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**Response to Questionnaire**

**Submitted by Stephen M. Kohn**
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**Founding Director, National Whistleblower Center**
**Before the European Parliament**
**Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance**

1. *As an expert on whistleblowing, what measures would you propose to this Parliament to make protection of whistle-blowers more effective in the EU, particularly when the whistleblowing involves money-laundering allegations?*

The EU should harmonize Europe's whistleblower protections with the highly effective whistleblower laws that are part of the U.S. tax code (covering illegal offshore banking and money laundering) and the Dodd-Frank Act (covering the financial services industry, publicly traded corporations, most banks, and violations of the Foreign Corrupt Practices Act). These laws have been highly praised by the regulatory agencies responsible for their administration, and have resulted in significant increases in the detection and enforcement of laws prohibiting money laundering, financial crimes and tax evasion. These legal provisions are codified as follows: Internal Revenue Code, 26 U.S.C. § 7623, Securities Exchange Act, 15 U.S.C. § 78u-6, Commodity Exchange Act, 7 U.S.C. § 26, and the False Claims Act, 31 U.S.C. § 3729-3732.

Whistleblower laws must be designed to undercut a fear to report wrongdoing, and a culture of silence that permits crimes, such as money laundering, to go undetected by law enforcement for years. As explained in the U.S. Senate report adopting the whistleblower protections in the Sarbanes-Oxley Act, "These examples further expose a culture, supported by law, that discourage employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity.

The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied." *See, e.g.* https://www.kkc.com/assets/site_18/files/senate%20report%20107-146%20(2002)%20_%20legislative%20history%20of%20sox%20whistleblower%20provisions.pdf; Stephen M. Kohn, *The New Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself*, 3rd ed. (Guildford, CT: Lyons Press, 2017), 34, 35, 38, 182, 282, 293, 306.

2. *Which are in your opinion best practices in the legislation on the protection of whistle-blowers and the implementation thereof?*

The laws referenced above incorporate the "best practices" developed after experimenting with numerous models for whistleblower protection over a 50-year time period (the State of California first adopted whistleblower protections in the private sector in 1959, and the Supreme Court of the United States first recognized whistleblower protections for government employees in 1968).

The premise of the modern whistleblower laws is to incentivize employees to report hidden frauds. It has been well documented that financial frauds, from illegal banking, to money laundering, to foreign bribery, are all designed to be conducted in secret. In other words, a successful fraud is a fraud for which the victims are not aware. Thus, without an "insider" who can document the frauds, it is very hard to detect and police these types of crimes. This is why the best whistleblower laws are in the financial sector, where the laws are specifically designed to target the detection of fraud and provide a reward to employees who risk their careers (or even their safety) to report significant instances of fraud or corruption that are unknown to law enforcement officials.

Summary of best practices:

A. A Whistleblower Office, as a government agency, with a professional and well trained staff, capable of accepting confidential or anonymous complaints, providing detailed information to prospective whistleblowers, operating a well-designed web page to inform potential whistleblowers of their rights, and coordinating/administering the whistleblower claims that are filed. A critical element of this office is to develop trust, over time, between whistleblowers (and their attorneys), so the office is utilized to develop major cases. The right to file a case/claim with the Whistleblower Office anonymously and/or confidentiality. The best way to prevent retaliation is for an employer (or the target of the whistleblower filing) not to know who the whistleblower is.

   Confidential and anonymous reporting is one of the most important steps in encouraging employees to step forward. It is well documented that persons who insist upon telling the truth/blowing the whistle will be shunned in all organizations. *See,* Reuben, Ernesto and Stephenson, Matt. Nobody Likes a Rat: On the Willingness to Report Lies and the Consequences Thereof, 2012.
   https://www.kkc.com/assets/site_18/files/resources/ernesto%20reuben-nobody%20lies%20a%20rate-%20on%20the%20willingness%20to%20report%20lies%20and%20the%20consquences%20thereof.pdf.

B. The confidentiality must attach to all phases of the investigation into the whistleblower's claims. In other words, the investigators must be required to conduct their investigation (and handle the evidence provided by the whistleblower) in a manner that will not reveal the identity of the whistleblower, or if possible, not reveal the fact that there is a whistleblower.

C. Compensation must be predicated on the quality of information provided by the whistleblower, not the amount of harm the employee suffers. The most successful anti-fraud whistleblower laws have been premised on incentivizing employees to report high-quality information to law enforcement, and then to cooperate with the investigation of the potential crime. The whistleblower would be compensated only if his or her original information resulted in a successful enforcement action. Compensation is based on a percentage of the recovery obtained by the government. Thus, the whistleblower would only obtain compensation under this framework if their information was the triggering factor in a successful enforcement action. Furthermore, there is no direct cost to the taxpayers or citizenry. All of the compensation is obtained directly from the sanctions paid by the wrongdoer as the result of a successful enforcement action.

In this manner the whistleblower is incentivized to produce the highest quality evidence in a manner that would be admissible in a regulatory proceeding to demonstrate that money laundering, tax evasion or other frauds occurred.

The best practices under this framework include the following: (a) a guaranteed minimum payment. This minimum payment is set in a range of 10% - 30% of the collected proceeds obtained directly from the wrongdoer. For example, the IRS tax whistleblower law sets the minimum payment at 15%, while the Dodd-Frank Act sets the minimum payment at 10%. These guaranteed minimum payments for a properly qualified whistleblower provide the employee with the guaranteed compensation necessary to incentivize taking the risk of becoming a whistleblower; (b) Judicial review available if the government and whistleblower cannot reach an agreement related to eligibility or the amount of compensation; (c) the program is administered by the "Whistleblower Office" housed in the regulatory agency with jurisdiction over the substantive violations reported by the employee. The awards are determined by the head of the whistleblower office, subject to judicial review; (d) rules for eligibility are reasonable and designed to incentivize reporting.

Every regulatory agency that administers these incentive programs, including the Securities and Exchange Commission, the Internal Revenue Service, the Commodity Futures Trading Commission and the Department of Justice, have all praised these whistleblower incentive programs as a cornerstone for the effective detection, prevention and prosecution of fraud. They have also been highly praised on a bi-partisan basis by leading members of the U.S. Congress. *See,* Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law, supporting the expansion of whistleblower incentives, https://www.kkc.com/assets/site_18/files/firrea_ag-holders-speech-sep-17-2014.pdf.

The success of the IRS whistleblower incentives program is extremely well documented. John A. Koskinen, Commissioner of the IRS, Remarks before the U.S. Council for International Business-OECD International Tax Conference; Stephen M. Kohn. *13.769 Billion Reasons to Thank Whistleblowers on Tax Day*, April 18, 2016. https://www.whistleblowersblog.org/2016/04/articles/tax-whistleblowers/13-769-billion-reasons-to-thank-whistleblowers-on-tax-day/. IRS Offshore Voluntary Disclosure Efforts Produce $6.5 Billion; 45,000 Taxpayers Participate. https://www.irs.gov/newsroom/irs-

offshore-voluntary-disclosure-efforts-produce-65-billion-45000-taxpayers-participate; Department of Justice, *Swiss Bank Program*. https://www.justice.gov/tax/swiss-bank-program.

The success of the False Claims Act whistleblower incentives law is undisputed. *See,* Senator Charles Grassley, Chairman of U.S. Senate Judiciary Committee, Speech given on National Whistleblower Day (July 30, 2018)( *Video*)*;* (Transcript of *Speech*); Department of Justice Press Release, "Justice Department Recovers Over $3.7 Billion From False Claims Act Cases in Fiscal Year 2017; Assistant Attorney General Stuart Delery - Remarks at American Bar Association's 10th National Institute on the Civil False Claims Act and Qui Tam Enforcement (2014); Attorney General, U.S. Department of Justice, remarks at the 25th anniversary of the False Claims Act (January 31, 2012).

The securities and commodities fraud whistleblower laws have likewise been highly praised by the officials with responsibility over these programs. *See* SEC Chairman Mary Jo White, Securities and Exchange Commission*, Remarks at the Securities Enforcement Forum,* Washington DC (October 2013)(" *The SEC "whistleblower program . . . has rapidly become a tremendously effective force-multiplier, generating high quality tips, and in some cases virtual blueprints laying out an entire enterprise, directing us to the heart of the alleged fraud"*); Kevin M. O'Neill, Deputy Secretary, Securities and Exchange Commission*, Order Determining Whistleblower Award Claim; Christopher Ehrman, Director of the CFTC's Whistleblower Office, Press Release "CFTC Announces Multiple Whistleblower Awards."* Also see, Report of National Whistleblower Center on the Foreign Corrupt Practices Act, Foreign Corrupt Practices Act: How the Whistleblower Reward Provisions Have Worked.

D. Protections against retaliation. If a whistleblower is not confidential, and suffers an adverse action, he or she must be able to pursue an employment case. The "best practices" for these claims include the following: (a) direct access to court or other judicial remedies available to victims of personal injury; (b) adjudicatory procedures that ensure full due process, and the ability to obtain injunctive relief, including a preliminary injunction for reinstatement; (c) a broad definition of a protected disclosure, to include both internal disclosures to supervisors/compliance programs and direct disclosures to regulatory or law enforcement agencies; (d) the ability for the judicial tribunal to award "affirmative relief" to abate any chilling effect caused by the retaliation; (e) no limit on the amount of damages, including back pay.

E. The remedies available to a whistleblower in a retaliation case must be designed to make the employee "whole" and realistically compensate an employee for the damages usually incurred in a whistleblower case, including loss of reputation, emotional distress, wage loss and anticipated future losses to his or her career. An employee should have the option of obtaining reinstatement to their prior position or "front pay," to compensate the employee for losses in future income if he or she is not reinstated. Compensatory and punitive damages should be available both to make an employee fully "whole," and to punish employers who engage in willful and abusive retaliation. Attorney fees must be available to whistleblowers who prevail in their cases, and these fees must be paid at market rates

(not the rates for which an indigent or wrongfully discharged employee could afford). An excellent description of the harms suffered by whistleblowers, even those who prevail in their cases, was published in the New England Journal of Medicine by Kesselheim, Aaron S., Studdert, David, and Mello, Michelle. *Whistle-Blowers' Experiences in Fraud Litigation against Pharmaceutical Companies*, 2010. https://www.nejm.org/doi/full/10.1056/NEJMsr0912039.

F. Prohibition against the abusive use of nondisclosure agreements ("NDAs"). NDAs, which are commonly used in employment agreements or severance agreements, must be restricted in scope to avoid any prohibition against an employee's right to lawfully disclose misconduct, suspected violations of law or potential financial crimes to law enforcement, regulatory agencies, or Members of Parliament. *See* SEC Order issuing regulatory sanctions KBR/Brown & Root based on NDAs. *In re KBR*.

3. *How should breaches of the legislation on the protection of whistle blowers be sanctioned? In other words, which sanctions are more effective to ensure an effective protection of whistle-blowers, particularly when the situation involves money laundering in banks?*

Retaliation against whistleblowers should be considered a regulatory or criminal offense. The U.S. Securities and Exchange Commission ("SEC"), among other agencies, has classified retaliation as a securities violation, and has sanctioned companies that engage in retaliation (i.e. regulatory fines and penalties). In 2002, in response to major corporate scandals, the obstruction of justice laws were amended as part of the Sarbanes-Oxley corporate reform law. This amendment made the intentional interference with the "livelihood" of "any person" in retaliation for providing "truthful" information concerning a possible crime to federal law enforcement officials a criminal felony, subjecting the retaliator to a ten year prison sentence. However, the most common, and effective, practical way to punish or sanction those who commit retaliation is to permit a court or judicial tribunal to award punitive damages to the victim. The federal whistleblower obstruction of justice law is available here: 18 U.S.C. §1513.