# WHISTLEBLOWER LAWS AND THE FIGHT AGAINST CORRUPTION FROM WITHIN

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On July 31, 1789, the First Congress of the United States passed 18 qui tam[1] laws mandating that whistleblowers (informants) whose information resulted in a successful prosecution obtain a percentage of the fines obtained from the fraudsters. The Founders of the United States looked toward the people to be a full partner in enforcement of law—and included qui tam provisions in the major revenue-producing laws enacted by the First Congress. Among the 18 were reward laws targeting customs violations (still covered under the False Claims Act), bribery, illegal conflicts of interest, criminal larceny, and reporting improper lending by the Bank of the United States. These rewards generally were set between 25 to 50 percent of the monies collected from the wrongdoer.

In 1863, Abraham Lincoln recognized both the danger of government contractor profiteering and the need for private persons to become involved in its prevention when he signed into law the False Claims Act.[2] During the Civil War, President Lincoln and his supporters in Congress were disgusted with government contractors, some of whom were selling sawdust as gunpowder and profiting from the terrible costs of the war. Congressional investigations uncovered "waste and squandering" of public funds. Overcharging was common, and war contracts were given without any advertising at exorbitant rates above market value.

To encourage citizens to disclose these frauds, Michigan senator Jacob Howard introduced Senate Bill 467, what is today referred to as the False Claims Act. As Senator Howard explained, a key provision in the law was a qui tam clause based on the "old-fashioned idea of holding out a temptation" for persons to step forward and turn in thieves. Senator Howard strongly defended the bill as, in his words, the "safest and most expeditious way I have ever discovered of bringing rogues to justice."

Under the law, any person who had knowledge of the fraud was authorized to file a lawsuit on behalf of the United States. If frauds were proven, the wrongdoer had to pay up to twice the amount of the fraud, plus a large fine of $2,000. The whistleblower, known in the law as the "relator," would get half the money, and the United States would collect the other half.

Over 200 years later, the US Supreme Court heard a challenge to the constitutionality of the False Claims Act's qui tam reward provisions. In an opinion written by Justice Scalia, the Court unanimously upheld the law's constitutionality, citing the qui tam laws enacted by the First Congress.[3]

Qui tam puts teeth into the right of the people to expose fraud and misconduct. It is the modern framework for protecting people who courageously step forward and report corruption. Although modern whistleblowing is deeply rooted in the finest traditions of American law, the rules governing their use today are strictly 21st-century smart.

## THE RISE OF THE FALSE CLAIMS ACT

On March 2, 1863, President Lincoln signed S. 467 into law. The False Claims Act was visionary legislation. It was passed before the rise of modern industry and before the federal government became a multitrillion-dollar enterprise. Like other visionary civil rights legislation signed during the Civil War and Reconstruction eras, it was progressive, years ahead of its time. Its use would remain dormant until the New Deal and the outbreak of World War II, when government procurement would reach a previously unimaginable amount.

In the late 1930s and early 1940s, in the wake of large New Deal and war-related federal spending, the False Claims Act was dusted off and a handful of qui tam suits were filed. Although small in number, these cases targeted some of the most powerful corporations and political machines in the country, including Carnegie–Illinois Steel Corporation (for selling "substandard" steel to the US Navy),[4] the Anaconda Wire & Cable Company (for selling "defective wire and cable"),[5] contracts awarded to Hague Machine (led by Frank Hague, Jersey City mayor and the co-chair of the Democratic National Committee), and corrupt contracts awarded to a company owned by Tom Prendergast, the notorious "boss" from Kansas City.

World War II brought the same defense spending—and subsequent contractor fraud—that prompted the passage of the False Claims Act after the Civil War. It also spawned parasitic lawsuits, with relators who had no firsthand knowledge of the fraud but simply copied the details from the criminal proceedings. In *Marcus v. Hess*,[6] the Supreme Court held that it was up to Congress to make any changes to the law. In 1943, Congress significantly weakened the False Claims Act by making payment of rewards discretionary instead of mandatory, radically reducing the amount of awards (from a mandatory 50 percent to a maximum of 10 percent), and creating procedural hurdles to qualify for any compensation whatsoever (done by changing the type of information that could qualify for a reward).[7]

After 1943, attempts by whistleblowers to use the False Claims Act were fruitless. Qui tam relators or whistleblowers could not get around the numerous procedural or substantive roadblocks that prevented them from filing claims or collecting recoveries. Consequently, over 100 attempts to use the law to hold contractors accountable failed in the courts. The law was down and out, but not dead.

While use of the False Claims Act declined in the years after 1943, fraud against the federal government grew. In 1985, 45 of the 100 largest defense contractors, including nine of the top 10, were under investigation for multiple fraud offenses.[8] Moreover, several of the largest defense contractors were convicted of criminal offenses. Misconduct was not limited to defense contractors, however.

At the height of the Reagan Revolution—and its gargantuan increases in defense spending—a freshman senator from Iowa, Chuck Grassley, led the charge to increase oversight and accountability for federal spending by resurrecting the False Claims Act. On August 1, 1985, he, along with Congressman Howard Berman from California, introduced the bipartisan False Claims Reform Act[9] which rejuvenated qui tam lawsuits by modifying the law to encourage whistleblower incentives.

While Congress debated the False Claims Reform Act, scandals and tragedy pushed the law across the finish line. America watched in horror when on January 28, 1986, just five months after the Reform Act was introduced into Congress, the space shuttle Challenger exploded on national television. After the explosion, the public soon learned that employees of Morton-Thiokol, one of NASA's private contractors, had raised specific safety concerns over the design defects that ultimately caused the explosion. However, their internal safety warnings were ignored. High-ranking NASA officials intimidated these engineers, who kept their concerns from the astronauts who boarded that doomed flight and from the millions of Americans who watched the shuttle lift off on national television.

At the same time, weaknesses in existing whistleblower laws were becoming obvious. Whistleblowers were exposing corruption in government contracting, widespread environmental violations, and absurd cost overruns ripping off taxpayers. Newspapers were filled with stories on how contractors had billed the Department of Defense $7,622 for a coffeepot, $435 for a hammer, and $640 for a toilet seat. The public was outraged. The pressure on Congress to act was overwhelming.

Change would come. As 1986 came to an end, Congress started to get serious about protecting whistleblowers. The False Claims Reform Act of 1986 reversed the anti-whistleblower provisions of the 1943 amendments, modernized the law, restored the rights of whistleblowers to file claims, and set mandatory reward levels, regardless of the amount of money collected from the corrupt or abusive contractor.

The 1986 amendments reestablished the ability of whistleblowers to file qui tam lawsuits and permitted whistleblowers to directly litigate their cases against contractors, whether or not the United States joined in the action. If the United States decided not to file any claim against the contractor, the whistleblower had the right to continue the lawsuit individually, conduct discovery, participate in a trial, and attempt to prove that the con- tractor had stolen from the taxpayer. If the United States decided to join the lawsuit, the whistleblower was still guaranteed the right to participate in the case, protect their rights, and present the case against the contractor.

The 1986 amendments also set mandatory guidelines for monetarily rewarding whistleblowers. If a whistleblower filed a False Claims Act suit and the United States used this information to collect damages from the contractor, the whistleblower was guaranteed between 15 and 25 percent of the total monies collected. If the government refused to hold the contractor accountable, the whistleblower could pursue the case "in the name of the United States," even without the intervention or support of the Justice Department. If the whistleblower won the claim, they would be entitled to between 25 and 30 percent of the amount of money collected by the United States. The Justice Department did not have the authority or discretion to reduce whistleblower rewards below the statutory minimums.

Other provisions of the law were substantially improved as well. First, the law called for treble damages—the contractor would have to pay three times the amount of the fraud. Second, the amount of the per-violation fine was increased from $2,000 to between $5,000 and $10,000.[10] The contractor would have to pay the attorney fees and costs incurred by the whistleblower in pursuing the claim.

An anti-retaliation provision was also included in the law. Companies were prohibited from firing or discriminating against employees who filed False Claims Act lawsuits. A worker could file a multimillion-dollar claim against the company, and the company was strictly prohibited from firing the employee. If fired, the employee was entitled to reinstatement and double back pay, along with traditional special damages, attorney fees and costs.

The reformed False Claims Act worked. Between October 1986 and September 2021, more than $70 billion was paid back into the US Treasury, and whistleblowers obtained over $8 billion in rewards.[11] In 2005, the General Accounting Office determined that the average whistleblower reward under the False Claims Act was $1.7 million. In some instances, the whistleblowers were able to collect well over $50 million in rewards for a single case, and in 2022 a whistleblower obtained a court-ordered reward of over $200 million. Countless billions of dollars were saved through better regulations, deterrence, and internal corporate oversight sparked by the fear of False Claims Act cases. Thousands of wrongdoers have been prosecuted, and many have been thrown into jail.

The reach of government spending is vast, and so is the scope of the False Claims Act. The US government is the largest landowner and the largest employer in the United States. Billions upon billions of federal taxpayer dollars are spent on hiring contractors, allocating grants to state and local governments, buying goods and services, healthcare, and handing payouts to massive government programs. Federal monies are spent on everything from highway construction to social services to our nation's defense.

The False Claims Act prohibits fraud in the spending of every penny of taxpayer money. It also reaches into other programs that do not directly implicate government spending, such as the payment of royalties on government leases (such as oil and gas leases), false statements to obtain benefits from the government, false customs declarations, misrepresentations in grant applications, billing for services not rendered, billing for services not needed, billing for services not properly performed, selling defective merchandise, failure to ensure quality standards, kickbacks to obtain grants or sell products, failure to meet grant requirements, improperly using government property, overcharging for services, billing to the wrong accounts, underpaying on obligations or leases, improper marketing to increase the demand on goods and services paid for by the government, improper denial of required coverage, upcoding (false diagnosis to increase payments), failure to pay mandatory penalties, fees, or customs duties, violation of contracting rules, conflicts of interest, and bill padding (including unnecessary items on a bill).

In 2009 and 2010, Congress expanded the scope of the False Claims Act, broadening the definitions of claim and obligation, increasing the reach of the law's conspiracy provisions, and ensuring that subcontractors and government-sponsored corporations or programs were covered under the act. In closing various loopholes in the law, Congress explicitly demanded that the law be interpreted to "protect all Federal funds." Every dime is covered, regardless of who submits the bill or who commits the underlying fraud.

For years corporations argued for a narrow interpretation of what is a false claim. They urged courts to ignore common sense and strictly apply the terms explicitly set forth in the four corners of a contract. If a requirement was not explicitly set forth in a formal contract or a billing statement, there would be no liability. They wanted to convert a law designed to target fraud into a breach of contract dispute.

In *Universal Health Services, Inc. v. United States ex rel. Escobar*, the Supreme Court unanimously upheld the "implied certification" theory of liability under the False Claims Act but adopted a rigorous materiality standard for determining liability in such cases.[12] If a defendant "knowingly fails to disclose ... noncompliance" with a material "statutory, regulatory, or contractual requirement," the company can be guilty of violating the law even if that requirement is not explicitly set forth in the agreement entered into between the defendant and the government.[13] The Court explained that during the Civil War, when the False Claims Act was passed, Congress was concerned about the United States being "billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war."[14] It is not the terms of a contract that are controlling, but whether the goods being sold are "worthless."

Materiality was defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money."[15] The Court warned that minor or insubstantial noncompliance is not material. But material terms do not need to be spelled out in every contract and can indeed be implied.

Based on the successes of these cases, Congress enacted new qui tam laws, covering taxes (2006), securities fraud and violations of the Foreign Corrupt Practices Act (2010), fraud in the commodities futures and swaps markets (2010), auto safety (2015), and money laundering (2021-22). Each of the laws is somewhat different, but given the breadth of coverage, numerous whistleblowers will be reached by their provisions.

## TAX FRAUD

The False Claims Act had proven to be the most successful fraud-detection law in US history, but it excluded false claims related to tax payments. In 2006, the inability of the government to detect massive violations of the tax code was reminiscent of the government's inability to police its contracts 20 years before. Tax fraud was rampant. For example, in illegal offshore accounts alone, it was estimated that over $5 trillion was stashed. For years, millionaires and billionaires had devised sophisticated tax-avoidance schemes, often aided by bankers, accountants, and advisors.

On December 20, 2006, Congress passed an amendment to an archaic 1867 reward law[16] for people who reported tax crimes.[17] Following the lead of the False Claims Act, the amendment included a qui tam law requiring the IRS to pay rewards to whistleblowers who exposed major tax underpayments, violations of internal revenue laws, or any actions of persons "conniving" to cheat on their taxes. The IRS was required to establish a Whistleblower Office, and if a claim was denied, the employee could appeal that decision to the Tax Court.

The scope of the law extends beyond tax fraud and evasion. It also covers non-fraudulent underpayments of tax. Moreover, the scope of the law was significantly enlarged in 2018, when Congress included all criminal tax cases, FBAR payments, and all matters investigated by the IRS.[18] Thereafter, in 2019 Congress prohibited job-related retaliation against tax whistleblowers.

Since the 2006 amendments, the IRS has paid over 2,500 whistleblowers a total of $1.05 billion, and collected over $6.4 billion in sanctions.[19] However, due to the backlog in calculating whistleblower awards, these numbers are actually 10 years behind. The actual amount of sanctions obtained from whistleblower disclosures is radically higher.

The ink was hardly dry on the federal tax whistleblower law before billions of dollars in claims were filed with the IRS. Most famous of these were allegations submitted by Bradley Birkenfeld, a banker who had worked for UBS, the largest bank in the world. According to Birkenfeld, UBS had created a "major wealth" section that catered to offshore North American accounts, helping over 18,000 Americans hide their income, file fraudulent income tax returns, and evade taxes.[20] The North American program had $20 billion in assets, all in secret nondisclosed accounts that violated numerous US tax laws.

Within months of the passage of the new IRS whistleblower law, Birkenfeld walked into the offices of the Department of Justice with thousands of pages of evidence fully documenting the UBS tax scheme. He provided all the details of the accounts, including the fact that UBS bankers regularly traveled to the United States with encrypted laptops to transact illegal business with their American clients. In 2008, UBS agreed to a $780 million settlement with the United States and turned over the names of more than 4,000 US citizens who held illegal accounts with the bank.

Thousands of Americans with Swiss accounts feared being exposed to public shame, heavy fines, and criminal prosecutions. The IRS capitalized on these fears and initiated a one-time amnesty program, in which US citizens with illegal offshore accounts could confidentially turn themselves in, pay reasonable penalties, and escape criminal prosecution.[21] As of 2022, the United States has recovered more than $24 billion in sanctions directly attributable to or triggered by the IRS tax whistleblower law.

## BASIC RULES GOVERNING THE IRS WHISTLEBLOWER LAW

The basic rules[22] that govern the IRS whistleblower law are as follows:

### Violations covered

The tax whistleblower law covers any underpayment of taxes, fraudulent or not. As a result of a 2018 amendment, it now also covers criminal tax fraud prosecuted by the Justice Department and all violations investigated by the IRS, including some money laundering and asset forfeiture cases. The law also covers those who conspire to violate the laws.

### Proceedings covered

The whistleblower is eligible for a reward if monies are recovered by the United States based on the whistleblower's information through an administrative proceeding, a judicial proceeding, a settlement, or "any related action." However, unlike the False Claims Act, the whistleblower does not have the right to initiate legal proceedings against the taxpayer. It is up to the IRS or the US government to file the lawsuit or reach a settlement with the taxpayer.

### Who can file?

The applicant for the reward does not have to be an employee of the targeted company. They can be an outside contractor, a compliance official, a banker, a business partner, or any other person who is able to obtain credible information of a major tax fraud or underpayment.

### Procedure for filing

IRS whistleblower claims are filed directly with the IRS. There is no lawsuit. There is no public filing. Nothing is officially served on the employer or the individual who violated the tax laws. There is no requirement to file an internal complaint.

### IRS Form 211

The IRS has created a form that must be used for filing a whistleblower claim. Form 211, Application for Award for Original Information, must be completed in its entirety, dated, signed personally by the whistleblower, and filed by the applicant or his/her attorney. Although not required, whistleblowers should first file Form 211, and thereafter commence working with investigators.

### Information wanted by the IRS

In the IRS's own words: "The IRS is looking for solid information, not an 'educated guess' or unsupported speculation. We are looking for a significant Federal tax issue—this is not a program for resolving personal problems or disputes about a business relationship."[23] If the whistleblower's allegations cannot be independently corroborated, a claim will be denied.

### Lawful disclosures

A whistleblower should not violate the law in order to obtain information about tax frauds. If the whistleblower knows about the existence of supporting evidence, but cannot lawfully obtain that information, the IRS suggests that the whistleblower "should describe these documents and identify their location to the best of his or her ability."[24]

### Confidentiality and anonymity

Form 211 cannot be filed anonymously. The whistleblower making the claim must personally sign Form 211, swear that they have examined the application and any accompanying statement and supporting documentation, and affirm that the "application is true, correct and complete, to the best of" their knowledge. However, the IRS has strong confidentiality protections. The IRS Manual requires the IRS to protect the identity of any person seeking the whistleblower reward "to the fullest extent permitted by law." But the IRS warns that under some circumstances the whistleblower's identity may have to be disclosed, such as if the whistleblower "is needed as a witness in a judicial proceeding." In the rare event where disclosure is needed, the IRS "will make every effort to notify the whistleblower before deciding whether to proceed in such a case."[25]

### Amount of reward

The reward provision, modeled after the False Claims Act, includes not just the back taxes, but any "penalties, interest, additions to tax, and additional amounts" obtained by the US government on the basis of the whistleblower's information. If the IRS collects sanctions based on information provided by the whistleblower, the whistleblower is entitled to a reward of between 15 percent and 30 percent of any amount recovered by the IRS.

### Judicial review

The whistleblower has the right to appeal award determinations of the Whistleblower Office to the US Tax Court. Appeals must be filed within 30 days of the Whistleblower Office's ruling. The Tax Court has issued rules for these appeals.[26] The whistleblower must file a petition with the Tax Court setting forth the date of the determination, an explanation as to why the whistleblower "disagrees with the determination," a statement of facts that supports the whistleblower's appeal, and a specific petition for relief, along with other information.

### Financial threshold

The IRS reward program has two parts. The first part, based on the 1867 law, covers small tax frauds and underpayments (under $2 million). The amount of any reward paid to informants under this program is strictly discretionary, and there is no appeal of an IRS denial of a claim. The second part of the IRS program, created by the 2006 Amendment, mandates that the IRS pay rewards, sets the percentage amounts for such rewards, and provides a judicial review. However, the mandatory reward provisions only apply to large tax cases. To be eligible for an award, the tax, interest, additions to tax, and additional amounts in dispute must exceed in the aggregate $2 million and, if the allegedly noncompliant person is an individual, the individual's gross income must exceed $200,000 for any taxable year at issue in a claim."

### Participation in the fraud

Whistleblowers who participated in the fraud are entitled to a full reward. This aspect of the law dates back to the original False Claims Act signed by President Lincoln which was designed to encourage "rogues" to step forward and turn in other "rogues." However, the Office of the Whistleblower may reduce the amount of an award to a whistleblower who "planned and initiated" the fraud or underpayment.

### Criminal convictions

A whistleblower who is convicted of a crime related to the tax violations is disqualified from any reward. A word of caution: Although the IRS Office of the Whistleblower has been very supportive of whistleblowers who may have engaged in wrongdoing, the Justice Department Tax Division has filed charges against tax whistleblowers, including the most famous tax whistleblower of all time, Bradley Birkenfeld. Thus, when approaching the IRS, it is important to be sensitive to the Justice Department Tax Division's differing view of whistleblowing.

## SECURITIES AND COMMODITIES FRAUD

In the summer of 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The nation was still reeling from the devastating impact of the Great Recession of 2008, in which millions of Americans lost their jobs, their homes, and their retirement. In large part, the recession was fueled by misconduct on Wall Street, including outright fraud, the most notorious instance of which was the Bernard Madoff Ponzi scheme that resulted in over $20 billion in losses to thousands of innocent investors, many of whom lost their life savings.

As with so many other scandals, it turned out there were whistleblowers with inside information who either tried to call attention to the frauds and were ignored or were too afraid to step forward. The Senate Banking Committee, in devising a long-term fix to the broken Wall Street regulatory system, heard extensive testimony on the role of whistleblowers in detecting and preventing frauds. When the final 2,000-page Dodd-Frank Act was finally passed, two new qui tam provisions were signed into law.[27]

Dodd-Frank amended the Commodities Exchange Act (CEA) by adding a new Section 23, titled Commodity Whistleblower Incentives and Protection. Section 23 of the CEA, along with the rules and regulations issued by the Commodity Futures Trading Commission (CFTC)[28] to implement the provisions of the section, governs the whistleblower program and provides detailed procedures and requirements about the program and process for obtaining a whistleblower award. The whistleblower rules became effective in October 2011 and were amended in July 2017.

The CEA covers the sale of commodities—the futures trading of fungible goods and assets, such as agricultural products (grain, animal products, fruits, coffee, sugar); energy (crude oil, coal, electricity); cryptocurrency, market manipulation, and insider trading of commodities; natural resources (gold, precious gems, plutonium, water); commoditized goods (generic pharmaceuticals); and financial commodities (foreign currencies and securities). The CEA also covers the $300 trillion "swaps" markets. In other words, the scope of the CEA is massive and transnational. The law is not limited to regulating public companies in the United States, but also covers the worldwide commodities markets.

Section 922 of Dodd–Frank amended the Securities Exchange Act (SEA) to include a new Section 21F establishing the parameters of the new Securities and Exchange Commission (SEC) whistleblower program that will pay awards to whistleblowers who voluntarily provide the SEC with original information about a violation of the securities laws that leads to a successful enforcement of an action brought by the SEC and results in monetary penalties exceeding $1,000,000.[29] The SEC adopted final rules to implement Section 21F on August 12, 2011.[30]

The SEA is the signature law regulating finances in the United States, including all trades conducted on various stock exchanges, such as the New York Stock Exchange and the NASDAQ, and all securities sold in the United States, including stocks, bonds, American Depository Receipts (ADRs), and debentures.

Both qui tam provisions have liberal "related action" provisions that let whistleblowers obtain rewards when other agencies prosecute crimes related to Dodd-Frank violations. This can include Justice Department criminal prosecutions. The new qui tam provisions are sweeping in scope and cover a significant portion of the world economy.

By incorporating qui tam incentive provisions into the fabric of these two extremely broad regulatory statutes, Congress sent a clear message: Employees were expected to play a critical role in protecting investors and consumers from financial fraud.

The two Dodd-Frank qui tam laws are substantially identical. They are modeled on the federal False Claims Act and the 2006 IRS whistleblower reward law. Under Dodd-Frank, qualified whistleblowers are entitled to rewards of "not less than 10 percent" and "not more than 30 percent" of the total amount of money collected by the government as a "monetary sanction" against companies or individuals who violate either of the two laws (and numerous other federal laws that are incorporated by reference into these two laws). Like the IRS qui tam provision, the laws only cover major frauds, and the incentives are paid only if the total amount of sanctions exceed $1 million.

The monetary sanctions on which the reward is based include direct fines paid to the commissions, interest, penalties, and monies paid as part of a "disgorgement." The disgorgement payments can be massive, as they are the mechanism by which the commissions require a wrongdoer to release its "fraudulent enrichment." Disgorgement is measured by the amount of ill-gotten gains, and amounts often are many times larger than actual fines or penalties. Sanctions also include monies placed in the SEC-administered "fair funds"—the funds set aside to benefit investors who were harmed by the violations.

Both qui tam laws contain anti-retaliation provisions, prohibiting employers from firing employees who file qui tam actions or engage file claims or contact the commissions. Employees must file their retaliation claims directly in federal court. Under the SEA anti-retaliation provision, wrongfully discharged workers are entitled to double back pay.

Dodd-Frank added a new feature, unique in American whistleblower law: anonymous filing of qui tam claims.[31] To be anonymous, whistleblowers must act through an attorney intermediary. In this manner the attorneys sign the complaints and the whistleblowers' names are not revealed, even to the government. This reduces the risk that the government will inadvertently disclose the identity of whistleblowers.

Anonymous whistleblowing not only benefits the employee who fears retaliation, but it can be exploited by the commissions as an investigative tool. If the whistleblower remains undetected by management, they are in an invaluable position to obtain further information about a possible cover-up, or even information that could result in a criminal obstruction of justice charge.

In addition to the stereotypical whistleblower (i.e., a company insider), the Dodd-Frank Act also permits analysts to file reward claims. Under both qui tams, claims must be filed "in a manner established by rule or regulation" by the respective commission. The mandatory filing procedures of the SEC and CFTC are published on the websites of each.

Just as the False Claims Act and IRS whistleblower laws produced spectacular results, the Wall Street reward laws have been likewise highly successful. In its short history, the SEC has already granted over $1.5 billion in awards, while the CFTC broke all records and awarded a whistleblower $200 million for his role in exposing a billion-dollar bank fraud.

The SEC Office of the Whistleblower's 2022 Annual Report remarked on the program's remarkably successful short history, confirming that whistleblower cases recovered more than $6.3 billion in sanctions from fraudsters, of which over $1.5 billion was returned to harmed investors and another $3.1 billion was paid up by huge corporations in "disgorgement" of "ill-gotten gains." Payments to whistleblowers surpassed the billion-dollar mark.

## ANTI-MONEY LAUNDERING ACT

On January 1, 2021, Congress passed the Anti-Money Laundering Act of 2020 (AML), which expanded upon the existing anti-money laundering statutory framework, originally established under the Bank Secrecy Act (BSA).[32] AML was one of the most comprehensive efforts to modernize the US government's regulatory scheme to combat the financing of terrorism and detect other financial crime activity. AML, which also contains the Corporate Transparency Act (CTA), established disclosure and transparency requirements, strengthened enforcement tools, and expanded the BSA's whistleblower provisions.

The Financial Crimes Enforcement Network (FinCEN), a bureau of the Department of the Treasury, is the primary federal agency responsible for implementing many of AML's provisions and promulgating rules to strengthen and improve the regulatory regime.

In 2022, Congress passed the Anti-Money Laundering Whistleblower Improvement Act, which further amended the AML, creating Dodd-Frank-styled protections and rewards for persons reporting money laundering, violations of the Bank Secrecy Act, and sanctions-busting.[33] The war in Ukraine fueled support for the bill, as Congress recognized how whistleblower reward laws will play a central role in detecting the wealth of sanctioned Russian oligarchs.

The new whistleblower law covers a wide range of conduct related to money laundering and violations of sanctions. The entities involved include banks that operate in the United States or transfer money into the United States, money transmission services, money services businesses (MSBs), and cryptocurrency wallets. MSBs include dealers in foreign exchange, check cashers, issuers or sellers of traveler's checks or money orders, providers of prepaid access, money transmitters, US Postal Service, and sellers of prepaid access. Money transmission services include a person that either "provides money transmission services" or who is otherwise "engaged in the transfer of funds."

A money transmission includes "the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means," which can cover crypto or virtual currencies. In its enforcement action against the cryptocurrency trading company Bittrex, FinCEN warned that although "certain Anonymity-Enhanced Cryptocurrencies (AECs) present unique money laundering risks and challenges," companies engaged in this practice must still comply with Bank Secrecy Act requirements.[34]

Banks, other financial institutions, and even cryptocurrency wallets that are covered under the Bank Secrecy Act must establish effective anti-money laundering programs. These programs must be "reasonably designed to assure and monitor Bank Secrecy Act compliance."[35] Their minimum requirements include: "(A) the development of internal policies, procedures, and controls; (B) the designation of a compliance officer; (C) an ongoing employee training program; and (D) an independent audit function to test programs."[36]

Even before the AML whistleblower law was amended to cover violations of sanctions requirements, FinCEN and the Department of the Treasury's Office of Foreign Assets Control (OFAC) worked together to penalize financial institutions that violate sanctions requirements.

Like the other Dodd-Frank reward laws, the AML whistleblower law will only make payouts in large cases—that is, where either the Departments of Treasury (including FinCEN) or Justice individually or collectively issue a sanction of over $1 million. The law targets all actors in the money laundering chain, including banks, bankers, and cryptocurrency wallets, which often turn a blind eye toward large and questionable depositors. Those who engage in the money laundering face civil and criminal penalties and asset forfeiture. Whistleblower claims must be filed with either the Department of Treasury or Justice. Reward applications are filed only with Treasury, which is required to pay rewards between 10 and 30 percent to all qualified whistleblowers.

But the law still contains some loopholes. Unlike Dodd-Frank, the scope of sanctions for which a reward can be based is limited and does not directly include proceeds collected as a forfeiture, restitution, or monies paid in victim compensation. These limitations may impact the size of an award. Additionally, employees whose official job duties are to work within a company's AML program are excluded from obtaining rewards. The precise scope of this exclusion or how the Treasury Department will interpret it are not known.

The following cases were successfully prosecuted by FinCEN in 2021–22 and provide insight as to what crimes whistleblowers can report under the AML in order to qualify for mandatory rewards between 10 and 30 percent of the recovered sanction.

- Bittrex, Inc., which owns and operates a convertible virtual currency trading platform that hosts digital wallet services for storing and transferring cryptocurrencies, was required to pay fines and penalties of over $53 million for failure to maintain an AML program, sanctions violations, and failure to file suspicious activity reports.[37] In regard to sanctions, FinCEN explained that "Bittrex had failed to prevent persons located in the Crimea region of Ukraine, Cuba, Iran, Sudan, and Syria from using its platform to engage in approximately $263,451,600.13 worth of virtual currency-related transactions between March 2014 and December 2017."
- USAA Federal Savings Bank was sanctioned $140 million for failing to implement an adequate AML program, failure to train its employees on money laundering requirements, failure to implement a proper customer due diligence (i.e., a Know Your Customer) program, and failure to file suspicious activity reports.
- BitMEX, a virtual currency exchange, was sanctioned $100 million by FinCEN for "willfully failing to implement an Anti-Money Laundering Program," failing to conduct customer due diligence and transaction monitoring, "willfully failing to implement a Customer Identification Program," operating on the "darknet and other illicit marketplaces," and engaging in transactions involving fraud and scams.[38]
- Capital One's wallet was smacked to the tune of $390 million due to its check-cashing service's failure to implement and maintain an effective

program guarding against money laundering and its failure to "accurately and timely" file SARs reports.[39] These violations resulted in the failure of the bank "to accurately and timely report millions of dollars in suspicious transactions, including proceeds connected to organized crime, tax evasion, fraud, and other financial crimes laundered through the Bank into the U.S. financial system." For example, organized crime figure Domenick Pucillo, pleaded guilty to conspiring to commit money laundering in connection to loan sharking and illegal gambling proceeds that flowed through his Capital One accounts as an associate of the Genovese organized crime family.

## INTERNATIONAL CORRUPTION

Historically, the most important international anti-corruption law was the Foreign Corrupt Practices Act (FCPA), which targets bribery of foreign government officials.[40] Enacted by Congress in 1977, its goal is to stop global corporate bribery. It was amended and strengthened in 1998 to conform to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention), of which the United States was a founding party. Although the FCPA remains the most significant transnational anti-corruption law, the CEA has started to rival it in scope and importance. Whereas the FCPA primarily targets publicly traded corporations that pay bribes or lack proper documentation for foreign payments, the CEA has no such limitations. Its jurisdiction is based on the international trade in commodities, regardless of whether a company sells stock on US or international stock markets, and regardless of whether the corruption violates the SEA.

The FCPA permits the United States to exercise broad extraterritorial jurisdiction to target bribes paid by non-US citizens to foreign officials in countries outside the United States. Historically, this has made the FCPA a highly effective transnational anti-corruption law.

The passage of the Dodd-Frank Act allowed, for the first time, whistleblowers from foreign countries to report bribes paid to their leaders by foreign corporations and obtain monetary rewards under a US whistleblower law. The law also requires corporations that trade on US stock exchanges to have strong internal controls, prohibiting off-the-books accounting. These record-keeping requirements are a key enforcement method; they mandate an accurate accounting of all assets, thereby forcing a company to admit on paper that it has paid a bribe or face harsh sanction.

The abilities of the FCPA and the CAE to police corruption were radically enhanced in 2010 as part of the Dodd-Frank Act, when whistleblowers were authorized to obtain monetary rewards, worldwide, for reporting FCPA and CEA violations. Working together, these currently are the most important transnational anti-corruption laws. They cover both US and non-US citizens, permit anyone residing abroad to file confidential and anonymous claims in the United States, and grant enforcement authority to US law enforcement even when the country victimized by the corruption has no whistleblower protections.

Who is covered? First, "issuers" (companies that sell stock to US citizens) and their officers, directors, employees, and agents are subject to prosecution under the FCPA. An issuer does not have to be a US company. Issuers are broadly defined to include companies that trade on US stock exchanges and foreign companies that trade in ADRs. Second, all "domestic concerns" are also covered. A domestic concern is defined as any citizen, national, or resident of the United States or any corporation, partnership, association, business trust, sole proprietorship, or other association organized under the laws of the United States.

The law covers payments intended to influence foreign officials to use their positions "in order to assist ... in obtaining or retaining business for or with, or directing business to, any person." The FCPA prohibits paying a bribe to gain a business advantage. The DOJ/SEC Resource Guide lists the following actions as prime examples of when corporations are often induced to pay bribes to foreign officials:

- Winning a contract
- Influencing the procurement process
- Circumventing the rules for importation of products
- Gaining access to non-public bid tender information
- Evading taxes or penalties
- Influencing the adjudication of lawsuits or enforcement actions
- Obtaining exceptions to regulations
- Avoiding contract termination[41]

The amount of the sanction or fine paid under the FCPA is very important for whistleblowers, as the Dodd-Frank reward provisions only kick in if the government (or the SEC) obtains over $1 million in sanctions. The penalties for FCPA violations include fines up to $2 million for each violation committed by corporations or business entities and fines up to $100,000 for each violation committed by an individual.

On September 22, 2014, the SEC issued an historic ruling in a case under the FCPA, awarding a non-US citizen $30 million for turning in a corporation that paid bribes to foreign government officials.[42] In making this award, it sent a clear message That the rewards program was open to anyone. In issuing the $30 million award, the SEC stated:

> 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. ... When these key territorial connections exist, 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.[43]

The SEC's payment had its intended impact. Between 2011 and September 2021, 5,908 non-US persons in over 130 different countries filed corruption claims in the United States to the SEC alone. Although the CFTC does not publish statistics as to the country of origin of their complainants, it also commenced paying non-US citizens who report corruption.

The FCPA is not the only US law with transnational application. Other US laws that have transnational application include the Anti-Money Laundering Improvement Act, Act to Prevent Pollution from Ships, the False Claims Act, the Lacey Act/Endangered Species Act, the Internal Revenue Act, the Securities Exchange Act, and the Commodity Exchange Act.

## OTHER FEDERAL WHISTLEBLOWER LAWS

### Auto safety

In January 2015, the Fixing America's Surface Transportation Act (FAST Act) was signed into law. The FAST Act contains a whistleblower reward law for auto-manufacturing whistleblowers, the Motor Vehicle Safety Whistleblower Act (MVSWA).[44] On April 14, 2023, the NHTSA published proposed rules to implement the whistleblower provisions of the MVSWA.[45] Through NHTSA's auto safety whistleblower program, individuals who voluntarily provide NHTSA original information which leads to a successful enforcement action with over $1 million in penalties are entitled to a monetary award of 10 to 30 percent of the funds collected by the government.

Because of the eight-year delay in promulgating regulations, however, the auto-safety whistleblower program has been largely dormant. The NHTSA confirmed in its rule proposal that it has only issued one whistleblower award since the program's creation: $24 million to a whistleblower for exposing untimely recalls from Hyundai and Kia.[46]

To qualify for the reward the whistleblower must be an employee or contractor in the auto industry, and the sanction obtained by the US government must be at least $1 million. The reward range was set between 10 percent and 30 percent of the sanction.

Whistleblowers must voluntarily provide original information to the Department of Transportation. The definition of original information is the same as that contained in Dodd-Frank. The information must relate to a "motor vehicle defect, noncompliance, or any violation" (including reporting violations) that is "likely to cause unreasonable risk of death or serious physical injury."

Unlike any other whistleblower reward law, the auto safety law requires that, under some circumstances, an employee first report their concerns within the company to be eligible for a reward. This provision conflicts with the right of whistleblowers to file confidential claims with the government, which is also protected under the law. Under the reward law, with some important exceptions, if the auto company/supplier/dealership has "an internal reporting mechanism in place to protect employees from retaliation," a whistleblower must use that mechanism in order to qualify for a reward. Whistleblowers can bypass internal reporting requirements if:

- A whistleblower reasonably believes they would be subject to retaliation if the issues were reported internally through the company's mechanism;
- The whistleblower reasonably believes the safety concern was already reported internally, was the subject of a company investigation or inquiry, or was already known to the employer; or
- The Department of Transportation has "good cause to waive" the requirement. This good cause will be defined in the rules the Department of Transportation is required to publish.[47]

## Pollution from ships

The International Convention for the Prevention of Pollution from Ships, better known simply as the MARPOL Protocol, signed by more than 150 countries including the United States, prohibits, among other things, dumping oil or garbage on the high seas. After signing on to the convention, the United States enacted the Act to Prevent Pollution from Ships (APPS) to enforce its requirements.[48]

The APPS law requires every ship entering US territorial waters to have an accurate log of all discharges. If a ship from a foreign country, owned by a foreign company, and staffed by a foreign crew, enters US territorial waters, the Coast Guard can ask to inspect the discharge log. If the log does not record all discharges accurately, the ship is in violation of the APPS.

To prosecute a case under APPS, the US government needs proof that an illegal discharge was not accurately recorded in the ship's log. Whistleblowers are the key to unlocking this door. Crewmembers are in a position to witness the discharges and gather evidence to prove that a ship illegally dumped pollutants. This evidence often consists of photos taken on crewmembers' cell phones and the ability of crewmembers to show Coast Guard inspectors where the equipment used to discharge oil is hidden onboard. Why would crewmembers who reside outside the United States, and who would have little or no protection in their native lands from retaliation, risk their jobs to report ocean pollution? The answer is simple: large whistleblower rewards, paid by the United States regardless of country of citizenship.

APPS permits the US government to ask a court to award whistleblowers up to 50 percent of the criminal penalties obtained by the government for APPS prosecutions. The government is also permitted to earmark a percentage of the fines and penalties to be used to address the environmental harms caused by ocean pollution. The DOJ regularly asks the courts to pay these international whistleblowers the maximum award, and consistently seeks restitution payments to benefit the environment.

Between 1993 and 2021, the US government collected over $300 million in fines and penalties from APPS violators in whistleblower-originated cases. From all fines and penalties collected, $53 million was paid directly to environmental organizations as part of community service or restitution payments. From APPS fines collected, courts approved over

$36 million in compensation to the whistleblowers.[49] In 80 percent of the cases, the court approved a maximum whistleblower reward (50 percent of the fines collected).

### Wildlife Trafficking

Five years before the False Claims Act would be modernized, with no fanfare or publicity, Congress enacted whistleblower reward laws to the most important wildlife protection laws in the United States: the Lacey Act[50] and the Endangered Species Act.[51] The strategy to be used was simple: incentivize informants to report violations of the laws protecting endangered species and prohibiting illegal wildlife trafficking by paying monetary rewards to whistleblowers. Unfortunately, these laws were based on the older reward laws, which are discretionary and, to date, have uniformly failed.

The principal law for stopping wildlife trafficking is the Lacey Act. Originally passed in 1900, it has been amended over time to become the premier anti-trafficking law. Under the act, it is "unlawful for any person to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce" any fish, wildlife, or plant "taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law." The Lacey Act's scope includes trafficking in violation of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the international convention designed to protect endangered species and forests.

In 1981 Congress amended the Lacey Act to include whistleblower rewards.[52] Under these amendments the secretaries of the Commerce, Interior, and Treasury Departments were authorized to pay whistleblower rewards. The Department of Agriculture was also given authority to pay awards under the plants provision of the act, which includes illegal logging. These agencies have broad discretion to reward whistleblowers, and, unlike most other whistleblower reward laws, there is no cap on the amount of award or percentage of collected proceeds that may be given to a whistleblower. The 1981 Lacey Act amendments also contained a miscellaneous section that included an identical reward provision for whistleblowers who report violations of the Endangered Species Act.

On December 31, 1982, Congress went even further. A little-noticed appropriations act contained a provision "for other purposes," amending the Fish and Wildlife Improvement Act.[53] One of these other purposes was the grant of sweeping authority to the Departments of Interior and Commerce to pay whistleblower rewards from appropriations. Unlike other whistleblower reward laws, payments would not have to be based on the amount of funds recovered in a specific enforcement action. Instead, these departments can use appropriated funds to compensate whistleblowers who report violations. Rewards can be paid even if no "collected proceeds" are ever obtained. The goal of the Fish and Wildlife Improvement Act's whistleblower provision was to incentivize the reporting of violations, regardless of whether or not the United States could ever successfully prosecute the case.[54]

The agencies responsible for their implementation, the US Fish and Wildlife Service (FWS), the National Oceanic and Atmospheric Administration (NOAA), and the Department of Agriculture have not implemented effective whistleblower programs. The laws are unknown to most wildlife protection organizations, and none of the responsible federal agencies have established a whistleblower office. Although money was required to be set aside to pay whistleblowers, three of the four agencies empowered to pay rewards have completely ignored their legal obligations. FWS has only paid a handful of awards, and these have all been in token amounts.

## FIRST AMENDMENT

In the landmark case of *Pickering v. Bd. of Educ.*, the US Supreme Court held that state and local public employee whistleblower disclosures made on matters of public concern are protected under the First Amendment.[55] Causes of action under the First Amendment are filed under the Civil Rights Act of

1871[56] and attorney's fees are available under 42 U.S.C. § 1988.

Most states have also enacted specific laws protecting state and local government employees, and some states include government workers under their Whistleblower Protection Act statutes. State legal protections for government workers should always be considered as an alternative or supplement to a government whistleblower claim, especially after the Supreme Court's decision in *Garcetti v. Ceballos*.[57]

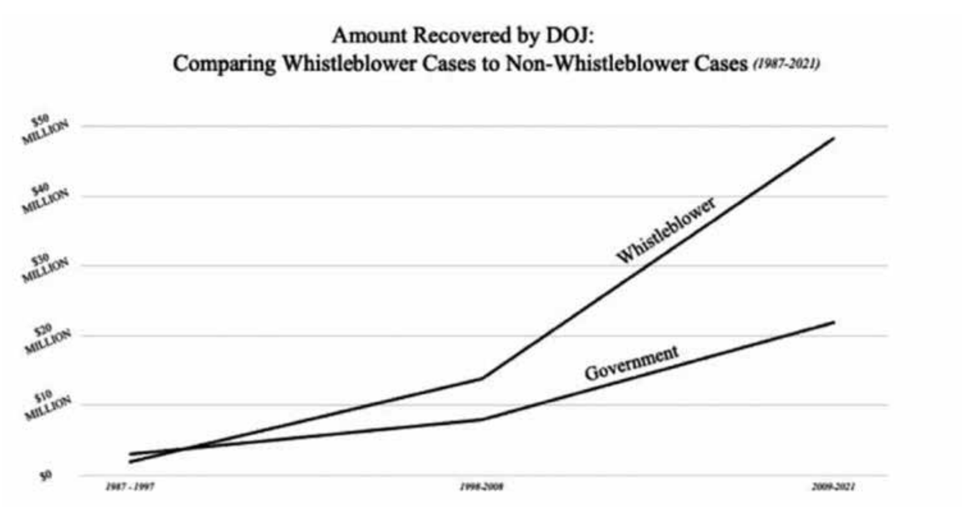
## SUCCESS OF WHISTLEBLOWER CLAIMS

In a reward case, compensation is based on a percentage of the fines and penalties paid by the wrongdoer. The better the evidence, the higher the penalties. The higher the penalties, the bigger the reward.

For example, under the False Claims Act, if a whistleblower's evidence was used to successfully prosecute a case, the government is required to pay the whistleblower 15 to 30 percent of the monies collected in fines and penalties. In a Medicare fraud case under the False Claims Act, if the government collects a $10 million fine, the whistleblower must be paid between $1.5 million and $3 million in compensation. This is true even if the company never knew who the whistleblower was and the whistleblower kept their job. These mandatory minimum and maximum reward percentages are reflected in other modernized whistleblower laws: Tax (15 to 30 percent); Securities (10 to 30 percent); Commodities (10 to 30 percent); Motor Vehicle Safety (10 to 30 percent); FCPA (10 to 30 percent).

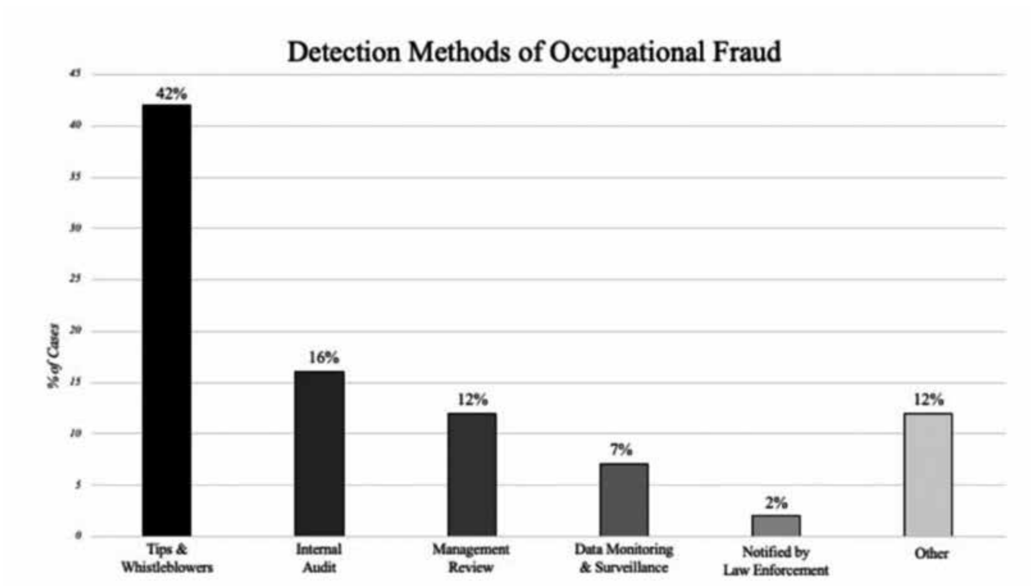
No one knew if this law would work, but an experiment was underway. Were whistleblowers simply disgruntled employees, or were they the key to fraud detection in major corporations? For the first time, the effectiveness of whistleblowers could be objectively quantified. Because whistleblowers were entitled to a reward, the government would have to evaluate each fraud case, determine whether the whistleblower's information was the reason the case was successfully prosecuted, and allocate an award based on the whistleblower's contribution. In this manner, the effectiveness of whistleblowing could be calculated to the penny.

The results of this experiment surprised even the strongest whistleblower advocates. When the False Claims Act was initially modernized, the government was struggling to detect fraud. In 1987 the government collected a total of $86 million in civil penalties from fraudsters nationwide. The amount attributed to whistleblowers was $0. Within six years the total recoveries obtained by the United States dramatically increased. In 1993, the government recovered $372 million from corrupt government contractors. Whistleblowers were *directly responsible* for more than half of those recoveries. The increases continued year after year, and the percentage of recoveries directly attributed to the high quality of whistleblower disclosures skyrocketed and is currently 70 percent of the civil fraud recoveries from corrupt contractors.



While the False Claims Act was demonstrating, in dollars and cents, the effectiveness of reward-based whistleblowing in government contracting cases, the stock market was being rocked by scandal. In 2002, corporate giants Enron and WorldCom went bankrupt, caused by fraud committed by top executives. Thousands of investors lost their retirements and life savings. Consequently, academics and private trade associations started to study the science of fraud detection. They wanted to learn how corporations could prevent meltdowns, as well as protect themselves from misconduct. These studies all came to the same conclusion: The largest source of all fraud detections were tips from whistleblowers.

Comprehensive surveys conducted by the Association of Certified Fraud Examiners (ACFE) in 2022 demonstrate how companies detect fraud. As can be seen, tips (i.e., whistleblowers) are the largest source of all fraud detection and constitute 42 percent of frauds detected within corporations. Law enforcement was able to identify only two percent of the frauds. Thus, a fraud detection program dependent on government agents or regulators to uncover fraud is destined to fail. But if whistleblowers can be encouraged to report, the ability to detect fraud will radically increase.




The most important and comprehensive study on whistleblower reward laws came out of the University of Chicago Booth School of Business. In the wake of the collapse of Enron, leading economists from the University of Chicago and University of Toronto published a groundbreaking article based on an in-depth analysis of "all reported fraud cases in large U.S. companies between 1996 and 2004."[58] The study found that a monetary incentive motivates people with information but does not lead to frivolous suits.

Their conclusion was unequivocal: Whistleblowers were the key to fraud detection, but within existing corporate cultures, whistleblowers were punished. "Not only is the honest behavior not rewarded by the market, but it is penalized. Given these costs, however, the surprising part is not that most employees do not talk; it is that some talk at all."

Fifteen years later, researchers at the Harvard School of Business confirmed the utility of paying whistleblower rewards as a fraud-fighting tactic. In the most comprehensive study ever conducted on the effectiveness of the qui tam reward provisions of the False Claims Act, the Harvard professors concluded: "In sum, these findings support the view that cash-for-information programs help to expose misconduct. Specifically, our findings show that whistleblowers respond to financial incentives by filing additional lawsuits, which the DOJ investigates for a longer period and that are more likely to result in a settlement."[59]

## CONCLUSION

The success of these new whistleblower laws is stunning. Since the first modern whistleblower reward law was passed in October 1986, well over $100 billion in sanctions have been collected from corporate bad actors triggered by whistleblower disclosures and paid back to the victims of crime and the taxpayers. But that is just the beginning of the benefits. Experts estimate that the deterrent effect caused by the fear that whistleblowers will use these new laws to expose wrongdoing is well over $1 trillion in savings. Of the thousands of whistleblowers who used these programs, many were protected and compensated. Since 1987, the government has paid over $10 billion in awards to whistleblowers.

Today, tens of thousands of employees are taking advantage of modernized whistleblower laws. These cases bear little resemblance to Hollywood stereotypes or the sensational stories that dominate the headlines. Instead, a silent army of whistleblowers are changing the very landscape of corporate crime. The most powerful institutions have been caught red-handed and held accountable, all thanks to whistleblowers. These include such diverse household names as Boeing, Novartis, Cisco, CVS, University of Phoenix, Bank of America, Shell Oil, Pfizer, Goldman Sachs, Mayo Clinic, Lockheed Martin, The Scooter Store, Office Depot, Citigroup, Merck, Walgreens, Harvard University, OfficeMax, Princeton Review, Chevron, JP Morgan, UBS, Northrop Grumman, and Deutsche Bank. They have all paid the price for violating the law and ignoring their whistleblowers.

The new reward laws demonstrate that whistleblowing is the key to detecting corporate crime. These laws were created because of the critical role their insider information plays in successful white-collar crime prosecution. Before these new laws were passed, whistleblowers regularly paid the price for stepping forward with their jobs, careers, and even their lives. Today modern whistleblowing has changed the historical dynamic where whistleblowers were always on the losing side of the equation. The new laws create a realistic path forward for fighting corruption. When whistleblowers win, the public is well served.

Notes

1 The term qui tam comes from the phrase "qui tam pro domino rege, &c, quam pro seipso in hac parte sequitur" 140 which means "who as well for the king as for himself sues in this matter." Black's Law Dictionary (2019).

2 31 U.S.C. §§ 3729–3733.

3 Vt. Agency of Nat. Res. v. United States ex rel. Stevens, 529 U.S. 765, 776 (2000).

4 German v. Carnegie-Illinois Steel Corporation, 169 F.2d 715 (3d Cir. 1948).

5 United States v. Anaconda Wire & Cable Co., 57 F. Supp. 106 (S.D.N.Y. 1944).

6 U. S. ex rel. Marcus v. Hess, 317 U.S. 537 (1943).

7 Act of December 23, 1943, ch. 377, 57 Stat. 608.

8 GAO Report to Congress, Fraud in Government Programs: How Extensive is it? How Can it be Controlled?, 1981.

9 S. 1562, 99th Cong., 2d Sess. (1986) (False Claims Reform Act).

10 The amount of the per-violation fine is tied to inflation. As of 2022, the minimum sanction is $12,537 per false claim, and the maximum sanction per submission is $25,076.

11 See, e.g., Fraud Statistics—Health and Human Services: Oct. 1, 1986-Sept. 30, 2022, Civ. Div. US Dep't. of Just., available at https://www.justice.gov/opa/press-release/file/1567691/download.

12 579 U.S. 176 (2016).

13 Id. at 181.

14 Id. at 182.

15 Id.

16 Act of Mar. 2, 1867, ch. 169, § 7, 14 Stat. 471, 473 (codified by ch. 11, § 3463, 35 Rev. Stat. 686 (1873-74)). The law was enacted years before there was a federal income tax, and unlike the False Claims Act, there was no qui tam provision. Rewards paid to informants were strictly discretionary. Because the IRS was not required to do anything to

help would-be whistleblowers, they didn't. The rewards provision remained mostly unused and ignored for years.

17 Tax Relief and Health Care Act, P.L. 109–432 (2006) (adding subsection (b) to I.R.C. § 7623 making whistleblower awards mandatory where proceeds collected exceed $2 million). The IRS qui tam law is codified at 26 U.S.C. § 7623. The internal IRS rules governing the rewards provision are located in Part 25 of the IRS Manual, available at www.irs.gov. Rules for filing claims are also codified at 26 C.F.R. Part 301.7623-1. The whistleblower law was amended in 2018 to cover criminal tax frauds, among other crimes. See Section 41108 of Public Law 115-123 (Feb. 9, 2018). An anti-retaliation provision was added in 2019 (Section 1405 of Public Law 116-25 (July 1, 2019)).

18 Section 41108 of the Bipartisan Budget Act of 2018 amended I.R.C. Section 7623, including the addition of a new subsection (c) that expanded the definition of "proceeds" to include criminal fines, civil forfeitures, and violations of reporting requirements.

19 John Hinman, The IRS Whistleblower Office (Jul. 21, 2022), available at https://www.irs.gov/about-irs/the-irs-whistleblower-office.

20 See, e.g., Press Release, Dep't. of Just., Former UBS Banker Sentenced to 40 Months for Aiding Billionaire American Evade Taxes (Aug. 21, 2009).

21 See, e.g., I.R.S. Fact Sheet, FS-2014-6, IRS Offshore Voluntary Disclosure Efforts Produce $6.5 Billion; 45,000 Taxpayers Participate (Jun. 2014).

22 IRM § 25.2.2.

23 TTB and IRS Whistleblower Program, available at https://www.ttb.gov/ttb-tip-line/ttb-tipline-whistleblower-program.

24 I.R.S. Notice 2008-4; 2008-2 I.R.B. 253, Claims Submitted to the IRS Whistleblower Office under Section 7623 (Dec. 19, 2007).

25 Id.

26 Tax Court Rules 340-44, available at https://www.ustaxcourt.gov/rules.html.

27 The sections of Dodd-Frank that relate to whistleblower rewards are Section 748 (Commodity Exchange Act) (7 U.S.C. § 26) and Sections 922-24 (Securities Exchange Act) (15 U.S.C. § 78u-6).

28 17 C.F.R. § 165.

29 15 U.S.C.A. § 78u-6 (West 2010).

30 17 C.F.R. §§ 240 and 249.

31 17 C.F.R. §§ 240.21F-7 and 21F-9(a) (SEC); 17 C.F.R. §§165.3(c), 165.4, and 165.7(c) (CFTC).

32 Pub. L. 91-508 (1970).

33 31 U.S.C. § 5323. The legislative history of the AML Whistleblower Improvement Act is published as House Report 117-423 (July 20, 2022).

34 In re Bittrex, No. 2022-03, Consent Order Imposing Civil Money Penalty at *7 (Oct. 22, 2022).

35 12 C.F.R. § 326.8(a).

36 31 U.S.C. § 5318(h).

37 In re Bittrex, at *4-5.

38 In re BitMEX, No. 2021-02, Consent Order Imposing Civil Money Penalty (Aug. 10, 2021).

39 In re Capital One, Assessment of Civil Money Penalty, Number 2021-01 (Jan. 15, 2021).

40 The Foreign Corrupt Practices Act is codified at 15 U.S.C. § 78m and § 78dd-1, et seq. The best source of information explaining the requirements of the FCPA is A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition, by the Criminal Division of the U.S. Department of Justice and the Enforcement Division of the U.S. Securities and Exchange Commission (hereinafter FCPA Resource Guide) (July 2020), available at www.justice.gov/criminal-fraud/fcpa-resource-guide.

41 See FCPA Resource Guide, supra note 40, at 12.

42 Whistleblower Award Proceeding, File No. 2014-10, Exchange Act Release No. 73174 (Sept. 22, 2014).

43 Id.

44 The reward law is codified at 49 U.S.C. § 30172.

45 Implementing the Whistleblower Provisions of the Vehicle Safety Act (hereinafter NHTSA Proposed Rules), 88 Fed. Reg. 23,276 (proposed Apr. 14, 2023) (to be codified at 49 C.F.R. § 513).

46 Consent Order, In re: Hyundai Motor America, Inc., RQ17-004, Recall Nos. 15V-568 and 17V-226 (Nov. 23, 2020); Consent Order, In re: Kia Motors America, Inc., RQ17-003, Recall No. 17V-224 (Nov. 23, 2020).

47 NHTSA Proposed Rules, supra note 45, at 23,294 (Proposed Rule § 513.7).

48 33 U.S.C. § 1908(a).

49 A detailed listing of APPS cases for which rewards were paid is posted at www.kkc.com/resources/APPS.

50 16 U.S.C. § 3375(d).

51 16 U.S.C. § 1540(d).

52 The congressional history behind the original 1981 amendments to the Lacey Act and the 1982 Fish and Wildlife Improvement Act are located in House Report No. 97-276 (Oct. 19, 1981) (Lacey); 128 Cong. Rec. H10207 and H31972 (Dec. 17, 1982) (Improvement).

53 16 U.S.C. §7421(c)(3).

54 The wildlife whistleblower laws and program are fully explained in Kohn, Monetary Rewards for Wildlife Whistleblowers: A Game-Changer in Wildlife Trafficking Detection and Deterrence, 46 Env. Law Reporter 10054 (Jan. 2016), available at www.whistleblowers.org/wildlife.

55 391 U.S. 563 (1968).

56 42 U.S.C. § 1983.

57 547 U.S. 410 (2006) (a 5–4 ruling that limited the scope of protected activity in First Amendment employment cases).

58 Alexander Dyck et al., Who Blows the Whistle On Corporate Fraud? The Initiative on Global Market's Working Paper No. 3, Chicago Booth School (Oct. 2008).

59 Aiyesha Dey et al., Cash-for-Information Whistleblower Programs: Effects on Whistleblowing and Consequences for Whistleblowers, Harvard Law School Forum on Corporate Governance (Jun. 10, 2021).

## APPENDIX

### FEDERAL QUI TAM LAWS

| | |
|---|---|
| Anti-Money Laundering (AML) Act | 31 U.S.C. § 5323 |
| Act to Prevent Pollution from Ships (APPS) | 33 U.S.C. § 1908(a) |
| Commodity Exchange Act (CEA) | 7 U.S.C. § 26<br><br>17 C.F.R. Part 165 |
| Endangered Species Act | 16 U.S.C. § 1540(d) |
| False Claims Act | 31 U.S.C. § 3729–3732 |
| Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) | 12 U.S.C. §§ 4201–10 |
| Fish and Wildlife Improvement Act | 16 U.S.C. § 742l(k) |
| Foreign Corrupt Practices Act | 15 U.S.C. §§ 78m, 78dd, 78ff<br><br>Filing procedures for FCPA cases are identical to the SEC and CFTC procedures published at 17 C.F.R. Parts 240 (SEC) and Part 165 (CFTC) |
| Internal Revenue Code | 26 U.S.C. § 7623 |
| Lacey Act | 716 U.S.C. § 3375(d) |
| Major Frauds Act | 18 U.S.C. § 1031(h) |
| Motor Vehicle Safety Act | 49 U.S.C. § 30172 |
| Securities Exchange Act | 15 U.S.C. § 78u-6<br><br>17 C.F.R. § 240 |

## STATE AND MUNICIPAL FALSE CLAIMS ACTS

| | |
|---|---|
| Alaska (City of Anchorage) | City of Anchorage FCA AO No. 2016-48. |
| California | California False Claims Act § 12650, et seq. |
| Colorado | Colorado False Claims Act, C.R.S. § 25.5-304, et seq. |
| Connecticut | Connecticut False Claims Act § 17b-301a. |
| Delaware | Delaware False Claims and Reporting Act § 1201, et seq. |
| District of Columbia | District of Columbia False Claims Act § 2-308.03, 2-308.13-2–308.21, et seq. |
| Florida | Florida False Claims Act § 68.081–68.093.<br><br>Miami Dade County False Claims Ordinance (Ord. No. 99-152, § 1, 11-2-99) § 21-256-266. |
| Georgia | State False Medicaid Claims Act § 49-4-168–§ 49-4-168.8, et seq. |
| Hawaii | False Claims to the State § 661-21–§ 661-29, et seq.<br><br>Qui Tam Actions or Recovery of False Claims to the Counties § 46-171–§ 46-179, et seq. |
| Illinois | Illinois Whistleblower Reward and Protection Act § 175-1–§175-8, et seq. |
| Indiana | Indiana False Claims and Whistleblower Protection IC 5-11-5.5–IC 5-11-5.5-18. |
| Iowa | Iowa False Claims Act, Title XV, Subtitle 5, Ch. 685. |
| Louisiana | Louisiana False Claims Act § 46:437.1–46:437.14, 438.1–438.8, 439.1–439.2, 439.3–439.4, 440.1–440.3. |
| Maryland | Maryland False Claims Act § 2-601–2-611. |
| Massachusetts | Massachusetts False Claims Act Ch 12 § 5A-12 § 5O, et seq. |
| Michigan | The Medicaid False Claims Act MCL 400.611. |
| Minnesota | Minnesota False Claims Act Minn. Stat. § 15C.01, et seq. |
| Montana | Montana False Claims Act § 17-8-401–§ 17-8-403, et seq. |
| Nevada | Nevada Submission of False Claims to State or Local Government § 357.010–§ 357.250, et seq. |
| New Hampshire | Medicaid Fraud and False Claims § 167:61-b–§ 167:61-e, et seq. |
| New Jersey | Supplementing Title 2A of the New Jersey Statutes and amending 2 P.L. 1968, c.413 (N.J.S.A. 2A:32C-1). |
| New Mexico | Medicaid False Claims Act § 27-14-1, et seq.<br><br>Fraud Against Taxpayers Act § 44-9-1–§ 44-9-14, et seq. |
| New York | New York State False Claims Act § 187–§ 194, et seq. New York City False Claims Act § 7-801–§ 7-810.<br>Rule Governing the Protocol for Processing Proposed Civil Complaints Pursuant to the New York City False Claims Act § 3-01–§3-03, et seq. |
| North Carolina | North Carolina False Claims Act § 1-605–§ 108A-63. |
| Oklahoma | Oklahoma Medicaid False Claims Act Title 63 § 5053, et seq. |
| Rhode Island | Rhode Island False Claims Act § 9-1.1-1–§ 9-1.1-8. |
| Tennessee | Tennessee Medical False Claims Act § 71-5-181–§ 71-5-186. |

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| Texas | Texas False Claims Act § 32.039.<br><br>Medicaid Fraud Prevention § 36.001–36.008, § 36.051–§36.055, § 36.101-§ 36.117, § 36.131-§ 36.132.<br><br>Health and Human Services Commission § 531.101–§ 531.108, § 531.1061–§ 531.1062, et seq. |
| Vermont | Vermont False Claims Act, 32 V.S.A. §§ 630-6423. |
| Virginia | Virginia Fraud Against Taxpayers Act § 8.01-216.1–§ 8.01-216.19, et seq. |
| Washington | Washington False Claims Act, RCW 43.131; 74.09. |
| Deficit Reduction Act of 2005 | 42 U.S.C. § 1396(h)<br><br>Provides extra financial incentives for states to enact False Claims Acts. |