

TO: Interested Parties  
FROM: Transparency International U.S. Office  
DATE: April 7, 2020

**RE: Recommended Reforms for Whistleblower Protections in the United States**

Whistleblowing is one of the most direct methods of exposing, fighting, and preventing corruption, making it one of the most important means of protecting the rule of law, sustainable development, and democratic institutions. Yet whistleblowers<sup>1</sup> continue to face harassment, threats, adverse employment actions, blacklisting, and even violence without having meaningful access to fair and independent fora for relief, while those who retaliate against enjoy impunity.

Every public and private sector employee should have the right to anonymously blow the whistle on waste, fraud, or abuse without fearing professional or personal consequences, and the right to quick and robust due process before an independent tribunal. Stronger protections are needed to provide justice for whistleblowers who have been retaliated against and to ensure that retaliation is deterred in the future. Even when whistleblowers follow procedures as required, the procedures do not consistently work as intended. Given this inaction and apparent bias, supervisors presumably feel empowered to retaliate knowing that the whistleblowers will have no substantive redress. Timely and meaningful action by unbiased decision makers is critical to the success of any whistleblower program.

The right of a whistleblower to report wrongdoing is a cornerstone of anti-corruption legal frameworks across the world,<sup>2</sup> including here in the U.S.<sup>3</sup> Today, there are over 60 federal whistleblower protection laws that apply to an extremely diverse range of private and public sector entities,<sup>4</sup> along with hundreds of state- and local-level analogs and untold numbers of private sector agreements and policies. As one may expect, these laws, agreements, and policies contain unique definitions, procedures, protections, and reward programs tailored to the situations that engendered their adoption.

For this reason, Transparency International has focused on developing and promoting principles and best practices that can be adapted into specific whistleblower proposals.<sup>5</sup> In this same vein, the recommendations below, informed by Transparency International's *International Principles for Whistleblower Legislation*<sup>6</sup> and *Best Practice Guide for Whistleblowing Legislation*,<sup>7</sup> among other sources, can be adapted into specific federal whistleblower reforms.

- 1. As the U.S. grapples with the coronavirus crisis and an unprecedented level of associated federal spending, Congress can include five key whistleblower reforms in future response packages.** Congress can:
  - a. As a condition of receiving federal funds, require entities to adopt robust whistleblower protections that allow company employees, agents, subcontractors, and subgrantees to blow the whistle on waste, fraud, or abuse related to the funding without fear of retaliation;

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<sup>1</sup> The Whistleblower Protection Act of 1989 defines a “whistleblower” as an employee who discloses information, either internally or externally, that they reasonably believe evidences a violation of a law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety. *See* Whistleblower Protection Act of 1989, 5 U.S.C. § 2302(b)(8) & (b)(9).

<sup>2</sup> *See* UN General Assembly, United Nations Convention Against Corruption, Article 33, 31 October 2003; *see also* United Nations, “Report of the Special Rapporteur on the Promotion of the Right to Freedom of Opinion and Expression” 4 (2015); Council of Europe, “Protection of Whistleblowers,” Recommendation CM/Rec(2014)7 and Explanatory Memorandum 15 (2014).

<sup>3</sup> The U.S. Supreme Court has long recognized that public employee speech involving matters of public concern constitutes protected speech under the First Amendment. *See Pickering v. Board of Education*, 391 U.S. 563 (1968).

<sup>4</sup> An overview of significant whistleblower laws is available on the National Whistleblower Center’s website. *See* National Whistleblower Center, “Key Whistleblowers Law,” <https://www.whistleblowers.org/key-whistleblower-laws/> (accessed March 31, 2020).

<sup>5</sup> For an overview of this work, *see* Transparency International, “Our Work on Whistleblowing,” at [https://www.transparency.org/whatwedo/activity/our\\_work\\_on\\_whistleblowing](https://www.transparency.org/whatwedo/activity/our_work_on_whistleblowing) (accessed March 31, 2020).

<sup>6</sup> Transparency International, *International Principles for Whistleblower Legislation*, 2013, [www.transparency.org/whatwedo/publication/international\\_principles\\_for\\_whistleblower\\_legislation](http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation).

<sup>7</sup> Transparency International, *Best Practice Guide for Whistleblowing Legislation*, [www.transparency.org/whatwedo/publication/best\\_practice\\_guide\\_for\\_whistleblowing\\_legislation](http://www.transparency.org/whatwedo/publication/best_practice_guide_for_whistleblowing_legislation).

- b. Include a new, comprehensive whistleblower law that will provide robust and standardized whistleblower protections and processes to any U.S. worker dealing directly with the impact of the coronavirus (especially public health professionals). Should necessary response timelines make this overhaul unfeasible, then Congress should immediately pass a resolution that clarifies, streamlines, and raises awareness of the protections that are currently available to workers under the U.S.'s complex patchwork of existing whistleblower laws;
  - c. Authorize rewards of no less than 15%, and up to 50%, of the total amounts recovered by the federal government for those who blow the whistle on waste, fraud, or abuse related to any congressional response package;
  - d. Provide funding for a special Department of Justice task force to aggressively investigate fraud related to coronavirus relief efforts and prioritize whistleblower complaints related to the government's response.
2. **Confirm qualified members to the Merit Systems Protection Board.** Despite a backlog of some 2,500 cases—a large portion of which are whistleblower cases—the agency charged with adjudicating federal whistleblower claims has lacked a quorum for over three years. (And for the last year, it hasn't had a single member.) The Senate and White House must prioritize the appointment of new Board members so whistleblowers who may have faced retaliation can pursue some form of relief.
  3. **Permit whistleblowers to receive a stay from the Board if they can establish a *prima facie* case of retaliation.** Because the Board is currently inoperative, whistleblowers with pending cases who may be reeling from adverse personnel actions have no means of receiving temporary relief. The Office of Special Counsel, which advocates on whistleblowers' behalf, can request stays of adverse personnel actions while investigating alleged retaliation, and the Board should grant such stays if complainants can demonstrate a *prima facie* case of retaliation.
  4. **Give whistleblowers their day in court.** Federal employees are the only major sector of the labor force that do not have the right to have their whistleblower cases decided by a jury of their peers.<sup>8</sup> Instead, they must rely on a Merit Systems Protection Board that not only appears to have a history of bias against them (the Board has decided some 95 percent of its cases against whistleblowers), but is ill-equipped to handle the number and complexity of the cases it reviews. Federal employees should be able to have their cases heard in court before a jury of their peers immediately upon exhausting their administrative remedies.
  5. **Protest whistleblowers from retaliations disguised as “investigations.”** Investigations conducted by aggrieved employers in the hopes of uncovering unrelated whistleblower conduct or undermining a whistleblower's credibility are not currently considered forms of retaliation (except at the Department of Veteran's Affairs). Congress should close this loophole by adding retaliatory investigations to the list of prohibited personnel practices across all sectors of the government.
  6. **Expand existing whistleblower rewards programs.** Strong whistleblower reward programs provide the twin benefits of motivating people to come forward and helping to change traditional stigmas of whistleblowing. Yet in some cases, such as under the Dodd-Frank Act, whistleblowers are ineligible for awards if they work for law enforcement agencies, regulatory agencies, or self-regulatory organizations, or if minimum recovered fund thresholds are not met (for example, under Dodd-Frank, over \$1,000,000 must be recovered before a whistleblower is eligible for a reward). Eligibility and recovery provisions should be expanded to offer opportunities and incentives that reflect the positive downstream effects of recovery actions.
  7. **Establish a Senate Whistleblower Ombudsman Office.** Congressional staff are often closest to the “powers of the purse,” yet the offices of individual members may have completely different procedures, training, and resources dedicated to responding to whistleblowers, leaving many offices ill-prepared to maintain the confidentiality of a whistleblower. A House Whistleblower Ombudsman Office was established in February 2020 to develop best practices for whistleblower intake and to provide trainings to House offices, and a Senate counterpart would help ensure that all congressional staff have access to the same resources and are applying the same best practices.
  8. **Reaffirm that federal whistleblowers have an enforceable right to remain anonymous.** While federal whistleblower law makes clear that inspectors general are obligated to maintain a whistleblower's confidentiality except in certain circumstances, recent research suggests that heightened public awareness about whistleblowing is more effective than the quantity and quality of whistleblowing laws themselves. By increasing the public's awareness of the protections, processes, and results of whistleblower actions, Congress could boost the confidence of prospective whistleblowers and spur additional public engagement and investment in protecting whistleblowers.

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<sup>8</sup> Even government contractors have a statutory right to bring a retaliation complaint to a jury of their peers. *See* 41 U.S.C. § 4712(c)(2) (2016).