The Dodd-Frank Bounty Program: Disclosing the Unknown (and Getting Handsomely Paid For It)

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◈ TABLE OF CONTENTS ◈

I.	Securities whistleblower incentives: conditions and procedures	151
II.	The traps and snares of whistleblowing	153
Conclusion		157

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> "There are known knowns. These are things we know that we know. There are known unknowns. That is to say, there are things that we know we don't know. But there are also unknown unknowns. There are things we don't know we don't know."
>
> Donald Rumsfeld[2]

La question des lanceurs d'alerte en droit américain tire sa particularité des racines anciennes de cette pratique et du rôle qui y est joué par les récompenses financières. Dans un paysage juridique émaillé de nombreuses illustrations, la loi Dodd-Frank de 2010 incite les lanceurs d'alerte à divulguer des informations sur les «illégalités qu'on ne voit pas» au sein de l'entreprise. Les sommes versées par

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(2) Quoted at a Pentagon news conference on February 12, 2002, in response to a question by Jim Miklaszewski. For extended historical discussion on this quote, *cfr* David A. GRAHAM, "Rumsfeld's Knowns and Unknowns: The Intellectual History of a Quip", *The Atlantic*, March 27, 2014; Errol MORRIS, "The Certainty of Donald Rumsfeld (Part 1)", *The New York Times*, March 25, 2014.

l'autorité de régulation boursière américaine (la Securities and Exchange Commission – SEC) peuvent être considérables – allant jusqu'à $22 millions pour une seule personne en 2016. Reste à savoir si le bilan est positif. Une pratique de cinq années a montré les failles de la loi Dodd-Frank: outre les effets pervers que le système engendre avec son cortège d'alertes abusives (engorgeant les services de la SEC), il est à craindre que la perspective de «tirer le jackpot» encourage d'autres comportements illégaux de la part des lanceurs d'alerte. D'aucuns craignent même une forme de «police secrète» opérant en marge des mécanismes traditionnels de poursuite. Fondamentalement, nous faisons face ici à de vastes problèmes d'ordre culturel.

In the days that followed his taking of office, President Barack Obama was compelled to address the failures and excesses revealed by the financial crisis of 2008.(3) Somewhat long in the making but nevertheless a notable illustration of this reform drive was the "Dodd-Frank" Act of 2010 that recognized the shadow banking system as a source of systemic risk and that provided regulatory tools to mitigate the problem (most notably through regulatory oversight and wider margins of safety, in effect signaling a "re-regulation" of financial markets after the deregulation trend of the 1980s-90s).(4) A particular feature of Dodd-Frank was its treatment of violations of federal securities laws disclosed by "whistleblowers" – defined as "[a]n employee who reports employer wrongdoing to a governmental or law-enforcement agency".(5) To take an analogy from the animal kingdom, whistleblowers serve to ferret out fraud – like rabbit hunters use ferrets to drive out rabbits from burrows – where Uncle Sam's purse is involved and – increasingly – where corporate America's purse is involved.(6) The topic of whistleblowers is far from new in the United States. Over a period of time stretching back to the beginning of the Republic,(7) Con-

(3) The collapse of Lehman Brothers in September 2008 came close to bringing down the world's financial system. Huge bailouts – financed by taxpayers – were necessary to shore up the industry. The crisis revealed excessive subprime lending in the housing market that wormed its way through overall financial markets.

(4) The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, *Pub. L.* No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 5 U.S.C., 15 U.S.C., and 18 U.S.C.) (hereinafter referred to as the "Dodd-Frank Act" or "Dodd-Frank"). The Dodd-Frank Act was signed into law on July 21, 2010 by President Barack Obama (the law was named after its Democratic sponsors in Congress, Chris Dodd and Barney Frank). For the full text of the Act, see http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf. For extended discussion on the Dodd-Frank Act, *cf.* 124 *Harv. L. Rev.* 1829, 2010-2011. Alan Greenspan, the former Federal Reserve chairman, was particularly harsh on the Dodd-Frank financial reforms, considering they could create the "largest regulatory induced market distortion" in the US since the imposition of wage and price controls in 1971: *cfr* Alan GREENSPAN, "How Dodd-Frank fails to meet the test of our times", *Financial Times*, March 30, 2011.

(5) Black's Law Dictionary 1734 (9th ed. 2009). Under the Dodd-Frank Act, a whistleblower must be an individual. A company is not eligible to be a whistleblower.

(6) *Cfr* John ASHCROFT, Catherine HANAWAY, and Claudia L. OÑATE GREIM, "Whistleblowers Cash In, Unwary Corporations Pay", 40 *Hofstra L. Rev.* 367, 367-68 (2011-2012).

(7) Encouraging people to come forward by offering a financial incentive can be traced back to 13th century England. In 1778, the Continental Congress provided that it was "the duty of all per-

gress and state legislatures have addressed whistleblower protection through a variety of industry specific measures,[8] either in the follow-up to adverse disclosures of industry fraud (*ex-post*),[9] or to anticipate and prevent opportunities for increased fraudulent activity (*ex-ante*).[10] The federal False Claims Act (FCA), originally passed in 1863 in response to military contractor fraud perpetrated on the government during the Civil War, provides a classroom illustration of whistleblower incentives via a mechanism commonly referred to in the United States as a "*qui tam*" action.[11] [12] This short expression refers to an action by which private citizens – known as "relators" – with personal knowledge of wrongdoing (in the case of the FCA, fraud perpetrated against the government) can bring suit on behalf of the United States and in return receive a "cut of the judgment proceeds should they prevail".[13] A noteworthy feature of the Dodd-Frank reform of 2010, to be found in §922 of the Act, was that

sons in the service of the United States ... to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge": quoted in Shawn Marie BOYNE, "Whistleblowing", 62 *Am. J. Comp. L. Supp.* 425 (2014). Early American Congresses enacted multiple statutes with financial incentive provisions, relating to the collection of duties, regulation of the slave trade, and the employment of seamen without a contract: *cfr* J. Randy BECK, "The False Claims Act and the English Eradication of Qui Tam Legislation", 78 *N. C.L. Rev.* 539 553 (2002) ("Qui tam enforcement has never been as widespread in this country as it once was in England. Early American Congresses continued the English practice by enacting a few qui tam statutes").

(8) For an overview of sector specific legislation, *cfr* Shawn Marie BOYNE, "Whistleblowing", *op. cit.*

(9) See most notably The Tax Relief and Healthcare Act of 2006, *Pub. L.* No. 109-432, 120 Stat. 2922, 2958 (2006) (codified at 26 U.S.C. §7623) (establishing an expanded IRS whistleblower bounty program).

(10) The Patient Protection and Affordable Care Act (PPACA) of 2010, *Pub. L.* No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 42 U.S.C.). The PPACA – commonly known as "Obamacare" – encourages and protects employees who report violations of the law's consumer protections. For extended discussion on this particular aspect of Obamacare, *cfr* Shawn Marie BOYNE, "Whistleblowing", *op. cit.*, at pp. 445-448.

(11) The full expression reads, "qui tam pro domino rege quam pro se ipso in hac parte sequitur", literally meaning "who as well for the king as for himself sues in this matter".

(12) The False Claims Act – also known as "Lincoln's Law" – originally dealt with military contractor fraud such as a horse being sold multiple times or the selling of supplies that were made of nothing but boxes of sawdust. The FCA remained relatively dormant after the Civil War but came back to life under the New Deal when government spending increased and "opened up numerous opportunities for unscrupulous government contractors to defraud the government": *cfr* U.S. *ex rel. Findley v. FPC-Boran Employees' Club*, 105 F.3d 675, 679 (D.C. Cir. 1997). The FCA has been amended several times since its inception, most notably in 1943 and 1986.

(13) U.S. *ex rel. Lamers v. Green Bay*, 998 F. Supp. 971, 977 (E.D. Wis. 1998), *aff'd*, &68 F.3d 1013 (7th Cir. 1999). One recent FCA lawsuit concerned Lance Armstrong and his associates. The case had originally been filed by Floyd Landis and related to the defendants' taking of sponsorship money from the United States Postal Service (USPS) while falsely representing that they were not using performance enhancing drugs or other doping techniques. For extended discussion on this case, *cfr* Anthony CASEY & Anthony NIBLETT, "Noise Reduction: The Screening Value of Qui Tam", 91 *Washington University L. Rev.* 1169 (2014).

whistleblowers would henceforth not only receive protection from termination or adverse employment action but that they would now have the opportunity to claim financial awards – or bounties – equal to 10-30 per cent of any financial penalty for bringing information to the Securities and Exchange Commission (SEC).(14) The idea allegedly came in the aftermath of the SEC mishandling of a tip on Bernard Madoff's Ponzi scheme.(15) One year after Dodd-Frank was passed, the SEC adopted Rule 21 governing the application of §922.(16) In short, these provisions paved the way for significant financial incentives to encourage whistleblowing. Although considered to be "shrouded in secrecy",(17) thousands of cases have now tested the Dodd-Frank bounty program, the SEC receiving more than 4,000 tips during fiscal year 2016 alone (with more people receiving awards for that year – in the aggregate of $100 million – than in the five previous years combined).(18) (19) The second-highest award made under the SEC's whistleblower program was made in August 2016 and led to the Commission authorizing an award of $22 million to a company insider who provided information about a securities violation that would have been unlikely

(14) Historically, the creation of the SEC is related to the stock market crash of October 1929 and the ensuing Great Depression. To restore faith in capital markets (via reliable information and rules of honest dealing), Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934, the latter act establishing the SEC. President Roosevelt appointed Joseph P. Kennedy – President John F. Kennedy's father, to serve as the first chairman of the SEC. In terms of organization, the SEC is composed of five Presidentially-appointed Commissioners, with staggered five-year terms (besides a staff 4,600 persons spread out over Washington D.C. and eleven regional offices). *Cfr* Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* (2006), establishing the Securities and Exchange Commission and providing for the regulation of secondary trading of securities and the regulation of financial markets and their participants.

(15) In the Madoff case, Harry Markopolos repeatedly drew the SEC's attention to the fraud, pressing the issue for nearly a decade. The SEC ignored these calls in part because of Markopolos's personal motivation and rivalry with Madoff: *cfr* Geoffrey Christopher RAPP, "Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act", 73 *BYU L. Rev.* 112-113, 135 (2012).

(16) The final rules were adopted by the SEC on May 25, 2011 (by a 3-2 vote) and took effect on August 12, 2011. See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300 (June 13, 2011, codified at 17 C.F.R. pts. 240 and 249. Rule 21 is Internet available at https://www.law.cornell.edu/cfr/text/17/part-240, or https://www.sec.gov/about/offices/owb/reg-21f.pdf (accessed January 7, 2016).

(17) *Cfr* Tom BRAITHWAITE, Kara SCANNELL and Michael MACKENZIE, "Deutsche Bank whistleblower snubs $8.25m SEC payout", *Financial Times*, August 19, 2016.

(18) *Cfr* David LYNCH, "Whistleblowers pipe up for SEC cash", *Financial Times*, September 19, 2016. The author points out more than 14,000 tips flowed into the SEC over the program's first five years. In 2009, government estimates put at $2 billion the amount of money recovered in whistleblower lawsuits: *cft* Patrick A. BARTHLE II, "Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bounty Program", 69 *Wash. & Lee L. Rev.* 1201, at 1203 (note 10) (2012).

(19) In the United States, the federal government's fiscal year begins on October 1 and ends on September 30.

to have been detected but for the whistleblower's information.[20] Among the many high-profile whistleblower cases based on the Dodd-Frank bounty program, we may refer to a tip in the spring of 2016 from bank executives working at Merrill Lynch outlining the details of a trading scheme that inflated the bank's profits while putting at risk up to $63 billion in customer funds. Alerted by the bank executives' lawyers, the SEC took up the affair with Merrill Lynch settling charges of securities law violations. Following the bank's admission of wrongdoing and payment of a $415 million penalty, "the tipsters [stood] to receive a multimillion-dollar reward".[21] In another high-profile case from 2016, the SEC offered two former risk officers at Deutsche Bank a $16.5 million reward (the third largest in the whistleblower's program history) for helping the SEC uncover false accounting at the Bank. The SEC found Deutsche had misstated its accounts by improperly valuing a giant derivatives portfolio (leveraged trades were presented as unleveraged) and imposed a fine $55 million.[22]

Part One of this article details the contours of the Dodd-Frank whistleblower bounty provisions. Part II deals with the more inherent issues that lie beneath the mechanism, in terms of misuse, meritless claims, or simply offering an effective means of either minimizing corporate criminality or deterring it altogether.

I. SECURITIES WHISTLEBLOWER INCENTIVES: CONDITIONS AND PROCEDURES

To be eligible for an award under Dodd-Frank, a whistleblower must provide the SEC with original information, that both relates to possible securities violations (past, ongoing, or about to occur) and that "results in monetary sanctions exceeding $1,000,000.[23] [24] In stark contrast with the federal False

(20) *Cfr* SEC, 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program (November 15, 2016), p. 11 (and note 14), Internet available at https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf (accessed January 10, 2017).

(21) *Cfr* David LYNCH, "Whistleblowers pipe up for SEC cash", *Financial Times*, September 19, 2016. On this case, see SEC, 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program (November 15, 2016), *op. cit.*, p. 2.

(22) In effect, the $16.5 million payout represented 30% of the $55 million the SEC imposed on Deutsche Bank.

(23) The $1,000,000 threshold deviates from the recovery available to whistleblowers under the FCA (where recovery of the tipster's share of the bounty is available regardless of the government's final proceeds).

(24) *Cfr* Rules §240.21F-2 and §240.21F-3(a). The Attorney General of the United States, an appropriate regulatory authority, a self-regulatory organization, or a state attorney general in a criminal case may bring a "related" judicial or administrative action (under the same conditions: original whistleblower information that leads the Commission to obtain monetary sanction totaling more than $1,000,000). *Cfr* Rule §240.21F-3(b). By "appropriate regulatory authority", reference is had to the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Organization, the Office of Thrift Supervision, and other regulatory agencies defined under Section 3(a)(34) of the Exchange Act (15 U.S.C. 78c(a)(34)).

Claims Act, all the potential whistleblower is required to do is simply submit the information to an online collection system or fill out a form and mail it or fax it to the SEC Whistleblower Office.[(25)] The "voluntary" nature of the submission is understood restrictively.[(26)] By definition, it excludes information provided in response to a request made by the Commission or given in the course of an inquiry. It also excludes information received by way of a pre-existing legal duty or a contractual duty owed to the Commission.[(27)] The SEC will further not consider information that the whistleblower obtained through a communication that was subject to the attorney-client privilege, nor information that was obtained by a means or in a manner that violated applicable federal or state criminal law.[(28)] The bounty program is only triggered once the information leads to successful enforcement[(29)] and provided the financial threshold for the sanction – $1,000,000 – is met.[(30)]

The determination of the amount of the award is at the discretion of the SEC[(31)] but Rule 21 sets forth clear guidelines. Whereas in the past, bounty payments were capped at 10% of what was collected of the monetary sanction,

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A "self-regulatory organization" includes "any national securities exchange, registered securities association, registered clearing agency, the Municipal Securities Rulemaking Board, and any other organization that may be defined as self-regulatory organizations under Section 3(a)(26) of the Exchange Act (15 U.S.C. 78c(a)(26))", at Rule §240.21F-4(h). For one author, "the 'related action' provision of the Dodd-Frank program greatly expands the scope of this whistleblower bounty program": *cfr* Patrick A. BARTHLE II, "Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bounty Program", *op. cit.*, at p. 1209.

(25) In FCA qui tam actions the relator is required to file a complaint with a court and hire a lawyer (the complaint is filed *in camera* and under seal for sixty days): *cfr* 31 U.S. C. §3730(b). The requirements under the Dodd-Frank bounty program are significantly lighter: "[Y]ou must submit your information about a possible securities law violation by either of these methods: (1) Online, through the Commission's website located at www.sec.gov; or (2) by mailing or faxing a Form TCR (Tip, Complaint or Referral) to the SEC Office of the Whistleblower...": *cfr* §240.21F-9(a).

(26) *Cfr* Patrick A. BARTHLE II, "Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bounty Program", *op. cit.*, p. 1210.

(27) *Cfr* §240.21F-4(a).

(28) *Cfr* §240.21F-4(b).

(29) By "successful enforcement", the Rules essentially refer to "sufficiently specific, credible and timely" information to enable the SEC to bring "a successful judicial or administrative action based in whole or in part" on conduct that was the subject of the whistleblower's original information: *cfr* §240.21F-4(c)(1).

(30) In the event of multiple judicial or administrative proceedings brought by the SEC, the Commission will look into whether they arise out of the "same nucleus of operative facts": *cfr* §240.21F-4(d)(1). Supposing a whistleblower gives original information that leads to tow separate actions – one leading to a $500,000 sanction, and the other leading to an $800,000 sanction, "these amounts would not be aggregated, and 'no whistleblower award would be authorized because no single action will have obtained sanctions exceeding $1,000,000'": *cfr* Patrick A. BARTHLE II, "Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bounty Program", *op. cit.*, at p. 1206.

(31) *Cfr* §240.21F-5(a).

Dodd-Frank imposes a mandatory floor of 10% and a ceiling of 30%.[32] The SEC takes four criteria into consideration to *increase* the amount of the bounty.[33] The first concerns the significance of the information provided by the whistleblower, most notably inasmuch as it relates to the success of the enforcement action and results in the conservation of the resources of the Commission. The second factor concerns the actual assistance provided by the whistleblower (essentially the timeliness of the initial report and the extent to which the tipster remediated the harm caused by the violations). Rule 21, doubtless out of concern for the whistleblower's welfare, also invites the Commission to grant due consideration to "[a]ny unique hardships suffered by the whistleblower as a result of his or her reporting and assisting in the enforcement action".[34] The third criterion to play a part in the amount of the whistleblower's award concerns the very interest of law enforcement, with most notably considerations of deterrence and exposure of industry-wide practices. Finally, the SEC is entrusted with taking into account the whistleblower's participation in internal compliance systems. All the while, determinations as to whether or to whom to make an award may be appealed within 30 days after the Commission issues its final decision to the United States Court of Appeals for the District of Columbia Circuit (or to the circuit where the aggrieved person resides or has his principal place of business).[35] Conversely, the amount of the award is not appealable.[36] As such, the funds come from a separate congressional appropriation rather than from the penalties paid by the companies.[37]

II. THE TRAPS AND SNARES OF WHISTLEBLOWING

At first sight, three principal issues may be singled out in relation to the application of the SEC's bounty program. One first element of controversy concerns the persons who support the punishment – those actually responsible for the malfeasance or the company's unwitting shareholders. Eric Ben-Artzi, the

(32) *Cfr* §240.21F-5(b). Should there be multiple tipsters in the same action or related action, a percentage is awarded to each whistleblower (the aggregate amount complying with the guideposts of 10 and 30% collected).

(33) *Cfr* §240.21F-6. Factors that ate taken into account to *decrease* the amount of the whistleblower's award include the culpability of the whistleblower (scienter and egregiousness of the underlying fraud committed by the whistleblower) and unreasonable reporting delay.

(34) *Cfr* §240.21F-6.(a)(2)(vi).

(35) According to one author, this is Dodd-Frank's "most important achievement": *cfr* Geoffrey Christopher RAPP, "Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act", *op. cit.*, at 79 ("Dodd-Frank was not, by any means, a complete failure. Its most important achievement is that, in contrast to the Administration's proposed Investor Protection Act of 2009, it provides for judicial review of SEC decisions not to pay bounties").

(36) *Cfr* §240.21F-13.

(37) *Cfr* David LYNCH, "Whistleblowers pipe up for SEC cash", *op. cit.*

former risk officer at Deutsche Bank who blew the whistle on the Bank's false accounting (mentioned in the introduction), is the first person to have raised this issue. In 2015, Mr. Ben-Artzi and a fellow Deutsche trader provided the SEC with original information on Deutsche's Bank's illegal practices and applied for an award under the SEC's bounty program. Mr. Ben-Artzi then shocked Wall Street by turning down his share of the $16.5 million payout (in effect, refusing $8.25 million) to protest at the "broken" US justice system.(38) At the heart of his grievance was the fact that the German bank's shareholders would support the $55 million fine imposed by the SEC on Deutsche Bank, leaving the bank's top managers unscathed (and retiring from the bank with multimillion-dollar bonuses based on the misrepresentation of the bank's balance sheet). Put differently, Deutsche did not commit the wrongdoing. Deutsche was the victim. What particularly galled Mr. Ben-Artzi was a "revolving door" policy between a substantial number of prominent executives at Deutsche Bank and the SEC's top echelon.(39) In effect, he blew the whistle a second time.(40) The SEC defended itself by saying it was not obliged to punish senior bank executives, sustaining that it brought cases against individuals only when the evidence supported it. To this, Mr. Ben-Artzi replied that in a similar case (Trinity Capital and its subsidiary Los Alamos National Bank), several senior executives were charged with wrongdoing, settled and paid fines.(41) The Deutsche Bank case understandably struck a raw nerve in financial and legal circles.

Another issue of concern behind the application of the SEC's bounty program has to do with misuse and non-meritorious reporting. As mentioned above, the SEC received more than 4,000 tips during fiscal year 2016 alone.(42) Besides being swamped with more complaints than it can handle,(43) the question remains whether these tips addressed to the SEC were actually meritorious. The problem lurks – by nature – behind the practice of giving incentives to informants. When looking at statistics in 2010 for the federal False Claims

(38) *Cfr* "Deutsche whistleblower hopes others will follow example", *Financial Times*, August 20-21, 2016. Out of the $8.25 million payout, Mr. Ben-Artzi was expected to net more than $3 million after lawyer's fees and 50% of the award due to his ex-wife in a divorce settlement.

(39) By way of illustration, the SEC's enforcement director (Dick Walker) between 1998 and 2001 served as general counsel for Deutsche Bank. Another enforcement director for the SEC (Robert Khuzami) between 2009 and 2013 also served as Deutsche Bank's former general counsel for the Americas. Robert Rice served as a senior lawyer at Deutsche Bank between 2004 and 2013 (leading an internal investigation into the valuation claims), before moving to the SEC as chief counsel.

(40) *Cfr* Eric BEN-ARTZI, "We have a duty to protect shareholders from executive wrongdoing", *Financial Times*, August 19, 2016.

(41) *Ibidem*.

(42) Exactly 4,218 tips: SEC, 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program (November 15, 2016), *op. cit.*, at 23.

(43) The resource limitations – or underfunding – of the SEC are notorious: *cfr* Geoffrey Christopher RAPP, "Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act", *op. cit.*, at 136-37.

Act, it appears that nearly 75% of all *qui tam* actions filed under the FCA were dismissed without a settlement or judgment (and a fortiori, without an award). The problem is enhanced under the Dodd-Frank program where, as shown above, the reporting requirements of the potential whistleblower are much lighter than under the FCA.[44] Indeed, "by failing to institute a *qui tam* system or to impose any costs on the whistleblower, the Act fails to provide an adequate screening mechanism to discourage frivolous tips".[45] According to the SEC (writing in November 2016), the Commission has issued awards to a mere 34 individuals on the basis of Dodd-Frank (since the beginning of the program…), out of a total of 18,334 whistleblower tips.[46] Taken from an economic analysis of law perspective, one could consider that the Dodd-Frank bounty program, with its share of non-meritorious reporting, has a significant impact on transaction costs. Again, experience with the False Claims Act is illustrative of the problem. According to a senior official at the Department of Justice (DOJ) who testified before a Congressional committee, the Civil Division of the DOJ spent "20,000 hours [between 1987 and 1992] investigating … 150 *qui tam* cases that were [later] dismissed by the courts or not pursued after we declined to intervene". Furthermore, we are confronted with the neighboring issue of "nurturing unlawful conduct".[47] Inasmuch as a tipster's compensation is tied to what is collected of the monetary sanction, the putative tipster could be considered to have an incentive to let damages inflate, thereby increasing his "slice of the cake".[48] Richard Posner addressed this issue in his opus on *Economic Analysis of Law* many years ago.[49] One case sheds interesting light

(44) *False Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 102d Cong. 25 (1992) (Sup. Docs. No. Y4.J89/1: 102/49) (statement of Stuart M. Gerson, Assistant Attorney General, Civil Division, Department of Justice).

(45) *Cfr* Shawn Marie BOYNE, "Whistleblowing", *op. cit.*, at 448. See also Anthony CASEY & Anthony NIBLETT, "Noise Reduction: The Screening Value of Qui Tam", *op. cit.*

(46) SEC, 2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program (November 15, 2016), *op. cit.*, at 17.

(47) Several of these problems are brought out in a human rights perspective in a recent French article: *cfr* Johanna SCHWARTZ MIRALLES, "Les récompenses financières des lanceurs d'alerte portent-elles atteinte aux droits fondamentaux ? Le cas du droit américain", *La Revue des droits de l'homme*, 10/2016, Internet available at http://revdh.revues.org/2383 (accessed January 10, 2017). As proof of abuse, the author most notably devotes part of her analysis to the 9th Circuit's ruling in *Cafasso v. General Dynamics*, 637 F.3d 1047 (9th Cir. 2011), Internet available at http://caselaw.findlaw.com/us-9th-circuit/1560668.html (accessed January 10, 2017). See also Conseil d'État, *Le droit d'alerte : signaler, traiter, protéger* (Paris : La Documentation française, 2016).

(48) This fear is expressed by numerous authors: *cfr*, among others, John ASHCROFT, Catherine HANAWAY, and Claudia L. ONATE GREIM, "Whistleblowers Cash In, Unwary Corporations Pay", *op. cit.*, at 387 ("Whistleblowers will sit on information until the fraud becomes large enough to maximize their reward and, as a consequence, money that could have been saved for victim-investors will instead be paid to the government in fines and penalties and to the whistleblower").

(49) According to Posner, "[t]he incentive for waiting would be to obtain greater compensation, since the penalty for the completed crime would be heavier than the penalty for the attempt". Posner further underlines the possible dilemma arising from private enforcement situations, most

on such an occurrence (again in relation to the FCA) offering proof, if proof were needed, that these forms of behavior are not the product of academic speculation.(50)

On close inspection, the Dodd-Frank bounty program reveals many important flaws. Having said as much, "the overwhelming critique centers around the SEC's deliberate decision not to make internal reporting a prerequisite to obtaining whistleblower award bounties".(51) This in turn may produce dire consequences. In our opinion, a former Attorney General of the United States – known for his conservatism – gives the "coup de grâce" to the entire mechanism. For John Ashcroft (and fellow authors Catherine Hanaway and Claudia L. Oñate Greim): "[b]y not conditioning whistleblower rewards on initial reporting to internal compliance, the Dodd-Frank Act may also motivate would-be whistleblowers to act as a secret police force, of sorts, for the government. This secret police will not be bound by the Constitution, as federal authorities would be. Therefore, whistleblowers potentially could be collecting documents, reporting on conversations, and acquiring evidence that would be bound the reach of subpoenas and warrants".(52) In short, there now exists a new breed of prosecutors in the United States – private citizens – working and assisting the government in its task of detecting and deterring corporate fraud and malfeasance.(53) In addition to being ineffectual, one wonders if this private-citizen-informant trend will not drag Americans down an information well of Orwellian magnitude.

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notably that "[t]he private enforcer would presumably be paid per offender convicted... There are several veins in which the enforcer could increase his 'catch', and hence his income ... He could fabricate an offense ... or encourage an individual to commit an offense that he would not have committed without encouragement...": *cfr* Richard A. POSNER, *Economic Analysis of Law*, 7th Edition (New York: Wolters Kluwer Law & Business, 2007), at 661.

(50) In one case (involving aircraft fraud against the United States), the relator contacted his attorneys in mid-1987, when damages against the government were at $13.1 million. The relator nevertheless did not file suit until 1990, when damages compiled to the staggering amount of $41.6 million. Needless to say, the relator's bounty had more than tripled as well. *Cfr* U.S. *ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1037-39 (6th Cir. 1994). The Sixth Circuit remanded the matter to the district court with instructions to reduce certain components of the award and to conduct further factfinding proceedings consistent with its opinion. The case is Internet available at: https://law.resource.org/pub/us/case/reporter/F3/041/41.F3d.1032.92-4283.93-3015.html (accessed January 10, 2017).

(51) *Cfr* John ASHCROFT, Catherine HANAWAY, and Claudia L. OÑATE GREIM, "Whistleblowers Cash In, Unwary Corporations Pay", *op. cit.*, at 385-86. See also Johanna SCHWARTZ MIRALLES, "Les récompenses financières des lanceurs d'alerte portent-elles atteinte aux droits fondamentaux ? Le cas du droit américain", *op. cit.*, at para. 51,

(52) *Ibid.*, at 388.

(53) *Cfr* Dayna BOWEN MATTHEW, "Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act", 76 *Ind. L.J.* 525, 529 n. 13 (2001) (likening *qui tam* relators to "private prosecutors").

CONCLUSION

The Dodd-Frank bounty program is a harbinger of the expanding use of whistleblowers across American industries. While its contours seem simple enough, and while its objectives appear steeped in good intentions, its flaws are significant enough to warrant utmost caution before envisaging similar measures on the heels of public disclosures of industry fraud in Europe. Today, regulators in Canada and Australia encourage whistleblowers (though Australia does not pay financial bounties).[54] Europe is somewhat divided on these matters. Assuredly, certain German *Länder* have gone down this path[55] and recent press articles have noted that Belgian Finance Minister Johan Van Overtveldt was thinking of setting up a bounty program with respect to information given on tax evasion.[56] Nevertheless, few States in Europe seem willing to adopt a full-blown bounty scheme to motivate whistleblowing. Regarding France, Johanna Schwartz Miralles emphasizes the difference: "La France, pour sa part, s'avère actuellement très réticente quant à la rémunération des lanceurs d'alerte". At the heart of the matter lies a difference in cultural attitudes.[57] Regardless of corporate fraud in the strict sense of the word, European history has often shown that a combination of denunciation and money makes for an unsavory cocktail. Better that corporations detect systemic wrongdoing in its earliest stages and reduce the likelihood of whistleblowing in the first place.

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(54) *Cfr* David LYNCH, "Whistleblowers pipe up for SEC cash", *Financial Times*, September 19, 2016. For an in-depth comparative overview, *cfr* Tom FAUNCE, Kim CROW, Tony NIKOLIC, and Frederick M. MORGAN, Jr., "Because they have evidence: Globalizing financial incentives for corporate fraud whistleblowers", in *International Handbook on Whistleblowing Research* (Edited by A.J. BROWN, David LEWIS, Richard MOBERLY, and Wim VANDEKERCHOVE) (Cheltenham: Edward Elgar Publishing Ltd., 2014), pp. 381-404.

(55) *Cfr* Anne MICHEL, «Fraude fiscale: vers une rémunération des informateurs du fisc», *Le Monde Economie,* November 18, 2016. The author refers to the Land of North Rhine-Westphalia.

(56) *Cfr* Frédéric CHARDON, «Le fisc pourrait racheter les données belges des «Leaks'», *La Libre Belgique*, November 14, 2016.

(57) *Cfr* Johanna SCHWARTZ MIRALLES, "Les récompenses financières des lanceurs d'alerte portent-elles atteinte aux droits fondamentaux? Le cas du droit américain", *op. cit.,* at para. 5 (citing the 2aforementioned 016 Report by the Conseil d'État, *Le droit d'alerte: signaler, traiter, protéger*). Anne Michel also notes the difference with respect to tax evasion: "La rémunération de personnes dénonçant des fraudes à l'impôt, telle qu'elle se pratique déjà dans plusieurs pays étrangers, ne fait pas partie de la tradition française. Et ce, alors même que les services de police et de gendarmerie, ainsi que les douances, disposent, pour leur part, de la possibilité d'acheter des renseignements": *cfr* Anne MICHEL, «Fraude fiscale: vers une rémunération des informateurs du fisc», *op. cit.*