University Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984), *cited in* S. Rep. 99-345, pp. 34-35.

Although the NWC objects to this exclusion, and reserves the right to challenge this new and non-statutorily based exclusion in court, the NWC suggests that the exclusion be modified and contain the following additional clauses: (1) any legal, compliance, audit or other "similarly functioned" employee who, in good faith, believes that he or she has been or may be subject to retaliation for reporting wrongdoing and/or for engaging in the protected activities explicitly protected under *Mackowiak* or *Kansas Gas & Electric* may directly file a Dodd-Frank request for a reward, and the information provided shall be considered as being "derived from" "independent knowledge."

Restrictions on Obtaining Evidence must be Reasonable and Narrowly Tailored

§ 165.2(g)(6): This exclusion is too broad. It directly raises concerns over the methods used by an employee to gather information. Often these methods may be reasonable, but may also violate state or federal law. For example, in Maryland, one-party taping of conversations is illegal, while in the District of Columbia such evidence-gathering techniques are legal. An employee could easily make a good faith mistake and improperly tape a conversation. But even in Maryland, a person cannot be convicted of one-party taping under state law if he or she obtained federal immunity and/or if he or she did not know, at the time the tape was made, that such taping was illegal. Thus, adopting this rule, the Commission will find itself responsible for adjudicating -- without any real due process afforded to the whistleblower -- whether or not evidence-gathering techniques violated a law, and if so, whether or not the whistleblower was in fact guilty of violating said law (i.e. whether the state could prove, beyond reasonable doubt, that the employee in fact violated each and every element of the criminal claim).

A better rule would be based on admissibility of evidence. If a whistleblower provided evidence to the Commission that was in some manner tainted, and such evidence could not be used as a basis for the administrative, judicial or criminal proceeding that resulted in the payment of the sanctions, that part of the whistleblower's claim would be denied. However, if information provided by the whistleblower is used as a basis for obtaining the sanction, the whistleblower must be entitled to a full reward.

Burdens of Proof must Comply with the Law

§ 165.2(i)(1) and (2): These proposed regulations establish a burden of proof on whistleblowers based on a "significantly contributed" standard and an "essential to success" standard. This standard violates the burden of proof set forth under the statute. The correct standard is whether or not the information “Led to the successful enforcement of the covered judicial or administrative enforcement action.”

“Original Information” must be Defined in a Manner Consistent with the Legislative Intent/The FCA

§ ***165.2(k)(ii)***: This standard for establishing "original information" violates a central tenant of the False Claims Act, and is not legally justified under the provisions of Dodd-Frank. The mere fact that the Commission may "already know" of information provided by a whistleblower cannot be, as a matter of law, a disqualifying factor. In 1986 one of the most important reforms enacted by Congress fixing the False Claims Act was the elimination of a "government knowledge" disqualification. There is a high likelihood that the government may know about numerous frauds, and that a company may file information with the government that if, fully understood or explained, would set forth all of the facts necessary to demonstrate the fraud. This rule would permit wrongdoers to file a "document dump" on regulatory agencies, and then hide behind that dump in order to justify disqualifying a whistleblower. The broad government knowledge defense is no longer legally justifiable under any circumstance and inclusion of such a rule is highly illegal.

The controlling legal authority on this issue is contained in the False Claims Act, 31 U.S.C. § 3730(e)(3), which states: “In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil monetary proceeding in which the Government is already a party.”

In the legislative history of the 1986 FCA amendments, Congress explicitly *rejected* to the holding in *Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), and other similar cases. These cases barred a *qui tam* lawsuit because the federal government was in “possession of the information.” The proper standard is not mere possession of information, but whether or not the government has initiated a formal administrative or judicial proceeding based on the information.

The FCA rule is predicated on the date the government actually takes action on the information it has, and the extent of such action. For example, if the government initiates an administrative action against a company for violation "x," then any subsequent whistleblower disclosure on violation "x" would not constitute "original information," unless that new information was not known to the government, and was thereafter used by the government as a basis for sanctioning the wrongdoer. However, until an administrative action is filed, the mere fact the government has information in a "file drawer" or a filing cabinet cannot, as a matter of law, disqualify the whistleblower from a reward.

The rule for qualifying for a reward is the "first to file" rule, not the first to have information stashed away in files or unopened documents. Under the FCA the rule is very clear and has *worked* very successfully in motivating whistleblowers to expeditiously step forward, and in motivating the government to initiate proceedings.

The FCA "first to file" rule is, *See* 31 U.S.C. § 3730(b)(5), was incorporated into Dodd-Frank and must be strictly followed. Thus, it does not matter who was the first person to provide information to the Commission or another law enforcement organization. The key issue is who was the first to file the *qui tam* related reward request. If the whistleblower files that request first, and if no other person filed a similar request prior to that filing, and the government had not initiated a formal proceeding (administrative, civil or criminal), the whistleblower meets this requirement.

The 90 Day Rule for Filing Claims will Result in Hardship, Loss of Information, and is Inconsistent with the Applicable Statute of Limitations

§ 165.2((l)(2) This requirement cannot be justified under law or policy. This is inconsistent with the statute of limitations permitted for filing claims set forth in the Dodd-Frank Act. Why must a whistleblower file a CEA claim within 90 days of providing testimony to Congress or other law enforcement agency? The employee may very well provide this information, but be unaware that he or she can file a claim under the CEA. Thus, simply by blowing the whistle to Congress, an employee could waive significant rights. This rule will simply disqualify otherwise valid whistleblowers for no legitimate purpose. Congress set forth the statute of limitations for enforcing the underlying laws administered by the CFTC. As long as a whistleblower comports with these Statues of Limitations a claim must be considered timely. This rule violates that statutory mandate.

The Definition of "Voluntary" is Inconsistent with the Purposes of the Statute and Violates the Law

§ 165.2(o) Under the misprision of a felony statutes every American is under a duty to report violations of law. In today's modern workplace, almost every employee enters into a "legal or contractual" obligation with his or her employer to report wrongdoing. Consequently, this rule will result in the disqualification of most every potential whistleblower.

This disqualification is not contained in the Dodd-Frank Act. In fact, the Dodd-Frank Act prohibits the enforcement of any "contractual" obligation that may waive an employee's right to file a CEA claim.

The empirical data demonstrates that many employees do not report fraud and misconduct, even if they are under a legal or contractual duty to report such problems. The empirical data also demonstrates that these legal and contractual rules are primarily expository in nature, and employees are almost never sanctioned for keeping quiet about misconduct they observed (or even participated in). The entire purpose behind the Dodd-Frank reward provisions was to induce and motive employees to report violations, regardless of pre-existing reporting requests.

If pre-existing legal and contractual obligations resulted in employee reporting, there never would have been an Enron, WorldCom, or 2007-08 financial meltdown. There would have been no need for Congress to have enacted the Dodd-Frank Act.

The Submission Process must be Monitored by a Whistleblower Office

§ 165.3 This provision sets forth the basic rules for submitting a CEA claim. The final rule should reasonably require an employee to file a specific form in order to initiate the CEA-rewards process. Such a rule will clearly establish the date in which the initial application was filed, and will facilitate the internal monitoring of the filing. Additionally the CFTC should implement the following additional rules:

First, the CFTC should establish a Whistleblower Office ("WO") that will have exclusive jurisdiction over the administration and processing of CEA-reward applications.

Second, every office within the CFTC should know about the reward program, and know where the completed forms are filed. Thus, if a whistleblower accidently files a claim in the wrong office, the mistake can be remedied. By rule, every office within the CFTC should be directed to forward any CEA-reward form to the WO.

Third, once a reward application is filed, the WO must give the application a docket number, and conduct an internal review to determine whether, on the fact of the application, the whistleblower is the first to file. During this process the WO should categorize claims by the name of the alleged wrongdoer (the "respondent") and should have a process for ensuring that multiple claims filed against a single respondent are coordinated. Claims may overlap, and whistleblowers may have information that provides additional support for ongoing investigations.

Fourth, although the "first to file" rule theoretically disqualifies the second whistleblower to file a claim, under the False Claims Act it is often best for claims to be consolidated and rewards shared. If two or three whistleblowers all have information that builds a strong case against a respondent, these whistleblowers may want to voluntarily agree to work together, and waive any claims to being the "first to file." Additionally, by

encouraging cooperation between multiple whistleblowers, the Commission can avoid costly and wasteful litigation at the end of a case attempting to determine who was the first to file on which claim. Such internal disputes are best resolved through a consent agreement, stipulation or settlement. These types of agreements are common in FCA cases.

Fifth, the WO should coordinate the whistleblower's claim with the various offices of the CEA and other law enforcement agencies that may have an interest in the underlying allegations. Often a CEA violation may also implicate violations of other laws, and these agencies may have an interest in working with the whistleblower. Joint task forces are common under the FCA, and should be encouraged under the Dodd-Frank Act.

Sixth, the WO should coordinate the processing of information that may be under court-ordered seals or protective orders. It is in the overall interest of federal law enforcement for a whistleblower's information to be fully shared between relevant agencies, and the WO should be required to facilitate that process.

Seventh, the WO must keep the whistleblower reasonably informed as to the status of his or her case. At a minimum, the WO should send a letter every 90
days to the whistleblower concerning the status of the claim. Additionally, the WO should be a point of contact facilitating meetings between the whistleblower and CFTC staff conducting the investigation and prosecuting a civil or administrative proceeding.

Eight, the WO must be responsible for attempting to settle the rewards cases. Under the FCA, the vast majority of cases settle with an agreement between the whistleblowers and the United States as to the scope of a whistleblower's case, and the percentage of a whistleblower's reward. Although whistleblowers have a legal right to oppose settlements and obtain court hearings on these matters, in the overwhelming majority of cases these issues are resolved though a settlement.

Settling claims and paying significant rewards serves the public interest by encouraging other employees and whistleblowers to come forward with information, and by having a chilling effect on potential wrongdoers. People who are contemplating violating the law must understand that

there are strong whistleblower laws that will pay rewards to people to expose the violations.

Ninth, assuming that a settlement cannot be reached, the WO should provide information to the staff personnel that will present the position of the Commission Staff to the Commission for a final adjudication. The WO should have knowledge of every aspect of the whistleblower-rewards proceeding, and must be required to maintain accurate records.

The overall process must be "user friendly," non-complex and incorporate common sense principles for managing a whistleblower case. The current rules are very complex and should be conformed to the current practices typical in FCA cases.

Whistleblowers must be Provided the Right to Intervene to Protect their Identity or Confidentiality

§ 165.4 Confidentiality can be extremely important to whistleblowers. Thus, prior to any Commission action that may reveal the identity of a whistleblower, the whistleblower must be informed of this intended action, and be provided with a reasonable opportunity to oppose the action, including, but not limited to, a reasonable opportunity to intervene in an ongoing proceeding in order to obtain a protective order.

Mandatory Assistance to the Commission must Conform to the Dodd-Frank Standards

§ 165.5(b)(2) The Dodd-Frank Act places a low burden on whistleblowers that seek to file a rewards application. Whistleblowers that file a claim in accordance with the statute must be entitled to their reward.

The requirement to cooperate with Commission staff must be voluntary. Obviously, the Commission can take such cooperation into effect when determining the amount of a reward, or whether or not to even investigate the "tip." But the rules cannot force whistleblowers to take unpaid actions at the behest of the Commission Staff, and thereafter disqualify a whistleblower from a reward because the whistleblower did not do everything required by the staff.

Again, most whistleblowers will want to voluntarily provide the greatest assistance to the Commission in order to increase the likelihood that a claim will be investigated and ultimately result in a large sanction.

Whistleblowers cannot be Required to Sign Confidentiality Agreements

§ 165.5(b)(3) Whistleblowers cannot be required to execute non-disclosure agreements. The Dodd-Frank Act does not require or authorize any such rule. Obviously, if a whistleblower files a claim, and thereafter declines to execute a non-disclosure agreement, this failure could impact the willingness of the Commission staff to share information with the whistleblower during the course of its investigation. Thereafter, this could result in the Commission either not filing an enforcement action and/or not obtaining the full amount of sanctions it otherwise may have obtained. Such outcomes are not to the advantage of the whistleblower, which will only collect a reward if the Commission undertakes some form of enforcement action, and recovers a large sanction.

Additionally, the whistleblower must retain the right to object to the actions of the Commission, without risking being disqualified from a reward. This is a basic First Amendment right. If the whistleblower believes the Commission is mishandling an investigation, he or she retains the right to blow the whistle on that suspected misconduct.

Furthermore, the whistleblower may have clients who may need to know about his or her underlying concerns. For example, if a whistleblower believes a company is operating a Ponzi scheme, it would be rather odd that the whistleblower could not tell his or her clients about the scheme in order to protect these clients, simply because the employee also filed a Dodd-Frank rewards application.

The "Acquired Information" Standard is not Narrowly Tailored

§ 165.6(a)(4) The rule disqualifies whistleblowers from a reward if the whistleblower obtained his or her information from persons otherwise disqualified under § 165.6(a)(1)-(3). Although this rule is logical for most of the disqualifications, it should not be applied to disqualifications under § 165.6(a)(2). That disqualification concerns persons convicted of violations related to the enforcement action at issue.

The rule should be modified to permit non-family members who learn of the wrongdoing from the criminal to potentially qualify for the reward. Take for example, a secretary who works for a high-ranking manager. As a result of the secretary's whistleblowing, the high-ranking manager is convicted of criminal violations of the CEA or SEA. However, the secretary *learned* of the violations directly from the high-ranking manager, and thereafter turned in the frauds to the Commission. Although the secretary learned of the frauds from the criminal wrongdoer, that secretary clearly should be eligible for a reward.

It would be illogical and violate public policy for criminal wrongdoers to know that anyone they discuss their criminal misconduct with will be disqualified from a Dodd-Frank reward. The opposite must be true. Those who engage in criminal wrongdoing must understand that *anyone* they tell about their crime could potentially turn them in and get a reward. That fear will create a deterrent that serves the public's best interest.

The Procedure for Filing for a Reward will Result in Hardship

§ 165.7 The procedures set forth in this section of the final rule are simply unworkable. Whistleblowers cannot be expected to follow the Commission's web site and somehow understand that a sanction published on that web site resulted from, or related to, the allegations the whistleblower put forth. It creates a procedural nightmare for whistleblowers and their counsel, it creates a procedure in which the whistleblower is divorced from the claims he or she initiated and will only result in confusion. This will lead to injustices and an undermining of the core purpose of the Dodd-Frank rewards provisions.

This provision and requirement should be cut in its entirety. A properly working WO, as previously set forth, will result in a fair and reasonable process to adjudicate, settle and finalize whistleblower rewards, with minimum cost to the Commission. A properly working WO will maximize the opportunity to settle cases and will ensure that all claims filed related to any ongoing investigation are coordinated and properly adjudicated.

The rule must vindicate the deterrence aspect of the law. Procedure that will result in the denial of otherwise valid claims will have a chilling effect on the willingness of employees to disclose fraud.

The Payment Process must be Simplified and Streamlined in a Manner Consistent with the FCA

§ 165.14. Under the FCA, it is common for all relator shares to be fully discussed and resolved before any final settlement agreement is executed and presented to a court for approval. Before a sanctions proceeding against a wrongdoer is resolved, the WO should, wherever possible, bring the whistleblowers into the process, explain the amount of total sanction, try to resolve relator share issues and try to have a complete settlement of all outstanding issues. It is to all parties' advantage for these matters to be resolved outside of costly and counter-productive litigation between whistleblowers and each other and/or the Commission staff. The Commission must attempt to have excellent working relations with whistleblowers, in order to establish a reputation as an office that is open, receptive and fair. The goal is to use the procedures in order to encourage employees to step forward, not create obstacles to rewards that will result in litigation.

The Culpable Conduct Exclusion must be Narrowly Tailored

§ 165.17 This exclusion is not permitted under the statute and thus must be cut. However, if the provision is not cut, it should be modified by the following caveat: the restrictions only apply if an employee engaged in the misconduct *without* the knowledge or consent of his or her management or the corporate wrongdoer. If an employee is instructed by management to violate the law, or if such violations are knowingly condoned by management, any employee who blows the whistle on such management actions should be entitled to a full reward. The terminology of the Energy Reorganization Act is helpful in understanding this concept. Under the ERA employees who engage in misconduct lose protection only if the employee acted "without direction from his or her employer."

The Commission should Adopt the Leahy-Grassley Recommendations

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

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

Part XI: The Rulemaking Proposal Submitted by Over 10 million Investors should be Adopted

The National Coordinating Committee for Multiemployer Plans' Comments to the SEC should be Approved

In Response to the S.E.C.'s Proposed Rules Implementing the Whistleblower Provisions of the Dodd-Frank Act, The National Coordinating Committee for Multiemployer Plans (NCCMP) submitted a letter dated December 17, 2010, urging the S.E.C. to modify its Proposed Rules. *See* Exhibit 20. The proposals submitted by the NCCMP to the SEC are equally applicable to the CFTC rulemaking process. The NWC supports the positions taken by the NCCMP and hereby incorporates the December 17th comments of the NCCMP into the NWC's formal rulemaking comments.

The NCCMP is a national organization that is devoted to protecting the interests of the approximately ten million employees, retirees, and their families. The pension funds they represent invest billions upon billions of dollars into the commodities and securities markets. Their board consists of representatives from pension funds from many of the largest trade unions in the United States, including the AFL-CIO Building and Construction Trades Department, the United Food and Commercial Workers Union, the International Brotherhood of Electrical Workers, the International Brotherhood of Teamsters, the Service Employees International Union, among many others. Given the size of their investments in the market, the concerns raised by NCCMP must be carefully weighed in any final rulemaking process.

The NWC specifically calls to the attention of the CFTC the following comments and proposals of the NCCMP:

* The NCCMP properly cites to the False Claims Act as the model upon which the Dodd-Frank whistleblower rules should be based. Letter, p. 2.

* The NCCMP properly understood that the filing procedures for Dodd-Frank reward claims must be "user friendly." Letter, pp. 2, 4-5, 9. In this regard, the NWC completely agrees with the proposal by the NCCMP that the filing procedures should be modeled on IRS Form 11, and the IRS process. Congress clearly looked at the IRS process as the model for the Dodd-Frank *qui tam* law. Letter, p. 5.

* The NCCMP properly understood that any limitations or exclusions on the class of persons eligible for a reward must be narrow and fully consistent with the statutory language of the Dodd-Frank. Letter, pp. 5-6.

* The NWC strongly supports the position of the NCCMP that the final rule should mandate that companies subject to the jurisdiction of the Commission implement compliance programs in accordance with 73 *Federal Register* 67064. Letter, pp. 7-8.

* The NWC strongly supports the position of the NCCMP that the final rule must provide a clear anti-retaliation rule modeled on 10 C.F.R. § 50.7. The agree with the NCCMP that the Commission should impose sanctions on companies that retaliate against employees, and subject those companies to the most severe sanctions, including delisting. Letter, p. 8.

* The NWC strongly endorses the NCCMP's position that there needs to be widespread public education concerning the rights individuals have under the *qui tam* and anti-retaliation provisions of the CEA. This is essential in order for the law to have a maximum deterrent effect. Letter, pp. 8-9.

Part XII: Additional Proposed Changes to the CFTC Rules

Comparison and Analysis of CFTC and SEC proposed Whistleblowing Rules with the Statutory Requirements of the Dodd-Frank and False Claims Act

CFTC - Rule	SEC - Rule	Dodd Frank or FCA Rule	Proposed Modification
" [if you obtained the information] As a result of the legal representation of a client on whose behalf your services, or the services of your employer or firm, have been retained, and you seek to use the information to make a whistleblower submission for your own benefit, unless disclosure is authorized by the applicable federal or state attorney conduct rules" §165.2(g)(3)	*"[if you obtained the information] As a result of the legal representation of a client on whose behalf your services, or the services of your employer or firm, have been retained, and you seek to use the information to make a whistleblower submission for your own benefit, unless disclosure is authorized by § 205.3(d)(2) of this chapter, the applicable state attorney conduct rules…"* §240.21F-4(b)(4)(ii)	Exclusion not permitted under Dodd-Frank and not recognized under any whistleblower law. Exclusion not permitted 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.	The perceived problem of attorneys filing reports based on client information can and should be dealt with by state laws that govern attorney ethics. In their December 17, 2010 letter to the SEC, the Taxpayers Against Fraud succinctly stated how this problem should be handled: "…the better approach is that followed by the Justice Department and the I.R.S. – i.e. exclude validly privileged information from consideration, and leave sanctions against attorneys to those professional and judicial tribunals charged with enforcing the relevant conduct rules." Ex. 21, page 8.
"Because you were a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity, and	*"Because you were a person with legal, compliance, audit, supervisory, or governance responsibilities for an entity, and*	Exclusion not permitted under Dodd-Frank and not recognized under any whistleblower law. Exclusion not	This exclusion must be eliminated in its entirety. It is not supported in the law or by the empirical data. This provision must exempt reports related to potential violations of federal law. If *any* employee believes that a

the information was communicated to you with the reasonable expectation that you would take appropriate steps to cause the entity to remedy the violation, unless the entity subsequently failed to disclose the information to the Commission within sixty (60) days or otherwise proceeded in bad faith;" §165.2(g)(4)	*the information was communicated to you with the reasonable expectation that you would take appropriate 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;"* §240.21F-4(b)(4)(iv)	permitted 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. The same Congress that enacted Dodd-Frank also amended the exclusions under the FCA (i.e. the 111th Congress) and did not create this exclusion. The 111th Congress narrowed the scope of the FCA exclusion.	federal criminal law was violated, there is a strong and overriding public policy that supports the prompt and immediate notification of the police/law enforcement of the possible commission of a federal crime. 18 U.S.C. § 1513(e). White-collar criminals do not have the right to have their employers notified of their crimes prior to the alerting federal law enforcement of said crimes. Inducing such a delay would constitute an obstruction of justice and would not serve the public interest. No suspected criminal has the right to prior notification that his or her wrongdoing may be reported to the police. The report should happen immediately and can happen confidentially. Any rule that promotes or mandates the prior notification of wrongdoers of their crimes could and would result in the destruction of evidence and/or a cover-up of illegalities. It is an unquestionable mandate of public policy that law enforcement should be notified at the earliest possible moment of any reasonably suspected violation of law. No one would argue or promote any rule or regulation that could in any manner result in the delay of law enforcement notification of crimes such as rape, bribery, money

			laundering, theft or extortion. The same rules apply to criminals who are wealthy or powerful, or whose crimes are committed, not in the streets, but in the corporate offices of publicly traded companies. Furthermore, corporations do not have the right to conduct initial investigations of criminal activity. They do not have the right to have t heir corporate compliance or legal departments investigate such conduct prior to the notification of the police or other law enforcement officials. This provision would interfere with the right of employees to file confidential/anonymous claims with the Commissions. If not eliminated, the CFTC proposal to establish a firm 60-day deadline should be adopted. The concept "reasonable time" is vague and subject to abuse, costly litigation and will fuel disputes between the Commissions and the whistleblowers. It will also promote prompt investigations by the alleged wrongdoer. Further, The National Whistleblowers Center agrees with the additional concerns over the current form of this proposed rule

			which were raised by the Taxpayers Against Fraud (TAF) in their letter to the Securities & Exchange Commission, dated December 17, 2010. Of particular importance is their concern that "[t]he 'supervisory' responsibilities relevant to disqualification under this subsection are undefined, and could be broadly cast to include a vast number of employees in any organization. Such vagueness would no doubt chill many from stepping forward." Ex.21, page 6. Additionally, TAF's concerns regarding the breadth and vagueness of the SEC's exempted categories is applicable to the CFTC Proposed Rules 165.2(g)(1)-(6). "Proposed Rule 21F-4(b)(4)'s definition of "original information" creates sweeping, and often vague, status exclusions that would disqualify broad categories of whistleblowers far beyond what Congress envisioned or the statute articulates. … In addition, many of the SEC's additional bases for disqualification are contingent upon the agency's exercise of discretion and can be neither known nor ascertained at the time a submission is made." Ex. 21, page 6.

"Otherwise from or through an entity's legal, compliance, audit or other similar functions or processes for identifying, reporting and addressing potential non-compliance with law, unless the entity failed to disclose the information to the Commission within sixty (60) days or otherwise proceeded in bad faith;" §165.2(g)(5)	*"Otherwise from or through an entity's legal, compliance, audit or other similar functions or processes for identifying, reporting and 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;"* §240.21F-4(b)(4)(v)	See comments on §§ 165.2(g)(4) and 240.21F(b)(4)(iv)	See comments on §§ 165.2(g)(4) and 240.21F(b)(4)(iv)
"By a means or in a manner that violates applicable federal or state criminal law." §165.2(g)(6)	"By a means or in a manner that violates applicable Federal or State criminal law;" §240.21F-4(b)(4)(vi)	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).	This provision should be eliminated. There are significant differences concerning the legality of various evidence collection techniques under state law, and the legality of some evidence collection techniques can only be decided on a case-by-case basis. The better practice is to instruct whistleblowers not to provide the government with any evidence illegally collected and to create a process in which evidence can be screened to ensure that tainted evidence is not used by investigators.

			Furthermore, if the evidence provided by the whistleblower is inadmissible in an enforcement proceeding, that could and would impact the scope of a reward, or ultimate eligibility. But these issues are best left to adjudication on a case-by-case basis without implementation of a blanket exclusion. If the rule is not eliminated, the NWC recommends the following modification: Change the rule to read as follows: "By a means or in a manner that violates applicable Federal ~~or State~~ criminal law, if the whistleblower knew at the time he or she collected the information that such collection was conducted in violation of federal law."
"[...] significantly attributed to the success of the action;" §165.2(i)(1)	*"[...] significantly attributed to the success of the action;"* §240.21F-4(c)(1)	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*	The standard of proof set forth herein (i.e. "significantly attributed" must be changed to conform to the "led to the successful enforcement" standard. Further, The National Whistleblowers Center agrees with the additional concerns over the current form of this proposed rule which were raised by the Taxpayers Against Fraud (TAF) in their letter to the Securities & Exchange Commission, dated

		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.	December 17, 2010. Importantly, TAF stated that "[The Dodd-Frank Act] makes clear that the significance of the contribution is not a threshold consideration as to whether an award should be made. … The significance of the whistleblower's contribution is only a factor in determining how much an award should be…" Ex. 21, page 18.
"[…] essential to the success of the action." §165.2(i)(2)	*"[…] essential to the success of the action."* §240.21F-4(c)(2)	Same comments as in §§ 165.2(2)(i)(1) and 240.21F-4(c)(1).	Same comments as in §§ 165.2(2)(i)(1) and 240.21F-4(c)(1).
"Is not already known to the Commission from any other source, unless the whistleblower is the original source of the information;" §165.2(k)(1)(ii)	*"Is not already known to the Commission from any other source, unless you are the original source of the information;"* §240.21F-4(b)(1)(ii)	Under the FCA, the "original source" rule is triggered only when there is a "public disclosure." Also, mere government knowledge is not enough to trigger a disqualification, as it is widely recognized that the information may simply have been provided to the government as part of a large "document dump" by a wrongdoer. 31 U.S.C. § 3730(e)(3) and (4). In order to	This portion of the proposed rules should be cut in their entirety. This rule most be modified and made consistent with 31 U.S.C. § 3730(e)(3) and (4). The broad disqualification contained in the proposed rule is modeled on the government knowledge rule widely discredited and repealed as part of the 1986 amendments to the FCA. The final rule should reflect the disqualification as set forth in the Dodd-Frank Act, which is consistent with 31 U.S.C. § 3730(e)(3) and (4). Significantly, the same Congress that enacted Dodd-Frank also amended the FCA in order to narrow the scope of the § 3730(e) exclusions. There is no indication that Congress intended to include a broad "government

		disqualify a whistleblower under the government knowledge rule, the government must be a party to an administrative or civil proceeding based on those allegations.	knowledge" exemption, and the actions of the 110th Congress, combined with the specific legislative history and statutory terms of Dodd-Frank demonstrate the opposite. A new provision can be added to the rule which states as follows: "In no event may a person file a rewards claim which is based upon allegations or transactions which are the subject of a civil or criminal suit or an administrative civil monetary penalty proceeding in which the Government is already a party."
"Information first provided to another authority or person. If you provide information to Congress, any other federal, state, or local authority, any self-regulatory organization, the Public Company Accounting Oversight Board, or to any of any of the persons described in paragraphs (g)(3) and (4) of this section, and you, within 90 days, make a submission to the Commission[…]"	*"If you provide information to Congress, any other Federal, State, 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[…]"* §240.21F-4(b)(7)	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 "first to file" portion of the rule should provide sufficient incentive for whistleblowers to file their claims in a timely fashion. The rule should be amended to require that any claim be filed prior to the exhaustion of the statute of limitations related to the underlying law that is being violated. Providing information to another authority should not trigger an extremely short statute of limitations for filing rewards claims. Instead, there should be a mechanism in place for agencies to share information provided by whistleblowers in order to ensure that appropriate enforcement actions are initiated, regardless of which agency an employee initially reports a suspected violation.

§165.2(I)(2)			This can and should be accomplished by Memoranda of Understanding between agencies and reasonable inter-agency coordination undertaken by a Whistleblower Office. The Commissions should also acknowledge in the rule that these limitations periods are not jurisdictional in nature, if such tolling is permitted under the underlying civil and administrative laws for which the sanction is obtained.
"The phrase ''voluntary submission'' or ''voluntarily submitted'' within the context of submission of original information to the Commission under this part, shall mean the provision of information made prior to any request from the Commission, Congress, any other federal or state authority, the Department of Justice, a registered entity, a registered futures association, or a self-regulatory	*"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 any request, inquiry, or demand from the Commission, the Congress, any other Federal, State, or local authority, any self-regulatory organization, or the Public Company*	No such statutory exclusion exists under the FCA.	This provision must be modified or cut. Whistleblowers should not be discouraged from providing information to the Commission regarding ongoing inquiries, as they may have invaluable information concerning related violations and/or will be able to provide the Commission with important proof to enable the Commissions to prevail in an action. The term "voluntary" should include all submissions that are voluntary. Only compelled disclosures should be covered under the rule. The term "relevant" as used on the proposed rule is too vague and broad. The proposed rule should be modified as follows: "* *

organization to you or anyone representing you (such as an attorney) about a matter to which the information in the whistleblower's 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 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.[...]” §165.2(o)	*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 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.”* §240.21F-4(a)(1)		**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 be considered voluntary, and you will not be eligible for an award,~~ even~~ if your response i~~s not~~ compelled by subpoena or other applicable law.”*
“In addition, your submission will not be considered voluntary if you are under a pre-existing legal or contractual duty to report the violations that are the subject of	*“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*	No such exclusion exists under the FCA nor is such an exclusion permitted under the Dodd-Frank Act. The clause of the proposed rule	The exclusion must be cut in its entirety. The clause of the proposed rule that relates to a "contractual duty" is subject to abuse and is in direct conflict with the Dodd-Frank Act. Companies can simply make reporting violations a contractual duty for all

your original information to the Commission, Congress, any other federal or state authority, the Department of Justice, a registered entity, a registered futures association, or a self-regulatory organization." §165.2(o)	*are the subject of your original information to the Commission or to any of the other authorities described in paragraph (1) of this section."* §240.21F-4(a)(3)	related to a "contractual duty" violates § 23(n) of the CEA and § 21F(e)(1) of the SEA.	employees, contractors' agents, etc, and thereby completely undermine the Congressional intent and purpose of the Dodd-Frank Act. The Dodd-Frank Act prohibits all contractual waivers that would interfere with the right of a whistleblower to obtain any remedy or reward available under Dodd-Frank. *See*, §§ 23(n) of the CEA and 21F(e)(1) of the SEA. Additionally, there are numerous legal obligations that require persons to report violations and crimes, including the misprision of a felony laws. Despite these obligations, most employees do not report these violations to the proper law enforcement authorities. One of the primary purposes of the Dodd-Frank Act is to encourage the disclosure of such violations, even if the whistleblower is under a contractual or legal duty to report. This provision will undermine the central purpose of the law.
"A whistleblower's submission of information to the Commission will be a two-step process…" §165.3	*"The submission of original information to the Commission is a two-step process:…"* §240.21F-9	These provisions are inconsistent with the FCA and the Dodd-Frank Act.	This entire section of the proposed rules should be revised in order to ensure that the final rule is "user friendly" and consistent with the provisions of the FCA and Dodd-Frank. Instead of having a "two-step" process, the final rule should have a one-step process, which requires two filings. Under the FCA whistleblowers

			trigger the FCA investigatory and adjudicatory process by making two initial filings. First, the whistleblower must file a formal complaint. Second, the whistleblower must file a formal "disclosure statement" including "substantially all material evidence" the whistleblower "possess" about the underlying allegations. 31 U.S.C. § 3730(b)(2). This requirement facilitates the earliest possible notification to the government of the alleged violations, and requires that the whistleblower provide the government with all material information justifying the allegations at the earliest possible time. The Commission rules should be modeled on this approach. A required rewards "form" can be used as a substitute for a complaint. The whistleblower should also be informed that their official rewards application will not be considered as final until they also submit their "disclosure" statement and provide the Commission with their evidence. As in the FCA, complaints (or "forms") and disclosure statements must be able to be amended and supplemented. There should be no secondary application process. Once filed, the

			claim should be fully monitored by a Whistleblower Office or a division within the appropriate unit of the Commission (such as the Enforcement Division) that has the responsibility to docket the complaint, properly review the complaint to ensure that it is provided to the proper unit for investigation and to work with the whistleblower throughout the process to keep the whistleblower informed of the progress, facilitate communications between the whistleblower and the investigators, and attempt to reach a stipulation or settlement as to the final adjudication of the rewards claim. Requiring a second application based on a internet notification is completely unworkable and will result in the denial of claims for no good reason. It also sets up a structure that alienates the whistleblower from the investigation they started, and the investigation for which they should be a key witness.
"Section 23(h)(2) of the Commodity Exchange Act requires that the Commission not disclose information that could reasonably be expected to reveal the identity	*"The law requires that the Commission not disclose information that could reasonably be expected to reveal the identity of a whistleblower,*	The Dodd-Frank Act contains specific rules protecting the confidentiality of whistleblowers.	In order to ensure that confidentiality is breached only when necessary, a provision should be added to this rule requiring that government agencies provide timely notice to the whistleblowers prior to disclosing their identity to non-governmental sources,

of a whistleblower, except that the Commission may disclose such information in the following circumstances: (1)…,(2)…,(3)…" §165.4(a)	*except that the Commission may disclose such information in the following circumstances: (1)…,(2)…,(3)…"* §240.21F-7(a)		and that the whistleblower have an opportunity to intervene in a civil, criminal or administrative proceeding in order to request that their identity to protected and/or to obtain a protective order limiting the further disclosure of their identity or other relief available under the rules of civil procedure governing protective orders.
"In order to be eligible, the whistleblower must: Provide the Commission, upon its staff's request, certain additional information, including: Explanations and other assistance, in the manner and form that staff may request, in order that the staff may evaluate the use of the information submitted;[…]" §165.5(b)(2)	*"In addition to any forms required by these rules, the Commission may also require that you provide certain additional information. If requested by Commission staff, you may be required to: Provide explanations and other assistance in order that the staff may evaluate and use the information that you submitted;"* §240.21F-8(b)(1)	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	The proposed rules should be modified to conform to the FCA. Whistleblowers should be required to provide the Commission with "substantially all material evidence" at the time they file their claim. However, the Commissions cannot require further voluntary cooperation. The whistleblowers are not paid government employees, and cannot be required to perform work for the government without payment. However, it would be almost inconceivable that a whistleblower would not work hand-in-hand with the government in order to ensure that (a) the Commissions open an investigation into their allegations; (b) open a formal proceeding into their allegations and (c) prevail in their enforcement actions. Why would a whistleblower file a claim if he or she was not prepared to voluntarily and aggressively assist the United States in its efforts to enforce the law and obtain

		proceeding an aid the government's efforts. 31 U.S.C. § 3730(c)(1).	penalties in excess of the one million dollar threshold? However, making such cooperation mandatory, and placing no limits on the scope of such cooperation that can be required by the Commissions, creates the potential for abuse.
"In order to be eligible, the whistleblower must: [...]all additional information in the whistleblower's possession that is related to the subject matter of the whistleblower's submission;[...]" §165.5(b)(2)	*"In addition to any forms required by these rules, the Commission may also require that you provide certain additional information. If requested by 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;"* §240.21F-8(b)(2)	These provisions are similar to the FCA requirement set forth in 31 U.S.C. § 3730(b)(2).	The CFTC proposal conforms to the FCA as drafted. The SEC proposal should be modified in the following manner: " . . . in other forms that our staff and the whistleblower may agree to."
"In order to be eligible, the whistleblower must: [...]and testimony or other evidence	*"In addition to any forms required by these rules, the Commission may also require that you provide*	No such requirement exists in the FCA.	These provisions should be modified in a manner consistent with 31 U.S.C. § 3730(b)(2) and (c)(1).

acceptable to the staff relating to the whistleblower's eligibility for an award;" §165.5(b)(2)	*certain additional information. If requested by Commission staff, you may be required to: Provide testimony or other evidence acceptable to the staff relating to whether you are eligible, or otherwise satisfy any of the conditions, for an award;"* §240.21F-8(b)(3)		
"In order to be eligible, the whistleblower must: If requested by Commission staff, enter into a confidentiality agreement in a form acceptable to the Commission, including a provision that a violation of the confidentiality agreement may lead to the whistleblower's ineligibility to receive an award." §165.5(b)(3)	*"In addition to any forms required by these rules, the Commission may also require that you provide certain additional information. If requested by Commission staff, you may be required to: 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."* §240.21F-8(b)(4)	No such provision exists in the FCA. The provision is inconsistent with federal law and inconsistent with the requirements placed on whistleblowers under the Dodd-Frank Act.	The government cannot require whistleblowers to execute non-disclosure forms that may prevent whistleblowers from providing information to Congress or making other protected disclosures. When presented for execution in a form that is not improperly restrictive, the agreement to enter into a confidentiality agreement must be voluntary, and cannot be made a requirement for a reward.

"No award under § 165.7 shall be made: To any whistleblower who acquired the information you gave the Commission from any of the individuals described in paragraphs (a)(1), (2), or (3) of this section;" §165.6(a)(4)	*"In addition, you are not eligible if: You acquired the information you gave the Commission from any of the individuals described in paragraphs (c)(1), (2), (3), or (4) of this section;"* §240.21F-8(c)(5)	No such provision exists in the FCA. There is no empirical evidence that such a provision is needed. This provision is not required under Dodd-Frank.	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 directly from an "individual" disqualified under this rule because the secretary's boss was the principal wrongdoer. However, that secretary must be able to provide information to the Commission and qualify for a reward. Additionally, a participant in a fraud scheme -- who did not initiate the scheme -- may obtain information about the fraud scheme directly from the chief wrongdoer (who may be the potential whistleblowers boss). The law seeks to encourage such participants to turn in the principal wrongdoers, and provide information on the fraud, even if these persons obtained their information about the fraud directly from the chief wrongdoer who, during the course of the proceeding, is indicted and convicted of his or her crimes.

"Whenever a Commission judicial or administrative action results in monetary sanctions totaling more than $1,000,000 (i.e., a covered judicial or administrative action) the Commission will cause to be published on the Commission's Web site a ''Notice of Covered Action.'' Such Notice of Covered Action will be published subsequent to the entry of a final judgment or order that alone, or collectively with other judgments or orders previously entered in the Commission covered administrative or judicial action, exceeds $1,000,000 in monetary sanctions. A whistleblower claimant will have sixty (60) calendar days from the date of the Notice of Covered Action	*"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 Web site a ''Notice of Covered Action.'' Such Notice will be published subsequent to the entry of a final judgment or order that alone, or collectively with other judgments or orders previously entered in the Commission action, exceeds $1,000,000; or, in the absence of such judgment or order, within thirty (30) days of the deposit of monetary sanctions exceeding $1,000,000 into a disgorgement or other fund pursuant to Section 308(b) of the Sarbanes-Oxley Act of 2002. A claimant will have sixty*	See comments made related to §§ 165.3 and 240.21F-9.	This provision must be cut. See comments related to §§ 165.3 and 240.21F-9. Further, The National Whistleblowers Center agrees with the additional concerns over the current form of this proposed rule which were raised by the Taxpayers Against Fraud (TAF) in their letter to the Securities & Exchange Commission, dated December 17, 2010. Importantly, TAF noted in their letter that the procedure outlined in the SEC Proposed Rules §240.21F-10(a) is "backwards and creates unnecessary hurdles for whistleblowers who – by law – are entitled to receive a mandatory award." Ex. 21, page 21.

to file a claim for an award based on that action, or the claim will be barred." §165.7(a)	*(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."* §240.21F-10(a)		
"Procedures applicable to the payment of awards.[…]" §165.14	*"Procedures applicable to the payment of awards.[…]"* §240.21F-13	See comments made related to §§ 165.3 and 240.21F-9.	See comments made related to §§ 165.3 and 240.21F-9. Payments to whistleblowers should be made at the earliest possible time. Timely payments will encourage other employees to make protected disclosures and will have a deterrent effect on potential wrongdoing. Under the FCA payments made to whistleblowers are typically negotiated during the final stages of an investigatory or adjudicatory proceeding, and an agreement is reached as to the portion of a case subject to a whistleblower reward,, and the percentage share of recovery. The rules should facilitate a process similar to the one typically used in FCA cases. Appeals and dispute resolution procedures should exist, but should not be to primary method for resolving issues related to a whistleblower reward-share and resolving a claim.
"In determining whether the required $1,000,000	*"In determining whether the required $1,000,000*	No such exclusion exists in the FCA. There is no	This proposed rule should be cut. However, if it is not cut, an additional clause should be inserted into the rule as

threshold has been satisfied (this threshold is further explained in § 165.7) 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 primarily on conduct that the whistleblower principally directed, planned, or initiated. Similarly, if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments	*threshold has been satisfied (this threshold is further explained in § 240.21F–10 of this chapter) 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. Similarly, if the Commission determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making*	empirical record that whistleblowers have abused the FCA in a manner reflected in this proposed rule.	follows: " . . . directed, planed, or initiated, provided that the whistleblower undertook such actions without with approval, knowledge or consent of his or her employer."

pursuant to § 165.14.” §165.17	*payments.”* §240.21F-15		
“The rights and remedies provided for in this Part 165 of the Commission’s regulations may not be waived by any agreement, policy, form, or condition of employment including by a predispute arbitration agreement. No predispute arbitration agreement shall be valid or enforceable if the agreement requires arbitration of a dispute arising under this Part.” §165.19	SEC-REGULATION DOES NOT INCLUDE ANY EQUIVALENT OF THIS CLAUSE	This is a clear statutory requirement in the Dodd Frank Act, applicable to laws enforced both by the SEC and the CFTC. The rules should require the strict enforcement of this provision of law.	The SEC should adopt the rule proposed by the CFTC.
Appendix A to part 165	NO APPENDIX INCLUDED		The Commissions should ensure compliance with the anti-retaliation provisions, and ensure that reports to internal compliance departments are fully protected, in a similar manner utilized by the Nuclear Regulatory Commission pursuant to 10 C.F.R. § 50.7. The laws governing employees under the Atomic Energy Act and

			the laws governing employees under the CEA/SEA are similar, inasmuch as the laws prohibit retaliation in order to ensure compliance with rules and procedures administered by the respective Commissions. The Commissions should use their rule-making authority to ensure that employees who contact internal compliance offices are not subject to any retaliation whatsoever. Without such a rule, the public policy behind encouraging employee participation in compliance programs will be undermined.

Part XIII: Proposed Additions to the Final Rule

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 Commodities Futures Trading 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 Commodities 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 **Commodities 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 **Commodities 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 Commodities 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 Commodities 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 Commodities 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 Commodities 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 Commodities 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.

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 Commodities 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 Commodities 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~~ **Commodities 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 **Commodities 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 Commodities 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 **Commodities 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 Commodities 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

Commodities 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.~~

Part XIV: Conclusions and Methodology

Conclusions and Recommendations for Final Rule

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

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

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

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

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

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

Conclusion #7: By formal rule, the CFTC must establish that disclosures submitted to internal compliance programs be afforded the same level of protection as direct disclosures to the CFTC. In this regard, the CFTC should establish, by rule, that it will consider a claim or disclosure filed internally within a company to constitute a formal request for a reward under CFTC § 23. The CFTC should establish rules to adjudicate these claims and require that the regulated companies establish procedures for timely notification of such employee filings.

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

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

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

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

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

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

Research Methodology

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

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

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

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

decided from January 1, 2007 to January 24, 2011. The modern cases were selected in order to best duplicate employee behaviors once a *qui tam* law has been in existence for a sufficient amount of time for employees to learn about its potential usage. In other words, by limiting the review to modern cases the study could focus on employee behaviors based on the fact that the law had been in active use for over 20 years, and numerous newspaper and television stories had been published making the public aware of the large multi-million dollar rewards potentially available under the FCA.

Using a Standardized and Objective Method to Locate Cases Eliminated Bias in the Sample. In order to eliminate bias from the case selection process, the NWC reviewed *all* cases in which a 31 U.S.C. 3730(h) case was decided at the district court level from January 1st, 2007 until January 24, 2011. These cases were found by Shepardizing "31 U.S.C. 3730" in the LexisNexis online database under the index "31 U.S.C. sec. 3730 (h)", and restricting the results to those cases filed after 2007. This search method produced a list of all cases filed since 2007 that contained a citation to 31 U.S.C. 3730(h). United States District Court and Appeals Court cases in which a 3730(h) claim was filed were then extracted from this list, creating a population of 157 cases to be examined. All of the included cases are listed in the Exhibits listed throughout this Report.

The Objectively Identified Cases in the Sample were Reviewed in order to Determine Employee Reporting Behaviors. Once located, each case was separately reviewed. In some cases it was impossible to determine the reporting history of the employee. Other cases did not concern legitimate *qui tam* filings. In the cases where it was unable to determine the method used by the employee to initially reported the alleged fraud, the full appellate history of the case was then examined. Despite this further review, 31 cases proved impossible to determine the status of internal reporting or were otherwise clearly inapplicable based on the factual statements set forth in these cases. The cases that were excluded from the study are set forth in Exhibit 14, Chart of Non-Applicable Cases Excluded from Survey.

This left a final population of 126 cases that were then analyzed to determine if the employee-plaintiff reported the alleged fraud internally before filing a lawsuit, whether or not they worked in a compliance or

quality assurance related position for their former employer, and if the Plaintiff engaged in a “protected action” under 31 U.S.C. 3730(h).

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.

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Exhibit List

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

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

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

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

Reserved

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit 20, The National Coordinating Committee for Multiemployer Plans letter December 17, 2010
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/nccmpcommenttosec.pdf

Exhibit 21, The Taxpayers Against Fraud Letter December 17, 2010,
http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/tafcommenttosec.pdf