

NWC | NATIONAL WHISTLEBLOWER CENTER

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Dear Members of Congress:

We are writing in regard to an urgent matter concerning the whistleblower protection provision contained included in the money laundering title (Title LXIII) of the [2021 National Defense Authorization Act, H.R. 6395](#) ["NDAA"]. The title's whistleblower section, Section 6314, contains two problematic provisions. The first permits the Department of Treasury to effectively deny a meaningful reward to qualified whistleblowers. The second completely excludes from coverage employees of FDIC-insured banks and credit unions.

These two loopholes would greatly undercut Congress's intent to strengthen protection of whistleblowers with evidence of money laundering and terrorist financing. The most effective whistleblower laws - the False Claims Act, the Dodd Frank Act, and the IRS whistleblower law - all make certain minimum payments to fully qualified whistleblowers non-discretionary. Excluding from coverage employees of FDIC-insured banks and credit unions would leave those employees without safe and effective means of reporting wrongdoing.

These two loopholes were *not* included in the original Senate bill on which Section 6314 was based. See Section 307 of the Illicit Cash Act, [S. 2563](#).

The problems caused by these two unprecedented and dangerous loopholes are striking.

First, the unlimited discretion of the Department of Treasury to set award amounts at any level under 30% would eliminate incentives to disclose wrongdoing. If an employee lawfully reports a \$200 million fraud, and complies with all of the requirements of the law, the Treasury Department could approve a reward in the amount of \$1.00 (one dollar). That determination would not be subject to any judicial review, even if the award determination was arbitrary, capricious and an abuse of discretion.

Second, the decision to exclude employees of FDIC-insured banks and credit unions who leave these employees with no whistleblowing channels other than outdated laws that for years have failed to protect and incentivize them.

Based on our 30+ years of experience, these provisions will create uncertainty in the administration of the whistleblower program that will result in most of the highly placed whistleblowers not reporting violations to the government. It will also result in unjustifiable reward denials that will completely discredit the program.

Correcting the proposed language requires only two minor changes in the legislation.

First, the language in the current bill permits a reward "up to 30%." The original Senate bill that Section 6314 was modelled provided for a maximum award of 30%, but also mandated a minimum award of "not less than 10 percent." This is the precise current language in the Dodd-Frank Act's highly

successful whistleblower law. See 7 U.S.C. § 28(b)(1)(A) and 15 U.S.C. § 78u-6(b)(1)(A). The language from the Illicit Cash Act and the Dodd-Frank Act should be incorporated into § 6314.

Second, the language in the current bill excludes from coverage any whistleblower who is “acting in the normal course of the job duties” should be cut. Because the vast majority of whistleblowers identify wrongdoing in the “normal course” of their “job duties,” this provision should simply be deleted.

We completely support Congress’ intent to incentivize whistleblowers to report illegal money laundering and terrorist financing. As explained in the article “Can Whistleblowers Stop Money Laundering: An Analysis of the Illicit Cash Act’s Whistleblower Provision?,” [Mondaq](#) (Feb. 26, 2020), if amended the reforms set forth in Section 6314 would be highly beneficial. We strongly urge Congress correct the two loopholes in Section 6314.

The changes needed in Section 6314 are set forth in the Appendix to this letter.

Thank you in advance for your prompt attention to these critical and urgent matters. If you have any questions, please do not hesitate to contact us.

Respectfully submitted,

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APPENDIX

The below provision is located on page 2936, line 16 [Section 6314, amendment to section 5323(b)(1)] and page 2938, lines 20-21 [section 5323(c)(2)(A)(iii)] of the proposed amendment as published in the Conference Report. The changes are made in bold/underline.

SEC. 6314. UPDATING WHISTLEBLOWER INCENTIVES AND PROTECTION
(a) WHISTLEBLOWER INCENTIVES AND PROTECTION.—

‘(b) AWARDS.—

“(1) IN GENERAL.—In any covered judicial or administrative action, or related action, the Secretary, under regulations prescribed by the Secretary, in consultation with the Attorney General and subject to subsection (c) and to amounts made available in advance by appropriation Acts, shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the employer of the individual, the Secretary, or the Attorney General, as applicable, that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to not more than 30 percent, **or not less than 10 percent**, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

The below provision is located on page 2948, line 19 [Section 6314, amendment to section 5323(g)(6)] as published in the Conference Report. A complete deletion of paragraph (6) is recommended.

(g) PROTECTION OF WHISTLEBLOWERS

~~(6) COORDINATION WITH OTHER PROVISIONS OF LAW.—This subsection shall not apply with respect to any employer that is subject to section 33 of the Federal Deposit Insurance Act (12 U.S.C. 1831j) or section 213 or 214 of the Federal Credit Union Act (12 U.S.C. 1790b, 1790c).~~