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Dear Madams/Sirs:

Consultation on the transposition of the EU Whistleblowing Directive in Ireland

By way of this letter, we would like to supplement and expand upon our response of 10 July 2020 to Consultation Question 9 regarding the measures of support for reporting persons Ireland might consider adopting as it transposes the EU Whistleblowing directive into Irish law. Specifically, we urge Ireland to consider the U.S. and Canadian experience, as detailed below, of enlisting whistleblowers to help root out fraud by offering them a percentage of any monetary recovery the Government obtains as a result of the whistleblowers' information. Rather than a bounty, the promise of a percentage interest in the Government's recovery instead serves as a safety net, seeking to offset the considerable risks whistleblowers face, including life-long career blacklisting, and encourage them to speak up and expose frauds that are otherwise difficult, if not impossible, for the government to detect. Our recommendation is based on the deep understanding we have gained over our more than 100 years of collective experience representing whistleblowers under the North American whistleblower reward programmes of what motivates whistleblowers and of the significant risks they take and harm they face in reporting wrongdoing.

The Whistleblower Provisions of the U.S. False Claims Act

Any discussion of North American whistleblower reward programmes must start with the U.S. Federal False Claims Act ("FCA"), the grandfather of U.S. whistleblower reward programmes. Originally enacted in 1863 during the U.S. Civil War to combat the fraudulent sale of substandard supplies to the Union Army, such as rancid food and defective weapons, the FCA has since grown to become the Department of Justice's most effective tool for prosecuting frauds against the U.S. government through its unique approach to harnessing the power of whistleblowers. Recognizing the embattled government's limited resources and ability to detect and prosecute these frauds on its own, the FCA reached back to thirteenth-century English common law to revive the concept of *qui tam*, derived from the Latin phrase, "he who sues on behalf of the King as well as for himself," pursuant to which any of the King's subjects could prosecute a claim on the King's behalf and receive a statutory portion of the recovery. Through the adoption of its *qui tam* provisions, the FCA allows private citizens with information about fraud, also known as relators, to bring suit on the government's behalf to help recover government funds lost to fraud. To encourage whistleblowers to undertake the personal and professional risks inherent in speaking out and bringing a *qui*

tam lawsuit on the government's behalf, the FCA rewards these private citizen relators/whistleblowers with fifteen to thirty percent of any recovery the government obtains through the relator's lawsuit.

Despite its lofty aspirations and early promise, the FCA suffered some setbacks in the courts and remained largely overlooked and underutilized until the 1980s when a wave of egregious defense fraud triggered renewed interest in the FCA and prompted a legislative amendment. In response to unscrupulous defense contractors billing the government for $400 hammers, $1,000 bolts, and $7,000 coffeepots and other pervasive ongoing frauds against the federal fisc, Congress substantially amended the Act in 1986 - and, again, in 2009 and 2010 - to enhance the U.S. government's ability to encourage and empower whistleblowers to help recover losses sustained as a result of fraud. With the amendments, Congress sought to encourage individuals with knowledge of fraud to disclose the information without fear of reprisals or government inaction, and to encourage a cadre of private attorneys who represent whistleblowers to commit legal resources to prosecuting fraud on the government's behalf. The most significant amendments from 1986 included the imposition of triple damages on wrongdoers, an increase of the maximum percentage a whistleblower could receive as a reward to thirty percent, and the addition of significant anti-retaliation protections for whistleblowers.

By the mid-1990s, hundreds of millions of government dollars were recovered under the FCA every year, with tens of millions in rewards going to whistleblowers. By 2000, annual recoveries extended into the billions as the FCA's reach expanded beyond defense contractors to fraud in other industries, including healthcare and banking. Recent years have seen an even greater increase in FCA enforcement. Since strengthening the whistleblower provisions of the FCA in 1986, the U.S. Treasury and state government have recovered more than $44 billion in civil settlements and criminal fines as a result of whistleblower-initiated claims.[1]

As the above figures attest, the *qui tam* provisions of the FCA are the driving force behind the FCA's demonstrated success in combating fraud against the U.S. government. By deputizing whistleblowers to act as private prosecutors and launch lawsuits in the government's name, while at the same time affording whistleblowers a safety net against the often calamitous effects of speaking out by awarding them a percentage of the Government's recovery, the *qui tam* provisions activate, protect and incentivize whistleblowers to serve as citizen watchdogs and protectors of the public fisc.

Indeed, the U.S. Department of Justice (DOJ), Congress, and Supreme Court have repeatedly underscored this fact. Frequent DOJ press releases laud the statute's incentive structure and trumpet whistleblowers' role in helping the government fight fraud. Former DOJ Assistant Attorney General Chad Readler said "[b]ecause those who defraud the government often hide their misconduct from public view, whistleblowers are often essential to uncovering the truth" and further added that DOJ's FCA recoveries "continue to reflect the valuable role that private parties can play in the government's effort to combat false claims concerning government contracts and programs." Congress and the Supreme Court have likewise highlighted the important role whistleblowers and whistleblower rewards have played in strengthening the Act. See, e.g., Graham Cty. Soil & Water Dist. v. U.S. ex rel. Wilson, 559 U.S. 280 (2010) ("We do not doubt that Congress passed the 1986 amendments . . . 'to strengthen the Government's hand in fighting fraud 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 . . . to bring such information forward.").

[1] https://www.justice.gov/opa/press-release/file/1233201/download

The SEC and CFTC Whistleblower Programs adopted under Dodd-Frank

In July 2010, inspired by the success of the whistleblower provisions of the FCA and still smarting from the effects of the SEC's failure to heed whistleblower Harry Markopoulos's repeated warnings of the Madoff Ponzi scheme that triggered the 2008 financial crisis, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, known colloquially as "Dodd-Frank." One of the most important components of this broad overhaul of the U.S. financial regulatory system was the enactment of whistleblower programs within the U.S. Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission ("CFTC"), through which those with knowledge of securities/commodities laws violations are financially incentivised to share this information with the SEC/CFTC. Like the FCA, the whistleblower programs under Dodd-Frank provide a whistleblower reward of up to thirty percent of any fine or penalty the SEC/CFTC imposes as a result of the whistleblower's tip. In passing this legislation, Congress replaced an outdated SEC whistleblower program seeking information on insider trading that by all accounts had been unsuccessful presumably due in large part to the fact it left entirely to the SEC's discretion the decision whether to pay whistleblowers.[2] In so doing, Congress recognized the critical role mandatory financial awards play in encouraging whistleblowers to undertake the considerable personal and professional risks of coming forward to provide information regarding securities/commodities law violations to the SEC/CFTC.

Over the 10 years since the passage of Dodd-Frank as word of the programmes and their success has spread, whistleblower tips to the SEC and CFTC have grown from an initial trickle to the current flood, prompting the imposition of substantial fines and penalties against transgressors as well as the payment of significant awards to whistleblowers. Since the inception of the program, the SEC has received over 33,300 whistleblower tips,[3] with more than 5,200 tips in 2019 alone. In 2019, 9% of all tips (479) originated outside of the U.S. from international whistleblowers across 70 different countries. Since issuing its first award in 2012, the SEC has paid a total of $501 million in whistleblower awards to 85 individuals.[4] As of November 2019, these whistleblower tips have enabled the SEC to impose fines and penalties upon transgressors of more than $2 billion.[5] The CFTC program has experienced similar success. Since issuing its first award in 2014, the CFTC has awarded $110 million to whistleblowers whose information has prompted the CFTC to impose $900 million in sanctions orders.[6] Given the steady growth of these programs, the number of whistleblower awards and corresponding imposition of fines are expected to continue to grow in coming years and have inspired the adoption of similar programmes worldwide, including the Ontario Securities Commission's Whistleblower Program in Canada, which has paid $8,025,000 in rewards to whistleblowers since its inception in 2016.[7]

In its most recent 2019 annual report to Congress, the SEC's Office of the Whistleblower made clear that financially incentivising whistleblowers is of paramount importance to its program's success: "We hope that the awards made in FY 2019 will continue to incentivize individuals, both in the U.S. and abroad, to report high-quality information regarding potential securities laws violations promptly to the Commission, which in turn, helps the Commission better protect investors and the marketplace."

[2] Between 1989 and 2010, the SEC paid whistleblowers a total of $159,537 in awards under this discretionary program. https://www.sec.gov/files/474.pdf
[3] https://www.sec.gov/files/sec-2019-annual-report-whistleblower-program.pdf
[4] https://www.sec.gov/news/press-release/2020-141
[5] https://www.sec.gov/files/sec-2019-annual-report-whistleblower-program.pdf
[6] https://www.whistleblower.gov/
[7] https://www.osc.gov.on.ca/en/NewsEvents_nr_20200406_osc-awards-over-half-million-whistleblower.htm

The IRS Whistleblower Program

From the inception of the IRS Whistleblower Program in 2007 to 2019, the IRS has collected $5.7 billion in proceeds as a result of whistleblower tips exposing individuals who evaded their U.S. tax obligations. During this same period, the IRS paid $931.7 million in awards to whistleblowers, which represents 16% of the total proceeds the IRS have recovered as a result of whistleblower tips.

Just and Necessary Compensation to Offset Risks

Aside from this clear empirical evidence that the U.S. and Canadian whistleblower reward systems work, there is also a simple policy rationale for the use of financial incentives. They are just and necessary because they seek to compensate whistleblowers for undertaking the myriad risks that are attendant to exposing wrongdoing. No question, laws protecting whistleblowers have vastly improved in recent years. But the risk of repeated retaliation, estrangement, alienation, and career-long blacklisting remains very real. We know this first-hand from our work with our whistleblower clients, and studies continually underscore the point.

A 2013 National Business Ethics Survey conducted by nonprofit Ethics Resource Center (ERC) and published in 2015, reports that "[m]ore than one in five workers (21%) who reported misconduct said they suffered from retribution as a result . . . . Asked why they kept quiet about misconduct, more than one-third (34%) of those who declined to report said they feared payback from senior leadership. Thirty percent worried about retaliation from a supervisor, and 24 percent said their co-workers might react against them."[8] A study of pharmaceutical industry whistleblowers published in the New England Journal of Medicine revealed the personal toll whistleblowing exacts on whistleblowers, including strain on personal relationships and the development of stress-related health problems.[9] Financial incentives thus not only encourage whistleblowing, but also provide some measure of just recompense for the significant hardships so many whistleblowers suffer for standing up and speaking out, including in many cases the loss of a career due to blacklisting.

Financial incentives also allow whistleblowers to more easily partner with qualified counsel to represent them through the legal process. The frauds whistleblowers uncover involving government programs are frequently protracted and complex and require significant expert legal advice. Only through the promise of a reward are many whistleblowers 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 claims or complaints unworthy of the government's involvement, and for packaging those that are worthy with the legal arguments and evidence that are most likely to get the government's attention, thereby allowing the government to leverage its limited resources and to take action.

Arguments Against Incentives Are Unfounded & Easily Redressed

Two principal arguments are typically made against whistleblower rewards: one, that rewards lead to frivolous filings and therefore waste government resources, and two, that encouraging whistleblowers to bring information to the government will discourage internal reporting and undermine internal ethics and compliance programs. Neither argument has been borne out by the U.S. experience.

First, we have seen no evidence from any U.S. agency operating a whistleblower reward program (e.g., DOJ, SEC, CFTC and IRS) that gives credence to the assertion that the prospect of whistleblower rewards has led to a rash of frivolous filings. To the contrary, the fact that a large percentage of whistleblowers' claims

[8] https://www.ethics.org/ecihome/research/nbes/nbes-reports/nbes-2013
[9] https://www.nejm.org/doi/full/10.1056/nejmsr0912039

are submitted via attorneys ensures that such frivolous or malicious claims are weeded out. As whistleblower lawyers, we must adhere to a number of procedural, ethics and other rules that forbid us from assisting clients to submit frivolous or malicious claims, many of which impose sanctions upon us and/or our clients for engaging in such behaviour.[10] Indeed, since most whistleblower counsel are paid on a contingency fee basis (i.e., we are paid a percentage of the whistleblower's reward), it makes business sense for us to thoroughly vet whistleblowers' cases and only pursue matters we have concluded (based on research and analysis) are likely to succeed.

Instead of encouraging frivolous claims, the incentives afforded under the U.S. whistleblower reward programmes instead have resulted in a greater number of meritorious whistleblower complaints, leading to a greater number of successful enforcement actions. Research shows more whistleblower claims submitted in areas where rewards are offered than where they are not.

Second, the concern that government incentives interfere with or undermine employers' internal compliance programs is equally unfounded. The business community made this argument as part of its unsuccessful attempt to undercut the effectiveness of SEC and CFTC whistleblower rewards programmes during the rule-making process. However, there is no evidence that financial rewards drive whistleblowers to report directly to the government in the first instance and bypass reporting internally to their employers. To the contrary, experience of whistleblower programs and studies show the opposite is true: in most cases, individuals who blew the whistle to the government only did so after attempting to work out issues internally. In the case of the SEC program, 85% of the whistleblowers who have received awards from the SEC to date tried to report internally first before coming to the SEC.[11] Similarly, a 2013 National Business Ethics Survey conducted by nonprofit Ethics Resource Center found that only a tiny fraction of whistleblowers - a mere 3% - 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. Only after they attempt to work it out internally and are rebuffed or ignored, do they then take their concerns to the government.[12]

Last but not least, another frequent argument against the introduction of U.S.-style whistleblower reward programmes is that they are simply incompatible with U.K. and EU culture. However, a recent report from March 2018 published by leading academics from universities in the U.K. and Ireland and commissioned by the U.K.'s Financial Conduct Authority ("FCA") debunked the FCA's mistaken belief that whistleblower rewards are a uniquely American invention and instead noted that the payment of such rewards has been

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[10] See Federal Rule of Civil Procedure 11. Section 3031(d)(4) of the False Claims Act ("If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment. 31 "). U.S.C. sec. 3031(d)(4).

[11] 2019 Annual Report to Congress of SEC Whistleblower Program at p. 18. https://www.sec.gov/files/sec-2019-annual-report-whistleblower-program.pdf (Of all the whistleblowers who have received awards from the SEC program to date, "approximately 85 percent raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.").

[12] This fits with our experience as well, in which many clients do not think of themselves as whistleblowers at the time they report the wrongdoing. They are just doing their job and expect their employers will be pleased with them for raising a concern. It is only when their superiors retaliate against them and their colleagues disown them that these clients come to think of themselves as whistleblowers.

part of British and English law for six centuries, including as recently as 1951.[13] Studies have noted a recent cultural shift away from an attitude of adoration for big corporations and instead toward one of distrust. This has fostered a greater appreciation for whistleblowers who expose unsavoury corporate practices and hold corporations accountable.[14]

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Our own experience representing whistleblowers counsels that whistleblower reward programs offering financial incentives are just and necessary compensation for individuals who often risk a great deal to report wrongdoing to the government. Likewise, the broad success of the U.S. and Canadian whistleblower regimes demonstrates the key role such incentives play in not only recovering government funds lost to fraud and corruption, but also in encouraging strong internal compliance efforts within and among businesses and deterring further wrongdoing. As it moves toward improving and expanding its whistleblower regime consistent with the dictates of the EU Whistleblower Directive, we urge Ireland to adopt models similar to those in U.S. and Canada that incentivize whistleblowers to help the government root out fraud and ensure taxpayer dollars reach their intended recipients. These programs have taken on added significance in the present moment as whistleblowers alert governments across the globe to a myriad of scams aimed at misappropriating vitally needed COVID relief funds.

Yours faithfully

Mary Inman
Carolina Gonzalez
Alicja Dijakiewicz-Kocon

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[13] *What do we know about rewards for whistleblowers?* co-authored by Dr. Wim Vandekerckhove (University of Greenwich), Dr. Bethania Antunes (University of Greenwich) and Prof. Kate Kenny (Queen's University Belfast), March 2018. The report also unequivocally found that offering financial rewards to whistleblowers can make a regulator more effective as they lead to: (i) less anonymous whistleblowing; (ii) more efficient use of regulators' resources; (iii) deterrence of wrongdoing; and (iv) strengthening of internal compliance of regulated organisations.

[14] https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1436&context=jbl