

# Monetary Rewards for Wildlife Whistleblowers: A Game-Changer in Wildlife Trafficking Detection and Deterrence

by Stephen M. Kohn

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## Summary

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Despite the enactment of scores of wildlife protection laws, illegal activities are difficult to detect under current enforcement policies. Both the Lacey Act and the Endangered Species Act include language providing monetary incentives to persons who disclose information about wildlife crimes, but these provisions have not been effectively implemented. Given the years of delay in implementing them, Congress should step in once again to ensure that its original intent is effectuated, either through oversight of the responsible federal agencies or legislation. Drawing on lessons learned from the financial sector, implementation of the wildlife whistleblower reward laws should both encourage whistleblowers to come forward and fully explain how potential whistleblowers can obtain compensation and confidentiality protections.

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## I. Introduction

“Whistleblowers have always been crucial,” U.S. Senate Judiciary Committee Chairman Charles (Chuck) Grassley said recently, pointing out that “it is simple common sense.”<sup>1</sup> Senator Grassley (R-Iowa) at the time was thinking of the False Claims Act (FCA),<sup>2</sup> but five years before the U.S. Congress enacted the modern whistleblower provisions in that statute, and years before the potential impact of reward laws was known to policymakers, Congress amended the Lacey Act<sup>3</sup> and the Endangered Species Act (ESA)<sup>4</sup> to include provisions providing monetary incentives to persons who disclosed original information reporting wildlife crimes. If implemented effectively, these reward laws have an even greater potential to encourage whistleblowers to step forward than do newly enacted and highly publicized whistleblower laws such as those included in the Dodd-Frank Act.<sup>5</sup>

The agencies with responsibility for preventing, policing, and prosecuting illegal wildlife crimes were vested with broad and almost unlimited discretion to use the reward laws as a powerful tool in their enforcement arsenal. For example, unlike other whistleblower laws, the Lacey Act and the ESA impose no cap on the percentage of collected

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*Author's Note: Stephen Kohn has represented whistleblowers for over 30 years, establishing numerous precedents strengthening whistleblower rights. Mr. Kohn worked extensively with the U.S. Congress in drafting key whistleblower laws, including protections contained in the Sarbanes-Oxley, Dodd-Frank, and Whistleblower Protection Enhancement Acts. In 1985, he wrote the first book on whistleblower law. His eighth book on whistleblowing is *The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself* (Lyons Press, 3d rev. printing 2013). The author would like to give special thanks to Dr. Gina Green, the Co-Chair of the National Whistleblower Center's Board of Directors, whose insight was key to recognizing the critical role whistleblower reward laws can play in aiding in the detection of wildlife crimes.*

1. *Oversight of the False Claims Act*, Hearing Before the House Comm. on the Judiciary, Subcomm. on the Constitution and Civil Justice, 113th Cong. (July 30, 2014) (prepared floor statement of Sen. Charles Grassley, then-Ranking Member, S. Comm. on the Judiciary), <http://www.grassley.senate.gov/news/news-releases/grassley-testimony-benefits-false-claims-act> [hereinafter Sen. Grassley Remarks].
2. 31 U.S.C. §§3729-3733. The provision of the statute that authorizes whistleblowers to file complaints and obtain rewards, known as *qui tam*, is codified in §3730.
3. 16 U.S.C. §§3371-3378.
4. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.
5. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, contained two whistleblower reward provisions, one covering violations of the Securities Exchange Act (and Foreign Corrupt Practices Act (FCPA)), 15 U.S.C. §78u-6, and the second covering violations of the Commodity Exchange Act, 7 U.S.C. §26. The regulations implementing these two reward provisions are codified at 17 C.F.R. Part 240 and 17 C.F.R. Part 165, respectively.

proceeds for which a whistleblower may be paid. Unfortunately, the four executive departments authorized to pay rewards under those statutes—the U.S. Department of Agriculture (USDA), the U.S. Department of Commerce, the U.S. Department of the Interior (DOI), and the U.S. Treasury—have not effectively implemented them. There are no reported cases under these laws, no published regulations, and no reward application procedures.

Whistleblower reward provisions arose “from a realization that the Government needs help—lots of help—to adequately” enforce anti-corruption laws.<sup>6</sup> Given the success of similar reward laws in other enforcement programs, discussed below, this Article recommends that the responsible agencies promptly implement the wildlife whistleblower laws. Because whistleblowers are currently entitled to obtain monetary payments if their disclosures lead to the successful enforcement of over 40 laws designed to protect endangered plants, fish, and wildlife, including the Lacey Act and the ESA, these laws should be widely publicized and, where appropriate, attorneys should commence filing claims.

The need to aggressively implement the whistleblower reward laws is particularly compelling in the area of wildlife protection. The White House’s *National Strategy for Combating Wildlife Trafficking* identified the need to “strengthen enforcement” as one of three top national priorities necessary to stop illegal wildlife trade.<sup>7</sup> Killing, trafficking, and selling endangered species, plants, and fish is highly profitable. Despite federal policies making protection of endangered wildlife a major priority,<sup>8</sup> wildlife crime is a “big business” that pushes “vulnerable wild animals” to “the edge of extinction.”<sup>9</sup>

A comprehensive report issued by INTERPOL and the United Nations Environment Programme (UNEP) estimates that the total losses worldwide due to illegal

trafficking, poaching of plants, fish, and wildlife, and prohibited logging is between US\$48-153 billion annually.<sup>10</sup> The Congressional Research Service warned Congress that the United States “may be a significant destination for illegal wildlife,” and the “magnitude of the illegal trade may be increasing.”<sup>11</sup> This was confirmed by the White House’s *National Strategy*, finding that “the United States is among the world’s major markets for wildlife and wildlife products . . . [and] also serves as a transit point for trafficked wildlife.”<sup>12</sup>

These assessments were borne out by major studies on illegal trafficking in fish, plants, and animals. A study published in *Marine Policy* found that “illegal and unreported catches represented 20-32% by weight of wild-caught seafood imported to the United States.”<sup>13</sup> The revenue from this illegal trafficking in the United States is valued between \$1.3 billion to \$2.1 billion annually. The National Academy of Sciences found “many lion populations are either now gone or expected to disappear within the next few decades.”<sup>14</sup> INTERPOL and the United Nations (U.N.) determined that “15,000 elephants were illegally killed” at just 42 monitored sites in 2012 alone.<sup>15</sup> According to the Congressional Research Service, “as much as 23% to 30% of hardwood lumber and plywood traded globally” “could be from illegal logging activities.”<sup>16</sup> The adverse economic impact caused by the “pervasive problem” of illegal logging in the United States is tens of billions of dollars.<sup>17</sup>

One of the main reasons for the escalation in illegal wildlife trafficking is simple: It is a highly profitable business with a “low risk of capture.”<sup>18</sup> According to the Congressional Research Service, resources allocated to combat illegal wildlife trafficking in the United States are not sufficient. For example, only 25% of “declared wildlife shipments” entering the United States are inspected, and almost none of the “undeclared shipments” are inspected to ensure that anti-trafficking laws are followed.<sup>19</sup> Outside the United

6. 132 CONG. REC. 28580 (Oct. 3, 1986) (floor remarks by Sen. Charles Grassley, principal sponsor of the 1986 FCA amendments).

7. WHITE HOUSE, NATIONAL STRATEGY FOR COMBATING WILDLIFE TRAFFICKING 2 (Feb. 2014), available at <https://www.whitehouse.gov/sites/default/files/docs/nationalstrategywildlifetrafficking.pdf> [hereinafter NATIONAL STRATEGY].

8. Exec. Order No. 13648, 78 Fed. Reg. 40619 (July 5, 2013).

9. World Wildlife Fund, *Illegal Wildlife Trade*, [worldwildlife.org](http://worldwildlife.org). See also Poaching and Terrorism: A National Security Challenge, Statement of Assistant Attorney General John C. Cruden for the House Committee on Foreign Affairs, Subcommittee on Terrorism, Nonproliferation, and Trade (Apr. 22, 2015), <http://www.justice.gov/opa/speech/poaching-and-terrorism-national-security-challenge-statement-assistant-attorney-general>;

Wildlife trafficking—which includes poaching of protected species and trafficking in their parts—has become one of the most profitable types of transnational organized crime. Illegal trade at this scale has devastating impacts: it threatens security, hinders sustainable economic development, and undermines the rule of law. The illicit trade in wildlife is decimating many species worldwide, and some species—including such majestic animals as rhinoceroses, elephants, great apes, totoaba, sea turtles, and tigers—face extinction in our lifetimes or our children’s lifetimes.

10. UNEP, *The Environmental Crime Crisis: Threats to Sustainable Development From Illegal Exploitation and Trade in Wildlife and Forest Resources* 19 (Christian Nellemann et al. eds., 2014), available at <http://www.unep.org/unea/docs/RRAcrimccrisis.pdf>.

11. CONG. RESEARCH SERV., INTERNATIONAL ILLEGAL TRADE IN WILDLIFE: THREATS AND U.S. POLICY 3 (2008).

12. NATIONAL STRATEGY, *supra* note 7, at 6.

13. Ganapathiraju Pramod et al., *Estimates of Illegal and Unreported Fish in Seafood Imports to the USA*, 48 MARINE POL’Y 102 (Sept. 2014).

14. Hans Bauer et al., Lion (*Panthera leo*) populations are declining rapidly across Africa, except in intensively managed areas (Proceedings of the National Academy of Sciences Sept. 27, 2015), [www.pnas.org/content/early/2015/10/21/1500664112.abstract](http://www.pnas.org/content/early/2015/10/21/1500664112.abstract).

15. UNEP, *supra* note 10, at 32.

16. PERVAZE SHEIKH, CONG. RES. SERV., THE LACEY ACT: COMPLIANCE ISSUES RELATED TO IMPORTING PLANTS AND PLANT PRODUCTS 2 (July 24, 2012).

17. *Id.* at 2-3 (discussing the numerous adverse economic impacts of illegal logged wood).

18. CONG. RESEARCH SERV., *supra* note 11, at 7.

19. *Id.* at 26.

States, where most of the illegal trade originates, enforcement is abysmal because many countries “suffer from an inability to enforce wildlife trade laws.”<sup>20</sup> Illegal trading even occurs on the Internet, through popular sites such as eBay, where ivory products were offered for sale.<sup>21</sup>

Despite the enactment of scores of wildlife protection laws,<sup>22</sup> including laws designed to protect plants and habitat,<sup>23</sup> illegal activities are difficult to detect under current enforcement policies. This significantly contributes to “an unprecedented spike in illegal wildlife trade, threatening to overturn decades of conservation gains.”<sup>24</sup> As President Barack Obama recognized when he signed Executive Order No. 13648, establishing the Presidential Task Force on Wildlife Trafficking, the international crisis in illegal wildlife trafficking “continues to escalate.”<sup>25</sup>

What role, if any, should whistleblowers play in the effort to stop illegal wildlife trafficking and hold accountable those who profit from this trade?

## II. Modern Whistleblower Laws

### A. Overview

Over the past 30 years, laws that encourage whistleblowers to report serious wrongdoing by offering monetary rewards have proven to be “the most powerful tool the American people have to protect the government from fraud.”<sup>26</sup> Then-Attorney General Eric Holder, speaking in 2012, stated that the impact of whistleblower reward laws “has been nothing short of profound”<sup>27</sup>; and Senator Grassley has confirmed that whistleblower reward laws now account for approximately 80% of all U.S. civil fraud prosecutions.<sup>28</sup> These laws have not only proven effective within the United States, but additionally thousands of foreign nationals have

taken advantage of provisions permitting whistleblowers to obtain rewards under the Foreign Corrupt Practices Act (FCPA).<sup>29</sup> (Appendix F charts the 90-plus countries from which over 1,500 whistleblowers have filed claims under the FCPA and related laws.)

The chair of the U.S. Securities and Exchange Commission (SEC), the official charged with responsibility over securities and FCPA whistleblower cases, has concurred, stating in 2013 that “the SEC’s whistleblower program . . . has rapidly become 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 the alleged fraud.”<sup>30</sup> In a series of public statements, U.S. Department of Justice (DOJ) and congressional officials responsible for overseeing America’s oldest whistleblower reward law (the FCA) have lauded the program, describing it as providing “ordinary Americans with essential tools to combat fraud,”<sup>31</sup> and noting that “most cases resulting in recoveries were brought to the government by whistleblowers,”<sup>32</sup> that “whistleblowers have led to an unprecedented number of investigations and greater recoveries,”<sup>33</sup> and that “the need for a robust whistleblower reward law cannot be understated.”<sup>34</sup>

It is now well-documented that the single most important source of information regarding fraud is tips from whistleblowers.<sup>35</sup> It is also well-documented that the over-

20. *Id.* at 31.

21. Ted Williams, *On the Internet, Illegal Trade in Endangered Wildlife Thrives*, ENVIRONMENT 360, Apr. 20, 2015, at [http://e360.yale.edu/feature/on\\_the\\_internet\\_illegal\\_trade\\_in\\_endangered\\_wildlife\\_thrives/28671](http://e360.yale.edu/feature/on_the_internet_illegal_trade_in_endangered_wildlife_thrives/28671).

22. *See, e.g.*, Robert Anderson, *The Lacey Act: America’s Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUBLIC LAND L. REV. 27 (1995).

23. SHEIKH, *supra* note 16.

24. World Wildlife Fund, *Illegal Wildlife Trade*, <http://www.worldwildlife.org/threats/illegal-wildlife-trade>.

25. President Obama’s justification for issuing the Executive Order clearly spelled out the crisis facing numerous endangered species:

Poaching operations have expanded beyond small-scale, opportunistic actions to coordinated slaughter commissioned by armed and organized criminal syndicates. . . . Wildlife trafficking [generates] billions of dollars in illicit revenues each year, contributing to the illegal economy, fueling instability, and undermining security. Also, the prevention of trafficking of live animals helps us control the spread of emerging infectious diseases. For these reasons, it is in the national interest of the United States to combat wildlife trafficking.

Exec. Order No. 13648, 78 Fed. Reg. 40619 (July 5, 2013).

26. Stuart Delery, Assistant Attorney General, Remarks at the American Bar Association’s 10th National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 5, 2014), <http://www.justice.gov/iso/opa/civil/speeches/2014/civ-speech-140605.html>.

27. Eric Holder, Attorney General, Remarks at the 25th Anniversary of the False Claims Act (Jan. 31, 2012), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-25th-anniversary-false-claims-act-amendments-1986>.

28. Sen. Grassley Remarks, *supra* note 1.

29. FCPA, 15 U.S.C. §§78m, 78dd-1 through 78dd-3, and 78ff. *See* National Whistleblower Center, *The Importance of Whistleblower Rewards in Combating International Corruption* (Dec. 9, 2014), available at <http://www.kkc.com/wp-content/uploads/2014/12/Anti-Corruption-Report.pdf>. On September 22, 2014, SEC approved a \$30 million award to a foreign national, finding that the rewards provision has transnational application:

In our view, there is a sufficient U.S. territorial nexus whenever a claimant’s information leads to the successful enforcement of a covered action brought in the United States . . . . When these key territorial connections exist, it makes no difference whether, for example, the claimant was a foreign national, the claimant resides overseas, the information was submitted from overseas, or the misconduct comprising the U.S. securities law violation occurred entirely overseas.

In re Claim for Reward, SEC Whistleblower Award Proceeding 2014-10 (Sept. 22, 2014), available at <https://www.sec.gov/rules/other/2014/34-73174.pdf>. *See also infra* app. F (chart of SEC-related international whistleblowers).

30. Mary Jo White, Chair, U.S. Securities & Exchange Comm’n, Remarks at the Securities Enforcement Forum (Oct. 9, 2013), <http://www.sec.gov/News/Speech/Detail/Speech/1370539872100>.

31. Holder, *supra* note 27.

32. DOJ, Civil Division Fiscal Year 2012 Budget Request, available at <http://www.justice.gov/sites/default/files/jmd/legacy/2014/01/12/fy12-bud-summary-request-performance.pdf>.

33. Press Release, DOJ, Justice Department Recovers Nearly \$5 Billion in False Claims Cases in Fiscal Year 2012 (Dec. 4, 2012), at <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-5-billion-false-claims-act-cases-fiscal-year-2012>.

34. U.S. SENATE JUDICIARY COMMITTEE, THE FALSE CLAIMS ACT CORRECTION ACT OF 2008, S. REP. NO. 110-507 (2008), at [http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp110yWjtd&refer=&tr\\_n=sr507.110&item=&sel=TOC\\_1650&](http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp110yWjtd&refer=&tr_n=sr507.110&item=&sel=TOC_1650&).

35. The Association of Certified Fraud Examiners issues an annual report based on a statistical study of fraud reports worldwide. In its 2014 *Report to the Nations*, the Association’s study found that tips constituted the most important source of fraud detection worldwide. Tipsters or whistleblowers detected approximately 50% of all frauds, while law enforcement authorities were only able to uncover approximately 2.5% of the frauds. *See* Association of Certified Fraud Examiners (ACFE), *2010 Global Fraud Survey: Report to the*



whelming majority of potential whistleblowers choose to never disclose their concerns to law enforcement.<sup>36</sup> Most keep completely quiet, and those who do report usually only do so internally to either a direct manager or another individual within the company. This empirical data led the Ethics Resource Center (a corporate-sponsored nongovernmental organization (NGO)) to conclude that “one of the critical challenges facing . . . government enforcement officials is convincing employees to step forward when misconduct occurs.”<sup>37</sup>

Congress enacted whistleblower reward laws to address the fear that most insiders have when reporting corruption. Over time, this incentive model has proven to be the most effective means to obtain critical information on any corrupt enterprise. The incentive model’s effectiveness has been praised by all of the agencies with authority to grant rewards (DOJ, SEC, the Commodity Futures Trading Commission (CFTC), and the Internal Revenue Service (IRS)). Additionally, the leading study on the behavior of whistleblowers, published by the University of Chicago Booth School of Business, also confirmed that “a strong monetary incentive to blow the whistle does motivate people with information to come forward.”<sup>38</sup> The study, based on a review of major fraud cases, endorses the enactment of additional monetary award-based whistleblower laws, concluding: “The idea of extending the *qui tam* statute to corporate frauds (i.e., providing a financial award to those who bring forward information about a corporate fraud) is very much in the Hayekian spirit of sharpening the incentives of those who are endowed with information.”<sup>39</sup> Finally, “there is no evidence that having stronger monetary incentives to blow the whistle leads to more frivolous suits.”<sup>40</sup>

*Nations on Occupational Fraud and Abuse*. Similar results were also reported in the Association’s subsequent reports published in 2011-2014.

36. Ethics Resource Center, *Blowing the Whistle on Workplace Misconduct* (Dec. 2010), available at [http://www.kkc.com/wp-content/uploads/2015/09/ERC\\_Blowing-the-Whistle-on-Workplace-Misconduct-December-2010.pdf](http://www.kkc.com/wp-content/uploads/2015/09/ERC_Blowing-the-Whistle-on-Workplace-Misconduct-December-2010.pdf).
37. *Id.* (The Center’s reports on workplace behavior are corporate-sponsored. The most recent survey was paid for by the Altria Group, Inc., Walmart, Inc., Lockheed Martin Corp., Edison Int’l, Inc., PricewaterhouseCoopers LLP, United Tech. Corp., Raytheon, KPMG LLP, Assurant, Inc., Archer Daniels Midland, SAIC, BAE Systems, and Bechtel Group, Inc.) See Ethics & Compliance Initiative, *2013 National Business Ethics Survey*, at <http://www.ethics.org/research/eci-research/nbes/nbes-reports/nbes-2013>. The National Business Ethics Survey pointed out the problems faced by employees who do not blow the whistle confidentially: “The percentage of workers who reported the misconduct they see has stalled, and retaliation against workers who reported wrongdoing continues to be a widespread problem.” The failure of employees to report misconduct remained a major problem, with 37% of employees who witnessed misconduct in 2013 failing to report the wrongdoing to *anyone*, including a supervisor inside the company.
38. I.J. Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?* 4 (Chicago Booth School of Business Research Paper Series No. 08-22, Center for Research in Securities Prices Working Paper No. 618 Oct. 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=891482](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891482). Because of the mistreatment of whistleblowers, without rewards, the vast majority of employees never disclose fraud. *Id.* at 23 (“Given these costs, however, the surprising part is not that most employees do not talk; it is that some talk at all.”).
39. *Id.* at 29 (referring to economist and philosopher Friedrich Hayek, best known for his view on classical liberalism).
40. *Id.* at 25.

Currently, the U.S. government promotes four U.S. laws that contain whistleblower reward provisions.<sup>41</sup> These laws govern a large part of the U.S. economy, including securities and commodities transactions, government contracting and procurement, taxation, and foreign bribery. The agencies responsible for investigating whistleblower claims and paying rewards have been proactive, establishing well-defined procedures to govern these programs. For example, SEC’s reward program is managed by a special Whistleblower Office, which operates an informative web page, has rules for filing claims and qualifying for rewards, and permits foreign nationals to file claims under the FCPA.<sup>42</sup> IRS and the CFTC also have offices dedicated to facilitating whistleblower reward payments.<sup>43</sup> DOJ, although it has not established a formal office, has adopted procedures consistent with the statutory requirements for reviewing and intervening in whistleblower reward claims filed under the FCA.<sup>44</sup>

These programs have strengthened the ability of the government to detect and prosecute civil and criminal violations, resulting in recoveries of over \$50 billion in fines and penalties, in addition to the successful prosecution of numerous criminals.<sup>45</sup> In 2012, then-Attorney General Holder stated that whistleblower reward laws have “provided ordinary Americans with essential tools to combat fraud . . . and to bring accountability to those who would take advantage of the United States government—and of American taxpayers,” and opined that “Some of these [cases] may have saved lives. All of them saved money.”<sup>46</sup> Not surprisingly, because criminal activity is orchestrated in secret, whistleblowers are the primary source of information uncovering fraud.

The agencies administering the modern whistleblower laws have ensured that whistleblowers are paid. Since 1986, whistleblowers have been paid over \$5.3 billion in compensation for risking the loss of their jobs, careers,

41. See FCA, 31 U.S.C. §§3729-33 (fraud in government contracting or procurement); Internal Revenue Act, 26 U.S.C. §7623 (tax fraud or underpayment of taxes); Commodity Exchange Act, 7 U.S.C. §26 (fraud in commodity futures trading); Securities Exchange Act, 15 U.S.C. §78u-6 (securities fraud); and the FCPA, 15 U.S.C. §78u-6 (foreign bribery and lack of internal controls; note that whistleblower provisions are under the Securities Exchange Act, 15 U.S.C. §78u-6).

42. See SEC, 2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program (2014), available at <http://www.sec.gov/about/offices/owb>. See also *infra* app. F (setting forth the number of international whistleblowers under SEC’s Dodd-Frank Act program, along with the countries for which they are citizens).

43. See SEC, Office of the Whistleblower, [www.sec.gov/whistleblower](http://www.sec.gov/whistleblower), and CFTC, Whistleblower Program, [www.cftc.gov/consumerprotection/WhistleblowerProgram](http://www.cftc.gov/consumerprotection/WhistleblowerProgram).

44. 31 U.S.C. §3730. See U.S. Government Accountability Office (GAO), Information on False Claims Act Litigation (Dec. 15, 2005), available at <http://www.gao.gov/new.items/d06320r.pdf>. DOJ publishes an online “primer” on how to use the FCA at [http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS\\_FCA\\_Primer.pdf](http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf).

45. See S. REP. NO. 110-507 (2008). The Senate Committee on the Judiciary noted the “critical role” that whistleblowers play in detecting fraud, *id.* at 6, and quoted testimony by Michael Hertz, Deputy Assistant Attorney General, that the existence of the whistleblower law and “well-publicized recoveries had a salutary effect” on deterrence, *id.* at 8.

46. See Holder, *supra* note 27.

or even their lives for doing the right thing.<sup>47</sup> Moreover, the government has exploited a number of large payments to publicize the existence of these programs worldwide and encourage thousands of whistleblowers to provide U.S. law enforcement authorities with credible information concerning wrongdoing. Both DOJ and SEC regularly issue national press releases whenever they pay a major reward.

Can the United States harness the power of whistleblower rewards in the context of enforcing wildlife protection and anti-trafficking laws? To answer this question, it is necessary to return to 1973, to the original passage of the ESA, and then to review Congress' actions in 1981 and 1982 that strengthened the enforcement powers of the Secretaries of Agriculture, Commerce, the Interior, and Treasury by amending the Lacey Act of 1900 and the Fish and Wildlife Improvement Act of 1978.

### B. The Origin of Wildlife Whistleblower Protections

In 1973, the concept of whistleblowing was in its infancy. The first law explicitly protecting federal employee whistleblowers would not be passed until 1978.<sup>48</sup> The first modern whistleblower reward law, contained in amendments to the FCA, was not enacted until 1986. Based on the success of the FCA, the Internal Revenue Code was amended in 2006 with a tax whistleblower award law, and in 2010, Congress enacted the Dodd-Frank Act, which permitted whistleblower rewards for reporting violations of the securities and commodities fraud, as well as the major international anti-bribery law, the FCPA.

However, in 1973, years before the utility of whistleblower reward laws was understood, Congress inserted a modest whistleblower reward provision in the newly enacted ESA.<sup>49</sup> The provision was visionary but weak, stating that:

Upon the recommendation of the Secretary, the Secretary of the Treasury is authorized to pay an amount equal to one-half of the civil penalty or fine paid, but not to exceed \$2,500, to any person who furnishes information which leads to a finding of civil violation or a conviction of a criminal violation of any provision of this Act or any regulation or permit issued thereunder.<sup>50</sup>

The \$2,500 cap and the discretionary nature of the award doomed this provision to fail—there are no reported cases under this provision. Employees and other insiders who witness violations of the ESA will not risk their jobs, careers, or their safety for a mere \$2,500, which the governing federal agency might easily refuse to pay.

47. DOJ, FRAUD STATISTICS OVERVIEW: OCTOBER 1, 1987-SEPTEMBER 30, 2015, at 2 (relator share awards), available at <http://www.justice.gov/opa/file/796866/download>.

48. Section 2301 of the Civil Service Reform Act of 1978, 5 U.S.C. §2301, amended by the Whistleblower Protection Act of 1989, 5 U.S.C. §2302.

49. ESA §11(d), Pub. L. No. 93-205.

50. Pub. L. No. 93-205 §11(d).

### C. The Lacey Act Amendments of 1981

The Lacey Act is among America's earliest and most important wildlife protection laws. Originally passed in 1900, it has been amended over time to become the premier anti-trafficking law.<sup>51</sup> Under the Act, it is "unlawful for any person to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce" any fish or wildlife or plant "taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law."<sup>52</sup> The Lacey Act's scope includes the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)<sup>53</sup>; however, the "person" must be subject to U.S. jurisdiction.

The Lacey Act prohibits the failure to properly "mark" most wildlife shipments, and "encompasses virtually any wild animal, fish, or invertebrate, dead or alive, from any part of the world." It also covers "any member of the plant kingdom . . . which is listed on an appendix to [CITES]."<sup>54</sup> The statute provides for both civil and criminal penalties, and the seizure of vessels used for transporting illegal wildlife: "Vessels, vehicles, aircraft, and other equipment used to aid in the unlawful import, export, transport, sale, receipt, acquisition, or purchase of fish, wildlife, or plants may be forfeited in certain circumstances."<sup>55</sup>

In 1981, Congress amended the Lacey Act to increase enforcement authorities under the law. Their intent was clear:

A massive illegal trade in fish and wildlife, their parts and products, and wild plants has been uncovered . . . . The serious consequences of such trade may include the introduction of exotic diseases which threaten the agriculture and pet industries . . . and the ultimate threat to the survival of the species itself. The purpose of [the 1981 amendment] is to provide more effective enforcement tools to the wildlife agencies of the state and the Federal Government to control this trade.<sup>56</sup>

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Powerful tools are needed to combat and control the massive illegal trade in wildlife which threatens the survival of numerous species, threatens the welfare of our agriculture and pet industries, and imposes untold costs upon the American taxpayers.<sup>57</sup>

A whistleblower reward provision was included in the 1981 amendment: "[The whistleblower reward provision]

51. See Association of Fish & Wildlife Agencies, *The Importance of the Lacey Act: The Nation's Champion Legislation Against Wildlife Crime and Illegal Wildlife Trade 2* (2014) ("The Lacey Act remains one of the nation's most important conservation statutes and a powerful tool for protecting fish and wildlife in the U.S. and supporting conservation worldwide."), available at [http://www.fishwildlife.org/files/LaceyAct\\_FactSheet.pdf](http://www.fishwildlife.org/files/LaceyAct_FactSheet.pdf).

52. 16 U.S.C. §3372(a)(2).

53. 27 U.S.T. 1087; T.I.A.S. 8249; 993 U.N.T.S. 243. See <https://www.cites.org/eng>.

54. See Anderson, *supra* note 22, at 53-54 (internal citations omitted).

55. *Id.* at 70-73.

56. H.R. REP. NO. 97-276, at 7 (Oct. 19, 1981).

57. *Id.* at 19.

directs the Secretary to pay rewards to persons who furnish information leading to an arrest, conviction assessment or forfeiture from sums received as penalties, fines or forfeitures.”<sup>58</sup> This provision did not mimic the weaknesses contained in the ESA. The \$2,500 cap was not adopted—there was no limit imposed on the percentage or amount of a reward that the government could pay a Lacey Act whistleblower. Further, Congress changed the purely discretionary nature of the ESA’s reward provision. Language was included in the Lacey Act indicating that Congress wanted agencies to pay all qualified whistleblowers. The statute provided that the responsible agencies “shall pay” the awards. The new Lacey Act whistleblower reward law stated:

Beginning in fiscal year 1983, the Secretary [i.e., the Secretary of Interior, Commerce, or Agriculture] or the Secretary of the Treasury shall pay, from sums received as penalties, fines, or forfeitures of property for any violation of this chapter or any regulation issued hereunder a reward to any person who furnishes information which leads to an arrest, a criminal conviction, civil penalty assessment, or forfeiture of property for any violation of this chapter or any regulation issued hereunder.<sup>59</sup>

As explained below, when Congress enacted the Lacey Act’s whistleblower reward provision, it also amended the ESA to eliminate the cap and make payment of rewards mandatory.

The Lacey Act whistleblower reward law contains the basic framework that Congress would eventually approve for reward provisions in other laws, such as the Internal Revenue Code and Securities and Exchange Act. The basis for the reward is predicated on the monies obtained by the federal government as a result of the whistleblower’s information. The Lacey Act permits whistleblowers to collect for both civil and criminal penalties and obtain a portion of any restitution, and further states that a reward could include payment based on any “seizures” obtained under the law.

This seizure provision can significantly increase the reward payable to a whistleblower. The Lacey Act contains quality-assurance requirements that whistleblowers are historically well-suited to enforce and also gives the government the power to seize any “vessel” used in importing any of the prohibited fish, wildlife, or agricultural products covered under the law. If implemented, whistleblowers would be in a position to provide evidence justifying the seizure of vessels and greatly benefit from this reward provision.

For example, if employees on these vessels had knowledge that those operating the vessels either were complicit with illegal wildlife trafficking or grossly negligent in preventing such crimes, they could file claims and obtain rewards based not only on the civil and criminal penalties, but also on the value of any seized vessel. Whistleblowers who first raise their concerns with vessel operators would

be in an especially favorable position for collecting under the reward law; by analogy, under the FCA whistleblower reward provision, the failure of a company to properly investigate an employee’s concerns can give rise to corporate liability under a theory of willful ignorance.

The Lacey Act authorizes four separate departments of the federal government to pay awards. The Department of Commerce, DOI, and Treasury are given joint and several authority to pay rewards. USDA is also given authority to pay awards under the “plants” provision of the Act, which includes illegal logging. The law gives these agencies broad discretion to implement rules to reward whistleblowers and, unlike any of the future whistleblower reward laws, has no cap on the amount of an award or percentage of collected proceeds that may be given to a whistleblower. By contrast, under the whistleblower provisions of the Commodity Exchange Act, the FCA, FCPA, Internal Revenue Act, and Securities Exchange Act, rewards are capped at a maximum of 30% of collected proceeds. By declining to cap whistleblower awards in the 1981 Lacey Act amendments, Congress implicitly provided agencies with tremendous power to aggressively use the reward law and to ensure that, in cases where a monetary sanction may be small, the whistleblower reward can still be significant.

Additionally, Congress took steps to ensure that money would always be available to pay rewards. The Lacey Act provided that monies obtained from enforcement actions be placed in a separate fund to pay rewards.<sup>60</sup> However, once the amount of monies deposited into the Lacey Act Reward Fund exceeds \$500,000, the funds would be used to pay for conservation grants unrelated to whistleblower protection. Monies transferred out of the Reward Fund that are used to pay for other projects can be funded outside of the formal appropriation process. This use of reward funds was questioned by Mr. William Clark, a noted expert in illegal wildlife trade (currently working for INTERPOL), before the U.S. House of Representatives Committee on Natural Resources: “Instruments such as the Lacey Act Reward Fund do exist, but they are underused, and often resources are diverted to forestry or fisheries agencies which tend to be better funded anyway.”<sup>61</sup>

A 2012 report by an NGO analyzing the potential impact of the Lacey Act on combating illegal logging illustrates how the reward laws can become an effective tool that increases the enforcement capabilities of the U.S. government. The report, authored by the Union of Concerned Scientists, explained that “the most effective way to reduce

60. 16 U.S.C. §1540(d):

Whenever the balance of sums received under this section and section 3375(d) of this title, as penalties or fines, or from forfeitures of property, exceed \$500,000, the Secretary of the Treasury shall deposit an amount equal to such excess balance in the cooperative endangered species conservation fund established under section 1535(i) of this title.

This provision applies to fines and penalties collected under the ESA and Lacey Act.

61. *Poaching American Security: Impacts of Illegal Wildlife Trade*, U.S. House of Representatives, Committee on Natural Resources, Oversight Hearing (Mar. 5, 2008) (testimony of William Clark), available at <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=198841>.

58. *Id.* at 24.

59. 16 U.S.C. §3375(d).



illegal logging” is to reduce its profitability. If the Lacey Act is “adequately enforced,” the report said, it would significantly reduce the “incentives for illegal logging and associated trade,” creating “disincentive(s) for participating in any part of the illegal trade.”<sup>62</sup> The key is to “create policies that make it easier to identify and catch illegal loggers and wood traders, and to impose expensive fines on them.”<sup>63</sup> Based on the highly successful application of the reward laws in all of the other areas for which they have been enacted, whistleblowers are a proven critical source of information necessary to detect and prosecute those who violate the law.

Further, the implementation of a whistleblower detection program would encourage companies, including those whose vessels are used to transport the products, to make “investment(s) to ensure their part of the supply chain is legal.”<sup>64</sup> Incentivizing whistleblowers to report illegal trafficking creates a reporting structure that, as in other areas of the economy where such laws have been utilized, revolutionizes the enforcement capabilities of the appropriate government authorities.

#### D. *Post-Lacey Act Wildlife Whistleblower Laws and the Importance of the 1982 Amendment to the Fish and Wildlife Improvement Act*

The 1981 Lacey Act amendments also include a “miscellaneous” section that contains specific fixes to other laws. Congress used this provision to fix the defects in the ESA’s reward law. Congress eliminated the monetary cap, made the discretionary authorities under the 1973 Act mandatory, and harmonized the ESA’s whistleblower reward law with that of the Lacey Act. The two were now identical.

In the final House Report on the 1981 amendments, Congress explained its reasoning for fixing the weaknesses in the ESA:

[T]he Secretaries of the Interior and Commerce have been unable to pay rewards from the proceeds of fines and civil penalties under the Endangered Species Act because Section 11(d) of that Act has been interpreted to make payment by the Secretary of the Treasury discretionary. This amendment would make it clear that upon recommendation by either the Secretary of the Interior or the Secretary of Commerce, rewards shall be made available.<sup>65</sup>

Thereafter, Congress included whistleblower reward provisions identical to the Lacey Act in four other wildlife protection laws: the Rhinoceros and Tiger Conservation Act, the Antarctic Conservation Act, the Fish and Wildlife Improvement Act, and the Wild Bird Conservation Act.<sup>66</sup>

On December 31, 1982, Congress went even further in strengthening the authority of the government to pay awards for whistleblowers that report wildlife crimes.<sup>67</sup> A little-noticed appropriations act for conservation programs on military reservations contained a rider “for other purposes.” One of these “other purposes,” which originated as a floor amendment in the House, amended the Fish and Wildlife Improvement Act of 1978. This amendment, approved as Section 7 of the bill, includes sweeping authorization for DOI and the Department of Commerce to pay whistleblower rewards from “appropriations.”<sup>68</sup> Unlike other whistleblower reward laws, payments would not have to be based solely on the amount of funds recovered in a specific enforcement action. Instead, DOI and the Department of Commerce may use appropriated funds to compensate whistleblowers.

The 1982 amendment also broadened the scope of laws for which rewards could be paid. Under the amended Fish and Wildlife Improvement Act, *all* wildlife laws administered by the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (i.e., the Department of Commerce’s National Oceanic and Atmospheric Administration (NOAA) division) were covered. The law explicitly ensures that rewards can be paid to whistleblowers who reported violations of “any laws administered by the United States Fish and Wildlife Service or the National Marine Fisheries Service relating to fish, wildlife, or plants.”<sup>69</sup> The amendment now covers over 40 major wildlife laws, effectively closing any loopholes in coverage.<sup>70</sup> This provision also applies to all such laws, “notwithstanding any other provision of law.” Accordingly, even if a specific wildlife whistleblower law has a cap on payments, the Fish and Wildlife Improvement Act explicitly authorizes the payment of rewards directly from agency appropriations.

Like other wildlife whistleblower protection laws, the Fish and Wildlife Improvement Act’s amendment was enacted years before empirical data existed demonstrating the effectiveness of reward laws. During the House floor debate on the amendment, it was clear that Congress was beginning to understand the importance of paying rewards in order to detect crimes. Then-Congressman John Breaux (D-La.) explained that “undercover activities,” which implicitly included almost all whistleblower cases, were always “difficult and dangerous but highly successful.”<sup>71</sup> Additionally, the amendment was designed to draw out insiders who could help “apprehend large-scale commercial violators of wildlife laws.”<sup>72</sup>

As the year 1982 came to a close, the stage was set for the federal government to aggressively use whistleblower reward laws. Large financial rewards could be offered to

62. Patricia Elias, Union of Concerned Scientists, *Logging and the Law: How the U.S. Lacey Act Helps Reduce Illegal Logging in the Tropics* 12 (Apr. 2012), available at [http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global\\_warming/illegal-logging-and-lacey-act.pdf](http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global_warming/illegal-logging-and-lacey-act.pdf).

63. *Id.* at 18.

64. *Id.*

65. H.R. REP. NO. 97-276, at 28 (Oct. 19, 1981).

66. Currently, the following wildlife protection laws have nearly identical reward provisions: Lacey Act, 16 U.S.C. §3375(d); ESA, 16 U.S.C. §1540(d); Rhinoceros and Tiger Conservation Act, 16 U.S.C. §5305a(f); Antarctic

Conservation Act, 16 U.S.C. §§2409 & 2439; Fish and Wildlife Improvement Act, 16 U.S.C. §7421(c)(3); and Wild Bird Conservation Act, 16 U.S.C. §§4912(c) & 4913(b).

67. Pub. L. No. 97-396, 96 Stat. 2005.

68. 16 U.S.C. §7421(k)(2).

69. *Id.* §7421(k).

70. See *infra* app. B, for a listing of laws covered under this provision.

71. 128 CONG. REC. H10207 and H31972 (Dec. 17, 1982).

72. *Id.*

insiders willing to risk their careers (or lives) to report the killing of endangered animals, fish, and plants in violation of over 40 separate fish, plant, and wildlife protection laws. These payments could be made to whistleblowers on a worldwide basis, rewarding non-U.S. citizens who disclose information about illegal wildlife being imported into the United States or illegal trafficking that could otherwise be policed under U.S. law.

### E. *The Current Status of Wildlife Whistleblower Laws: Inactive*

Yet, none of the federal agencies responsible for administering the wildlife whistleblower protection laws have taken steps to fully implement or properly publicize these laws. No implementing regulations have been published. There are no publicly available procedures for wildlife whistleblowers to file disclosures, apply for rewards, or obtain payment. There are no appeal procedures if a reward is denied. There are no published decisions documenting any award payments to any whistleblowers by USDA, Commerce, DOI, or Treasury.

FWS has non-public internal procedures for how a special agent could request that one of his or her informants obtain a reward. These procedures are referenced online in Part 450 of the massive FWS Manual. Part 450, Section 450 FW-2, entitled “paying rewards,” has not been made publicly available by FWS. FWS considered this provision exempt from public disclosure as “law enforcement sensitive.”<sup>73</sup>

However, on November 18, 2015, a copy of this internal procedure was obtained by the National Whistleblower Center pursuant to a Freedom of Information Act (FOIA) request.<sup>74</sup> These previously non-public internal procedures are not particularly helpful or encouraging to would-be whistleblowers. They grant complete discretion to the special agent who works with an informant/whistleblower to recommend a reward. That recommendation is subject to approval by the regional Supervisory Agent in Charge and must be approved by the Chief of the FWS Office of Law Enforcement. There are no application procedures for the whistleblower to utilize, and there are no appeal procedures if the Special Agent decides not to apply for a reward or if the Chief denies a reward. There is no requirement to inform potential whistleblowers of their right to obtain a reward. Rewards are prohibited if, in the opinion of FWS, paying compensation “would create a conflict of interest or appearance of impropriety,” even though the underlying statutes do not contain any such prohibition. If a Special Agent recommends an award, they must fill out an official “Request for Payment of Reward” form addressing eight factors, none of which were approved after publication or comment to the whistleblower community.<sup>75</sup>

Under FWS’ internal operating procedures, employees of foreign governments are prohibited from receiving a reward, but the procedures do not bar U.S. government officials from giving awards to themselves.<sup>76</sup> This rule is backwards. The Lacey Act and the ESA explicitly *prohibit* most U.S. government officials from obtaining rewards, but do not prohibit foreign officials from obtaining rewards.<sup>77</sup> On the other hand, it is easy to foresee how foreign government employees, who risk retaliation at the hands of corrupt local officials or poachers, may become important confidential sources of information to U.S. authorities. The threats faced by foreign nationals who expose or try to stop illegal trafficking are well-documented. For example, as of July 7, 2015, the International Ranger Federation counted 52 Park Rangers as having died in the line of duty the prior year.<sup>78</sup>

Extensive review of the websites of the agencies responsible for paying whistleblower rewards failed to identify any information whatsoever about the reward laws. On their website, NOAA’s Office of Law Enforcement only has a toll-free phone number posted for reporting violations. FWS’ website offers both a phone number and an e-mail address. None mention anything about a whistleblower’s right to obtain a reward.

This is in stark contrast to the modern whistleblower laws that have been more effectively implemented by DOJ, SEC, the CFTC, and IRS. All of the agencies that administer the modernized whistleblower laws have extensively publicized their provisions and encouraged whistleblowers to file disclosures and qualify for rewards. The procedures adopted by those agencies are worth reviewing.

FWS’ record on paying rewards is extremely weak. Between 1981 and 2003, FWS did not maintain records on how many rewards were paid under the Lacey Act or the ESA.<sup>79</sup> During this time period, there is only one public reference confirming a payment. In 1987, FWS awarded an anonymous whistleblower \$3,000 for reporting the illegal killing of a grizzly bear.<sup>80</sup> This payment was not made

to the National Whistleblower Center in November 2015, this criteria was not publicly available.

76. FWS, Service Manual Chapter, Part 450. These internal rules were obtained by the National Whistleblower Center pursuant to FOIA. The National Whistleblower Center is publishing Part 450, the Fish and Wildlife Reward procedures, at [www.globalwhistleblower.org](http://www.globalwhistleblower.org).

77. 16 U.S.C. §3375(d)(2) (“Any officer or employee of the United States or any State or local government who furnishes information or renders service in the performance of his official duties is ineligible for payment under this subsection.”).

78. Press Release, International Ranger Federation, World Ranger Day Celebrations, Remembrance and E-Kit (July 31, 2015), <http://internationalrangers.org>. A CNN report documented the murder of 140 rangers at the hands of poachers in the past 20 years. Pete Kowalczyk, *These Park Rangers Would Die (and Have) to Save Mountain Gorillas*, CNN.com, Nov. 25, 2015, at <http://www.cnn.com/2015/11/12/africa/virungational-park-mountain-gorilla/>.

79. See FOIA request FWS2016-00128, available at [www.globalwhistleblower.org](http://www.globalwhistleblower.org).

80. See News Release, DOI, Montana Resident Receives \$5,000 Reward in Grizzly Bear Case (Jan. 21, 1987), <http://www.fws.gov/news/Historic/NewsReleases/1987/19870121.pdf>. In paying the award, the FWS Director stated: “Without this individual’s help, this case would not have been solved . . . I hope his willingness to get involved will serve as a model for other citizens who may observe violations of wildlife conservation laws.”

73. FWS, Service Manual Chapters, Paying Rewards, [www.fws.gov/policy/450FW2LINK.html](http://www.fws.gov/policy/450FW2LINK.html).

74. See FOIA request FWS2016-00128, available at [www.globalwhistleblower.org](http://www.globalwhistleblower.org).

75. FWS, Service Manual Part 450 lists eight factors a Special Agent must address when he or she recommends the approval of an award. Until released



as part of any organized whistleblower-incentive program. Although not publicly available, in response to an FOIA request filed by the National Whistleblower Center, FWS did provide a complete accounting of reward payments made under the Lacey Act and the ESA between fiscal year (FY) 2004 and 2015.<sup>81</sup> During this 12-year period, FWS made 32 reward payments under the Lacey Act and 15 reward payments under the ESA. The average reward was \$5,710. No publicity surrounding any of these rewards could be located, and the basis for the rewards is still not a matter of public record.

As explained below, these payments are inconsequential in comparison to payments made under similar reward laws. A comparison as to the amount of rewards paid under the Lacey Act, the ESA, and the FCA makes this point crystal clear.<sup>82</sup>

## 1. SEC and IRS Whistleblower Procedures

SEC has a special webpage managed by its Office of the Whistleblower. That site contains information on how to apply for a reward (including forms used for filing a formal application), copies of all of the rules governing the program, statements by SEC Commissioners and other officials praising the whistleblower program, explanatory statements on the purposes of the law, copies of all award decisions, links to other related programs, press releases issued encouraging whistleblowers to file a claim under the program and informing the public as to awards being granted, and copies of annual reports issued by the Office of the Whistleblower.<sup>83</sup>

SEC and the CFTC have published extensive rules setting out clear criteria for qualifying for a reward, how whistleblowers may file disclosures anonymously and confidentially, explicit application procedures, guidance on how to evaluate “related actions,” an internal review process, the right to an internal administrative appeal if a reward is denied, and a process for determining the amount of a reward for qualified whistleblowers. IRS has also published clear internal operating procedures and rules that establish similar procedures, including clarifications on confidentiality procedures.

The IRS and SEC whistleblower reward laws are structurally similar to the wildlife laws. All of these laws require whistleblowers to file their claim administratively. They vest with the prosecutorial authorities the discretion of whether to conduct an investigation into the underlying whistleblower allegations. In other words, it is up to IRS or SEC (or DOJ, if relevant) to investigate the allegations of criminal or civil violations and to prosecute the wrongdo-

ers. The whistleblowers only obtain a reward if the government agencies are successful in their enforcement activities, and there is no private right of action to pursue wrongdoers. The whistleblower is, first and foremost, a witness for the government, whose right to recovery is predicated on the government proving the underlying violations. Thus, the administrative rules governing the processing of these reward claims are critical to the success of the programs.

Both the IRS and SEC programs are newly implemented and still developing.<sup>84</sup> The IRS reward program has two parts. The first is a purely discretionary program, which grants IRS the complete (and nonreviewable) discretion whether or not to pay a reward.<sup>85</sup> From FY 2011 through June 30, 2015, IRS paid whistleblowers \$54 million under this program.<sup>86</sup> The IRS law also has a mandatory reward program if the alleged tax violations are large (over \$2 million). This program requires IRS to pay rewards between 15-30% where the whistleblower’s original information results in actual sanctions received by IRS. From FY 2011 through June 30, 2015, IRS paid \$261 million in rewards under its mandatory program.<sup>87</sup> During this same time period, the total rewards paid by FWS under both the Lacey Act and the ESA was \$71,000.00.<sup>88</sup>

## 2. Whistleblower Procedures Under the FCA

The FCA has a very different structure, but ultimately, the rules for qualifying a whistleblower for a reward and determining the amount of the reward are very similar to IRS and SEC laws. Under the FCA, the whistleblower must file a formal lawsuit in federal court.<sup>89</sup> Under IRS and SEC procedures, the claim is not filed in court, but instead filed with the administrative agency. This makes the initial filing procedure under the FCA much more difficult than the filing procedures under IRS or SEC laws. Further, the requirement that a formal lawsuit be filed makes it more difficult for a whistleblower to pursue his or her claim confidentially.

The whistleblower’s FCA lawsuit must name the wrongdoer as a defendant, and the lawsuit must be initially served under seal on DOJ. DOJ is required to investigate the claim, and can thereafter intervene in the case. If DOJ intervenes, it takes control of the litigation, but the whistleblower remains a party to the case and can pursue the case if DOJ declines to take action. However, outside of these very significant procedural differences, the rules for deciding a reward are similar.

All of the reward laws require the whistleblower to provide original information to the government, and establish

FWS paid \$3,000 to the informant. A private foundation paid another \$2,000 to the informant.

81. See Letter from William Woody Assistant Director, Office of Law Enforcement, FWS (Dec. 2, 2015); FOIA request FWS2016-00128, available at [www.globalwhistleblower.org](http://www.globalwhistleblower.org). The rewards issued by the FWS under the Lacey Act and the ESA are set forth in Appendices C and D.

82. Compare Appendices C and D (setting forth rewards paid under the wildlife laws), with Appendix E (setting forth rewards paid under the FCA), *infra*.

83. See [www.sec.gov/whistleblower](http://www.sec.gov/whistleblower).

84. See U.S. GAO, IRS WHISTLEBLOWER PROGRAM: BILLIONS COLLECTED, BUT TIMELINESS AND COMMUNICATION CONCERNS MAY DISCOURAGE WHISTLEBLOWERS, No. GAO-16-20 (Oct. 2015) (hereinafter IRS GAO REPORT).

85. 26 U.S.C. §7623(a).

86. IRS GAO REPORT, *supra* note 84, at 23.

87. *Id.*

88. See Letter from William Woody, Assistant Director, Office of Law Enforcement, FWS (Dec. 2, 2015); FOIA request FWS2016-00128, available at [www.globalwhistleblower.org](http://www.globalwhistleblower.org). See also *infra* apps. C and D.

89. 31 U.S.C. §3730(b).

rules both for eligibility and for disqualification, which are similar. Although under the FCA a court has the ultimate authority to set the reward (or approve or disapprove a reward), in practice in the vast majority of cases for which a reward is paid, DOJ proposes the amount of the reward, and the whistleblower and DOJ reach an agreement.<sup>90</sup> Under the FCA, there are numerous judicial decisions discussing the eligibility of whistleblowers to obtain a reward.<sup>91</sup> These cases are often applied to SEC and IRS programs, as the substance of the qualification rules under all of the laws are similar.

Thus, since 1986, DOJ, IRS, and SEC have collectively processed thousands of whistleblower claims. Over \$50 billion in sanctions based on whistleblower disclosures has been collected. Thousands of wrongdoers have been held accountable and successfully prosecuted based, in whole or in part, on whistleblower information. The IRS Commissioner explained how a Swiss banker's disclosures were critical in triggering IRS' successful multibillion-dollar campaign to eliminate illegal foreign offshore banking:

The IRS' serious efforts to combat offshore tax evasion . . . [was] brought to our attention . . . by whistleblowers . . . . A turning point in our enforcement efforts came in 2009 with the agreement reached with UBS. This agreement represented a major step toward global tax transparency and helped build a foundation for our future enforcement efforts.<sup>92</sup>

These agencies have, for the most part, lived up to their obligation to pay whistleblower rewards: Over \$5.3 billion in compensation has been paid to whistleblowers since the FCA was modernized in 1986.<sup>93</sup> Rewards have proven to be the best method to protect whistleblowers by ensuring that people who provide the government with high-quality original information demonstrating criminal activity, and risk their jobs, careers, or even their lives to do so, are adequately compensated. The regulators who oversee these laws have enthusiastically endorsed them.<sup>94</sup>

### 3. Whistleblower Procedures Under the Act to Prevent Pollution From Ships

The Act to Prevent Pollution From Ships (APPS), like the wildlife laws, contains a little known whistleblower reward provision.<sup>95</sup> The law permits the U.S. government, as part of the resolution of a criminal proceeding under the APPS, to ask a court to award whistleblowers up to 50% of the criminal penalties obtained by the government. The law is weaker than the wildlife laws, as the Justice Department does not have the discretion simply to grant the reward; it must ask a court to approve any such grant. Additionally, the rewards are capped at 50% of any collected criminal penalties. The wildlife laws have no such cap and apply to both civil and criminal penalties. Like the wildlife laws, the reward provisions have transnational application. Pollution that occurs outside the United States can be prosecuted once a ship enters U.S. jurisdiction, and non-U.S. citizens are fully eligible for rewards.<sup>96</sup>

Although this law is obscure and rarely used, over 50% of prosecutions under the APPS rely on whistleblowers.<sup>97</sup> DOJ's Environment and Natural Resources Division<sup>98</sup> regularly asks the court to approve rewards, almost always at the maximum 50% level, which are regularly approved by the court.<sup>99</sup> As explained by DOJ, "significant whistleblower awards" under the APPS "have become a routine practice," as has paying these rewards to non-U.S. citizens.<sup>100</sup>

For example, in 2014, a whistleblower was awarded \$512,500 in an APPS case. This single reward is almost twice as much as *every* reward paid under the wildlife whistleblower laws since they were enacted in 1981.<sup>101</sup> DOJ widely publicized the reward, issuing a national press release.<sup>102</sup> The policies articulated by DOJ in aggressively paying rewards, at maximum levels, in APPS cases is fully applicable to wildlife trafficking cases:

Enforcement, IRS, stating that "Whistleblowers can provide valuable leads, and often offer unique insights . . . whistleblowers have insights and information which can help the Service understand complex issues or hidden relationships." Memorandum from John Dalrymple, Deputy Commissioner for Services and Enforcement, IRS, on IRS Whistleblower Program (Aug. 20, 2014), *available at* <https://www.irs.gov/pub/whistleblower/IRS%20Whistleblower%20Program%20Memorandum%20%28signed%20by%20DCSE%29.pdf>.

90. *Id.* §3730(b)-(d).

91. *United States ex rel. Davis v. District of Columbia*, 670 F.3d 832 (D.C. Cir. 2012); *Campbell v. Redding Med. Ctr.*, 421 F.3d 817, 824 (9th Cir. 2005) (law "encourage[s] whistleblowers to come forward by rewarding the first to do so"); *Kellogg Brown & Root v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015). In fact, the underlying purpose of Congress' amending the FCA in 1986 was to "encourage more private enforcement" by liberalizing the rules for whistleblowers to file claims and obtain rewards. S. REP. NO. 345, 99th Cong., at 23-24 (1986).

92. John A. Koskinen, Commissioner, IRS, Remarks at the U.S. Council for International Business-OECD International Tax Conference (June 3, 2014), *available at* <https://www.irs.gov/PUP/irs/Commissioner%20Koskinen%20Remarks%20at%20US%20CIB%20and%20OECD%20Int%20Tax%20Conf%20June%202014.pdf>.

93. DOJ FRAUD STATISTICS, *supra* note 47. See Appendix E, for a year-by-year accounting of the payments.

94. The leadership of both IRS and SEC have echoed the praise given to reward laws by the Attorney General. See Mary Jo White, Chair, Securities & Exchange Comm'n, Remarks at the Securities Enforcement Forum (Oct. 9, 2013) ("Rewards 'create powerful incentives' for informants 'to come to the Commission with real evidence of wrongdoing . . . and meaningfully contributes to the efficiency and effectiveness of our enforcement efforts.") Chair White explained that whistleblower tips "are of tremendous help" in "stopping ongoing and imminent fraud, and lead to significant enforcement actions." See also John Dalrymple, Deputy Commissioner for Services and

95. 33 U.S.C. §1908(a).

96. *See United States v. Overseas Shipholding Group, Inc.*, Government's Amended Motion for Whistleblower Awards, No. 06-CR-10408 (D. Mass. Mar. 15, 2007), *available at* [www.globalwhistleblower.org](http://www.globalwhistleblower.org).

97. Marine Defenders, Rewards for Whistleblowers, <http://www.marinedefenders.com/commercial/rewards.php>.

98. That DOJ's Environment and Natural Resources Division regularly urges the approval of rewards is significant, as this is the branch of DOJ that also prosecutes wildlife crimes.

99. Government's Amended Motion, *supra* note 96, at 3 n.3. In this case, the court approved the payment of \$5,250,000 to 12 whistleblowers, all of whom were foreign nationals. See *United States v. Overseas Shipholding Group, Inc.*, Order Concerning Whistleblower Awards, No. 06-CR-10408 (D. Mass. May 25, 2007), *available at* [www.globalwhistleblower.org](http://www.globalwhistleblower.org).

100. Government's Amended Motion, *supra* note 96, at 3.

101. See *infra* apps. C and D.

102. Press Release, U.S. DOJ, Drilling Operator Sentenced for Environmental and Maritime Crimes in Alaska (Dec. 19, 2014).

The APPS award provision serves a valuable law enforcement purpose by encouraging those most likely to know of the illegal conduct to report it and cooperate with law enforcement. Because the discharge of oily waste typically takes place in the middle of the ocean in international waters, the only persons likely to know about the conduct and the falsification of the ORB are the crew members. Absent crew members with firsthand knowledge of the illegal conduct coming forward, APPS violations are otherwise extremely difficult to uncover. The government's success in detecting the illegal activity and obtaining sufficient evidence to support investigations and prosecutions is dependent upon the willingness of a crew member to step forward. In turn, a crew member must assess the risks associated with coming forward, such as the possibility that the crew member will lose relatively lucrative employment and be blacklisted and barred from working in the marine shipping industry in the future. A substantial monetary award, as provided by APPS, both rewards the crew member for taking those risks and provides an incentive for other crew members to come forward and report illegal conduct on vessels in the future.<sup>103</sup>

The need for the responsible executive agencies to immediately and properly implement the wildlife whistleblower laws has never been greater. Numerous species are on the verge of extinction. Billions of dollars in illegal trafficking in violation of the Lacey Act alone occurs within the United States on an annual basis. President Obama's Executive Order explained the crisis facing endangered wildlife, fish, and plants, and the need for prompt protective action:

The poaching of protected species and the illegal trade in wildlife and their derivative parts and products (together known as "wildlife trafficking") represent an international crisis that continues to escalate . . . . The survival of protected wildlife species such as elephants, rhinos, great apes, tigers, sharks, tuna, and turtles has beneficial economic, social, and environmental impacts that are important to all nations.<sup>104</sup>

Reward programs have been remarkably successful in every context for which they have been implemented. There is no reason why the wildlife whistleblower laws cannot be implemented and aggressively enforced by the responsible executive agencies, as intended by Congress and required under law, to protect endangered species and stop illegal wildlife trafficking.

### III. Making a Weakness a Strength

The failure of any executive agency to implement the wildlife whistleblower laws presents an unlikely opportunity. These agencies can learn from the successes of the other whistleblower reward laws and structure their rules in a manner to capitalize on these experiences. Because the laws

vest significant discretion in the implementing agencies, there are very few restrictions on the ability of the executive to both effectuate Congress' intent and ensure that the potential positive impact of the whistleblower reward laws is realized. Moreover, the White House's *National Strategy* explicitly identified the use of "administrative tools" to strengthen enforcement capabilities.<sup>105</sup> Among the administrative tools the executive can and should implement to ensure that "insiders" are willing to take the considerable risk that whistleblowers face whenever they disclose information, the following rules and procedures should be expeditiously approved:

#### A. Confidentiality

Consistent with the FCPA and the Dodd-Frank Act, provisions should be implemented that permit anonymity and confidentiality in whistleblowing.<sup>106</sup>

#### B. Guaranteed Minimum Payments

Consistent with all of the modern whistleblower reward laws, a guaranteed minimum award should be set. Only with guaranteed minimum awards can a potential whistleblower be assured that taking the risk of blowing the whistle can result in a payment. The Commodity and Securities whistleblower laws set a minimum payment of 10% of the collected proceeds.<sup>107</sup> The FCA and IRS laws set that minimum at 15%.<sup>108</sup> Because the fines and sanctioning authorities under the wildlife laws are not as aggressive as under laws such as the FCA, which provides for treble damages, the minimum percentage should be no less than 15%. Because the wildlife laws do not contain maximum caps on the percentage of rewards paid, and rewards paid for reporting violations covered under the Fish and Wildlife Improvement Act can come from operating funds, as explained below, these features should be used to incentivize reporting.

#### C. Flexible Maximum Payments

Unlike any of the other whistleblower reward laws, the wildlife laws do not contain any cap or maximum percentage on which an award may be based. This discretion gives the executive agencies that administer the law flexibility to increase awards whenever the total amount of collected proceeds is small. This is particularly true for DOI and the Department of Commerce, who can use appropriations to pay rewards even if no monetary sanction is ever obtained.

105. NATIONAL STRATEGY, *supra* note 7, at 6. The *National Strategy's* enforcement recommendations fully support the aggressive utilization of existing reward laws. The *National Strategy* called upon agencies to "analyze and assess" existing "laws, and regulations, and enforcement tools that the United States can use against wildlife trafficking to determine which are most effective and which need strengthening to better deter wildlife trafficking and foster successful investigation and prosecution of traffickers." *Id.*

106. 17 C.F.R. §240.21F-7.

107. *Id.* §240.21F-5.

108. 31 U.S.C. §3730(d); 26 U.S.C. §7623(b)(1).

103. *Id.*

104. Exec. Order No. 13648 (July 1, 2013).



This flexibility permits agencies to make reward payments when only modest civil penalties are collected, when the government criminally prosecutes crimes, and when monetary recoveries are small, but the impact on wildlife protection is significant.

To encourage whistleblowers, especially in foreign countries that have low wage rates, a guaranteed minimum award of \$25,000 should be paid whenever the whistleblower's original information leads to a successful enforcement action, even if that payment is 100% of the collected proceeds or must be paid from appropriated funds. Awards should be set at 50% of amounts collected between \$25,000 and \$2.5 million. Thereafter, the awards should be consistent with the percentages available under the FCA (that is, a minimum of 15% and maximum of 30%). This award process permits agencies to use the flexible award structures permitted under the law to incentivize reporting, particularly in cases where the impact on protecting wildlife is great, but the amount of collectable fines may be small.

#### D. A Central Whistleblower Office

A central whistleblower office should be established, consistent with the office mandated under the securities laws. SEC's Whistleblower Office now serves as a model for other whistleblower offices.<sup>109</sup> It has a dedicated staff whose function is to ensure that whistleblower disclosures are properly processed and referred to the appropriate investigative agents. The Office has an informative website; explains the rules required for whistleblowers to qualify for a reward; has a safe, confidential form, available online, for providing information to SEC and applying for a reward; and is available to whistleblowers on a worldwide basis.

#### E. Clear Rules Explaining Eligibility

Clear rules for eligibility and administrative appeals need to be established.<sup>110</sup> It is essential that a potential whistleblower (or their counsel) can review the rules governing eligibility for a reward when deciding whether to take the risk of blowing the whistle. Further, the administrative process for applying for a reward, and appealing any administrative decision denying a reward, must be clearly explained to ensure that information is provided to the proper office in the correct format and that a whistleblower's claims will be fairly adjudicated. These types of procedures have been published in regard to the CFTC, IRS, and SEC programs.<sup>111</sup>

#### F. Judicial Review of Claim Denials

All of the modern whistleblower laws permit some form of judicial review if a reward is denied. The CFTC, IRS, and

SEC also permit an internal administrative appeal.<sup>112</sup> The FCA grants U.S. district courts significant authority over approving rewards and can reject the government's recommendation as to the amount of a reward and whether a whistleblower is qualified to obtain a reward.<sup>113</sup> The tax whistleblower law gives significant de novo authority to the U.S. Tax Court to review the decisions of IRS setting a reward amount or denying a reward altogether.<sup>114</sup> Under the securities and commodities laws, there is a more limited right to judicial review, limited to reviewing final agency administrative actions in the federal courts of appeals. Whistleblowers cannot appeal the percentage range of a reward (provided it falls within the mandatory 10-30% range), but can appeal a decision to deny a reward altogether. Rules implementing the wildlife whistleblower laws should explicitly set forth the process for judicial review and ensure that the Administrative Procedure Act's judicial review requirements are made explicit when implementing these laws.

#### G. Uniform Application Procedures

Consistent with the CFTC, IRS, and SEC rules, wildlife whistleblowers should file a formal application for a reward with a centralized office in accordance with procedures that are widely publicized by the responsible wildlife enforcement agencies.<sup>115</sup> This form will ensure that the whistleblower office delegated authority over the reward program obtains sufficient information to ensure that the whistleblower's information can be forwarded to the responsible enforcement agencies and that the claim is properly registered and docketed for investigation and adjudication.

#### H. Rules Ensuring That Non-U.S. Citizens Can Participate in the Program

The implementing rules must take into account that many sources of information will be non-U.S. residents. Much of the illegal activity prohibited under the wildlife protection laws originates in foreign countries, and some U.S. laws have transnational application.<sup>116</sup> Thus, the rules approved by SEC covering whistleblowers who report violations of the FCPA should, where appropriate, be duplicated. Between the approval of SEC's whistleblower rules in August 2011

112. *Id.* §240.21F-13.

113. 31 U.S.C. §3730(b)-(d).

114. 26 U.S.C. §7623(b)(4).

115. 17 C.F.R. §§240.21F-9 and 240.21F-10.

116. For example, on November 5, 2015, President Obama signed into law the Illegal, Unreported, and Unregulated Fishing Enforcement Act. Pub. L. No. 114-81. The Act was intended to address destructive impact of illegal fishing that "threaten(s) sustainable fisheries worldwide." H. REP. NO. 114-212, at 15 (July 20, 2015), available at <https://www.congress.gov/114/crpt/hrpt212/CRPT-114hrpt212-pt1.pdf>. As the House Report noted, illegal fishing undermines legitimate global fishing markets, resulting in "economic losses between \$10-23.5 billion dollars worldwide annually." *Id.* Consequently, "without international enforcement, illegal fishermen are operating in an environment where the monetary reward of [illegal] fishing far outweighs the risk of being caught." *Id.* at 16.

109. 17 C.F.R. §240.21F. The SEC Whistleblower website is <https://www.sec.gov/about/offices/owb/owb-resources.shtml>.

110. *Id.* §§240.21F through .21F-13.

111. *Id.* §240.21F-8.

and September 2015, non-U.S. citizens from over 90 countries filed more than 1,500 whistleblower claims with SEC, primarily related to violations of the FCPA. The Commission has already paid over \$30 million in reward payments to international whistleblowers.<sup>117</sup> SEC's anti-bribery program demonstrates how U.S.-based whistleblower reward laws can have positive transnational impact. This is fully demonstrated by Appendix F, which sets forth each country for which a non-U.S. citizen has filed a confidential whistleblower claim with SEC. Almost all of these claims would be for violations of the FCPA.

When implemented, wildlife whistleblower rules need to be cognizant of this important aspect of the laws, particularly because many countries involved in illegal wildlife activities do not have advanced democratic institutions capable of protecting whistleblowers. Without confidential access to the U.S. rewards program, non-U.S. whistleblowers would be in danger of career-threatening or life-threatening retaliation. The smuggling of endangered plants, fish, or animals into the United States, almost by definition, occurs outside the United States. The wildlife whistleblower laws must be implemented in light of the strong need for transnational application.

### I. Interagency Cooperation

Numerous federal agencies have responsibility for protecting endangered wildlife. The wildlife whistleblower laws themselves empower a number of federal agencies to pay rewards. Executive Order No. 13648 identified even more agencies as sharing in responsibility for protecting wildlife. A process must be formalized requiring these agencies to share whistleblower-provided information and cooperate in investigations and prosecutions. Moreover, as with all of the other whistleblower reward laws, a "related action" provision must be formalized. A "related action" provision ensures that, regardless of which government agency eventually relies on the whistleblower's information, the whistleblower can obtain a reward.<sup>118</sup>

### J. Timeliness

The most significant criticism of current whistleblower reward programs is the long delay in paying a reward. In some areas of law enforcement, delays may be justified, but not in the area of wildlife protection. The need to publicize and implement the wildlife whistleblower laws has already suffered an unjustifiable 30-year delay. The need to encourage whistleblowers in a timely manner is demonstrated by the findings and concerns raised in the executive order, and the fact that extinction of a species and destruction of critical habitat is irreversible.

When implemented, the wildlife whistleblower rules should contain strict time limits for deciding the eligibility of a whistleblower's claim. The best practice is that used in

the FCA and APPS: The whistleblower reward is decided at the time that a settlement is reached with a wrongdoer, and payment to the whistleblower occurs within days (or weeks) of the receipt of payment from the wrongdoer. There is no reason why a whistleblower's eligibility cannot be decided simultaneously with the investigation of a claim and its final resolution. Additionally, if whistleblowers have provided information prior to the formalization of the rules, a process must be established to review these older claims and pay the reward authorized under law.

### K. Reward Participants Who Make Voluntary Disclosures

A central tenet of all successful whistleblower reward laws ensures that persons who participated in the illegal conduct are encouraged to turn in their compatriots in order to obtain monetary compensation. In 1863, when the first major U.S. reward law was debated in Congress, its principal sponsor, Sen. Jacob M. Howard (R-Mich.), explained: "I have based [the FCA] upon the old-fashioned idea of holding out a temptation, and 'setting a rogue to catch a rogue,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice."<sup>119</sup> Consistent with this intent, all of the reward laws have permitted participants to collect rewards. These laws have drawn a distinction between persons who "planned and initiated" the violations, or who were convicted of violating the underlying law (who are generally disqualified from the program), from simple participants.<sup>120</sup>

The current internal operating procedures used by FWS in determining whether to grant a reward do not discuss the "participant" question. However, they do contain a very broad disqualification provision, not authorized under the statutes, that prohibits rewards in cases where "receipt of a reward would create a conflict of interest or appearance of impropriety."<sup>121</sup> This broad disqualification provision should be amended and limited to the disqualifications permitted under IRS, SEC, and/or FCA laws.

119. Cong. Globe, 27th Cong., 1st Sess. 956 (Feb. 14, 1863) (statement of Senator Howard).

120. See SEC Rulemaking Comments, 76 Fed. Reg. 34350 (June 13, 2011):

As a preliminary matter, we do not believe that a *per se* exclusion for culpable whistleblowers is consistent with Section 21F of the Exchange Act. As commenters noted, the original Federal whistleblower statute—the False Claims Act—was premised on the notion that one effective way to bring about justice is to use a rogue to catch a rogue. This basic law enforcement principle is especially true for sophisticated securities fraud schemes which can be difficult for law enforcement authorities to detect and prosecute without insider information and assistance from participants in the scheme or their coconspirators. Insiders regularly provide law enforcement authorities with early and invaluable assistance in identifying the scope, participants, victims, and ill-gotten gains from these fraudulent schemes. Accordingly, culpable whistleblowers can enhance the Commission's ability to detect violations of the Federal securities laws, increase the effectiveness and efficiency of the Commission's investigations, and provide important evidence for the Commission's enforcement actions.

121. FWS, Service Manual Chapters, §450 FW 2.5(B).

117. SEC, 2014 Annual Report, *supra* note 42.

118. 17 C.F.R. §240.21F-3(b).

## L. *Adjust Law Enforcement Tactics to Integrate Whistleblower Disclosures*

Whistleblowers will enable law enforcement to detect “large-scale commercial violators” and use a localized source to uncover entire trafficking networks. Some of the provisions contained in the wildlife laws are well-suited for whistleblowers. For example, persons who work on docks or boats could be incentivized to report based on the provisions of the laws permitting the seizure of vessels used for criminally transporting the wildlife.<sup>122</sup> Rewards based on monies obtained from seized vessels could be very large. Likewise, provisions in the Fish and Wildlife Improvement Act’s 1982 amendments permit the government to use appropriated funds to establish dummy companies to further effectuate the detection of these crimes.<sup>123</sup> Using insiders, in conjunction with these legal authorities, could result in the disclosure of major supply routes and entire criminal enterprises.

## IV. The Role of Wildlife Protection NGOs and Whistleblower Advocates

The wildlife whistleblower reward laws are on the books. Claims can be filed today. It is incumbent upon whistleblower and wildlife advocacy groups to call attention to these laws, both in the United States and worldwide, and to educate potential whistleblowers about the laws’ provisions. This movement has already begun. The National Whistleblower Center, of which this author is a founder, has stepped forward to initiate a public education campaign designed to educate potential whistleblowers and to advocate for prompt federal action implementing these laws.<sup>124</sup>

Similarly, the Center’s website, [globalwhistleblower.org](http://globalwhistleblower.org), has posted information and created a process for whistleblowers to report wildlife crimes.<sup>125</sup> The National Whistleblower Legal Defense and Education Fund recently implemented a worldwide attorney referral program to match wildlife whistleblowers with attorneys knowledgeable in whistleblower law.<sup>126</sup> The program, protected under the attorney-client confidentiality privilege, aims to ensure that confidential claims can be filed with the federal agencies responsible for paying rewards to individuals who courageously provide original information about violations of the Lacey Act, the ESA, and related laws. These grassroots efforts can be increased. NGOs are well-positioned to ensure that all eligible wildlife whistleblowers know of their right to obtain a reward, and to use this knowledge as

encouragement to step forward in a responsible and effective manner.

Until the responsible government agencies enact rules promoting the use of these laws, aggressive grassroots activity to ensure that prospective whistleblowers learn of their ability to lawfully qualify for rewards is the first step toward implementation. Educational activities must also be combined with cultivating a network of attorneys willing and able to represent claimants and properly advise potential whistleblowers as to their rights.

## V. Conclusion

Congress should consider clarifying the wildlife whistleblower laws. In 2010, Congress strengthened SEC’s whistleblower program after the SEC Inspector General documented the agency’s failure to properly exploit an older whistleblower program.<sup>127</sup> Given the widespread recognition that wildlife protection enforcement efforts must be improved, one would hope that a highly critical Inspector General review is no longer needed to spur action. Ideally, the agencies delegated with broad authorities to protect whistleblowers and informants would act promptly to implement these all but dormant laws. But given the years of delay in implementing these wildlife whistleblower laws, Congress should step in once again to ensure that its original intent, clearly expressed in 1981 and 1982, is effectuated. The federal government has the ability to quickly approve procedures fully and effectively implementing the wildlife whistleblower laws. The utility of these procedures is now beyond reasonable doubt. In explaining the “benefit of significant whistleblower incentives,” the Chair of SEC bluntly stated: “They persuade people to step forward. They put fraudulent conduct on our radar that we may not have found ourselves or as quickly. And they deter wrongdoing by making would-be violators ask themselves—*who else is watching me?*”<sup>128</sup>

The government’s implementation of the wildlife whistleblower reward laws should both encourage whistleblowers to come forward with original information concerning wildlife crimes and fully explain how potential whistleblowers can obtain compensation and confidentiality protections. The precedent is already established. Federal agencies responsible for these laws can copy from the best practices of DOJ, IRS, and SEC to institute a highly effective program in a short period of time. It is up to the responsible agencies, NGOs, and whistleblower advocates to implement the laws and encourage an army of valuable informants to step forward and provide the government with the information it needs to protect endangered species—potential victims that cannot speak on their own behalf.

122. See e.g., Lacey Act, 16 U.S.C. §3374(a)(2) (“vessels, vehicles, aircraft, and other equipment used to aid in the importing, exporting, transporting, selling, receiving, acquiring, or purchasing of fish or wildlife or plants in a criminal violation of this chapter for which a felony conviction is obtained shall be subject to forfeiture to the United States . . . .”); and ESA, 16 U.S.C. §1540(e)(4)(B) (same provision).

123. 16 U.S.C. §7421(k)(3).

124. For more information, visit [www.whistleblowers.org](http://www.whistleblowers.org).

125. For more information, visit [www.globalwhistleblower.org](http://www.globalwhistleblower.org).

126. See *Protect Yourself*, [www.whistleblowers.org](http://www.whistleblowers.org).

127. U.S. SECURITIES & EXCHANGE COMM’N, OFFICE OF INSPECTOR GENERAL, ASSESSMENT OF THE SEC’S BOUNTY PROGRAM (Report No. 474, Mar. 29, 2010), available at <http://www.sec.gov/oig/reportspubs/474.pdf>.

128. Mary Jo White, Chair, Securities & Exchange Comm’n, Remarks at the Securities Enforcement Forum (Oct. 9, 2013). In her remarks, Chair White explained that the whistleblower tips were “providing our investigators [with] very specific, timely and credible tip(s)” and that “as more awards are made, we expect more people to come forward.”



**APPENDIX A**  
**Departments of the Federal**  
**Government Authorized to Pay**  
**Wildlife Whistleblower Rewards**

**Antarctic Conservation Act, 16 U.S.C. §2409(b)(4)**

Secretary of the Department in which the Coast Guard is  
 Operating (Homeland Security)  
 Secretary of Commerce  
 Secretary of the Interior  
 Secretary of Treasury  
 National Science Foundation

**Antarctic Marine Living Resource Convention, 16 U.S.C. §2439**

Secretary of Commerce  
 Secretary of the Department in which the Coast Guard is  
 operating (Homeland Security)

**Endangered Species Act, 16 U.S.C. §1540(d)**

Secretary of Agriculture (plants only)  
 Secretary of Commerce  
 Secretary of the Interior  
 Secretary of Treasury

**Fish and Wildlife Conservation Act, 16 U.S.C. §7421(k)(2)**

Fish and Wildlife Service (U.S. Department of the Interior)  
 National Marine Fisheries Service (U.S. Department of  
 Commerce)

**Lacey Act, 16 U.S.C. §3375(d)**

Secretary of Agriculture (plants only)  
 Secretary of Commerce  
 Secretary of the Interior  
 Secretary of Treasury

**Rhinoceros and Tiger Conservation Act, 16 U.S.C. §5305a(f)**

Secretary of Agriculture (plants only)  
 Secretary of Commerce  
 Secretary of the Interior  
 Secretary of Treasury

**Wild Bird Conservation Act, 16 U.S.C. §4913(b)**

Secretary of the Interior

- Migratory Bird Hunting Stamp Act, 16 U.S.C. §718
- Migratory Bird Treaty Act, 16 U.S.C. §§703 et seq.
- National Wildlife Refuge System, 16 U.S.C. §688
- Rhinoceros and Tiger Conservation Act, 16 U.S.C. §§5301 et seq.
- Wild Bird Conservation Act, 16 U.S.C. §§4901 et seq.

**Rewards Permitted to Be Paid by the National Marine Fisheries Service**

- American Fisheries Act of 1998, Pub. L. No. 105-277, Title II, §§201 et al.
- Antarctic Conservation Act of 1978, 16 U.S.C. §§2401 et seq.
- Antarctic Marine Living Resources Convention Act, 16 U.S.C. §§2431 et seq.
- Antarctic Protection Act of 1990, 16 U.S.C. §2465
- Atlantic Coastal Fisheries Cooperative Management Act, 16 U.S.C. §5103
- Atlantic Salmon Convention Act of 1982, 16 U.S.C. §§3601 et seq.
- Atlantic Striped Bass Conservation Act of 1984, 16 U.S.C. §1851 note
- Atlantic Tunas Convention Act of 1975, 16 U.S.C. §§971 et seq.
- Certificate of Legal Origin for Anadromous Fish Products, Pub. L. No. 101-627, 16 U.S.C. §1822 note
- Deep Seabed Hard Mineral Resources Act of 1980, 30 U.S.C. §§1401 et seq.
- Dolphin Protection Consumer Information Act, 16 U.S.C. §1385 et seq.
- Driftnet Impact Monitoring, Assessment and Control Act, Pub. L. Nos. 100-220 and 104-208, 16 U.S.C. §1822 note
- Eastern Pacific Tuna Licensing Agreement Act of 1984, 16 U.S.C. §972
- Endangered Species Act of 1973, 16 U.S.C. §§1531 et seq.
- Fish and Seafood Promotion Act, 16 U.S.C. §§4001 et seq.
- Fisherman's Protective Act of 1967, 22 U.S.C. §1980
- Florida Keys National Marine Sanctuary and Protection Act, Pub. L. No. 101-605
- Fur Seal Act Amendments of 1983, 16 U.S.C. §§1151 et seq.
- High Seas Driftnet Act of 1992, 16 U.S.C. §18269
- High Seas Fishing Compliance Act, 16 U.S.C. §5506
- Illegal, Unreported and Unregulated Fishing Enforcement Act of 2015, Pub. L. No. 114-81
- Lacey Act, 16 U.S.C. §§3371 et seq.
- Land Remote-Sensing Policy Act of 1992, 15 U.S.C. §§5601 et seq.
- Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§1801-1884
- Marine Mammal Protection Act of 1973, 16 U.S.C. §1361
- Marine Sanctuaries Act, 16 U.S.C. §1431
- Northern Pacific Anadromous Stocks Convention Act of 1992, 16 U.S.C. §§5001 et seq.
- Northern Pacific Halibut Act of 1982, 16 U.S.C. §773
- Ocean Thermal Energy Conservation Act of 1980, 42 U.S.C. §§9101 et seq.
- Pacific Salmon Treaty Act of 1985, 16 U.S.C. §§3631 et seq.
- Shark Finning Prohibition Act, Pub. L. Nos. 106-557 and 109-479, 16 U.S.C. §1822 note
- South Pacific Tuna Act of 1988, 16 U.S.C. §§3631 et seq.
- Sponge Act of 1906, 16 U.S.C. §§781 et seq.
- Sustainable Fisheries Act of 1996, Pub. L. No. 104-297, 16 U.S.C. §§1801 et seq.
- Tuna Convention Act of 1950, 15 U.S.C. §§951 et seq.
- Whaling Convention Act of 1949, 16 U.S.C. §916

**APPENDIX B**

**Laws Covered Under the Wildlife Whistleblower**  
**Reward Provision of the Fish and Wildlife**  
**Conservation Act, 16 U.S.C. §7421(k)(2)**

**Rewards Permitted to Be Paid by the Fish and Wildlife Service**

- African Elephant Conservation Act, 16 U.S.C. §§4201 et seq.
- Airborne Hunting Act, 16 U.S.C. §742
- Antarctic Conservation Act of 1978, 16 U.S.C. §§2401 et seq.
- Bald and Golden Eagle Protection Act, 16 U.S.C. §668
- Endangered Species Act of 1973, 16 U.S.C. §§1531 et seq.
- Lacey Act, 16 U.S.C. §§3371 et seq.
- Marine Mammal Protection Act of 1973, 16 U.S.C. §§1361 et seq.

**APPENDIX C**  
**Awards Granted Under the**  
**Endangered Species Act**  
*FY 2004 – FY 2015*

Year	Awards Issued	Amount Paid
2004	-0-	\$0.00
2005	1	\$3,000
2006	-0-	\$0.00
2007	1	\$10,000
2008	-0-	\$0.00
2009	2	\$5,500
2010	-0-	\$0.00
2011	7	\$16,500
2012	1	\$8,500
2013	1	\$5,000
2014	2	\$8,000
2015	-0-	\$0.00
Total Number of Awards Issued: 15		
Total Amount of Awards Paid FY 2004-FY 2015: \$55,500		
<b>Average Amount of Award Issued: \$3,700</b>		

Source: FWS, FOIA Response FWS-2016-00128 (Dec. 2, 2015). FWS did not have information on the pre-2004 reward payments.

**APPENDIX D**  
**Awards Granted Under the Lacey Act**  
*FY 2004 – FY 2015*

Year	Awards Issued	Amount Paid
2004	3	\$13,500
2005	4	\$9,000
2006	7	\$13,500
2007	1	\$2,500
2008	2	\$19,500
2009	4	\$53,500
2010	4	\$68,500
2011	1	\$2,000
2012	1	\$3,500
2013	5	\$27,500
2014	0	\$0.00
2015	0	\$0.00
Total Number of Awards Issued: 32		
Total Amount of Awards Paid FY 2004-FY 2015: \$213,000		
<b>Average Amount of Award Issued: \$6,656.25</b>		

Source: FWS, FOIA Response FWS-2016-00128 (Dec. 2, 2015). FWS did not have information on the pre-2004 reward payments.

**APPENDIX E**  
**Awards Granted Under the False Claims Act**  
*FY 1987 – FY 2015*

Year	Amount Paid
1987	\$0.00
1988	\$97,188
1989	\$1,446,970
1990	\$6,611,606
1991	\$10,686,287
1992	\$24,381,432
1993	\$29,343,137
1994	\$70,292,246
1995	\$45,628,096
1996	\$25,851,597
1997	\$67,515,904
1998	\$78,751,017
1999	\$64,392,552
2000	\$184,054,520
2001	\$218,252,350
2002	\$165,960,141
2003	\$338,690,141
2004	\$112,600,348
2005	\$170,612,237
2006	\$225,523,908
2007	\$197,384,770
2008	\$204,284,294
2009	\$259,153,532
2010	\$393,516,528
2011	\$559,448,210
2012	\$287,782,447
2013	\$396,173,357
2014	\$444,454,464
2015	\$597,610,533

Source: DOJ, FRAUD STATISTICS OVERVIEW: OCTOBER 1, 1987-SEPTEMBER 30, 2015. DOJ did not release the total number of whistleblowers rewarded per year. Since 1986, a total of 10,593 whistleblower claims were filed with DOJ, and the average award paid per claim filed was \$503,045.00.

**APPENDIX F**  
**International Whistleblower Tips FY 2011-2015**

United Kingdom	221	Slovenia	4
Canada	216	Ukraine	4
China, People's Republic of	164	Ecuador	3
India	153	El Salvador	3
Australia	97	Greece	3
Ireland	51	Hungary	3
Germany	40	Indonesia	3
Russia	39	Kuwait	3
Brazil	27	Qatar	3
Mexico	27	Vietnam	3
Israel	24	Belize	2
Argentina	23	Botswana	2
Singapore	22	Costa Rica	2
South Africa	21	Cyprus	2
Switzerland	21	Czech Republic	2
Hong Kong	19	Lebanese Republic	2
Netherlands, The	19	Panama	2
Curaçao	18	Saudi Arabia	2
France	18	Zambia	2
Spain	18	Bahamas, The	1
New Zealand	17	Bangladesh	1
Malaysia	15	Burkina Faso	1
Thailand	15	Cameroon	1
Turkey	14	Cayman Islands	1
Italy	13	Democratic Rep. of the Congo	1
Chile	11	Denmark	1
United Arab Emirates	11	Egypt	1
South Korea	10	Honduras	1
Norway	9	Iceland	1
Philippines	9	Jamaica	1
Belgium	8	Jordan	1
Bulgaria	8	Kazakhstan, Republic of	1
Japan	8	Kenya	1
Poland	8	Luxembourg, Grand Duchy of	1
Portugal	8	Maldives	1
Romania	8	Malta	1
Sweden	8	Mauritius	1
Venezuela	8	Monaco	1
Slovak Republic	7	Montenegro	1
Taiwan	7	Morocco	1
Austria	6	Nicaragua	1
Colombia	6	Papua New Guinea	1
Finland	6	Peru	1
Ghana	6	Rwanda	1
Pakistan	6	Serbia	1
Dominican Republic	5	Uruguay	1
Nigeria	4	Uzbekistan	1
<b>Total Tips Received</b>	<b>1557</b>		

Source: SEC, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2014); SEC, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM (2015).