

UNITED STATES OF AMERICA
COUNCIL ON WILDLIFE TRAFFICKING

“UNLOCKING THE POWER OF THE WILDLIFE WHISTLEBLOWER LAWS”

WRITTEN STATEMENT

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Thank you for this opportunity to provide this Statement to the Council on Wildlife Trafficking.

Whistleblower reward laws encourage “insiders” to report serious wrongdoing by offering monetary rewards. Over time they have proven to be the “most powerful tool” for uncovering fraud and corruption.² The U.S. Attorney General, speaking in 2012, stated that the impact of whistleblower reward laws “has been nothing short of profound.”³ Over time, this incentive model has proven to be the most effective means to obtain critical information on any corrupt enterprise.⁴

It is time to use these whistleblower reward laws to incentivize the detection, reporting, investigation, and prosecution of illegal wildlife trafficking.

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² Stuart Delery, Assistant Attorney General, Remarks at the American Bar Association's 10th National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 5, 2014), <http://www.justice.gov/iso/opa/civil/speeches/2014/civ-speech-140605.html>.

³ Eric Holder, Attorney General, Remarks at the 25th anniversary of the False Claims Act (Jan. 31, 2012), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-25th-anniversary-false-claims-act-amendments-1986>

⁴ In a series of public statements, U.S. Department of Justice (DOJ) and congressional officials responsible for overseeing America's oldest whistleblower reward law (the False Claims Act) have lauded the program, describing it as providing “ordinary Americans with essential tools to combat fraud,” and noting that “most cases resulting in recoveries were brought to the government by whistleblowers,” “whistleblowers have led to an unprecedented number of investigations and greater recoveries,” and “the need for a robust whistleblower reward law cannot be understated.” See Frequently Asked Questions, Whistleblower Rewards for Informants who Report Violations of Wildlife Trafficking Laws, note 6.

Background to the Wildlife Reward Laws

In 1981-82 Congress enacted whistleblower reward laws to incentivize the detection and reporting of illegal wildlife trafficking.⁵ Congress understood the importance of promoting insiders to report these crimes: “Powerful tools are needed to combat and control the massive illegal trade in wildlife which threatens the survival of numerous species, threatens the welfare of our agriculture and pet industries, and imposes untold costs upon the American taxpayers.”⁶

Whistleblowers were one of the “powerful tools” Congress envisioned enlisting in the war against traffickers. The goal of the law was simple – pay whistleblowers whose disclosures resulted in successful prosecutions a monetary reward: “[The whistleblower reward provision] directs the Secretary to pay rewards to persons who furnish information leading to an arrest, conviction assessment or forfeiture from sums received as penalties, fines or forfeitures.”⁷

Under the Lacey Act the Secretaries of Commerce, Interior, and Treasury are given joint and several authorities to pay rewards. The Department of Agriculture is also given authority to pay awards under the “plants” provision of the Act, which includes illegal logging. Thereafter, Congress included whistleblower reward provisions identical to the Lacey Act in four other wildlife protection laws: the Rhinoceros and Tiger Conservation Act, the Antarctic Conservation Act, the Endangered Species Act and the Wild Bird Conservation Act.

On December 31, 1982, Congress went even further in strengthening the authority of the government to pay awards for whistleblowers that report wildlife crimes. Congress granted of sweeping authority to the Departments of Interior and Commerce to pay whistleblower rewards from “appropriations” in the Fish and Wildlife Improvement Act. Unlike other whistleblower reward laws, payments would not have to be based solely on the amount of funds recovered in a specific enforcement action.⁸ Instead, Interior and Commerce can use appropriated funds to compensate whistleblowers.⁹

In a move unprecedented in any other whistleblower reward law, Congress authorized rewards to persons who simply reported **violations** – even if there never was a successful

⁵ The main wildlife whistleblower reward laws are codified as follows: Lacey Act, 16 U.S.C. §3375(d); Endangered Species Act, 16 U.S.C. §1540(d); Rhinoceros and Tiger Conservation Act, 16 U.S.C. §5305a(f); Antarctic Conservation Act, 16 U.S.C. §§2409 & 2439; Fish and Wildlife Improvement Act, 16 U.S.C. §742l(c)(3); and Wild Bird Conservation Act, 16 U.S.C. §§4912(c) & 4913(b).

⁶ The Congressional history behind the original 1981 amendments to the Lacey Act, which included the whistleblower reward laws, is located in House Report No. 97-276 (Oct. 19, 1981).

⁷ H.R. REP. No. 97-276, at 7 (Oct. 19, 1981).

⁸ The sweeping authority granted the Fish and Wildlife Service and the National Marine Fisheries Service to award whistleblowers under any wildlife protection laws administered by these agencies was enacted as part of the Fish and Wildlife Improvement Act, Pub. L. No. 97-396, 96 Stat. 2005, 16 U.S.C. §742l(k)(2).

⁹ During the House floor debate on the amendment, it was clear that Congress was beginning to understand the importance of paying rewards in order to detect crimes. Then-Congressman John Breau (D-La.) (the principle sponsor of the legislation) explained that “undercover activities,” which implicitly included almost all whistleblower cases, were always “difficult and dangerous but highly successful.” Additionally, the amendment was designed to draw out insiders who could help “apprehend large-scale commercial violators of wildlife laws.”

prosecution. The Improvement Act also broadened the scope of laws for which rewards could be paid. *All* wildlife laws administered by the Fish and Wildlife Service and/or the National Marine Fisheries Service (i.e., the Department of Commerce's National Oceanic and Atmospheric Administration/NOAA division) were covered. The amendment now covers over 40 major wildlife laws, effectively closing any loopholes in coverage.¹⁰

After the Improvement Act was passed in 1982, all of the wildlife whistleblower reward laws remained dormant. Whistleblower advocates were unaware of these provisions, NGOs did not publicize how these laws could be utilized and none of the four federal departments with authority to pay rewards publicized the existence of the laws, or made procedures or criteria available to the public so potential whistleblowers could act on the incentives created by Congress.

Whistleblower Reward Laws Skyrocket Crime Detection and Prosecution in other Areas

In 1986 Congress amended the False Claims Act, and the ability of whistleblowers to obtain monetary rewards was widely publicized in the press, by the Department of Justice, and by whistleblower advocates. The success of this law became legendary, and Congress enacted similar reward laws covering tax evasion, securities and commodities fraud, foreign bribery (Foreign Corrupt Practices Act), ocean pollution and most recently, auto safety.

The U.S. Government has successfully processed thousands of whistleblower claims and collected over \$50 billion in sanctions directly attributable to whistleblower disclosures. Further, the successful campaign to end illegal offshore banking was initiated by whistleblower disclosures.¹¹

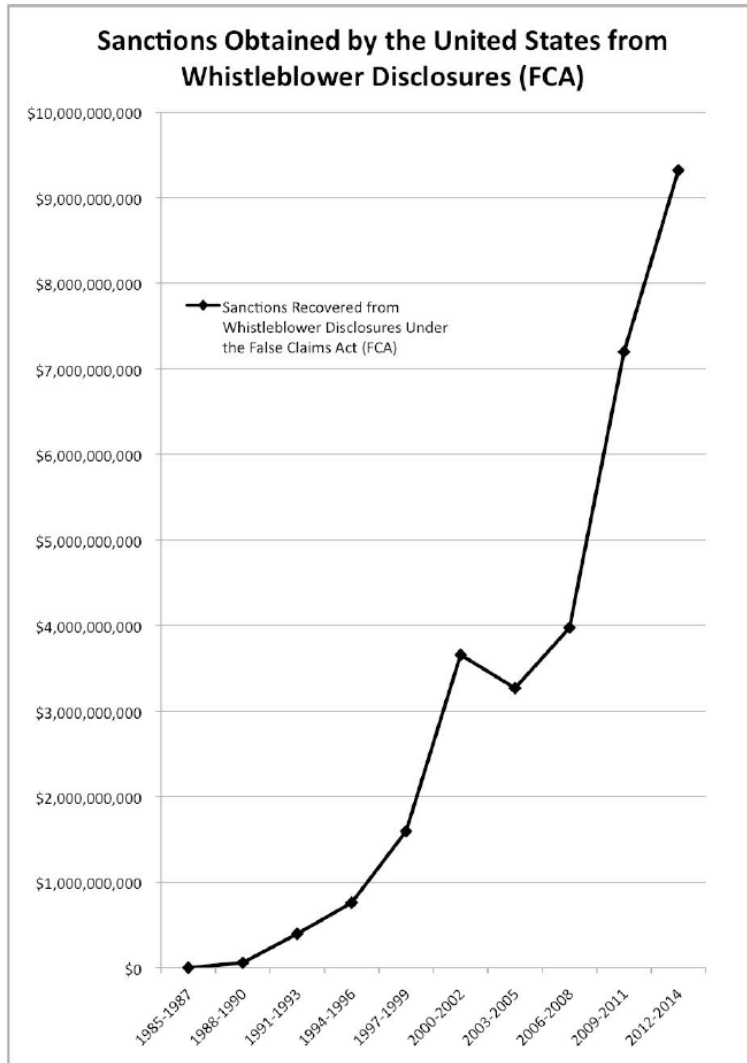
Rewards have proven to be the best method to protect whistleblowers by ensuring that people who provide the government with high-quality original information demonstrating criminal activity, and risk their jobs, careers, or even their lives to do so, are adequately compensated. The regulators who oversee these laws have enthusiastically endorsed them.

¹⁰ The legislative history of the 1982 Fish and Wildlife Improvement Act is set forth in 128 CONG. REC. H10207 and H31972 (Dec. 17, 1982).

¹¹ In discussing the role of whistleblowers in exposing illegal conduct in foreign banks, the U.S. Internal Revenue Service's top Commissioner explained how one Swiss banker's disclosures were critical in triggering the IRS's successful multibillion-dollar campaign to eliminate illegal foreign offshore banking:

The IRS' serious efforts to combat offshore tax evasion . . . [was] brought to our attention . . . by whistleblowers A turning point in our enforcement efforts came in 2009 with the agreement reached with UBS. This agreement represented a major step toward global tax transparency and helped build a foundation for our future enforcement efforts.

John A. Koskinen, Commissioner, Internal Revenue Service, Remarks at the U.S. Council for International Business-OECD International Tax Conference (June 3, 2014), *available at* <https://www.irs.gov/PUP/irs/Commissioner%20Koskinen's%20Remarks%20at%20US%20CIB%20and%20OECD%20Int%20Tax%20Conf%20June%202014.pdf>.



Source: "Fraud Statistics-Overview" Civil Division, U.S. Department of Justice (October 1, 1987-September 30, 2014).

These laws have proven effective not only within the United States, but across the globe. Thousands of foreign nationals have taken advantage of provisions permitting rewards under laws such as the Foreign Corrupt Practices Act (FCPA).¹² Between 2011 and 2015, over 1500 whistleblowers from 95 countries filed claims under the FCPA. The Chair of the U.S. Securities and Exchange Commission (SEC), the official responsible for securities and FCPA whistleblower cases, stated that “the SEC’s whistleblower program . . . has rapidly become a tremendously effective

¹² Foreign Corrupt Practices Act (FCPA), 15 U.S.C. §§78m, 78dd-1 through 78dd-3, and 78ff. See National Whistleblower Center, *The Importance of Whistleblower Rewards in Combatting International Corruption* (Dec. 9, 2014), available at <http://www.kkc.com/wp-content/uploads/2014/12/Anti-Corruption-Report.pdf>. See also Appendix F, *infra* (chart of SEC related international whistleblowers).

force-multiplier, generating high quality tips, and in some cases virtual blueprints laying out an entire enterprise, directing us to the heart of the alleged fraud.”¹³



The SEC’s Foreign Corrupt Practices Act Whistleblower Reward Program is being used by International Whistleblowers

On September 22, 2014, the SEC approved its first reward to a foreign national – paying the whistleblower \$30 million U.S. dollars. The Commission loudly proclaimed that its reward program was open to foreign nationals: *“In our view, there is a sufficient U.S. territorial nexus whenever a claimant’s information leads to the successful enforcement of a covered action brought in the United States it makes no difference whether, for example, the claimant was a foreign national, the claimant resides overseas, the information was submitted from overseas, or the misconduct comprising the U.S. securities law violation occurred entirely overseas.”*¹⁴

¹³ Mary Jo White, Chair, U.S. Securities & Exchange Comm’n, Remarks at the Securities Enforcement Forum (Oct. 9, 2013), <http://www.sec.gov/News/Speech/Detail/Speech/1370539872100>.

¹⁴ See, *In re Claim for Reward*, SEC Whistleblower Award Proceeding 2014-10 (Sept. 22, 2014), available at <https://www.sec.gov/rules/other/2014/34-73174.pdf>. The Director of the SEC’s Division of Enforcement further explained the critical role whistleblowers play in reporting foreign bribery:

[I]nternational whistleblowers can add great value to our investigations. Recognizing the value of international whistleblowers, we have made . . . awards to whistleblowers living in foreign countries. In fact, our largest whistleblower award to date — \$30 million — went to a foreign whistleblower who provided us with key original information about an ongoing fraud that would have been very difficult to detect. In making this award, the Commission staked out a clear position that the fact that a whistleblower is a foreign resident does not prevent an award when the whistleblower’s information led to a successful Commission enforcement action brought in the United States concerning violations of the U.S. securities laws.

The U.S. Government enacted whistleblower reward laws to address the fear that most insiders have when reporting corruption. Not surprisingly, because bribery and corruption are orchestrated in secret, whistleblowers are the primary source of information uncovering fraud. Thousands of wrongdoers have been held accountable and successfully prosecuted (many going to jail) based, in whole or in part, on whistleblower information.

APPS: A Prototype for Detecting and Prosecuting Wildlife Trafficking

The Act to Prevent Pollution from Ships (“APPS”) includes a whistleblower reward provision that has proven vital for enforcing laws criminalizing pollution on the high seas.¹⁵ Significantly, this law can be used as a prototype for the implementation of the wildlife whistleblower laws. The majority of APPS cases are brought to light when members of the crew, who often are the only individuals with information, disclose violations to the U.S. Government. Similar to the wildlife laws, the crimes prosecuted originate outside the United States and the overwhelming majority of whistleblowers are non-U.S. citizens.

By implementing APPS and permitting whistleblowers to obtain monetary rewards for providing high quality information that results in successful prosecutions, the United States is now the *number one* enforcer of the MARPOL Convention (the international treaty banning pollution on the high seas).

APPS permits the U.S. government to ask a court to award whistleblowers up to 50% of the criminal penalties obtained by the government for APPS prosecutions.¹⁶ The Justice Department now regularly asks the courts to pay these international whistleblowers the maximum award, and courts routinely approve the request. Today almost all successful APPS prosecutions rely on whistleblowers to document and report the illegal ocean dumping.¹⁷

Based on the most recent 70 cases identified in PACER, and through the research conducted by the NWC, the track record under the APPS whistleblower law speaks for itself:

- **Fines Collected:** The U.S. Government collected approximately \$175 million in fines and penalties from APPS violators in whistleblower-originated cases.
- **Money for conservation** – From all fines and penalties collected, \$45 million was paid directly to environmental organizations as part of “community service” or “restitution” payments. The monies were used directly to benefit the environment and oceans.
- **Incentivizing and Protecting Whistleblowers:** From APPS fines collected, courts approved \$31.8 million as compensation to the whistleblowers.
- **DOJ Honored its Obligation to Reward Whistleblowers:** 80% of all APPS whistleblowers obtain the maximum award (50% of the fines collected) and the largest reward paid for an individual whistleblower was \$2,100,000 (*USA v. Omi Corporation*). The average reward paid per whistleblower in the most recent 70 identified cases was \$163,575.

¹⁶ See Government’s Amended Motion for Whistleblower Awards, *U.S. v. Overseas Shipholding Group, Inc.*, 06-CR-10408 (D. Mass, March 15, 2007), available at www.globalwhistleblower.org.

¹⁷ <http://www.marinedefenders.com/commercial/rewards.php>. A detailed listing of APPS cases for which rewards were paid (including copies of the indictments, plea agreements, and whistleblower reward filings) is posted at www.kkc.com/resources/APPS.

When the U.S. Department of Justice, Environment and Natural Resources Division (the unit from the DOJ that has jurisdiction over APPS)¹⁸ asks the Court to approve rewards, they carefully explain the importance of paying “significant whistleblower awards” as a matter of “routine practice.”¹⁹ The Justice Department’s rationalization for paying maximum rewards says it all:

The APPS award provision serves a valuable law enforcement purpose by encouraging those most likely to know of the illegal conduct to report it and cooperate with law enforcement. Because the discharge of oily waste typically takes place in the middle of the ocean in international waters, the only persons likely to know about the conduct and the falsification of the ORB [the discharge log] are the crew members.

Absent crew members with firsthand knowledge of the illegal conduct coming forward, APPS violations are otherwise extremely difficult to uncover. The government’s success in detecting the illegal activity and obtaining sufficient evidence to support investigations and prosecutions is dependent upon the willingness of a crew member to step forward. In turn, a crew member must assess the risks associated with coming forward, such as the possibility that the crew member will lose relatively lucrative employment and be blacklisted and barred from working in the marine shipping industry in the future.

*A substantial monetary award, as provided by APPS, both rewards the crew member for taking those risks and provides an incentive for other crew members to come forward and report illegal conduct on vessels in the future.*²⁰

The justification used by the Department of Justice (and regularly approved by numerous U.S. District Courts) to aggressively implement the reward provision is equally applicable to the wildlife whistleblower reward laws, which are strikingly similar in goals and structure.

First, the DOJ recognizes that the reward provides an incentive to those “likely to know” about illegal conduct to both report the criminal activity and cooperate with law enforcement. In other words, because the reward is dependent on the success of the prosecution, the whistleblower has a strong motive to provide the government with the best possible evidence of wrongdoing, and cooperate as a witness during the investigatory process or at trial. The same motivation can be triggered under the wildlife whistleblower laws.

Second, the DOJ recognizes that the criminal activity in these cases originate outside of U.S. jurisdiction (i.e. in the “middle of the ocean” and in “international waters”). This is also true for other transnational whistleblower laws, such as the FCPA. The actual crime is initiated outside the United States, so the ability of the U.S. government to obtain evidence of this type of crime is almost completely dependent upon witnesses who reside or work outside the U.S. Again, the same is true in most wildlife trafficking cases.

¹⁸ The fact that the DOJ’s Environment and Natural Resources Division regularly urges the approval of rewards is significant, as this is the branch of the DOJ that also prosecutes wildlife crimes.

¹⁹ In this case the Court approved the payment of \$5,250,000 to twelve whistleblowers, all of whom were foreign nationals. See “Order Concerning Whistleblower Awards, 06-CR-10408 (D. Mass, May 25, 2007), available at www.globalwhistleblower.org.

²⁰ *Id.*

Third, the DOJ explains that the whistleblowers have “first hand knowledge.” This type of witness is key to any successful criminal or civil enforcement action. In order to successfully prosecute the government needs a witness who can provide competent, non-hearsay testimony. Whistleblower-witnesses in wildlife trafficking cases would also have direct first hand knowledge, and their testimony could be critical for a successful prosecution.

Fourth, the DOJ frankly admits that the success of their cases is dependent on whistleblowers. This type of admission is a breath of fresh air, as it gives whistleblowers their fair share of the credit.

Fifth, the DOJ recognized the stressful and difficult decision that whistleblowers face when they decide to step forward. At the point of time when a whistleblower makes a disclosure, the whistleblower does not know if he or she will be paid a reward. These informants do know they are taking a big risk, and may lose “lucrative employment” or face blacklisting, or worse. Thus, a reward must be large, and there must be a reasonable guarantee that if the whistleblower’s information is successfully used, a reward will be paid. The same risks exist for any person who blows the whistle on wildlife trafficking.

Finally, the DOJ acknowledged how paying a reward can act as the best advertisement both to encourage others to come forward, and make boat owners aware that if they decide to break the law, there is a strong chance they will be caught, heavily fined and be held accountable in a court of law. Lets do the same for wildlife.

The Wildlife Whistleblower Reward Laws

Based on the dramatic success of reward laws, there has been a renewed interest in the dormant wildlife trafficking whistleblower laws.²¹

Based on the recognition that whistleblowers could play an invaluable role in helping detect and enforce wildlife trafficking laws, in 2016 the U.S. Agency for International Development, in partnership with the Smithsonian Institute, National Geographic and TRAFFIC awarded the non-profit organization National Whistleblower Center a “Grand Prize” in the Crime Tech Challenge. The NWC also won the “People’s Choice Award,” based on widespread public support for empowering whistleblowers.²²

The NWC’s award-winning international program is the first of its kind to systematically make potential whistleblowers aware of the financial incentivizes that could help persuade them to become informants, and the first program to help qualified whistleblowers apply for rewards. This

²¹ See Kohn, *Monetary Rewards for Wildlife Whistleblowers: A Game-Changer in Wildlife Trafficking Detection and Deterrence*, 46 ENVIRONMENTAL LAW REPORTER 10054 (Jan. 2016).

²² See *Grand Prize Winners*, WILDLIFE CRIME TECH CHALLENGE, <https://wildlifecrimetech.org/grandprizewinners> and *National Whistleblower Center: Leveraging U.S. laws to beat wildlife crime worldwide*, THE CHALLENGE BLOG (Feb. 11, 2016), https://wildlifecrimetech.org/blog?article_id=10

program has started to be implemented at www.whistleblowers.org/wildlife and is described at <https://wildlifecrimetech.org/grandprizewinners> and https://wildlifecrimetech.org/blog?article_id=10.

The next step to implement the Congressional intent behind these wildlife whistleblower laws, and to unlock the power of whistleblower-detection similar to what we have seen in the FCPA, APPS and other reward laws, is for the government agencies responsible for paying the reward to work together and establish an effective system for full implementation.

All of the agencies responsible for paying Lacey Act/Fish and Wildlife Improvement Act rewards are members of the Presidential Task Force, including Treasury, Agriculture, Interior and Commerce. In order to implement the wildlife whistleblower reward laws, these agencies need to take action. The next steps are straightforward:

- The responsible agencies should **establish a Whistleblower Office** (or offices) along the lines of the highly successful SEC Whistleblower Office (see www.sec.gov/whistleblowers). This Office publicizes the existence of rewards, operates and user-friendly web site where whistleblowers can file their allegations, and these filings are reviewed and, where appropriate, coordinated with the appropriate investigators.
- **Awards should commence being paid immediately.** Under the False Claims Act and the FCPA the Department of Justice and the SEC have recognized that widely publicizing reward payments is critical to incentivizing new and high-value whistleblowers/informants to step forward.
- **Procedures for the processing claims** should be **formalized**, and interim criteria for rewards should be published. But the payment of rewards, and the establishment of an office, should not wait until agencies formalize their practices.
- Ultimately, a **criteria for paying rewards should be published and widely distributed**, so that potential whistleblowers understand the kinds of evidence needed for a successful violation and in order to qualify for the maximum reward.
- The responsible agencies should also make clear that the **definition of “person”** under the Lacey Act includes NGOs, and that international agencies working with informants on-the-ground in Africa, Asia and other high-risk areas can fully qualify for rewards under the law.

The Council on Wildlife Trafficking, and the Presidential Task Force need to play the central roles in ensuring that these powerful and potentially revolutionary detection and enforcement mechanisms are fully and effectively implemented by the U.S. government in a manner that will maximize the information provided by whistleblowers to fight wildlife trafficking.

Thank you for this opportunity to share our program with you, and make recommendations as to how the Presidential Task Force can effectuate these laws and ensure that their potential is fully realized.