

February 20, 2017

The Future Of Federal Whistleblower Programs Under President Trump

In the wake of the 2016 election, there is uncertainty over how seriously to take the frequent and repeated calls to repeal the Dodd-Frank Act. Many Congressional Republicans campaigned on the promise to do away with Dodd-Frank, and Rep. Jeb Hensarling (R-TX), who chairs the House Financial Services Committee, maintains that reform is a priority for 2017. President Donald Trump, who consulted with Rep. Hensarling during his campaign, has been a vocal critic. In addition, one member of Trump's transition team, former Republican SEC Commissioner Paul Atkins, has criticized the SEC whistleblower program for its lack of mandatory internal reporting with employers. He alleges this system incentivizes employees to report to the SEC first in hopes of getting a financial reward.¹ Atkins similarly protests the large fines imposed by the SEC over the past few years² and argues for greater deregulation.³

Proponents of the current legislative scheme fear the Republican-majority Congress will pass legislation gutting Dodd-Frank and eliminating federal protections for SEC whistleblowers. Some have also voiced concerns that Republicans might target protections under other federal laws as well, such as the Sarbanes-Oxley Act (SOX). These fears may be overblown, given that Republicans do not have a filibuster-proof majority in the Senate. Furthermore, the Dodd-Frank whistleblower protections are unlikely to change much, with experts skeptical that Republicans will attempt a full-scale appeal.⁴ Since 2012, the SEC has issued almost \$150 million in whistleblower awards, with \$75 million awarded in 2016 alone (a fact prominently touted on the SEC's website).⁵ The success and efficiency of the whistleblower provisions have earned them praise among senior law enforcement officials and relatively broad bipartisan support,⁶ in contrast to "regulatory" provisions that place additional (and allegedly costly) reporting and administrative burdens on companies.⁷

Protecting whistleblowers also seems in line with Trump's promises to police markets for fraud and his populist "Drain the Swamp" rhetoric, which includes greater accountability for *both* Wall Street and Washington.⁸ Some Republican lawmakers fear the public may interpret their

¹ Divining the Future of the SEC Whistleblower Programs under President Trump, <http://blowthewhistle.com/divining-future-sec-whistleblower-programs-president-trump/>

² See, e.g., SEC Announces \$7 Million Whistleblower Award, <https://www.sec.gov/news/pressrelease/2017-27.html>

³ NY Law Journal Report: Trump And The Future Of The SEC Whistleblower Program, <http://www.whistleblower-defense.com/2016/11/22/ny-law-journal-report-trump-and-the-future-of-the-sec-whistleblower-program/>

⁴ The Future of Whistleblower Enforcement Activity Under the Trump Administration, <http://www.benthamimf.com/blog/blog-full-post/bentham-imf-blog/2017/01/04/the-future-of-whistleblower-enforcement-activity-under-the-trump-administration>

⁵ SEC | Office of the Whistleblower, <https://www.sec.gov/whistleblower/>

⁶ Big SEC Whistleblower Bounties Won't Change With Trump, <http://www.labaton.com/en/about/press/Big-SEC-Whistleblower-Bounties-Wont-Change-With-Trump.cfm>

⁷ The Future of the SEC Whistleblower Program, <http://pickholzlaw.com/future-sec-whistleblower-program-post-election-concerns-sec-whistleblowers-sec-whistleblower-lawyers-part-1.html>

⁸ The Future of Whistleblower Enforcement Activity Under the Trump Administration

February 20, 2017

zeal to dismantle Dodd Frank and other federal financial regulations as them helping Wall Street at the expense of “Main Street,” which could result in long-term backlash from Trump’s working-class base. Furthermore, Republican support for whistleblower protections is not limited to those in Dodd-Frank; indeed, the Fraud Enforcement and Recovery Act of 2009 included expansive amendments to the False Claims Act (FCA), which reward individuals for blowing the whistle on frauds against the federal government.⁹

As a result, many insiders believe Republicans will pick and choose which provisions of Dodd-Frank to repeal while leaving the whistleblower provisions largely intact, perhaps even “transplanting” them as amendments into a different law, such as the Securities Act of 1933.¹⁰ Rep. Hensarling’s Financial CHOICE Act, which he has sponsored as a replacement for Dodd-Frank, passed out of the Financial Services Committee in September 2016. In its current form, the Financial CHOICE Act does not alter either the whistleblower reward programs or enhanced whistleblower protections currently available under Section 21F of Dodd-Frank.¹¹ Also, Sen. Chuck Grassley (R-IA), the chairman of the Senate Whistleblower Protection Caucus, is a strong supporter of both whistleblowers and President Trump.

Even in the unlikely event Republicans repeal or dilute existing whistleblower protections under Dodd-Frank, SOX will protect employees of publicly traded companies (including wholly owned subsidiaries and affiliates) from retaliation for reporting fraud and securities violations. However, SOX does not protect employees of non-publicly traded companies, has a shorter statute of limitations, and requires whistleblowers to file an administrative charge with the Department of Labor before going to federal court.¹²

Thus, while Dodd-Frank’s whistleblower provisions are on track to survive the Act’s eventual overhaul, Republicans will try to shift the focus of SEC enforcement from corporations to individuals, making it more difficult for whistleblowers to qualify for awards (especially if, as expected, Trump’s new SEC leadership decreases the size of sanctions levied against corporate offenders).¹³ Federal whistleblower protections (and incentives) under Dodd-Frank will *not* disappear in the next year or so, but they will likely be scaled back, perhaps significantly, by a Republican-controlled Congress and Trump-appointed SEC officials.

⁹ The Future of the SEC Whistleblower Program

¹⁰ *Id.*

¹¹ What’s Next For Whistleblowers?, <http://bernabeipllc.com/wp-content/uploads/2016-11-28-National-Law-Journal2.pdf>

¹² *Id.*

¹³ What Does Trump’s Presidency Mean for Dodd-Frank Whistleblowers?, <http://www.kmblegal.com/whistleblower-blog/what-does-trumps-presidency-mean-dodd-frank-whistleblowers>