Why Whistleblowing Works:

A New Look at the Economic Theory of Crime

By Stephen M. Kohn, Esq.

Kohn, Kohn, and Colapinto, Northeastern University School of Law, National Whistleblower Center

Abstract

This paper asks the most important question in whistleblowing: Why does whistleblowing work? The article studies the impact of modernized whistleblower award laws on the detection and prosecution of white-collar crime. It traces the origins of modern whistleblower laws from the original understanding of corporate crimes formulated by the famous criminologist Professor Edwin Southerland, and integrates that analysis with the economic theory of crime developed by the Nobel Prize winning economist Professor Gary Becker. It looks at whistleblowing as a rational economic activity, whereas most discussions of whistleblowing focus on its moral or ethical dimensions. It concludes that a successful anti-corruption program must be based on the assumption that the vast majority of potential whistleblowers are rational economic actors, and that laws must be designed that recognize this economic reality. Just as Professor Becker understood that white collar criminals' behavior was predicated on rational economic activity (i.e. the risk of detection and punishment), whistleblowing activity, for the most part, is also based on rational economic assumptions.

The article adds a new dimension to Professor Becker's theory on the economics of crime by looking not at the behavior of criminals, but at the behavior of those who would potentially

report those criminals to law enforcement, and thus revolutionize the detection of white-collar crime.

The article looks at the unique features of white-collar crime, such as the class nature of its participants and its impact on society, and how these features lay the foundation for understanding how to make detecting these crimes possible. It outlines Professor Becker's economic theory of crime, and how that plays into any program or set of laws designed to reduce corporate crimes. Finally, it traces the history of the most successful anti-fraud laws and how they have relied upon incentivizing whistleblowers, thereby making whistleblower disclosures a rational economic activity. Although some whistleblowers are driven purely by ethics and morality, by making the act of whistleblowing a rational economic activity, the number of persons willing to risk their careers to report wrongdoing radically increases, the acceptance of whistleblowing by society increases, and the ability to detect and deter white collar crimes radically increases.

In the United States, these findings support Congress' enactment of new whistleblower laws, or the amending of older laws, consistent with the modernized False Claims and Dodd-Frank Acts. They provide guidance for ongoing efforts within the U.S. Department of Justice and other federal agencies to create a whistleblower programs that are based on the assumption that employees and other insiders with critical information about fraud and corruption will respond rationally to incentives and protections contained in laws such as the False Claims and Dodd-Frank Acts. They also fully support the findings of the Organization of Economic Cooperation and Development endorsing the Dodd-Frank award law as a successful mechanism to combat international bribery by public companies. It provides support for the findings in the United States Strategy Countering Corruption that endorsed using whistleblower award laws to

combat international financial crimes. Finally, the article provides support efforts occurring internationally to expand the protections afforded whistleblowers against retaliation, and the creation of economic incentives to support reporting activities.

This article is a modified version of the conclusion originally published in Kohn's Rules for Whistleblowers: A Handbook for Doing What's Right (Lyons Press 2023).

Why has whistleblowing been such an effective tool in the detection and prosecution of fraud and corruption?

To find the answer we need to go back in time to 1939, when the famous criminologist, Professor Edwin H. Sutherland, first coined the phrase "white-collar crime." Sutherland explained the sharp distinction between crimes committed by corporations or government officials and what he termed simply as "street crime." In so doing, he explained, for the first time, the types of violations modern-day whistleblowers would be best suited to expose and who was committing these crimes.[1]

Shortly before the outbreak of World War II, the U.S. Armed Forces Institute published Professor Sutherland's book *Principles of Criminology*, in which he first explained the unique characteristics of white-collar corporate crimes:

> *The danger from robbery or kidnaping is clearly realized, for they involve direct sensory processes. . . . [But] theft by [fraud] . . . affects persons who may be thousands of miles away from the thief. These white-collar criminaloids, however, are the most dangerous to society of any type of criminals from the point of view of the effects on private property and social institutions.*

Sutherland did not hold back on explaining who was behind white-collar crimes such as bribery and price fixing: They were committed by the "upper classes." To Sutherland, the

---

[1] Sutherland, Edwin H., *Principles of Criminology* (United States Armed Forces Institute, 1939); *White Collar Crime* (New York: Holt, Rinehart & Winston, 1949); 5 *American Sociological Review* 1 (Feb. 1940).

stereotypes of poor "slum dweller(s)" committing crimes did not apply to the "the crimes of the business world." Corporate crimes are "indirect, devious, anonymous and impersonal." The difference between stealing from an individual by a personal theft and indirectly stealing from thousands of people by manipulating stock prices made white-collar crime unique. Sutherland observed that "persons practicing fraud have ordinarily felt no pangs of conscience, for the effects of fraudulent behavior have not become apparent in individual victims known to the defrauders but have been impersonal and diffuse."

Professor Sutherland warned that white-collar crime can undermine the social institutions necessary for people to trust their government in a democracy. His words of caution are ominous, particularly today, given the rise in authoritarian leaders within numerous democratic countries. Sutherland was extremely concerned that large-scale corruption would undermine the very fabric that holds society together:

> *The financial loss from white-collar crime, as great as it is, is less important than the damage to social relations. White-collar crimes violate trust . . . lower social morale and produce social disorganization. Many of the white-collar crimes attack the fundamental principles of the American institutions. Ordinary crimes, on the other hand, produce little effect on social institutions or social organization.*

Where do whistleblowers fit into this analysis? Sutherland understood that the largest problem in fighting corruption was detection. Since these crimes are committed in secret with no direct victim, "arrests were seldom made." He cautioned that "expert techniques of

concealment have been developed… for the purpose of preventing" the detection of white-collar crime. Sutherland understood the problem, but it would take years before academia, or Congress, would recognize the most effective method to detect these crimes.

Sutherland took the first step in coming to grips with the cancer of big business corruption. The second step was taken by Professor Gary Becker, the University of Chicago Nobel Prize–winning economist. For Becker, to develop a strategy for combatting white-collar crimes, it was imperative to also understand why top business leaders, wealthy individuals, and highly educated executives were willing to risk their positions and violate the law. Professor Becker's answer to that question was radical, but ultimately based on common sense: White-collar crime was good for business. Without a realistic risk of getting caught evading taxes, paying bribes, or defrauding the government was a rational economic activity. Only by understanding why committing white-collar crimes was a rational business decision would it be possible to develop tactics for fighting those crimes.

In his landmark 1968 paper, "Crime and Punishment: An Economic Approach," Becker explained that crime was best understood as a rational economic activity.[2] If a business could be more profitable by breaking the law, why not break the rules for profit? Without the risk of being detected (and a sufficiently high sanction if you were caught), breaking the law was a rational business decision, increasing corporate profits and making its owners wealthy.

---

[2] Becker, Gary, "Crime and Punishment: An Economic Approach," *Journal of Political Economy* 76 (1968), 169–217. Also see, Becker, *Essays in the economics of crime and punishment (Human behavior and social institutions)* (New York: National Bureau of Economic Research, distributed by Columbia University Press, 1974); Becker, Gary, and Guity Nashat Becker, "The Economics of Life: From Baseball to Affirmative Action to Immigration, How Real-World Issues Affect Our Everyday Life" (McGraw-Hill, 1997).

Becker postulated a straightforward formula for understanding white-collar crime and how to fight it: The risk of detection plus the amount of punishment would equal the rate of crime. Or, as Becker explained in economic terms: "If the aim" was "deterrence," by raising the "probability of conviction," corporate executives could be deterred from committing these crimes. Under this formula, once the act of committing white-collar crime is viewed as a rational decision often made by highly educated and well-paid executives, only then can the tactics necessary to combat this crime be understood. If the risk of detection was high and punishment was severe, the rate of crime would be low. No rational executive would engage in corrupt activities if they thought they would be caught. The greater the risk, the greater the punishment, the lower the rate of criminal activity.

The key was increasing the risk of detection so that committing a crime "exceed(ed) the gain" obtained from breaking the law. A realistic fear of detection, coupled with strong sanctions against those who got caught, would deter a rational economic actor from engaging in white-collar corrupt activities. Instead of crime being profitable (and fully justifiable on a cost-benefit approach), by increasing rates of detection and penalties, crime could become a detriment to business profits and an impediment to the private accumulation of wealth.

According to Becker, if his formula was followed, criminal offenses properly targeted "could be reduced almost at will," because "[f]or the individual to elect to engage in crime, the gain relative to its loss must exceed the odds of capture." At the heart of his crime-busting theory was a fundamental premise: The government would have to figure out a method to increase its ability to detect well-hidden white-collar crimes. The government needed to create laws where a rational executive, when "contemplating whether to commit a crime," is forced to

take into "consideration not only the punishment they face if caught but also their chances of being apprehended."

Without a realistic risk of detection and punishment, engaging in illegal corporate activities is a rational business decision. Those who are honest would be forced out of the market, forced to accept lower profits, or forced to join with their corrupt competitors to prosper. As will be shown, this is why whistleblowing is the cornerstone to ensuring fair competition, ensuring that all honest citizens and businesses can enjoy the benefits of a civil society, without being prejudiced by greedy corporate crooks.

The Crisis of Detection

The U.S. Congress was not deaf to the problem of corporate corruption. In 1978, the House of Representatives Committee on the Judiciary, Subcommittee on Crime held a series of public hearings titled "White-Collar Crime."[3] Congress wanted to know why law enforcement's efforts to tackle corruption were not working. Based on the testimony, it quickly became obvious that a principal impediment to enforcing laws governing corporate ethics was the inability to detect violations. Without detection there could be no cases to prosecute. The strictest laws protecting consumers, preventing fraud in government contracting, or punishing tax evaders would not work unless there was a method to find out who was breaking the law. Congress decided it was time to hear from the nation's top prosecutors and demand answers.

Benjamin Civiletti, the Deputy Attorney General, reported that government contractors were knowingly selling defective airplane parts to the Air Force and subjecting impoverished

[3] U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Crime, "Hearings: White-Collar Crime" (June 21, July 12 and 19, and Dec. 1, 1978).

Medicaid patients to unnecessary medical tests simply to make more money. Like Professor Sutherland, Civiletti warned that public corruption creates a "deep sense of betrayal and disappointment" in the government, fueling widespread public cynicism. He was blunt:

> *[T]he impact of white-collar illegality extends beyond simply pecuniary loss. Corruption of government officials can affect the quality of our food, and the safety of our homes. Such illegality also has insidious effects on the public's perception of the integrity of our political, economic, and social and governmental institutions. Official corruption invariably involves breaches of trust, either in a legal or moral sense, and such offenses generate in the public a deep sense of betrayal and disappointment. Such public perceptions are fertile ground for the development of widespread public cynicism and a conviction that the entire economic and political system is corrupt and lacks integrity*
>
> *[W]hite-collar offenses have the capacity to subvert the basic assumptions of our institutions and drain our national will . . .*

Civiletti testified that methods to detect corporate crime must be improved. The "crime detection techniques developed in response to so-called street crimes" simply are not applicable when enforcing anti-corruption laws: "[I]nvestigators must look at not merely a single discrete act constituting the offense, but an entire course of conduct spanning months and even years. Relevant evidence may be spread out across the nation or around the world. Unlike street crimes where the crime is evident and the

investigation focuses on establishing the identity of the culprit, an investigation of white-collar illegality centers primarily on determining if a crime actually occurred."

He further testified:

> *[White-]collar offenses are low visibility crimes. Victims may never be aware of the victimization the covert nature of white-collar illegality requires us to move from a reactive enforcement posture [i.e., an investigation triggered when the victim of a crime makes a complaint] to an enforcement posture in which we affirmatively seek out and pursue evidence of white-collar illegality even if no victim ever files a formal complaint. This would include using undercover techniques.*

Other witnesses confirmed the hidden nature of criminal corruption, describing white-collar crime as invisible. For example, Herbert Edelhertz, former chief of the Fraud Section, DOJ Criminal Division, testified that a white-collar crime investigation is "an exercise which can only be compared to an archeological excavation — the tombs are carefully hidden and constructed with fake passages and antechambers to divert the search. The search itself is so laborious and complex an effort that it can easily destroy the trail it seeks to follow."

Congressional witnesses confirmed Gary Becker's theories on crime. They recognized that business executives would, consciously or not, engage in a rational cost-benefit analysis when considering whether to break the law for profit. Only if laws could be enacted that increased the risk of detection and increased the level of punishment could prosecutors successfully fight back. The U.S. attorney for the Southern District of New York testified that

white-collar criminals were "smart enough to calculate the 'risks-to-benefits'" before engaging in corrupt activities. But under the current system there was simply no effective deterrent:

> *They are very smart. They are committing these crimes not out of need but out of greed, and they are smart enough to weigh the risks-to-benefits before they go into the crime. The profit from this kind of crime is enormous. They know the risk of detection, even with everything the Federal Government is trying to do now, is very slight. The cases are very difficult to investigate and very difficult to prosecute. And if, at the end of all that, after you have investigated and prosecuted successfully, a Federal judge is going to give somebody 2 months in jail or probation. [T]here is nothing to deter the next person for engaging in that kind of criminal activity.*

The U.S. attorney for New Jersey agreed with this assessment: White-collar crimes are of a "premeditated, calculated nature" and their motivation is greed. Thus, "if we can, through law enforcement, demonstrate to would-be white-collar offenders that not only will they run the risk of criminal prosecution and perhaps incarceration or like treatment, but in addition they will simply not be permitted to retain their ill-gotten gains which we will seek to recover through pursuit of civil remedies, I think the deterrent effect will be greatly heightened."

Eight years later, Congress would approve a new technique for detecting white-collar crimes: incentivizing insider-whistleblowers to do the job.

Congress Acts

There have always been whistleblowers willing to take massive personal risks to expose corruption. Some of these early whistleblowers, such as Daniel Ellsberg, are held up as heroes, while most others are forgotten. Regardless of their level of public recognition, all faced harsh personal consequences. In the early 1980s, Congress began to acknowledge that an effective anti-corruption detection system cannot be dependent on the one-in-a-thousand whistleblower willing to place everything at risk and suffer severe retaliation. Not only was such reliance unrealistic, but the retaliation faced by these early whistleblowers created a massive chilling effect on other potential informants. Leading economists from the Universities of Chicago and Toronto, in their breakthrough study "Who Blows the Whistle on Corporate Fraud?" understood this problem well: "Honest behavior is not awarded. Given [the] costs [of whistleblowing], the surprising part is not that most employees do not talk, it is that some talk at all."[4]

Congress started to look for a legal procedure that could break this corporate code of silence. They found it in an old Civil War law designed to combat fraud in defense contracting.

The original False Claims Act had been signed into law by President Abraham Lincoln on March 2, 1863.[5] It was designed to empower the American people to help in the fight against defense contractor fraud that was undermining the Union army. Corrupt war profiteers were becoming rich and threatening the outcome of the war. Union soldiers were dying because of widespread frauds that impacted the quality of their food (contaminated meat), the strength of their horses (contractors sold the army blind horses), and the quality of their

[4] Alexander Dyck et al., "Who Blows the Whistle on Corporate Fraud," *The Initiative on Global Market's Working Paper No. 3*, University of Chicago Booth School of Business (Oct. 2008).
[5] U.S. Statutes at Large, 37th Cong., Ch. LXVII (March 2, 1863).

munitions (sawdust sold as gunpowder). The False Claims Act targeted these fraudsters by using a technique known as *qui tam*.

Qui tam whistleblower award provisions are intended to incentivize insiders to turn on their coconspirators.[6] *Qui tam*, a Latin phrase that roughly translates to "in the name of the king," empowering citizens to file lawsuits to enforce the law. The *qui tam* "relator" (the term used for whistleblowers in the 1863 law) could file a lawsuit in federal court against fraudsters who were ripping off the government by paying kickbacks to obtain government contracts (or engaging in other corrupt activities at the expense of the taxpayers). If they prevailed, they would collect a bounty.

On August 1, 1985, a freshman senator from Iowa, Charles Grassley, rose to the floor of the U.S. Senate and announced that he was introducing a bill to revitalize the Civil War False Claims Act and its *qui tam* whistleblower award provisions. He was clear in purpose: Laws to prevent corruption were "in desperate need of reform." His goal was "expanding enforcement tools, by strengthening deterrence, and by encouraging disclosure of fraud by private individuals."[7]

The False Claims Act amendments packed the two-punch solution to white-collar crime proposed by Professor Becker: They created a mechanism for whistleblowers to solve the "detection" problem, and it increased the penalties for those found guilty – including treble damages and liquidated damages for every false claim. The proposed amendments also

---

[6] Congressional Globe, 37th Cong., 3rd Sess. pp. 952-58 (1863) ("I have based the [False Claims Act] on the old-fashioned idea of holding out a temptation, and 'setting a rouge to catch a rogue,' which is the safest and most expeditious way I have discovered of bringing rouges to justice.")(Senator Jacob M. Howard, R-Mich., February 14, 1863 speech on Senate floor).

[7] Senator Charles Grassley, *Congressional Record* (Aug. 1, 1985) (statement introducing False Claims Act amendments).

reduced the burden of the government for proving civil frauds, enabling internal whistleblower complaints ignored (or covered up) by a fraudster to form the backbone of a successful case.

A year later, Grassley's vision was signed into law.[8] Game on. The False Claims Act was modernized. The amendments created procedures that could incentivize whistleblowers to provide the U.S. attorney general with their best evidence of fraud. Under the updated law, the Justice Department was required to review the whistleblower's evidence and investigate. If the Justice Department agreed with the whistleblower, the government could intervene in the lawsuit and prosecute the fraudster. The discretion of the government to deny otherwise qualified whistleblowers from obtaining an award was ended. The law created a guaranteed minimum and maximum pay-out based on the amount of sanctions obtained from the fraudster and the quality of information provided by the whistleblower.

Awards for qualified whistleblowers were mandatory, and all the rights of a *qui tam* relator could be enforced in federal court.[9] The reward structure aligned the interests of the government and the whistleblower. The better the whistleblower's evidence, the better the government's case. The better the case, the larger the sanction. The larger the sanction, the larger the award, as awards were not based on a flat fee, but on a percentage of recovery – with no upper limit. Thus, whistleblowers at the highest corporate levels, with intimate knowledge of the frauds, could be incentivized to step forward with quality evidence henceforth unavailable to government investigators.

Qui tam was back and modernized to target white-collar crime. Whistleblowers could obtain large financial awards if their evidence was truthful and strong enough to find a fraudster guilty. So began a bold experiment in whistleblower advocacy. Time would tell if

[8] 31 U.S.C. §§ 3729-32.
[9] Senate Report No. 99-345 (1986)(legislative history of the 1986 amendments).

incentivizing insiders with large financial awards based solely on the size of the sanction imposed on large-scale corporate crimes would solve the detection problem inherent in white-collar crime cases.

Track Record: Unprecedented Success

Nearly four decades after the False Claims Act amendments were signed into law by President Ronald Reagan, objective empirical data became available enabling prosecutors, Congress, and whistleblowers to judge this new crime-fighting tool. The results surprised even the strongest whistleblower advocate. Congress had found a mechanism to incentivize insiders to report otherwise impossible-to-detect white-collar crimes. The first conundrum decried by Professor Sutherland was solved. Professor Becker's crime-fighting equation had found an answer. The thousands of successful prosecutions and the billions collected in fines under the FCA created a new era of corporate accountability. Whistleblowers were the shock troops in a war against corruption — a war that could be won.

The best starting point for evaluating the success of the *qui tam* whistleblower award laws is to look at the history of the False Claims Act from 1986 through 2024. Because the United States must pay whistleblowers who prevail in these claims a percentage of the monies actually recovered by the government from dishonest contractors, the U.S. Department of Justice keeps accurate statistics of every FCA recovery. The DOJ, down to the penny, has calculated the monies obtained as a direct result of whistleblower disclosures and compares those numbers to sanctions obtained in government-initiated cases. The results are stunning. Hard data exists that precisely quantifies the impact of whistleblowers.

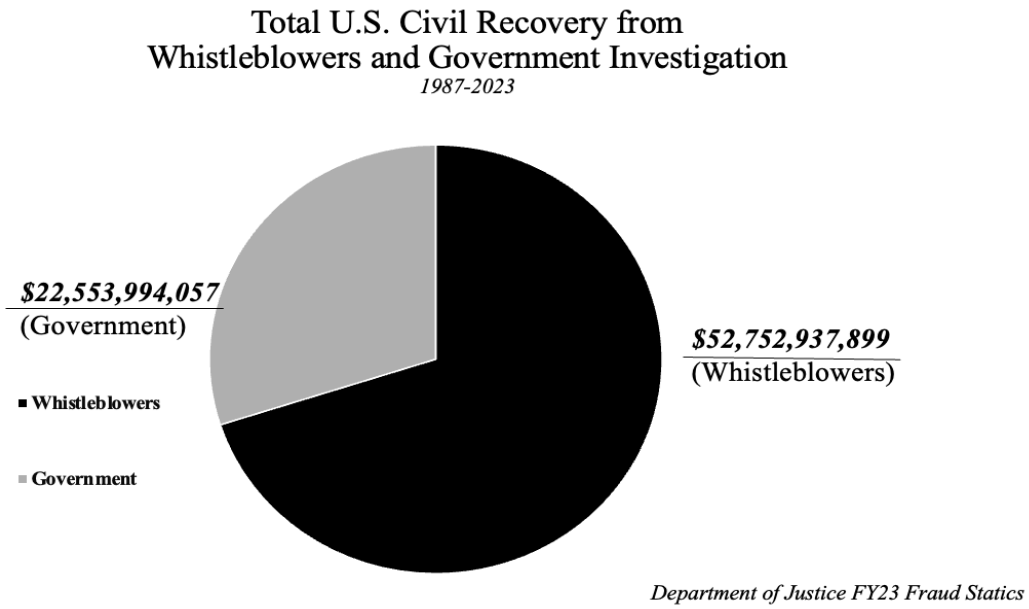
In 1987, the problems in successfully prosecuting government fraud cases were obvious. In that year, the United States recovered only $86.4 million in civil fraud cases. Whistleblowers were not responsible for any of these recoveries, because the amended law was brand new, and whistleblower-filed cases would take several years to be resolved.[10] However, by the year 2000, after numerous cases had been filed and resolved, and millions in awards were paid, the United States fraud recoveries skyrocketed. In that year alone, the United States recovered a staggering $1.577 billion from fraudsters. Of those recoveries, $1.2 billion came from whistleblower triggered cases.[11] By dollars and cents, the new whistleblower law worked. Using the *qui tam* methodology to detect and punish white collar crimes committed against the government demonstrated the veracity of Gary Becker's theory on the economics of crime.

Overall, the statistics published by the U.S. Department of Justice Civil Fraud Division speak for themselves.[12] Between October 1, 1987, and September 30, 2023, the following recoveries have been obtained, and rewards paid:

- Fraud recoveries initiated by the DOJ Civil Fraud Division without the help of whistleblowers under the FCA: $22.5 billion;
- Fraud recoveries initiated by whistleblower *qui tam* lawsuits: $52.7 billion;
- Awards actually paid to whistleblowers under FCA: $8.998 billion;
- Total amount of sanctions under the False Claims Act: $75.3 billion.

Since the False Claims Act was amended in 1986, whistleblowers are the direct source of approximately 70 percent of civil fraud recoveries obtained by the United States.

[10] U.S. Department of Justice Fraud Statistics, https://www.justice.gov/opa/media/1339306/dl?inline.
[11] Id.
[12] Id.



What is even more remarkable is that not one penny of the awards paid to whistleblowers comes from the Treasury or from taxpayer monies. Instead, all awards are paid directly from the sanctions obtained from the fraudsters. As part of their fines and penalties the white-collar criminals are forced to pay the very whistleblowers who turned them in, provided the evidence to find them guilty, and worked hand-in-hand with the government (for no pay) to make sure there was accountability and justice.

Over time, and based on the objective statistical data, the government officials responsible for administering the False Claims Act publicly praised its success, in the strongest of terms. For example:

- Attorney General of the United States: "[T]he False Claims Act has provided ordinary Americans with essential tools to combat fraud, to help recover damages, and to bring

accountability to those who would take advantage of the United States government – and of American taxpayers."[13]

- Assistant Attorney General: "[M]ost [civil fraud cases that result] in recoveries were brought to the government by whistleblowers under the False Claims Act;" "Those [1986] amendments have played a critical role in transforming the FCA into what it is today – the most powerful tool the American people have to protect the government from fraud."[14]
- Chairman of the Senate Judiciary Committee: "One of the smartest things Congress has ever done is to empower whistleblowers to help the government combat fraud. They get results. Without whistleblowers, the government simply does not have the capability to identify and prosecute the ever-expanding and creative schemes to bilk the taxpayers. That is not rhetoric. That is history."[15]

The following are a very small sample of the types of cases whistleblowers have prevailed in under the False Claims Act, and the amounts of money actually recovered from the fraudsters triggered by the whistleblower complaints:[16]

- Amerigroup Insurance: $225 million for illegally denying Medicaid coverage to pregnant women;

---

[13] https://kkc.com/wp-content/uploads/2020/03/Attorney-General-Eric-Holder-Speaks-at-the-25th-Anniversary-of-the-False-Claims-Act-Amendments-of-1986-_-OPA-_-Department-of-Justice.pdf.

[14] Statement of the Assistant Attorney General on the False Claims Act: Assistant Attorney General, U.S. Department of Justice, "Remarks at American Bar Association's 10th National Institute on the Civil False Claims Act and *Qui Tam* Enforcement" (June 5, 2014).

[15] https://kkc.com/wp-content/uploads/2020/07/Grassley-False-Claims-Act-is-Our-Most-Important-Tool-to-Fight-Fraud-against-Taxpayers-Chuck-Grassley.pdf.

[16] The Department of Justice publishes its press releases, which extensively document the amount of money the United States recovers as a result of whistleblower disclosures under the False Claims Act. The recoveries cited in this section are derived from these releases. See U.S. Department of Justice, Civil Division, Commercial Litigation Branch, *Press Releases*, published at www.doj.gov/civil/press/index.

- Armor Holdings, Inc., and Hexcel Corporation: $45 million for manufacturing and selling defective bullet proof vests;
- Bank of America: $1 billion for banking/mortgage fraud;
- Beverly Enterprises, Inc.: $170 million for charging to Medicare the salaries paid to nurses who worked on non-Medicare patients;
- BP/Amoco: $32 million for false statements related to their oil leases;
- Bristol-Myers Squibb: $515 million for illegal pricing and marketing of over fifty different types of drugs;
- Ciena Capital, LLC: $26.3 million for false certification of small business loan requirements;
- Cisco Systems: $48 million for overcharging and defective pricing;
- Citigroup: $158 million for mortgage fraud;
- ConocoPhillips: $97.5 million for underpayment of natural gas royalties on public lands;
- C.R. Laurence Co.: $2.3 million for evading customs duties;
- CVS Corporation: $37 million for overcharging Medicaid;
- Deutsche Bank: $202 million for defrauding HUD and the FHA;
- Duke University: $112.5 million for submitting falsified research on NIH and EPA grants;
- Eli Lilly & Co.: $1.415 billion for promoting drugs for uses not approved by the Food and Drug Administration;
- Freedom Mortgage Corp.: $113 million for issuing HUD-backed mortgages that did not meet requirements.

- GlaxoSmithKline: $750 million for selling adulterated drugs;
- Hospital Corporation of America: $840 million for performing medically unnecessary tests, overbilling, “upcoding” (using false diagnosis codes to increase payments), and billing for non-reimbursable costs;
- Lockheed Martin: $10.5 million for filing false invoices to obtain early payments;
- Los Angeles Department of Water and Power: $160 million for overcharging customers;
- Merck: $650 million for kickbacks and Medicaid Best Practice violations;
- NetCracker Technology Corp.: $11.4 million for using individuals without security clearances on defense contracts;
- Northrop Grumman: $191 million for fraudulent overcharging and selling defective equipment;
- Oracle: $200 million for price-gouging on computers;
- Pfizer, Inc.: $2.3 billion for illegal kickbacks and illegal marketing of numerous drugs, including Lipitor, Viagra, and Celebrex;
- Pratt & Whitney: $52 million for defective turbines used in fighter jets;
- Purdue Frederick Co.: $634.5 million for misbranding the painkiller Oxycontin;
- Schering Plough: $435 million for illegal sales and marketing of brain tumor, cancer, and hepatitis drugs;
- Science Applications International Corporation: $5.9 million for violations of conflict-of-interest requirements in contracts with the Nuclear Regulatory Commission;
- Shell Oil Company: $110 million for underreporting and underpaying royalties;
- Smithkline Beecham Clinical Laboratories: $325 million for charging the government for tests that were not performed, adding on unnecessary tests to increase billable costs,

paying kickbacks to obtain a doctor's medical business, and double billing for dialysis tests;

- Tenet Healthcare: $900 million for Medicare billing violations, kickbacks, and bill padding;
- Toyobo Co. of Japan: $66 million for selling defective fiber used in bulletproof vests;
- University of Phoenix: $67.5 million for violations of student loan regulations;
- Walgreens: $120 million for improper drug switching;
- Zoladz Construction Co.: $3 million for improperly obtaining set-aside contracts designated for disabled veteran–owned companies;

But these successful prosecutions only tell half the story. Specific violations are corrected, mandatory compliance enhancements are almost always included as part of the resolutions, individuals are held accountable, and each successful case sends a powerful message: If you commit fraud, you will get caught. Your own employees can make millions of dollars turning you in. The whistleblower stops being the loser, and the fraudster starts paying for his or her crimes.

The remarkable success of the False Claims Act pushed Congress to enact a series of other laws aimed at paying awards to whistleblowers to incentivize reporting of other white-collar crimes. The first new award law, passed in 2006, covered tax evasion and underpayments.[17] Almost immediately the law was used to crush illegal offshore Swissbanking.[18] Next up were two powerful award provisions included in the Dodd-Frank Act,

[17] 26 U.S.C. § 7623.

[18] John A. Koskinen, Commissioner, Internal Revenue Service, Remarks at the U.S. Council for International Business–OECD International Tax Conference (June 3, 2014), available at https://www.irs.gov/pub/newsroom/Commissioner%20Koskinen's%20Remarks%20at%20US%20CIB%20and%20OECD%20Int%20Tax%20Conf%20June%202014.pdf; Dennis J. Ventry Jr, "Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States," *Villanova Law Review* 59, no. 3 (Aug. 2015); Matthew Allen, "Swiss-U.S. Tax Evasion Saga: Where Are We Now?" (Jan. 2016),

one covering securities frauds and foreign bribery[19] and the other covering commodities frauds.[20]

The success of the post–False Claims Act award laws can also be objectively demonstrated. Under the Dodd-Frank Act, the Commodity Futures Trading Commission reported that as of 2022 it has collected over $3 billion in sanctions from whistleblower cases and paid over $300 million in awards.[21] This success is all the more remarkable given the small size of the CFTC, which operates on a tiny annual budget of approximately $300 million.[22]

The program showed phenomenal growth. The CFTC did not issue its first award until 2014, and that was for only $240,000. As shown in the chart below since that date the amount exploded,[23] so much so that the CFTC has asked Congress to significantly increase the size of its whistleblower award fund.[24]

www.swissinfo.ch/eng/business/unfinished-business_swiss-us-tax-evasion-saga--where-are-we-now-/41924910; IRS Press Release, "Offshore Compliance Programs Generate $8 Billion."

[19] 15 U.S.C. § 78u-6.

[20] 7 U.S.C. § 26.

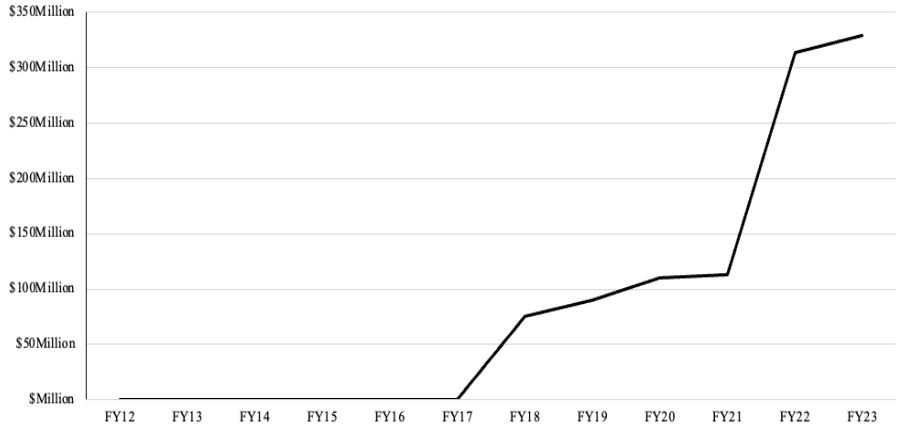
[21] CFTC, Annual Reports of the Office of the Whistleblower, https://www.whistleblower.gov/reports.

[22] Kohn, *Rules for Whistleblowers: A Handbook for Doing What's Right* (Lyons Press: 2023), pp. 150-53.

[23] *See,* Annual Reports, CFTC Office of the Whistleblower, available online at https://www.whistleblower.gov.

[24] https://www.grassley.senate.gov/news/news-releases/grassley-nunn-and-hassan-lead-bipartisan-bicameral-effort-to-bolster-successful-whistleblower-program.

Amount of Whistleblower Awards Granted by the Commodity Futures Trading Commission



Source: CFTC Office of the Whistleblower Annual Report to Congress

The SEC's program saw similar growth. In fiscal year 2012 (the first year an award was paid), the total amount paid to whistleblowers was only $45,739.16. But in FY 2023 that number grew to over $600 million, and the total amount of awards paid to whistleblowers since Dodd-Frank was passed was over $1.9 billion. Overall, as of 2022, the SEC obtained over $6.3 billion in sanctions from fraudsters, of which over $3 billion was in disgorgement of ill-gotten gains. Over $1.5 billion was directly returned to harmed investors.[25]

As explained in the SEC Office of the Whistleblower's 2022 Annual report: Whistleblowers have played a critical role in the SEC's enforcement efforts in protecting investors and the marketplace. Enforcement actions brought using information from meritorious whistleblowers have resulted in orders for more than $6.3 billion in total monetary sanctions including more than $4 billion in disgorgement of ill-gotten gains and interest, of which more than $1.5 billion has been, or is scheduled to be, returned to investors.

[25] 2023 Annual Report, SEC Office of the Whistleblower, available online at https://www.sec.gov/whistleblower. https://www.sec.gov/files/2022_ow_ar.pdf.

The top government officials managing award programs have publicly praised the contributions whistleblowers make in fighting corruption.[26] In September 2020, all five SEC commissioners (three Republican members appointed by President Trump and two Democratic members) unanimously celebrated the SEC's whistleblower program and firmly rejected arguments that awards should be limited in large cases. The Trump-appointed chairman of the commission, Jay Clayton, expressed the views of the entire SEC when he stated: "Over the past ten years, the whistleblower program has been a critical component of the Commission's efforts to detect wrongdoing… particularly where fraud is well-hidden or difficult to detect."[27]

After the 2020 elections these same sentiments were echoed by the Biden-appointed chairman of the SEC, Gary Gensler: "Whistleblowers provide a critical public service and duty to our nation. The tips, complaints, and referrals that whistleblowers provide are crucial to the Securities and Exchange Commission. We must ensure that whistleblowers are empowered to come forward when they see misbehavior [and] that they are appropriately compensated."[28]

---

[26] Numerous public officials and Members of Congress have made public statements strongly supporting whistleblowers and recognizing their contributions. Many of these presentations are published on the You Tube channel of the National Whistleblower Center, on-line at: https://www.youtube.com/@NationalWhistleblowerCenterDC/videos. Video speakers include Senators Charles Grassley, Ron Wyden, Tammy Baldwin, James Lankford, Tammy Duckworth, and Ron Johnson, Representatives John Garamendi, Kathleen Rice, Jackie Speier, and Elijah Cummings, the Inspector General of the Department of Justice, the Secretary of Labor, the Director of the Federal Bureau of Investigation, U.S. Special Counsel, Director of the IRS Whistleblower Office, and the Chairman of the SEC. Also see, "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);" Senate Committee on the Judiciary, "The False Claims Act Correction Act," Senate Rep. No. 110-507 (Sept. 25, 2008), available online at https://g7x5y3i9.rocketcdn.me/wp-content/uploads/2020/03/FCA_Senate-Report_The-False-Claims-Act-Correction-Act-of-2008-Sep-25-2008.pdf.

[27] SEC Chairman Jay Clayton (Sept. 2020), "Strengthening Our Whistleblower Program."

[28] SEC Chair Gary Gensler statement on the whistleblower program published on *YouTube*, https://www.youtube.com/watch?v=kgwqO5GrDZY; Chair Gensler's speech praising the SEC program during the 2021 Whistleblower Day, published online at: https://www.sec.gov/news/speech/gensler-whistleblower-celebration.

Based on the success of Dodd-Frank, in 2020 the Bank Secrecy Act was amended to include monetary awards for money laundering. Two years later the AML whistleblower law was amended to conform to the mandatory award provisions of the False Claims and Dodd-Frank Acts. The scope of the law was also enlarged to cover whistleblowers who reported violations of U.S. sanctions.[29]

By the end of 2023 the impact of the newest *qui tam* law was paying off. The largest crypto currency exchange in the world, Binance, and its CEO were forced to plead guilty to money laundering crimes and violations of U.S. sanctions law. The company was fined over $4 billion, and its CEO (now former CEO) agreed to pay a $150 million fine. But what was most revealing was the nature of the criminal activity Binance had facilitated through its crypto exchanges. For the first time the *qui tam* whistleblower laws were able to be used to help detect terrorist financing and international criminal activity. The crimes Binance admitted to included permitting groups like ISIS, the armed wing of Hamas, criminal elements active in the "dark web," and Russians residing in occupied Ukraine to use its money exchanges to facilitate some of the worst behaviors in the world.

Most recently, on March 7, 2024 Deputy Attorney General Lisa Monaco announced a new Justice Department whistleblower award program. She explained that the *qui tam* laws had "proven" to be "indispensable" in enabling the government to fight white collar crime. She also understood that the key trick behind all of the new whistleblower laws was to "encourage individuals to report misconduct by rewarding whistleblowers." She then asked: "And how do we do that?" Here answer was direct: "Money."[30]

---

[29] 31 U.S.C. § 5323.

[30] https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-monaco-delivers-keynote-remarks-american-bar-associations.

Success has shifted attitudes toward whistleblowing not only among prosecutors who have first-hand knowledge of their critical role in enforcement proceedings, but among experts in the field. International auditors from the Organization for Economic Cooperation and Development (OECD) concluded that Dodd-Frank's "multi-faceted protections" "constitute a good practice given that they provide powerful incentives for qualified whistleblowers to report foreign bribery."[31] Thereafter, the OECD made a general recommendation that all of its member countries consider implementing award programs to combat foreign corruption.

On the heels of the OECD audit, every major agency of the United States government was asked to provide input into a new national strategy to fight corruption both domestically and internationally. Thereafter, in December 2021, the White House approved the United States Strategy on Countering Corruption. The Strategy explicitly recognized the critical role whistleblowers play in fighting corruption, stated that the U.S. government would stand in "solidarity" with whistleblowers, and specifically cited to the newly enacted whistleblower award laws covering money laundering and financial frauds as among the tools the United States would employ internationally to combat corruption.[32]

Most surprising was the radical change in attitude toward *qui tam* in the United Kingdom. For years UK regulators were critical of paying awards to whistleblowers. But on February 13, 2024 Nick Ephgrave, the Director of the United Kingdom's Serious Fraud Office spoke at the highly respected British "think tank," the Royal United Services Institute (RUSI) in London and announced a change in course: "I think we should pay whistleblowers. If you look at the example of the United States of America, their system allows that, and I think 86%

[31] See OECD Phase IV Report on U.S.A., https://www.oecd.org/corruption/anti-bribery/United-States-Phase-4-Report-ENG.pdf.
[32] United States Strategy on Countering Corruption, https://www.whitehouse.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf.

of the $2.2 billion in civil settlements and judgments recovered by the US Department of Justice were based on whistleblower information. Since 2012, over 700 UK whistleblowers have engaged US law enforcement."

These shifts in the perception of whistleblowers were reinforced by a comprehensive study of over 1168 whistleblower award cases conducted by Professors Aiyesha Dey, Jonas Heese, and Gerardo Pérez Cavazos at the Harvard Business School: "In sum, these findings support the view that cash-for-information programs help to expose misconduct. Our findings show that whistleblowers respond to financial incentives… These findings are inconsistent with the critics' view that greater financial incentives for whistleblowers primarily trigger meritless lawsuits."[33]

The Flip Side of the Economic Theory of Crime: Making Whistleblowing a Rational Economic Activity

Professor Becker predicted that by increasing the risk of detection and the amount of punishment the rate of white-collar crime would decrease. Empirical data on the impact of the False Claims Act and related *qui tam* whistleblower award laws vindicated this theory in the context of combatting white collar crimes. But his economic theory has also worked in a completely different manner. It is not simply that increased detection results in a decrease in crime. An increase in the incentives driving detection results in a radical increase in the number of persons willing to report crime. In short, the whistleblower award laws demonstrate that whistleblowers are also rational economic actors. By making whistleblowing a realistic

[33] https://corpgov.law.harvard.edu/2021/06/10/cash-for-information-whistleblower-programs-effects-on-whistleblowing-and-consequences-for-whistleblowers/.

economic alternative to going along with frauds and corrupt practices, the ability to detect and prosecute white-collar crime radically increases, thereby increasing not only the ability to hold fraudsters accountable, but the overall deterrent effect the whistleblower laws have on the rate of crime.

Thus, it is not just an abstract fear of detection that is at play. It is also the fact that as the number of persons willing to report crimes increases due to the economic incentives available under *qui tam*, the risk of detection skyrockets and considerably adds not only to the deterrent effect, but also to the ameliorative impact of each individual prosecution.

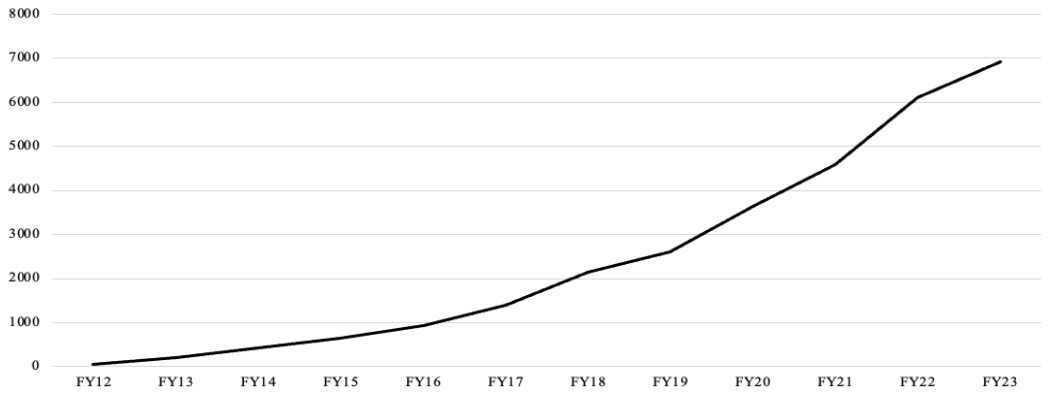
Objectively, rate of crime will also decrease as the number of persons willing to report increases. In other words, two forces work together to drive down the rate of crime. At the front end is a fear of detection, but coming from behind is an actual "army" of detectors, profiting not from engaging in crime, but by exposing it. The profit motive behind white-collar crime is turned on its head. In many cases it can be more profitable to report crime, than to commit it. In a sense the *qui tam* laws have turned the fraudster's most powerful weapon (greed) against itself. Ultimately, the motivation to report fraud can dominate the motivation to commit the frauds, resulting in a radical increase in compliance and a corresponding decrease in crime.

The evidence supporting this reversal of fortune for white collar criminals is reflected not only in the successful prosecutions outlined above, but in the numbers of persons willing to become whistleblowers, and the growing acceptance of whistleblowing in the workplace.

The *qui tam* laws have resulted in a massive and unprecedented rise in the number of whistleblowers willing to report potential frauds to the government. For example, the number of whistleblowers filing claims under the Commodity Exchange Act has risen from only 58 in

2012, to 1,530 in fiscal year 2023.[34] This rise in reporting occurred after the Commodity Futures Trading Commission issued its first set of awards, and after it made a historic award of over $100 million to a whistleblower.

Total Amount of Whistleblower Tips Received by the Commodities Futures Trading Commission

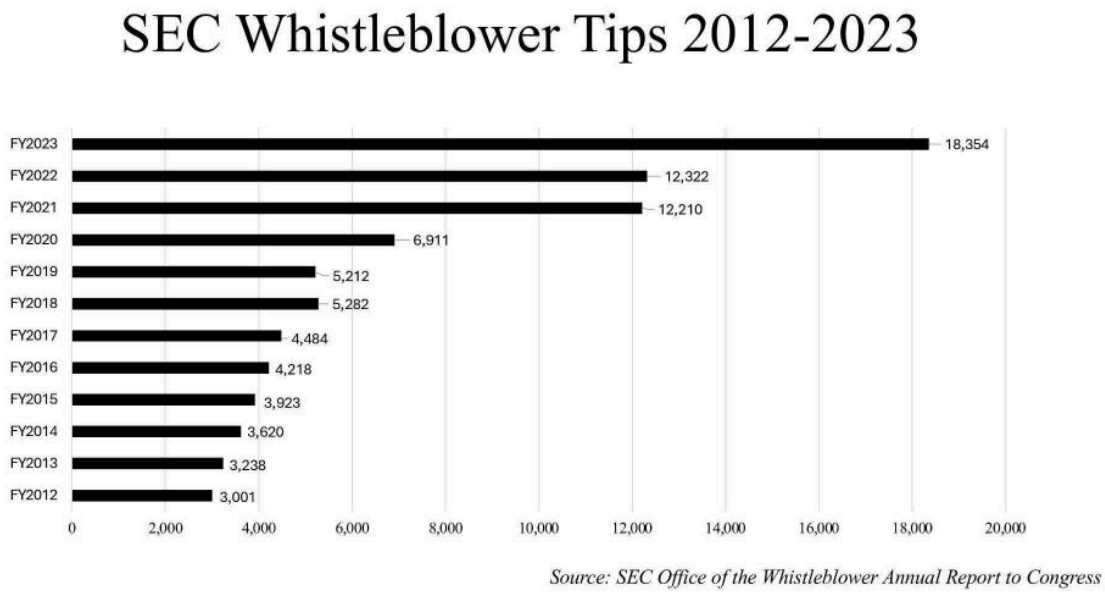


Source: CFTC Office of the Whistleblower Annual Report to Congress

The SEC award program is now the most popular whistleblower program both domestically and internationally. In 2023, an unprecedented large number of whistleblowers (18,000) filed formal whistleblower award claims. A remarkable growth since the program was started in 2010, and further proof that workplace culture was changing, and the acceptability of seeking awards was becoming more widely accepted.[35]

[34] CFTC Office of the Whistleblower Annual Report FY 2023, https://www.whistleblower.gov/sites/whistleblower/files/2023-10/FY23%20Customer%20Protection%20Fund%20Annual%20Report%20to%20Congress.pdf.

[35] SEC Office of the Whistleblower Annual Report for FY 2023, https://www.sec.gov/files/fy23-annual-report.pdf.



The growth in reports under Dodd-Frank is not limited to whistleblowers residing in the United States. Because the SEC's Dodd-Frank program also covers violations of the Foreign Corrupt Practices Act, thousands of whistleblowers from over 130 countries have filed claims with the SEC. The Commission's reports confirm that between 2011 and 2021, over 5,900 non-U.S. whistleblowers filed claims under Dodd-Frank, and many have been granted large awards.[36] In FY 2011, 32 international whistleblowers from 11 countries filed claims with the

[36] *Id.* SEC Office of the Whistleblower Annual Reports, 2011-2021 (after 2021 the SEC stopped publishing a country-by-country breakdown). As of 2021 5908 international whistleblowers had filed claims from over 130 countries. The first international whistleblower award of $30 million was granted on September 22, 2014. *See, https://www.sec.gov/news/press-release/2014-206*.

SEC. Three years later, 448 whistleblowers from 60 countries filed cases. In 2021, the last year the SEC published statistics on international filings, 1,350 non-U.S. whistleblowers from 99 countries filed claims.

The size and number of judgments and awards triggered by whistleblower disclosures not only sends the shock waves within corporate leadership necessary for entrenched corporate traditions to change, but it also changes the behavior of line-employees and incentivizes honest corporate leaders to confidentially turn-on their corrupt colleagues. Large rewards grab headlines, advertise the existence of powerful whistleblower laws incentivizing disclosures of corporate crimes, and encourage an extremely reluctant workforce to come forward and report frauds and threats to the public safety.

The Harvard Business School study found that 80% of whistleblowers who were not confidential suffered retaliation.[37] But even so, this did not stop over 85,000 whistleblowers, some holding high-level corporate positions, to come forward under the Dodd-Frank Act alone. This increase in reporting was driven not only by financial award, but also by the ability to file confidential and anonymous claims, thereby keeping the whistleblower secreted within a company and fully employed. Dodd-Frank delivered the one-two punch for accountability: Deterrence among corporate leaders and justice for the whistleblowers. Along with the False Claims Act, these laws have made reporting fraud a rational economic activity, thus opening the possibility that the vast majority of the workforce who are opposed to corruption, who

[37] The Harvard Business School study also found that a majority of whistleblowers whose cases were public were able to find comparable employment within one year: "The average whistleblower finds a new job approximately within one year. In 52% of the cases, the next job is better or equivalent to the one at the accused firm, while 10% of employees' next job is worse, and 21% of employees become self-employed. 16% of whistleblowers move to another state for their next job and 35% change industry." *See, https://corpgov.law.harvard.edu/2021/06/10/cash-for-information-whistleblower-programs-effects-on-whistleblowing-and-consequences-for-whistleblowers/.*

formally have no realistic means to safely report these crimes, are now willing to do so. The number of people reporting potential white-collar crimes using the existing award/*qui tam* laws is well over 100,000 over the past fifteen years. This army of reporters have triggered well over $100 billion in recoveries. These numbers are remarkable, and are having a drastic impact on workplace behavior, accountability, and opinions prosecutors have toward whistleblowing, and the willingness of employees to take the risk of reporting – even if those reports remain strictly confidential.

Deterrence

In September 2012, the world learned that a Swiss bank whistleblower, Bradley Birkenfeld, had just obtained what at the time was the largest award ever given to an individual whistleblower. For turning in UBS's massive illegal offshore banking operation, Birkenfeld was awarded $104 million by the IRS. As serendipity would have it, at the same time Birkenfeld's award was publicly announced, leading Swiss bankers and their consultants were holding a major industry meeting in Geneva, Switzerland. A reporter from Agence France-Presse was in attendance and had a bird's-eye view of the reaction leaders of Swiss banking had to Birkenfeld's award.

According to the reporter's firsthand account, the bankers "seethed" at Birkenfeld and attacked his "total lack of morality" for blowing the whistle on them. However, in their very next breath, they also acknowledged that Birkenfeld had "driven the nail into the heart of the once seemingly invincible Swiss bank secrecy" system. A highly respected banking consultant was reported declaring that their U.S. client offshore banking program was finished.[38]

[38] The Swiss banking leaders' response to the Birkenfeld whistleblower reward was documented in an *Agence France-Presse* article, reprinted at https://dailystar.com.lb/ArticlePrint.aspx?id=188088&mode=print and *SwissInfo* at

Paying Birkenfeld a historic award had an immediate impact on the entire Swiss banking system. The day after the Birkenfeld award was announced, the publication SwissInfo summarized these reactions as reported in various Swiss newspapers:[39]

> *The Blick tabloid newspaper said it proves how ruthlessly US officials are pursuing tax evaders and how determined they are to dry up tax havens.*
>
> *Zurich's Tages-Anzeiger went further, describing it as a "seductive offer for bankers." "This enormous reward show how the US are raising the stakes in their tax fight with Switzerland in promising such high compensation the IRS are hoping that more incriminating material is handed over."*
>
> *The French-speaking daily Le Temps agreed that Birkenfeld's huge reward could encourage other bank employees to follow his example.*

Deterrence was the name of the game. It was clear to these industry leaders that Swiss bankers could make far more money turning in their U.S. clients than they could serving them. For example, after the Birkenfeld case became public, news reports confirmed another massive Swiss bank whistleblower case. The defendant in that case was Switzerland's oldest bank, Wegelin & Co. The bank, founded in 1741, admitted to hiding $1.2 billion for American tax

---

https://www.swissinfo.ch/eng/whistleblower-payoff_birkenfeld-reward-may-temptother-bankers/33500198.

[39] The Swiss banking leader's immediate reaction to the Birkenfeld $104 million award is detailed in Kohn, *Rules for Whistleblowers: A Handbook for Doing What's Right* (Lyons Press, 2023), pp. 127-28, 288-89.

evaders. After pleading guilty to criminal charges, Wegelin was forced to close and declare bankruptcy, sending new shock waves throughout the international offshore banking community. The fact that Wegelin only had branches in Switzerland did not help it escape the long arm of U.S. law enforcement, and some of its executives remain international fugitives.

Like in the Birkenfeld case, press accounts confirmed that Wegelin bank whistleblowers were paid millions in awards.[40] Following these high-profile whistleblower cases, all (or most all) known illegal U.S. accounts in Switzerland were closed, and billions upon billions of dollars in monies formerly held in illegal offshore accounts were repatriated to the U.S. economy. These monies would be taxed forever and become part of the lawful U.S. economy.

The Department of Justice bragged about this revolution in offshore tax compliance. According to Justice, it demanded that every Swiss bank make "a complete disclosure of their cross-border activities," provide DOJ "on an account-by-account basis" information on U.S. taxpayers, pay "appropriate penalties," and agree to close accounts of non-compliant U.S. citizens in order to avoid the fate of Wegelin and UBS. As predicted, Swiss banks agreed to these terms in droves. Almost the entire Swiss banking empire, from large publicly traded banks to small banks with offices only in Switzerland, accepted the DOJ deal. These banks, and the terms of their settlements, are all published on the DOJ website at https://www.justice.gov/tax/swiss-bank-program.

The full impact of successfully using *qui tam* whistleblower laws to trigger compliance was explained by then-chairman of the IRS Advisory Council, University of California–Davis law professor Dr. Dennis Ventry. In a 2014 article in the *Villanova Law Review*, Ventry described how Birkenfeld's whistleblowing changed Swiss bank secrecy forever: "'Collateral

[40] https://www.paminsight.com/twn/article/wegelin-whistleblowers-win-$17-8m-us-award.

impact' hardly does justice to the effect of Birkenfeld's whistleblowing." He not only triggered the "UBS debacle" but also "everything that followed," including "more than 120 criminal indictments of U.S. taxpayers," "additional indictments against foreign bankers, advisors, and lawyers," "closure of prominent Swiss banks—including the oldest private bank," other persons "ratting out banks," and "banks themselves disclosing the names and accounts of [US] clients."

Ventry carefully laid out the benefits derived by the United States from the *qui tam* whistleblower program: The "treasure trove of inside information" that Birkenfeld provided U.S. officials formed "the foundation for the UBS debacle and everything that followed." He further explained:

> *[T]he U.S. government (take a deep breath) received: $780 million and the names of 250 high-dollar Americans with secret accounts as part of a deferred prosecution agreement (DPA) with UBS; another 4,450 names and accounts of U.S. citizens provided as part of a joint settlement between the U.S. and Swiss governments; more than 120 criminal indictments of U.S. taxpayers . . . more than $5.5 billion collected from the IRS Offshore Voluntary Disclosure Program (OVDP), with untold tens of billions of dollars still payable . . . banks themselves disclosing the names and accounts of clients who refuse to participate in the program to avoid their own monetary penalties and to defer or avoid criminal prosecution.*[41]

[41] Professor Dennis J. Ventry, "Not Just Whistling Dixie: The Case for Tax Whistleblowers in the States," 59 *Vill. L. Rev.* 425 (Aug. 2015).

Prior to the Birkenfeld case, attempts to crack Swiss bank secrecy had failed. But paying insiders large awards radically increased the risk of detection, and the notorious Swiss banking system collapsed, at least as it impacted U.S. citizens. The *qui tam* model worked on a global scale.

But the greatest dividend obtained from *qui tam* laws goes toward deterrence of future crimes. Ventry clearly saw this in the context of Swiss banking: "[Whistleblowers] prevent noncompliance from happening in the first place. An effective whistleblower program . . . add[s] significant risk to noncompliance by increasing the probability of detection and the likelihood of potential penalties, the two most important variables in traditional tax deterrence models."

Ventry's conclusion that a successful whistleblower program could have a massive deterrent effect on wrongdoing was fully documented in report No. GAO-13-318, issued by the U.S. Government Accountability Office.[42] The report compared two nearly identical voluntary tax compliance programs. Both targeted illegal Swiss offshore banking. Both offered amnesty and other benefits to tax evaders who voluntarily came forward and reported their secret accounts. The only difference between the two programs was one occurred before the Birkenfeld-UBS tax case, when most U.S. account holders did not fear detection. The second was implemented after the Birkenfeld-UBS tax case, with the intent to leverage the increased fear of detection generated by the UBS prosecution and the newly minted IRS whistleblower law that was targeting offshore banking.

The report provided hard data comparing the pre- and post-whistleblower voluntary compliance program. The results confirmed what common sense dictated: Fear of detection is

[42] "GAO-13-318 OFFSHORE TAX EVASION: IRS Has Collected Billions of Dollars, but May be Missing Continued Evasion" (2013) available at https:// www.gao.gov/assets/gao-13-318.pdf

a strong stimulus for deterring crime. Fear of detection can and will dramatically increase voluntary compliance with the law. The GAO numbers speak for themselves:

Pre-Whistleblower 2003 Program

Total amount collected: $200 million

Total number of participants: 1,321

Post-Whistleblower 2009 Program

Total amount collected: $4.1 billion

Total number of participants: 19,337

The numbers alone demonstrate a nearly 20:1 increase in voluntary compliance after the enactment of the IRS whistleblower law and one extremely successful high-profile case against a major bank. However, these numbers don't tell the entire picture. The IRS was flooded with taxpayers who wanted to turn themselves in. At the time of the GAO report, the government had only closed out 10,439 tax cases of the 19,337 persons who applied for amnesty under the post-Birkenfeld award program, so the actual amount of compensation returned to the American taxpayers would ultimately be far above the $4.1 billion figure. Everything predicted by the Becker economic model for deterring crime was empirically documented.

Academic studies have further confirmed this deterrent effect. Professor Giancarlo Spagnolo and Theo Nyreröd at the Stockholm School of Economics published a paper concluding that "whistleblowing deters financial misreporting." Professors Philip Berger and

Heemin Lee, from the University of Chicago Booth School of Business and the Zicklin School of Business at the City University of New York, respectively, confirmed the "high direct deterrence value of whistleblower cases," and concluded that the "opportunity for a large payout creates incentives for a whistleblower to come forward" and "creates a profit motive for rooting out impropriety." Assistant professor at the Boston University Questrom School of Business, Jetson Leder-Luis put a dollar figure to whistleblower-induced deterrence in the healthcare industry. After looking at cases where the United States recovered $1.9 billion from whistleblower-triggered cases, he developed an economic model that concluded the long-term deterrence effect caused by these cases was "around 6.7 times the settlement value" over a five-year period. Thus, without having to fire a shot, taxpayers were able to save another $18.9 billion in healthcare costs alone.[43]

The U.S. Securities and Exchange Commission is the first government agency to formally acknowledge the deterrent effect that whistleblowing has on crime. In 2022, the

[43] Niels Johannesen and Tim Stolper**, "**The Deterrence Effect of Whistleblowing: Evidence from Offshore Banking" (2017); Christine I. Wiedman and Chunmei Zhu, "Do the SEC Whistleblower Provisions of Dodd-Frank Deter Aggressive Financial Reporting?," available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3105521* (2017); Jaron H. Wilde, "The Deterrent Effect of Employee Whistleblowing on Firms' Financial Misreporting and Tax Aggressiveness" (2017); Professors Philip Berger and Heemin Lee, "Do Corporate Whistleblower Laws Deter Accounting Fraud?," available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3059231* ("[F]ind[ing] that exposure to Dodd-Frank reduces the likelihood of accounting fraud of treatment firms by 17% relative to control firms."); Professor Jetson Leder-Luis, "Whistleblowers, the False Claims Act, and the Behavior of Healthcare Providers" (2019); Theo Nyreod and Giancarlo Spagnold, "A Fresh Look at Whistleblower Rewards," published online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3871748; Professor Spagnolo and Theo Nyeröd, "Myths and Numbers on Whistleblower Rewards," online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3871748; "Rewarding Whistleblowers to Fight Corruption?" online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3871748; Butler, Jeffrey Vincent and Serra, Danila and Spagnolo, Giancarlo, "Motivating Whistleblowers" (October 23, 2017). *CEIS Working Paper No. 419*, Available at SSRN*: https://ssrn.com/abstract=3086671*; Ben Johnson, Minnesota House Research Department, "Do Criminal Laws Deter Crime? Deterrence Theory in Criminal Justice Policy: A Primer", available at https://www.house.leg.state.mn.us/hrd/pubs/deterrence.pdf; Andrew C. Call, et al., "Whistleblowers and Outcomes of Financial Misrepresentation Enforcement Actions," 56 J. Acct. Res. 123, 126 (2018); Jacob Raleigh, "The Deterrent Effect of Whistleblowing on Insider Trading," (Sept. 29, 2021) (unpublished manuscript), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3672026*.

commission cited to the numerous academic studies supporting these findings to significantly strengthen its whistleblower program, in part to increase deterrence:

> *Whistleblower programs, and the SEC's whistleblower program in particular, have been studied by economists who report findings consistent with award programs being effective at contributing to the discovery of violations. For example, a recent publication reports that, among other benefits, "[w]histleblower involvement [in the enforcement process] is associated with higher monetary penalties for targeted firms and employees." In addition, current working papers report that the SEC's whistleblower program deters aggressive (i.e., potentially misleading) financial reporting and insider trading.*[44]

Wall Street lobbyists and their Big Business allies continue to oppose strengthening whistleblower laws. But the fact remains: whistleblowing works. Its success at reducing white-collar crime is objectively documented, as is its utility in holding the largest fraudsters accountable and ensuring fair competition. Since the False Claims Act was amended, no less than $100 billion has been collected from white-collar criminals, money launderers, bribe-payers, sanctions-busters, and drug companies that rip-off government health-sponsored healthcare. The deterrent effect of these successful prosecutions can be estimated to be within the range of $1 to $2 trillion dollars. The key to this growth in successfully holding the most powerful special interests accountable,

[44] SEC, Notice of Proposed Rule, https://www.federalregister.gov/documents/2022/02/18/2022-03223/the-commissions-whistleblower-program-rules (Feb. 18, 2022), footnotes 78-81; SEC Final Rule, https://www.sec.gov/files/rules/final/2022/34-95620.pdf, footnotes 57, 70-71 (2022).

and establishing true equal justice under the law, is the willingness of all three branches of government to support a developing partnership between whistleblowers and law enforcement.

Making Whistleblowing a Rational Economic Activity: The Basic Framework for Successful *Qui Tam*/Whistleblower Laws

How does whistleblowing become a rational economic activity? In looking at the successful whistleblower laws three elements have proven critical.

First, there has to be an effective law enforcement agency to report to, and the penalties for the crimes being reported need to be substantial. No rational whistleblower should report to an agency that cannot or will not properly investigate a fraudster, if they are provided solid evidence of these crimes. Furthermore, no rational whistleblower should report potential crimes, if the criminals will not be held properly accountable. Why risk your job, career, and safety if nothing will come of it? Some whistleblowers will, for moral and ethical reasons, but the vast majority of potential whistleblowers will not. Not because they are weak or cowardly, but because making such reports simply is not a good rational economic choice for either themselves or their families.

Second, the Dodd-Frank Act demonstrated the importance of strict confidentiality and the ability to file claims anonymously. As the Harvard Business School study pointed out, 80% of whistleblowers who are known to their bosses report some form of retaliation. Likewise another study demonstrated that over 90% of retaliation cases are triggered by internal disclosures, where the identity of the whistleblower is known to the

bosses.[45] However, if a whistleblower can report his or her allegations confidentially the risk of retaliation drastically decreases. A company cannot fire a whistleblower if they do not know who the whistleblower is. This simple point of logic was explained by the Chief Judge of the U.S. Court of Appeals for the Fifth Circuit sixty years ago: "[T]he most effective protection from retaliation is the anonymity for the informer… [T]he shield of anonymity is preferable to the sword of punishment."[46]

In a 2018 proposed rulemaking, the SEC explained that permitting whistleblowers to "remain anonymous through the course of an investigation and resulting enforcement action" was "critically" important:

> *Indeed, our experience to date has been that approximately one-half of the whistleblowers who have received awards for information regarding their current or former employers took advantage of the opportunity to submit their tips to the Commission anonymously; the ability to report anonymously is an additional attractive feature of our program that helps to encourage company insiders and others to come forward by lessening their fear of potential exposure.*[47]

The third component of a successful whistleblower award law is a requirement that the payments be mandatory to all qualified whistleblowers, and that the payments be tied to the quality of the evidence provided. Unquestionably, this is the most important aspect to any whistleblower award law. Without a clear and enforceable right to obtain payment award laws

[45] Kohn, Stephen and Petit, Alyce and Reeves, Kate and Schweller, Geoff, Whistleblower Disclosures: An Empirical Risk Assessment (January 10, 2024). Available at SSRN: https://ssrn.com/abstract=4690852 or http://dx.doi.org/10.2139/ssrn.460852.
[46] *Writz v. Continental,* 326 F.2d 562 (5th Cir. 1964). Also see, Kohn, *Rules for Whistleblowers,* pp. 7-11.
[47] *SEC Whistleblower Rule Proposal; Release No. 34-83557;* File No. S7-16-18, p. 51.

have not and will not work. Either the government is willing to compensate the whistleblower or it is not. Whistleblowers, who are often distrustful of the government to begin with, understand that the government can deny them any compensation whatsoever, for any reason, for most potential whistleblowers there is little or no incentive to risk a good job or an excellent career to take the risks whistleblowing always implies. Discretionary award laws have all failed. Artificial limits on the amount of an award sends the wrong message to whistleblowers, and disincentive many of the best sources of information on white-collar crime, who often hold high level or well-paying jobs. Financial incentives need to motivate persons who have a lot to lose and make the risk of a potential catastrophic outcome worthwhile.

The first modern attempt to make the payment of awards rational, reasonable, and mandatory occurred when Congress amended the False Claims Act in 1986. By making the awards under that law mandatory Congress converted a moribund anti-fraud law into what has been recognized as America's most effective tool to fight fraud.[48] Congress made two key whistleblower reforms in the False Claims Act that revolutionized its impact: (1) The discretion of the United States to deny awards to otherwise qualified applicants was terminated; and (2) a minimum award was set at 15% of all collected proceeds for any qualified applicant; (3) the law contained no "cap" on the upper limit of an award. The better the evidence of wrongdoing, the higher the award. Awards were based on a percentage of the amount actually collected from the wrongdoer. The United States would always collect between 70-85% of any fine or penalty obtained due to the disclosures of the whistleblower, but the whistleblower would be

[48] Even the False Claims Act's harshest critic, the U.S. Chamber of Commerce, was forced to concede in a 2013 report that the FCA's whistleblower law was "the government's most important tool to uncover and punish against the United States." The Chamber admitted that it was "enforced largelu by whistleblowers." And that as a result successful cases had "skyrocketed." https://instituteforlegalreform.com/research/fixing-the-false-claims-act-the-case-for-compliance-focused-reforms/

rewarded for the quality of evidence and his or her cooperation with law enforcement in working to prove the underlying crimes. In short, the award mechanism would align the interests of the government prosecutors with the interests of the whistleblower, facilitating high quality prosecutions.

In 1986, Congress recognized that the failure to include a minimum reward was one of the principal reasons why the older version of the False Claims Act did not work. As explained in the law's Senate Report:

> *"The new percentages . . . create a guarantee that relators [i.e., whistleblowers] will receive at least some portion of the award if the litigation proves successful. Hearing witnesses who themselves had exposed fraud in Government contracting, expressed concern that current law fails to offer any security, financial or otherwise, to persons considering publicly exposing fraud.*
>
> *"If a potential plaintiff reads the present statute and understands that in a successful case the court may arbitrarily decide to award only a tiny fraction of the proceeds to the person who brought the action, the potential plaintiff may decide it is too risky to proceed in the face of a totally unpredictable recovery.*
>
> *"The Committee acknowledges the risks and sacrifices of [whistleblowers] . . . The setting of such a definite amount is sensible . . . the Government will still receive up to 90 percent of the proceeds—substantially more than the zero percent it would have received had the person not brought the evidence of fraud.*[49]

[49] https://kkc.com/wp-content/uploads/2020/03/FCA_Senate-Judiciary-Committee-report_July28-1986.compressed.pdf

Other older whistleblower laws also failed to include a requirement that whistleblowers be paid if they met the Congressionally set qualifications. These older laws, like the pre-1986 version of the False Claims Act, vested discretion within an executive agency to pay an award. Like the older version of the FCA, these laws all failed. In 2006, the IRS' award law was amended to mandate minimum awards of 15% to qualified whistleblowers. The results of this legislative change were dramatic, as outlined above in the Swiss banking cases.

Prior to the passage of the Dodd-Frank Act, the Securities and Exchange Commission also had a fully discretionary whistleblower award law. The SEC's Inspector General's audit No. 474 found that in its 20-year history that discretionary law resulted in payments to only five whistleblowers, who collectively obtained only $159,537 in awards. The audit was highly critical and led to an outright repeal of the law. Because of the complete failure of the older SEC reward law, Congress repealed that law in its entirety in 2010. It was replaced by the current Dodd-Frank Act reward law.

Like the 1986 amendments to the FCA, Dodd-Frank requires the SEC to pay a minimum reward to all fully qualified whistleblowers. Thereafter, the number of whistleblowers filing claims, the quality of enforcement actions, and the payments to whistleblowers all reached record numbers.

Finally, the legislative history of the Anti-Money Laundering Whistleblower Act demonstrates this point. The original AML whistleblower law, passed on January 1, 2021, did not require the Secretary of Treasury to pay awards, and set no mandatory minimum. Payments to whistleblowers were strictly discretionary and could be denied for any reason. Congress quickly recognized its mistake, and there was a timely and

aggressive bipartisan effort to fix the AML whistleblower law. On July 22, 2022, amendments to the AML law mandating a minimum award for all qualified whistleblowers was approved *unanimously* by the House Financial Services Committee, and the bill was "marked-up" for an immediate vote on the House floor.[50] The amendment made the award-granting requirements in the AML law identical to those in the Dodd-Frank Act.

In its report marking-up the AML amendments the House Financial Services Committee directly addressed this issue:

> *To combat abuse of anti-money laundering (AML) laws and to bolster enforcement of Bank Secrecy Act (BSA) regulations, AMLA included a program that requires Treasury to pay awards to whistleblowers who provide original information leading to successful enforcement actions for violating the BSA and AML requirements.*
>
> *As currently written in the statute, awards are capped at 25% with no minimum for a successful claim. According to the National Whistleblower Center, "It is highly unlikely that persons with relevant information relating to illegal money laundering and financing terrorism will risk their livelihoods, reputations and the potential of high litigation costs without reasonable financial assurances." Further, without a guaranteed fee covering incentive, it was reported that lawyers who specialize in representing potential whistleblowers were declining the cases.*

[50] See https://www.congress.gov/bill/117th-congress/house-bill/7195.

This bill remedies this issue by ensuring that whistleblowers who reveal information on money laundering receive awards of 10% to 30% of the fines imposed due to their information.[51]

Thereafter, on December 8, 2022 the Senate unanimously approved a bill identical to the House bill.[52] The central reform of both the House and Senate bills was to make the payment of awards mandatory (with no cap or limit on the amount of an award), thus conforming the AML whistleblower law to the key provisions in the False Claims Act, Dodd-Frank, and the IRS whistleblower laws. With only days remaining in the 117th Congress, in the midst of conflicting agendas and priorities, Congress ensured that the AML law would be amended to require mandatory awards. At the eleventh hour, the AML Whistleblower Enhancement Act was attached to the 2022 federal budget (without opposition) and became law as part of the federal budget approved as the last action of the 117th Congress.

As the award laws have matured, other less controversial provisions have become widely accepted. These include:

- The creation of a Whistleblower Office to publicize the award program, train investigators on working with whistleblowers, coordinate intake and the processing of cases, forward the cases to the responsible prosecutors/investigators in the field, and process the payment of awards to qualified applicants;
- A "related action" provision, that encourages whistleblowers to fully cooperate with other agencies that may benefit from their information, and qualifying them for a potential award based on other successful prosecutions;

[51] House Rep. 117-423, online at https://www.congress.gov/117/crpt/hrpt423/CRPT117hrpt423.pdf.

[52] See https://www.congress.gov/bill/117th-congress/senate-bill/3316/cosponsors.

- The recognition that simple participants in a fraud should not be excluded from the award programs, except if they are convicted of their crimes. However, the "kingpins" or those who "plan and initiate" the crimes should be excluded from the programs.

All of these enhancements implicitly recognize that whistleblowers are rational economic actors, and that laws must be created to make whistleblowing practical and realistic to the average worker. The increase in rationally based award laws are based on a recognition that the whistleblowers are bringing to law enforcement highly useful intelligence and evidence, and that procedures are needed to maximize the benefits of incentivizing employees to take the risks of blowing the whistle to report fraud and corruption.

The Vindication of Sutherland and Becker

Starting in the 1930's Professors Sutherland and Becker developed a theoretical framework for combating white-collar crimes. But until the False Claims Act was amended in 1986 these theories were largely untested. Once whistleblowers were empowered the predicted explosion in successful prosecutions and corresponding deterrence occurred. The modernized award laws solve the detection dilemma that, for years, had undermined enforcement of anti-corruption laws. Only then was it clear that Sutherland and Becker's understanding of how to fight white-collar crime were vindicated. 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, both in the United States and transnationally. Modern whistleblower laws make reporting fraud and corruption a rational economic activity.