

# The 12<sup>th</sup> Annual Pharmaceutical Regulatory and Compliance Congress

November 2-4, 2011

“Facilitating Disclosure and Prohibiting  
Retaliation”

Perspective of a Qui Tam Plaintiffs’ Counsel

# Research Findings

- Observers of corporate wrongdoing rarely report it to anyone.\*
- Example: During corporate accounting frauds that led to enactment of Sarbanes-Oxley Act, knowledgeable employees rarely spoke out about wrongdoing because of “a compelling norm of silence among employees.”\*

\*Moberly, R. *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*. 2006, citing, e.g., Estlund, C.L., *Free Speech and Due Process in the Workplace*, 71 IND.L.J. 101,119-23 (1995); Miethe, T.D.& Rothschild, J., *Whistleblowing and the Control of Organization Misconduct*, 64 Soc. Inquiry 322, 332-27(1994) (finding low levels of whistleblowing after discovery of misconduct.)

# Research Findings

- Those who do decide to blow the whistle are more inclined to report internally than externally.

Moberly, R. *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*. 2006, citing as examples Myron Peretz Glazer, *The Whistleblowers: Exposing Corruption in Government and Industry* 195 (1989); Karen L. Soeken & Donald R. Soeken, *A Survey of Whistleblowers: Their Stressors and Coping Strategies* 160 (1987); Elleta Sangrey Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 Am.Bus. L.J. 177, 198 (2002); Terry Morehead Dworkin & Elleta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 Am. Bus. L.J. 267, 300-301 (1991); Terance D. Miethe & Joyce Rothschild, *Whistleblowing and the Control of Organizational Misconduct*, 64 Soc. Inquiry 322, 335-37 (1994); Gregory R. Watchman, *Sarbanes-Oxley Whistleblowers: A New Corporate Early Warning System*, at 8: <http://www.whistleblower.org/doc/GAP%20Analysis%20Sarbanes%2DOxley%2Epdf> (last visited Nov. 9, 2006).

# Research Findings

- Nearly every observer of perceived wrongdoing who reports it to someone outside the organization has reported it *first* to at least one party *within* the organization.

Regh, M.T., Near, J.P., Miceli, M.P. & Van Sotter, J.R. (2004). *Predictor of retaliation against whistleblowers: Outcomes of power relationships within organizations*. Best Paper Proceedings of the 64<sup>th</sup> Annual Meeting of the Academy of Management, New Orleans. E1-E6; Miceli, M.P., & Near, J.P. (1992). *Blowing the whistle: The organizational and legal implications for companies and employees*. New York: Lexington.

# Trend in Pharmaceutical Qui Tam Matters Handled by Vogel, Slade & Goldstein

**At Least Two of These Three Factors Usually Are Present:**

- Wrongful Practice is Part of Corporate Business Plan
- Relator did not report to Compliance Office
- Relator Humiliated as a Result of Wrongful Practice or Reporting Thereof

# Factor 1:

## Wrongful Practice is Part of Corporate Business Plan

- Kickbacks
- Off-Label Promotion
- Nationwide Billing Policy



# **Factor 1:**

## **Wrongful Practice is Part of Corporate Business Plan**



**Immediate supervisor has no discretion to change plan, and/or corporate sales forecasts and budget dependent on continuation of illegal practice**

## Factor 2:

### Relator did not report to Compliance Office

- Compliance office off radar screen
- Lack of familiarity → lack of trust
- Concerns voiced to supervisor







## Factor 3:

### Relator Humiliated

- In response to raising concerns with supervisor,
- By failure to compete successfully in corrupt environment, and/or
- By public excoriation for following illegal training or instruction

# Factor 3:

## Relator Humiliated

**Nature of humiliation: dressed down in group; poor performance evaluation; citation for ethical violation; placed on PIP; and/or merit increase or bonus cut or denied.**

