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**VIA EMAIL**

Ms. Shelley Torey
3rd Floor Abbey 2
Department for Business Innovation and Skills
1 Victoria Street
London SW1H 0ET

Re: *Call for Evidence on the Whistleblowing Framework*

Dear Ms. Torey:

We welcome the opportunity to respond to the *Call for Evidence on the Whistleblowing Framework* by the Department for Business Innovation & Skills. We are US based lawyers with Constantine Cannon LLP, specializing in representing whistleblowers under the False Claims Act (FCA), its numerous state analogues, and more recently, the Dodd-Frank Act. In fact, we were among the first firms to file claims under the Dodd-Frank whistleblower provisions. We have limited our response to answering only the question of whether the UK should adopt the US system of financial incentives for whistleblowers (Nos. 25 & 26). For the reasons set forth below, we strongly believe it should. This comes from our substantial experience working within the US whistleblower regime. Perhaps even more importantly, it comes from working with numerous whistleblowers, and understanding what motivates them to step forward and what risks they face and actual harms they suffer for doing so.

**Question 25:** *Would a system of financial incentives be appropriate in the UK whistleblowing framework?*

Yes.

**Question 26:** *If yes, what evidence (if any) can you provide to suggest that financial incentives would have a positive or negative impact on exposing wrongdoing?*

It is important to highlight at the outset what we see as a fundamental misconception in the Department's *Call for Evidence* (at 16). That is, the notion that "[t]he success of the[] [FCA and Dodd-Frank] incentives programs is unclear." To the contrary, the success of these programs is powerfully borne out in the success of the FCA and Dodd-Frank whistleblower programs to which financial incentives are inextricably linked. It also is apparent from an honest

recognition of the character and purpose that drives most whistleblowers and the hurdles they face and sacrifices they make in standing up against fraud and misconduct.

False Claims Act

The False Claims Act is the linchpin of the U.S. whistleblower system. Also known as the Lincoln Law, it was enacted in 1863 by President Abraham Lincoln to combat fraud by companies selling rancid food, ailing mules, and defective weapons to the Union Army during the Civil War. Recognizing that the government did not have the resources to uncover and prosecute all of the fraud on its own, the law reached back to thirteenth-century England to revive the tradition of the *qui tam*, derived from the Latin phrase, "he who pursues this action on our Lord the King's behalf as well as his own." This permits private citizens, known as relators, to sue on the government's behalf. And it rewards them heavily for doing so by awarding them a sizeable chunk of any government recovery (15 to 30 percent).

Despite its lofty aspiration and early promise, the FCA was largely ignored for most of the next century. It was relegated even further to the sidelines when in the 1940s Congress sharply restricted the amount a *qui tam* relator could recover under the statute. The government did not seem all that interested in enlisting the support of its citizens to help police the public fisc. That began to change, however, in the 1980s with the significant increase in military spending that occurred during the Ronald Reagan presidency. And in 1986, amid widespread reports of outrageous abuses by government contractors -- $400 hammers, $1,000 bolts, $7,000 coffee pots -- Iowa's Republican Senator Charles Grassley succeeded in putting some serious teeth back into the FCA. The law was amended to impose triple damages on wrongdoers, reward whistleblowers with up to 30 percent of the government's recovery, and include significant anti-retaliation protections for employees who blow the whistle.

It took a few years for the public to catch on, but by the mid-1990s, hundreds of millions of dollars were being returned to the government through the FCA every year, with tens of millions in rewards going to whistleblowers. By 2000, these annual recoveries extended into the billions as the law's reach expanded beyond unscrupulous defense contractors to fraud in other industries, such as healthcare and banking. In 2011 alone, the government reclaimed more than $3 billion, 90 percent of which was recovered from actions spawned by whistleblowers. That figure rose to almost $5 billion last year, again with the vast majority of prosecutions initiated by whistleblowers.[1] This is quite a sea change from the level of whistleblower enforcement that

[1] *See* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

existed back in 1987 where a grand total of $86 million was recovered under the FCA and only a handful of whistleblower actions were filed.[2]

There should thus be little dispute that the financial incentives of the FCA have been a driving force in the huge success of the FCA in combating fraud against the US government. This is a fact the Supreme Court and Congress have repeatedly emphasized. In fact, each has explicitly said so in the context of the increased financial incentives provided for under the 1986 amendments. *See, e.g., Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 130 S. Ct. 1396, 1409 (2010) ("We do not doubt that Congress passed the 1986 amendments to the FCA to strengthen the Government's hand in fighting false claims," and "to encourage more private enforcement suits"); H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986) ("[T]he purpose of the 1986 amendments was to repeal overly-restrictive court interpretations of the qui tam statute" and to encourage "private individuals who are aware of fraud being perpetrated against the Government to bring such information forward."). It is also inherent in the rising scale of whistleblower recoveries the FCA mandates if the government declines to join the whistleblower's case (providing for 15-25 percent where the government joins and 25-30 percent where the government does not).

Dodd-Frank Act

The importance of financial incentives is also apparent from the recently enacted Dodd-Frank Act. This statute was Congress' response to the Great Recession and the Wild West behavior of the Wall Street institutions that led us there. The whistleblower provisions are largely modeled on the FCA and similarly include a whistleblower reward of up to 30 percent of any government recovery. In passing this legislation, Congress saw the wisdom of providing financial incentives to encourage whistleblowers to come forward, recognizing that the Securities and Exchange Commission's (SEC) then-existing whistleblower program -- which lacked any financial incentives -- did not work. Since the SEC created its whistleblower program with financial incentives, as required by the statute, the whistleblower tips have been flooding in. The agency reports that it receives about 7 tips a day, with 2 or 3 of them meriting investigation.

Even more notable is how public the SEC has been in recognizing the importance of whistleblower rewards. The $14 million award the agency made earlier in October, for example, was the exclusive subject of an SEC press release and trumpeted by the most senior officials to encourage future whistleblowers to step forward. SEC chief Mary Jo White could not have been any clearer: "We hope an award like this encourages more individuals with information to come

[2] In 1987, there were only 30 whistleblower actions while in 2011 and 2012 there were 638 and 647, respectively. The number of cases brought by the government, meanwhile, has dropped dramatically, from 343 cases brought without whistleblowers in 1987 to only 135 in 2012.

forward." The head of the SEC Whistleblower Office, Sean McKessy, was equally strong in his messaging, declaring how "gratifying" it was to make this payout and how "whistleblowers are coming forward to assist us in stopping potential fraud in its tracks."[3]

In recent interviews he gave with the Wall Street Journal and Reuters, McKessy all but promised more awards "with very big numbers" to come.[4] The SEC even identifies on its website those successful enforcement actions which are eligible for whistleblower awards. The list grows larger and larger each week, and the SEC has created a $450 million reserve fund from which these future awards will be made. This from an agency that prior to Dodd-Frank many believed was asleep at the switch. There can be no question the SEC whistleblower program is working, and the financial incentives provided for under Dodd-Frank are a major reason why.

Just and Necessary Compensation

Aside from this empirical evidence from the FCA and Dodd-Frank programs that financial incentives work, there is also a simple policy rationale for their use. They are just and necessary. They are just because they compensate whistleblowers for what will almost certainly be a tiresome and unpleasant ordeal. No question, the laws protecting whistleblowers have vastly improved in recent years. But the risk of retaliation or some form of estrangement, alienation or even blacklisting remains very real. We know this first-hand from our own clients, and it has been confirmed in study after study. In fact, one recent study by the Ethics Resource Center (ERC) -- a non-profit research group out of Arlington, Virginia -- says it is actually getting worse.[5]

Among the ERC findings are that roughly 45 percent of employees observe fraud or misconduct each year, 65 percent of this group reports it, and more than one in five of them, or 22 percent, are retaliated against for doing so. This is a significant jump from the 15 percent retaliation rate the ERC found from a study it conducted in 2009, and the 12 percent rate it found only two years before that. This represents an 85 percent increase in the retaliation rate over the past five years. What is perhaps even more disturbing about these findings is that the form this retaliation is taking appears to be trending in a more severe direction. It is not just a cold shoulder from colleagues or superiors, or simply being excluded from work decisions or assignments. It even goes beyond demotions, pay cuts, and firings. The retaliation is apparently going so far as to include harassment and even physical violence. And based on the ERC's findings, we are talking about a fairly sizeable and growing percentage of the retaliation.

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[3] *See* *http://www.whistleblower-insider.com/sec-puts-money-mouth-14m-whistleblower-award/#.UnO2bFbD-1s*.

[4] *Id.*

[5] *See* http://www.whistleblower-insider.com/whistleblower-retaliation-on-the-rise-bad-news-for-whistleblowers-and-their-employers-alike/#.UnOvMlbD-1s.

Financial incentives thus serve the very important purpose of providing some measure of just recompense for the significant financial, personal, and even physical hardships so many whistleblowers suffer for standing up and speaking out. They also provide a necessary incentive for whistleblowers to endure this extremely difficult, hostile, and arduous process. Financial awards are not the only motivating factor for whistleblowers. For many it is not even the main driving factor. But it is certainly a factor, and one that weighs heavily in the assessment most whistleblowers make when deciding whether they want to get involved. In addition, with all of the gains in whistleblower enforcement, about one-third of the roughly 70 million US workers who witness fraud in the workplace every year still fail to do anything about it. For this disinclined group of would-be whistleblowers -- about twenty-million strong -- the prospect of a sizeable bounty may be the only way to get them to take a stand against fraud.

There is one additional reason why financial incentives are necessary for a successful whistleblower program. They allow for whistleblowers to more easily find qualified counsel to represent them through the legal process. The various whistleblower laws, particularly the FCA, are long and complicated with innumerable requirements and restrictions on the type of fraud or misconduct that is covered and the way the complaint must be presented to the government. If a whistleblower does not submit all of the required information, or submits it the wrong way or to the wrong agency or too late in the process, he or she might be disqualified as a whistleblower altogether. Only through the promise of a sizeable reward will most whistleblowers be able to afford counsel or entice them to take up their representation. The involvement of counsel not only is of major importance to the whistleblower. It is critical for weeding out those claims or complaints not worthy of the government's involvement, and for packaging those that are worthy with the legal arguments and evidence that makes the most efficient use of the government's limited resources.

Arguments Against Incentives Do Not Hold Up

There are two principal arguments typically made against financial incentives. One, they lead to frivolous filings and a waste of government resources. And two, they will interfere with a company's internal compliance program. Neither argument has held up when considering the US experience.

There can be no question that financial incentives result in more whistleblower filings. That is what they are designed to accomplish. And with the increase in filings, there is almost certainly a corresponding increase in the number of whistleblower cases on which the government decides to take no action, despite expending government resources in reviewing them. But there has been no evidence from any agency that whistleblower rewards have led to frivolous filings. And given the involvement of counsel with most whistleblower claims, and the threat of Rule 11 sanctions that accompanies any filing under the FCA, it is unlikely that there would be.

In any event, the relevant question is not whether financial incentives result in a greater number of whistleblower complaints the government decides to decline (even if some of them are in fact frivolous). It is whether the incentives have resulted in a greater number of meritorious whistleblower complaints, leading to a greater number of successful prosecutions. As discussed above, under the FCA and Dodd-Frank whistleblower programs, it is clear that they have. That is why the SEC has set up such a hefty reserve fund for whistleblowers and highly publicizes every award it makes. It is also why Congress saw fit to increase the financial incentives under the FCA and why that has led to record-breaking government recoveries year after year.

Taxpayers Against Fraud, a non-profit public interest group dedicated to combating fraud, recently calculated a 20 to 1 return on the amount of money the US spends on investigating and prosecuting healthcare cases under the FCA.[6] The vast majority of these cases are brought by whistleblowers and have resulted in the government's recovery of almost $20 billion over the past five years. These kinds of numbers explain the government's unwavering commitment to encouraging whistleblowers with financial incentives and belie any suggestion that financial incentives do not work or somehow waste government resources.

The concern that incentives interfere with internal compliance programs is equally unfounded. This was one of the major arguments the business community made in unsuccessfully attempting to defeat the inclusion of a whistleblower rewards provision under Dodd-Frank. The truth is there is no evidence that financial rewards drive whistleblowers directly to the government at the expense of reporting internally to their employers. In fact, studies show just the opposite. One of these studies, also conducted by the ERC, found that only a tiny fraction of whistleblowers -- a mere 3 percent -- go directly to the government to report fraud or misconduct. Instead, they first work within their company to expose and attempt to remedy the wrong. According to the ERC study, it is only after they attempt to work it out internally that they then take their concerns to the government.[7]

What explains this behavior and what is consistent with our personal experience with whistleblowers is that it is not all about the money. No doubt, financial incentives are a critically important part of the equation. But money is not what ultimately drives most whistleblowers to step forward. It is a genuine interest in protecting the public from harm. It is also a desire to keep their company out of more serious trouble. Indeed, each of these motivations polled higher than money in the ERC study of what makes whistleblowers tick. These findings (and our real-world experience) go a long way in debunking the perception of the typical whistleblower as a

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[6] *See* http://www.taf.org/blog/fighting-healthcare-fraud-using-whistleblower-statute-returns-20-every-1-invested.

[7] *See http://www.whistleblower-insider.com/shattering-the-myth-of-the-whistleblower-as-a-rogue-and-disloyal-employee/#.UnOw61bD-1s*.

greedy, grubby, and self-centered individual driven by the money with no real concern for the public good. They should also discredit any argument that financial incentives will somehow corrupt or undermine an otherwise effective whistleblower program.

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From our own experience, and the broader experience that can be drawn from the unmistakable success of the US whistleblower system, this should not even be a close call. Financial incentives are a just and necessary component of any whistleblower program and we strongly urge the UK to adopt them as it moves towards improving and expanding its whistleblower regime.

Respectfully submitted,

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