

# Congress Aims to Strengthen Federal Employee Whistleblower Protections under New Administration

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Amid reports that the Trump administration is silencing dissent in the executive branch, it may be surprising to learn that protections for federal whistleblowers could soon be expanding significantly. In November 2016, the House passed the Follow the Rules Act (“FRA”) to protect federal employees who refuse to obey an instruction to engage in conduct that would violate a federal rule or regulation. The legislation moved forward in February 2017 with the new Congress when the House Oversight and Government Reform Committee reviewed the bill and again reported it out of committee for further consideration. Around the same time, the Committee also approved the Federal Employee Antidiscrimination Act of 2017 (“FEAA”), a law targeting gag orders and other restrictions that may prevent federal employees from reporting wrongdoing like fraud, waste, abuse or discrimination. Finally, on March 2, 2017, the U.S. Government Accountability Office (“GAO”) issued a report on a pilot program for [federal contractor whistleblowers](#), along with recommendations for agency inspectors general on ways to ensure the effective implementation of the program.

While it remains to be seen whether these initiatives will come to fruition, they are encouraging signs that Congress and federal agencies continue to recognize the important role whistleblowers play in promoting good government and the need to protect those who stand up for what is right.

## **Follow the Rules Act**

The FRA was originally introduced in September 2016 and garnered a bipartisan team of cosponsors – four Democrats and five Republicans. Although the Senate did not vote on the bill prior to the close of the 114th Congress, the bill was reintroduced on February 2, 2017, and again passed out of committee on its way to a full vote. The FRA is narrowly focused on closing a gap in protections for federal whistleblowers. Under current federal law, taking an adverse action against a federal employee who refuses to violate a statute is a prohibited personnel practice (“PPP”). The FRA further extends anti-retaliation protections to individuals who refuse to violate federal rules or regulations, the specific provisions that interpret and implement federal statutes, as well. Thus, as its name implies, the Follow the Rules Act will ensure that employees who refuse to violate binding federal rules and regulations will have the same legal protection as those refusing to violate a law passed by Congress.

Federal employees who have been subject to a PPP can report retaliation to the Office of Special Counsel (“OSC”) for investigation. If OSC finds a violation and the employee’s agency does not remedy the PPP on its own, OSC can order the federal Merit Systems Protection Board (“MSPB”) to take corrective action, such as a promotion, expungement of disciplinary records, or reinstatement with seniority, back pay, and lost benefits. If OSC either closes a complaint without taking action, or if it fails to take action within 120 days after a complaint is filed, a federal whistleblower may appeal directly to the MSPB in what is known as an “individual right of action.” The right to bring retaliation

complaints is an important one for federal employees to seek redress for wrongfully motivated adverse employment actions, and the FRA will close a small, but important, loophole in the law.

### **Federal Employee Antidiscrimination Act of 2017**

Like the FRA, a version of the Federal Employee Antidiscrimination Act of 2017 (“FEAA”) earned wide bipartisan support in the last Congress, passing by a unanimous 403-0 vote, and the law is again bridging the aisle in the new Congress. On February 2, 2017, the bill’s sponsor Rep. Elijah Cummings announced that the House Committee on Oversight and Government Reform approved the FEAA for a full vote by the House. Rep. Cummings stated that the FEAA “will help ensure that federal employees can report discrimination without suffering retaliation and that such reports will be thoroughly, fairly, and timely investigated and adjudicated [and] would also prohibit policies, forms or agreements that seek to prevent employees from disclosing waste, fraud, or illegal actions to the Congress.”

According to the Oversight Committee’s summary of the bill, the FEAA would make three main changes in federal agencies to add transparency and accountability to the investigation of complaints of discrimination and other illegal conduct:

- Ensure that the head of an agency’s Equal Employment Opportunity program reports directly to the agency head;
- Expand notifications that agencies are required to provide when discrimination is found to have occurred, and require agencies to track and report whether such findings resulted in any disciplinary action; and
- Prohibit non-disclosure agreements that seek to prevent federal employees from disclosing to Congress, the Office of Special Counsel or an Inspector General any information that relates to violations of laws, rules, regulations, or instance of waste, fraud or abuse.

The third reform in particular may prove very important. It mirrors legislative and regulatory initiatives designed to ensure that private-sector employers cannot rely on [confidentiality agreements to prevent employees from reporting](#) to law enforcement, including agencies such as the Securities and Exchange Commission and the Commodity Futures Trading Commission. This anti-gag order trend reflects concerns about private and public employers buying employees’ silence in exchange for severance payments or as a condition of continued employment.

### **GAO Recommendations on the Contractor Whistleblower Protections Pilot Program**

While Congress has been moving forward with increased statutory protections for federal employees, the federal government watchdog agency, the U.S. Government Accountability Office (“GAO”), has been studying the implementation of protections specifically aimed at defense contractors. On March 2, 2017, the GAO issued a report on the government contractor whistleblower protections pilot program (“pilot program”), instituted as part of the National Defense Authorization Act of 2013 ([2013 NDAA](#)). Prior to the pilot program, the law provided whistleblower protections to some government contractors in the defense sphere but left most of these individuals without recourse if they were retaliated against for opposing fraud, waste, or abuse in the execution of government contracts and grants. The 2013 NDAA drastically expanded the scope of existing protections to include most government contractors for four years, with the success of the law to be assessed prior to its lapsing in early 2017. In December 2016, Congress enacted a law making these protections permanent.

The [GAO’s report on the pilot program](#) assessed, among other things, various agencies’ implementation of the pilot program, the number of retaliation complaints received, and the handling and disposition of the complaints. The report focused in particular on four agencies that it concluded did not fully implement all aspects of the pilot program: the Departments of Commerce, Homeland Security, Interior and State. Based on its findings, the GAO issued four identical recommendations for each of the four agencies. The recommendations are as follows:

- For the Inspectors General of each agency to develop or clarify existing guidance on the implementation of the pilot

program, such as processes to identify levels of review during an investigation, and where the findings of investigations are to be reported;

For the Secretary of each agency to develop policies and processes to help ensure that Federal Acquisition Regulation clause 52.203-17 (which mandates that certain federal government contracts include clauses requiring contractors to inform employees of their whistleblower protection rights) is inserted in new contracts and major modifications as appropriate;

For the Secretary of each agency to develop policies and processes to help ensure that contracting officials can determine whether a modification is major and the applicability of the FAR whistleblower clause, and whether they are making their best efforts to include the clause into existing contracts during major modifications;

For the Secretary of each agency to develop policies and processes to help ensure that contracting officials communicate with contractors and subcontractors to help ensure employees are informed about the requirements and protections provided by the whistleblower protection pilot program.

These recommendations reflect the GAO's commitment to ensuring that agencies give [government contractor whistleblower protections](#) the strength that Congress intended.

## **Conclusion**

With any new presidential administration, the fate of regulations and priorities of the previous administration are often in doubt. But it appears that, at least for the time being, government whistleblowers will continue to have active, vocal advocates in the legislature and enforcement agencies charged with their protection. This is welcome news to all who recognize that the people in the best position to report and stop wrongdoing are those on the inside, and the public benefits from their insight only when they can speak out without fear of retaliation.