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July 11, 2018

Antonio Tajani
President of the European Parliament
Bât. Altiero Spinelli
60 rue Wiertz
1047 Brussels
Belgium

Jean-Claude Juncker
President of the European Commission
60 rue Wiertz
1047 Brussels
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Re: Proposal for EU Whistleblower Directive/FEEDBACK
COM/2018/218

Dear President Tajani and President Juncker:

We are writing in regard to the Proposal for a Directive of the European Parliament and of the Council (COM/2018/218), the proposal for a European Union-wide whistleblower directive (hereafter, "Whistleblower Directive" or "Directive") which has been submitted to the European Parliament for approval. We are filing this letter as part of our official filing permitted under the EU's "Feedback" provision.

Although we strongly support the efforts of the European Union to improve whistleblower protections, the Directive includes a number of provisions that would undermine this intent. Moreover, the Directive is inconsistent with the requirements of three anti-corruption conventions approved by nearly every nation-state in the EU.[1] Consequently, the Directive should be amended consistent with the concerns raised in this letter.

We base these conclusions on our experience representing whistleblowers since 1984, working with the U.S. Congress in drafting key whistleblower laws incorporated into major anti-fraud legislation, such as the Sarbanes-Oxley and Dodd-Frank Acts, our extensive and highly successful

[1] All members except for Portugal have signed the Council of Europe's *Civil Law Convention on Corruption* and the *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*. Finland and Netherlands have accepted the *United Nations Convention Against Corruption*, and Estonia and Slovenia have agreed to accession of the convention.

litigation on behalf of whistleblowers (including employees who work in Europe), and our work sponsored by various U.S. embassies and the U.S. Agency for International Development regarding the protection of U.S. and non-U.S. whistleblowers.[2] Our recommendations are also based on our representation of Swiss bank whistleblowers, including Mr. Bradley Birkenfeld, whose historic case achieved unprecedented reforms concerning illegal offshore banking, money laundering, and tax evasion.[3]

Mr. Bradley Birkenfeld, whose disclosures resulted in historic reforms of the illegal Swiss banking system as it related to U.S. taxpayers, has joined in signing this letter. He has direct personal experience working in Europe and trying to blow the whistle outside the United States. Given the importance of his disclosures, and the precedent they set for other successful whistleblowing, his concerns should be given special weight.

The Birkenfeld case demonstrated, beyond any doubt, that whistleblower laws can work to expose frauds committed in Europe and can have a remarkable impact on protecting the public interest. When debating and approving the proposal on whistleblowing, it is essential that European lawmakers fully understand what is necessary to make whistleblowing work in practice. Whistleblower laws need to be effective tools for detecting, deterring, and eradicating corruption. The positive impact of Mr. Birkenfeld's whistleblowing is clear. The U.S Internal Revenue Service (IRS), in evaluating his eligibility for an award under the U.S. tax laws, explained why they were approving the largest-ever individual whistleblower reward:

> *Birkenfeld provided information on taxpayer behavior that the IRS had been unable to detect, provided exceptional cooperation, identified connections between parties to transactions (and the methods used by UBS AG), and the information led to substantial changes in UBS AG business practices and commitment to future compliance. The actions against UBS AG and the attendant publicity also contributed to other compliance programs. Each of these factors could support an increase in the award percentage above the statutory minimum. The comprehensive information provided by the whistleblower was exceptional in both its breadth and depth. While the IRS was aware of tax compliance issues related to secret bank accounts in Switzerland and elsewhere, the information provided by the whistleblower formed the basis for unprecedented actions against UBS AG, with collateral impact on other enforcement activities and a continuing impact on future compliance by UBS AG.*[4]

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[2] Stephen M. Kohn, Esq. https://www.kkc.com/our-attorneys/stephen-m-kohn

[3] Although Mr. Birkenfeld worked in Switzerland for UBS bank, he was able to use American whistleblowers laws to effectuate unprecedent reforms, including the collection of over $15 billion in sanctions from Swiss banks and individuals with illegal offshore accounts. As of 2017, based on the fear or detection sparked by the Birkenfeld disclosures, over 56,000 Americans closed their illegal offshore accounts and paid sanctions to tax authorities. There are simply no reason why other European countries (and the EU collectively) cannot follow these precedents. https://www.kkc.com/whistleblowers/?id=41 Birkenfeld, Bradley C., *Lucifer's Banker*: *The Untold Story of How I Destroyed Swiss Bank Secrecy*, 2016. https://lucifersbanker.com/

[4] IRS Summary Reward Report. https://www.kkc.com/assets/site_18/files/whistleblowers/birkenfeld-award.pdf

These findings were reinforced by an audit of the U.S. Government Accountability Office. Based on Birkenfeld's disclosures UBS was forced to enter into a deferred prosecution agreement with the United States, turning over information on 4,450 U.S. clients and paying $780 million in fines in exchange for avoiding criminal charges.[5] Capitalizing on the Birkenfeld case, and the fear of detection generated by Birkenfeld's disclosures, the IRS launched an *Offshore Voluntary Disclosure Program*, allowing taxpayers with undisclosed offshore accounts to self-report their crimes, reduce their penalties, and possibly avoid criminal prosecution. As of 2018, more than 56,000 U.S. taxpayers had closed their illegal Swiss accounts, repatriated their monies to the U.S. taxable economy and billions in fines and penalties.[6] Since Birkenfeld blew the whistle on the Swiss banks, the United States has collected over $16.7 billion USD in fines and penalties from banks and individual account holders.[7]

The benefits of effective whistleblower laws are simply too large and too important to ignore. In 2017, the National Bureau of Economic Research (NBER) estimated that at least 10% of the world's GDP is illegally invested/deposited in offshore accounts.[8] The EU should not miss the opportunity presented by the public discussion on the Whistleblower Directive to implement an effective whistleblower program, modelled on the U.S. reward programs, to incentivize the detection of major frauds. In the case of tax evasion alone, the benefits of a U.S.-styled reward program could easily result in billions of dollars collected in fines and penalties, and a massive shift in capital from illegal offshore accounts to legal (and fully taxed) investments/bank accounts.

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[5] United States Government Accountability Office, GAO-13-318: OFFSHORE TAX EVASION; *IRS Has Collected Billions of Dollars, But May be Missing Continued Evasion.* March 2013. Pg. 36. https://whistleblowersblogboutique.lexblogplatformthree.com/wp-content/uploads/sites/778/2016/04/2013GAO-Offshore.pdf
Kohn, Stephen. *13.769 Billion Reasons to Thank Whistleblowers on Tax Day,* 2016. https://www.whistleblowersblog.org/2016/04/articles/tax-whistleblowers/13-769-billion-reasons-to-thank-whistleblowers-on-tax-day/

[6] *IRS to end offshore voluntary disclosure program; Taxpayers with undisclosed foreign assets urged to come forward now*, March 13, 2018. https://www.irs.gov/newsroom/irs-to-end-offshore-voluntary-disclosure-program-taxpayers-with-undisclosed-foreign-assets-urged-to-come-forward-now

[7] Kohn, Stephen. *13.769 Billion Reasons to Thank Whistleblowers on Tax Day,* 2016. https://www.whistleblowersblog.org/2016/04/articles/tax-whistleblowers/13-769-billion-reasons-to-thank-whistleblowers-on-tax-day/ *(documenting $13.769 billion obtained by U.S. government as of April 2016; IRS to end offshore voluntary disclosure program; Taxpayers with undisclosed foreign assets urged to come forward now*, March 13, 2018. https://www.irs.gov/newsroom/irs-to-end-offshore-voluntary-disclosure-program-taxpayers-with-undisclosed-foreign-assets-urged-to-come-forward-now
(documenting an additional $3 billion recovered).

[8] NBER Working Paper Series, *Who Owns the Wealth in Tax Havens? Macro Evidence and Implications for Global Inequality*. September 2017. http://www.nber.org/papers/w23805.pdf

SUMMARY

The following summarizes the Articles in the Directive that should be added, changed or removed.

- Article 13 mandates, with some exceptions, that employees who work in the private sector must report their concerns internally to their company before they can report potential criminal violations to law enforcement, government regulators or other "competent authorities." This mandate is inconsistent with three international conventions for which nearly all EU countries are members.[9] Furthermore, any rule that hinders the immediate reporting of criminal activity to the appropriate law enforcement officials constitutes an obstruction of justice. No meaningful whistleblower law can mandate internal reporting, at the expense of an employee's right to immediately and confidentially report criminal activity to law enforcement.

- The three anti-corruption conventions are approved by every member country, with the exception of one.[10] The protections and administrative procedures set forth in the Directive must be reviewed and made to conform to these three conventions. The EU cannot justify enacting whistleblower laws that are not harmonized with these conventions.

- Articles 16, 17, and 19 need to be eliminated or significantly amended to ensure the Directive cannot be used to retaliate against persons who disclose information to the appropriate authorities or used to harass or file lawsuits against whistleblowers. These articles explicitly empower corporations to use their overwhelming legal resources and political connections to file lawsuits against whistleblowers who raise concerns outside the very narrow confines of the Directive. This will have a major chilling effect on whistleblowers, undermine the rights of whistleblowers protected in the three above-mentioned conventions, cripple international cooperation in anti-corruption investigations and threaten whistleblowers who make disclosures to the press with prolonged and expensive litigation.

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[9] Council of Europe, *Civil Law Convention on Corruption*. 1999 (ETS 174) https://rm.coe.int/168007f3f6
United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, 2004. https://www.kkc.com/assets/site_18/files/resources_teaching/united-nations-convention-against-corruption.pdf
United Nations Office on Drugs and Crime, *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, 2004. https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf

[10] Council of Europe, *Civil Law Convention on Corruption*. 1999 (ETS 174) https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/174/signatures?p_auth=NJwbzUp1
United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, 2004. https://www.unodc.org/unodc/en/corruption/ratification-status.html
United Nations Office on Drugs and Crime, *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, 2004. https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en

- As explained below, and as demonstrated in the Birkenfeld/Swiss banking cases, the EU needs to add a provision promoting the establishment of whistleblower reward laws, modelled on the U.S. Internal Revenue Code (for tax cases),[11] the False Claims Act (for government procurement cases),[12] the Dodd-Frank Act (for securities fraud and Foreign Corrupt Practices Act cases),[13] the Act to Prevent Pollution from Ships (for ocean pollution cases)[14] and various wildlife trafficking laws (to stop the current extinction crisis).[15] Without effective reward laws, the vast majority of corrupt activities will remain undetected, and corruption, securities fraud, fraud in government contracting, tax evasion, ocean pollution, wildlife trafficking and foreign bribery will remain highly profitable.

Below are our recommendations for amending the Directive. The National Whistleblower Center is willing to discuss these amendments on request.

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[11] Stephen M. Kohn, *The New Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself*, 3rd ed. (Guildford, CT: Lyons Press, 2017), Pgs. 315-325
https://www.whistleblowersblog.org/2017/07/articles/whistleblower-faq/rule-30-never-forget-whistleblowing-works/

[12] *Over 60% of False Claims Act Recoveries Brought in by Whistleblowers in 2016!*
https://www.whistleblowersblog.org/2016/12/articles/false-claims-qui-tam/over-60-of-false-claims-act-recoveries-brought-in-by-whistleblowers-in-2016/
Whistleblowers Receive Rewards in False Claims Act Settlements
https://www.whistleblowersblog.org/2016/06/articles/false-claims-qui-tam/whistleblowers-receive-rewards-in-false-claims-act-settlements/

[13] *Foreign Nationals File Whistleblower Rewards Claims in United States*, 2014
https://www.whistleblowersblog.org/2014/12/articles/corporate-whistleblowers/foreign-nationals-file-whistleblower-rewards-claims-in-united-states/
Creating an Effective Anti-Corruption Program: *A Rebuttal to the Bank of England's Findings on Whistleblower Incentives, 2018.* Pgs. 14-15
https://www.whistleblowers.org/storage/docs/boe%20report.pdf

[14] *Whistleblower Detection Credited in 76% of Last 100 APPS Cases*, 2018
https://www.whistleblowersblog.org/2018/05/articles/environmental-whistleblowers/whistleblower-detection-credited-in-76-of-last-100-apps-cases/
Whistleblowers are Crucial to Combating Ocean Pollution, 2018
https://www.whistleblowersblog.org/2018/07/articles/environmental-whistleblowers/whistleblowers-are-crucial-to-combating-ocean-pollution/
Against the Tide: Whistleblowers and Illegal Fishing, 2017.
https://www.whistleblowersblog.org/2017/06/articles/environmental-whistleblowers/against-the-tide-whistleblowers-and-illegal-fishing/

[15] Stephen M. Kohn, *The New Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself*, 3rd ed. (Guildford, CT: Lyons Press, 2017). Pgs. 145-150
Whistleblowers: Our Secret Weapon in the Fight Against Wildlife Trafficking, 2017.
https://www.whistleblowersblog.org/2017/06/articles/environmental-whistleblowers/whistleblowers-our-secret-weapon-in-the-fight-against-wildlife-trafficking/
Congress Passes "END Wildlife Trafficking Act", 2016.
https://www.whistleblowersblog.org/2016/09/articles/environmental-whistleblowers/congress-passes-end-wildlife-trafficking-act/

ARTICLE-BY-ARTICLE ANALYSIS

Article 1
Material Scope

Section 1(a): Add new subsections to include illegal offshore banking[16] and foreign bribery[17] as predicate crimes for which whistleblowers can lawfully report. Additionally, sections should be added to protect any disclosures covered under the three anti-corruption conventions. Whistleblowers have been extremely effective in detecting and reporting these types of criminal activities and given the secretive nature of these crimes, they are almost impossible to detect without "insiders" willing to report them.

Article 3
Definitions

The definition of protected activity must include disclosures of information directly to law enforcement or regulatory authorities, cooperation with non-EU law enforcement authorities, and testimony in criminal, civil, administrative and regulatory proceedings.

Thousands of non-U.S. citizens are taking advantage of U.S. whistleblower laws to make disclosures concerning violations of the Foreign Corrupt Practices Act, tax frauds, ocean pollution, government contracting fraud, and securities violations. Many European corporations are covered under these laws, and European citizens are cooperating with U.S. authorities in investigations conducted by law enforcement authorities such as the U.S. Securities and Exchange Commission (SEC), U.S. Internal Revenue Service (IRS), and the U.S. Department of Justice (DOJ) must be protected. Pursuant to the three anti-corruption conventions, and sound public policy, communications between European whistleblowers and these law enforcement agencies must be fully protected.

The need for such protection cannot be overstated. For example, between FY 2011-17, over 2,650 international persons made whistleblower disclosures to the U.S. Securities and Exchange

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[16] Stephen M. Kohn, *The New Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself*, 3rd ed. (Guildford, CT: Lyons Press, 2017), Pgs. 342-345; *See* Section 2.2, Dean Zerbe and Stephen M. Kohn to Secretary of the Department of Treasury, Jacob J. Lew, *The Legality of the IRS' Proposed Whistleblower Rule: Flunking The Loving Test* (June 2014), Pgs. 22-28. https://www.kkc.com/assets/site_18/files/the-legality-of-the-irs-proposed-whistleblower-rule-flunking-the-loving-test_by-sm-kohn-and-zerbe-june-5-2014.pdf

[17] Stephen M. Kohn, *The New Whistleblower's Handbook A Step-by-Step Guide to Doing What's Right and Protecting Yourself*, 3rd ed. (Guildford, CT: Lyons Press, 2017), Pgs. 52, 119-128; *See* Foreign Corrupt Practices Act, 15 U.S.C. § 78m and § 78dd-1 et seq.; 31 U.S.C. § 3729-3732; *See* FCPA Cases https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml; *See* FCPA Legislative History https://www.justice.gov/criminal-fraud/legislative-history; *See* United States Criminal Division, Department of Justice and the Enforcement Division, Securities and Exchange Commission (2012) *A Resource Guide to the U.S. Foreign Corrupt Practices Act.* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf

Commission,[18] including citizens from 25 of the 28 countries of the EU.[19] Likewise, sea-men from Greece provided information on ocean pollution violations to the U.S. Department of Justice,[20] and numerous European corporations have been sanctioned or are under active investigation for violations of the Foreign Corrupt Practices Act,[21] a law that has a very robust whistleblower program enacted under the Dodd-Frank Act.[22] All of these whistleblowers need protection under the Directive.

Moreover, there are treaties and other cooperation agreements that mandate or authorize cooperation between U.S. law enforcement authorities and European law enforcement authorities, including, but not limited to, transnational law enforcement agencies such as INTERPOL. The proposed Directive must provide protection to persons who participate in these international or non-EU programs.

In regard to the three anti-corruption conventions, Article 13 of the *Civil Law Convention on Corruption* states that member countries must cooperate "in matters relating to civil proceedings in cases of corruption, especially concerning… the recognition and enforcement of foreign judgments and litigation costs…"[23] International crimes such as foreign bribery and illegal offshore banking can be investigated and prosecuted more efficiently if international cooperation is fully protected.

Article 43 of the *UN Convention Against Corruption* states "Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption."[24] In order to prevent corruption and bribery domestically and internationally, and to ensure adherence to the UN Convention, whistleblowers must be able to report crimes, and cooperate with law enforcement authorities, even if those authorities are outside of the EU and/or not included in the Directive's definition of "competent authorities."

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[18] *See* United States Securities and Exchange Commission, Annual Reports to Congress Under Dodd-Frank Whistleblower Program (2011-2017) https://www.sec.gov/reports?aId=edit-tid&year=All&field_article_sub_type_secart_value=Reports+and+Publications-AnnualReports&tid=59

[19] *Creating an Effective Anti-Corruption Program*: *A Rebuttal to the Bank of England's Findings on Whistleblower Incentives. 2018*, Pg. 16. https://www.whistleblowers.org/storage/docs/boe%20report.pdf

[20] https://www.whistleblowersblog.org/2018/05/articles/environmental-whistleblowers/whistleblower-detection-credited-in-76-of-last-100-apps-cases/

[21] Stephen M. Kohn, *The New Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself*, 3rd ed. (Guildford, CT: Lyons Press, 2017), Pgs. 458-463.

[22] "[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 whistleblowers award to date–$30 million–went to a foreign whistleblower who provided us with key original information." – Andrew Ceresney, Director of the U.S. Securities & Exchange Commission Division of Enforcement. https://www.sec.gov/news/speech/ceresney-sec-whistleblower-program.html

[23] Council of Europe, *Civil Law Convention on Corruption*. 1999 (ETS 174) https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f6

[24] United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, 2004. Pg. 30 https://www.kkc.com/assets/site_18/files/resources_teaching/united-nations-convention-against-corruption.pdf

The *UN Convention Against Transnational Organized Crime* is premised on international cooperation. For example, the convention mandates "mutual legal assistance in investigations, prosecutions and judicial proceedings" and requires that "mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements." *See* Article 18. Other articles that either mandate or require international cooperation are Articles 13 (cooperation), 16 (extradition), 17 (international transfers), 19 (joint investigations), 24 (protection of witnesses).

The Directive would undermine Article 26 of the *UN Convention Against Transnational Organized Crime* (i.e. "Measures to Enhance Cooperation with Law Enforcement Authorities). This article requires that "Each State Party shall take appropriate measures to *encourage* persons who participate or who have participated in organized criminal groups: *(a)* To supply information useful to competent authorities for investigative and evidentiary purposes." The Article also mandates that all EU countries encourage these potential whistleblowers to "provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime."

Under the Directive, whistleblowers who participated in criminal activities (but did not plan or initiate it) would not be denied protection if they cooperated with international law enforcement and/or decided to become a confidential informant and bypass a company's internal compliance program. Whistleblowers are often the best sources of information, for example international bankers who have served clients with illegal offshore accounts or the executives employed by said banks that approved these activities.

Moreover, as explained below, under Directive Articles 16, 17 and 19, these whistleblowers could be subjected to lawsuits by the very corporations engaged in the criminal activities for which the employees are trying to expose. Potentially subjecting these whistleblowers to the harsh penalties permitted under these three Directive Articles not only undermines the international conventions, it would have a major chilling effect on the willingness of key insider sources to ever blow the whistle.

Articles 4 and 5
Obligation to Establish Internal Channels/
Procedures for Internal Channels

Article 4 Section 1 and Article 5 Section 2(b): These provisions of the Directive discuss the procedures and rules governing internal corporate compliance programs. Clarifications in these procedures are necessary to ensure that internal reporting channels are not used to cover-up misconduct.[25] This is especially true when the criminal activity is large in scope or where the wrongdoing implicates high-level officials.

Two key safeguards must be incorporated into the proposal. The first concerns privilege; the files and documentation obtained as part of an internal investigatory or compliance process established under the proposal cannot be "privileged." The channels created under this Directive must be

[25] *See* Michael Volkov, "Redefining the Relationship of the General Counsel and the Chief Compliance Officer" (Sept 2014) http://compliancestrategists.com/pro/wp-content/uploads/2013/10/RAND-Volkov-WPprepub6.3.2014.pdf; Senator Charles Grassley to Mr.Trevor Fetter, "Grassley Investigates Tenet Healthcare's Use of Federal Tax Dollars." https://www.grassley.senate.gov/news/news-releases/grassley-investigates-tenet-healthcares-use-federal-tax-dollars; "Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament." *See* Charter of Fundamental Rights of the European Union 2000/C 364/01, *Article 44 Right to petition,* http://www.europarl.europa.eu/charter/pdf/text_en.pdf

separate and distinct from a company's law department. If corporations or government agencies were to keep its investigatory files secret and not subject to lawful subpoena by law enforcement agencies, there is potential for abusing these programs. Abuse of this kind is well-documented.[26]

Second, corporate compliance programs established under the Directive must have an obligation to self-report crimes.[27] If a company or government agency identified evidence that establishes a reasonable suspicion that crimes have been committed, the company/agency must self-report these potential crimes to the appropriate law enforcement agency. One of the central purposes of whistleblowing in general, and of an effective internal reporting system, is to facilitate the detection of criminal activity, and to have the ability to hold those who violate anti-corruption laws fully accountable. Without a requirement for self-reporting, the internal compliance programs will be abused and used to cover-up crimes.

This was the lesson learned in the United States which promoted the enactment of the "Close the Contractors Fraud Loophole Act, which mandated self-reporting by companies that have contracts with the U.S. government. Regulations promulgated under that law require:

> *Timely disclosure, in writing, to the agency OIG [i.e. the Office of the Inspector General, a federal law enforcement agency], with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontractor thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729–3733).*

48 C.F.R. § 52.203-13(c)(2)(F). Accord., 48 C.F.R. §§ 3.1003[28] and 9.406-2 (requirement for debarment of federal contractors who fail to self-report violations).

Compliance programs established under law (i.e. the Directive) that uncover evidence of corporate crime or government corruption must immediately report these crimes to the appropriate law enforcement agencies.

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[26] Michael Volkov, "Redefining the Relationship of the General Counsel and the Chief Compliance Officer" (Sept 2014) http://compliancestrategists.com/pro/wp-content/uploads/2013/10/RAND-Volkov-WPprepub6.3.2014.pdf; *See* Barko v Halliburton, No. 1:05-cv-1276 (DDC Mar. 6, 2014)

[27] *See Close the Contractors Fraud Loophole Act* Public Law 110-252, Title VI, Chapter 1; *See* 73 Federal Register 67064 (Nov. 12, 2009). Michael D. Greenberg," *Transforming Compliance: Emerging Paradigms for Boards, Management, Compliance Officers, and Government*" RAND Corporation (2014), Pgs. 56-68. https://www.rand.org/content/dam/rand/pubs/conf_proceedings/CF300/CF322/RAND_CF322.pdf;

[28] A contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract performed by the contractor or a subcontract awarded thereunder, credible evidence of 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 a violation of the civil False Claims Act. Knowing failure to timely disclose credible evidence of any of the above violations remains a cause for suspension and/or debarment. 48 C.F.R. § 3.1003.

Finally, *Article 5 Sections 2(b) and 3* must also include adequate protections to ensure the confidentiality of the whistleblowers in the procedures established in this Article.

Articles 9 and 11
Procedures Applicable to External Reporting/Record Keeping

Article 9 Sections 1(c) and 2-3 and Article 11 Section 1: The procedures for protecting the confidentiality of whistleblowers are completely inadequate. There are no provisions that permits a whistleblower to seek judicial relief to protect their identity or to obtain damages if confidentiality is violated. Additionally, it permits member states to enact laws that abridge confidentiality under national law, rendering the confidentiality provisions potentially meaningless. Confidentiality and anonymity are the two important provisions of law that both encourage reporting and protect whistleblowers from retaliation.[29] These protections must be as iron-clad as possible, and whistleblowers must be able to seek judicial relief if any entity engages in conduct that may violate these protections.

Article 13
Conditions for the Protection of Reporting Persons

Article 13 mandates internal reporting before an employee can report externally. The provision is inconsistent with three anti-corruption international conventions approved by nearly every nation-state in the EU, as well as every U.S. whistleblower law. The provision constitutes an obstruction of justice,[30] and it must be amended.

It is a fundamental principle under laws prohibiting an obstruction of justice that any attempts to harass or intimidate persons who report criminal activities to law enforcement is a crime. For example, the U.S. obstruction of justice statute makes it a serious felony crime for any person to retaliate against any whistleblower who directly informs law enforcement of suspected criminal activity. The statute states as follows:

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[29] *See* U.S. Securities and Exchange Commission, Regulation 21 F § 240.21F-7, https://www.sec.gov/about/offices/owb/reg-21f.pdf#nameddest=21F-9 ; Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest" (2013), Pgs. 5-6. https://issuu.com/transparencyinternational/docs/2013_whistleblowerprinciples_en

[30] 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 than 10 years, or both.
See Sarbanes-Oxley Act 18 U.S.C. § 1514A https://www.law.cornell.edu/uscode/text/18/1514A
15 U.S.C. § 78u-6 Securities whistleblower incentives and protection
https://www.law.cornell.edu/uscode/text/15/78u-6 ; *Journals of the Continental Congress 1774-1789,* Vol. 11, (Washington: Government Printing Office, 1908). Library of Congress.
https://docs.wixstatic.com/ugd/662f25_a5b3f03177ac4d539bd232fb0d483f3e.pdf
Transparency International, "International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest" (2013), Pg. 7.
https://issuu.com/transparencyinternational/docs/2013_whistleblowerprinciples_en

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 than 10 years, or both.

18 U.S.C. § 1513(e).

This statute sets forth the public policy that every employee has a right to report crimes to the police without fear of being fired. Any form of employment-related retaliation based on reports to law enforcement of truthful information concerning potential crimes constitutes a serious crime. Unfortunately, the Directive fails to recognize this fundamental right of every citizen.

In regard to inconsistencies between the Directive and various anti-corruption conventions, we call your attention to the following:

- Article 9 of the Council of Europe's *Civil Law Convention on Corruption* states that each party member "shall" protect persons who "suspect corruption" to "persons or authorities." The mandate that all persons have a right to report crimes related to corruption to the appropriate "authorities" must be fully protected in the Directive, without any precondition that an employee's company (that engaged in the wrongdoing) is notified of the whistleblower's concerns.

  Thus, nearly every nation-state in the EU is already under a duty to protect whistleblowers in accordance with Article 9's explicit and clear mandate: "*Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities."* The Directive's definition of a protected disclosure, and the procedures for making such disclosures, must conform to the letter and spirit of this mandate.

  Moreover, Article 11 protects those who give evidence in anti-corruption proceedings. This would require that persons who testify on crimes covered under this Convention be fully protected, and implicitly requires that those who are working with prosecutors in preparing evidence or testimony must also be protected. The Directive must ensure that all testimonial-related protected activities are explicitly covered under the Directive and that there be no requirement whatsoever that any person intending to provide testimony to anti-corruption law enforcement officials ever report their concerns to a corporation or individual suspected of having committed the underlying crimes.

- Article 33 of the *UN Convention Against Corruption* states that "each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and

on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention." It is well established that "competent authorities" are governmental law enforcement or regulatory agencies. This recognition is incorporated into the Directive, that defines "competent authorities" as governmental agencies.

Article 33 correctly sets forth the proper policy on protecting employees or other persons who directly report to "competent authorities."

Article 13 of the *UN Convention Against Corruption* contains numerous provisions that also call for the protection of anti-corruption disclosures that are not protected in the Directive. For example, Article 13-1(b) requires that the "public has effective access to information," however, mandating internal reporting could undermine this goal in a practical sense. Furthermore, Article 13-1(d) urges each party member to take measures for "Respecting, *promoting* and protecting the freedom to seek, receive, publish and *disseminate information concerning corruption*." Many of the Directive's provisions, including those that require internal reporting to the corporation accused of wrongdoing, and those that permit corporations accused of wrongdoing by a whistleblower to file lawsuits against the whistleblower (with expansive "due process" rights afforded to the corporation), undercut this mandate to "promote" the "disseminati(ion) of information concerning corruption."

Further, Article 13-1(a) requires "Enhancing the transparency of and promoting the contribution of the public to decision-making processes." The Directive does not protect disclosures to the European Parliament, a nation-state's parliament, or other decision-making bodies. Whistleblowers often play a critical role in providing information to these decision-making bodies. Reports to the European Parliament, a nation-state's parliament and/or other governmental commissions or decision-making bodies, must also be fully protected.

- The *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* establishes the "Criminalization of obstruction of justice" in Article 23. Moreover, Article 23, 25, and 32 lay out specific provisions for persons who give testimony or produce evidence regarding corruption crimes in court cases or government investigations. All such conduct must be fully protected in the Directive.

It is a fundamental right in a democracy that all persons are treated equally under the law. If a person violates the law, regardless of whether or not they work in a corporation or for a government agency, it is in the public interest that these crimes be immediately and quickly reported to law enforcement. Any rule, regulation or law that does not promote reporting of criminal activities, environmental violations, or government corruption to appropriate officials undermines the rule the law and is a threat to human rights.

Article 15
Measures for the Protection of Reporting Persons Against Retaliation

This Article fails to set forth the damages and other relief available to victims of retaliation. All effective whistleblower laws mandate damages, injunctive relief, and the payment of compensation for whistleblowers. This includes a complete "make whole" remedy, reinstatement, back pay, restoration of all benefits, "affirmative relief" to cure any chilling effect, compensatory damages, and in many cases, punitive damages.[31] Without explicating specific and effective damages the Directive will be fundamentally flawed.[32]

In addition to monetary damages, employees who prevail in a whistleblower case must be awarded their reasonable attorney fees and all costs.[33] Without compensation for fees and costs, whistleblowers will not be able to obtain adequate legal counsel and the laws will not be effectively administered.[34] Under U.S. law, every anti-retaliation law requires that the persons who engage in discriminatory practices pay the victims' fees. This fundamental provision ensures that whistleblowers obtain counsel, and that a private bar willing to represent whistleblowers is created.

The conventions aforementioned offer protections for whistleblowers who face retaliation. Article 33 of the *UN Convention Against Corruption* encourages the incorporation of "protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities" and Article 9 of the Council of Europe's *Civil Law Convention on Corruption* states "Each Party shall provide in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities."

Articles 16, 17, and 19
The Directive Enables Whistleblower Retaliation

Directive Articles 16, 17 and 19 all relate back to the scope of protected activities under the Directive. Any person who blows the whistle in a manner not explicitly covered under the Directive can be subjected to the provisions of these three Articles. As explained below, this will have a chilling effect on whistleblowing, and could have a *catastrophic* impact on whistleblowers who serve the public interest but raise their concerns directly to the press or law enforcement agencies.

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[31] Stephen M. Kohn, "Get Every Penny Deserved," *The New Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself*, 3rd ed. (Guildford, CT: Lyons Press, 2017), Pgs. 285-288.

[32] Transparency International, "International Principles for Whistleblower Legislation: Best Practices for Laws to Protect Whistleblowers and Support Whistleblowing in the Public Interest" (2013), Pg. 9. https://issuu.com/transparencyinternational/docs/2013_whistleblowerprinciples_en

[33] See 15 U.S.C. § 2087 – Whistleblower protection 3C § 4C § 7B https://www.law.cornell.edu/uscode/text/15/2087

[34] Civil Rights Attorney Fee Act, 42 U.S.C. § 1988 ; *Blum v. Stenson*, 465 U.S. 886 (1984) (determining fee rate) ; *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (no proportionality)

Articles 16 and 17 are misleading and unclear. They relate to the rights of "concerned persons," but that phrase is not given its ordinary meaning. A "concerned person" is *not* a person who raises a concern about wrongdoing or corruption; however, it has the opposite meaning. The definition of "concerned person" in the Directive actually refers to the target of the whistleblowing. In other words, those accused of wrongdoing.[35]

Further, the term "person" in these Articles does not just mean an individual who was wrongfully accused of engaging in criminal activity. "Persons" under the Directive's definition include both individual people, and "legal persons." A "legal person" is a corporation.

Thus, any corporation accused of wrongdoing by a whistleblower is afforded all of the rights set forth in Articles 16 and 17, and pursuant to Article 19, member-states of the EU cannot enact whistleblower protection laws that reduce the significant rights granted under these provisions. These rights are very extensive, and more far reaching then the rights granted whistleblowers. They include the right to an "effective remedy," "fair trial," and "presumption of innocence."

These three articles are not consistent with the requirements or policies set forth in the three anti-corruption conventions signed by nearly every EU-member state. They upend established whistleblower protection norms. They openly legalize potential massive retaliation against any whistleblower who raises his or her concerns outside the narrow requirements of the Directive. In short, the Directive empowers the potential wrongdoers to go after those who expose the wrongdoing.

The prospect of major financial institutions using Articles 16, 17 and 19 to harass, sue and ultimately financially ruin whistleblowers is not a hypothetical concern. Many corporations have sued and filed charges against whistleblowers, often destroying their lives and creating a chilling effect.

Articles 16, 17, and 19 must be struck from the Directive. Instead, the Directive should include additional provisions protecting whistleblowers from harassment lawsuit filed under the domestic law of member-states. This would include limitations on the use of libel laws against whistleblowers consistent with the well-established legal precedent that public officials cannot maintain such lawsuits unless they can demonstrate that the public statements of the whistleblowers were untruthful and made with malicious intent.

The Directive Must Mandate or Encourage Member States to Establish Whistleblower Incentives Programs

In addition to ensuring that whistleblowers are not victims of retaliation, whistleblower laws must incentivize insiders with information about government and corporate corruption to come forward and report these crimes.[36] The United States has utilized the financial award/*qui tam* process to incentivize the detection and reporting of corruption. The data from decades of legal enforcement has proven over time that this is the best method for protecting whistleblowers and increasing the

[35]Proposal for a Directive: COM/2018/218 § EU Whistleblower Protection, Article 16. https://ec.europa.eu/info/law/better-regulation/initiatives/com-2018-218_en

[36] *See* footnotes 10 through 14.

detection of crime. In every area for which *qui tam* reward laws have been implemented, the responsible law enforcement officials have praised these laws and cited their effectiveness, including the U.S. Department of Justice Division of Environment and Natural Resources (ocean pollution)[37]; Internal Revenue Service (tax fraud)[38]; DOJ Civil Division (fraud in government contracts and customs)[39]; and the Securities and Exchange Commission (securities fraud).[40]

These programs are extremely profitable, as the whistleblower is compensated only from the sanctions he or she was responsible for uncovering. Thus, without the whistleblower the regulatory or law enforcement agencies responsible for policing the misconduct would not have been able to discover the crimes at issue. Because corruption, bribery and frauds are usually conducted in private and are extremely hard to detect, the use of incentives to motivate original sources to take the risk and blow whistle have proven to be absolutely necessary for a successful anti-corruption program.

The utility of using rewards was demonstrated not only by numerous public remarks by officials responsible for managing these programs, but also in a comprehensive peer reviewed study of major fraud cases in the United States.[41]

We strongly urge the EU to establish reward laws, modeled on the successful U.S. programs. Without these laws, whistleblowers will never be fully and properly compensated for the risks they take, and the overwhelming majority of persons who may otherwise blow the whistle will remain silent.

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[37] "Information of this nature is otherwise difficult, if not virtually impossible to obtain [without help from the whistleblower]." — U.S. Department of Justice, *U.S. v. Consultores De Navegacion S.A., 1:08-cr-10274,* (Sept. 4, 2009) (U.S. District Court, Massachusetts). *See* https://www.whistleblowers.org/storage/docs/House-Testimony-final-final-12-1-16.pdf

[38] "Since 2007, information submitted by whistleblowers has assisted the IRS in collecting $3.6 billion in revenue." — Internal Revenue Service Director, Whistleblower Office, Lee D. Martin

[39] "Because those who defraud the government often hide their misconduct from public view, whistleblowers are often essential to uncovering the truth. The [Justice] Department's [monetary] recoveries this past year continue to reflect the valuable role that private entities can play in the government's effort to combat false claims concerning government contracts and programs." — Acting Assistant Attorney General Chad Readler. *See* https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017
Creating an Effective Anti-Corruption Program: *A Rebuttal to the Bank of England's Findings on Whistleblower Incentives, 2018.* https://www.whistleblowers.org/storage/docs/boe%20report.pdf

[40] The "whistleblower program . . . has rapidly become a tremendously effective 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." — Chair of the Securities and Exchange Commission Mary Jo White. *See* https://www.sec.gov/news/speech/spch100913mjw
Creating an Effective Anti-Corruption Program: *A Rebuttal to the Bank of England's Findings on Whistleblower Incentives, 2018.* https://www.whistleblowers.org/storage/docs/boe%20report.pdf

[41] *Who Blows the Whistle on Corporate Fraud?* University of Chicago Booth School of Business, European Corporate Governance Institute.
http://faculty.chicagobooth.edu/finance/papers/who%20blows%20the%20whistle.pdf

CONCLUSION

We strongly endorse the efforts of the European Union to protect whistleblowers. However, many of the Articles proposed by the European Commission need to be amended in order to ensure whistleblowers are protected. It is essential that the laws ultimately implemented work in practice, aid law enforcement in the detection and prosecution of corruption and are consistent with the international anti-corruption conventions. Otherwise, this whistleblower directive will undoubtedly put a dampening effect on the reporting of corruption in the EU. Additionally, the Directive needs to strongly endorse and/or require the use of reward laws to enhance the detection and deterrence of fraud and corruption.

We look forward to working with you in order to ensure that the European Parliament and the member-states of the European Union enact effective whistleblowers laws.

If you have questions or comments, please contact Stephen Kohn at the National Whistleblower Center at sk@kkc.com

Respectfully submitted,

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