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# Project On Government Oversight

May 11, 2011

Chairman Scott Garrett
Ranking Member Maxine Waters
Subcommittee on Capital Markets, Insurance, and Government-Sponsored Enterprises
House Committee on Financial Services
House of Representatives
Washington, DC 20512

RE: Today's hearing regarding the draft bill proposed by Representative Grimm to amend the whistleblower incentives and protections programs at the SEC and CFTC

Chairman Garrett and Ranking Member Waters:

We are writing to express our deep concerns with the draft bill proposed by Representative Michael Grimm (R-NY) to amend the whistleblower award programs at the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) before the programs have been fully implemented. Any modifications are premature, and would preempt the SEC and CFTC's rulemaking to finalize the terms and conditions under which whistleblowers could receive an award for disclosing corporate misconduct. After implementation and a study of the program is issued by the SEC Inspector General, we encourage the Subcommittee to explore those recommendations for how these programs might be improved by incentivizing more quality whistleblower tips, enhancing the investigations and enforcement actions connected to these tips, or even by supporting strong internal compliance systems at financial firms. Unfortunately, Rep. Grimm's legislation would do quite the opposite, gutting the fundamental features of the programs and making enforcement more difficult.

The Grimm bill is an extreme approach that would silence would-be whistleblowers, endanger critical inside informants, undermine investigations, hamstring enforcement at the SEC and CFTC, and provide lawbreaking financial firms with an escape hatch from accountability.

In short, the Grimm bill would greatly harm the interests of investors, shareholders, and taxpayers. This is not the right approach to deal with any legitimate concerns about the whistleblower programs raised by the financial industry.

POGO has a keen interest in encouraging whistleblowers to assist financial regulatory agencies in uncovering and deterring wrongdoing. Founded in 1981, the Project On Government Oversight (POGO) is a nonpartisan independent watchdog that champions good government reforms and conducts investigations to achieve a more effective, accountable, open, and ethical federal government.

Therefore, we strongly support the new whistleblower award programs at the SEC and CFTC enacted in the Dodd-Frank Wall Street Reform and Consumer Protection Act because incentives and protections for whistleblowers are a solid investment in strengthening the SEC and CFTC's ability to monitor securities and commodities markets and enforce the law to safeguard investors and taxpayers. Indeed, these programs are needed now more than ever to avert another Wall Street collapse and to monitor speculation on run-away oil prices.

**Whistleblowers Are Essential to Enforcement**

There is no doubt that whistleblowers play an essential role in exposing corporate misconduct. Whistleblowers have returned more than $27 billion taxpayer dollars since 1987 through the hugely successful False Claims Act award program,[1] upon which the SEC and CFTC whistleblower award programs are modeled. The False Claims Act allows individuals to file claims that government contractors are defrauding the American taxpayers. These "citizen whistleblowers" may receive between 15 and 25 percent of any recovered damages, providing a strong incentive for them to file claims.

A recent survey conducted by the Association of Certified Fraud Examiners found that nearly half of occupational fraud cases were uncovered by a tip or complaint from an employee, customer, vendor, or other source. In the case of detecting fraud perpetrated by owners and executives, tips played an even more important role.[2] Another recent study confirmed again that whistleblowers play a bigger role than external auditors, government regulators, self-regulatory organizations, or the media in detecting fraud.[3]

Indeed, at the SEC whistleblowers have featured prominently in numerous high-profile enforcement cases. In late 2008, for instance, Glen and Karen Kaiser provided the SEC with information and documents that enabled the agency to reopen its investigation into insider trading at Pequot Capital Management, formerly the nation's largest hedge fund, leading to a $28 million settlement.[4] And the public is now well aware of the attempts by Harry Markopolos to provide the SEC with detailed evidence of Bernie Madoff's Ponzi scheme.

Last year in March, the SEC Office of Inspector General (SEC OIG) identified the lack of a robust whistleblower program as a contributor to the failure of the SEC to make use of tips and to encourage more whistleblowers to come forward with relevant information, and recommended expanding the program.[5] The SEC likewise recognized the need for more authority and sought

[1] Taxpayers Against Fraud, "Fraud Statistics – Overview, October 1, 1987 through September 30, 2010," p. 2. http://www.taf.org/FCA-stats-2010.pdf (Downloaded May 10, 2011)
[2] Association of Certified Fraud Examiners, *2008 Report to the Nation on Occupational Fraud & Abuse*, pp. 18-23. http://www.acfe.com/documents/2008-rttn.pdf (Downloaded May 10, 2011) (hereinafter "Report to the Nation")
[3] Alexander Dyck, Adair Morse, and Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?" http://www.afajof.org/afa/forthcoming/4820p.pdf (Downloaded May 10, 2011)
[4] Securities and Exchange Commission, "SEC Awards $1 Million for Information Provided in Insider Trading Case," July 23, 2010. http://www.sec.gov/litigation/litreleases/2010/lr21601.htm (Downloaded May 10, 2011)
[5] Securities and Exchange Commission, Office of Inspector General, *Assessment of the SEC's Bounty Program* (Report No. 474), March 29, 2010. http://www.sec-oig.gov/Reports/AuditsInspections/2010/474.pdf (Downloaded December 17, 2010)

the legislation incorporated into Dodd-Frank to "establish a formal program with dedicated staff and state-of-the-art policies and procedures."[6]

In 2009, SEC Chairman Mary Schapiro testified before the financial services appropriations subcommittee calling for expanded authority to award and protect whistleblowers, stating "[w]histleblowers tend to do a lot of the work for you—hand you something that is pretty fully baked." In addition, she said a robust program would enable the SEC to "run with that kind of information and to pursue cases in a much more aggressive way."[7] And indeed, Chairman Schapiro recently noted that since creating the SEC whistleblower office, the SEC has seen a "significant increase in high-quality tips." In other words, Section 922 of the Dodd-Frank Act is already bearing fruit.[8]

**The Whistleblower Programs Are Thoughtfully Crafted**

Congress included the SEC's request for expanded whistleblower award authority in Section 922 of the Dodd-Frank Act, and created a similar program at the CFTC in Section 748.[9]

Section 922 added Section 21F to the Securities Exchange Act of 1934 and essentially replaced the SEC's less useful and extremely limited program with a robust program incorporating best practices.[10] Section 21F provides several new tools to expand and strengthen the program (these are mirrored in the CFTC program):

- **Allowing Tips on All Enforcement Matters:** Under the previous program, the SEC could only provide awards for tips related to insider trading; the SEC can now provide an award related to any administrative or judicial action brought under the securities laws that results in sanctions of more than $1 million.
- **Incentivizing Whistleblowers to Take the Risk:** Under the previous program, whistleblowers could only receive up to 10 percent of the amount recovered; under the new program, if an award is provided, it can be anywhere from 10 to 30 percent of the amount recovered. The minimum award for the IRS and False Claims Act whistleblower programs is 15 percent.

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[6] Memorandum from Robert Khuzami, Director, SEC Division of Enforcement, to H. David Kotz, SEC Inspector General, regarding Enforcement's response to the Office of Inspector General's Report, Assessment of SEC Bounty Program, Report No. 474, March 24, 2010, p. 28. http://www.sec-oig.gov/Reports/AuditsInspections/2010/474.pdf (Downloaded May 10, 2011)

[7] Hearing before the House Appropriations Subcommittee on Financial Services and General Government, "Financial Services and General Government Appropriations for 2010," March 11, 2009. http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg50865/pdf/CHRG-111hhrg50865.pdf (Downloaded May 10, 2011)

[8] Melanie Waddell, "SEC's Mary Schapiro Talks About Whistleblower Office, 12b-l: Exclusive Interview," (April 26 2011).

[9] 111th Congress, "Dodd-Frank Wall Street Reform and Consumer Protection Act" (Public Law 111-203), July 21, 2010, Sections 922 and 748. http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf (Downloaded May 10, 2011)

[10] Securities Exchange Act of 1934, Section 21F. http://www.sec.gov/about/laws/sea34.pdf (Downloaded May 10, 2011)

- **Providing Anonymity:** Whistleblowers can make disclosures anonymously, as long as they're represented by counsel. Anonymity was essential to the first whistleblower to receive an official award under the new program at the IRS after helping to return $20 million to taxpayers.[11]

- **Protecting Whistleblowers:** Whistleblowers cannot be retaliated against for providing a tip to the SEC, and can file for relief in U.S. District Court including reinstatement and back-pay if they are retaliated against.
- **Evaluating the New Program:** Of critical importance is the built-in accountability measure in Section 922 that requires a full-scale examination of the whistleblower program by the SEC OIG 30 months after enactment. This study will tell Congress and others how well the program is working, and if improvements are needed.

The Senate Banking Committee report accompanying the Dodd-Frank bill elaborates on Congress's reasons for including Section 922:

> The Committee, having heard from several parties involved in whistleblower related cases, has determined that enforceability and relatively predictable level of payout will go a long way to motivate potential whistleblowers to come forward and help the government identify and prosecute fraudsters.
>
> The Committee intends for this program to be used actively with ample rewards to promote the integrity of the financial markets.[12]

The new program with more incentives has already begun to work, even before it has been fully implemented. Tips have already begun to surge, the SEC told *The Wall Street Journal*. "We've gotten some very high-quality tips," said SEC official Stephen Cohen.[13]

The SEC and CFTC are poised to issue their final regulations. The SEC has engaged in a robust public comment period in which it has heard from a wide variety of stakeholders and it is well aware of the concerns of the financial industry. The draft rules themselves attempted to address some of the concerns raised by the financial industry. For example, in response to concerns that employees might unnecessarily bypass internal compliance, the SEC proposed incentivizing internal reporting by giving the Commission the authority to consider this in award amounts.[14]

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[11] "Local whistleblower gets $4.5M from the IRS," Associated Press, April 9, 2011. http://articles.philly.com/2011-04-09/news/29400784_1_tax-underpayments-irs-whistleblower-office-taxes-and-interest (Downloaded May 10, 2011)

[12] Senate Committee on Banking, Housing, and Urban Affairs, *The Restoring American Financial Stability Act of 2010* (Report No. 111-176), April 30, 2010, p. 112. http://www.gpo.gov/fdsys/pkg/CRPT-111srpt176/pdf/CRPT-111srpt176.pdf (Downloaded December 17, 2010)

[13] Jessica Holzer and Fawn Johnson, "Larger Bounties Spur Surge in Fraud Tips," *The Wall Street Journal*, September 7, 2010. http://online.wsj.com/article/SB10001424052748704855104575470080998966388.html (Downloaded May 10, 2011)

[14] Securities and Exchange Commission, "Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934," p. 51. http://sec.gov/rules/proposed/2010/34-63237fr.pdf (Downloaded May 10, 2010)

Not surprisingly, during the rulemaking financial industry lobbyists have been urging for more deference and outright rollbacks of the programs. POGO's comments to the SEC and CFTC oppose some of these proposals.[15]

**The Grimm Bill Would Gut the Whistleblower Programs before they Begin**

The Grimm draft bill considered by the Subcommittee today appears to be a direct response to many of the unsubstantiated industry concerns, without consideration for how to improve investigations and enforcement to better protect investors and taxpayers. It is also represents a troubling attempt to interfere with the SEC's thorough and transparent effort to craft implementing regulations that effectuate congressional intent.

Specifically, the Grimm draft bill would (1) **tip off lawbreakers** by requiring internal whistleblowing as a condition to receiving any award from the SEC, and requiring the SEC to provide notification before taking enforcement action based on a whistleblower disclosure, thereby permitting companies to thwart SEC enforcement actions by intimidating witnesses and destroying or altering evidence; (2) **disqualify many would-be whistleblowers** by allowing companies to require internal reporting in employment agreements; (3) **deny anonymity and counsel** by prohibiting contingency fee representation of whistleblowers; (4) **remove the incentive to inform regulators** by eliminating a minimum award requirement and giving the SEC the discretion to give whistleblowers nominal awards; (5) **strip protections for whistleblowers** who face retaliation for contacting the SEC or CFTC; and (6) **create an accountability loophole** by allowing special treatment for self-reporting if an accused firm does an internal investigation and makes some corrective action.

*Tipping Off Lawbreakers*

Internal reporting and notification requirements undermine investigations by the SEC and law enforcement. The Grimm bill would require whistleblowers to report violations to their employers *before* reporting to the SEC and CFTC, and additionally require the SEC to notify lawbreakers *before* taking enforcement actions based on whistleblower information. This would severely undermine enforcement by reducing the number of tips received by the regulators, and potentially putting valuable informants at risk for retaliation and limiting their access to key evidence. Lawbreaking financial entities would be given the opportunity to thwart enforcement actions by intimidating witnesses and destroying or altering evidence. It is hard to imagine requiring any law enforcement agency to tip off suspects in such a way.

In addition, internal reporting is not a prerequisite to obtaining a reward under other government whistleblower programs. To the contrary, under the False Claims Act, *qui tam* actions must be filed under seal, which gives the Department of Justice an opportunity to conduct an investigation before the defendant can destroy, conceal or alter evidence.

[15] Project On Government Oversight, "POGO's public comment regarding the SEC's whistleblower award program," December 17, 2010. http://www.pogo.org/pogo-files/letters/financial-oversight/fo-fra-20101217.html; and Project On Government Oversight, "POGO's public comment regarding the CFTC's whistleblower award program," February 4, 2011. http://www.pogo.org/pogo-files/letters/financial-oversight/fo-fra-20110204.html

The Grimm bill assumes good faith on the part of all financial firms. But lawful firms acting in good faith already have nothing to fear from the whistleblower programs. These programs are specifically designed to help the SEC and CFTC take action against firms committing large-scale violations—those resulting in monetary sanctions of $1 million or more. Moreover, if internal compliance programs were effective, then presumably the large-scale, rampant fraud in the financial industry that precipitated the recent economic crisis would have been identified and halted by such programs.

Chairman Schapiro pointed out the need to leverage third parties for high-quality leads and investigations to lead to enforcement:

> We get thousands of tips every year, yet very few of these tips come from those closest to an ongoing fraud. Whistleblowers can be a source of valuable firsthand information that may otherwise not come to light. These high-quality leads can be crucial to protecting investors and recovering ill-gotten gains from wrongdoers.[16]

Most firms can expect internal reporting in any case. It is well documented that most whistleblowers report internally first.[17] Still, the SEC also has proposed rules to encourage internal reporting by treating an employee as a whistleblower as of the date the report was made to the employer if the same information was provided to the SEC within 90 days. Also, it proposed permitting the SEC to consider a higher award for those who sought to resolve the violation by first using an internal compliance program.

In public comments submitted to the SEC and CFTC, POGO warned that calls by the Chamber of Commerce and other groups to require internal reporting would jeopardize the government's ability to learn about corporate fraud. This is especially true in cases where senior managers and executives are implicated in the alleged fraud. For instance, the Association of Certified Fraud Examiners found that "internal controls were not as effective at detecting frauds committed by top-level perpetrators, as these individuals are often uniquely positioned to override even the best-designed controls."[18] Where upper management is profiting from a fraudulent scheme, it would obviously be futile for a whistleblower to use internal reporting mechanisms to blow the whistle. That is why it is so important to incentivize corporate insiders with first-hand knowledge of fraud to blow the whistle to the SEC. If companies want to encourage internal whistleblowing, they should strengthen their internal compliance programs and demonstrate to their employee that such programs will respond to their concerns effectively and will not retaliate against whistleblowers.

The Grimm bill purports to address the demonstrated shortcomings in internal controls by offering that the internal reporting requirement *might* be waived by the SEC and CFTC if the wrongdoing observed by the whistleblower involves high-level management or evidence of bad

[16] Securities and Exchange Commission, "SEC Proposes New Whistleblower Program Under Dodd-Frank Act," November 3, 2010. http://www.sec.gov/news/press/2010/2010-213.htm (Downloaded May 10, 2011)
[17] Ethics Resource Center, *Blowing the Whistle on Workplace Misconduct*, December 2010, p. 5. http://www.ethics.org/files/u5/WhistleblowerWP.pdf (Downloaded May 10, 2011)
[18] "Report to the Nation," p. 19

faith in the firms' internal investigation. However, this proposal is based on the ludicrous premise that the regulators would be able to assess these factors in a preliminary investigation not lasting more than 30 days. It is hard to imagine any law enforcement entity being able to gather enough evidence to make these determinations in such a short timeframe.

It also is difficult to imagine many, if any, whistleblowers taking a gamble that the agency might waive internal reporting. Meanwhile, the high-stakes information in their possession that could lead to uncovering massive securities and commodities violations would be lost.

Financial industry lobbyists and other opponents of the whistleblower program such as the Chamber of Commerce have argued that internal compliance systems at financial firms will be endangered or degraded by strong incentives and protections for whistleblowers.[19] In fact, quite the opposite is true: strong whistleblower programs at the SEC and CFTC ensures compliance systems at financial firms will be strengthened.

Indeed, many consultants and law firms have advised firms to avoid running afoul of the new whistleblower rules by, for instance, building and maintaining a "robust compliance and reporting system to increase the likelihood that possible violations are reported early and internally."[20] This response seems reasonable and likely to improve not only internal reporting systems, but also improve the corporate culture within firms and thwart wrongdoing. This is exactly the kind of deterrent that is needed. The specific recommendations for beefing up compliance programs are not expensive or burdensome. These are commonsense, best practices that should already be in place by firms wishing to avoid violations of law.

*Disqualifying Legitimate Whistleblowers*

The SEC's proposed rule was already overly deferential to industry concerns that the expanded whistleblower award program might encourage employees to bypass existing legitimate internal investigations. For instance, the proposed rule would generally not consider whistleblower awards for people who have pre-existing legal or contractual duty to report their information, attorneys, public accountants, foreign government officials, and employees who learn about violations through a company's compliance program, or employees who are in positions of responsibility and the disclosure was made to them with the expectation that it would be addressed.

POGO has concerns that this proposed rule goes too far. For instance, it would exclude an earnest supervisor who decides to blow the whistle, but who first learned about the wrongdoing from an employee naturally seeking assistance from his or her boss. Also, employment contracts could be used by financial firms to disqualify would-be whistleblowers under this rule.

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[19] Letter from Americans for Limited Government, Ryder Systems, Inc., et al., to Securities and Exchange Commission regarding "Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934," December 7, 2010. http://sec.gov/comments/s7-33-10/s73310-110.pdf (Downloaded May 10, 2011)

[20] Jacko Law Group, PC, "Developing Internal Reporting Mechanisms in the Wake of the Whistleblower Incentive Program," September 2010, p. 3. http://www.jackolg.com/CM/Careers/JLG%20Legal%20Tip%20-%20Developing%20Internal%20Reporting%20Mechanisms%20in%20the%20Wake%20of%20the%20Whistelblower%20Incentive%20Program%20-%2009.2010.pdf (Downloaded May 10, 2011)

But the Grimm bill would go much farther, silencing just about anyone who might have knowledge of wrongdoing. It would deny incentives and awards to any whistleblower with a contractual obligation to cause the employer to investigate or respond to the misconduct or violations—basically, any employee could be disqualified by signing an employment agreement stipulating this requirement.[21] It is likely that more and more employment agreements will require internal reporting of wrongdoing, but Congress should not make that employee ineligible to participate in the whistleblower program. However, we strongly disagree that any employment contract should disqualify a whistleblower from participating in the program or nullify their rights and protections. We do agree with the SEC-proposed rule which states that "no person may take any action to impede a whistleblower from communicating directly with the Commission staff about a potential securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement...with respect to such communications."

Additionally, the Grimm bill gives the SEC and CFTC enormous discretion to determine if a whistleblower should be disqualified after having determined culpability with no due process rights. The provision calls for excluding whistleblowers "otherwise determined by the Commission to have committed, facilitated, participated in, or otherwise have been complicit in misconduct related to such violation." Yet, this determination would be made outside a court of law, with no requirement for a hearing or due process rights. Wrongdoers should not be rewarded, but the Grimm proposal gives the SEC the authority to deem just about any whistleblower culpable.

Section 21F already disqualifies individuals convicted of a crime related to the violation. The SEC also proposed to disqualify those who "directed, planned or initiated" the violation. Notably, the IRS program denies the claims of those convicted of criminal conduct arising from his or her role in initiating the action leading to tax underpayment, but stipulates that if the whistleblower planned or executed the violation but has not been convicted, the whistleblower office might simply reduce the award.[22]

*Denying Whistleblowers Anonymity and Representation by Counsel*

The Grimm bill also would deny whistleblowers the ability to retain counsel on contingency and participate in the program. Contingency fee representation is often the only way a whistleblower who has been fired for exposing a crime can afford representation. Most whistleblowers can not afford attorney fees and can only be represented if those fees are contingent on receiving an award. Contingency fee representation also provides a strong incentive to attorneys to take only the strongest cases, thereby eliminating many frivolous claims.

Because the Dodd-Frank law requires that whistleblowers be represented by counsel as a condition of anonymity, the disqualification of those with contingency fee representation would deny most whistleblowers the ability to work with the enforcement agencies and remain

[21] Grimm Bill dated May 4, 2011; Section 1(a)(2)(E). [Do you want to use this footnote for other sections where we reference the Grimm bill?)

[22] Internal Revenue Service, "Claims Submitted to the IRS Whistleblower Office under Section 7623." http://www.irs.gov/pub/irs-drop/n-08-04.pdf (Downloaded May 10, 2011)

anonymous. The option of anonymity is not only essential to encourage some whistleblowers to come forward, it also is often critical to an effective investigation by the agencies.

For instance, the recent IRS whistleblower who was an in-house CPA for a large national financial services firm which declined to report a $20 million-plus liability was provided anonymity, and counsels for the whistleblower stated it was an important condition for that individual's participation in the case.

*Removing the Incentive for Whistleblowers*

The Grimm bill would remove the minimum award possible under the program. The SEC and CFTC minimums are already under the standard minimum of 15 percent for the False Claims Act and IRS whistleblower programs. In fact, in 2006 Congress created a new minimum award for the IRS program to ensure more quality tips.[23] According to reports to Congress, the result has been a large jump in tips, from 2,740 cases in 2005 to 5,678 in 2009.[24] The Daily Mail reported that "hundreds of them alleged tax underpayments of more than $10million, and dozens more underpayments of $100million or more."[25]

Regarding the IRS program, Patrick Burns, president of Taxpayers Against Fraud, notes, "This law is not designed to snag the guppies, but to harpoon the whales. Whistleblower programmes have been incredibly successful in the arena of health care and defence spending, and now they are being tried as a weapon against tax cheats and Wall Street scoundrels."[26]

Likewise, if the SEC wants to "harpoon the whales" then the minimum incentive must be at least as high as mandated in Dodd-Frank, but likely higher, to match the minimums at the existing successful whistleblower programs at the DOJ and IRS.

*Stripping Protections for Whistleblowers*

The Grimm draft bill would also gut the important protections against retaliation in the whistleblower reward provisions of the Dodd-Frank Act. The Dodd-Frank Act includes protections against retaliation that are consistent with several other laws that protect a host of private sector employees, including those in financial services, manufacturing, food production and distribution, defense contracting, transportation, and healthcare.[27] It provides that those who come forward to the SEC and CFTC will have similar rights to bring an action in court if they are discharged, demoted, suspended, threatened, harassed, or discriminated against as a result.

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[23] 109th Congress, "Tax Relief and Health Care Act of 2006" (Public Law 109-432), December 20, 2006, Section 406. http://www.gpo.gov/fdsys/pkg/PLAW-109publ432/pdf/PLAW-109publ432.pdf (Downloaded May 10, 2011)
[24] Internal Revenue Service, "FY 2009 Annual Report to Congress on the Use of Section 7623," p. 9. http://www.irs.gov/pub/irs-utl/whistleblowerfy09rtc.pdf (Downloaded May 11, 2011)
[25] "'Encourage others to squeal': IRS awards $4.5m to accountant after tip off in first ever whistleblower award," *Daily Mail*, April 8, 2011. http://www.dailymail.co.uk/news/article-1374938/IRS-gives-4-5m-accountant-tip-whistleblower-award.html#ixzz1M3KMjnAn (Downloaded May 11, 2011) (hereinafter "IRS Awards $4.5 Million to Accountant")
[26] "IRS Awards $4.5 Million to Accountant"
[27] Department of Labor, Occupational Safety & Health Administration, "The Whistleblower Program," March 29, 2011. http://www.whistleblowers.gov/index.html (Downloaded May 11, 2011)

But under the Grimm proposal, adverse actions are allowed and are not considered retaliation as long as these actions are enforced consistently with other employees who aren't whistleblowers. It would be easy for a company to escape culpability for retaliation under this provision.

Whistleblowing is often a risky endeavor, and few would be willing to take such a gamble without specific protections under the law. It's also bad faith for the government to put into place a system for whistleblowing without these standard rights for the whistleblower.

**Creating a Gaping Accountability Loophole**

Under the Grimm draft bill, there is a complete loophole for lawbreakers. They would be granted special treatment—as though they had self-reported—just by virtue of responding to the notification by the agencies by conducting an internal investigation and taking "appropriate corrective action."

Although this subsection comes under the title "Good Faith," the loophole would in fact allow firms with bad faith to whitewash any allegations of misconduct and instantly reduce their liability.

**Conclusion**

It is far too early to determine if the SEC and CFTC whistleblower reward programs enacted by Congress in 2010 warrant modification. Congress should not undermine the substantial investment of time and resources in the rulemaking process made by the public, stakeholders, and the SEC and CFTC. Instead, Congress should wait for the SEC OIG examination of the functionality of these programs before arbitrarily modifying them without a demonstrated need to do so. So far, the SEC has found that its new whistleblower reward program is already resulting in an increase in high-quality tips.

We strongly urge you to oppose the Grimm proposals, which would gut the SEC and CFTC whistleblower award programs, discourage and endanger whistleblowers, jeopardize investigations and enforcement actions, and put investors, shareholders, and taxpayers at risk.

We welcome the opportunity to discuss this issue in more detail. Please be in touch with me or with POGO's Director of Public Policy, Angela Canterbury, at 202-347-1122 or acanterbury@pogo.org.

Sincerely,

Danielle Brian
Executive Director