[DISCUSSION DRAFT]

112TH CONGRESS
1ST SESSION

H. R. _____

To amend the whistleblower incentive and protection provisions of the Securities Exchange Act of 1934 and the Commodity Exchange Act to [to be provided]

IN THE HOUSE OF REPRESENTATIVES

Mr. GRIMM introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the whistleblower incentive and protection provisions of the Securities Exchange Act of 1934 and the Commodity Exchange Act to [to be provided]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AMENDMENTS TO THE SECURITIES EXCHANGE ACT OF 1934.

(a) EXCLUSION OF CERTAIN COMPLIANCE OFFICERS AND INTERNAL REPORTING AS A CONDITION OF AWARD.—Section 21F of the Securities Exchange Act of 1934 (15 U.S.C. 78u–6) is amended—

(1) in subsection (b), by redesignating paragraph (2) as paragraph (3) and inserting after paragraph (1) the following:

''(2) INTERNAL REPORTING REQUIRED.—In the case of a whistleblower who is an employee providing information relating to misconduct giving rise to the violation of the securities laws that was committed by his or her employer or another employee of the employer, to be eligible for an award under this section, the whistleblower, or any person obtaining reportable information from the whistleblower, shall—

''(A) first report the information described in paragraph (1) to his or her employer before reporting such information to the Commission; and

''(B) report such information to the Commission not later than 180 days after reporting the information to the employer.''; and

(2) in subsection (c)(2)—

(A) in subparagraph (C), by striking ''or'' at the end; and

(B) by redesignating subparagraph (D) as subparagraph (F) and inserting after subparagraph (C) the following:

"(D) to any whistleblower who fails to first report the information described in subsection (b)(1) that is the basis for the award to his or her employer before reporting such information to the Commission, in the case where the misconduct giving rise to the violation of the securities laws was committed by such employer or an employee of the employer, unless the whistleblower alleges and the Commission determines that the employer lacks either a policy prohibiting retaliation for reporting potential misconduct or an internal reporting system allowing for anonymous reporting, or the Commission determines in a preliminary investigation not exceeding 30 days that internal reporting was not a viable option for the whistleblower based on—

"(i) evidence that the alleged misconduct was committed by or involved the complicity of the highest level of management; or

"(ii) other evidence of bad faith on the part of the employer;

"(E) to any whistleblower who has legal, compliance, or similar responsibilities for or on

behalf of an entity and has a fiduciary or contractual obligation to investigate or respond to internal reports of misconduct or violations or to cause such entity to investigate or respond to the misconduct or violations, if the information learned by the whistleblower during the course of his or her duties was communicated to such a person with the reasonable expectation that such person would take appropriate steps to so respond; and''.

(b) ELIMINATION OF MINIMUM AWARD REQUIREMENT.—Subsection (b)(1) of such section is amended—

(1) by striking ''shall'' and inserting ''may''; and

(2) by striking ''in an aggregate amount equal to—'' and all that follows and inserting ''an amount determined by the Commission but not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.''.

(c) EXCLUSION OF WHISTLEBLOWERS FOUND CULPABLE.—Subsection (c)(2)(B) of such section is amended by inserting '', is found civilly liable, or is otherwise determined by the Commission to have committed, facilitated,

1 participated in, or otherwise been complicit in misconduct
2 related to such violation'' after ''violation''.
3 (d) PROHIBITION ON CONTINGENCY FEES BY AT-
4 TORNEYS.—Subsection (d)(1) of such section is amended
5 by adding at the end the following: ''Counsel may not rep-
6 resent a whistleblower in such claims on a contingency fee
7 basis.''.
8 (e) RULE OF CONSTRUCTION RELATING TO OTHER
9 WORKPLACE POLICIES.—Subsection (h)(1) of such sec-
10 tion is amended by adding at the end the following:
11 ''(D) RULE OF CONSTRUCTION.—Nothing
12 in this paragraph shall be construed as prohib-
13 iting or restricting any employer from enforcing
14 any established employment agreements, work-
15 place policies, or codes of conduct against a
16 whistleblower, and any adverse action taken
17 against a whistleblower for any violation of such
18 agreements, policies, or codes shall not con-
19 stitute retaliation for purposes of this para-
20 graph, provided such agreements, policies, or
21 codes are enforced consistently with respect to
22 other employees who are not whistleblowers.''.
23 (f) NOTIFICATION TO EMPLOYER.—Paragraph (2) of
24 subsection (h) of such section is amended—

(1) in the paragraph heading, by striking ''CONFIDENTIALITY'' and inserting ''NOTIFICATION TO EMPLOYER AND CONFIDENTIALITY'';

(2) by redesignating subparagraph (A) through (D) as subparagraphs (B) through (E), respectively;

(3) by inserting a new subparagraph (A) as follows:

''(A) NOTIFICATION OF INVESTIGATION.—

''(i) NOTIFICATION REQUIRED.—Prior to commencing any enforcement action relating in whole or in part to any information reported to it by a whistleblower, the Commission shall notify any entity that is to be subject to such action of information received by the Commission from a whistleblower who is an employee of such entity to enable the entity to investigate the alleged misconduct and take remedial action, unless the Commission determines in the course of a preliminary investigation of the alleged misconduct, not exceeding 30 days, that such notification would jeopardize necessary investigative measures and impede the gathering of relevant facts, based on—

"(I) evidence that the alleged misconduct was committed by or involved the complicity of the highest level management of the entity; or

"(II) other evidence of bad faith on the part of the entity.

"(ii) GOOD FAITH.—Where an entity notified under clause (i) responds in good faith, which may include conducting an investigation, reporting results of such an investigation to the Commission, and taking appropriate corrective action, the Commission shall treat the entity as having self-reported the information and its actions in response to such notification shall be evaluated in accordance with the Commission's policy statement entitled 'Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Statement of the Relationship of Cooperation to Agency Enforcement Decisions'."; and

(4) in the heading of subparagraph (B) (as redesignated by paragraph (3)), by striking "IN GENERAL" and inserting "CONFIDENTIALITY".

SEC. 2. AMENDMENTS TO THE COMMODITY EXCHANGE ACT.

(a) EXCLUSION OF CERTAIN COMPLIANCE OFFICERS AND INTERNAL REPORTING AS A CONDITION OF AWARD.—Section 23 of the Commodity Exchange Act (7 U.S.C. 26) is amended—

(1) in subsection (b), by redesignating paragraph (2) as paragraph (3) and inserting after paragraph (1) the following:

"(2) INTERNAL REPORTING REQUIRED.—In the case of a whistleblower who is an employee providing information relating to misconduct giving rise to the violation of the securities laws that was committed by his or her employer or another employee of the employer, to be eligible for an award under this section, the whistleblower, or any person obtaining reportable information from the whistleblower, shall—

"(A) first reported the information described in paragraph (1) to his or her employer before reporting such information to the Commission; and

"(B) report such information to the Commission not later than 180 days after reporting the information to the employer."; and

(2) in subsection (c)(2)—

(A) in subparagraph (C), by striking ''or'' at the end; and

(B) by redesignating subparagraph (D) as subparagraph (F) and inserting after subparagraph (C) the following:

''(D) to any whistleblower who fails to first report the information described in subsection (b)(1) that is the basis for the award to his or her employer before reporting such information to the Commission, in the case where the misconduct giving rise to the violation of the securities laws was committed by such employer or an employee of the employer, unless the whistleblower alleges and the Commission determines that the employer lacks either a policy prohibiting retaliation for reporting potential misconduct or an internal reporting system allowing for anonymous reporting, or the Commission determines in a preliminary investigation not exceeding 30 days that internal reporting was not a viable option for the whistleblower based on—

''(i) evidence that the alleged misconduct was committed by or involved the

complicity of the highest level of management; or

"(ii) other evidence of bad faith on the part of the employer;

"(E) to any whistleblower who has legal, compliance, or similar responsibilities for or on behalf of an entity and has a fiduciary or contractual obligation to investigate or respond to internal reports of misconduct or violations or to cause such entity to investigate or respond to the misconduct or violations, if the information learned by the whistleblower on the course of his or her duties was communicated to such a person with the reasonable expectation that such person would take appropriate steps to so respond; and".

(b) CAP ON AWARD IN CERTAIN CIRCUMSTANCES AND ELIMINATION OF MINIMUM AWARD REQUIREMENT.—Subsection (b)(1) of such section is amended—

(1) by striking "shall" and inserting "may"; and

(2) by striking "in an aggregate amount equal to—" and all that follows and inserting "in an amount determined by the Commission but not more than 30 percent, in total, of what has been collected

of the monetary sanctions imposed in the action or related actions.''.

(c) EXCLUSION OF WHISTLEBLOWERS FOUND CULPABLE.—Subsection (c)(2)(B) of such section is amended by inserting '', is found civilly liable, or is otherwise determined by the Commission to have committed, facilitated, participated in, or been complicit in misconduct related to such a violation'' after ''violation''.

(d) PROHIBITION ON CONTINGENCY FEES BY ATTORNEYS.—Subsection (d)(1) of such section is amended by adding at the end the following: ''Counsel may not represent a whistleblower in such claims on a contingency fee basis.''.

(e) RULE OF CONSTRUCTION RELATING TO OTHER WORKPLACE POLICIES.—Subsection (h)(1) of such section is amended by adding at the end the following:

''(D) RULE OF CONSTRUCTION.—Nothing in this paragraph shall be construed as prohibiting or restricting any employer from enforcing any established employment agreements, workplace policies, or codes of conduct against a whistleblower, and any adverse action taken against a whistleblower for any violation of such agreements, policies, or codes shall not constitute retaliation for purposes of this para-

graph, provided such agreements, policies, or codes are enforced consistently with respect to other employees who are not whistleblowers.''.

(f) NOTIFICATION TO EMPLOYER.—Paragraph (2) of subsection (h) of such section is amended—

(1) in the paragraph heading, by striking ''CONFIDENTIALITY'' and inserting ''NOTIFICATION TO EMPLOYER AND CONFIDENTIALITY'';

(2) by redesignating subparagraph (A) through (D) as subparagraphs (B) through (E), respectively;

(3) by inserting a new subparagraph (A) as follows:

''(A) NOTIFICATION TO EMPLOYER.—

''(i) NOTIFICATION REQUIRED.—Prior to commencing any enforcement action relating in whole or in part to any information reported to it by a whistleblower, the Commission shall promptly notify any entity that is to be subject to such enforcement of information received by the Commission from a whistleblower who is an employee of such entity to enable the entity to investigate the alleged misconduct and take remedial action, unless the Commission determines in the course of a pre-

1 liminary investigation not exceeding 30
2 days of the alleged misconduct, that such
3 notification would jeopardize necessary in-
4 vestigative measures and impede the gath-
5 ering of relevant facts, based on—
6 ''(I) evidence that the alleged
7 misconduct was committed by or in-
8 volved the complicity of the highest
9 level management of the entity; or
10 ''(II) other evidence of bad faith
11 on the part of the entity.
12 ''(ii) GOOD FAITH.—Where an entity
13 notified under clause (i) responds in good
14 faith, which may include conducting an in-
15 vestigation, reporting results of such an in-
16 vestigation to the Commission, and taking
17 appropriate corrective action, the Commis-
18 sion shall treat the entity as having self-re-
19 ported the information and its actions in
20 response to such notification shall be eval-
21 uated accordingly.''; and
22 (4) in the heading of subparagraph (B) (as re-
23 designated by paragraph (3)), by striking ''IN GEN-
24 ERAL'' and inserting ''CONFIDENTIALITY''.

1 **SEC. 3. STUDY.**

2 The Comptroller General shall conduct a study to de-
3 termine what impact, if any, the whistleblower incentives
4 program established under section 21F of the Securities
5 Exchange Act of 1934 (15 U.S.C. 78u–6) and section 23
6 of the Commodity Exchange Act (7 U.S.C. 26) has had
7 on shareholder value. The Comptroller General shall
8 transmit to Congress a report on the study not later than
9 18 months after the date of enactment of this Act