

DRAINING THE SWAMP REQUIRES ROBUST WHISTLEBLOWER PROTECTIONS AND INCENTIVES[†]

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He has lectured extensively on whistleblower law and employment law, especially on Dodd-Frank, Sarbanes-Oxley and False Claims Act actions, and has written several articles on whistleblower protections. Zuckerman co-authored a chapter on litigating whistleblower cases for Whistleblowing: The Law of Retaliatory Discharge, drafted a chapter on the D.C. Whistleblower Protection Act for the D.C. Practice Manual, and is a contributing author to The International Handbook on Whistleblowing Research. For nearly a decade, Zuckerman has been a contributing author to an annual update on the whistleblower-protection provisions of the Sarbanes-Oxley Act published by the ABA Fair Labor Standards Legislation Committee. Zuckerman's articles have been cited in various treatises and in a federal court opinion on the scope of Sarbanes-Oxley whistleblower protection. Zuckerman has trained administrative law judges, agency EEO directors, senior OIG officials, and delegations from more than thirty countries on federal whistleblower protections.

In addition to shaping whistleblower-protection law through successful outcomes for clients, Zuckerman has worked with whistleblower advocates to draft and lobby for the passage of whistleblower-protection laws and to advocate for more effective and vigorous enforcement of whistleblower-protection laws. Zuckerman drafted portions of the 2009 amendments to the D.C. Whistleblower Protection Act, which is now the strongest public-sector whistleblower-protection statute at the state level, and testified at a hearing about those amendments. Zuckerman's recommendations for improving OSHA's Whistleblower Protection Program are cited in Congressional hearing testimony and a top-to-bottom review of the program, and comments that he co-authored are cited in final regulations implementing the whistleblower-protection provisions of the Energy Reorganization Act and six environmental statutes.

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ABSTRACT

The Trump Administration has promised to “drain the swamp,” combat corporate corruption, and root out waste, fraud, and abuse in the federal government. To achieve those laudable goals, the new Administration will need to appoint effective leaders to the agencies or subagencies charged with enforcing whistleblower-protection laws, and Congress will need to preserve and, indeed, enhance whistleblower protections in the public and private sectors. In this Article, Tom Devine, Legal Director at the Government Accountability Project, and Jason Zuckerman, a whistleblower lawyer and former Senior Legal Advisor to the Special Counsel at the U.S. Office of Special Counsel, provide a detailed agenda for the new Administration to ensure effective enforcement of federal whistleblower-protection laws and an agenda for Congress to plug significant gaps in whistleblower-protection laws.

INTRODUCTION

The Trump Administration was elected with a mandate to “drain the swamp” and combat crony capitalism. The Administration has committed to reduce the influence of special interests and “fix a rigged system in which political insiders can break the law without consequence and where government officials put special interests above the national interest.”¹ Achieving these laudable objectives requires robust protection of

ploy to deregulate government meat inspection, blocking the next generation of the bloated and porous “Star Wars” missile defense systems, and sparking the withdrawal of dangerous prescription drugs such as Vioxx.

Tom has been a leader in the campaigns to pass or defend thirty-four major national or international whistleblower laws, including every one enacted over the past two decades. These include the Whistleblower Protection Act of 1989 for federal employees; eleven breakthrough laws since 2002 that create the right to jury trials for corporate whistleblowers; and new United Nations, World Bank, and African Development Bank policies that legalize public freedom of expression for their own whistleblowers. Tom has also served as an “Ambassador to Whistleblowers” in over a dozen nations on trips sponsored by the U.S. State Department. He has authored or co-authored numerous books, including 2011’s *The Corporate Whistleblower’s Survival Guide: A Handbook for Committing the Truth*, as well as *Courage Without Martyrdom: The Whistleblower’s Survival Guide*. Tom has published extensive law review articles, magazine articles, and newspaper op-eds, and is a frequent expert commentator on television and radio talk shows. Tom is a recipient of the “Hugh M. Hefner First Amendment Award” and the “Defender of the Constitution Award,” bestowed by the Fund for Constitutional Government. In 2006, he was inducted into the National Freedom of Information Act Hall of Fame.

Tom is a Phi Beta Kappa honors graduate of Georgetown University, earned his J.D. from the Antioch School of Law, and sits on the board of the Disaster Accountability Project.

¹ Donald J. Trump, *We Must Clean Up this Corruption*, USA TODAY (Nov. 7, 2016), <http://www.usatoday.com/story/opinion/2016/11/06/donald-trump-why-you-should-vote-me/93398970/>.

whistleblowers in the public and private sectors and significant incentives for whistleblowers to risk their careers to disclose fraud.

Whistleblowers are the canaries in the coal mine. They are our eyes and ears on the ground. Whistleblower disclosures are among the most effective tools to ensure that we, as a society, are able to address a variety of issues, such as caring for our veterans, keeping our country safe, and eliminating wasteful spending. Consider the following achievements made possible only by whistleblower disclosures:

- sparking the removal of the painkiller Vioxx, found to cause some 50,000 fatal heart attacks, as well as obtaining stronger consumer-safety enforcement for other prescription drugs, including Crestor (for lowering cholesterol), Meridia (for weight loss), Bextra (for pain relief), Accutane (for acne), Serevent (for asthma), Ketek (for sinusitis, bronchitis, and pneumonia), Actonel (an osteoporosis drug), ProHeart 6 (a dog medication), and Prevnar (an infant vaccine);
- exposing and stopping both a former oil-industry lobbyist, who was appointed to head the White House Council on Environmental Quality and was censoring government reports on climate change, and agency gag orders restricting the public communication of critical climate change research findings;
- helping to convince the House of Representatives to vote against legal immunity for major telecommunications companies, after disclosing that a major telecom's "Quantico Circuit" provided an unknown third party with unfettered access to every mobile communication over its network, including phone conversations, emails, and Internet use, and—after a series of disclosures by National Security Agency whistleblowers through institutional channels, Congress, and eventually the media—achieving the passage of the USA Freedom Act, which outlaws such government surveillance;
- forcing the cancellation of an already-approved and nearly complete nuclear power plant because its construction was compromised by the falsification of X-rays on safety welds, uninspected safety systems, and shoddy materials, such as automobile-junkyard metal substituted for nuclear-grade steel;
- exposing systematic illegality and forcing a new cleanup after the Three Mile Island nuclear incident by revealing utility-company plans to remove a reactor vessel head using a crane whose brakes and electrical system were destroyed in the accident (the vessel head

consisted of 170 tons of radioactive rubble that, if dropped, could have triggered another accident; whistleblowers went public with the evidence two days before the head lift was to take place and delayed its operation for eighteen months, until the crane was repaired and tested);

- releasing data about possible public exposure to radiation around the Hanford, Washington, nuclear waste reservation, where Department of Energy (“DOE”) contractors failed to account for 440 billion gallons of radioactive waste;
- shutting down the manufacturing division of a multinational corporation that had cornered the market on devices that test the accuracy of precision-calibration tools after exposing test results as random (averting tragedies arising from defective goods such as heart valves, computer equipment, automobiles, and airplanes—any product where precise conformance to design specifications means the difference between success and failure);
- precipitating the closure of two incinerators and the cancellation of three others, by disclosing that the operating ones had dumped toxic substances, such as dioxin, arsenic, chromium, mercury, and other heavy metals, into the environment of five states and, in some instances, next to churches and schoolyards;
- sparking public backlashes that forced the government three times to abandon its plans to replace its meat inspections with a corporate “honor system”;
- reducing from four days to two hours the amount of time that racially profiled minority women going through U.S. Customs could be stopped on suspicion of drug smuggling, strip-searched, and held incommunicado for hospital laboratory tests, without access to a lawyer or even permission to contact family and in the absence of any evidence that they engaged in wrongdoing;
- exposing Transportation Security Administration orders to cancel Federal Air Marshal coverage for the highest-risk cross-country airplane flights during the middle of a subsequently confirmed, post-9/11, larger-scale terrorist hijacking alert; the orders were rescinded after congressional protests following the disclosure;
- sparking a top-down removal of upper management at the U.S. Department of Justice (“DOJ”) after revealing systematic corruption in the DOJ’s program to train police forces of other nations to investigate and prosecute government corruption;

- exposing failure by U.S. Marine Corps procurement officials to deliver mine-resistant vehicles and nonlethal crowd dispersers, which caused deaths of Iraqi civilians and one-third of American combat deaths and injuries before the whistleblowing disclosure led to delivery of the lifesaving equipment;
- increasing the government's average annual civil recoveries for fraud in government contracts from an average of less than \$10 million before 1986 to over a billion dollars annually since reviving the False Claims Act that year; that law allows whistleblowers to file lawsuits challenging fraud in government contracts.²

We urge the Trump Administration to strengthen whistleblower protections as a means to expose waste, fraud, abuse, crime, and other illegal activity. We specifically recommend that the new Administration do the following:

- Fund the programs that protect whistleblowers. The Office of Special Counsel ("OSC"), OSHA's Whistleblower Protection Program, and other agencies or subagencies that protect whistleblowers are severely underfunded and are experiencing unprecedented backlogs. The Administration should urge increased funding for these critical programs, which protect the public interest and save taxpayer dollars.
- Advocate for legislation to expand whistleblower protections. While Congress strengthened whistleblower protections for federal employees in 2012, there are still significant gaps in statutory protections available to certain government employees and contractors. The Administration should work with Congress to enact appropriate legislation to protect these individuals, including providing jury-trial access.
- Protect public- and private-sector employees against retaliation through criminal investigations and prosecutions when they engage in protected whistleblowing for which it would be unlawful to fire them or take other employment actions.
- Provide independent due-process rights for intelligence-community employees and contractors who make lawful whistleblower disclosures.
- Finally, support strengthening and more aggressively enforcing current whistleblower-reward laws, such as the *qui tam* provisions of

² TOM DEVINE ET AL., THE CORPORATE WHISTLEBLOWER'S SURVIVAL GUIDE: A HANDBOOK FOR COMMITTING THE TRUTH 13–15, 99–104 (Brett-Koehler Publishers eds. 2011) (internal citations omitted).

the False Claims Act, the Securities and Exchange Commission (“SEC”) whistleblower-award program, and similar reward laws.

I. ROOT OUT GOVERNMENT WASTE, FRAUD, AND ABUSE BY PROTECTING FEDERAL-EMPLOYEE WHISTLEBLOWERS

During his campaign, President-elect Trump promised to root out waste, fraud, and abuse in government, and he often cited the U.S. Department of Veterans Affairs (“DVA”) as a prime example of government mismanagement. To clean up the DVA and effectively identify and cure government corruption and waste, it is critical to protect whistleblowers. The Trump Administration should, first, strengthen OSC, the agency charged with enforcing the Whistleblower Protection Act, as well as the Merit Systems Protection board (“MSPB”), which adjudicates cases; second, appoint independent and experienced Inspectors General; and, third, enact critical legislative reforms to close loopholes in protection and due process for federal workers.

A. *Strengthen OSC’s Enforcement of the WPA and Fund OSC’s Critical Good Government Mission*

OSC is an independent federal investigative and prosecutorial agency whose primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices (“PPP”), especially reprisal for whistleblowing, and by providing an independent, secure channel for most federal workers to disclose violations of laws, gross mismanagement or waste of funds, abuse of authority, and specific dangers to public health and safety. OSC “sav[es] taxpayers tens of millions of dollars, protects public health and safety, and increases the confidence of the public and the federal community in their government” and “promotes a fair and effective government, which inspires public confidence by safeguarding employee rights and holding government accountable.”³

Two recent examples illustrate the critical role that OSC plays in identifying fraud, waste, and abuse and in promoting accountability:

1. In FY 2015 and 2016, more than a dozen whistleblowers came to OSC to disclose widespread abuse of “administratively uncontrollable

³ U.S. OFFICE OF SPECIAL COUNSEL, PERFORMANCE AND ACCOUNTABILITY REPORT FOR FISCAL YEAR 2016 4 (2016) [hereinafter OSC 2016 REPORT], available at <https://osc.gov/Resources/OSC-FY2016-PAR-15Nov2016.pdf>.

overtime” in the U.S. Department of Homeland Security (“DHS”). Because of these disclosures, DHS cracked down on undue overtime payments, thereby saving \$83.7 million. Congress then adopted a new pay system for Border Patrol agents that, per the Congressional Budget Office, saves \$100 million every year.⁴

2. OSC referred to the VA Secretary allegations that employees at the Fort Collins Outpatient Clinic in Fort Collins, Colorado, failed to follow proper protocols when scheduling patient appointments. The VA substantiated the whistleblowers’ allegation that patient appointments at Fort Collins were not scheduled according to agency policy. Specifically, the clinic “blind scheduled” appointments for veterans after an initial appointment had been canceled, in violation of VA policy. The clinic also manipulated the “desired date” for appointments to show, falsely, that veterans waited for care for shorter periods than was actually the case. The VA has taken the recommended corrective actions to improve its scheduling practices, including disciplining six individuals responsible for the misconduct.⁵

These examples are illustrative. The Special Counsel’s role in protecting whistleblowers against retaliation is critical, especially because its protection enables whistleblowers to make disclosures to Congress, Inspectors General, and OSC that reveal significant misconduct and save taxpayers billions of dollars. The Senate Report accompanying the Civil Service Reform Act (“CSRA”) reveals that Congress was particularly concerned with protecting whistleblowers from retaliation:

In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the [General Services Administration] employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants.

⁴ *Id.*

⁵ *Id.*

These conscientious civil servants deserve statutory protection rather than bureaucratic harassment and intimidation.⁶

Unfortunately, OSC lacks the resources necessary to effectively enforce the WPA. According to its most recent Performance and Accountability Report, “the demand for [OSC’s] services continues to outpace the growth in [its] resources. OSC is struggling to keep pace with demand and is now facing its largest case backlog ever”⁷ This past year, OSC received 6141 new matters, a 17% increase over FY 2014 and the first time the agency’s caseload exceeded 6000. The 4056 new PPP complaints (an increase of 20%) and 1965 whistleblower disclosures about wrongdoing in government (a 26% increase) were both at record levels.⁸

To protect federal-employee whistleblowers, we recommend the following:

1. Increase funding for OSC.
2. Appoint a qualified Special Counsel with a record of independence and willingness to take bold action to hold agency officials accountable for retaliation and other PPPs.
3. Enact the OSC Reauthorization Act. While House and Senate versions are not identical, the most recent attempts to pass this legislation have contained much-needed reforms, including:
 - authority for the Special Counsel to act against retaliatory investigations, which could be used to nip retaliatory referrals for criminal prosecution in the bud;
 - subpoena authority for the Special Counsel to gather evidence necessary to prove retaliation when agencies refuse to cooperate with investigations;
 - restoration of rights threatened by a judicially imposed, open-ended, national-security “sensitive jobs” loophole that would permit cancellation at will for nearly all federal employees of merit system and whistleblower rights;
 - a requirement for the Office to issue regulations spelling out whistleblowers’ rights and implementing procedures; and a requirement that agencies demonstrate implementation of their

⁶ S. Rep. No. 95-969, at 8 (1978).

⁷ OSC 2016 REPORT, *supra* note 3 at 4.

⁸ *Id.*

corrective-action commitments, after OSC-ordered investigations of whistleblower disclosures.

B. Provide Genuine Whistleblower Protection for FBI Employees

The Federal Bureau of Investigations (“FBI”) currently has one of the least effective whistleblower policies in the U.S. Code. CSRA authorized the FBI to create its own equivalent system for merit-system principles, including whistleblower protection.⁹ On paper, the FBI had to create a policy equivalent to that available to other civil-service employees. The policy was functionally nonexistent for over a decade and has since been, compared to the Whistleblower Protection Act of 1989, a caricature of rights. The Justice Department can make significant improvements to the FBI whistleblower regulations through application of the following recommendations, which are consistent with the bipartisan FBI Whistleblower Protection Enhancement Act of 2015 (S. 2390).

S. 2390 would:

- establish parity with civil-service whistleblowers in terms of the scope of their rights for institutional disclosures and temporary relief;
- provide for due-process hearings by Administrative Law Judges;
- require published opinions on the results of whistleblower hearings;
- require regulations institutionalizing specifics for rights and procedures;
- create judicial review of administrative decisions; and
- require annual reports on implementation of the stronger rights.

C. Protect Whistleblowers in the Intelligence Community

The Trump Administration should continue to work to implement the Policy Directive on Protecting Whistleblowers with Access to Classified Information (PPD-19) by ensuring strong, independent due-process procedures; training so that managers and staff are aware of protections; and training so that agencies understand the protections available to government contractors under the directive.

⁹ 5 U.S.C. § 2303 (1980).

Senate legislation, S. 794, seeks to restore protections for Intelligence Community (“IC”) whistleblowers that were removed in 2012. It would give IC-contractor whistleblowers who work through institutional channels the same protection against gag orders and retaliation available to all other federal-contractor employees, including access to jury trials and compensatory damages. This legislation has significant potential to reduce leaks of classified information to the media by providing a legally safe alternative. During the previous administration, whistleblowers who exposed surveillance abuses entirely through government channels were harassed or prosecuted under the Espionage Act, facing thirty-five years of imprisonment in one case. Edward Snowden, who opted to disclose information to the media rather than through government channels, has said that the fate of whistleblowers and the cancellation of their preexisting rights were factors in his decision.¹⁰

D. Avoid Gutting Due-Process Protections for Federal Workers and Weakening the MSPB

The scandals at the VA and general mistrust of the government have precipitated a call for abolishing critical due-process protections for federal workers, i.e., imposing at-will employment on the federal workforce.¹¹ Gutting such protections is unnecessary and would politicize the federal workforce. In other words, personnel decisions that are currently made based on merit would be made instead on political affiliation, and the federal workforce would revert to a spoils system.

Contrary to the popular myth, federal employees do not have job security. Over FY 2000–2014, more than 77,000 full-time, permanent federal employees were discharged because of performance and/or conduct issues.¹²

Due to government shutdowns and across-the-board budget cuts that fail to assess the relative value of federal programs, top scientists and engineers are

¹⁰ Tom Devine, *Protect the Whistleblowers: The Case for Pardoning Snowden*, HILL (Nov. 22, 2016, 6:20 PM), <http://thehill.com/blogs/pundits-blog/homeland-security/307280-protect-the-whistleblowers-the-case-for-pardoning>.

¹¹ Due process includes the right to (1) be notified of the government’s intentions; and (2) receive a meaningful opportunity to respond before the action takes place. U.S. MERIT SYS. PROT. BD., *WHAT IS DUE PROCESS IN FEDERAL CIVIL SERVICE EMPLOYMENT?* ii (2015) [hereinafter MSPB, *WHAT IS DUE PROCESS?*], <http://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=1166935&version=1171499&application=ACR OBAT>; see also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

¹² MSPB, *WHAT IS DUE PROCESS?*, *supra* note 11, at 53. Appendix A of the report dispels additional myths about civil-service due-process protections.

already leaving the government for more lucrative and stable work in the private sector. Converting the federal workforce to a spoils system would hasten the exodus of workers whom the government cannot afford to lose. Gutting due-process protections for federal workers would render the government unable to attract and retain talent.

Before the Trump Administration and Congress hastily eliminate due-process rights for federal workers, it is worth considering why Congress enacted those protections more than one hundred years ago:

Until the early 1880s, the Federal civil service was a patronage or “spoils system” in which the President’s administration appointed Federal workers based on their political beliefs and support of his campaign rather than on their suitability and qualifications to perform particular jobs. Over time, this practice contributed to an unstable workforce lacking the necessary qualifications to perform their work, which in turn adversely affected the efficiency and effectiveness of the Government and its ability to serve the American people. The patronage system continued until President James A. Garfield was assassinated by a disgruntled Federal job seeker who felt he was owed a Federal job because of his support of the President’s campaign. A public outcry for reform resulted in passage of the Pendleton Act in 1883. The Pendleton Act created the Civil Service Commission (CSC), which monitored and regulated a civil service system based on merit and the use of competitive examinations to select qualified individuals for Federal positions. This process contributed to improvements in Government efficiency and effectiveness by helping to ensure that a stable, highly qualified Federal workforce, free from partisan political pressure, was available to provide capable and effective service to the American people.

During the following decades, it became clear that the CSC could not properly, adequately, and simultaneously set managerial policy, protect the merit systems, and adjudicate employee appeals. Concern over the inherent or perceived conflict of interest in the CSC’s role as both the rule-maker and adjudicator of those same rules was a principal motivating factor behind the passage of the Civil Service Reform Act of 1978 (CSRA). The CSRA replaced the CSC with three new agencies: MSPB as the successor to the Commission; OPM as the President’s agent for Federal workforce

policy and procedure; and the Federal Labor Relations Authority to oversee Federal labor-management relations.¹³

The primary purpose of the CSRA's providing review of agencies' adverse employment actions was to ensure that "[e]mployees are . . . protected against arbitrary action, personal favoritism, and from partisan political coercion."¹⁴

The MSPB adjudicates most due-process appeals, and its procedures require prompt adjudication. The Board is, and will remain, the only independent source of due process for employees to defend their (and the public's) merit-system rights generally and their whistleblower rights specifically. It has been a magnet for criticism by whistleblowers and congressional critics alike. But since the MSPB will always be whistleblowers' primary chance for a day in court, the Board must be reinforced and strengthened. That means (1) appointment of Board members with a proven history of experience and commitment to the values underlying merit-system and whistleblower rights; (2) training for Administrative Judges whose arbitrary, hostile interpretations have stifled the Whistleblower Protection Act's impact; and (3) significantly increased resources necessary to reduce multiyear backlogs.

Returning to a spoils system would not drain the swamp; it would render the federal workforce more susceptible to political pressure and corruption.

E. Authorize Jury Trials in Whistleblower Protection Act Cases

Federal employees who blow the whistle are the only significant sector of the labor force without access to jury trials when seeking to enforce their free-speech rights. Nearly all economic sectors provide for jury trials. And indeed state and municipal employees have access to jury trials in federal court to defend their free-speech rights under the First Amendment.

Until those covered by the Whistleblower Protection Act have access to jury trials, their rights will have second-class enforcement and legitimacy. While most whistleblowers cannot afford a court trial, an administrative hearing is inadequate if the case is technically complex or vulnerable to

¹³ U.S. MERIT SYS. PROT. BD., ANNUAL PERFORMANCE RESULTS FOR FY 2015 AND ANNUAL PERFORMANCE PLAN FOR FY 2016 (FINAL) AND 2017 (PROPOSED) (2016) (citations omitted), <http://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1268947&version=1274024&application=ACROBAT>.

¹⁴ S. Rep. No. 95-969, at 19 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2741.

political pressure. Those cases may also be lengthy, requiring resources the Board does not have. But they are the most significant reasons to have a Whistleblower Protection Act, because they have the greatest impact for the public.

Congress should act promptly, with support from the Trump Administration, so that federal employees, like other whistleblowers, may have their day in court, with their rights enforced by a jury of the citizens whom they purport to risk their careers defending. It is not realistic to expect first-class service from government employees who have second-class rights and are harassed for serving the public.

F. Strengthen Inspectors General and Hold Them Accountable

Federal inspectors general (“IG”) combat waste, fraud, and abuse by conducting audits and investigations. The Inspector General Act of 1978 established federal IGs as nonpartisan, independent offices in more than seventy federal agencies. They provide recommendations and findings to their affiliated agency heads and to Congress that can save the government millions of dollars per year.

The Council of the Inspectors General on Integrity and Efficiency’s (“CIGIE”) FY 2015 annual report to the President indicates that the combined work of about 13,000 federal OIG employees resulted in potential savings that totaled about \$36.5 billion. Based on the OIG community’s aggregate budget of approximately \$2.7 billion, these potential savings represent an about-\$14 return on every dollar invested in OIGs.

The potential savings includes \$26.3 billion from audit recommendations agreed to by management and \$10.2 billion from investigative receivables and recoveries.

OIGs also strengthened agency programs through the following:

- 5280 audit, inspection, and evaluation reports issued;
- 24,246 investigations closed;
- 545,504 hotline complaints processed;
- 5717 indictments and criminal information;
- 5553 successful prosecutions;

- 1861 successful civil actions;
- 7244 suspensions or debarments; and
- 4501 personnel actions.¹⁵

The Trump Administration should prioritize appointing qualified IGs and supporting pending legislation to increase IGs' access to agency records. During the Obama Administration's first term, several IG positions were vacant for years and OIGs were run by acting IGs. Hopefully, the Trump Administration will promptly appoint effective and non-partisan IGs.

Motivated by challenges that IGs face in gaining access to agency records, the House of Representatives passed the Inspector General Empowerment Act of 2016, H.R. 2395. The Act would authorize IGs to have full and prompt access to all agency records, including federal grand-jury materials, and allow IGs to subpoena federal contractors and former government employees under certain circumstances.

The Senate version, S. 579, would outlaw retaliatory investigations by IGs against whistleblowers. Ironically, OIGs that depend on whistleblowers are also the primary source of retaliatory investigations and even referrals for criminal prosecution, due to investigative requests by agency managers who conceal their agendas. To comply with the new ban, as a practical matter, OIGs would have to check whether the target of an investigative request had engaged in protected activity, and whether the OIG was being used for a hidden, retaliatory agenda.

But Congress and the new Administration should also take measures to ensure that IGs are held accountable. IGs have broad powers, including law-enforcement powers, and protections that support their independence.¹⁶ Unfortunately, some IGs have abused their power and performed politicized investigations designed to garner headlines rather than carry out their important duties under the IG Act. CIGIE investigates alleged misconduct by OIG officials. Recent investigations of IG misconduct call into question

¹⁵ COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY AND EFFICIENCY, PRESIDENTIAL TRANSITION HANDBOOK: THE ROLE OF INSPECTORS GENERAL AND THE TRANSITION TO A NEW ADMINISTRATION 12-13 (2016), available at https://www.ignet.gov/sites/default/files/files/Presidential_Transition_Handbook_Web.pdf.

¹⁶ WENDY GINSBERG & MICHAEL GREENE, CONG. RESEARCH SERV., FED. INSPECTORS GENERAL: HISTORY, CHARACTERISTICS, AND RECENT CONGRESSIONAL ACTIONS 6 (2016), available at <http://www.fas.org/sgp/crs/misc/R43814.pdf>.

whether CIGIE adequately deters IG misconduct, and it is not surprising that IGs are disinclined to hold other IGs accountable. Accordingly, the Trump Administration should consider putting other mechanisms into place to ensure that IGs do not abuse their power and that they are held accountable.

II. COMBAT CORPORATE FRAUD THROUGH CREDIBLE ENFORCEMENT OF WHISTLEBLOWER-PROTECTION LAWS

Following the massive accounting fraud that led to the collapse of Enron, WorldCom, and other companies, Congress enacted the Sarbanes-Oxley Act (“SOX”), which includes a broad whistleblower-protection provision “to encourage and protect those who report fraudulent activity that can damage innocent investors in publicly traded companies.”¹⁷ The legislative history of SOX reveals that Enron succeeded in perpetuating fraud against shareholders due in large part to a “corporate code of silence,” which “discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally.”¹⁸ Though a few SOX whistleblowers have achieved success at trial, OSHA’s Whistleblower Protection Program is failing to enforce SOX, due mainly to its crushing caseload.

Recent news reports revealed that, years ago, dozens of Wells Fargo employees filed SOX retaliation complaints, alleging that the company retaliated against them for raising red flags about corporate and consumer financial fraud. Indeed, as early as 2010, whistleblowers were providing evidence about the widespread fraud that recently resulted in Wells Fargo’s paying \$185 million in fines.¹⁹ Both Wells Fargo and OSHA ignored those early warnings. Wells Fargo, in fact, terminated the employment of someone, who served as a personal banker at the St. Helena branch in the Napa Valley from 2008 to 2010, soon after she alerted the company that bankers had opened fake customer accounts to meet sales goals. When the banker filed a complaint with OSHA, no one investigated it for six months; the case was ultimately dismissed when she pursued it in court. Other cases brought by Wells Fargo whistleblowers have been pending with OSHA for years. And

¹⁷ S. Rep. No. 107-146, 2002 WL 863249, at *19 (2002).

¹⁸ *Id.* at *4–5.

¹⁹ *E.g.*, Mark Villarreal & Liz Wagner, *Dozens of Wells Fargo Employees Filed Whistleblower Complaints with Feds, New Data Shows*, NBC BAY AREA (Nov. 22, 2016, 11:05 PM), <http://www.nbcbayarea.com/investigations/Dozens-of-Wells-Fargo-Employees-Filed-Whistleblower-Complaints-with-Feds-New-Data-Shows—402566925.html>.

there are similar examples of OSHA’s inability to quickly investigate claims of retaliation against whistleblowers who disclosed threats to nuclear, food, and transportation safety. As Congress explores options to slash agency budgets, it should consider increasing, not decreasing, the budget for OSHA’s Whistleblower Protection Program (“WPP”).

A. Reform and Fund OSHA’s Whistleblower Protection Program

OSHA’s WPP enforces twenty-two whistleblower-protection laws. Audits of the WPP in recent years have repeatedly confirmed that OSHA’s insurmountable caseload undermines the ability of investigators to conduct thorough investigation and enforce these laws effectively. For example, a 2010 GAO report identified significant deficiencies in the program.²⁰

Though OSHA leadership has implemented several improvements to the program, a recent DOL OIG report identified additional deficiencies, including that OSHA did not consistently ensure that complaint reviews under the Whistleblower Programs were complete, sufficient, and timely.²¹ Seventy-two percent of whistleblower investigations exceeded statutory timeframes by an average of 163 days.²² The Trump Administration should implement the recommendations in the OIG report and should foster increased cooperation between OSHA and other agencies. For example, whistleblower-retaliation complaints about consumer financial fraud filed with OSHA should be shared with the Consumer Financial Protection Bureau (“CFPB”) to enable the CFPB to investigate the alleged fraud. OSHA currently waits until investigations are completed to share the whistleblowers’ evidence of corporate misconduct with relevant law-enforcement agencies—that can mean delaying protection of the public for years and withholding evidence that could make a difference.

The DOL OIG recommends that OSHA:

1. monitor the whistleblower programs to routinely assess their efficiency and effectiveness, and finalize and implement the draft

²⁰ See GOV’T ACCOUNTABILITY OFFICE, WHISTLEBLOWER PROTECTION: SUSTAINED MANAGEMENT ATTENTION NEEDED TO ADDRESS LONG-STANDING PROGRAM WEAKNESSES (2010), available at <http://www.gao.gov/new.items/d10722.pdf>.

²¹ See OFFICE OF AUDIT, U.S. DEP’T OF LABOR, OSHA NEEDS TO CONTINUE TO STRENGTHEN ITS WHISTLEBLOWER PROTECTION PROGRAMS (2015), available at <http://www.oig.dol.gov/public/reports/oa/2015/02-15-202-10-105.pdf>.

²² *Id.* at 7.

- checklist to assist in determining if investigators completed steps and collected documentation to support determinations;
2. develop and monitor specific performance measures or indicators to ensure that whistleblower programs are working as intended;
 3. provide complete and unified guidance to ensure that appropriate methods are used to close investigations;
 4. issue an updated manual and implement controls to ensure that the manual will continue to be timely updated to reflect current policies, procedures, and statutes;
 5. develop and provide investigators with a comprehensive training curriculum to ensure that they have the proper skills, knowledge, and understanding of program requirements and goals;
 6. develop and implement a process to ensure that reasonable balance is applied between quality and timeliness to complete investigations within statutory timeframes; and
 7. develop and implement a formal process and working relationships with other agencies to ensure that information is timely shared to assist in the enforcement of the various statutes and correction of violations.²³

We recommend that OSHA take two additional steps to improve the WPP:

1. Offer complainants an option to litigate their claims at the Department of Labor Office of Administrative Law Judges if OSHA has not completed its investigation within 120 days of the filing of a complaint.
2. Perform an independent audit of the regional office's interpretations of the whistleblower-protection laws.

B. Appoint Qualified Administrative Review Board Judges Who Are Committed to the Rule of Law

The Administrative Review Board ("ARB") issues final agency decisions for the Secretary of Labor in cases arising under a wide range of worker-protection laws, including the whistleblower-protection and federal-service-contracts laws enforced by DOL. According to the DOL website, the ARB's "mission is to issue legally correct, just, and timely decisions."²⁴

²³ *Id.* at 3.

²⁴ U.S. DEP'T OF LABOR *Administrative Review Board Establishment and Mission*, <https://www.dol.gov/arb/mission.htm> (last visited Dec. 3, 2016).

The ARB, appointed by Secretary Chao during the George W. Bush Administration, was hostile to whistleblower-protection laws and issued opinions that imposed several obstacles to whistleblowing that contradicted the plain meaning of numerous whistleblower-protection laws. The Chao ARB gutted the whistleblower-protection provision of SOX by adding several hurdles and loopholes that Congress never envisioned. In addition, the Chao ARB wrote many results-oriented decisions that reversed the rare wins that whistleblowers had achieved in hearings before DOL administrative law judges. Such decisions lacked credible legal analysis and appeared to be designed to deter whistleblowers from prosecuting their claims.

Fortunately, ARB members appointed by Secretary Solis and Secretary Perez have issued many scholarly decisions that restored whistleblower rights and faithfully applied the plain language of the whistleblower-protection laws. Federal courts of appeals have adopted and deferred to these well-reasoned decisions. But if Wall Street lobbyists can handpick judges who will politicize the ARB and gut SOX's whistleblower-protection provision, then corporate whistleblowers will be silenced. And if a Trump Secretary of Labor appoints activist judges with an agenda to gut whistleblower-protection laws, then the institutional legitimacy of the ARB will be undermined because its opinions will be perceived as politically driven.

The Secretary of Labor in the Trump Administration should appoint qualified ARB members who are committed to applying the plain meaning and intent of the whistleblower-protection laws, not ideologues eager to devalue the whistleblower-protection laws.

III. USE WHISTLEBLOWER-REWARD LAWS TO COMBAT FRAUD ON THE GOVERNMENT, REDUCE THE DEFICIT, AND PROTECT INVESTORS

A. *Protect the Public Fisc by Enforcing the False Claims Act*

Health care fraud costs taxpayers at least \$60 billion annually.²⁵ The most effective tool to combat fraud on the government is the whistleblower or *qui tam* provision of the False Claims Act (FCA). Under the FCA, a successful *qui tam* relator can recover 15 percent to 30 percent of the government's total recovery in a suit for the knowing presentment of a false or fraudulent claim

²⁵ Jim Avila, *Medicare Funds Totaling \$60 Billion Improperly Paid, Report Finds*, ABC NEWS (Jul 23, 2015) <http://abcnews.go.com/Politics/medicare-funds-totaling-60-billion-improperly-paid-report/story?id=32604330>.

for payment or approval by the government or other violations of the FCA. Examples of fraudulent schemes or practices include double billing, upcoding, kickbacks, off-label marketing of pharmaceuticals, Medicare cost report fraud, billing for work not performed, providing defective equipment to the military, and performing unnecessary medical procedures. Qui tam actions brought by whistleblowers have enabled the federal government to recover more than \$50 billion.²⁶

The Trump Administration should use this indispensable tool to hold government contractors and grantees accountable for fraud and oppose attempts by lobbyists for fraudsters to weaken or gut the False Claims Act. In particular, the Trump Administration should oppose 1) caps on whistleblower award, which would reduce the incentive for relator counsel to invest substantial resources to investigate and prosecute FCA claims; and 2) requirements for whistleblowers to report fraud to their employers as a prerequisite for filing a *qui tam* action, which would expose whistleblowers to retaliation and permit fraudsters to cover-up or destroy evidence before the government has a chance to investigate the fraud. And President-elect Trump should oppose any reduction in funding of the investigations and prosecution of False Claims Act violations, including the successful Department of Health and Human Services and Department of Justice Health Care Fraud Prevention and Enforcement Action Team.

B. Reduce the Deficit by Rewarding Tax Whistleblowers

The IRS estimates that the United States loses \$450 billion per year to tax evasion and underpayments.²⁷ In 2006, Congress enacted legislation that provides robust incentives for whistleblowers to report large-scale tax fraud.²⁸ Since fiscal year 2007, the IRS has collected more than \$2 billion in tax underpayments due to whistleblower disclosures.²⁹ A notable success of the IRS Whistleblower Program is Brad Birkenfeld, whose disclosure led to the

²⁶ Sen. Grassley, False Claims Act is Our Most Important Tool to Fight Fraud against Taxpayers, Statement for the Record by Senator Chuck Grassley of Iowa Chairman, Senate Judiciary Committee At a House Judiciary Subcommittee on the Constitution and Civil Justice Hearing on “Oversight of the False Claims Act” April 28, 2016, in <http://www.grassley.senate.gov/news/news-releases/grassley-false-claims-act-our-most-important-tool-fight-fraud-against-taxpayers>.

²⁷ See U.S. GOV'T ACCOUNTABILITY OFFICE, IRS WHISTLEBLOWER PROGRAM: BILLIONS COLLECTED, BUT TIMELINESS AND COMMUNICATION CONCERNS MAY DISCOURAGE WHISTLEBLOWERS 2 (2015), available at <http://www.gao.gov/assets/680/673440.pdf>.

²⁸ *Id.* at 4–5.

²⁹ *Id.* at 23.

collection of more than \$1 billion in illegal offshore tax evasion and an award of \$104 million.

The GAO has found that the whistleblower-claim-review process takes several years to complete. Claims lasted 4 to 7.5 years, from the submission of the Form 211 to the award payment.³⁰ Much of this time was spent with the Whistleblower Office (“WO”)—claims were not paid until about 1.5 to 4.5 years after the OD sent the Form 11369 to the WO for an award evaluation.³¹

Unlike other whistleblower laws, the statute does not provide individuals with protections against retaliation. This has likely dissuaded many tax whistleblowers from reporting valuable information. Tax professionals often work in highly specialized areas within companies, where a limited number of employees are privy to specific information. Without protection, individuals may not risk their job security and financial well-being to report tax underpayments. The GAO has therefore recommended that Congress consider providing whistleblowers with legal protections against employer retaliation.³²

A 2016 audit report by the U.S. Treasury Inspector General for Tax Administration (“TIGTA”) outlined additional issues that the WO should address to continue the success of the tax whistleblower program.³³ First, the TIGTA audit revealed that the WO does not have appropriate controls in place for oversight of claims processing.³⁴ This failure to implement adequate controls has led to inaccurate data, inconsistent coding of the claims, and an overall increase in time to process the claims.³⁵ TIGTA suggested that the WO design and implement sufficient controls to ensure the consistent, appropriate, and expeditious processing of whistleblower claims.³⁶

Next, the TIGTA audit report found that the IRS should improve its communications with whistleblowers.³⁷ Specifically, the report highlighted the

³⁰ *Id.* at 15.

³¹ *Id.*

³² *Id.* at 43.

³³ *See generally* Treasury Inspector Gen. For Tax Admin., *The Whistleblower Program Helps Identify Tax Noncompliance; However, Improvements Are Needed to Ensure that Claims Are Processed Appropriately and Expeditiously* (2016), <https://www.treasury.gov/tigta/auditreports/2016reports/201630059fr.pdf>. (Bluebook rule 18.2).

³⁴ *Id.* at 23.

³⁵ *Id.*

³⁶ *Id.* at 31-32.

³⁷ *Id.* at “Highlights”.

IRS's failure to properly support rejection and denial decisions.³⁸ For example, the IRS has issued boilerplate denial letters to whistleblowers that state simply: "[The IRS] did not use the information [the whistleblowers] provided, did not proceed with an administrative or judicial action against the taxpayers based on [the whistleblowers'] information, and did not collect tax proceeds based on [the whistleblowers'] information."³⁹ The unsupported denials serve to undermine whistleblowers' confidence in the program and frustrate judicial review.

Finally, the TIGTA audit report found that the IRS has failed to contact whistleblowers for debriefings.⁴⁰ In an August 2014 memorandum to the WO, the IRS Deputy Commissioner for Services and Enforcement stressed the importance of debriefing whistleblowers when necessary to clarify information:

Some whistleblowers have insights and information which can help the [IRS] understand complex issues or hidden relationships. Debriefing of the whistleblower, whether in person or by telephone, is an invaluable and crucial component of the evaluation of the information prior to a decision on whether the information should be referred to the field for [examination] or investigation. A debriefing interview can identify connections between the taxpayer and others who may have had a significant role in the alleged noncompliance. The whistleblower may also be able to explain and clarify documents and information submitted with the Form 211.⁴¹

Despite these issues, the WO has successfully collected billions in tax underpayments and issued more than \$400 million in awards to whistleblowers.⁴² In 2015 alone, the WO made ninety-nine awards to

³⁸ *Id.*

³⁹ Order and Order of Dismissal for Lack of Jurisdiction, Anonymous 1 & Anonymous 2 v. Comm'r of Internal Revenue, No. 12472-11W, slip op at 1 (T.C. May 10, 2013), <https://www.ustaxcourt.gov/InternetOrders/DocumentViewer.aspx?IndexSearchableOrdersID=103945&Today=Y>.

⁴⁰ TREASURY INSPECTOR GEN. FOR TAX ADMIN., THE WHISTLEBLOWER PROGRAM HELPS IDENTIFY TAX NONCOMPLIANCE; HOWEVER, IMPROVEMENTS ARE NEEDED TO ENSURE THAT CLAIMS ARE PROCESSED APPROPRIATELY AND EXPEDITIOUSLY (2016), <https://www.treasury.gov/tigta/auditreports/2016reports/201630059fr.pdf>. (Bluebook rule 18.2).

⁴¹ Memorandum from John M. Dalrymple, IRS Deputy Comm'r for Servs. & Enf't, to the Whistleblower Office 2 (Aug. 20, 2014) [https://www.irs.gov/pub/whistleblower/IRS%20Whistleblower%20Program%20Memorandum%20\(signed%20by%20DCSE\).pdf](https://www.irs.gov/pub/whistleblower/IRS%20Whistleblower%20Program%20Memorandum%20(signed%20by%20DCSE).pdf).

⁴² IRS WHISTLEBLOWER PROGRAM FISCAL YEAR 2015 ANNUAL REPORT TO CONGRESS 4 (2015), https://www.irs.gov/pub/whistleblower/WB_Annual_Report_FY_15_Final%20Ready%20for%20Commissioner%20Feb%208.pdf.

whistleblowers, which totaled more than \$103 million.⁴³ The WO clearly is an important tool to narrow the tax gap. The IRS Whistleblower Program has the potential to continue its success by remediating known issues and instilling confidence in whistleblowers to come forward with information about large-scale tax underpayments.

C. *Protect Investors by Rewarding Whistleblowing to the SEC*

Press reports indicate that a repeal of the Dodd-Frank Act is among the top policy priorities of the Trump Administration.⁴⁴ Though some Dodd-Frank provisions may warrant reexamination, the Act's very successful whistleblower-reward program should not be repealed. The program has generated more than 18,000 tips, thereby enabling the SEC to recover \$584 million in penalties.⁴⁵ Some of those tips have equipped the SEC to halt ongoing fraud and prevent investors from losing millions of dollars.

Nearly four years after the SEC Whistleblower Program announced its first award, in 2012, it appears that the program is now firing on all cylinders. In 2016 alone, the program has issued more than \$75 million in awards to whistleblowers⁴⁶, which is more than the agency awarded in all the previous years of the program combined.⁴⁷ These whistleblowers have helped the SEC to identify fraud that might otherwise have gone undetected. In addition, these whistleblowers have provided strong evidence that has enabled the SEC to advance investigations while conserving time and resources.

As SEC Chair Mary Jo White noted in an April 2015 speech, the SEC “continue[s] to receive higher quality tips that are of tremendous help to the Commission in stopping ongoing and imminent fraud, and lead to significant enforcement actions on a much faster timetable than we would be able to

⁴³ *Id.*

⁴⁴ See e.g., Jesse Hamilton & Elizabeth Dexheimer, *Trump's Transition Team Pledges to Dismantle Dodd-Frank Act*, BLOOMBERG (Nov. 10, 2016, 2:07 PM) <https://www.bloomberg.com/news/articles/2016-11-10/trump-s-transition-team-pledges-to-dismantle-dodd-frank-act>; Ryan Tracy, *Donald Trump's Transition Team: We Will 'Dismantle' Dodd-Frank Act*, WALL ST. J. (Nov. 10, 2016) <http://www.wsj.com/articles/donald-trumps-transition-team-we-will-dismantle-dodd-frank-1478800611>. (Bluebook rule 18.2 and 16.6(f)).

⁴⁵ Editor, *SEC Whistleblower Program Records Best Year*, CORPORATE CRIME REPORTER, (Nov. 26, 2016 7:57 AM) <http://www.corporatecrimereporter.com/news/200/sec-whistleblower-program-records-best-year/>. (Bluebook rule 18.2).

⁴⁶ SEC. & EXCH. COMM'N, 2016 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1 (2016) [hereinafter SEC 2016 ANNUAL REPORT], <https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf>.

⁴⁷ *Id.*

achieve without the information and assistance from the whistleblower.”⁴⁸ The most common tips relate to corporate disclosure violations, offering fraud, stock manipulation, and insider trading.⁴⁹

According to the SEC Whistleblower Program’s 2016 annual report to Congress, whistleblower tips are on the rise.⁵⁰ In 2016, whistleblowers from sixty-seven foreign countries filed claims with the SEC.⁵¹ The international breadth of the whistleblower program is necessary to halt fraud in a now-global economy. In fact, the largest whistleblower award to date—more than \$30 million⁵²—was issued to a foreign whistleblower who provided the SEC with information about ongoing fraud that the agency admitted would otherwise “have been very difficult to detect”.⁵³ The SEC Whistleblower Program has issued a total of eight awards to whistleblowers living in foreign countries.⁵⁴

The increase in whistleblower tips has brought higher quality information, which has assisted the SEC in uncovering the biggest frauds. In 2016, the SEC Whistleblower Program has issued seven of the top ten whistleblower awards in the program’s history.⁵⁵ These tips alone have allowed the SEC to protect investors from losing hundreds of millions of dollars.

We recommend that the SEC continue to rely on whistleblowers to protect investors from fraud and ensure the integrity of U.S. markets. The SEC whistleblower program has been a low-cost and effective enforcement solution for securities-law violations. In 2015, the SEC’s total program cost was approximately \$1.6 billion.⁵⁶ To put this expense into perspective, the top

⁴⁸ Mary Jo White, Chair, Sec. & Exch. Comm’n, *The SEC as the Whistleblower’s Advocate* (Apr. 30, 2015), in <https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html>. (Bluebook rule 17.2.6).

⁴⁹ *Id.*

⁵⁰ SEC 2016 ANNUAL REPORT, *supra* note 46 at 23.

⁵¹ *Id.* at 26.

⁵² *Id.* at 10.

⁵³ Press Release, Sec. & Exch. Comm’n, SEC Announces Largest-Ever Whistleblower Award (Sept. 22, 2014), <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290>.

⁵⁴ SEC 2016 ANNUAL REPORT, *supra* note 46, at 18.

⁵⁵ *Whistleblower Awards for Tips Resulting in Enforcement Actions*, SEC. & EXCH. COMM’N, <https://www.sec.gov/page/whistleblower-100million>.

⁵⁶ U.S. SEC. & EXCH. COMM’N, AGENCY FINANCIAL REPORT: FISCAL YEAR 2015 44 (2015), <https://www.sec.gov/about/secpar/secfr2015.pdf>.

hedge-fund manager in 2015 made \$1.7 billion.⁵⁷ The new Administration should strengthen the SEC's whistleblower program, which would allow the agency to act on more whistleblower tips, halt ongoing fraud more quickly, and protect more investors. This would be consistent with the new Administration's promise to combat corruption.

In addition, the SEC Office of the Whistleblower should continue to bolster the program by enforcing the Dodd-Frank Act's prohibition against retaliation and Rule 21F-17 of the Act, which prohibits companies from using gag clauses in employment or severance agreements to prevent whistleblowers from providing information to the SEC.⁵⁸ This protection enables employees to confidently report fraud or violations to the SEC without fear of retaliation by their employers or of losing their severance pay and benefits.

CONCLUSION

To achieve its goals of combating waste, fraud and abuse and restoring trust in government, the Trump Administration should protect and reward whistleblowers.

⁵⁷ Stephen Taub, *The 2016 Rich List of the World's Top-Earning Hedge Fund Managers*, INSTITUTIONAL INV'RS ALPHA (May 10, 2016) <http://www.institutionalinvestorsalpha.com/Article/3552805/The-2016-Rich-List-of-the-Worlds-Top-Earning-Hedge-Fund-Managers.html>.

⁵⁸ 17 C.F.R. § 240.21F-17 (2011).