

## ***Activating Whistleblower Programs is Essential for the U.S. to Pursue its Official Policy to Combat Global Wildlife Trafficking***

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When the Eliminate, Neutralize, and Disrupt Wildlife Trafficking Act of 2016 [hereafter “END Trafficking Act”]<sup>1</sup> became law, it was a forceful response to grim news that “the scale and scope of wildlife trafficking continue to grow at an alarming rate, reversing decades of conservation gains.”<sup>2</sup> This legislation unequivocally reaffirmed the U.S. policy of fighting wildlife trafficking<sup>3</sup> and prioritized increasing law enforcement activities to disrupt global transnational criminal networks and prevent illegal wildlife trade.<sup>4</sup>

The END Trafficking Act proclaims U.S. law and policy will focus on:

1. Taking immediate action to stop the illegal global trade in wildlife and wildlife products and associated transnational crime;<sup>5</sup>
2. Employing U.S. Government resources in a coordinated manner to curtail poaching and dismantle illegal wildlife trade networks;<sup>6</sup> and
3. Building upon the National Strategy<sup>7</sup> and Implementation Plan<sup>8</sup> to further combat wildlife trafficking in a holistic manner and guide the U.S. Government response to ensure progress in the fight against wildlife trafficking.<sup>9</sup>

The National Strategy and Implementation Plan referenced in the END Trafficking Act provide further emphasis on strengthening enforcement activities<sup>10</sup> and enumerate specific priorities and principles to fight wildlife trafficking. Perhaps most importantly, both documents call for ending wildlife trafficking to be elevated as a core mission of all executive branch agencies and departments.<sup>11</sup> The priorities guiding executive agencies and departments in fulfillment of this mandate are:

1. Marshal Federal Resources for Combating Wildlife Trafficking;
2. Use Resources Strategically;
3. Improve the Quality of Available Information;

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<sup>1</sup> 16 U.S.C. §7601 *et seq.* This legislation codified President Obama’s Executive Order 13648, 78 Fed. Reg. 40621 (July 1, 2013).

<sup>2</sup> *National Strategy for Combating Wildlife Trafficking*, (Feb. 11, 2014) at 4.

<sup>3</sup> This policy is evidenced by the existence of over 40 wildlife protection laws including the Endangered Species Act- 16 U.S.C. §1531 *et seq.*; Lacey Act- 16 U.S.C. §3371 *et seq.*; Fish and Wildlife Improvement Act- 16 U.S.C. §742l; Rhinoceros and Tiger Conservation Act- 16 U.S.C. §5301 *et seq.* All of these laws also contain whistleblower reward provisions.

<sup>4</sup> 16 U.S.C. §7611(3).

<sup>5</sup> 16 U.S.C. §7612(1)

<sup>6</sup> 16 U.S.C. §7612(3)

<sup>7</sup> Referring to the *National Strategy for Combating Wildlife Trafficking*, (Feb. 11, 2014).

<sup>8</sup> Referring to the *National Strategy for Combating Wildlife Trafficking: Implementation Plan*, (Feb. 11, 2015).

<sup>9</sup> 16 U.S.C. §7612(4)

<sup>10</sup> Strengthening enforcement is one of the Three Strategic Priorities of the National Strategy.

<sup>11</sup> *National Strategy*, *supra* n. 2, at 5.

4. Consider All Links of the Illegal Trade Chain; and
5. Strengthen Relationships and Partnerships.<sup>12</sup>

Within his first month in office, President Trump issued an Executive Order that stated, "[i]t shall be the policy of the executive branch to (a) strengthen enforcement of Federal law in order to thwart... the illegal smuggling and trafficking of...wildlife."<sup>13</sup> The Order directs Federal law enforcement agencies to "give a high priority and devote sufficient resources to efforts to identify, interdict, disrupt, and dismantle transnational criminal organizations."<sup>14</sup> Unanimous support for the END Trafficking Act and President Trump's Executive Order reveal that ending illegal trade in wildlife is an issue that has strong bipartisan support.

It is indisputable that the enforcing wildlife trafficking laws has been identified as a priority by the leadership of the Executive and Legislative branches of the U.S. Government. Congress has also already provided agencies with the most powerful tool to harness and focus enforcement efforts: incentives for whistleblowers.<sup>15</sup> A robust whistleblower program focused on ending wildlife trafficking would embody many of the priorities and primary tactics identified as drivers of the National Strategy.

In fact, a whistleblower program is essential to foster the success of the National Strategy and Implementation Plan:

<b>Implementation Plan Objective</b>	<b>Whistleblower (WB) Program Contributions</b>
Ensure all appropriate enforcement authorities and tools are available to deter wildlife trafficking more effectively. <sup>16</sup>	WBs are a powerful detection and enforcement tool that has been at the disposal of relevant authorities for decades, but they have not been effectively utilized in the wildlife trafficking arena.
Strengthen interdiction and investigative efforts. <sup>17</sup>	WBs reduce burden of government undercover investigations; WB information can enable planning for successful interdiction.
Take the profit out of wildlife trafficking. <sup>18</sup>	WBs enhance enforcement activity and increase the likelihood that illegal activity will be discovered, raising the cost of engaging in the illegal activity.

<sup>12</sup> *Id.* at 5

<sup>13</sup> Executive Order 13773, 82 Fed. Reg. 10691(Feb. 9, 2017).

<sup>14</sup> *Id.*

<sup>15</sup> See Stephen M. Kohn, *Monetary Rewards for Wildlife Whistleblowers: A Game-Changer in Wildlife Trafficking Detection and Deterrence*, 46 ENVR. L. REV. 10054 (2016). Available at: [https://www.kkc.com/assets/site\\_18/files/reward-wildlife-whistleblowers.pdf](https://www.kkc.com/assets/site_18/files/reward-wildlife-whistleblowers.pdf)

<sup>16</sup> *Implementation Plan*, *supra* n. 8, at 6.

<sup>17</sup> *Id.* at 8.

<sup>18</sup> *Id.* at 11.

Implementation Plan Objective	Whistleblower (WB) Program Contributions
Enhance information sharing with international partners. <sup>19</sup>	U.S.-led development of secure reporting mechanisms for WBs will increase information that can be shared globally.
U.S. participation in multinational enforcement operations. <sup>20</sup>	International WBs might be uncomfortable with working directly with their own governments, going through U.S. channels could help secure collection of information with international implications.
Address wildlife trafficking in other transnational organized crime. <sup>21</sup>	Informed WBs can report evidence of violations of other laws they witness.
Focus on corruption and illicit financial flows. <sup>22</sup>	WB provisions in False Claims Act and Foreign Corrupt Practices Act mutually reinforce WB provisions in wildlife protection laws.

The incredible contribution<sup>23</sup> of whistleblowers in detecting many different types of illegal activities informed Congress's choice to incorporate this tool in over 40 wildlife protection laws.

Whistleblowers have long been valued by both Democrats and Republicans as a key component in the battle against wildlife trafficking. President Reagan signed amendments to the Lacey Act<sup>24</sup> and the Fish and Wildlife Improvement Act<sup>25</sup> which directed responsible U.S. agencies to harness the power of whistleblowers by offering rewards for information about illegal activities involving wildlife. In explaining the importance of adding the reward provision to the Fish and Wildlife Improvement Act, Congressman John Breaux highlighted the significance of “undercover operations to apprehend large-scale, commercial violators of wildlife laws.”<sup>26</sup> Congressman Breaux made that comment over 30 years ago, and in the intervening time the Secretaries of Interior, Commerce, Agriculture, and Treasury<sup>27</sup> have not taken any steps towards implementing the whistleblower provisions in wildlife protection laws.

However, where whistleblowers have been effectively utilized, they have played a critical role in exposing illegal activity. This has been demonstrated time-and-again under the False Claims Act,<sup>28</sup> Foreign Corrupt Practices Act,<sup>29</sup> Securities Exchange Act,<sup>30</sup> Commodity Exchange

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<sup>19</sup> *Id.* at 16.

<sup>20</sup> *Id.* at 17.

<sup>21</sup> *Id.* at 18.

<sup>22</sup> *Id.* at 19.

<sup>23</sup> For example, over 80% of False Claims Act cases are initiated by whistleblowers. *Grassley Floor Statement on the False Claims Act*. Senator Chuck Grassley of Iowa, Chairman, Senate Judiciary Committee. <https://www.grassley.senate.gov/news/news-releases/grassley-floor-statement-false-claims-act> (last visited Mar. 10, 2017).

<sup>24</sup> Pub. L. 97-79 (1981).

<sup>25</sup> Pub. L. 97-396 (1982).

<sup>26</sup> 128 Cong. Rec. H31972 (Dec. 17, 1982).

<sup>27</sup> 16 U.S.C. §3371(h) and 16 U.S.C. §3375(d)

<sup>28</sup> 31 U.S.C. §§3729-33

<sup>29</sup> 15 U.S.C. §78u-6

<sup>30</sup> 15 U.S.C. §78u-6

Act,<sup>31</sup> and Internal Revenue Act,<sup>32</sup> and the Act to Prevent Pollution from Ships.<sup>33</sup> U.S. Securities and Exchange Commission Chair Mary Jo White echoes the sentiment of various agencies in praising the effectiveness of a well-implemented whistleblower reporting and reward system:

*“[The SEC Whistleblower Program] has rapidly become a tremendously effective force-multiplier, generating high quality tips and, in some cases, virtual blueprints laying out an entire enterprise, directing us to the alleged fraud.”*<sup>34</sup>

The Act to Prevent Pollution from Ships (“APPS”) provides an effective model for incentivizing reports from international whistleblowers to uncover crime which would otherwise be undetectable. The U.S. Department of Justice has praised the success of incentivizing whistleblowers, noting, “Absent crew members with firsthand knowledge of the illegal conduct coming forward, APPS violations are extremely difficult to uncover.”<sup>35</sup> Due in large part to effectively harnessing the power of whistleblowers, the United States has become the number one enforcer of the MARPOL Protocol—the international treaty that APPS implements.<sup>36</sup> The Lacey Act could be just as effective as APPS if authorities utilized the available whistleblower reward provisions.

Both the APPS and the Lacey Act provide enforcement authorities<sup>37</sup> with the discretion to compensate whistleblowers who report illegal activity with money from the collected criminal sanctions, and to determine the amount of any such reward.<sup>38</sup> Additionally, whistleblower provisions in some wildlife laws, such as the U.S. Fish and Wildlife Improvement Act, go even further—allowing rewards for reporting a violation of law, even if that report does not result in enforcement action by the government.<sup>39</sup>

Despite the existence of a strong framework to combat wildlife trafficking by incentivizing and empowering whistleblowers to report crime, the Secretaries of Interior, Commerce, Agriculture, and Treasury have not taken action to unlock the power of whistleblowers to protect wildlife. Instead, trafficking has become “a global crisis, as increasingly sophisticated, violent, and

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<sup>31</sup> 7 U.S.C. §26

<sup>32</sup> 26 U.S.C. §7623

<sup>33</sup> 33 U.S.C. §1908(a)

<sup>34</sup> Mary Jo White, Chair, U.S. Securities and Exchange Comm’n, Remarks at the Securities Enforcement Forum (Oct. 9, 2013), <https://www.sec.gov/News/Speech/Detail/Speech/1370539872100> (last visited Mar. 3, 2017).

<sup>35</sup> U.S. Department of Justice, *USA v. Noble Drilling, LLC* (U.S. District Court, Alaska), 3:14-cr-00114, December 18<sup>th</sup>, 2014.

<sup>36</sup> “Very few other countries have any track record of prosecuting deliberate MARPOL violations, let alone a legal process that would protect witnesses from obstruction of justice such as occurred in the vast majority of vessel pollution prosecutions.” U.S. Department of Justice, Environment and Natural Resources Division, filing in APPS Case *United States v. Efploia*, MJG-11-0652 (U.S. District Court, Maryland) March 4, 2016.

<sup>37</sup> Under the APPS, court approval is required to award payment to a whistleblower. Under the Lacey Act, the Secretary of the Interior, Commerce, Agriculture, or the Treasury must award payment to a whistleblower—no court approval is needed. *See Kohn, supra* n. 15, at 10063.

<sup>38</sup> Under the APPS, whistleblower rewards are capped at 50% of the fine recovered in the enforcement action. The Lacey Act and other wildlife protection statutes do not place a cap on rewards. *See Kohn, supra* n. 15, at 10063.

<sup>39</sup> 16 U.S.C. §742k(2). These advance rewards may be paid through general appropriations. 16 U.S.C. §742l-1.

ruthless criminal organizations”<sup>40</sup> engage in this multibillion-dollar business.<sup>41</sup> Continued complacency by the four Secretaries and their agencies is a guaranteed recipe for extinction for elephants, tigers, and rhinos, and other endangered species.

### ***Immediate Actions Needed to Deploy Whistleblowers in the War Against Wildlife Trafficking***

The U.S. Secretaries of the Interior, Commerce, Agriculture, and Treasury must:

1. Inform the public about Wildlife Whistleblower Reward Laws;<sup>42</sup>
2. Create a Wildlife Whistleblower Office to facilitate reports from Whistleblowers;<sup>43</sup>
3. Publish Rules and Criteria so that Whistleblowers can Maximize Evidence and Rewards;<sup>44</sup>
4. Safeguard Confidentiality;<sup>45</sup>
5. Commence Payments to Wildlife Whistleblowers;<sup>46</sup> and
6. Recognize the Full Range of Potential Whistleblowers—including organizations like NGOs.<sup>47</sup>

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<sup>40</sup> *The Escalating International Wildlife Trafficking Crisis: Ecological, Economic and National Security Issues*, Senate Committee on Foreign Relations, Subcommittee on African Affairs and Subcommittee on East Asian and Pacific Affairs (May 21, 2014) (testimony of Dan Ashe, Director of the U.S. Fish and Wildlife Service).

<sup>41</sup> *Id.*

<sup>42</sup> Other Agencies regularly publicize the opportunity and success of whistleblower activities. See for example, the Securities and Exchange Commission:

<https://www.sec.gov/page/whistleblower-100million>

<https://www.sec.gov/news/pressrelease/2016-172.html>

<https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258>

<sup>43</sup> See SEC Office of the Whistleblower at <https://www.sec.gov/whistleblower/> (last visited Mar. 10, 2017).

<sup>44</sup> See SEC Final Rules on the Whistleblower Program at <https://www.sec.gov/about/offices/owb/reg-21f.pdf> (last visited Mar. 10, 2017) and Internal Revenue Code Section 7623(b).

<sup>45</sup> See SEC Rule 240.21F-7 regarding Confidentiality of submissions. See also IRS Internal Revenue Manual Subsection 25.2.1.2.

<sup>46</sup> 16 U.S.C. §3375(d) and 16 U.S.C. §1540(d). “[The whistleblower reward provision] **directs** the Secretary to pay rewards to persons who furnish information leading to an arrest, conviction assessment or forfeiture from sums received as penalties, fines or forfeitures.” House Report 97-276. See also *Restoring the Power of the Purse: Legislative Options*, House Committee on Oversight and Government Reform (Dec. 1, 2016), <https://oversight.house.gov/hearing/restoring-power-purse-legislative-options/>, reaffirming Congressional commitment to paying whistleblower rewards.

<sup>47</sup> The nonprofit organization the Natural Resources Defense Council and individual whistleblowers were recently awarded \$920,000 for their role in a case under the False Claims Act. See <https://www.justice.gov/opa/pr/lockheed-martin-agrees-pay-5-million-settle-alleged-violations-false-claims-act-and-resource> (last visited Mar. 9, 2017).