

February 25, 2016

Chairman Jason Chaffetz
House Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515

Ranking Member Elijah Cummings
House Committee on Oversight and Government Reform
2471 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Chaffetz and Ranking Member Cummings:

We, the undersigned groups, are writing to express our support for the “Whistleblower Augmented Reward and Nonretaliation (WARN) Act of 2016”, introduced by Ranking Member Cummings and Senator Tammy Baldwin. This common-sense legislation would provide updated financial incentives and stronger anti-retaliation protections for industry insiders who blow the whistle on bank fraud.

Time and time again, we are reminded of the heroic efforts by financial industry employees to expose Wall Street fraud and hold wrongdoers accountable. Bank insiders blew the whistle on many of the biggest Wall Street scandals that have come to light in recent months, providing evidence, for instance, that HSBC profited from doing business with international tax dodgers and criminals (Hervé Falciani)¹; that JPMorgan committed “massive criminal securities fraud” in the years leading up to the 2008 financial crisis (Alayne Fleischmann)²; and that BNP Paribas concealed transactions with Sudan, Cuba, and Iran, in violation of U.S. sanctions,³ just to name a few cases.⁴

¹ Martha M. Hamilton, “Whistleblower? Thief? Hero? Introducing the Source of the Data that Shook HSBC,” The International Consortium of Investigative Journalists, February 8, 2015. <http://www.icij.org/project/swiss-leaks/whistleblower-thief-hero-introducing-source-data-shook-hsbc> (Downloaded February 10, 2016)

² Matt Taibbi, “The \$9 Billion Witness: Meet JPMorgan Chase’s Worst Nightmare,” *Rolling Stone*, November 6, 2014. <http://www.rollingstone.com/politics/news/the-9-billion-witness-20141106> (Downloaded February 10, 2016)

³ Henry Engler, “BNP case spurs calls for whistleblower incentives in banking,” Reuters, July 21, 2014. <http://www.reuters.com/article/2014/07/21/us-banking-whistleblower-idUSKBN0FQ1D720140721> (Downloaded February 10, 2016)

⁴ In other high-profile Wall Street cases, including some tied to the 2008 financial crisis, whistleblowers provided evidence that Countrywide Financial, once the nation’s largest mortgage provider, was committing systemic home loan fraud (Eileen Foster); that 60 to 80 percent of mortgages bought and sold by Citigroup in 2006 were “defective” (Richard Bowen); that Deutsche Bank hid billions of dollars in losses during the financial crisis to avoid a potential bailout (Eric Ben-Artzi); that Lehman Brothers violated executive pay rules by failing to report millions of dollars’ worth of restricted stock awards (Oliver Budde); that UBS helped thousands of American clients evade U.S. taxes (Bradley Birkenfeld); and that Bernie Madoff and Allen Stanford were orchestrating multi-billion-dollar Ponzi schemes (Harry Markopolos and Leyla Basagoitia, respectively).

In far too many instances, federal authorities have ignored high-value insider tips or failed to protect tipsters,⁵ and Congress must continue to push for improved relations between agencies and whistleblowers. At the same time, there is a pressing need for legislative action to ensure that Wall Street oversight agencies have the necessary tools in their arsenal to incentivize whistleblowers and protect them from retaliation.

In the aftermath of the 2008 financial crisis—fueled in no small part by Wall Street fraud—Congress gave the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC) more tools to work with insiders who have firsthand knowledge of corporate malfeasance. These whistleblower programs are showing initial signs of success. In fiscal year 2014, the SEC received 3,620 whistleblower tips, a more than 20 percent increase in just two years, and paid its largest reward to date.⁶ SEC Chair Mary Jo White has stated that the agency’s whistleblower program is 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 an alleged fraud.”⁷

The SEC and CFTC programs are largely modeled after the False Claims Act, another successful enforcement tool that has enabled the government to work with whistleblowers to hold Wall Street accountable. Last year, for instance, False Claims Act whistleblowers played a central role in high-profile Department of Justice (DOJ) cases brought against Bank of America⁸ and JPMorgan.⁹

Despite these successes, the government’s whistleblower programs do not protect against all types of retaliation, and an outdated provision from a banking law restricts DOJ’s ability to reward whistleblowers in certain cases. The time has come for Congress to ensure that industry insiders have all the incentives and protections they need to safely blow the whistle on Wall Street fraud.

We urge you to adopt the following pro-whistleblower reforms outlined in the WARN Act:

⁵ William Cohan, “William D Cohan on Wall Street whistleblowers,” *Financial Times Magazine*, May 30, 2014. <http://www.ft.com/cms/s/2/ce216134-e6c7-11e3-9a20-00144feabdc0.html#axzz3UjlvU75> (Downloaded February 10, 2016)

⁶ Securities and Exchange Commission, *2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, November 17, 2014. <https://www.sec.gov/about/offices/owb/annual-report-2014.pdf> (Downloaded February 10, 2016)

⁷ Speech by Mary Jo White, Chair, Securities and Exchange Commission, “Remarks at the Securities Enforcement Forum,” Washington, DC, October 9, 2013. <http://www.sec.gov/News/Speech/Detail/Speech/1370539872100#.VQgsm9LBvLs> (Downloaded February 10, 2016)

⁸ Department of Justice, “Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis,” August 21, 2014. <http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading>; Aruna Viswanatha and Nate Raymond, “BofA ‘Hustle’ whistleblower earns \$57 mln payout in second case,” Reuters, December 17, 2014. <http://www.reuters.com/article/2014/12/17/bank-of-america-mortgages-whistleblower-idUSL1N0U123920141217> (All downloaded February 10, 2016)

⁹ Department of Justice, “JPMorgan Chase to Pay \$614 Million for Submitting False Claims for FHA-insured and VA-guaranteed Mortgage Loans,” February 4, 2014. <http://www.justice.gov/opa/pr/jpmorgan-chase-pay-614-million-submitting-false-claims-fha-insured-and-va-guaranteed-mortgage> (Downloaded February 10, 2016)

Remove the outdated or arbitrary limits on whistleblower rewards for banking industry employees. Under the current law, whistleblower rewards issued through the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) are effectively capped at \$1.6 million. The Justice Department has increasingly used FIRREA to prosecute Wall Street fraud, but the whistleblower reward incentive—adopted during the savings-and-loan crisis—is long outdated. A \$1.6 million cap is “a paltry sum in an industry in which, last year, the collective bonus pool rose above \$26 billion, and median executive pay was \$15 million and rising,” Attorney General Eric Holder stated last year. “In this unique environment, what would—by any normal standard—be considered a windfall of \$1.6 million is unlikely to induce an employee to risk his or her lucrative career in the financial sector.”¹⁰

The WARN Act would allow whistleblowers under FIRREA and the Federal Deposit Insurance Act (FDIA) to collect the following for their tips: between 20 percent and 30 percent of the first \$50 million in government recoveries, 10 percent to 20 percent of the next \$50 million recovered, and zero percent to 10 percent of the amount of any recovery that exceeds \$100 million.

The Act also would cancel the SEC’s discretion to arbitrarily reduce or cancel whistleblower awards due to reasonable delays in filing a disclosure. Without any standards or in some cases explanation, the commission has disqualified whistleblowers from the program for delays of mere weeks after learning of fraud, finding competent counsel, and preparation of successful disclosures, sometimes at extreme risk to their families’ safety when in foreign nations. The WARN Act would shield whistleblowers from sanction for spending the reasonable time necessary for a responsible disclosure.

Ban corporate maneuvers designed to muzzle whistleblowers. Big banks and other large companies have tried using various de facto gag tactics to stop employees from blowing the whistle. According to an article last year by whistleblower lawyers at the Government Accountability Project and Labaton Sucharow, these tactics include: “preventing employees from consulting legal counsel through the use of nondisclosure agreements”; “exploiting corporate whistle-blowers’ fear of retaliation and blacklisting by requiring notice of external reporting”; “de-incentivizing tips by making employees sign agreements waiving any future monetary awards for blowing the whistle; and intimidating potential whistle-blowers with lawsuits to enforce secrecy agreements, a battle few whistle-blowers have the desire and resources to fight.”¹¹

The WARN Act would prohibit employers from:

- using confidentiality agreements that force whistleblowers to waive their rights;

¹⁰ Speech by Attorney General Eric Holder, “Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law,” New York City, NY, September 17, 2014. <http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law> (Downloaded February 10, 2016)

¹¹ Jordan Thomas and Tom Devine, “Wall Street’s New Enforcers Aim to Muzzle Whistle-Blowers,” *DealBook*, July 21, 2014. <http://dealbook.nytimes.com/2014/07/21/wall-streets-new-enforcers-aim-to-muzzle-whistle-blowers/> (Downloaded February 10, 2016)

- conditioning employment benefits on an employee waiving his or her right to a whistleblower award;
- requiring whistleblowers to disclose to any private party their communications with government regulators;
- conditioning benefits on an employee's representation that he or she has not communicated with the government about a potential violation;
- seeking civil or criminal liability for an employee who has acquired and communicated information to the government;
- canceling whistleblower rights for attorneys through the back door by bar association disciplinary rules that lock in secrecy;
- blocking whistleblowers' right to counsel through the back door by bar association disciplinary rules that sanction lawyers for representing them; and
- engaging in any other discrimination that would chill the exercise of whistleblower rights.

Require more education and transparency about industry whistleblowing. Many banks fail to educate employees about their whistleblower rights and remedies. In addition, there is a lack of information about FIRREA whistleblower rewards, which have rarely been issued since the statute was enacted.¹²

The WARN Act would require banks to educate employees about their whistleblower rights and remedies under FIRREA, and would require the Attorney General to provide Congress with an annual report on FIRREA rewards and related cases.

Expand protected whistleblowing activities and anti-retaliation remedies. Even if an employee does not qualify for a reward, he or she should still be protected from retaliation for blowing the whistle on bank fraud. Unfortunately, there are several gaps and loopholes in the existing anti-retaliation statutes, and a number of recent court rulings have further undermined whistleblower protections.¹³

The WARN Act would:

- protect bank employees from retaliation if they refuse to alter information previously provided to the Justice Department, or if they provide new information about threats to the safety and soundness or reputation of a financial institution;
- expand protection to applicants and former employees, to shield against blacklisting or retaliation against the pensions, insurance policies or other benefits of alumni;

¹² Devlin Barrett, "Holder Proposes Bigger Rewards for Wall Street Whistleblowers," *The Wall Street Journal*, September 17, 2014. <http://www.wsj.com/articles/attorney-general-holder-to-propose-big-new-rewards-for-wall-street-whistleblowers-1410957241> (Downloaded February 10, 2016)

¹³ *Liu Meng-Lin v. Siemens AG*, U.S. Court of Appeals for the Second Circuit, 13-cv-4385, August 14, 2014. http://www.ca2.uscourts.gov/decisions/isysquery/386f6d92-6ab2-4b57-840a-832cd6e0ae6d/1/doc/13-4385_opn.pdf; and *Khaled Asadi v. G.E. Energy (USA), L.L.C.*, U.S. Court of Appeals for the Fifth Circuit, 12-cv-20522, July 17, 2013. <http://www.ca5.uscourts.gov/opinions%5Cpub%5C12/12-20522-CV0.wpd.pdf> (All downloaded February 10, 2015)

- eliminate contradictions in prior statutory language on the definition of “whistleblower,” which had led to contradictory rulings on whether they had rights;
- prohibit companies from retaliating against whistleblowers who contacted the SEC or CFTC by changing their employment or compensation status;
- provide an administrative remedy and assigned task that they or another person believe to be in violation of the law, or if they provide or assist in providing information related to a potential violation of law to their employer or a person with supervisory authority over them;
- amend the procedures, evidentiary standards, and burdens of proof for anti-retaliation cases brought under the SEC and CFTC programs so that a whistleblower only needs to show that his or her exercise of protected behavior was a contributing factor leading to an unfavorable personnel action, and that an employer must demonstrate by clear and convincing evidence that it would have taken the same unfavorable action in the absence of that protected behavior;
- provide for compensatory damages and for punitive damages up to \$250,000 in SEC and CFTC anti-retaliation suits;
- prohibit firms from discriminating against employees who report wrongdoing through internal compliance programs; and
- extend anti-retaliation protections to foreign nationals living outside the U.S. who expose violations of U.S. financial laws.

Strike a better balance between whistleblower confidentiality, public access to information, and government accountability. While it is absolutely essential to protect the confidentiality of whistleblowers, especially those who choose to make anonymous reports, the statute that created the revamped whistleblower programs at the SEC and CFTC included an unnecessary exemption to the Freedom of Information Act (FOIA) that makes it impossible to obtain information on the substance of the whistleblower’s allegation.

The WARN Act would allow regulators to reveal confidential whistleblower information to an outside party, but only if they provide advance notice to the whistleblower and obtain his or her written consent.

As agencies with limited resources continue to prosecute Wall Street fraud tied to the 2008 financial crisis, and to probe abusive banking activities that could fuel the next crisis, the government needs all the help it can get from insiders with firsthand knowledge of corporate malfeasance. The WARN Act provides much-needed incentives and protections to industry whistleblowers, and would go a long way toward restoring public confidence in the government’s oversight of Wall Street. We urge you to pass this important legislation without delay.

Sincerely,

Americans for Financial Reform
ACORN8
Bank Whistleblowers United
Bill of Rights Defense Committee/Defending Dissent Foundation

Demand Progress
Drum Majors for Truth
Gordon Hamel (White House Whistleblower)
Government Accountability Project
International Association of Whistleblowers
Mehri & Skalet PLLC
National Forum On Judicial Accountability
National Whistleblowers Center
OAK (Organizations Associating for the Kind of Change America Really Needs)
OpenTheGovernment.org
Plea for Justice Program
Power Over Poverty Under Laws of America Restored (POPULAR)
Project On Government Oversight
Public Citizen
Taxpayers Protection Alliance
United Support and Memorial for Workplace Fatalities
Whistleblower and Source Protection Program (WHISPeR)

Cc: Senator Tammy Baldwin