



Testimony of Angela Canterbury, Director of Public Policy,
before the Subcommittee on Contracting Oversight,
Senate Committee on Homeland Security and Governmental Affairs,
on “Whistleblower Protections for Government Contractors”
December 6, 2011

Chairman McCaskill, Ranking Member Portman, Members of the Subcommittee, thank you for inviting me to testify today, and for your attention to whistleblower protections for government contractors and other recipients of federal funds. I am Angela Canterbury, Director of Public Policy at the Project On Government Oversight (POGO). Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. POGO’s investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. Thus, POGO has a keen interest in contractor accountability and protecting whistleblowers who assist in uncovering and deterring government waste, fraud, abuse, mismanagement, and threats to public health and safety.

Whistleblowing works for the public, but without strong public policy, not for the whistleblower

Whistleblowers are the guardians of the public trust and safety, and among the best partners in crime fighting. It is a well-known fact that whistleblowers have saved countless lives and billions of taxpayer dollars. There also is no doubt that whistleblowers play an essential role in exposing corporate misconduct.¹

A survey conducted this year by the Association of Certified Fraud Examiners found that nearly half of occupational fraud cases were uncovered by a tip or complaint from an employee, customer, vendor, or other source.² In the case of fraud perpetrated by owners and executives, more than half were uncovered by tips from whistleblowers. An academic study earlier this year

¹ Bryan Rahija, “Who Discovers More Corporate Fraud: Whistleblowers, Regulators, or Journalists?” *POGO Blog*, April 8, 2010. <http://pogoblog.typepad.com/pogo/2010/04/who-discovers-more-corporate-fraud-whistleblowers-regulators-or-journalists.html>

² Association of Certified Fraud Examiners, *2008 Report to the Nation on Occupational Fraud & Abuse*, 2008, pp. 18-23. http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/2008-rttn.pdf (Downloaded December 1, 2011)

confirmed that whistleblowers play a bigger role than external auditors, government regulators, self-regulatory organizations, or the media in detecting fraud.³

But perhaps the best illustration of how whistleblowers can save taxpayer dollars is the more than \$27 billion recovered since 1987 through the hugely successful False Claims Act (FCA) award program.⁴

The FCA prohibits a person or entity from fraudulently or dishonestly obtaining or using government funds. It also allows individuals or entities to bring a civil claim, in the name of the government, against contractors defrauding American taxpayers. If the claim is successful, the individual or entity can receive up to 30 percent of the recovery.⁵ The law not only acts as a deterrent, but also incentivizes whistleblowing through the financial awards and strong protections against retaliation. Federal Circuit Court Judge Hall said that the FCA provisions supplement the government's "regular troops" since it "let loose a posse of ad hoc deputies to uncover and prosecute frauds against the government."⁶

What's at Stake?

However, the False Claims Act only covers fraud and does not protect or incentivize whistleblowers who witness waste, mismanagement, and a host of other illegalities, in spite of the government's huge exposure to these risks given the amount of federal dollars distributed to non-federal entities.

According to USAspending.gov, out of nearly \$3.8 trillion in the federal budget in fiscal year 2011, roughly half was spent on prime awards to contractors, grantees, states and localities, and others. And yet, most of this whopping sum of \$1.9 trillion in taxpayer dollars was spent without protecting those on the front lines who come forward when they witness waste, fraud, and abuse.⁷

A recent POGO report illustrates the imperative of protecting whistleblowers in this growing workforce of federal contractors. In fact, in some federal offices contractor employees outnumber federal employees⁸:

³ Alexander Dyck, Adair Morse, and Luigi Zingales, "Who Blows the Whistle on Corporate Fraud?" <http://www.afajof.org/afa/forthcoming/4820p.pdf> (Downloaded May 10, 2011)

⁴ 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 1, 2011)

⁵ 31 U.S.C. § 3729

⁶ *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992), paragraph 17. <http://law.justia.com/cases/federal/appellate-courts/F2/961/46/208412/> (Downloaded December 1, 2011)

⁷ In fiscal year 2011, total Prime Award Spending was \$1.9 trillion, or about 50 percent of total federal spending. Contracts accounted for about 24 percent of prime awards and about 12 percent of total federal spending. Grants accounted for about 28 percent of prime awards and about 14 percent of total federal spending. And spending on states and localities accounted for about 13 percent of prime awards and about 6 percent of total federal spending.

⁸ A specific example is the Department of Defense: "at 15 of the 21 [contracting] offices we reviewed, contractor employees outnumbered DOD employees and comprised as much as 88 percent of the workforce." Government Accountability Office, *Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain*

Since 1999, the size of the federal employee workforce has remained relatively constant at about 2 million, while the contractor workforce has increased radically—from an estimated 4.4 million to 7.6 million in 2005. In other words, the federal contractor workforce dwarfs the federal employee workforce nearly four-fold.⁹

Most known contractor whistleblowers have come forward using the False Claims Act to uncover fraud, or have relied on its remedies for retaliation for doing so. But even with solid public policy such as that underlying the False Claims Act, the road is still arduous for whistleblowers. For example:

- Michael J. DeKort was a Lockheed Martin engineer who revealed that a \$96.1 million contract awarded to “Integrated Coast Guard Systems” (a joint venture of Lockheed Martin and Northrop Grumman) to remodel Coast Guard vessels resulted in faulty boats that created “unacceptable danger” to the crew. DeKort warned the company and was ignored. He attempted to work through the internal appeals procedures, but was fired in 2006.¹⁰ DeKort filed his suit in 2006, and in 2007 the Coast Guard decommissioned the boats because they were unsafe. Lockheed settled with DeKort four years later, in 2010, for an undisclosed amount, and his claims have largely been substantiated.¹¹
- James Brady III was a former Kellogg Brown & Root (KBR) employee who claimed that KBR, one of the DoD’s largest contractors, violated the False Claims Act by making illegal payments to a Turkish subcontractor with money that was intended to support troops. Brady alleges that there were about \$80 million in overcharges on the subcontract, \$31 million of which could not be found. He also

DOD Contractor Employees (GAO-08-169), March 2008, p. 3. <http://www.gao.gov/new.items/d08169.pdf> (Downloaded April 28, 2011); “DOD relies extensively upon contractors to support overseas contingency operations. As of March 2011, DOD had more contractor personnel in Afghanistan and Iraq (155,000) than uniformed personnel (145,000). Contractors made up 52% of DOD’s workforce in Afghanistan and Iraq.” Congressional Research Service, *Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis* (R40764), May 13, 2011, Summary. <http://www.fas.org/sgp/crs/natsec/R40764.pdf> (Downloaded June 9, 2011) (hereinafter *Department of Defense Contractors in Afghanistan and Iraq: Background and Analysis* (R40764)) Another example is Department of Homeland Security (DHS): “Because of the Department of Homeland Security’s aggressive Secure Border Initiative program schedule coupled with shortages of government program managers and acquisition specialists... Customs and Border Protection relied on contractors to fill the skills gap and get the program underway... [CBP] continues to rely heavily on contract personnel, who comprise more than 50% of the Secure Border Initiative workforce.” Department of Homeland Security, Office of Inspector General, *Better Oversight Needed of Support Services Contractors in Secure Border Initiative Programs* (OIG-09-80), June 2009, p. 1. http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_09-80_Jun09.pdf (Downloaded April 28, 2011)

⁹ Project On Government Oversight, *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, September 13, 2011. <http://www.pogo.org/pogo-files/reports/contract-oversight/bad-business/co-gp-20110913.html#2>

¹⁰ The Society on Social Implications of Technology of the Institute of Electrical and Electronics Engineers, “IEEE-SSIT Presents Carl Barus Award for Outstanding Service in the Public Interest to Michael DeKort,” January 31, 2008. http://www.ieeesit.org/publications_sub.asp?Level2ItemID=9&Level3ItemID=67 (Downloaded December 2, 2011)

¹¹ Boyd & Associates, “‘Deepwater’ Whistleblower Michael J. DeKort’s Last Minute Settlement with Lockheed Martin Approved by U.S. District Court,” December 2, 2010. <http://www.businesswire.com/news/home/20101202005516/en/%E2%80%9CDeepwater%E2%80%9D-Whistleblower-Michael-J.-DeKort%E2%80%99s-Minute-Settlement> (Downloaded December 1, 2011)

claims that he was fired for disclosing this information to KBR and the Army. POGO's Federal Contractor Misconduct Database shows that the case is ongoing and DOJ joined the lawsuit earlier this year.¹²

- Caroline Herron is a former Fannie Mae vice president who returned to the organization to work as a high-level consultant. She alleged to the Treasury that Fannie Mae ran the government's \$113 million foreclosure-prevention campaign to benefit its own bottom line, not help troubled borrowers. She said this led to a massive waste of public funds and drove up the cost for taxpayers of modifying mortgages. She was working as an independent contractor at the time, and was fired the same month she blew the whistle. A lawsuit against Fannie Mae is currently underway.¹³

These and so many other brave acts illustrate the tremendous value to the American people when wrongdoing is exposed by whistleblowers. But there are countless other examples of contractor whistleblowers who, like Walter Tamosaitis who is testifying today, have taken great personal risk to protect the public and expose waste but who have no recourse comparable to the FCA.¹⁴

As I and other experts have noted in hearings before congressional panels and in the public record, the cost-benefit analysis for most whistleblowing is so often all cost to the whistleblower and all benefit to society. Professor Richard E. Moberly in his testimony before Congress aptly stated:

Furthermore, almost all the benefits of a whistleblower's disclosure go to people other than the whistleblower: society as a whole benefits from increased safety, better health, and more efficient law enforcement. However, most of the costs fall on the whistleblower. There is an enormous public gain if whistleblowers can be encouraged to come forward by reducing the costs they must endure. An obvious, but important, part of reducing whistleblowers' costs involves protecting them from retaliation after they disclose misconduct.¹⁵

In addition, what can't be represented are the many other would-be-whistleblowers who never come forward because they have no real recourse should they face retaliation such as harassment, demotions, or perhaps losing their jobs. Ultimately, when whistleblowers lose, the taxpayers lose. Billions in wasteful spending, crimes perpetrated, threats to public health and safety may never come to light, simply because we have an inadequate whistleblower protection public policy.

¹² Project On Government Oversight, Federal Contractor Misconduct Database, "KBR: Brady v. KBR (False Claims and Retaliation)." <http://www.contractormisconduct.org/index.cfm/1,73,222,html?CaseID=1533>

¹³ Peter Overby, "Consultant: Federal Aid Program Failing Homeowners," *National Public Radio*, August 6, 2010. <http://www.npr.org/templates/story/story.php?storyId=129011474> (Downloaded December 1, 2011)

¹⁴ Government Accountability Project, "Protection for pocketbook whistleblowers," April 14, 2011. <http://www.whistleblower.org/storage/documents/Pocketbook.pdf> (Downloaded December 1, 2011)

¹⁵ Testimony of Richard E. Moberly, Professor, before the Committee on Education and Labor, Subcommittee on Workforce Protections, One Hundred Tenth Congress, on "Private Sector Whistleblowers: Are There Sufficient Legal Protections?," May 15, 2007, pp. 34-37. <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg35185/pdf/CHRG-110hhrg35185.pdf> (Downloaded December 1, 2011)

Gaping Accountability Loopholes in the Law

The accountability loopholes are many in the patchwork of laws that protect only some contractors and federal fund recipient employees who blow the whistle, and only under very limited circumstances.

While the False Claims Act is in many ways the gold standard, it is limited to claims involving fraud perpetrated by a person or entity receiving federal funds. In addition, it is, practically speaking, constrained by the limited resources of the Department of Justice, and the legal community that often doesn't pursue cases when DOJ declines to intervene. As a result of its narrow scope, the FCA doesn't provide expansive whistleblower protections to contractor employees.

There also are extremely narrow protections for employees of entities with public contracts under 41 U.S.C. § 4705. This law is fairly flimsy, lacking fundamental policies for an effective whistleblower statute. It doesn't protect disclosures of gross mismanagement, gross waste, substantial danger to health and safety, or violations of law, rule, or regulations—only disclosures of “substantial” violations of law relating to the contract. 41 U.S.C. § 4705 also does not specifically protect the most commonplace disclosures—those made internally to one's supervisor or to another employee with the authority to investigate or resolve the matter.¹⁶ It is well-documented that most whistleblowers report internally first.¹⁷

Also, under the statute, investigations and enforcement have no deadline. The mandated Inspector General (IG) investigation of retaliation claims, subsequent issuance of the enforcement order by the agency head after the IG confirms the retaliation, and the compliance by the contractor as ordered by the agency can at each go on interminably. No access to court is provided except for a review of the agency order, and if that order is never issued, there is no explicit right under that provision of law. In addition, even these insubstantial protections can be negated through employment agreements such as nondisclosure and forced arbitration clauses. In sum, few contractor employees can or should rely on these protections.

The protections for nuclear contractor employees under the Energy Reorganization Act were similarly flawed until the amendments in 2005.¹⁸ As described in POGO's report earlier that year, *Homeland Security and National Security Whistleblowers: The Unfinished Agenda*, nuclear contractor whistleblowers were trapped for years in a failed administrative process, waiting for relief.¹⁹ However, Congress addressed this issue in the Energy Policy Act of 2005, Public Law 109-58, which provided for *de novo* review in federal district court if the Secretary of Energy fails to act within a year.²⁰

¹⁶ 41 U.S.C. § 4705 does not protect disclosures except those made to an authorized official at the Department of Justice or other agency or to a Member of Congress.

¹⁷ Ethics Resource Center, *Blowing the Whistle on Workplace Misconduct*, December 2010, p. 5. <http://www.ethics.org/files/u5/WhistleblowerWP.pdf> (Downloaded December 1, 2011)

¹⁸ 42 U.S.C. § 5851

¹⁹ Project On Government Oversight, *Homeland and National Security Whistleblower Protections: The Unfinished Agenda*, April 28, 2005. <http://www.pogo.org/pogo-files/reports/whistleblower-issues/the-unfinished-agenda/#53>

²⁰ Energy Policy Act of 2005, Public Law 109-58, August 8, 2005. <http://doi.net/iepa/EnergyPolicyActof2005.pdf> (Downloaded December 1, 2011)

In addition, progress has been made closing other loopholes for Department of Defense (DoD) contractor whistleblowers. The protections championed by Senators Claire McCaskill and Susan Collins and enacted in 2009 upgraded rights for DoD contractor whistleblowers (10 U.S.C. § 2409).²¹ These protections are now broader than the other contractor provisions in that more types of disclosures to more types of recipients are protected. There also is a reasonable time limit placed on the IG investigation of 180 days (subject to extension). In addition, if the agency then fails to act on the IG's findings within 210 days, the whistleblower can take the complaint to district court.

However, the DoD contractor protections also lack some basic best practices found in other modern private sector whistleblower laws, including: protecting disclosures of abuse of authority; requiring the IG to recommend relief if the whistleblower meets the burdens of proof, the same legal standards found in every whistleblower law since 1989 and also used by federal employees in cases under the Whistleblower Protection Act²²; and providing for a genuine remedy of compensatory damages to “make whole” those who have been found to have endured reprisal for protected disclosures.

Thus, the new specific protections have not yielded the kind of accountability needed. This is apparent in Iraq and Afghanistan where many instances of waste, fraud, or abuse have been documented—the Commission on Wartime Contracting (CWC) estimated \$31 to \$60 billion in waste alone.²³ Of course many contractors in these and other areas of conflict are hired by the State Department and are not even covered under 10 U.S.C. § 2409.

In June 2009, this Subcommittee held a hearing on the performance of private security contractor ArmorGroup, a subsidiary of G4S/Wakenhut Services, working for State Department.²⁴ At that hearing the committee found “significant problems with staffing and training” and “supervisory negligence” in addressing those issues. In September 2009, POGO exposed an international scandal, after dozens of Kabul Embassy private security contractors working for ArmorGroup came to POGO with evidence of gross misconduct.²⁵ They did so at tremendous personal risk, given their utter lack of protections. As allegations of retaliation and reprisals against the whistleblowers mounted, Senators McCaskill, Collins, and Robert Bennett took action and sent a letter of inquiry to the State Department.²⁶ The result was finally a termination of that contract, but the government did not provide the whistleblowers with any protection. As POGO's

²¹ 10 U.S.C. § 2409

²² 5 U.S.C. § 1214(b)(4)(B) and 5 U.S.C. § 1221(3)

²³ Commission on Wartime Contracting in Iraq and Afghanistan, *Final Report to Congress: Transforming Wartime Contracting: Controlling costs, reducing risks*, August 2011.

http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf (Downloaded December 1, 2011)

²⁴ Senator Claire McCaskill, “Contracting Subcommittee to Explore Security Contracts at Afghanistan Embassy,” June 3, 2009. http://mccaskill.senate.gov/?p=press_release&id=169 (Downloaded December 1, 2011)

²⁵ Letter from the Project On Government Oversight to Secretary of State Hillary Clinton regarding the U.S. Embassy in Kabul, September 1, 2009. <http://www.pogo.org/pogo-files/letters/contract-oversight/co-gp-20090901.html>

²⁶ Letter from Senators Claire McCaskill, Susan Collins, and Robert Bennett, to Patrick Kennedy, State Department Undersecretary for Management, regarding allegations of whistleblower retaliation by contract guards at the U.S. Embassy in Kabul, Afghanistan, September 16, 2009. <http://mccaskill.senate.gov/pdf/2009-09-16CMC-Bennett-Collins.pdf> (Downloaded December 1, 2011)

Executive Director Danielle Brian testified to the CWC, contractors still have few protections under the law, and as a result, are far less likely to report wrongdoing.²⁷

As our reliance on contractors has grown, increasingly a contractor employee may be sitting alongside a federal employee performing the same work.²⁸ But they have different rights. Federal employees have more statutory protections under the Whistleblower Protection Act (WPA), even though that law also is inadequate.²⁹ Protections for federal workers and for contractor employees providing products and services to the government must keep pace with the modern protections Congress has extended to private sector whistleblowers in the eight laws passed in the past decade.³⁰

The Recovery Act Model

In addition to the False Claims Act, there is another model whistleblower protection law for federal fund recipients—it simply needs to be extended beyond its original scope. The American Recovery and Reinvestment Act of 2009 included excellent whistleblower protections for employees of entities funded by the Recovery Act, including contractors, subcontractors, grantees, and states and localities.³¹ Like the DoD contractor protections, it covers a wide range of disclosures of wrongdoing related to covered federal funds. But, importantly, it also covers disclosures of abuse of authority, as well as covering other protected disclosures when made to a supervisor or a person working for the employer with “authority to investigate, discover, or terminate misconduct.”³² In addition to several other best practices, there are reasonable time limits on the investigation, the agency order, and better access to court.

²⁷ Testimony of Danielle Brian, Project On Government Oversight, before the Commission on Wartime Contracting in Iraq and Afghanistan on “Are Private Security Contractors Performing Inherently Governmental Functions?,” June 18, 2010. http://www.wartimecontracting.gov/docs/hearing2010-06-18_testimony-Brian.pdf (Downloaded December 1, 2011)

²⁸ Government Accountability Office, *Defense Contracting: Army Case Study Delineates Concerns with Use of Contractors as Contract Specialists* (GAO-08-360), March 2008, p. 39. <http://www.gao.gov/new.items/d08360.pdf> (Downloaded December 1, 2011); “The ‘blended’ or ‘multisector’ workforce, where contractors are co-located and work side-by-side with federal managers and staff, has blurred some boundaries.” Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, p. 24. https://www.acquisition.gov/comp/aap/24102_GSA.pdf (Downloaded December 1, 2011)

²⁹ The WPA must be expanded and modernized as proposed by the Whistleblower Protection Enhancement Act, S. 743, which was unanimously voted out of this Committee in October of this year. FederalDaily Staff, “Whistleblower protection clears another hurdle,” *FederalDaily*, October 24, 2011. <http://federaldaily.com/articles/2011/10/24/groups-praise-senate-clearance-whistleblower-protection-enhancement-act.aspx> (Downloaded December 1, 2011) S. 743 was introduced April 6, 2011, by Senator Daniel Kahikina Akaka. http://thomas.loc.gov/home/gpoxmlc112/s743_is.xml (Downloaded December 1, 2011)

³⁰ 18 USC § 1514A(b)(1)(B), 42 USC § 5851(b)(4), 49 U.S.C. § 31105(c), 49 U.S.C. § 20109(d)(3), 6 USC § 1142(c)(7), 10 USC § 2409(c)(2), 15 USC § 2087(b)(4), American Recovery and Reinvestment Act, section 1553(c)(3).

³¹ One Hundred Eleventh Congress, American Recovery and Reinvestment Act of 2009, Public Law 111-5, Section 1553 of Division A, Title XV. <http://www.gpo.gov/fdsys/pkg/PLAW-111publ5/html/PLAW-111publ5.htm> (Downloaded December 1, 2011)

³² One Hundred Eleventh Congress, American Recovery and Reinvestment Act of 2009, Public Law 111-5, Section 1553(a).

The Recovery Act has experienced extremely low incidence of fraud.³³ As reported by the White House in 2010, consequential investigations of the 3,806 complaints of wrongdoing “represent less than 0.2 percent of the number of total Recovery Act Awards,” and the “GAO has acknowledged that levels of fraud remain quite minimal.”³⁴ Certainly the whole story of waste, fraud, and abuse in the stimulus spending has yet to be told, but these early indicators are encouraging.

The New York Times highlighted the low incidence of fraud in Recovery Act spending, citing an interview with Earl Devaney, Chair of the Recovery Accountability Board:

The IG community has gotten on the front end of Recovery Act spending, monitoring the money from day one and allowing the public to access the same information, [Devaney] said. IGs no longer have to “stumble upon fraud like we usually do.” The result, he said has been far less fraud than expected.³⁵

Better Protections, More Accountability: The Non-Federal Employee Whistleblower Protection Act

The Non-Federal Employee Whistleblower Protection Act of 2011, S. 241, builds on the success of the Recovery Act and mirrors many of its provisions.³⁶ Introduced earlier this year by this Subcommittee’s Chair, Senator McCaskill, along with Senator Jim Webb, S. 241 would bridge the wide gaps in current coverage and comprehensively apply best-practice protections to all federal funds recipient employees.

S. 241 would:

- Eliminate the patchwork of protections by covering all non-federal recipients of federal funds—including contractors, subcontractors, grantees, state and local governments, and other professional organizations.
- Prohibit reprisals for whistleblowing to appropriate federal entities including to an inspector general, the Comptroller General of the United States, the Attorney General, a Member of Congress, a State or Federal regulatory or law enforcement agency, a court or grand jury, and the head of a Federal agency or their representatives.

³³ The White House, Office of the Vice President, “Vice President Biden Delivers New Report to the President on Recovery Act Progress: Ambitious Spending Targets Met; Cost-Savings Fund 3,000 Additional Job-Creating Projects,” October 1, 2010. <http://www.whitehouse.gov/the-press-office/2010/10/01/vice-president-biden-delivers-new-report-president-recovery-act-progress> (Downloaded December 1, 2011)

³⁴ The White House, *2010 Fiscal Year End Report to the President on Progress Implementing the American Recovery and Reinvestment Act of 2009*, September 2010. http://www.whitehouse.gov/sites/default/files/recovery_act_report_9-30-2010.PDF (Downloaded December 1, 2011)

³⁵ Emily Yehle, “Interior IG Brings Detective’s Zeal to Stimulus Watchdog Post,” *New York Times*, September 10, 2010. <http://www.nytimes.com/gwire/2010/09/10/greenwire-interior-ig-brings-detectives-zeal-to-stimulus-6880.html?pagewanted=all> (Downloaded December 1, 2011)

³⁶ One Hundred Twelfth Congress, U.S. Senate, The Non-Federal Employee Whistleblower Protection Act of 2011 (S. 241), Introduced by Senator Claire McCaskill on January 31, 2011. <http://www.gpo.gov/fdsys/pkg/BILLS-112s241is/pdf/BILLS-112s241is.pdf> (Downloaded December 1, 2011)

- Protect the most common disclosures made by employees seeking to fix a problem—those made internally to those with supervisory authority over the employee or another employee of the employer with the authority to investigate, discover, or terminate the conduct, such as an internal compliance officer.
- Protect an employee for participating in a proceeding related to the misuse of any Federal funds, such as a hearing or investigation, and also for reasonably opposing the misuse of Federal funds.
- Expand the types of protected disclosures to include those related to the implementation or use federal funds regarding gross mismanagement, gross waste, substantial and specific danger to public health and safety, abuse of authority, or a violation of a law, rule, or regulation.
- Ensure legitimate claims of reprisal will be investigated by an appropriate Inspector General and a report issued within 180 days, unless an extension is deemed necessary and explained by the IG.
- Provide for effective remedies, including compensatory damages, and enforcement when reprisal is confirmed.
- Offer opportunity for rebuttal, if employer can prove by clear and convincing evidence that the reprisal would have happened absent the whistleblowing.
- Provide for access to a jury trial and once administrative remedies have been exhausted, and a time limit of 210 days for action by the agency. Also, makes the investigative file available to the employer and employee should the employee bring a civil suit.
- Eliminate the risk of another agreement, such as a nondisclosure or mandatory binding arbitration, from nullifying the rights under this Act (except for collective bargaining agreements).

In sum, S. 241 would ensure strong protections for those on the front lines against waste, fraud, abuse of taxpayer dollars, and threats to public health and safety. This is extremely effective public policy that will result in far more accountability.

A few suggested improvements to S. 241

While POGO strongly supports the Non-Federal Employee Whistleblower Protection Act, we also recommend some improvements to strengthen the legislation and policies for whistleblowers.

First, more reporting by the IGs and GAO would help Congress conduct oversight of the new provisions. The bill currently would require IGs to include in their semi-annual reports to Congress a list of investigations that were extended, discontinued, or not conducted. This is an excellent policy to help keep Congress and the public apprised when IGs exercise this discretion, but it also would be useful to require a list of the number of complaints received and investigations concluded, and a summary of determinations. Additionally, it would be useful for the GAO to conduct a periodic review of how the protections are enforced, including actions taken by the government and the employer following affirmative determinations by IGs.

Second, every federal fund recipient covered by the legislation should be required to post notices of the rights and remedies under this section at work sites. This requirement of the Recovery Act likely served as a powerful deterrent to waste, fraud, and abuse and an effective enforcement tool.

Third, accountability to taxpayers could be significantly increased by requiring the IGs to also separately investigate the wrongdoing the whistleblower exposed that resulted in the retaliation claim, if an investigation had not yet taken place.

Last, though it may be beyond the scope of this legislation, we'd like to see the incentives for whistleblowing expanded. The great success of the False Claims Act could be replicated more fully if the awards could also be made available in instances where waste, mismanagement, and other illegalities are uncovered and brought to justice. This FCA model of protecting and incentivizing whistleblowing in the public interest has been replicated with great success in many states,³⁷ as well as in the whistleblower programs at the Internal Revenue Service,³⁸ the Securities and Exchange Commission,³⁹ and the Commodities Futures Trading Commission.⁴⁰

Regarding the IRS program, Patrick Burns, president of Taxpayers Against Fraud, said:

This law is not designed to snag the guppies, but to harpoon the whales....Whistleblower programs have been incredibly successful in the arena of health care and defense spending, and now they are being tried as a weapon against tax cheats and Wall Street scoundrels.⁴¹

In fact, in 2006 Congress created a new minimum award for the IRS program to ensure more quality tips.⁴² According to reports to Congress, the result has been a large jump in tips, from 2,740 cases in 2005 to 5,678 in 2009.⁴³ Likewise, before Congress upgraded the FCA to include awards to incentivize whistleblowing, recoveries were in the millions of dollars a year. Since

³⁷ Andrew Longstreth, "Whistleblower Laws, Lucrative for Some States, Stall in Others," *Insurance Journal*, November 28, 2011. <http://www.insurancejournal.com/news/national/2011/11/28/225270.htm> (Downloaded December 1, 2011)

³⁸ Internal Revenue Service, "Whistleblower—Informant Award," July 19, 2011. <http://www.irs.gov/compliance/article/0,,id=180171,00.html> (Downloaded December 1, 2011)

³⁹ Securities and Exchange Commission, Office of the Whistleblower, "Welcome to the Office of the Whistleblower." <http://www.sec.gov/whistleblower> (Downloaded December 1, 2011)

⁴⁰ Commodity Futures Trading Commission, "Whistleblower Information." <http://www.cftc.gov/ConsumerProtection/WhistleblowerInformation/index.htm> (Downloaded December 1, 2011) (hereinafter "Whistleblower Information")

⁴¹ MaryClaire Dale, "IRS awards \$4.5M to whistleblower," *Associated Press*, April 8, 2011. <http://www.usatoday.com/money/perfi/taxes/2011-04-08-irs-whistleblower-taxes-reward.htm> (Downloaded December 1, 2011)

⁴² One Hundred Ninth Congress, Tax Relief and Health Care Act of 2006, Public Law 109-432, December 20, 2006, Section 406. <http://www.gpo.gov/fdsys/pkg/PLAW-109publ432/pdf/PLAW-109publ432.pdf> (Downloaded May 10, 2011)

⁴³ Internal Revenue Service, *FY 2009 Annual Report to Congress on the Use of Section 7623*, 2009, p. 9. <http://www.irs.gov/pub/irs-utl/whistleblowerfy09rtc.pdf> (Downloaded May 11, 2011)

then, recoveries have averaged about \$1 billion per year, with 2010 recoveries topping \$3 billion.⁴⁴

Indeed, strong protections are just the first step in a robust whistleblower program.

Conclusion

In these tough economic times, with a ballooning federal deficit, it's just plain common sense to have more "deputies" to safeguard taxpayer dollars and the public trust. This is why POGO and our partners in the Make It Safe Coalition strongly support better whistleblower protections for federal contractors.

Given the bipartisan support for expanding coverage of federal fund recipient whistleblowers, Congress should act now. Similar protections have passed the House twice in the two previous Congresses, as part of the Whistleblower Protection Enhancement Act.⁴⁵ In addition, the House Oversight and Government Reform Committee recently included a two-year pilot project for expanding the DoD contractor whistleblower protections to all federal contractors.⁴⁶ That shows bipartisan support, but stops short of the real reform that is needed.

We can and should move towards a better policy and more accountability now. It's time that Congress end the patchwork of protections and expand the Recovery Act provisions to all federal fund recipients in order to reduce the waste, fraud, and abuse in federal spending. We urge you to support enactment of S. 241.

Thank you for the opportunity to testify before you today. I look forward to your questions.

⁴⁴ 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 1, 2011)

⁴⁵ One Hundred Tenth Congress, Whistleblower Protection Enhancement Act of 2007 (H.R. 985), Introduced by Representative Henry Waxman on February 12, 2007. <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR00985:@@R> (Downloaded December 1, 2011); One Hundred Eleventh Congress, Amendment to the "American Recovery and Reinvestment Act of 2009," (H.R. 1), Introduced by Representative Todd Platts on January 28, 2009. <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HZ00020> (Downloaded December 1, 2011)

⁴⁶ One Hundred Twelfth Congress, Whistleblower Protection Enhancement Act of 2011, (H.R. 3289), Introduced by Representative Darrell Issa. <http://thomas.loc.gov/cgi-bin/bdquery/D?d112:1:./temp/~bdYPPV:@@X/home/LegislativeData.php> (Downloaded December 1, 2011)