



Statement of the U.S. Chamber of Commerce

ON: **Legislative Proposals to Address the Negative
Consequences of the Dodd-Frank Whistleblower
Provisions**

TO: U.S. House Subcommittee on Capital Markets and Government
Sponsored Enterprises

DATE: **May 11, 2011**

The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance -- is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 115 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Good afternoon Chairman Bachus, Ranking Member Frank, and Members of the Committee. Thank you for the opportunity to submit views on the potential unintended impacts of the Dodd-Frank Whistleblower Provisions on corporate compliance programs.

My name is Marcia Narine, and I am here on behalf of the US Chamber of Commerce.

Until May 1, 2011, I served as the Vice President of Global Compliance and Business Standards, Deputy General Counsel and Chief Privacy Officer of Ryder, a *Fortune 500* global transportation and supply chain management solutions company with over 28,000 employees worldwide. Prior to that role, I spent almost eighteen months as the group director of human resources for Ryder's Supply Chain Solutions division. I began my career at Ryder in 1999 as senior counsel focusing on labor and employment.

Before joining Ryder, I was an associate attorney with Morgan, Lewis and Bockius' labor and employment practice. I have also worked as a commercial litigator with Cleary, Gottlieb, Steen and Hamilton working on securities fraud, among other matters, and as a law clerk to former Justice Marie Garibaldi of the Supreme Court of New Jersey. I earned my law degree from Harvard in 1992, and my bachelors degree in political science and psychology from Columbia in 1988. I left corporate life to pursue a career in academia and am currently researching and writing law review articles on compliance, governance, employment law, and international human rights and am a founding member of a foundation focusing on maternal and infant mortality and education in the Congo.

The basis of my testimony stems in large part from my experience at Ryder establishing its global compliance and ethics program under the direction of its two general counsels, its CEO and its board; my experiences as both in house and outside counsel training, deposing and preparing witnesses and employees; personally interviewing employees around the world who consider themselves "whistleblowers"; and speaking with other compliance professionals and conducting research to benchmark and continually improve our compliance program.

The views expressed are entirely my own and should not be attributed to any of my former employers although I do expect to draw on some of those experiences.

There are at least five ways in which this legislation will adversely affect compliance programs.

First, the bill creates a presumption that all companies operate at the lowest possible level of ethical and illegal behavior and provides every incentive for the whistleblower to bypass existing compliance programs. Employees can go straight to the SEC to report their suspicions without even alleging that the existing company reporting mechanism is not a viable, functioning, credible or legitimate option.

It appears as though responsible companies, which have spent millions of dollars and several years investing in compliance programs and building strong ethical corporate cultures since the Federal Sentencing Guidelines were enacted are being penalized because the SEC failed to pay attention to the whistleblower who repeatedly brought information to them about Bernard Madoff, who defrauded investors of \$65 billion.

The Sentencing Guidelines are not mandatory but are used by the Department of Justice when making charging, non prosecution and deferred prosecution decisions when corporations commit crimes and by federal district judges when imposing sentences. In fact, the explosion in the number of compliance programs in the United States after 2004 is due in large part to the revision of the Guidelines. The Guidelines require a company to take seven steps³ to ensure mitigation of fines and penalties for corporate crimes. Compliance officers base their programs on these steps and boards, which have an oversight duty under the law, use these standards to ensure that an effective compliance program exists.

The 2010 Revisions added important clarifications.⁴ Ironically, the SEC's current position allowing whistleblowers to bypass the compliance program squarely contradicts the intent of the new guidelines because the revisions require companies to discover wrongdoing first and to voluntarily disclose to the government, which

³The 2004 Guidelines require a company to establish standards and procedures to reduce the likelihood of a violation of the law; assign oversight of compliance program to high level individuals such as a compliance and ethics officer; delegate substantial discretionary authority only to reputable individuals without a propensity to or history of violating the law; develop position-specific compliance training and communications; establish audit and monitoring process; publicize the anonymous reporting system and ensure that there is no retaliation; establish uniform disciplinary action, including against those who failed to detect a violation; take steps to prevent similar offenses and make changes to the compliance program if necessary.

⁴ The 2010 revisions require a company to ensure that the Chief Compliance Officer reports to the Board or Audit Committee and if s/he reports to the General Counsel that the Compliance Officer has direct and unfettered access and reporting obligations to the Board or appropriate Board Committee; discover the problem inside the organization rather than outside; after conducting an investigation promptly voluntarily disclose the wrongdoing to the government; and ensure that compliance officer wasn't involved in the violation or willfully ignorant.

companies cannot do without the aid of employees willing to come forward internally. Companies rely on employees and other tipsters who come forward in good faith. In fact, in many instances, corroboration rates for anonymous tips can be higher than for those who provide names, so responsible companies have an incentive to provide a multipronged complaint structure where employees or others can come forward and bring tips.

The coverup is always worse than the crime. While there are companies that shred documents, retaliate against employees and commit crimes, both civil and criminal remedies and penalties already exist for that kind of behavior under both Sarbanes-Oxley and other laws and the government should enforce those. Dodd-Frank should not compound the problem. The irresponsible companies which don't have effective compliance programs or strong ethical cultures won't have any incentives at all to develop them now because they will simply assume that employees will report externally. This means that their shareholders and employees won't enjoy the benefits of a strong ethical compliance culture further risking the kind of financial fraud that Dodd-Frank was meant to prevent.

If the Committee wants to encourage responsible companies to continue to build strong programs and irresponsible companies to start, it should not dismantle the effective incentive structure of the Sentencing Guidelines. Instead, for a whistleblower to receive the bounty, s/he should be required to use the internal mechanism first unless s/he alleges that there is no viable independent internal reporting mechanism such as a credible anonymous hotline or email system, independent internal or external auditor, board member or general counsel or that the entire executive team is involved in malfeasance.

Second, the SEC has indicated that the agency does not plan to automatically share information with a company when it receives a tip from a whistleblower. As of today, the whistleblower investigation office has not yet been funded. Even if it were fully funded, the corporation has the best access to documentation and witnesses. While the whistleblower community and apparently the SEC cynically view this as a negative, this Committee should view this as a positive. Responsible companies and boards want to know sooner rather than later if something is wrong before the problem gets bigger. The Sentencing Guidelines provide credit and possibly nonprosecution for voluntary disclosure. Publicly-traded companies don't only have to worry about regulators- there are private rights of action, potential significant loss of share price, employee morale and reputational value if there are even allegations of fraud. Accordingly, it makes sense for a company to retain counsel and other investigators and experts, conduct a thorough investigation, notify outside auditors and the board, preserve documents and disclose to the government and regulators if

appropriate. Under the legislation as written and under the SEC's current position, if a whistleblower discloses malfeasance to the SEC but not the company and the SEC does not inform the Company, the alleged wrongful conduct could continue unchecked.

The SEC and corporations have the same goals – protecting shareholder value. The SEC's posture on this issue may hurt, not help the shareholders, which include company employees, pension funds, institutional investors and individuals. The presumption should be that the whistleblower reports internally first, but if not then the SEC informs the company immediately unless there is a legitimate reason not to do so. This allows for an immediate and thorough investigation.

Third, the legislation as written has a loophole that could allow legal, compliance, audit, and other fiduciaries to collect the bounty although they are already professionally obligated to address these issues. While the whistleblower community believes that these fiduciaries are in the best position to report to the SEC on wrongdoing, as a former in house counsel and compliance officer, I believe that those with a fiduciary duty should be excluded and have an "up before out" requirement to inform the general counsel, compliance officer or board of the substantive allegation or any inadequacy in the compliance program before reporting externally.

Fourth, currently culpable individuals may also collect a bounty despite their participation in the conspiracy. This could lead to the bizarre result that an agent who is terminated after a company realizes that he has been committing unauthorized bribes for which the company could be liable could turn the company in to the SEC and DOJ for violations of the Foreign Corrupt Practices Act and could then conceivably collect a multimillion reward when the government fines the company. Culpable individuals should not be able to collect a bounty.


Finally, the proposal's anti-retaliation provisions are unclear. Generally, under normal circumstances employees should be disciplined or terminated if they violate clearly established, well documented, consistently followed company policies. However, the Dodd-Frank legislation as written is ambiguous as to whether legitimate, nondiscriminatory business reasons will suffice for taking adverse action against a whistleblower who steals from the company, sexually harasses an employee, fails to come to work or commits an illegal act such as workplace violence. The legislation needs clarification to ensure that while no adverse employment action can be taken for making a good faith report under the Act, the Act should not affect a company's ability to take legitimate non-retaliatory action employment actions.

Thank you again for the opportunity to present my views. These are important issues and the compliance and ethics community has spent many years doing good work to encourage employees, suppliers, customers and members of the general public to report known or suspected wrongdoing internally so that these matters can be investigated and remedied. Dodd-Frank Whistleblower Reform will not prevent the next financial crisis. But what may happen is that the legislation as written may erode some of the very good work that has been done over the past few years if some of the fixes that we have suggested are not adopted.

United States House of Representatives
Committee on Financial Services

"TRUTH IN TESTIMONY" DISCLOSURE FORM

Clause 2(g) of rule XI of the Rules of the House of Representatives and the Rules of the Committee on Financial Services require the disclosure of the following information. A copy of this form should be attached to your written testimony.

1. Name:	2. Organization or organizations you are representing:
Marcia Narine	US Chamber of Commerce
3. Business Address and telephone number:	
	
4. Have you received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008 related to the subject on which you have been invited to testify?	5. Have any of the organizations you are representing received any Federal grants or contracts (including any subgrants and subcontracts) since October 1, 2008 related to the subject on which you have been invited to testify?
<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
6. If you answered .yes. to either item 4 or 5, please list the source and amount of each grant or contract, and indicate whether the recipient of such grant was you or the organization(s) you are representing. You may list additional grants or contracts on additional sheets.	
7. Signature:	
Marcia Narine	

Please attach a copy of this form to your written testimony.