The failure to adequately protect whistleblowers who report illegal money laundering threatens the core anti-corruption policies of the United States. Due to the procedures mandated by the U.S. Senate, the fate of whistleblowers who courageously report money laundering currently rests with the U.S. Senate Banking Committee, which must approve amendments to a law it endorsed last term in order to commence the reform process. By way of background, in 2020 that Committee
unanimously approved reforms that would have adequately protected whistleblowers who disclosed money laundering. The original Banking Committee proposal was modeled on the Dodd-Frank Act, and contained key provisions necessary for a whistleblower law to work.

Although Congress passed reforms to the money laundering laws in 2020, the whistleblower protections eventually approved were defective. The original Banking Committee proposals were amended and two key provisions necessary for the whistleblower reforms to work were cut. The Banking Committee has a second shot at getting the job done right, and if it acts there is a very strong chance that the reforms will become law, and whistleblower protections for money laundering informants will start to be effective. Time is of the essence, as the legislative “vehicle” for fixing this problem is quickly fading.

What is at Stake?

The importance of protecting whistleblowers who report money laundering is at the heart of the entire anti-corruption program of the United States. The scope of the problem is immense. Fighting money laundering was explicitly identified as a priority action item in President Joseph Biden’s “Memorandum on Establishing the Fight Against Corruption as a Core United States National Security Interest” (hereinafter “Anti-Corruption Memorandum” or “Memorandum”). This Memorandum recognized that money laundering (which includes terrorist financing) is a major threat to national security and financial integrity. Biden placed fighting corruption at the “core” of his foreign policy and law enforcement priorities.

The President explained that he wanted to “lead efforts to promote good governance; bring transparency to the United States and global financial systems; prevent and combat corruption at home and abroad, and make it increasingly difficult for corrupt actors to shield their activities.” President Biden justified the urgency reflected in his Memorandum: “Corruption corrodes public trust; hobbles effective governance; distorts markets . . . undercuts development efforts; contributes extremism . . . and provides authoritarian leaders a means to undermine democracies worldwide.” Biden’s Memorandum mirrored concerns already well documented by numerous international and domestic agencies, including the Department of Justice and the United Nations.

The Biden Memorandum identified the need to “bolster the capacity” for “combating money laundering” and “illicit finance” by using nongovernmental “oversight and accountability actors,” such as whistleblowers. The importance of whistleblowers in detecting and aiding the prosecution of money laundering is well documented. Thus, whether or not the U.S. whistleblower laws covering money laundering will provide effective protections is an essential question currently facing the Senate Banking Committee, Congress, and ultimately the President. But the first step to fixing these problems rests with the Banking Committee.

The Dodd-Frank Act has Proven its Effectiveness in Fighting International Corruption

Incentivizing and protecting whistleblowers as a tool in detecting international and
domestic corruption is widely recognized. Congress first experimented with creating what is now understood as the Dodd-Frank Act whistleblower-structure in 1986, when it amended the False Claims Act to establish a reasonable *qui tam* or whistleblower reward provision. Congress created a simple formula. Incentivize high-quality reporting of well-hidden frauds (such as kickbacks in government contracting) by offering whistleblowers a reward based strictly on the quality of information provided and the ability of the government to use the whistleblower’s information to prosecute a fraudster successfully. The taxpayer would always recover the vast majority of sanctions obtained in a whistleblower case (between 70%-90% of the collected sanctions). No taxpayer monies would ever be used to compensate a whistleblower. They would only be paid if their information triggered a successful enforcement action, and the money would come from the fraudster, not the taxpayer.

The law worked and soon became recognized as America’s most successful anti-fraud law. Based on this success, Congress incorporated these basic procedures in the modernized FCA into the major anti-fraud laws, such as the IRS tax and Dodd-Frank Act whistleblower laws. Significantly, in regard to understanding the potential impact of a DFA-style whistleblower law on combating money laundering, the Dodd-Frank Act also covered transnational corruption cases filed under the Foreign Corrupt Practices Act. Thus, a whistleblower-incentive program could be tested on a worldwide scale, directly targeting high-level corruption and bribery.

The DFA worked remarkably well and quickly became the most effective international anti-corruption law in the world. For example, since 2011, under the Dodd-Frank Act alone, over 4538 non-U.S. citizens from 129 countries filed whistleblower cases, primarily under the Foreign Corrupt Practices Act (FCPA). Using a law essentially identical to the DFA, whistleblowers also played a key role detecting and prosecuting illegal offshore accounts that stashed U.S. taxpayer money in foreign banks.

All major government agencies, including those from the Justice Department and the SEC, have, in glowing terms, praised these whistleblower laws. For example, the Organization for Economic Co-operation and Development (“OECD”) has specifically praised the Dodd-Frank Act’s whistleblower law in its Phase IV report on the U.S. implementation of the OECD’s anti-bribery convention. The report was based on a “year-long review” conducted by international officials with expertise in fighting corruption and highly praised the use of the Dodd-Frank Act’s whistleblower law in fighting corruption. They specifically praised the “powerful incentives for qualified whistleblowers to report foreign bribery allegations” contained in the DFA.

The OECD’s findings came as no surprise. Since the enactment of the Dodd-Frank Act, every Chairman of the SEC (Democrat and Republican) has praised the law’s ability to attract high-quality whistleblowers with insider information and incentivize these informants to assist in major securities law violations, including violations of the FCPA. The SEC Chairman under President Trump, Mr. Jay Clayton, was blunt in describing the importance of the Dodd-Frank Act: “Over the past ten years, the whistleblower program has been a critical component of the Commission’s efforts to detect wrongdoing . . . particularly where fraud is well-hidden or difficult to detect.”
These sentiments were recently echoed by the new Biden-appointed Chairman of the SEC, Gary Gensler: “Whistleblowers provide a critical public service and duty to our nation. The tips, complaints, and referrals that whistleblowers provide are crucial to the Securities and Exchange Commission as we enforce the rules of the road for our capital markets. . . . Investors in our capital markets have benefited from the critical information provided by whistleblowers. . . We must ensure that whistleblowers are empowered to come forward when they see misbehavior [and] that they are appropriately compensated.”

Money Laundering Whistleblowers Need Dodd-Frank Act Protections

Given the role of money laundering in promoting international corruption, the Senate Banking Committee previously recognized the importance of providing protections based on the Dodd-Frank Act to employees who reported corrupt money laundering activities. The Committee unanimously approved a bill that mirrored the central features of the Dodd-Frank Act. Without dissent on June 25, 2020, the DFA-based money laundering whistleblower law was incorporated (by Section 5313) into the National Defense Authorization Act (NDAA) proposal approved by the U.S. Senate.

At the heart of the Banking Committee’s proposal was the incorporation of the Dodd-Frank Act’s provisions for incentivizing and compensating whistleblowers who risk everything to report corruption. Like the False Claims Act, the DFA provides for a mandatory minimum payment to fully qualified whistleblowers, paid from the sanctions obtained from enforcement actions whistleblower’s trigger. This provision has proven to be the most effective part of the Dodd-Frank Act. Under the DFA, a whistleblower is entitled to a minimum payment of 10% and a maximum payment of 30% from the sanctions of the crimes they detect and lawfully report. In order to ensure that the sanctions recovered by whistleblower disclosures pay for these rewards, the Dodd-Frank Act also created a revolving fund that is used exclusively to pay rewards. No taxpayer monies are ever used to pay whistleblowers. Instead, the sanctions obtained from the criminal wrongdoers are placed in the revolving fund used for this purpose.

After being approved by the Senate, the Banking Committee’s money laundering whistleblower proposal was placed before the House-Senate Conference Committee tasked with approving the final version of the National Defense Authorization Act. For reasons that are still unclear, the Conference Committee gutted the Senate’s whistleblower law covering money laundering. Instead, it passed a gravely defective law. The final law failed to include the two key provisions of the DFA. First, the final version stripped out the core mandate of the Dodd-Frank Act to pay mandatory minimum rewards to fully qualified whistleblowers. Instead of requiring a minimum payment to whistleblowers whose courageous reporting (often at the risk of their job, career, and even their safety) triggered a successful enforcement action, the law made awards discretionary. It permits the Secretary of Treasury to deny fully qualified whistleblowers any award whatsoever, regardless of the amount of sanctions obtained, the contributions of the whistleblower, and the hardships suffered by the whistleblower.

But that is not the worst of it. Even if the Secretary of Treasury approved an award,
there is no fund to pay it. Instead, the law requires that whistleblower rewards be paid pursuant to the Congressional “appropriations” process. It is simply unrealistic to assume that Congress, every year, will somehow allocate money to whistleblowers. Instead, Congress would necessarily politicize the reward process, even if they ever allocate one red cent. Whistleblowers have no lobbying power and can never compete against the thousands of well-financed special interests that successfully lobby every year for sums of money appropriated by Congress. Using appropriations to pay whistleblowers has been fully discredited. For example, when the House Oversight Committee conducted joint hearings on this issue, both the Democrats and Republican members unanimously rejected any such suggestion. The hearing was chaired by then-Congressman Mark Meadows (R-N.C.) and Congressman Jim Jordan (R-Ohio), both of whom understood the importance of carving whistleblowers out of the appropriations process. They were joined by Ranking Member Gerald Connolly (D-VA).

To avoid this problem, the Dodd-Frank Act created a special fund to pay rewards. This revolving fund was paid for strictly by sanctions obtained from criminals and wrongdoers in successful enforcement actions. No taxpayer funds are ever used. Such a fund was approved by the Senate Banking Committee and the full Senate in 2020. It was stripped out of the final NDAA bill without explanation or justification.

Creating an unfunded discretionary reward program is a throwback to the highly discredited whistleblower laws that existed fifty years ago. None of these older laws worked, and neither will the money laundering whistleblower law. Congress amended all of the older laws to make the payment of awards mandatory if a whistleblower met the strict criteria established by Congress. These laws include the False Claims Act (amended to make awards mandatory in 1986), IRS whistleblower law (amended to make rewards mandatory in 2006, and the securities whistleblower law. Specifically, the SEC had a discretionary reward law prior to the enactment of the Dodd-Frank Act. The SEC failed to exercise its discretion properly under both Democratic and Republican administrations. The older securities law was repealed and replaced by the now-highly effective Dodd-Frank Act.

**What is to be Done?**

Given the destructive role money laundering plays in facilitating international corruption, terrorist financing, bribery, tax evasion, and drug dealing, fixing the money laundering whistleblower law should be the number one priority of both the Biden administration and Congress. The Senate Banking Committee has the authority to commence the process to fix these problems, but to date has not put forward the necessary amendments. In 2020 the Senate Banking Committee, under Republican leadership (but with full bi-partisan support of all Democrats), vetted and approved a Dodd-Frank Act-based whistleblower law for money laundering. The Senate approved the two key features that made the Dodd-Frank Act highly effective: A mandatory reward program for fully qualified and highly courageous whistleblowers and a fund that can pay those whistleblowers directly from the sanctions obtained from whistleblower-triggered cases. The Democratic-led Banking Committee needs to follow this precedent.

Because Congress used the National Defense Authorization Act (NDAA) last year to
address money laundering whistleblower issues, the NDAA is the appropriate (and the only realistic) mechanism to fix the law. Ignoring the problems created in last year’s NDAA is simply not acceptable. It is not acceptable to promote international (and highly dangerous) whistleblowing on corrupt money laundering while at the same time not having a fund to compensate these whistleblowers or a legal requirement that they get paid anything, regardless of their sacrifice. The law, as it stands now, can only be described as a double-cross for whistleblowers. History demonstrates that unfunded and discretionary whistleblower laws have all failed. Congress amended the False Claims Act, IRS, and securities whistleblower laws to fix this problem. It is time to fix the money laundering law.

The failure to incorporate the key features that make the DFA highly successful into the money laundering whistleblower law was a tragic mistake. It is a stain on America’s anti-corruption commitments and will undermine the purported goals of President Biden’s anti-corruption initiative. It is a problem that can and should be fixed.

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