NWC | NATIONAL WHISTLEBLOWER CENTER

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February 7, 2019

Via email president@ep.europa.eu

Antonio Tajani
President
European Parliament
Rue Wiertz 60
1047 Bruxelles
Belgium

Re: Proposal for a Directive of the European Parliament and of the Council on the Protection of Persons Reporting on Breaches of Union Law ("Whistleblower Directive")
Mandate for Negotiations

Dear Mr. Tajani:

On behalf of the National Whistleblower Center, I want to thank you and your members for your work on behalf of protecting whistleblowers within the European Union.

We are writing to express our strong opposition to a provision in the Council of Europe's draft Whistleblower Directive ("Directive") defining the scope of protected activity. This provision is detrimental to whistleblowing and would constitute a serious set-back for whistleblower protections.

We request that, during the final negotiations over the Directive, you take the issues raised in this letter into consideration and insure that the fundamental right of citizens to report crimes to law enforcement are vindicated in the final approved Directive. Simply stated, if the Directive creates any impediment interfering with the right of employees to confidentially and quickly report suspected criminal activities to the appropriate law enforcement officials, the Rule of Law – which is the cornerstone in the protection of human rights and democratic government – will be undermined.

I. INTRODUCTION

The Council has approved a language that requires employees, in most circumstances, to report potential illegal activities to their employer, prior to going to law enforcement authorities.[1] Similar requirements have been rejected in the United States, despite numerous attempts by corporate lobbyists to insert this requirement into various whistleblower laws. As explained below, the proposed requirement is bad policy, undermines whistleblower protections, fails to promote accountability, subjects publicly traded companies in Europe to potential liability under U.S. securities laws, is inconsistent with the mandates under international anti-corruption conventions, and in many circumstances would violate obstruction of justice laws.

Perhaps the best summary as to why the European Union should reject this proposal was stated by U.S. Senator Charles Grassley (Republican-Iowa), the former Chairman of the Senate Judiciary Committee, and the current Chairman of the Senate Finance Committee.[2] In a 2016 statement submitted to the House Judiciary Subcommittee on the Constitution and Civil Justice,[3] Senator Grassley explained:

> *Whistleblowers are the indisputable key to protecting taxpayer money against fraud. They must be protected. They will not be protected if they are required to report internally before making any protected external disclosure.*
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> * * *

[1] In its press release on the Council-approved version of the Directive, the Council described its proposal on protected disclosures as follows: "Reporting system: whistleblowers will first have to use internal channels within their organization before calling on external ones (set up by public authorities) and, eventually, going for public disclosure. However, the principle of a three step system includes exceptions allowing a person to go directly for external or even public disclosures in some specific cases (e.g. in case of manifest or imminent danger for the public interest)." *Council Adopts Its Position*, EUROPEAN COUNCIL, COUNCIL OF THE EUROPEAN UNION (Jan. 25, 2019), https://www.consilium.europa.eu/en/press/press-releases/2019/01/25/better-protection-of-whistleblowers-council-adopts-its-position/.

[2] Senator Grassley is the leading expert within the U.S. Congress on whistleblower laws, and has carefully overseen the implementation of various whistleblower laws since the enactment of the False Claims Act in 1986.

[3] STATEMENT FOR THE RECORD BY SENATOR CHUCK GRASSLEY OF IOWA CHAIRMAN, SENATE JUDICIARY COMMITTEE AT A HOUSE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE HEARING ON "OVERSIGHT OF THE FALSE CLAIMS ACT" (April 28, 2016), https://www.grassley.senate.gov/news/news-releases/grassley-false-claims-act-our-most-important-tool-fight-fraud-against-taxpayers (emphasis added).

In a perfect world, organizations would value input from their employees, work to fix the problems they identify, and go about their business. We do not live in a perfect world.

* * *

Whistleblowers need to be able to disclose wrongdoing outside of their organizations. They need strong protections regardless of who first receives their complaint. Protecting internal reporting is important, but requiring it only discourages many would-be whistleblowers with evidence of actual wrongdoing from coming forward. Moreover, when they do, they are often subjected to the hostility of the ill-intentioned manager or worse… Indeed, if Congress required internal reporting, the evidence shows that companies would wield it as a weapon against whistleblowers.

* * *

Moreover, the data shows that equal protections for internal and external disclosures do not dissuade whistleblowers from reporting internally, where they feel comfortable doing so, even if they do have a strong qui tam case. A 2012 report by the National Whistleblower Center found that 89.7% of employees who would eventually file a qui tam case initially reported their concerns internally, either to supervisors or compliance departments. Requiring internal reporting therefore is not only highly detrimental to whistleblowers and ineffective at uncovering fraud, it is just not necessary.

II. EMPLOYEES MUST HAVE THE RIGHT TO DIRECTLY REPORT VIOLATIONS OF LAW TO THE POLICE AND REGULATORY AUTHORITIES

A. REQUIRING INTERNAL REPORTING IS INCONSISTENT WITH LAWS PROHIBITING OBSTRUCTION OF JUSTICE

In 2002, the U.S. Congress enacted historic financial reform legislation known as the Sarbanes-Oxley Act ("SOX"). In light of the history of financial frauds on Wall Street, and the well-documented need to fully protect employees if they report wrongdoing, Congress amended the obstruction of justice laws to prohibit retaliation against employees who reported potential crimes to federal law enforcement agencies. *See* Title 18 United States Code §§ 1513(e). It made any restriction on the right of any person to communicate truthful information about potential criminal activities to law enforcement authorities a criminal felony. Persons who engaged in such retaliation

could be subjected to a 10-year prison term. This provision is extremely broad, and its mandate speaks for itself:

> 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 obstruction of justice statute vindicates the "rule of law," a pillar for all Democratic societies and a necessary precondition for the protection of human rights. Without the right of the people to freely report criminal activity to law enforcement, without any impediments or conditions, the rule of law is severely threatened, if not completely undermined.

In order for civil society to protect its citizens from criminal elements (including corporate criminals), governments must be able to detect and investigate potential violations. In order for Parliament to protect its citizens, it must have access to information necessary for conducting oversight and drafting effective legislation. These fundamental principles are ingrained in every Democratic state. They are reflected in the major anti-corruption conventions approved by all members of the European Union, and are well established under U.S. law. They are also reflected in the historic development of republican governments.

For example, on July 30, 1778, at the height of the American War for Independence, the U.S. Continental Congress enacted America's the very first whistleblower law. It reinforced these well-established Democratic principles by codifying:

> *That it is the duty of all persons in the service of the United States, as well as all other inhabitants thereof, to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors.*

Resolution of the Continental Congress (emphasis added).

Consistent with this historic 1778 Resolution, in 1895, the U.S. Supreme Court unanimously held that: "It is the right, as well as the duty, of every citizen . . . to communicate to the executive officers any information which he has of the commission of an offense against those laws; and such information, given by a private citizen is privileged." *In re Quarles* and *Butler*, 158 U.S. 532, 535 (1895).

The modern obstruction of justice statute reflects these fundamental principles. The freedom to report crimes to law enforcement is the foundation of any legal system with the ability to protect and promote human rights.

B. U.S. WHISTLEBLOWER LAWS PROTECT DIRECT REPORTING TO LAW ENFORCEMENT AND REGULATORY AGENCIES

Every major U.S. anti-retaliation/whistleblower protection law protects employees who report their concerns directly to the government. None require internal reporting in order to be protected. In fact, the opposite is the case.

For example, the Sarbanes-Oxley Act's anti-retaliation law defined protected activities as including direct and unimpeded communications with law enforcement, Congress and regulatory authorities. The SOX explicitly protected direct communications with "a Federal regulatory or law enforcement agency [or] any Member of Congress or any committee of Congress." 18 U.S.C. § 1514A(a)(1)(A), (B) (emphasis added). Additionally, the SOX gave corporate employees the right to directly initiate government proceedings or investigations against their employer, and to testify and participate in those proceedings without having to first communicate any concern to their employer, including the right "to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation . . . any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders." 18 U.S.C. § 1514A(a)(2).

Consistent with the Obstruction of Justice statute, the U.S. Securities and Exchange Commission ("SEC") approved a rule prohibiting any restriction on the right of employees subject to SEC rules to directly contact the SEC. There is no requirement to first notify a corporate compliance program. In fact, the SEC rejected proposals from corporate lobbyists to implement an internal reporting requirement substantially identical to the proposal contained in the draft Directive.

The SEC Rule is clear: "No person may take any action to impede an individual from communicating directly with the Commission [i.e. the SEC's] staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement." Title 17 C.F.R. § 240.21F-17. This rule, implemented under the authority of the historic Dodd-Frank Act (signed into law in 2010) is applicable to all publicly traded companies and companies that are registered with the SEC.[4]

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[4] We note that most publicly traded European companies are already subject to the SEC rule. Specifically, any European company that trades on an American stock exchange, or permits American citizens to invest in their companies through ADRs (i.e. American Depository Receipts). By adopting domestic legislation consistent with the existing securities laws prohibiting restrictive NDAs, the European Parliament would

Shortly after adopting this Rule, the SEC issued an enforcement decision against the multinational corporation Kellogg Brown & Root ("KBR").[5] KBR had employees who provided information to their internal compliance program to execute a nondisclosure agreement requiring employees to obtain permission from the attorneys running the compliance review prior to discussing their concerns with "anyone." The SEC found that this agreement created a chilling effect on the right of employees to contact the government, and sanctioned KBR.[6] KBR was fined $130,000 for having employees execute these agreements, despite the fact that there was no evidence that any employee was prevented from communicating concerns to the government.[7] Because the right of employees to freely communicate concerns with the government is so important, any interference with this right was be strictly prohibited.

Furthermore, in order to comply with the SEC's enforcement order, and to mitigate the chilling effect caused by their conduct, KBR agreed to notify employees that they are free to communicate directly with the government. The language adopted in the *KBR* ruling, and for which KBR agreed to communicate to employees, reaffirmed the fundamental right of employees to blow the whistle directly to the government, without having to first notify the company of their concerns:

> Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

In Re KBR, Inc. SEC Rel. No. 74619 (Apr. 1, 2015).[8]

Finally, most (if not all) publicly traded European companies are required to adhere to the SEC rules concerning the freedom of employees to directly report allegations

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protect its companies that are covered under the U.S. SEC's rules (or conduct business in the United States) from unknowingly violating serious criminal or regulatory requirements that would harm investors.

[5] The undersigned counsel represented the whistleblower who initiated this enforcement proceeding against KBR.

[6] *In Re KBR, Inc*. Rel. No. 74619 (Apr. 1, 2015), https://www.kkc.com/assets/site_18/files/resources_teaching/barko_sec-order.pdf.

[7] *Id.*

[8] https://www.kkc.com/assets/site_18/files/resources_teaching/barko_sec-order.pdf.

of misconduct to federal officials.[9] The proposal in the Directive would create a conflict with the regulatory requirements imposed on these companies as a condition of trading their stock in the United States. Moreover, the proposed Directive would be self-defeating. European employees will continue to avoid notifying their local authorities about misconduct, but instead will use the American laws to ensure stronger protections. Between 2011 and 2018, over 1,000 employees from EU countries filed claims in Washington D.C. under the Dodd-Frank Act (which protects confidentiality and permits direct reports to the government without first contacting compliance programs).[10]

It should be unacceptable to the European Union that citizens of the Union do not feel protected when reporting violations in Europe, and instead feel compelled to rely on U.S. laws. European whistleblowers will continue to use the U.S. systems if the EU Directive does not fully protect their rights. Based on my representation if *numerous* European whistleblowers, many of whom have credibly reported major violations of law, and my participation in a number of anti-corruption conferences in Europe, there is no doubt that many more European citizens will be compelled to use U.S. laws, if Europe does not take steps to properly protect its citizens who report fraud and corruption.

C. THE EUROPEAN UNION MUST ENSURE THAT ITS WHISTLEBLOWER DIRECTIVE IS CONSISTENT WITH INTERNATIONAL TREATY OBLIGATIONS APPORVED BY ALL MEMBER STATES

Every nation in the European Union has approved three major anti-corruption Conventions that implicitly or explicitly permit whistleblowers to directly communicate their concerns with government officials, without having to first notify the company.[11]

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[9] The SOX, and the Dodd-Frank Act, explicitly authorize employees of publicly traded corporations (including European corporations that permit American citizens to invest in their companies through the use of ADRs) to directly contact the Securities and Exchange Commission (and other law enforcement agencies) with allegations of corporate wrongdoing.

[10] *Annual Reports of the Office of the Whistleblower*, U.S. SECURITIES & EXCHANGE COMM'N, https://www.sec.gov/reports?aId=edit-tid&year=All&field_article_sub_type_secart_value=Reports+and+Publications-AnnualReports&tid=59.

[11] Council of Europe, Civil Law Convention on Corruption, ETS 174 (1999), https://rm.coe.int/168007f3f6; United Nations Office on Drugs and Crime, 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, Convention Against Transnational Organized Crime and the Protocols Thereto (2004), https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html.

The European Union, in its Whistleblower Directive, must ensure that the reporting requirements protected under these Conventions are not contradicted in the final version of the Directive.

1. The Civil Law Convention on Corruption

Article 9 of the 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.*" (emphasis added). Under this Convention, whistleblowers have the right to report corporate crimes to "authorities."

Article 11 of the Convention requires the protection of those who give evidence in regulatory or civil proceedings. Again, the Directive must explicitly recognize this right, and ensure that no witness/employee must first inform his or her employer as to the nature of his or her testimony, prior to giving that testimony in a formal proceeding. Requiring employee-witnesses to first report their evidence of misconduct to their employer would open the door to witness tampering, and would give an unfair advantage to corporations that violate the law. In this regard, the act of disclosing evidence to regulators is the first step in a whistleblower becoming a witness in a regulatory or civil proceeding.

Article 13 of the Convention states that member countries must cooperate "in matters relating to civil proceedings in cases of corruption, especially concerning . . . obtaining evidence." Again, it is incumbent upon the European Union to implement in the final Directive rules that would ensure that whistleblowers can cooperate with law enforcement or regulatory officials from member countries without first having to inform the corporation that is accused of wrongdoing as to the evidence against it.

2. The United Nations Convention Against Corruption

The proposed Directive is also inconsistent with a number of provisions in the United Nations Convention Against Corruption. Article 33 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." (emphasis added).

Article 13-1(b) requires the "public" to have "effective access to information" and 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." Requiring initial reports to corporations accused of misconduct or criminal activity is inconsistent with this mandate.

Article 13-1(a) requires "[e]nhancing the transparency of and promoting the contribution of the public to decision-making processes." The requirement on employees to first report potential crimes and regulatory violations to the corporations accused of such misconduct is inconsistent with this mandate. The draft Directive also interferes with the right of employees or whistleblowers to fully and freely communicate with Members of Parliament and/or Parliamentary committees, who rest at the heart of the decision-making process in Democratic nations.

Article 13-2 requires that each State Party that ratified the Convention (which includes every member of the European Union) "*take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention*." The draft Directive is clearly inconsistent with this mandate, and would also make anonymous reporting impossible. Once an employee discloses his or her evidence of corporate crimes to his or her employer, their ability to remain anonymous is forfeited.

3. The United Nations Convention Against Transnational Organized Crime

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." Article 18. Other articles that either mandate or require international cooperation are Articles 13 (cooperation), 16 (extradition), 17 (international transfers), 19 (joint investigations), and 24 (protection of witnesses).

The draft Directive is inconsistent with these requirements. Requiring witnesses and whistleblowers to first report wrongdoing (including bribery, money laundering, illegal banking and other frauds for which major financial institutions have engaged in) to the companies committing these crimes completely violates these mandates. Every nation within the European Union is required, "to the fullest extent possible," to provide "assistance in investigations, prosecutions and judicial proceedings." Requiring witnesses to first report their evidence to the very corporations under investigation completely negates this mandate.

Article 26, "Measures to Enhance Cooperation with Law Enforcement Authorities," requires "[e]ach State Party [to] take appropriate measures to *encourage* persons who participate or who have participated in organized criminal groups … [t]o supply

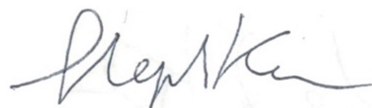
information useful to competent authorities for investigative and evidentiary purposes." (emphasis added). The draft Directive is inconsistent with this treaty obligation. This Article also mandates that all EU countries encourage these potential whistleblowers to "provide factual, concrete help to competent authorities that may contribute to depriving organized criminal groups of their resources or of the proceeds of crime." Mandatory internal reporting is inconsistent with this mandate.

CONCLUSION

Any law, rule, or regulation that restricts the right of the people to report truthful information about potential violations of law to Parliament or law enforcement authorities undermines the rule of law, violates international anti-corruption Conventions, violates U.S. securities laws applicable to numerous European companies, and may create an obstruction of justice.

Thank you in advance for your careful consideration of this information. If you have any questions, please do not hesitate to contact my office. I can be reached at the following email: help@whistleblowers.org.

Respectfully submitted,



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