

December 12, 2011

Chairman Scott Garrett
Ranking Member Maxine Waters
Subcommittee on Capital Markets and Government Sponsored Enterprises
House Committee on Financial Services
2129 Rayburn House Office Building
Washington, DC 20512

RE: This week's mark-up of legislation to amend the whistleblower incentive and protection programs at the SEC and CFTC

Dear Chairman Garrett and Ranking Member Waters:

On behalf of the undersigned organizations, we are writing to express our opposition to the "Whistleblower Improvement Act of 2011" (H.R. 2483), scheduled for markup on December 13, 2011, before the Subcommittee on Capital Markets and Government Sponsored Enterprises.

The passage of H.R. 2483 would result in sweeping changes to the whistleblower incentive and protection programs at the Securities and Exchange Commission (SEC) and Commodity Futures Trading Commission (CFTC). This legislation, introduced by Representative Michael Grimm (R-NY), is an extreme approach that would silence would-be whistleblowers, endanger critical inside informants, undermine investigations, hamstring enforcement at the SEC and CFTC, and provide lawbreaking financial firms with an escape hatch from accountability.

The whistleblower programs that would be upended by H.R. 2483 are based on America's most effective anti-corruption statute, the False Claims Act, which has returned more than \$27 billion to taxpayers since 1987.¹ Under sections 748 and 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFTC and the SEC now have the authority to compensate whistleblowers whose disclosures lead to enforcement actions with sanctions of \$1 million or more. At a time when these agencies are trying to overcome their limited staffing and resources to avert another Wall Street collapse, it is more important than ever to incentivize and protect whistleblowers who have inside information on egregious abuses in the securities and commodities markets.

Despite coming under significant pressure from industry groups seeking to undermine these initiatives, the final rules approved by the SEC and CFTC are largely favorable to whistleblowers, investors, consumers, shareholders, and taxpayers. Unfortunately, Representative Grimm's legislation would eviscerate the whistleblower programs before they have a chance to bear fruit.

¹ Department of Justice, Office of Public Affairs, "Department of Justice Recovers \$3 Billion in False Claims Cases in Fiscal Year 2010: \$2.5 Billion Health Care Fraud Recovery Largest in History—More Than \$27 Billion Since 1986," November 22, 2010. <http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html> (Downloaded December 12, 2011)

Specifically, H.R. 2483 would:

- **Tip off lawbreakers** by requiring whistleblowers to report internally before going to the SEC or CFTC, and requiring the SEC to provide notification before taking enforcement action based on a whistleblower disclosure. This would permit lawbreaking companies to thwart enforcement actions by intimidating witnesses and destroying or altering evidence. Most companies acting in good faith with strong compliance programs can already expect employees to report internally first. Making internal reporting a requirement would only serve the interests of lawbreakers.
- **Disqualify many would-be whistleblowers** by denying incentives and awards to any whistleblower with a contractual obligation to cause the employer to investigate or respond to the misconduct. Companies could simply require employees to sign an agreement that states this obligation, thereby denying access to the whistleblower programs. This provision would also make it easier for the SEC and CFTC to deny a whistleblower award without any specific criteria or due process for making such a determination.
- **Remove the incentive to inform regulators** by eliminating a minimum award requirement and giving the SEC and CFTC the discretion to give whistleblowers nominal awards. Whistleblowers often put their livelihoods at great risk in order to provide regulators with evidence of wrongdoing. In order to incentivize whistleblowers to take this risk, the Dodd-Frank Act established a minimum award amount of 10 percent for tips that lead to successful enforcement actions with sanctions of \$1 million or more. It is imperative that Congress maintain this 10 percent minimum, which is still below the 15 percent minimum that is generally available to whistleblowers who participate in the False Claims Act and Internal Revenue Service whistleblower programs.
- **Strip protections for whistleblowers** who face retaliation for contacting the SEC or CFTC. The protections provided in the Dodd-Frank Act are consistent with several other laws that protect a host of private sector employees, including those in the financial services, manufacturing, food production and distribution, defense contracting, transportation, and healthcare sectors. H.R. 2483 would legalize retaliation whenever a company's employment agreements, policies, or manuals bar employees from communicating with the government. Removing protections would provide corporate criminals with a blank check to gag employees and eliminate whistleblowers at will.
- **Create an accountability loophole** by allowing special treatment for "self-reporting" if an accused firm conducts an internal investigation and takes "appropriate corrective action" once notified by the SEC and CFTC of the whistleblower tip and pending enforcement action. Although this subsection comes under the title "Good Faith," the loophole would in fact allow firms with bad faith to whitewash any allegations of misconduct and instantly reduce their liability.

It is far too early to determine if the SEC and CFTC whistleblower programs warrant any modification, to say nothing of the sweeping changes proposed in H.R. 2483. The SEC recently reported that it received 334 whistleblower tips on a wide range of issues between August 12 and

September 30, 2011.² It could still be a long time before we see major enforcement actions resulting from these tips. Congress should let these investigations run their course before deciding to modify the whistleblower programs. In the case of the SEC, Congress should at least wait for SEC Office of Inspector General to conduct its Dodd-Frank-mandated review of the agency's whistleblower program.

The whistleblower provisions included in the Dodd-Frank Act were thoughtfully crafted, and the SEC and CFTC have invested significant time and resources in the rulemaking process. Instead of rushing to overhaul these efforts without any demonstrated need, Congress should give the SEC and CFTC more time to fully implement their programs.

In sum, we strongly urge you to oppose H.R. 2483, which would greatly harm the interests of whistleblowers, investors, consumers, shareholders, and taxpayers. We would welcome more discussion on the SEC and CFTC whistleblower programs, which can be arranged by contacting Angela Canterbury at the Project On Government Oversight at 202-347-1122 or acanterbury@pogo.org.

Sincerely,

AFL-CIO
American Library Association
Americans for Financial Reform
Association of Research Libraries
Center for Media and Democracy
Citizens for Responsibility and Ethics in Washington (CREW)
Common Cause
Consumer Action
Consumer Federation of America
Defending Dissent Foundation
FAA Whistleblowers Alliance
Fund for Constitutional Government
Government Accountability Project (GAP)
iSolon.org
OpenTheGovernment.org
Neighborhood Economic Development Advocacy Project (NEDAP)
New Jersey Action
OMB Watch
Project On Government Oversight (POGO)
Public Citizen
Service Employees International Union (SEIU)
Taxpayers Protection Alliance
U.S. PIRG
Voices for Corporate Responsibility

² Securities and Exchange Commission, *Annual Report on the Dodd-Frank Whistleblower Program: Fiscal Year 2011*, November 2011, p. 5. <http://www.sec.gov/about/offices/owb/whistleblower-annual-report-2011.pdf> (Downloaded December 12, 2011)

Whistleblowers Support Fund

cc: Representative Michael G. Grimm
House Financial Services Chairman Spencer Baucus and Ranking Member Barney Frank
SEC Chairman Mary L. Schapiro
SEC Commissioners Aguilar, Gallagher, Paredes, and Walter