

May 24, 2011

Chairman Spencer Bachus  
Ranking Member Barney Frank  
House Committee on Financial Services

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

RE: Draft bill proposed by Representative Grimm to amend the whistleblower incentives and protections programs at the SEC and CFTC

Chairman Bachus, Ranking Member Frank, Subcommittee Chairman Garrett and Subcommittee Ranking Member Waters:

We are writing to express our opposition to the proposals in a draft bill 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). The Grimm draft 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.

The whistleblower programs the Grimm draft seeks to upend are based on America's most effective anti-corruption statute, the False Claims Act, which has returned more than \$27 billion taxpayer dollars since 1987. Under sections 748 and 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFTC and the SEC can compensate whistleblowers whose disclosures lead to enforcement actions with penalties of \$1 million or more. Like the False Claims Act right to file lawsuits on behalf of taxpayers to challenge fraud in government contracts and share the recovery, these programs are designed to allow the enforcement agencies to create partnerships with insiders with critical knowledge of large-scale corporate misconduct to better protect taxpayers.

Our groups 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 with their far too limited resources. Indeed, these whistleblower programs are needed now more than ever to avert another Wall Street collapse and to monitor speculation on today's run-away oil prices.

The SEC and CFTC are on the verge of issuing their final rules to implement these programs after carefully considering the concerns of all stakeholders—including the regulated industries—through a robust rulemaking process. Even though the agencies have not yet fully implemented the programs, 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.<sup>1</sup>

The Grimm draft bill would gut the whistleblower programs before they begin, and resembles the proposals made by industry without consideration for the stakeholders the whistleblower rules are designed to protect: investors and taxpayers. There are no evidence-based improvements to investigations and enforcement or whistleblower program best practices to be found in the proposal. Instead, the Grimm draft bill would:

- **Tip off lawbreakers** by requiring whistleblowers to report internally before going to the SEC or CFTC, and requiring the SEC to provide notification before taking enforcement action based on a whistleblower disclosure. This would permit lawbreaking companies to thwart SEC enforcement actions by intimidating witnesses and destroying or altering evidence. Most companies acting in good faith with strong compliance programs can expect employees to report internally first without such requirements. These requirements only serve lawbreakers.
- **Disqualify many would-be whistleblowers** by denying incentives and awards to any whistleblower with a contractual obligation to cause the employer to investigate or respond to the misconduct or violations. This provision would allow employers to deny access to the incentives and awards created by the new law to any and all employees simply by having them sign an employment agreement containing language stating this obligation. It also would give the SEC and CFTC the ability to claim a whistleblower was culpable and deny an award without any specific criteria or due process for making that determination.
- **Deny anonymity and counsel** by prohibiting contingency fee representation of whistleblowers. According to Dodd-Frank, anonymity is only an option if the whistleblower is represented by counsel, and most whistleblowers cannot afford representation unless it is on contingency. Therefore the Grimm draft bill would deny anonymity to nearly all whistleblowers, and severely undermine the efficacy of the program.
- **Remove the incentive to inform regulators** by eliminating a minimum award requirement and giving the SEC and CFTC the discretion to give whistleblowers nominal awards. Whistleblowers put their livelihoods at great risk and make enormous personal and financial investments in revealing the wrongdoing to regulators. The incentive to do so must be at least the minimum award of 10 percent already in the law, which is still below the 15 percent minimums which have created adequate incentives for whistleblowers to use the successful False Claims Act and IRS programs.
- **Strip protections for whistleblowers** who face retaliation for contacting the SEC or CFTC. 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.<sup>2</sup> The Grimm draft would legalize retaliation whenever a

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<sup>1</sup> Melanie Waddell, “SEC’s Mary Schapiro Talks About Whistleblower Office, 12b-1: Exclusive Interview,” (April 26 2011).

<sup>2</sup> Department of Labor, Occupational Safety & Health Administration, “The Whistleblower Program,” March 29, 2011. <http://www.whistleblowers.gov/index.html> (Downloaded May 11, 2011)

company's employment agreements, policies, or company manuals bar employees from communicating with the government. This gives corporate criminals a blank check to gag employees and eliminate whistleblowers at will.

- **Create an accountability loophole** by allowing special treatment for “self-reporting” if an accused firm does an internal investigation and makes some corrective action once notified by the SEC and CFTC of the whistleblower tip and pending enforcement action. Under the Grimm draft bill, this is a complete loophole for lawbreakers. They would be granted special treatment under the law with reduced penalties—as though they had self-reported—just by virtue of 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.

Not only are the Grimm proposals the wrong approach, in any case it is far too early to determine if the SEC and CFTC whistleblower reward programs warrant modification. The Dodd-Frank provisions were thoughtfully crafted as state-of-the-art whistleblower incentive and protection programs. Additionally, 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 full implementation and the SEC Inspector General's full-scale examination of the functionality of these programs mandated by Dodd-Frank before arbitrarily amending them without a demonstrated need to do so.

We strongly urge you to oppose the Grimm proposals, which would greatly harm the interests of investors, shareholders, whistleblowers, and taxpayers. We would welcome more discussion on the SEC and CFTC whistleblower programs, which can be arranged by contacting Angela Canterbury at the Project On Government Oversight at 202-347-1122 or [acanterbury@pogo.org](mailto:acanterbury@pogo.org).

Sincerely,

AFL-CIO  
Americans for Financial Reform  
Association of Research Libraries  
Center for Financial Privacy and Human Rights  
Center for Media and Democracy  
Citizens for Responsibility and Ethics in Washington (CREW)  
Common Cause  
Consumer Federation of America  
Defending Dissent Foundation  
Fund for Constitutional Government  
Government Accountability Project (GAP)  
iSolon.org  
OpenTheGovernment.org  
New Jersey Action  
OMB Watch  
Project On Government Oversight (POGO)

Public Citizen  
Service Employees International Union (SEIU)  
Taxpayers Against Fraud  
Taxpayers Protection Alliance  
U.S. PIRG  
Voices for Corporate Responsibility

cc: Representative Michael G. Grimm  
SEC Chairman Mary L. Schapiro  
SEC Commissioners Casey, Walter, Aguilar, and Paredes