THE WHISTLEBLOWER INDUSTRIAL COMPLEX

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Abstract

Although the whistleblower programs (WBPs) created by Dodd-Frank have received universal acclaim, little is known about how they actually work. Last year, the Securities and Exchange Commission (SEC) received an average of 49 whistleblower tips every workday. Success depends on sifting through this avalanche of tips to determine which ones to investigate. To date, however, the tip-sifting process has been entirely shrouded in secrecy.

This paper breaks new ground. It offers a rare look inside the WBPs administered by both the SEC and the Commodity Futures Trading Commission (CFTC), shining a bright light on the critical role played by private whistleblower attorneys in the tip-sifting process. Using a new dataset comprised of information I obtained under the Freedom of Information Act, I find (among other things) that tipsters represented by lawyers significantly outperform unrepresented ones, repeat-player lawyers outperform first-timers, and lawyers who used to work at the SEC outperform just about everybody.

The upshot is that the SEC and CFTC have effectively privatized the tip-sifting function that is at the core of the WBPs. Private lawyers have likely extracted hundreds of millions of dollars in fees and expenses from these programs, with a disproportionate share going to a concentrated group of well-connected, repeat players. Unlike traditional plaintiffs' side securities attorneys and attorneys who represent clients seeking government payments in many other contexts, private whistleblower lawyers operate free from virtually all public accountability, transparency, or regulation. I highlight significant efficiency and accountability deficits imposed by this oversight-free private outsourcing program and propose reforms to realign these private actors with the public interest.

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Although the SEC was informed that Bernie Madoff's high-flying investment fund was likely a Ponzi scheme, the agency failed to act until it was too late.[2] Out of the ensuing wreckage came Dodd-Frank Sections 748 and 922, which empowered the CFTC and SEC to stand up new centralized whistleblower offices to receive tips and make financial payments (AKA "bounties") to individuals who provide the agency with actionable information.[3]

These whistleblower programs (WBPs) have been praised by SEC and CFTC Chairs,[4] other Republican and Democratic political leaders,[5] the Madoff whistleblower,[6] and leading academics,[7] among many others.[8] To many, WBPs seem to combine the best of

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[2] HARRY MARKOPOLOS, NO ONE WOULD LISTEN (2010); SEC OIG, *Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme, Report No. 509* (Aug. 31, 2009).

[3] Pub. L. No. 111-203 § 922 (2010); *see also* Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 773-75 (2018) (reviewing origins of the SEC program).

[4] SEC Chair Gary Gensler, *Remarks at Securities Enforcement Forum* (Nov. 5, 2021) ("we benefit greatly from . . . our robust whistleblower program"); SEC Chair Jay Clayton, *Strengthening our Whistleblower Program* (Sept. 23, 2020) (a "critical component of the Commission's efforts to detect wrongdoing and protect investors and the marketplace"); SEC Chair Mary Jo White, *The SEC As The Whistleblower's Advocate* (Apr. 30, 2015) ("game changer"); CFTC Chair Rostin Behnam, *Keynote at the FIA Boca 2022 International Futures Industry Conference,* (Mar. 16, 2022) (emphasizing "the contributions of the CFTC's Whistleblower Program"); CFTC Chair Timothy Massad, Testimony before the Sen. Comm. On Agriculture (Dec. 10, 2014) ("an important tool").

[5] Letter from (Democratic) Senators to SEC Chair Clayton (Sept. 17, 2020) ("an unqualified success") https://www.sec.gov/comments/s7-16-18/s71618-7801845-223661.pdf; Letter from (Republican Sen.) Chuck Grassley to SEC Chair Gensler (Mar. 12, 2021) ("a critical component of the SEC's enforcement arsenal"); Sen. Chuck Grassley, Press Release, *Congress Passes Grassley Bill To Save CFTC Whistleblower Program* (Jun. 23, 2021) ("far more successful than Congress imagined when we set it up back in 2010"); *see also* Samuel Rubenfeld, *Dodd-Frank Rollback to Spare SEC Whistleblower Program, Experts Say*, WALL ST. J. (Nov. 15, 2016).

[6] Letter from Harry Markopolos to SEC, Re: *Proposed Amendments to Whistleblower Rules* (Sept. 14, 2018).

[7] JOHN COFFEE., CORPORATE CRIME AND PUNISHMENT 114 (2020) ("dramatically successful"); Amanda Rose, *Better Bounty Hunting: How the SEC's New Whistleblower Program Changes the Securities Fraud Class Action Debate,* 108 NW. L. REV. 1235, 1237 (2014) ("the proverbial nail in the [fraud on the market] class action coffin").

[8] *E.g.*, Somers, 138 S. Ct. at 777 ("robust"); SEC Comm'r Robert Jackson, *Statement on Proposed Rules Regarding SEC Whistleblower Program* (Jun. 28, 2018) ("crucial to our enforcement efforts" and "among our Staff's most successful endeavors"); SEC Comm'r Kara Stein, *Statement on Proposed Amendments to the Commission's Whistleblower Program Rules* (Jun. 28, 2018) ("a resounding success"); SEC Comm'r Hester Peirce, *Statement at Open Meeting*

public and private enforcement while avoiding their worst features. Calls to establish similar programs across the government have proliferated.[9]

But WBPs are no panacea. They create a new challenge for the agencies who administer them: sifting through the flood of tips to find the ones worth investigating. A program that successfully generates many tips may nonetheless fail to detect major misconduct if it cannot accurately identify the good ones and assign an appropriate level of agency resources to investigating them.[10]

The SEC WBP involves a jaw-dropping amount of tip-sifting. By September 30, 2021, the SEC had received a total of 52,400 tips – including 12,200 tips in FY 2021 alone[11] or about 49 tips per workday. Over the same period, the agency had paid out awards to just 216 tipsters,[12] less than 1 out of every 250 tips. For every tip that resulted in an award, 249 did not.

So, if the SEC were to receive the Madoff tips today, would the result be different? The real answer is: we don't know. The sifting process is cloaked in extraordinary secrecy. The SEC and CFTC disclose next to nothing about the tips they receive, the

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on Amendments to the Commission's Whistleblower Program Rules (Jun. 28, 2018) ("a critical part of our enforcement program"); SEC Comm'r Elad Roisman, *Statement on the Commission's New and Improved Whistleblower Program Rules* (Sept. 23, 2020) ("To call this program a success is an understatement."); SEC Comm'r Caroline Crenshaw, *Statement of Commissioner Caroline Crenshaw on Whistleblower Program Rule Amendments* (Sept. 23, 2020) ("I am proud of our whistleblower program.").

[9] Financial Compensation for Consumer Financial Protection Bureau Whistleblowers Act, Proposed Legislation (Introduced Oct. 5, 2021); JENNIFER TAUB, BIG DIRTY MONEY: THE SHOCKING INJUSTICE AND UNSEEN COST OF WHITE COLLAR CRIME 146 (2020) (proposing a uniform whistleblower regime across all regulatory agencies); COFFEE, CORPORATE CRIME, *supra* note _ at 119 (similar); Martin Totaro & Connor Raso, *A Brief Proposal to Expand The Scope of Whistleblower Programs,* BROOKINGS (Sept. 23, 2021) (similar); Verity Winship, *Private Company Fraud,* 54 U.C. DAVIS L. REV. 663, 712-22 (2020) (proposing to expand the SEC WBP's applicability to private company employees); NASAA Whistleblower Model Act, https://www.nasaa.org/policy/legislative-policy/model-state-legislation/nasaa-whistleblower-model-act; Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2251 (2010) (monetary incentives for employee whistleblowers "should be expanded").

[10] *Infra* Part I.C.

[11] SEC, OWB Annual Report for FY 2021 at 28.

[12] SEC, Press Release, *SEC Awards $40 Million to Two Whistleblowers* (Oct. 15, 2021).

investigations they initiate based on those tips, or the awards they pay out.

This paper breaks the silence. It provides an unprecedented look inside the WBPs by examining one key variable that shapes how the SEC and CFTC sort through the tips they receive: the private lawyers who represent whistleblowers.

These private whistleblower attorneys have escaped critical scrutiny for too long. Scholarly analyses of the WBPs have either ignored these lawyers, minimized their role, or adopted a rosy, optimistic account of their influence: i.e., assuming these attorneys **improve** agency tip-sifting by screening out low quality tips and by ensuring that the highest-quality ones receive the most careful attention.[13]

But the true role of these attorneys is not so benign. Private whistleblower attorneys might also **undermine** or **distort** agency tip-sifting by flooding the agency with tips in the hopes of hitting the jackpot; by wrapping mediocre tips in superficially compelling packaging; by leveraging connections and other reputational capital to capture the agency's scarce attention; by charging high contingency fees and incurring large expenses that sap whistleblowers' incentives to go forward; or by screening out high-quality tips due to judgment errors and biases.[14]

Given the potentially significant costs these attorneys might be imposing, studying how they *actually* perform is essential for policymakers who hope to evaluate and improve the WBP. This paper presents a first-of-its kind study of the role played by private lawyers in the WBPs, based on an original dataset comprised of all lawyers and law firms that have represented successful whistleblowers before the SEC and the CFTC from the WBPs' inception through 2020. I gathered this and other information about the WBPs from the agencies under the Freedom of Information Act through a series of requests filed and repeatedly appealed over the course of nearly two years, beginning in August 2020.[15]

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[13] *Infra* Part II (reviewing prior scholarship on whistleblower lawyers).

[14] *Infra* Part II.

[15] In April 2022, I learned that investigative journalists from *Bloomberg* had recently filed a virtually identical FOIA request with the SEC. At that point, I had already invested 18 months in this FOIA campaign – including researching and filing numerous requests and administrative appeals (which the agency granted); conducting legal research to challenge the agency's application of various FOIA

Key findings include the following:

- ***Lawyers Dominate –*** Both SEC and CFTC awarded twice as many awards to represented tipsters as to unrepresented ones. In the aggregate, represented tipsters received 5x more dollars from the SEC and 28x more dollars from the CFTC than unrepresented ones. Average awards for a represented tipsters also dramatically exceeded those for unrepresented tipsters in both programs.[16]
- ***Concentration –*** Both programs are dominated by a small set of well-connected firms. At the CFTC, a single firm accounts for two-thirds of all dollars paid out. At the SEC, a single firm accounts for one-fifth of all dollars paid out.[17]
- ***Repeat Players –*** Repeat player lawyers dominate both programs. The median and average awards for clients of lawyers who have previously won at least one award are dramatically higher than first-timers.[18]
- ***Revolving Door –*** About a quarter of all dollars awarded by the SEC have gone to clients of lawyers who formerly worked for that agency. Assuming a standard contingency fee, the SEC has effectively caused as much as $70 million to be paid to its own alumni.[19]
- ***Women –*** Female lawyers appear to be significantly underrepresented among the ranks of successful lead attorneys in these programs. The CFTC has issued only one award to a client of a lead female whistleblower lawyer. For every dollar the SEC has paid out, just ***seven cents*** went to

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exemptions (which the agency then dropped); analyzing the agency's productions to identify significant deficiencies and errors (which the agency then corrected); and spending hours on the phone with the SEC FOIA liaison – and these efforts had, by April 2022, successfully led the agency to produce about 70-80% of the relevant information (the remainder came in the subsequent months). With their piggyback request, *Bloomberg* was able to quickly obtain the information, and published a report in July 2022, which does credit my FOIA efforts and quotes me and an earlier public draft of this paper. John Holland, *SEC Tip Line Was Meant To Stop Another Madoff. Is it Working?,* BLOOMBERG (Jul. 26, 2022). For a description of the FOIA process here, see *infra* Part V.B.

[16] *Infra* Part III.B.

[17] *Infra* Part III.C.

[18] *Id.*

[19] *Id.*

clients of lead female lawyers. The top-performing firms at both agencies include no female lawyers.[20]

- ***Law Firm Types –*** Very small firms (≤ 5 lawyers) have done well, while traditional plaintiffs' firms[21] and large defense-side firms are virtually absent.[22]

A key takeaway is that WBPs seem to have substantially *outsourced* the tip-sifting function to private whistleblower lawyers. It is doubtful that this covert privatization has yielded enhanced tip-sifting efficiency. I estimate that private attorneys and other intermediaries have extracted as much as $300 million (or roughly one third of the total payouts made by these programs).[23] That is $300 million of public funds that is not being used to incentivize whistleblowers to come forward. Had these funds instead been appropriated directly to the SEC, it could have roughly ***quadrupled*** its tip-sifting staff for the last decade,[24] while avoiding a significant amount of wasteful duplication involved in the privatization system.[25]

Moreover, the under-the-radar outsourcing of tip-sifting has undermined transparency and accountability for the WBPs. Whenever agency leaders report on the WBPs' performance, the first and most important data point they cite is the seemingly impressive dollar amount paid out to whistleblowers. But these statements conspicuously fail to account for the fact that very substantial proportion of those amounts are not actually going to whistleblowers but are instead paid to private attorneys and other intermediaries. As a result, Congress and the public at large are being repeatedly fed a grossly exaggerated picture of the program's accomplishments – and a grossly understated picture of its true costs.[26]

Further, when the close relationship between the dominant repeat-player firms and the agency enforcement attorneys is

[20] *Infra* Part III.D.

[21] One traditional plaintiffs' firm did very well in the SEC program. But the whistleblower practice has since left the firm. *Infra* Part II.E.

[22] *Infra* Part III.E.

[23] *Infra* Part IV.A.

[24] *Infra* note _.

[25] *Id.* (evaluating the efficiency costs imposed by outsourcing tip-sifting).

[26] *Id.*

combined with the agency's encouragement of tipsters to provide *ongoing* support and assistance to open investigations into their employers, the result is a significant risk that tipsters are effectively being deputized as government agents, raising a variety of constitutional and legal concerns.[27]

For the last decade, whistleblower lawyers have operated free from virtually any meaningful public oversight, regulation, transparency, or accountability. This *laissez faire* approach stands in sharp contrast to the extensive legal and regulatory regime governing the private attorneys who enforce the securities laws through private class actions.[28] It is also out of step with the more careful regulatory approach to private contingency fee arrangements in many other contexts where private parties are seeking monetary payouts from the federal government.[29] It is time to reconsider whether this outsourcing without oversight is serving the public interest, and whether some new measure accountability and transparency is needed to ensure these private actors are adding value to these programs, not merely extracting it.[30]

This paper makes four important contributions:

First, it contributes to the debate over how to improve whistleblower "bounty" programs. The WBPs have received close attention from scholars[31] and policymakers, with repeated efforts

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[27] Part IV.A (collecting statements by former SEC officials now in private whistleblower practice averring that they benefit from special access to confidential information about ongoing SEC investigations and direct access to the agency's investigative files, and that they direct their whistleblower clients to gather information using techniques that would be illegal if done by the agency).

[28] *Infra* Part IV (discussing the legal regime that applies to traditional securities class action plaintiffs' attorneys).

[29] *Infra* Part IV.A.

[30] *Infra* Part V.

[31] *E.g.*, Rose, *Better Bounty, supra* note _; COFFEE, CORPORATE CRIME, *supra* note _ at 113-21; Anthony Casey & Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam,* 91 WASH U. L. REV. 1169 (2014); David Engstrom, *Whither Whistleblowing: Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design,* 15 THEORETICAL INQ. L. 605 (2014); July Rose O'Sullivan, *"Private Justice" and FCPA Enforcement: Should the SEC Whistleblower Program Include a* Qui Tam *Provision?,* 53 AM. CRIM. L. REV. REV. 67 (2016); Usha Rodrigues, *Optimizing Whistleblowing,* 94 TEMP. L. REV. 255, 285-86, 302 (2022); Christina Skinner, *Whistleblowers and Financial Innovation,* 94 N.C. L. REV. 861, 908-09 (2016); Gregory Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act,* 2012 BYU L. REV. 73; Amy Deen Westbrook, *Cash for your Conscience: Do Whistleblower Incentives Improve Enforcement of the Foreign*

from SEC[32] and Congress[33] to revise the program rules in recent years. But whistleblower lawyers have not been the subject of any of these debates. This paper corrects this oversight, putting these lawyers front and center. I show that these attorneys are squarely at the heart of how WBPs actually operate and that they impose serious costs on the programs. This paper is also the first to chronicle the extensive, relentless, and remarkably effective advocacy and publicity campaign undertaken by the private whistleblower bar that has shaped the views of policymakers, scholars, journalists, and the public at large.[34] And, whereas prior scholarship on WBPs has been predominantly theoretical,[35] this paper offers the first empirically-grounded description of the role private whistleblower lawyers play in these regimes.[36]

Corrupt Practices Act?, 75 WASH. & LEE L. REV. 1097 (2018); Jennifer Pacella, *Making Whistleblowers Whole,* UC IRVINE L. REV. (forthcoming 2022); *see also infra* (discussing these and other WBP papers).

[32] *See* SEC, Proposed Rule, *Whistleblower Program Rules,* 83 Fed. Reg. 34702 (2018); SEC, Final Rule, *Whistleblower Program Rules,* 85 Fed. Reg. 70898 (2020); SEC, Proposed Rule, *The Commission's Whistleblower Program Rules,* 87 Fed. Reg. 9280 (2022).

[33] *E.g.*, Sen. Chuck Grassley, Press Release, *Grassley, Warren Work to Strengthen SEC Whistleblower Program* (Mar. 31, 2022); Rep. Al Green, Press Release, *Congressman Al Green Introduces Sweeping Legislative Package to Protect and Reward Whistleblowers* (Oct. 5, 2021); Sen. Tammy Baldwin, Press Release, *U.S. Senator Tammy Baldwin Introduces Bipartisan Legislation to Boost Protections for SEC, CFTC Whistleblowers* (Sept. 25, 2019).

[34] *Cf., e.g.*, Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine,* 121 COLUM. L. REV. 2564 (2021) (describing the hidden contingent forces, institutions and players that have shaped contemporary shareholder-centric law and thinking about corporate governance).

[35] *But see* Caroline Dayton, Note, *An Empirical Analysis of SEC Enforcement Actions in Light of the Dodd-Frank Whistleblower Program,* 12 N.Y.U. J. L & BUS. 215 (2015) (comparing SEC enforcement patterns before and after the creation of the WBP). There are some important recent studies of firm responses to the WBPs. Christine Wiedman & Chunmei Zhu, *Do The SEC Whistleblower Provisions of Dodd Frank Deter Aggressive Financial Reporting?* (Feb. 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3105521; Qingjie Du & Yuna Heo, *Political Corruption, Dodd-Frank Whistleblowing, and Corporate Investment,* 73 J. CORP. FIN. 102145 (2022).

[36] In a prior paper showing that attorneys surprisingly do not move between the SEC and the plaintiffs'-side class action bar, I noted that the sole exception appeared to be the private whistleblower bar; that, based on the very limited publicly available data on whistleblower awards, the former SEC attorneys seemed to be disproportionately successful in obtaining awards from the agency where they used to work; and that I had filed a FOIA request seeking complete records to investigate this relationship further. Alexander Platt, *The Non-*

Second, the paper contributes to debates over the corrosive effect of the "revolving door" in financial regulation. Policymakers and commentators have repeatedly raised concerns that the rapid movement of personnel between[37] and academics have devoted substantial attention to this criticism.[38] This paper is the first to highlight a new way former officials seem to be wielding considerable authority to capitalize on their experience and sway agency action: by moving from the SEC into the private whistleblower bar.[39]

Third, the paper contributes to the study of how lawyers shape financial markets. Prior literature has explored the economic incentives, institutional and personal characteristics, political dynamics, and practical effects of the plaintiffs' bar,[40] federal and state enforcers,[41] deal lawyers,[42] in-house counsel,[43] and compliance specialists,[44] among others. This paper is the first to extend this study to the newest group of attorneys shaping markets: the private whistleblower bar.

Revolving Door, 46 J. CORP. L. 751 (2021). The present project grew directly out of this past one.

[37] *E.g.*, Chuck Grassley, Press Release, *SEC's Revolving Door* (Feb. 11, 2013); Chuck Grassley, Press Release, *Report Shows SEC's Revolving Door Must Be Slowed* (May 13, 2011); Ian Wenik, *Elizabeth Warren Says SEC Rule Tainted by "Soft Corruption,"* CITYWIRE (Aug. 22, 2018); *see also* Patrick Radden Keefe, *Jordan Thomas's Army of Whistle-Blowers,* NEW YORKER (Jan. 17, 2022) (quoting former SEC official and current private whistleblower attorney Jordan Thomas criticizing former SEC Chair Jay Clayton as "the poster child of the revolving door").

[38] *E.g.*, Ed deHaan et al., *The Revolving Door and the SEC's Enforcement Outcomes: Initial Evidence From Civil Litigation,* 60 J. ACCOUNTING & ECON. 65 (2015); James Cox & Randall Thomas, *Revolving Elites: The Unexplored Risk of Capturing the SEC,* 107 GEO. L.J. 845, 851-52 (2019).

[39] *Infra* Part II.E, III.B, IV.

[40] *E.g.*, JOHN COFFEE, ENTREPRENEURIAL LITIGATION (2015); Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys,* 31 REV. LITIG. 758 (2012); Stephen Choi et al., *Coalitions Among Plaintiffs' Attorneys in Securities Class Actions,* 24 AM. L. & ECON. REV. 278 (2022).

[41] *E.g.*, Stephen Choi et al., *Should I Stay or Should I Go? The Gender Gap For Securities and Exchange Commission Attorneys,* 62 J. L. & ECON. (2019); Andrew Jennings, *State Securities Enforcement,* 47 B.Y.U. L. REV. 67, 128-29 (2021).

[42] *E.g.*, Cathy Hwang, *Value Creation by Transactional Associates,* 88 FORDHAM L. REV. 1649 (2020).

[43] Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411 (2008).

[44] Miriam Baer, *Compliance Elites,* 88 FORDHAM L. REV. 1599 (2020).

Fourth, the paper contributes to the debate over government outsourcing of public enforcement. Prior studies have carefully examined efficiency and accountability tradeoffs arising in various forms of private outsourcing of government litigation and enforcement.[45] This paper is the first to examine these tradeoffs in the context of WBP tip-sifting.

This paper proceeds in five parts. Part I reviews how traditional public and private enforcement programs address the case selection challenge and then shows how whistleblower bounty programs reconstitute that challenge. Part II thinks through how private whistleblower lawyers may shape agency tip sifting – for better or for worse. Part III presents an empirical analysis of all attorneys who have represented successful whistleblowers in the SEC and CFTC WBPs through 2020. Part IV draws on this study to highlight the costs these lawyers impose on the WBPs. Part V proposes reforms.[46]

I. BACKGROUND: THE CASE SELECTION CHALLENGE

The universe of corporate misconduct is vast.[47] It includes era-defining catastrophes, technical violations that seemingly harm no one, and much in between. Picking which violations to pursue is a defining challenge for law enforcement. Traditionally, two models for addressing this case selection challenge have emerged: the "public enforcement" model, which vests discretion over case selection in the hands of government agencies; and the "private enforcement" model, which assigns responsibility for case selection to entrepreneurial lawyers who bring civil lawsuits against corporate

[45] *E.g.*, Margaret Lemos, *Privatizing Public Litigation,* 104 GEO. L.J. 515 (2016); Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers,* 106 VA. L. REV. 467 (2020); Sean Griffith, *Corporate Governance in an Era of Compliance,* 57 WILLIAM & MARY L. REV. 2075 (2016); Kiel Brennan-Marquez, *Outsourced Law Enforcement,* 18 U. PA. J. CON. L. 797 (2016); Jennifer Chacon, *Privatized Immigration Enforcement,* 52 HARV. C.R.-C.L. L. RV. 1 (2017).

[46] NB: My aim is to improve and expand the reach of the WBPs, not abolish or curtail them. I do not favor any reform that would risk compromising whistleblower anonymity. My criticisms are focused on the effects private attorneys are having on the WBPs, not their subjective intentions. This paper focuses on whistleblower attorneys, not attorney whistleblowers. *Cf., e.g.*, Jennifer Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime,* 33 YALE J. ON REG. 491 (2016); Dennis Ventry, *Stitches for Snitches: Lawyers as Whistleblowers*, 50 U.C. DAVIS L. REV. 1455 (2017).

[47] Eugene Soltes, *The frequency of corporate misconduct: public enforcement versus private reality*, 26 J. FIN. CRIME 923 (2019) (showing, based on internal compliance data obtained from large corporations, that violations committed exceed the public enforcement by an enormous margin).

offenders on behalf of victims. More recently, an alternative hybrid model has been gaining steam; whistleblower programs adopted or expanded in recent decades at numerous agencies are increasingly seen as an appealing alternative.

This Part reviews how traditional public and private enforcement regimes deal with the case selection problem as well as the well-known shortcomings of each model (Sections A and B, respectively). It then turns in Section C to whistleblower programs, which do not avoid the case selection problem, but reconstitute it as a problem of tip-sifting. Section C also shows why tip-sifting is a fundamental challenge, not amenable to easy fixes through internal program design tweaks.

A. Public Enforcement and the Case Selection Challenge

Traditional public enforcement programs confront the case selection problem by vesting discretion over case selection in an expert professional staff (investigators, prosecutors, etc.) subject to oversight by politically accountable leaders. These professionals identify potential cases of corporate wrongdoing through proactive monitoring and surveillance,[48] coordination with other enforcers,[49] cooperation with targets,[50] and regular review of regulatory filings,[51] investigative journalism,[52] and other public information, among other techniques.

These professionals typically act with broad discretion over how to allocate investigatory resources over the universe of potential wrongdoing.[53] However, this independence is not unlimited; staff operate under the supervision of leaders who are democratically accountable through appointment and removal by elected officials,

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[48] Geoffrey Christopher Rapp, *Intelligence Design: An Analysis of the SEC's New Office of Market Intelligence and Its Goal of Using Big Data to Improve Securities Enforcement,* 82 U. CIN. L. REV. 415 (2013).

[49] Verity Winship, *Enforcement Networks,* 37 YALE J. REG. 274 (2020).

[50] Miraim Baer, *Designing Corporate Leniency Programs,* in THE CAMBRIDGE HANDBOOK OF COMPLIANCE (van Rooij & Sokol, eds.).

[51] Ann Lipton, *Not Everything is About Investors: The Case for Mandatory Stakeholder Disclosure,* 37 YALE J. REG. 499, 509 (2020).

[52] SEC, Enforcement Manual at 12 (Nov 28, 2017) https://www.sec.gov/divisions/enforce/enforcementmanual.pdf (hereinafter: "SEC Enforcement Manual").

[53] Margaret Lemos, *Democratic Enforcement: Accountability and Independence for the Litigation State,* 102 CORNELL L. REV. 929 (2017).

legislative oversight, and/or direct elections.[54] These politically-accountable leaders can play a significant role in shaping the office's investigatory priorities and case selection in line with relevant political preferences and incentives.[55]

This model has some well-documented limitations. Some corporate misconduct may just not be discoverable through these mechanisms. For instance, in some cases, only a small group of insiders may have any knowledge about the wrongdoing and may be strongly incentivized to keep silent – perhaps because they fear negative consequences from coming forward. No amount of skilled investigation by public prosecutors may be able to uncover the misconduct in these cases.

Further, public enforcers may operate under severe budget and staffing constraints.[56] The universe of potential significant violations within the program's jurisdiction may vastly outstrip the resources available to detect, investigate, and prosecute those violations. No matter how intelligently public enforcers ration their resources, some significant misconduct is all-but certain to go undetected and unprosecuted.

There are also structural issues that can lead public enforcers to pursue something other than the most socially valuable mix of cases. At the staff level, "independence" may create its own problems. For instance, case selection may be skewed by "bureaucratic slack"; the relatively stable work environment and comfortable salaries and benefits may lead members of the professional staff to be less diligent and ambitious, leading some offices to avoid the most difficult, risky, and challenging cases.[57]

The case selection priorities of enforcement professionals may also be skewed by the forces of "regulatory capture." Enforcers may decline to pursue certain potential misconduct because they do not want to anger a prospective future employer when they hope to walk

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[54] *Id.*

[55] Urska Velikonja, *Politics in Securities Enforcement,* 50 GA. L. REV. 17 (2015). *Compare, e.g.,* Tom Driesbach, *Under Trump, SEC Enforcement of Insider Trading Dropped to Lowest Point in Decades,* NPR (Aug. 14, 2020), *with* SEC, Press Release, *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues* (Mar. 4, 2021).

[56] William Bratton & Michael Wachter, *The Political Economy of Fraud on the Market,* 160 U. PA. L. REV. 69, 150-62 (2011).

[57] Amanda Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis,* 158 U. PA. L. REV. 2173, 2216-17 (2010).

through the "revolving door" to the private sector or because they have come to internalize the views of the industry.[58]

At the supervisory level, the accountability of these leaders to executives, legislatures, and the public may also distort case-selection priorities. Leaders may face pressure to look for highly salient (but socially non-valuable) cases[59]; cases against disfavored companies (and look the other way when violations occur within favored companies)[60]; and/or to rack up impressive-seeming (but meaningless) enforcement statistics.[61]

In sum, the public enforcement model is likely to fail to uncover some important cases of significant misconduct. A widely cited 2010 study of corporate frauds that took place in large U.S. companies found that public enforcers accounted for initial revelation in just 20% of cases.[62]

B. Private Enforcement and the Case Selection Challenge

Traditional private enforcement programs address the case selection challenge by assigning responsibility over case selection to entrepreneurial attorneys who represent victims of wrongdoing in private lawsuits against the offenders. Private enforcement relies on a substantive and procedural legal regime that incentivizes private attorneys to identify and pursue actionable cases and assigns the responsibility of overseeing these attorneys mainly to courts who interpret the substantive and procedural legal regime. The typical regime includes the ability to pursue a class action which enables the grouping of many parties' claims into a single action, the ability to extract very large damages (or settlements), and the ability for the

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[58] Cox & Thomas, *Revolving Elites, supra* note _ (reviewing literature); *see also* Panel Discussion, 23 FORDHAM J. CORP. & FIN. L. 400, 433 (whistleblower attorney Jason Zuckerman: "[T]here is a real issue with the revolving door. It is important to evaluate the potential impact of enforcement attorneys at the SEC knowing that they will likely take lucrative positions on the other side.").

[59] Jonathan Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J. L. & PUB. POL'Y 639 (2010).

[60] *Cf.* Mihir Mehta & Wanli Zhaob, *Politician Careers and SEC enforcement against financial misconduct,* 69 J. ACCT. & ECON. 101302 (2020); Jonas Heese, *The Political Influence of Voters Interests On SEC Enforcement*, 36 CONTEMP. ACT. RESEARCH 869 (2019); Maria Correia, *Political connections and SEC enforcement*, 57 J. ACCT. & ECON. 241 (2014).

[61] Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics,* 101 CORNELL L. REV. 901 (2016).

[62] Dyck et al., *supra* note _.

attorneys to recover large fees measured by some proportion of the total damages award.

The private enforcement model corrects some of the aforementioned deficits of public enforcement. Private enforcement is not hindered by the same sorts of budgetary constraints; the more successful these attorneys are in their cases, the more resources at their disposal to reinvest in new cases. Private enforcement also corrects for the problems of bureaucratic slack. If these attorneys don't find cases to bring or fail to extract payments from those cases, they can't make a living. And it also corrects for the problems of "regulatory capture" and for the political forces that may distort public enforcement. Unlike public enforcers, they rarely join the regulated industry or a defense firm, and therefore have no reason to "trim their sails" in the hopes of doing so.[63]

But there are some fundamental flaws with private enforcement as well. Just like public enforcement, some important types of corporate misconduct may simply be undetectable by even the most zealous private enforcers. Again, in cases where the misconduct is known only by a small group, no amount of zealous advocacy or investigation by entrepreneurial attorneys is likely to help.

Further, because private attorneys are interested in maximizing their own profits not the socially optimal level of enforcement, they are likely to be uninterested in pursuing some significant cases of misconduct.[64] All else equal, these profit-driven attorneys will systematically prefer to file cases where the misconduct is cheaper to discover and prove, including where the government, journalists, or some other actor has already done the legwork of investigating and uncovering the misconduct.[65] This model thus tends to under-emphasize some important categories of socially important cases.

Thus, the 2010 study noted above found that private litigation accounted for the initial revelation of misconduct in just 3% of the cases in the sample.[66]

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[63] Platt, *The Non-Revolving Door, supra* note _.

[64] Steven Shavell, *The Fundamental Divergence Between The Private and the Social Motive To Use the Legal System,* 26 J. LEGAL STUDS. 575 (1997).

[65] Zachary Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285 (2016); Alexander Platt, "*Gatekeeping" in the Dark: SEC Control over Private Securities Litigation Revisited,* 72 ADMIN. L. REV. 27 (2020).

[66] Dyck et al., *supra* note _.

C. Whistleblower Programs and the Case Selection Challenge

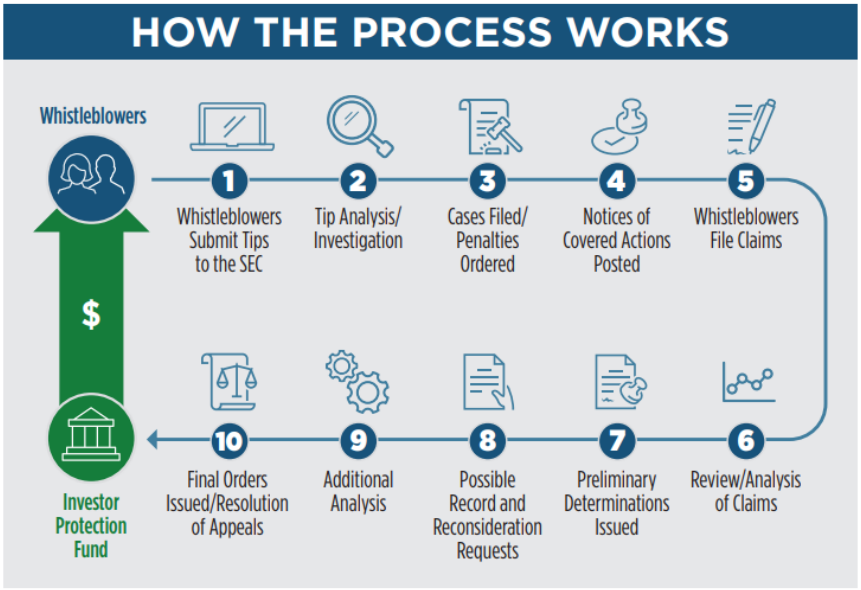
Whistleblower programs incentivize corporate employees and other well-placed individuals to come forward with actionable information about illegal conduct by offering financial payments ("bounties") and other benefits, such as the right to file tips anonymously and the right to file an anti-retaliation lawsuit against their employer in the event they are fired as a result of their tipping. Although these programs harness private incentives to bring information to the agency's attention, the agency retains complete prosecutorial discretion – it alone gets to decide which tips to investigate and prosecute. And only those tips that lead to successful prosecutions and recoveries will ultimately entitle the tipster to a bounty.

The SEC's whistleblower process is depicted below in Figure 1. After a tipster submits a tip (Step 1), it is evaluated by agency officials who work for a subdivision of the SEC's Division of Enforcement called the "Office of Market Intelligence" (OMI) (Step 2).[67] Some tips are selected for further investigation.[68] Some of those lead to actual enforcement actions. And some of those lead to the payment of money by the targets to the agency via settlement or otherwise (Step 3). At this point, the SEC's whistleblower office posts a notice on its website alerting the public of a new "covered action" – a pool of money the SEC has recovered for which one or more whistleblowers *may* be eligible to file a claim to try to get up to 30% (Step 4). Any whistleblowers who believe their tips helped the agency pursue this action then file claims seeking a bounty payment (Step 5). The agency then processes these claims, makes determinations, resolves objections (if any) from affected whistleblowers, and then issues the award (Steps 6-10).

[67] SEC Office of the Whistleblower, Annual Report to Congress FY 2021 at 28.

[68] SEC, OWB, Frequently Asked Questions, No. 12 https://www.sec.gov/whistleblower/frequently-asked-questions (Hereinafter: "SEC OWB FAQ"). For a description of the process for declining to pursue a tip, see GAO, *SEC: Systematically Assessing Staff Procedures and Enhancing Control Design Would Strengthen Internal Oversight* (GAO-20-115) (Dec. 2019) at 37-38.

Figure 1: The SEC Whistleblower Process[69]



Whistleblower programs have significant potential to improve upon the traditional public and private enforcement models. Whereas traditional private enforcement creates and exploits the private financial incentives of entrepreneurial *attorneys*, whistleblower programs are designed to directly incentivize individuals with actionable information.[70] And whereas traditional public enforcers are strictly constrained by limited investigatory resources, whistleblower programs magnify the power of those limited resource by having the actionable information dropped right on their doorstep.[71]

These programs have been gaining traction.[72] Under 2006 legislation, the Internal Revenue Service (IRS) has a Whistleblower Office to receive and review tips regarding tax noncompliance and

[69] SEC OWB, Annual Report to Congress FY 2021 at 13. The CFTC process is substantially similar. *See* https://www.whistleblower.gov/overview.

[70] Rose, *Better Bounty, supra* note _; *see also* Dyck et al., *supra* note _ (finding, in the pre-D-F bounty era, that 17% of the misconduct in the sample were first revealed by employees, practically the same as what was uncovered by professional public enforcers).

[71] *See SEC Oversight, Hearing before H. Subcomm. On Capital Markets* at 2 (Jul. 14, 2009) (statement of Chair Paul Kanjorski) (the WBP will "leverage the Commission's limited resources and increase the number of cops on the beat").

[72] *See* Engstrom, *Whither, supra* note _ at 606-07; Geoffrey Christopher Rapp, *Four Signal Moments in Whistleblower Law: 1983-2013*, 30 HOFSTRA LAB. & EMP. L. J. 389, 392 (2013) ("the prominence of whistleblowers, for better or for worse, is here to stay").

to pay "monetary awards to eligible individuals whose information is used by the IRS."[73] FinCEN, inside the Treasury Department, has set up a program focused on anti-money laundering laws.[74] The National Highway Traffic Safety Administration recently issued its first ever whistleblower award.[75] And, as mentioned above, there are proposals to expand further into yet more areas.[76]

But, when it comes to the "case selection problem," whistleblower problems are no silver bullet. As many scholars have pointed out, these programs require public officials to sift through the tips they receive under the program to identify the ones worth pursuing with scarce agency investigatory resources.[77] This challenge becomes more difficult and more time-consuming as the program is more successful in attracting tips. Thus, a very large number of tips received is potentially a bug, rather than a feature.[78] Indeed, the point was made repeatedly in Congress[79] and at the

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[73] https://www.irs.gov/compliance/whistleblower-office. For an early overview, see Michelle Kwon, *Whistling Dixie about the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions*, 29 VA. TAX. REV. 447 (2010).

[74] *See* Giovanni Scarcella, Note, *Qui Tam and the Bank Secrecy Act: A Public-Private Enforcement Model to Improve Anti-Money Laundering Efforts,* 90 FORDHAM L. REV. 1359 (2021).

[75] https://www.nhtsa.gov/press-releases/first-whistleblower-award. *But see* Ben Foldy, *Whistleblower Waits Years For Award,* WALL ST. J. (Apr. 5, 2021) (noting that NHTSA took 6 years to set up the program).

[76] *Supra* note _.

[77] *See* Justin Evans et al., *Reforming Dodd-Frank from the Whistleblower's Vantage,* 58 AM. BUS. L.J. 453, 479 (2021); Amanda Rose, *Calculating SEC Whistleblower Awards: A Theoretical Approach,* 72 VAND. L. REV. 2047, 2064-65 (2019); Rose, *Better Bounty, supra* note _ at 1280, 1282; Casey & Niblett, *supra* note _; Engstrom, *Whither, supra* note _ at 613-16; O'Sullivan, *supra* note _ at 90-91; Victor Razon, Note, *Replacing the SEC's Whistleblower Program: The Efficacy of a* Qui Tam *Framework in Securities Enforcement,* 47 PUB. CONTRACT L. J. 335, 346-47 (2018); COFFEE, CORPORATE CRIME, *supra* note _ at 115-16; Dave Ebersole, Note, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions,* 6 OHIO ST. ENTREPRENEURIAL BUS. L. J. 123, 135-36, 148 (2011); Jenny Lee, Note, *Corporate Corruption & the New Gold Mine: How the Dodd-Frank Act Overincentivizes Whistleblowing*, 77 BROOK. L. REV. 303, 321-22 (2011); Rodrigues, *supra* note _ at 285-86, 302; Skinner, *supra* note _ at 908-09; Westbrook, *supra* note _ at 1165-66.

[78] *See* source cited in prior FN; *see also* Gregory Zuckerman & Dave Michaels, *Whistleblower Inc.,* WALL ST. J. (Dec. 8, 2018) ("Critics say the deluge of those seeking rewards is now overwhelming the system.").

[79] *SEC Oversight: Current State and Agenda,* Hearing before the H. Subcomm. on Capital Markets, H. Rep. 111-57 at 23 (Jul. 14, 2009) (testimony of SEC Chair Mary Schapiro); *Strengthening the SEC's Vital Enforcement Responsibilities,* Hrg. Before the S. Comm. On Banking, S. Hrg 111-175, 70 (Testimony of Mercer

agencies[80] as they were setting up the programs. It runs contrary to the assertion by many WBP supporters who insist that the large number of tips received is a sign of success.[81]

The SEC's whistleblower program is a case in point of the extreme tip-sifting burden, as Figure 3 illustrates. From its inception through Sept. 30, 2021, the WBP received over 52,400 tips. In FY 2021 alone, the agency received close to 12,200 tips – or about 49 per workday. Sifting and investigating those tips presents a massive burden for the relatively small group of staff in OMI. The same limited budget that constrains the agency's traditional public enforcement program also constrains its ability to investigate those tips.[82] Under the Freedom of Information Act, I obtained a list of all SEC employees that have been assigned to OMI from 2011 through 2021. As Figure 2 shows, only 30-50 SEC staff have been assigned

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Bullard); *Strengthening Investor Protection,* Hearing Before the Comm. On Fin. Servs. H. Rep. No. 111-84 at 33 (Oct. 6, 2009) (testimony of Denise Crawford, NASAA).

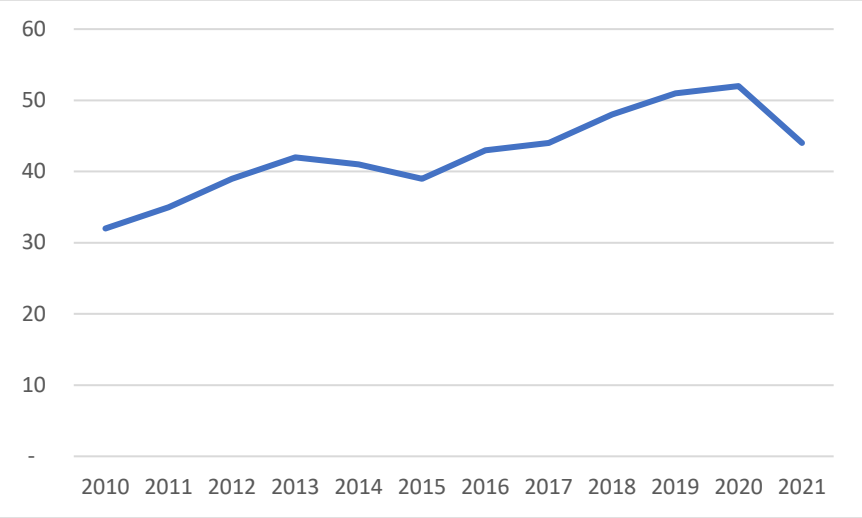
[80] SEC Comm'r Troy Paredes, *Statement at Open Meeting to Propose Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934* (Nov. 3, 2010); SEC Comm'r Kathleen Casey, *Adoption of Rules for Implementing the Whistleblower Provisions of 21F of the Securities Exchange Act of 1934* (May 25, 2011); SEC Comm'r Troy Paredes, *Statement at Open Meeting to Adopt Final Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Act of 1934* (May 25, 2011).

[81] *E.g.*, Comm'r Allison Herren Lee, *June Bug vs. Hurricane: Whistleblowers Fight Tremendous Odds and Deserve Better* (Sept. 23, 2020) ("The value of the program is evident from the staggering volume of tips we receive . . . ."); Comm'r Kara Stein, *Statement on Proposed Amendments to the Commission's Whistleblower Program Rules* (Jun. 28, 2018) (similar); Comm'r Hester Peirce, *Statement on Proposal to Revisit Recently Adopted Whistleblower Rule Amendments* (Feb. 10, 2022) (similar); Compl. ¶ 2 Thomas v. SEC, 21-cv-108 (DDC, Jan. 13, 2021) [hereinafter: "Compl., *Thomas v. SEC*"] (similar); SEC OWB FY2021 Report to Congress (similar); CFTC Chair Christopher Giancarlo, *Testimony before the H. Comm. On Appropriations* (Mar. 7, 2018) (asserting that recent reforms to the whistleblower program "are working" because "In FY 2017, the Commission received a record number of whistleblower reports—nearly twice as many as in any other year, and FY 2018 is on track to receive nearly twice as many as in FY 2017."); Sen. Chuck Grassley, *We Need To Save The CFTC Whistleblower Program From Financial Shortfall* (Mar. 2, 2021) (noting that "Whistleblowers have been approaching the [CFTC] to report actionable claims of wrongdoing in far greater numbers, and its whistleblower program has grown at a much faster rate than Congress expected when we created it back in 2010" and declaring this to be a sign of the program's success).

[82] Keefe, *supra* note _; SEC Roundup, Episode 17: Discussing SEC's Whistleblower Program with Jordan Thomas (Mar. 1, 2022) https://www.youtube.com/watch?v=LunjVsWUHPs.

to that tip-sifting function during that time period – a small team to handle this volume.

Figure 2: SEC Staff Assigned to OMI[83]



The CFTC has received a total of 4,599 tips through September 2021. As Figure 4 shows, the larger volume of tips received by the SEC exceeds the larger amount of enforcement resources available to that agency.

[83] This does not account for any non-SEC staff assigned to OMI during this period. I have a separate FOIA request pending for this information.

Figure 3: Tips Received[84]

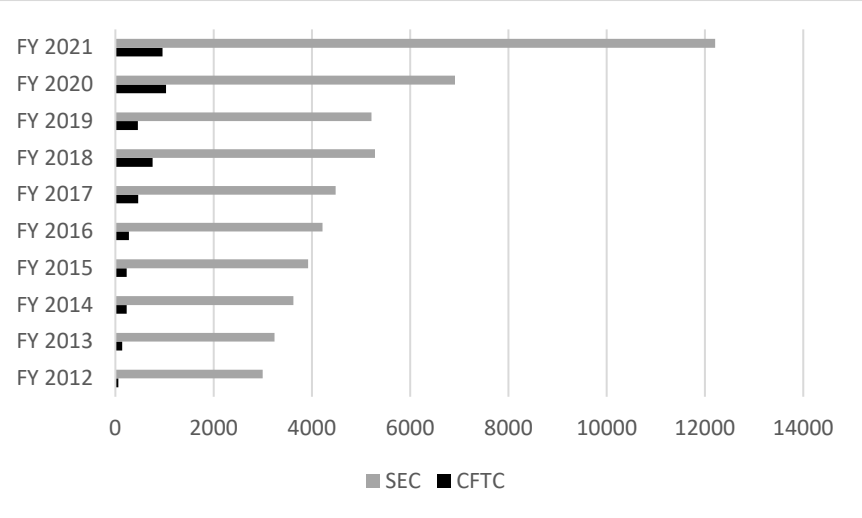
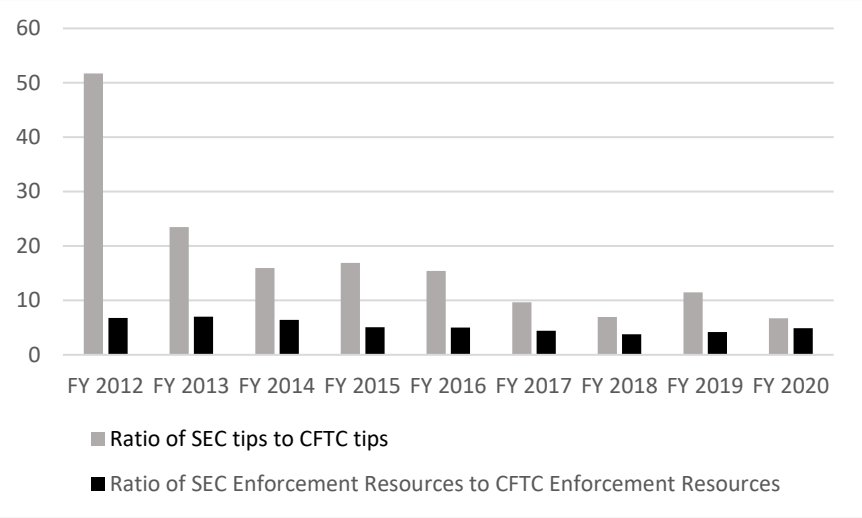


Figure 4: WB Tips and Enforcement Resources



Ideally, agencies could tweak formal aspects of whistleblower programs to encourage high-quality tips, discourage low-quality ones, and/or facilitate the government's ability to easily distinguish between the two.[85] Unfortunately, the toolkit of formal whistleblower program design does not offer any easy solutions.

WB Benefits – Whistleblower programs motivate individuals to come forward with information by offering "bounties" – financial rewards for actionable information. Substantial financial rewards

[84] SEC OWB FY 2021 Report to Congress; CFTC Annual Reports.

[85] Niblett & Casey, *supra* note _ at 1189; Rose, *Calculating*, *supra* note _ at 2065; Engstrom, *Whither, supra* note _ at 613.

are necessary to attract high quality tipsters to come forward.[86] In many cases, the individuals with access to the best information about misconduct are very senior executives. For these individuals, only the prospect of an extremely large payout will be sufficient to motivate them to come forward – both because they already have substantial wealth (so the marginal benefits of small rewards are less significant) and because they stand to lose a great deal from turning on their employer.[87]

Unfortunately, however, the prospect of a large payout also may attract many lower quality tipsters. Submitting a tip becomes like buying a lottery ticket – a relatively cheap upfront investment with a very limited prospect of a massive win.[88] To the extent high payouts encourage more low-quality tips, they may actually *undermine* the efficacy of the program.[89]

The result is a seemingly no-win situation.[90] Increase the magnitude of payouts and you may attract more low-quality tips, dilute the overall quality of tips submitted, increase the costs of sifting through them, and arguably even increase the level of underlying fraud. Decrease the payouts, and you may lose the best quality tips from high-income, high-access individuals, who are no longer going to be incentivized to risk their livelihood to expose misconduct, and therefore also potentially increase the level of underlying fraud.

WB Protections **–** Another key feature of whistleblower programs are provisions that limit the costs whistleblowers face from their employers for reporting out violations. For instance, programs may enable tipsters to submit tips anonymously and provide legal antiretaliation protections including private rights of

[86] *See* Evans et al., *supra* note _ at 474.

[87] *E.g.*, Jackson, *supra* note _.

[88] Rose, *Calculating, supra* note _ at 2067 n.97; Casey & Niblett, *supra* note _ at 1196; Rapp, *Mutiny, supra* note _ at 122; Justin Blount & Spencer Markel, *The End of the Internal Compliance World as We Know It, or An Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting Under the Dodd-Frank Act's Whistleblower Provision*, 17 FORDHAM J. CORP. & FIN. L. 1023, 1041 (2012); Yehonatan Givati, *Of Snitches and Riches: Optimal IRS and SEC Whistleblower Awards,* 55 HARV. J. LEGIS. 105, 124-25 (2018).

[89] *See* Rose, *Calculating, supra* note at 2065; Casey & Niblett, *supra* note _ at 1186; Lee, *supra* note _.

[90] Engstrom, *Whither, supra* note _ at 613.

action.[91] Just like the prospect of a high financial payout, these protections are understood as a key pre-requisite to attract high-quality tips.[92] A high-level executive with unique access to information about corporate misconduct may only be willing to come forward if she can do so anonymously and with a strong legal protection against retaliation by her employer.[93]

But again, these same protections also tend to attract low-quality tips.[94] An employee who is on the verge of being fired for legitimate reasons may attempt to manufacture an antiretaliation lawsuit by submitting a phony tip. Less extreme, an employee with borderline information about borderline conduct may err on the side of submitting the tip if she can do so anonymously.[95]

So, again, there is a seemingly no-win situation: reducing anonymity or antiretaliation protections, and programs risk losing the best quality tips. Increase the same, and programs may be

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[91] Evans et al., *supra* note _ at 474-75. For an argument in favor of expanding anti-retaliation protections in the WBPs, see Leora Eisenstadt & Jennifer Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 699 (2018).

[92] Casey & Niblett, *supra* note _ at 1200.

[93] *But cf.* Scott Patterson & Jenny Strasburg, *Source's Cover Blown By SEC,* WALL ST. J. (Apr. 25, 2012) ("SEC officials said there is ***always*** a risk a whistleblower's identity might be disclosed during an investigation . . . ."); *The SEC Whistleblower Program*, FRAUD IN AMERICA PODCAST 41:00 (Oct. 2021) https://www.fraudinamerica.com/podcast/episode/209eb13c/the-sec-whistleblower-program [hereinafter: "FRAUD IN AMERICA PODCAST"] (statement of former SEC WB chief and current WB lawyer Sean McKessy, noting that, in practice, there is no guarantee that a whistleblower will remain anonymous). For proposals to expand WBP protections, see Pacella, *Making Whistleblowers Whole, supra* note _, and Nizan Packin & Benjamin Edwards, *Regulating Culture: Improving Corporate Governance with Anti-Arbitration Provisions for Whistleblowers,* 58 WM. & MARY L. REV. ONLINE 41 (2017).

[94] Casey & Niblett, *supra* note _ at 120; *cf.* Jonathan Macey, *Getting the Word Out about Fraud: A Theoretical Analysis of Whistleblowing and Insider Trading*, 105 MICH. L. REV. 1899, 1937-38 (2007) ("disgruntled former employees, especially those who have been terminated, are likely to bring whistleblower complaints in order to try to obtain reinstatement and/or back pay" or simply to "exact revenge"); *see also* DONALD LANGEVOORT, SELLING HOPE, SELLING RISK 100 (2016) ("ex-girlfriends and ex-spouses seem especially motivated to share their stories"); Heidi Hansberry, Comment*, In Spite of Its Good Intentions, the Dodd-Frank Act Has Created an FCPA Monster,* 102 J. CRIM. L. & CRIMINOLOGY 195 (2012); Lucienne Hartmann, Comment, *Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd-Frank Act and the Emergence of 'Greedy,' the Eighth Dwarf,* 62 MERCER L. REV. 1279 (2011).

[95] Casey & Niblett, *supra* note _.

flooded by low-quality tips that make it more difficult for the agency to find the good ones.

WB Sanctions **–** Another possible design mechanism is the imposition administrative sanctions or other penalties on individuals who submit undesired tips.[96] These sanctions range from bars from submitting successive tips, to monetary penalties, to criminal prosecution for perjury. Each of these holds some promise for the task of deterring bad tipsters without deterring good ones.

However, there are two problems. First, there is the same fundamental challenge of avoiding over- and under-deterrence. If the penalties are too severe and too broadly applicable, the agency may chill good whistleblowers from coming forward. If the penalties are too weak or too narrowly applied, these sanctions will fail to curb the flow of bad tips. Second, these sanctions are, themselves, costly to implement. In order to impose any of these sanctions, the responsible agency must construct some administrative process – likely involving some kind of rulemaking, investigations, adjudication, appellate rights, etc. The costs of implementing all of this come out of the same, limited, budget.[97]

Perhaps for these reasons, agencies have made only scarce use of direct sanctions against WBs. In 2020, the SEC adopted a new rule authorizing the agency to permanently bar individuals from submitting further applications for awards who submit too many frivolous award applications.[98] To date, however, the SEC seems to have imposed permanent bars on just two individuals.[99] And, in any case, the mild nature of the sanction at issue – a bar from participating in the program – is unlikely to deter others from frivolous filing: On the upside, they still have the remote chance of a potential win; on the downside, they face, at worst, the prospect of being excluded from the program.

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[96] *Id.* at 1204-06.

[97] *Id.* at 1204. *But see* Lund & Sarin, *supra* note _ at 328-29 (expressing optimism that various features of the WBPs "somewhat check the rate of false positives").

[98] SEC, *Whistleblower Program Rules,* 85 Fed. Reg. 70,898 (2020).

[99] SEC, Press Release, *SEC Bars Two Individuals from Whistleblower Award Program* (Sept. 28, 2021); *see also* SEC, OWB FY 2021 Report at 21.

Sifting Budget – Another design mechanism would be to simply allocate more resources to the task of sifting through tips.[100] More resources would give the agency more person-hours, or more sophisticated technology to sift through the new tips. But there are limits to this as well. This would either involve more appropriations or reallocation within the agency's budget away from other priorities. There are familiar practical and political limits to both.

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The toolkit of formal whistleblower program design does not provide any easy fixes for the case selection challenge. But there are other possible mechanisms outside that toolkit that may shape agency sifting of tips.[101] The remainder of this paper focuses on one of these: the private lawyers who help whistleblowers file their tips with agencies.

II. THEORY: PRIVATE WHISTLEBLOWER LAWYERS AND CASE SELECTION

Whistleblower lawyers have dominated public discourse related to the WBPs. Many of these lawyers helped draft the Dodd-Frank whistleblower legislation and/or the initial rules for the program.[102] Whenever the SEC of CFTC has proposed new or amended rules for

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[100] *E.g.*, Mary Kreiner Ramirez, *Whistling Past the Graveyard: Dodd-Frank Whistleblower Programs Dodge Bullets Fighting Financial Crime*, 50 LOYOLA U. CHI. L. REV. 617, 648-51 (2019).

[101] Many have called for one external change: shifting to a qui tam regime. *E.g.*, Casey & Niblett, *supra* note _ at 1202; Rose, *Better Bounty*, *supra* note _; O'Sullivan, *supra* note _; Evans et al., *supra* note _ at 500; Ramirez, *supra* note _ at 664; Brandon Nathaniel Garrett, *Dodd-Frank's Whistleblower Provision Fails to Go Far Enough: Making the Case for a Qui Tam Provision in a Revised Foreign Corrupt Practices Act,* 81 U. CIN. L. REV. 765 (2012); Razon, *supra* note _ at 337. Congress directed the SEC OIG to specifically evaluate this possibility. *See* Dodd Frank § 922(d)(1)(G). The OIG report recommended against it. SEC, OIG, *Evaluation of the SEC's Whistleblower Program* (Jan. 13, 2013) Rept. No. 511.

[102] Kohn Kohn & Colapinto [hereinafter: KKC], SEC Whistleblower Attorney, https://kkc.com/whistleblower-services/sec-whistleblower-attorney/ ("helped write and modernize whistleblower rules"); SEC Whistleblower Advocates, Jordan Thomas, https://secwhistlebloweradvocate.com/our-attorneys/jordan-thomas/ ("principal architect"); Constantine Cannon, Eric Havian, https://constantinecannon.com/attorney/eric-r-havian/ ("actively involved in the legislation"); Phillips & Cohen, Sean McKessy https://www.phillipsandcohen.com/attorney/sean-x-mckessy/ ("principal architect"); Meissner Associates, https://www.secwhistleblowerattorney.net ("involved").

the program, these lawyers are first in line to file comments,[103] lobby commissioners,[104] and sue to shape the program in line with their interests.[105] And these private actors also dominate public dialogue regarding WBPs through universally favorable media coverage,[106]

[103] SEC, *Comments on Proposed Rule: Amendments to the Commission's Whistleblower Program Rules* https://www.sec.gov/comments/s7-16-18/s71618.htm (listing comments on WBP rule changes from KKC LLP, Phillips & Cohen LLP, Cohen Milstein PLLC; Wampler Buchanan PA, National Whistleblower Center, and the Whistleblower Law Collaborative LLC); CFTC, *Comments for Proposed Rule 81 FR 59551* (listing comments on 2017 amendments to WBP rules from GS2 Law and Stephen Kohn).

[104] SEC, *Comments on Proposed Rule: Amendments to the Commission's Whistleblower Program Rules* https://www.sec.gov/comments/s7-16-18/s71618.htm (noting numerous meetings between Commissioners and SEC whistleblower lawyers from KKC LLP; National Whistleblower Center; Zuckerman Law Firm; Labaton Sucharow; Phillips & Cohen); Letter from KKC LLP to Jay Clayton, *re: Amendments to the SEC's Whistleblower Program Rules* (Jul. 24, 2018) at 2 (listing 7 meetings between KKC attorneys and SEC officials between January and March 2011 regarding the new whistleblower program rules).

[105] *See* Compl., *Thomas v. SEC, supra* note _.

[106] *E.g.,* Keefe, *supra* note _; Jacob Goldstein, *The Whistleblower Whisperer*, NPR PLANET MONEY PODCAST (May 29, 2019); Randall Smith, *Once an SEC Regulator, Now Thriving as a Lawyer for Whistle-Blowers,* N.Y. TIMES (Mar. 20, 2018); Gretchen Morgenson, *SEC's First Whistle-Blower Chief Will Join a Washington Law Firm,* N.Y. TIMES (Sep. 6, 2016); *Labaton Partner Jordan Thomas on the SEC's Whistleblowing Program and See Something, Say Something,* CORPORATE CRIME REPORTER (May 14, 2015); Stacey Vanek Smith, *Whistleblower Protection Program,* THE INDICATOR FROM PLANET MONEY, NPR (Mar. 29, 2022); *How Corporate Whistleblowers Make Millions* CNBC, (Nov. 11, 2019) (TV segment featuring whistleblower attorneys); https://kkc.com/our-whistleblower-law-firm/our-whistleblower-lawyers/stephen-m-kohn (listing media appearances on many TV shows).

frequent public appearances,[107] op-eds,[108] blogs,[109] academic articles,[110] amicus briefs,[111] practice guides,[112] law school

[107] SEC Enforcement Forum 2020, *Panel on Whistleblower Update – The Impact on Corporations and SEC Enforcement (*Oct. 28, 2020); Francesca Comyn, *Mutiny and the Bounty: The Long Reach of US Regulators,* THE CURRENCY (Dec. 10, 2021); Rock Center Lunch Event: Whistleblowers, Ethics and Compliance (Jan 2021) https://www.youtube.com/watch?v=6oO3vxh_Ss4&t=25s; Anti-Corruption Law Program's Roundtable Discussion on Whistleblowing: Protections, Abuses, and Reporting Systems (Peter A. Allard School of Law (UBC) (May 28, 2021); FORBES 30 UNDER 30 CONFERENCE, *Whistleblowers & Corporate Accountability* (Nov. 15, 2019) https://www.forbes.com/video/6104539762001/whistleblowers--corporate-accountability--under-30-summit-2019/?sh=483d2394e266; *The SEC and CFTC whistleblower reward programs*, BERKELEY BOOSTS EXECUTIVE EDUCATION (Aug. 2, 2021) [Hereinafter: "BERKELEY PANEL"] https://www.youtube.com/watch?v=j2GyHTrfNTE; *see also* Keefe, *supra* note _ (describing frequent speaking engagements of prominent SEC whistleblower lawyer).

[108] Jason Zuckerman & Matt Stock, *One Billion Reasons Why the SEC Whistleblower-Reward Program Is Effective*, FORBES (Jul. 18, 2017); Jordan A. Thomas, *"Impossible Position" for Corporate Fraud Gatekeepers,* CFO.COM (Mar. 15, 2018); Sean McKessy, *SEC's Misguided 'Solution' in Search of a Problem: Proposed Rule Would Hurt Whistleblower Program,* NYU PROGRAM ON CORPORATE COMPLIANCE AND ENFORCEMENT (Jan. 31, 2019); Rebecca M. Katz & James M. Weir, *Plaintiffs' Perspective: The SEC's Final Rules for Whistleblowers Offer a Balanced Approach to an Important New Program*, SECURITIES LITIGATION REPORT (July/Aug. 2011); Stephen Kohn, *Will the SEC's Proposed Whistleblower Rules Undermine the Deterrent Effect of the Dodd-Frank Act?*, NAT. L. REV. (Aug. 19, 2020); Erika A. Kelton & Eric R. Havian, *Whistle Stop,* N.Y. POST (Feb. 27, 2011).

[109] WHISTLEBLOWER PROTECTION LAW AND SEC WHISTLEBLOWER AWARDS BLOG https://www.zuckermanlaw.com/whistleblower-protection-law-blog/; FRAUD IN AMERICA BLOG https://www.fraudinamerica.com/blog.

[110] Evans et al., *supra* note _ (academic article on the SEC WBP co-authored by two SEC whistleblower attorneys and based on interviews with numerous other whistleblower attorneys); Tanya Marcum & Jacob Young, *Defining the Whistleblower: The Digital Realty Case and Proposed Legislation,* 26 RICHMOND J. L & TECH. 1 (2020) (academic article on WBPs "supported by . . . the National Whistleblower Center," an organization founded and led by private whistleblower lawyers); Richard Moberly et al., *De Facto Gag Clauses: The Legality of Employment Agreements that Undermine Dodd-Frank's Whistleblower Provisions,* 30 ABA J. LAB. & EMP. L. 87 (2014) (academic article on WBP coauthored by two whistleblower lawyers).

[111] Br. for the NWC et al. as Amici Curiae, *Digital Realty Trust, Inc. v. Somers,* 16-1276 (U.S.); Br. of TAFEF as *Amicus Curiae*, 16-1276 (U.S.); Br. of Amicus Curiae NWC, No. 12-3 (U.S. Aug. 7, 2013).

[112] KMB Legal, SEC Whistleblower Practice Guide, https://www.kmblegal.com/sites/default/files/SEC-Whistleblower-Practice-Guide.pdf; STEPHEN KOHN, THE WHISTLEBLOWER'S HANDBOOK (2017); SEC WHISTLEBLOWER ADVOCATES, THE SEC WHISTLEBLOWER HANDBOOK

teaching,[113] congressional advocacy,[114] and even a "national whistleblower day."[115]

Notwithstanding their ubiquity in public debates on the WBPs, these attorneys have managed to escape critical scrutiny. Most scholars ignore the role of private whistleblower lawyers in WBPs. Others expressly minimize their role.[116] Still others have adopted an optimistic view of their role – the core idea is that these attorneys' interests and incentives align perfectly with their clients and society at large, and that they will play a positive role by screening out bad cases, performing useful investigation, fact-gathering and legal analysis, and shepherding clients through the process, and then are fairly rewarded for their efforts.[117]

The truth, however, is more complicated. As a theoretical matter, it is impossible to know whether private whistleblower lawyers are mainly **adding** value to the program – or **extracting** it. This part outlines five different channels private whistleblower lawyers may impact tip sifting: (A) by providing additional fact development, external validation, and legal analysis along with the submitted tips; (B) by making tips of varying quality superficially more attractive to the agency; (C) by increasing or decreasing the

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https://secwhistlebloweradvocate.com/pdf/SEC_Whistleblower_Program_Handbook.pdf.

[113] Erika Kelton, *Phillips & Cohen* (describing courses she has taught on whistleblower law at NYU and Berkeley Law); David Chase, Adjunct Faculty, U. Miami School of Law, https://www.law.miami.edu/faculty/david-chase

[114] *Putting Investors First: Examining Proposals to Strengthen Enforcement Against Securities Law Violators,* hearing before the H. Fin. Servs. Comm. (Jun. 18, 2019) (testimony of Jordan A. Thomas*)*; Rubenfeld, *supra* note _ (noting whistleblower attorney "working with Sen. Chuck Grassley" on legislation regarding the WBP); Chuck Grassley, Press Release, *Grassley, Warren Work To Strengthen SEC Whistleblower Program* (Mar. 31, 2022) (press release from Senators Warren and Grassley announcing new legislative proposal quoting whistleblower lawyer); *infra* note _ (collecting whistleblower lawyer statements that they helped draft the legislation authorizing the WBPs).

[115] https://www.nationalwhistleblowerday.org.

[116] COFFEE, CORPORATE CRIME, *supra* note _ at 118 ("The real difference between the whistle-blower and the relator . . . is that the plaintiff's lawyer plays a much larger role in a qui tam action."); Casey & Niblett, *supra* note _ at 1203 n.130 (predicting that "the role of contingency fee lawyers will not be nearly as important in the [WBPs]" as compared to the False Claims Act context); *cf.* Dorothy Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study,* 100 TEX. L. REV. 285 (2021) (claiming that law firms "have begun to advise whistleblowers to file complaints in the past few years").

[117] *Infra.*

aggregate volume of tips submitted; (D) by altering the substantive characteristics of the pool of tips that are submitted; and (E) by leveraging reputational effects and signals to get their tips more attention. Each of these channels has potential costs and benefits on the overall tip-sifting process.

This theoretical analysis complicates the rosy story often told about the impact of whistleblower lawyers on the tip-sifting process. It also points directly toward the urgent need for empirical study of these lawyers and their impacts.

A. Tip Quality

Whistleblower lawyers can improve the quality of the tips the agency receives by investing their own resources up front to investigate tips and including independent verification, expert opinions, fact gathering or other providing indicia of credibility along with the tip to the agency.[118] Lawyers can encourage and guide tipsters to collect factual information by secretly taping phone calls or meetings with culpable personnel, obtaining documents without permission, and otherwise.[119] Relatedly, the lawyer may perform a complete **legal** analysis of the tip, including detailed comparisons between the strength and nature of the particular allegations and evidence gathered in this case and that relied upon in prior cases settled or adjudicated by the agency. A tip that includes such independent verification, factual documentation, or legal analysis, may reasonably be treated by the agency as more deserving of its scarce attention.[120]

This seems like a salutary effect. The agency is effectively outsourcing some of its up-front investigative and analytical burden

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[118] O'Sullivan, *supra* note _ at 103; Rapp, *Mutiny, supra* note _ at 121; Gregory Christopher Rapp, *Legislative Proposals to Address the Negative Consequences of the Dodd-Frank Whistleblower Provisions: Written Testimony Submitted to the U.S. House Committee on Financial Services,* University of Toledo Legal Studies Res. Paper No. 2011-02; Skinner, *supra* note _ at 919; Engstrom, *Whither, supra* note _ at 614 n.25; Rodrigues, *supra* note _ at 283; *see also* Keefe, *supra* note _ (describing case where an elite whistleblower lawyer had a client's scientific papers reviewed by "ten prominent experts" including a Nobel Laureate).

[119] *Infra* Part IV.C.3.

[120] *See* O'Sullivan, *supra* note _ at 103 (quoting SEC official stating that the "quality of tips has increased with more detail and greater supporting documentation due to the fact that a greater percentage of tipsters are hiring lawyers to help them out.").

to these entrepreneurial private attorneys, and everyone benefits from their efforts.[121]

But there are some potential downsides. As discussed in the next section, it may be possible to provide seemingly credible external verifications or legal analysis for mediocre tips. If so, the attractive "packaging" for the tip may actually make it *more* costly for the agency to determine that it is, after all, not worth pursuing. Moreover, a high-quality tipster might *NOT* want to secure additional documents or direct evidence: perhaps it is too costly or risky that the individual will be exposed. And to the extent the agency is relying on costly external validation, investigation or analysis, as a prerequisite for serious investigation, it may be wrongly overlooking fundamentally strong and socially important tips that lack such things – because they were filed by unrepresented tipsters, or tipsters represented by less well-resourced counsel who cannot afford to invest so much up front, or tipsters who are unwilling to take on the costs and personal risks needed to gather the necessary additional factual evidence (and maybe had assumed the government would be able to do so through its own formal processes).

The ongoing communication between a private whistleblower lawyer and the agency enforcement attorneys during an open investigation may also tend to transform the attorney's whistleblower client into a kind of undercover agent – operating under the indirect direction of the government to gather particular information on a target outside the bounds of ordinary investigatory processes and rules.[122] As discussed below, this potential raises serious questions about whether the whistleblower program is being used to circumvent constitutional and other legal protections that ordinarily apply to government investigations.[123]

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[121] *E.g.*, Rose, *Better Bounty*, *supra* note _ at 1280-81; O'Sullivan, *supra* note _ at 99-102; David Becker, *What More Can Be Done To Deter Violations of the Federal Securities Laws?,* 90 TEX. L. REV. 1849, 1888 (2012); *see also* Zuckerman & Michaels, *supra* note_ (quoting SEC whistleblower lawyer: "The program has established the equivalent of an auxiliary fire department.").

[122] This concern was flagged at the outset. *See* Letter from Covington & Burling et al. to Elizabeth Murphy (SEC) (Dec. 17, 2010) *re: Proposed Rules for Implementing the Whistleblower Provisions* at 11; Letter from Arent Fox to Elizabeth Murphy (SEC) *re: File No. S7-33-10* at 1 (Dec. 15, 2010); Letter from Association of Corporate Counsel to Elizabeth Murphy (SEC) *re: Proposed Rules for Implementing the Whistleblower Provisions of Section 21F* (Dec. 17, 2010).

[123] *Infra* Part IV.A.

B. Tip Presentation

Attorneys may superficially shape tips in a manner that makes them more attractive to their agency audience. A savvy whistleblower lawyer may keep apprised of the agency's ever-vacillating enforcement priorities and know how to "sell" a given tip to agency reviewers by choosing which possible underlying violations to emphasize in the presentation based on which violations are at the top of the current administration's priority list.[124] More broadly, skilled whistleblower lawyers may understand various preferences of the agency – in presentation, organization, support, style, communication patterns – and make sure that the superficial presentation of their client's tip reflects all of these aspects in order to maximize the chances of being heard.[125]

All of this is obviously beneficial to the tipster who hires the skilled professional. Yet, it imposes a social cost: a high-quality tip with the wrong presentation may be ignored in favor of a lower-quality tip with better presentation. Again, this may mean that high quality tips will be ignored because they are filed by unrepresented tipsters or tipsters with less well-experienced or well-connected counsel.

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[124] Lisa Banks & Michael Filoromo, *The SEC Whistleblower Practice Guide* at 23 (2021 10th ed.) (the best tips are those that "advance the SEC's current enforcement agenda, which is not a constant") https://www.kmblegal.com/sites/default/files/SEC-Whistleblower-Practice-Guide.pdf.

[125] Constantine Cannon SEC Whistleblower Program, https://constantinecannon.com/practice/whistleblower/whistleblower-types/whistleblower-reward-laws/sec/ (visited May 6, 2022) ("Experienced SEC whistleblower lawyers can help whistleblowers submit stronger claims, connecting the whistleblower's evidence with the applicable law to spell out the nature of the wrong in a compelling way to the SEC."); Jason Zuckerman & Mathew Stock, *5 Tips for SEC Whistleblowers to Get SEC Whistleblower Awards*, WHISTLEBLOWER PROTECTION LAW AND SEC WHISTLEBLOWER AWARDS BLOG, https://www.zuckermanlaw.com/5-tips-sec-whistleblowers-lessons-learned-sec-whistleblower-awards/ (Apr. 2, 2022) (stating that they could "write a book" about how to "tailor . . . tips to quickly grab the whistleblower office's attention"); Halperin Bikel PLLC https://www.uswhistleblowerlawyer.com/sec-whistleblower-attorneys/ ("Halperin Bikel lawyers know how to prepare, package and present your case so that it will attract the interest of the federal prosecutors who sift through literally thousands of complaints each year to select the handful they will pursue."); Banks & Filoromo, *supra* note _ at 24 (if SEC "cannot understand your client's submission on a first read, it will not likely end up at the top of the stack"); *see also* FREDERICK LIPMAN, WHISTLEBLOWERS: INCENTIVES, DISINCENTIVES AND PROTECTION STRATEGIES 195 (2012) (suggesting that tipsters who submit a "draft complaint" listing the SEC as plaintiff may have an advantage).

C. Tip Volume

Private whistleblower attorneys may *increase* the overall volume of tips submitted to the agency. These attorneys are entrepreneurial – they are motivated by the prospect of winning an award for one or more of their clients, which they will get to keep a percentage of for themselves. In many cases, attorneys have established practices that are primarily devoted to whistleblower representation. This means their livelihoods depend on achieving successful outcomes. This gives attorneys an incentive to actively go out and seek out potential whistleblowers – through marketing, networking, media appearances and more.[126]

The upshot could be beneficial or harmful for agency tip-sifting. At the top of the market, this creates an entrepreneurial incentive to seek out the best tips, screen out all others, and spend lots of time perfecting the tip and completing expensive external validations of it before submitting it. Down the chain, though, the involvement of entrepreneurial attorneys in this process may tend to actually raise the agency's tip-sifting costs. Some attorneys may develop an assembly line style whistleblower practice, where they seek out and submit as many remotely plausible tips as they can.[127] For instance, one attorney's website advertises that he has "submitted more than 200 cases under the Dodd-Frank reward program";[128] another firm has "more than 100 pending cases";[129] and another lawyer claims to have blown the whistle "hundreds of times" to the SEC.[130]

Attorneys may also depress tip volume by serving as a screening function.[131] A tipster may go to a respected firm for advice. If the

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[126] *Infra* text accompanying notes _ (describing the extensive marketing and publicity efforts of whistleblower lawyers).

[127] Rose, *Better Bounty, supra* note _ at 1290; Jessica Luhrs, Note, *Encouraging Litigation: Why Dodd-Frank Goes too Far in Eliminating the Procedural Difficulties in Sarbanes-Oxley*, 8 HASTINGS BUS. L.J. 175, 182 (2012); *see also* Hearing before the H. Comm. On Fin. Servs. 112-29 at 27 (May 11, 2021) (Statement of Robert Kueppers, Deloitte LLP) (expressing concerns about whistleblower lawyers "soliciting large groups of people who have just been recently laid off and so forth").

[128] Rickman Law Group, https://rickmanlegal.com/ (visited May 6, 2022).

[129] Diana Novak Jones, *Surge in SEC whistleblower awards sparks legal practice boomlet* REUTERS (Feb. 8, 2021).

[130] CNBC, *How Corporate Whistleblowers Make Millions* at 4:00, https://www.cnbc.com/video/2019/11/12/how-corporate-whistleblowers-make-millions.html.

[131] O'Sullivan, *supra* note _ at 99-102; Rapp, *Mutiny, supra* note _ at 121.

firm is reputation-sensitive and advises against moving forward with submitting, the tipster may abandon the effort. However, a firm that declines a case may or may not dissuade the tipster from moving forward with another firm or pro se. Indeed, the first firm may have a practice of actually *referring* tipsters it rejects to other less-demanding firms who will then happily take the case. It is an empirical question as to which effect predominates.

Finally, the involvement of private attorneys may depress tip volume by charging sufficiently high fees and expenses that deter a promising tipsters from coming forward. Whistleblower lawyers typically charge a contingency fee for their services. That is, they agree to do the work up front for no charge, with an understanding that if the tip results in an award, they will get to keep some percentage of that award – reportedly between 30 and 40%.[132] In addition, these whistleblower attorneys may take additional money out of the award to cover the costs of expenses – including the hiring of experts, investigators, and other professionals.[133] A prospective tipster may take this into account when deciding whether the risk of coming forward is worth his time.[134]

D. Tip Characteristics

Beyond the raw volume of tips, whistleblower lawyers may also alter the sort of tips that get passed along to the agency. These private attorneys have financial incentives to take on cases and invest substantially in the subset of cases that they believe are most likely to lead to a sizable award – and to reject cases that do not. For instance, all else equal, whistleblower attorneys may prefer clients with information relevant to already-opened SEC investigations,

[132]KKC LLP, SEC Whistleblower Attorney, https://kkc.com/whistleblower-services/sec-whistleblower-attorney/ (visited May 6, 2022); Keefe, *supra* note _; Lydia DePillis, *The SEC Undermined a Powerful Weapon Against White-Collar Crime,* N.Y. TIMES (Jan. 13, 2021) ("usually about a third").

[133] Silver Law Group, *How Attorney Contingency Fees Work for Whistleblowers* SEC WHISTLEBLOWER LAWYER BLOG (Sept. 14, 2016).

[134] Imagine a tipster who would be willing to incur the risks of coming forward for an expected payday of at least $10. If the tipster knows that 50% of any bounty will go to attorney fees and expenses, the tipster won't come forward unless he expects the agency to issue a bounty of at least $20.

larger companies,[135] and financial services firms,[136] all of which may correlate with a higher likelihood of a payday, but none of which necessarily correlate with socially valuable cases. This may tend to create an echo chamber effect – where the SEC's own general preferences are applied *before* the tip is ever submitted, resulting in some socially important tips never making it to the agency at all.

Further, when a private whistleblower lawyer screens a potential client, their own biases and idiosyncrasies may enter the decision. A lawyer may be less likely to pursue a tip if it implicates substantive areas of the securities laws they are less familiar with, or an area where the lawyer happens to have recently filed a different tip last week, or where they previously filed a much beloved but ultimately failed tip that left a bad taste in their mouth. A lawyer or firm may be less eager to take on a client whose tip deals with certain companies because their spouse, child, friend, or college roommate works or worked there, or because they invest in that company's stock, or because they are a loyal customer of that company, or because they have some sentimental attachment to the company or some other idiosyncratic reason. Perhaps there are entire industries that the lawyer just does not understand (or want to understand) and is inclined to avoid. Perhaps the lawyer has particularly strong relationships with a set of expert witnesses or investigators who all happen to have conflicts of interest that prevent them from working on any matters dealing with certain companies or industries and this leads the lawyer to turn down the case. All of these factors and many others might filter down to the law firm's ultimate decision to not to take on a particular case, regardless of the quality and importance of the underlying tip.

None of this would matter if we could assume that a rejected tipster would invariably find another (less biased) firm to represent them – or file the tip on their own. But we cannot assume this. Some tipsters may rely on expert counsel to evaluate their claims such that

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[135] James Cox et al., *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 8o NOTRE DAME L. REV. 893, 902 (2005); *see also infra* note _ (quoting leading whistleblower attorney averring that, prior to advising his client to submit a tip, he first obtained verification from the agency that it was, indeed, conducting an investigation into the target).

[136] Rosenfeld, *supra* note _ at 170 (reporting that financial services firms were more likely than non-financial services firms to be assessed a civil penalty); *see also* SEC Whistleblower Advocates, https://secwhistleblowerадvocate.com/sec-whistleblower-clients/ (leading WB firm reporting that 66% of its clients are in the financial services sector).

a rejection from one (or two) high quality whistleblower firms who have reviewed the information may lead the tipster to re-evaluate the strength of their claims, and decide that the matter is not worth pursuing further. Further, it takes a great deal of courage for many of these tipsters to risk sharing their information with any outsiders. Any time they share the information, this brings (or may feel like it brings) a heightened risk of being exposed. A tipster who has been rejected by one firm may be discouraged from continuing to shop their case around.

Separately, demographic and cultural characteristics of the whistleblower bar may make certain classes of tipsters more or less likely to place their trust in these lawyers. For instance, if the whistleblower bar is as male-dominated as some other areas of corporate and securities legal practice,[137] and if female whistleblowers are less likely to want to work with and entrust male whistleblower attorneys,[138] this may help explain the (anecdotally) observed rarity of female whistleblowers who have come forward under the SEC's program.[139]

E. Reputational Effects

A final critical way WB attorneys may reduce agency screening costs has nothing to do with the substance of the tip, or the quality

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[137] *E.g.*, Afra Afsharipour, *Women and M&A,* 12 U.C. IRVINE L. REV. 359 (2022) (women are just 10.5% of lead legal advisors for buyers in large M&A deals).

[138] *Cf.* Ethan Michelson, *Women in the Legal Profession, 1970-2010: A Study of the Global Supply of Lawyers*, 20 IND. J. GLOBAL LEG. STUD. 1071, 1103 (2013) ("all available evidence suggests a significant degree of lawyer-client gender homophily, that women lawyers are disproportionately likely to represent women clients"); Christine Beckman & Damon Phillips, *Interorganizational Determinants of Promotion: Client Leadership and the Attainment of Women Attorneys,* 70 ANN. SOCIOLOGICAL REV. 678 (2005) (finding law firms whose corporate clients had female CEOs or legal counsel had a higher growth rate of female partners).

[139] Keefe, *supra* note _ (quoting leading whistleblower attorney as stating "there are so few" female whistleblowers). *But see, e.g.,* Clare Tilton, Note, *Women and Whistleblowing: Exploring Gender Effects in Policy Design,* 35 COLUM. J. GENDER & L. 338, 353-54 (2018) (finding that empirical literature is mixed as to whether women or men are more likely to blow the whistle); Constantine Canon, *Honoring Women Who Have Been Whistleblowers* (Mar. 8, 2021) (listing prominent female whistleblowers); Patricia Sellers, *Are women more likely than men to be whistleblowers?,* FORTUNE (2014); *see also, e.g.*, Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality,* 88 TEX. L. REV. 1151, 1196-98 (2010) (finding, through an experimental psychological study, that men and women responded differently to different types of whistleblowing incentives).

of its presentation, but rather may follow simply from *who* they are.[140]

A generally well-known, and highly respected law firm who submits a tip may provide a useful reputational heuristic for the under-resourced agency enforcement screeners. A firm or lawyer with a good reputation may provide the agency with a good reason to "pull" the tip from the stack and give it a careful review. The agency may assume that the law firm has exercised careful and expert judgment and discretion in determining whether to pass along the tip.[141]

More specifically, there may be a repeat-player effect. A lawyer that has already submitted a tip that has been useful to the agency may be regarded as more likely to submit a high-quality tip going forward.[142] Lawyers or firms who have submitted tips that proved false, misleading or weak may have a harder time getting the agency's attention in subsequent attempts.[143]

Finally, a lawyer who used to work for the agency may be more trusted by the staff, such that when that ex-agency attorney submits a tip, the tip may receive additional attention and credence. There have been numerous reports of attorneys moving from the agency to

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[140] *See* Evans et al. *supra* note _at 478 (reporting from anonymous interviews with program insiders that communication between the SEC and the whistleblower "may be facilitated by personal trust between the government attorney and whistleblower counsel."); FRAUD IN AMERICA PODCAST, *supra* note _ at 19:00 (statement of Sean McKessy) (stating that, when he was in charge of setting up the WBP, he helped "retrain" SEC Enforcement staff to "rethink the way they think about whistleblowers, whistleblowing, counsel for whistleblowers, making sure they understood that these people are assets" and "don't worry about who's going to get paid" and "just focus on the information").

[141] *E.g.*, Hagens Berman, https://www.hbsslaw.com/whistleblower/5-tips-for-chossing-a-whistleblower-attorney ("Your attorney's reputation can make or break your case . . . . We bring a select number of whistleblower cases every year and bring our cases to agencies and prosecutors familiar with our success."); GS2Law, Whistleblower Law, https://www.gs2law.com/whistleblower-law ("All of our whistleblower partners have developed close relationships with the various offices of whistleblower (CFTC, SEC, IRS).").

[142] *E.g.*, https://www.zuckermanlaw.com/sec-whistleblower-lawyers/ ("the SEC is more likely to act on a whistleblower's tip if they receive a compelling submission from an SEC whistleblower law firm that has a track record of successfully representing whistleblowers").

[143] *See* O'Sullivan, *supra* note _ at 105; Rose, *Better Bounty, supra* note _ at 1289-90.

the private whistleblower bar.[144] Clients represented by such attorneys may have an advantage in getting the agency's attention.[145] These lawyers may also have special access to otherwise secret information about the agency's enforcement priorities and particular investigations that can give them a significant advantage over competitors. For instance, one former head of the SEC's whistleblower office – now a private whistleblower lawyer – has leveraged his relationships at the commission to learn about otherwise secret investigations[146] and

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[144] Aruna Viswanatha, *Out of the SEC, Into the Whistleblower Industrial Complex,* WALL ST. J. (Sept. 5, 2016); Smith, *Once an SEC Regulator, supra* note _; Keefe, *supra* note _; Gretchen Morgensen & Emily Glazer, *Wells Kept Client's Fund Fee Rebates,* WALL ST. J. (May 10, 2018); Jenny Strasburg & Scott Patterson, *SEC Faces Questions About Tipster Policy,* WALL ST. J. (Apr. 26, 2012); Jones, *Boomlet, supra* note _; *see also* Platt, *The Non-Revolving Door, supra* note _ at 802-08.

[145] Many firms claim this. *E.g.*, Phillips & Cohen, https://www.phillipsandcohen.com/whistleblower-practice-areas/sec-whistleblower-program-lawyers/ ("No whistleblower law firm knows the SEC whistleblower program better . . . Sean McKessy, a Phillips & Cohen partner who was the first Chief of the SEC Office of the Whistleblower, led the SEC's efforts to set up the program and its policies and processes."); SEC Whistleblower Advocates, https://secwhistlebloweradvocate.com/a-client-first-approach/ ("only former senior SEC prosecutors work on our whistleblower matters" and that "We are proud to offer clients a dream team of legal experts with over 100 years' combined SEC experience overseeing hundreds of successful SEC enforcement actions."); The Law Firm of David Chase, https://www.securitiesfrauddefense.net/practice-areas/sec-whistleblower-representation/ ("The Firm's principal . . . previously served as Senior Counsel in the SEC's Enforcement Division and thus understands the types of cases, the quality of the evidence and the manner in which it needs to be presented to best maximize the chance that the SEC will successfully pursue the case and potentially pay a bounty to the whistleblower."); Motley Rice, https://www.motleyrice.com/attorneys/rebecca-m-katz ("Using her experience as a former SEC attorney and in private practice, Rebecca provides critical, objective legal counsel to those who need knowledge and support to ensure their confidentiality and protection in undertaking the complex and ever-changing whistleblower laws.").

[146] BERKELEY PANEL, *supra* note _ at 1:03:40-1:04:21 (statement of Sean McKessy) ("I've had clients come to me with something where I'm like: 'This has to be – the SEC has to be all in on this.' And I do have the ability to call, you know, in this instance it was a cyber case, and I call the head of the Cyber Unit. And I said: 'I've got somebody who's got what I think is really great information about XYZ entity.' And wouldn't you know it? A couple of days later, I got an email from someone saying, you know: 'I work at the New York office and if you have any information about XYZ, you should send it our way.' And so that was a way for me to confirm my suspicion that this has to be something agency is working on, and then direct it to the right folks.").

even received the SEC's entire investigative file, both to the great advantage of his clients and practice.[147]

These reputational effects are ambiguous. On the one hand, they may effectively improve the efficiency of agency tip-sifting by outsourcing much of the screening work to trusted and expert private entrepreneurial lawyers. On the other hand, they may introduce various distortions into the process – the agency may be attaching more credibility to weaker tips (and overlooking stronger ones) solely based on the reputation of counsel. And they may also be undermining the competition in the market for whistleblower counsel.

III. EVIDENCE: PRIVATE WHISTLEBLOWER LAWYERS IN THE SEC AND CFTC WHISTLEBLOWER PROGRAMS

A. Data and Methodology

Through a series of Freedom of Information Act requests filed beginning in August 2020, I obtained from the SEC and the CFTC a list of all attorneys and law firms that represented successful whistleblowers from the programs' inceptions through 2020. This data provides a unique look "under the hood" at these two highly secretive whistleblower programs. Table 1 presents descriptive statistics for the sample and Figure 5 plots the data over time.

[147] FRAUD IN AMERICA PODCAST, *supra* note _ at 25:40 (former SEC whistleblower chief and current private whistleblower lawyer Sean McKessy, stating that in some cases the SEC enforcement staff is "willing to just turn over their entire file to me and my client to say: 'Can you help us contextualize what we were told by the company?'").

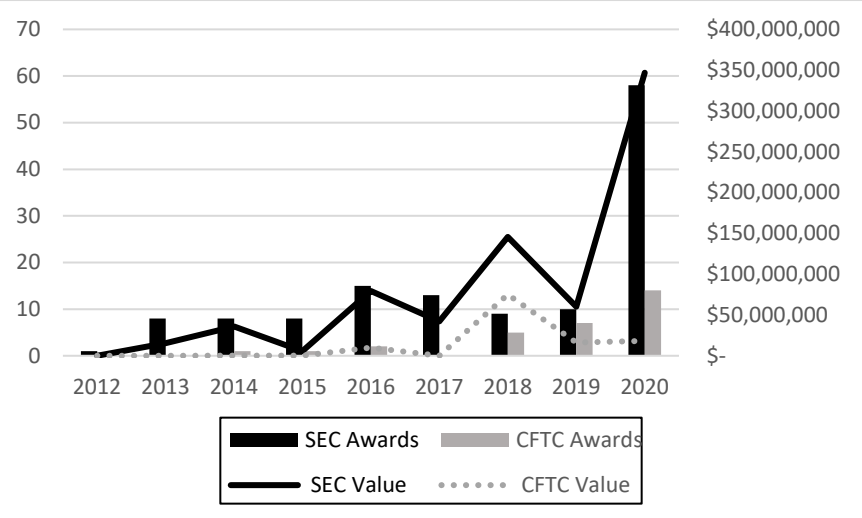
Table 1: Descriptive Statistics

	SEC	***CFTC***
Awards[148]	130	30
Orders[149]	102	26
Aggregate Value	$731,542,027	$120,250,000
Average Award	$6,199,509	$4,008,333
Median Award	$1,500,000	$500,000
Low	$0	$12,500
High	$114,000,000	$30,000,000

[148] Two of the awards disclosed by the SEC had received $0 – presumably because the agency had not been able to actually collect any penalties from the underlying enforcement action because the target went into bankruptcy. Mark Maremont, *Informant Expected Payout, Got Zilch,* WALL ST. J. (Jun. 28, 2021).

[149] Some orders cover multiple awards.

Figure 5: SEC and CFTC Whistleblower Awards Over Time



There are some important limitations. First, from the SEC, I have received complete data for 116 out of the 130 awards in the date range and partial data for the remainder.[150] The agency has withheld the award amounts for 12 pro se awards and the identity of lawyers and law firms for 2 awards. Similarly, from the CFTC, I have received complete data for 26 out of the 31 awards in the sample and partial data for the remaining 5. The CFTC has withheld the identities of five lawyers and law firms.

Second, because the data is limited to tips that led to awards and does not include tips submitted, tips that led to investigations, or tips that led to enforcement actions, it is not possible to draw definite conclusions regarding the relative levels of success.

Third, the data covers the period from the creation of the programs (2011) thru the end of 2020, so any changes since then will not be captured. Given the program's continued growth, including a "record-breaking" year in FY2021,[151] this is a significant limitation. (I have a FOIA request pending with the SEC for all data through the present.)

Fourth, the data includes attorneys and firms who represented whistleblowers at any point in the process. Thus, it is possible that some of these attorneys were retained after the initial tip was submitted and only helped with the award application process. This may affect the analysis in several ways. For instance, attorneys engaged only for the award-application part of the process (and not

[150] For discussion of the FOIA process, see *infra* Part V.B.

[151] SEC OWB FY 2021 Report at 1.

the initial tip-submission) would not exert influence over the agency's initial tip-sifting process and possibly might be compensated differently than attorneys who were engaged for the entire process.

B. The Role of Lawyers

The data confirm that private whistleblower lawyers play a central role in the tip-sifting process. Table 2 shows that the overwhelming majority of awards issued by both agencies go to individuals represented by counsel. And the average award is also much larger for represented tipsters than unrepresented ones.

Table 2: Represented vs. Pro Se

	SEC		**CFTC**	
	Represented	Pro Se	Represented	Pro Se
Awards	87	43	20	10
Aggregate Value	$610,372,500	$120,747,426	$116,050,000	$4,200,000
Average	$7,015,776	$3,908,694	$5,802,500	$420,000
Median	$1,500,000	$1,500,000	$1,750,000	$245,000
High	$114,000,000	$22,000,000	$30,000,000	2,000,000
Low	$0	$45,000	$12,500	25,000

Assuming each of these lawyers charged the standard 30-40% contingency fee,[152] the SEC and CFTC have effectively paid out between $183- $244 million and $35-$46 million, respectively, to attorneys over this period – in both cases, equivalent to about 4-5% of the agencies' respective enforcement budgets during this period.[153]

Bigtime awards, in particular, are especially likely to go to represented by tipsters. Of the 20 awards issued by the SEC for $10 million or more, only 4 went to pro se tipsters. Thus, the

[152] *Supra* note _.

[153] *See* SEC Annual Budget Authorizations FY2014-2022 (providing actual enforcement budgets for FY 2012-2020); CFTC Annual reports. This calculation significantly understates the real costs because it does not include amounts used to pay for expenses and costs, which may be taken out on top of the lawyers' contingency fee. *Supra* note _.

overwhelming majority of the most important whistleblowers are relying on lawyers.

These findings are consistent with the idea that the agency is effectively outsourcing tip-sifting to private lawyers. However, it should be noted that the data cannot definitively prove this is happening. It's theoretically possible, for instance, that the agencies know how to find the good quality tips regardless of whether they are represented by lawyers and that these good quality tipsters just happen to be more likely to hire lawyers. More importantly, even assuming the agencies *are* relying on lawyers to identify and screen tips, these findings cannot establish whether the lawyers are adding positive value to the program by screening for the best quality tips; dressing up mediocre tips in attractive wrapping to get the agency's attention; or capitalizing on their reputation and connections to get their clients' tips put on the top of the pile.

Finally, at first glance, the fact that represented tipsters receive nearly twice as many dollars on average from the SEC as unrepresented ones may seem like a strong signal that lawyers are adding value. But after accounting for fees and costs,[154] the average SEC whistleblower may not be left much better off than his or her unrepresented counterpart.

C. Reputational Effects

Not all law firms are equal when it comes to winning awards from these agencies. Table 3 reports the awards issued to "repeat players" – that is, to firm/lawyers that have *already* successfully won an award. It shows that, for both agencies, both the average award and the median award issued to clients of repeat players is significantly larger than that issued to first-timers.

[154] *Supra* note _.

Table 3: Repeat Players vs. First Timers

	SEC		CFTC	
	Repeat Players	First Timers	Repeat Players	First Timers
Awards	22	54	7	8
Aggregate Value	$226,052,000	$377,920,500	$69,500,000	$44,525,000
Average	$10,275,091	$5,998,738	$9,928,571	$5,565,625
Median	$ 2,950,000	$1,200,000	$9,000,000	$1,000,000
High	$33,000,000	$114,000,000	$15,000,000	$30,000,000
Low	$200,000	$0	$2,500,000	$12,500

The CFTC's program has been dominated by a single dominant repeat player law firm, which has won 7 awards from the CFTC for a total of $77 million, accounting for 65% of all dollars awarded.

Next I examine the effect of the revolving door. First, I reconfirm that many former SEC attorneys appear to be pursuing careers in the whistleblower bar. Twelve different law firms who represented one or more successful whistleblowers included at least one former SEC official.[155] I call these "revolver" firms.

Table 4 shows that whistleblowers represented by a revolver firm account for 30 awards and $176 million – that's about a quarter of <u>all</u> dollars paid under the program. Assuming these lawyers charge the standard 30%-40% contingency fee, the SEC has effectively paid out between $53 million and $70 million to its own alumni. By contrast, none of the successful CFTC whistleblower attorneys formerly worked at that agency.

[155] For ten of these firms, the former SEC official was named as the official lead counsel. For the other two, the former SEC official was not named as lead counsel but was a member of the firm's whistleblower team. *See* next FN.

Table 4: Revolvers vs. Non-Revolvers (SEC Only)[156]

	Revolver	**Non-Revolver**
Awards	30	55
Aggregate Value	$176,740,000	$426,232,500
Average	$5,924,667	$7,749,682
Median	$1,250,000	$1,600,000
High	$33,000,000	$114,000,000
Low	$0	$0

A single dominant "revolver" practice accounts for an overwhelming amount of this effect. Jordan Thomas, who helped establish the SEC's Whistleblower Program and then founded and led a Whistleblower Practice at Labaton Sucharow staffed by numerous former SEC officials,[157] is responsible for 10 awards in my dataset, accounting for $152,575,000 – about 20% of all dollars awarded.

The findings appear consistent with the theory of reputational effects impacting the tip-sifting process. But, again, these findings cannot definitively show that reputational effects are driving these results. It could be that better tipsters find their way to repeat-player or revolving door firms. And, even assuming that these firms actually do better for their clients in some way, it is not possible to tell whether this is because the agency is viewing them more favorably because of their reputations or whether these firms are just more skilled at the work.

[156] I define "revolvers" to include both firms where the specifically named lead counsel is a former SEC official him/herself and firms where someone else within the firms SEC WB practice was a former SEC official. For instance, whistleblowers represented by the law firm Phillips & Cohen received (at least) five WB awards in the sample, all of which list Erika Kelton as the counsel of record. Although Kelton did not work at the SEC herself, her partner Sean McKessy did – he was the first Chief of the SEC's Whistleblower office. Accordingly, for purposes of this analysis, I treat the Phillips and Cohen awards issued after McKessy joined the firm as "revolver" awards.

[157] More recently, and after the period my sample covers, Thomas left Labaton with his colleagues to start his own firm exclusively focused on SEC whistleblower matters. *See* Keefe, *supra* note _; David Thomas, *Labaton's Jordan Thomas Splits to form SEC Whistleblower Law Firm,* REUTERS (Jan. 4, 2022).

Still, the findings show that reputational effects are a real possibility and thus, worth investigating further. While both "repeat player" and "revolving door" effects have benign elements, they also both raise the prospect that the agency is focusing its attention on the wrong tips – ignoring high-quality tips in favor of those submitted by preferred attorneys.[158]

D. Lawyer Characteristics

Female whistleblower lawyers seem to have had little success in these programs. Table 5 reports that clients of lead female lawyers have won 15 awards and $50 million from the SEC, compared to 62 awards and $553 million for clients of lead male attorneys. Only 7 cents of every dollar the SEC has paid out have gone to clients of lead female lawyers. The CFTC's program has been even more lopsided, making only a single award to a client of a lead female attorney. Only ½ a cent of every dollar the CFTC has paid out have gone to clients of lead female lawyers.

[158] The revolving door continues to spin. Constantine Cannon, *Former Regional Director of the SEC's Chicago Office Joins Constantine Cannon's Whistleblower Practice,* (Dec. 8, 2021) https://constantinecannon.com/firm-news/former-regional-director-of-the-secs-chicago-office-joins-constantine-cannons-whistleblower-practice; Viswanatha, *supra* note _ (quoting prominent former SEC official now in private whistleblower practice that "current . . . SEC attorneys now regularly ask me how they can do what I do").

Table 5: Female Lead Lawyers

	SEC		CFTC	
	Female[159]	Male	Female	Male
Awards	15	62	1	14
Aggregate Value	$50,432,000	$553,540,500	$500,000	$113,525,000
Average	$3,362,133	$7,907,721	$500,000	$8,108,929
Median	$750,000	$1,600,000	$500,000	$6,500,000
High	$35,000,000	$114,000,000	$500,000	$30,000,000
Low	$0	$0	$500,000	$12,500

There are some other indications that whistleblower lawyers skew male. The most successful SEC whistleblower firm in my sample consists of ***five*** male attorneys and no female attorneys.[160] The most successful CFTC whistleblower firm in my sample consists of 10 male attorneys and no female attorneys.[161]

If female whistleblowers are more likely to entrust female lawyers,[162] the finding that female whistleblower lawyers have been relatively quiet in these programs raises the possibility that there is an untapped population of female executives with actionable high-quality information about wrongdoing who are not yet coming forward with it because (among other reasons) there is something about the whistleblowing system that is skewing male.

[159] I treat a whistleblower as being represented by a female lead attorney if at least one of the named attorneys is female.

[160] SEC Whistleblower Advocates, Our Whistleblower Team https://secwhistleblowerадvocate.com/our-attorneys/ (visited May 6, 2022).

[161] https://www.gs2law.com/associates-partners (visited June 22, 2022).

[162] *See* sources cited *supra* note _ (discussing lawyer-client gender homophily).

E. Law Firm Characteristics

One theory discussed above is that high-reputation law firms may have an easier time getting the agency's attention in the program – even independent from any *personal* connections with the agency or prior success in the whistleblower program. One group of high-reputation firms are large "white shoe" defense firms. Many of these firms have white-collar practices that specialize in representing high-level executives or insiders – including in many cases where the interests of their client run directly contrary to that of their corporate employer. White-collar defense lawyers often negotiate cooperation agreements for their clients with the government – that involve them essentially giving up information about corporate wrongdoing that helps aid government enforcement or prosecutions in exchange for leniency in their own cases. It is not a huge leap to imagine some white-collar lawyers at these big firms jumping into the whistleblower program – effectively doing the same thing as a cooperation agreement, but without waiting for the government to initiate a prosecution first.

However, as Table 6 reports, big defense firms have not performed well in either program. Only three AmLaw 200 firms won any award from the SEC in the sample period (and one of these awards was $0). At the CFTC, not a single one of these firms from won any awards. This is subject to multiple interpretations: it could be that these prominent "white shoe" firms are failing to win awards because they cannot get the agency's attention for their good tips, because they are submitting weak tips, or because they are not really submitting tips at all. These firms may face real or apparent conflicts that prevent them from participating. They may refer eligible clients to elite whistleblower specialists. In any case, the most prestigious law firms in the country have (so far) not been participating directly in the program.

A number of commentators have predicted or claimed that traditional plaintiffs' side securities litigation firms would take a dominant role in these programs.[163] This turns out to be incorrect. At the CFTC, barely any awards or dollars went to firms listed on the ISS Top 50 (a widely used list of top securities class action plaintiffs' firms). And, while such firms did win 21 awards from the SEC and over $214 million dollars, a single firm – Labaton Sucharow – is responsible for about 75% of this amount. After the sample period, the entire SEC whistleblower practice at Labaton departed the firm to start their own firm. Accordingly, Labaton is unlikely to have much success going forward – and the same goes for the traditional plaintiffs' bar.

By contrast, solo practitioners and very small firms (5 lawyers or less) won 28 awards and $244 million from the SEC, constituting a substantial share of the awards. In this way, whistleblower practice may bear a closer resemblance to ***old-fashioned*** plaintiffs' litigation, which was characterized by small entrepreneurial firms, than modern plaintiffs' litigation, which is dominated by larger institutional players.[164]

Table 6: Law Firm Characteristics[165]

(in thousands of $)

	SEC			CFTC		
	ISS Top 50	AmLaw200	≤ 5 Lawyers	ISS Top 50	AmLaw200	≤ 5 Lawyers
Awards	21	3	28	2	0	1
Aggregate Value	$214,600	$3,000	$244,085	$4,500	$0	$30,000
Average	$10,219	$1,000	$8,717	$2,250	-	$30,000
Median	$1,500	$800	$1,500	-	-	$30,000
High	$50,000	$2,200	$114,000	$2,500	-	$30,000
Low	$38	$0	$130	$2,000	-	$30,000

[163] Engstrom, *Whither, supra* note _ at 614 n.25; Rose, *Better Bounty, supra* note _ at 1299; Joe Palazzolo, *First Comes the Whistleblower, Then Comes the Securities Class Action?,* WALL ST. J. (Nov. 17, 2010).

[164] *See* Ratner, *supra* note _.

[165] All are mutually exclusive except one award which appears on both the ISS Top 50 list and <5 lawyers.

IV. IMPLICATIONS: REEVALUATING PRIVATE WHISTLEBLOWER LAWYERS

Private whistleblower lawyers are serving an essential role in WBPs as informational intermediaries. As explained above, administering WBPs involves a daunting case selection challenge in the form of sifting through tips to determine which ones to pursue and which to ignore, and the mechanisms of formal program design (bounties, protections, etc.) do not offer any easy solutions to this essential challenge. The study above suggests that agencies have turned to the private whistleblower bar to resolve this challenge. At both SEC and CFTC, the overwhelming majority of dollars have been paid to represented tipsters, and average awards at both agencies are also significantly higher for represented tipsters. Well-connected, repeat-player lawyers play an outsized intermediation role. At the CFTC, a single firm accounts for a quarter of awards and two-thirds of all dollars. At the SEC, the top two firms together account for 18 awards and 27% of all dollars paid out. In both, repeat player firms significantly outperform first timers. And at the SEC, firms staffed with former SEC officials outperform others.

The WBPs effectively pay private actors to receive, sift, and investigate whistleblower tips and make recommendations. They are, in other words, classic government outsourcing programs. This Part evaluates the costs of this essential, but heretofore overlooked policy choice to outsource tip-sifting to private actors. I focus primarily on costs, because the benefits provided by private whistleblower lawyers have been well articulated in public debates about the program while costs have been almost completely overlooked. Section A highlights accountability and efficiency deficits caused by this outsourcing. Section B highlights additional costs imposed by this decision by comparing these private attorneys with the private attorneys who drive traditional securities class action litigation.

A. WBPs as Legal Outsourcing

WBPs mobilized private actors (whistleblower lawyers, investigators, and other experts) to perform a function that otherwise might have been performed exclusively by the government: receiving, reviewing, evaluating, and investigating tips from potential whistleblowers. In exchange for their labors, these private intermediaries have received approximately $300 million of funds from the government.

Imagine an alternative universe in which, instead of authorizing the agencies to pay hundreds of millions of dollars to private lawyers and other intermediaries for their tip-sifting services (as the real programs effectively do) Congress appropriated these funds directly to the agencies to expand their tip-sifting departments.[166] The total dollars allocated to bounties *actually* received by successful whistleblowers in this hypothetical regime would be unchanged. The difference is that the preliminary tip-sifting and investigation work would be kept "in house" and done exclusively by public officials, under the direction of agency leaders.

The thought-experiment highlights an important but overlooked policy choice to outsource the tip-sifting function for WBPs to private intermediaries.

There are some good reasons why this policy choice has gone unnoticed for so long. Most generally, it speaks to the deep entrenchment and acceptance of formerly controversial policy design methods of privatization and outsourcing.[167] More specifically, it is the product of a deliberate PR strategy pursued doggedly by whistleblower attorneys to hide the costs they impose on the system.[168] And, finally, it is also likely the result of the fact that keeping the privatization under the radar has allowed the agency to dramatically overstate the efficacy of the program and understate its true costs.

But it's time to face reality. The WBPs have effectively outsourced a substantial part of the tip-sifting function to private intermediaries. This Section leverages this insight to critically reevaluate the role played by whistleblower lawyers. Drawing on the literature on privatization and outsourcing, I highlight the

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[166] Imagine further that, in this alternative regime, private intermediaries were prohibited to be paid more than a nominal fee for filing tips.

[167] Julie Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQ. L. 369, 395 (2016) (describing the "deep capture" by which "industry groups and neoliberal think tanks have worked to shape thought processes about optimal regulatory structure . . ., positioning privatization and competition as core governance strategies"); JON MICHAELS, CONSTITUTIONAL COUP 99 (2017) ("We're all privatizers now.").

[168] For instance, a leading SEC whistleblower attorney has insisted that private whistleblower attorneys give the agency "the benefit of information, materials and expert assistance to investigate and prosecute their cases at ***no additional cost to the commission***." Zuckerman & Michaels, *supra* note_; *see also infra* notes _; *supra* notes _.

significant and too-long overlooked accountability and efficiency they impose.

1. The Accountability Deficit

Scholars have warned that replacing public officials with private actors in performing public functions can weaken accountability.[169] Private actors may be able to circumvent rules that ordinarily apply to their government counterparts regarding transparency,[170] administrative procedure,[171] employment,[172] and constitutional boundaries.[173] And some forms of privatization can also undermine accountability by facilitating agency capture, pay-to-play, or other forms of corruption.[174]

The WBP outsourcing regime seems to be vulnerable to these same criticisms.

Transparency Deficits – Privatization has led agency leaders to repeatedly make misleading statements to Congress and the public. These officials have repeatedly claimed that the aggregate dollar amounts paid out by their agencies in bounties were awarded ***to whistleblowers***.[175] But, as these officials know (or should know), a

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[169] PAUL VERKUIL, OUTSOURCING SOVEREIGNTY 4 (2007); KEVIN KOSAR, CRS REPORT: PRIVATIZATION AND THE FEDERAL GOVERNMENT 10 (Dec. 28, 2006) Jack Beerman, *Privatization and Political Accountability,* 28 FORDHAM URB. L.J. 1507, 1525-26 (2001); Kimberly Brown, *We the People, Constitutional Accountability, and Outsourcing Government,* 88 INDIANA L.J. 1347 (2013).

[170] Alfred Aman & Landyn Rookard, *Private Government and the Transparency Deficit,* 71 ADMIN. L. REV. 437 (2019).

[171] Alfred Aman, *Privatization and Democracy: Resources in Administrative Law,* in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (2009 Minow & Freeman eds.); Nina Mendelson, *Six Simple Steps to Increase Contractor Accountability,* in GOVERNMENT BY CONTRACT, *supra* note _; Van Loo, *supra* note _ at 517.

[172] Jon Michaels, *The American Deep State,* 93 NOTRE DAME L. REV. 1653 (2018).

[173] Gillian Metzger, *Privatization as Delegation,* 103 COLUM. L. REV. 1367 (2003); MICHAELS, *supra* note _; David Rubenstein, *Supremacy, Inc.*, 67 UCLA L. Rev. 1130 (2020).

[174] Beerman, *supra* note _ at 1529, 1537; Lemos, *Privatizing, supra* note _ at 542-46; Paul Starr, *The Case For Skepticism,* in PRIVATIZATION AND ITS ALTERNATIVES (William Gormley ed. 1991) at 31; PAUL LIGHT, THE GOVERNMENT-INDUSTRIAL COMPLEX, 117-18 (2019).

[175] SEC Chair Gary Gensler on SEC Surpassing $1 Billion in Awards to Whistleblowers, YouTube https://www.youtube.com/watch?v=kgwqO5GrDZY (Sep. 16, 2021) ("A total of a billion dollars has been awarded to whistleblowers . . ."); SEC Chair Jay Clayton, *Strengthening our Whistleblower Program* (Sept. 23, 2020) ("we have awarded approximately $368 million to eligible

very substantial portion of these funds went to private intermediaries, not whistleblowers. By ignoring the substantial intermediation costs of outsourcing, these officials likely overstate the magnitude of bounty payments *actually* paid to whistleblowers – and thus the efficacy of the program.

Similarly, the SEC routinely emphasizes the fact that whistleblowers have "conserved SEC time and resources."[176] Once the true costs of intermediation are factored in – i.e., the hundreds of millions of dollars that the SEC is paying *not* to whistleblowers but to private lawyers, experts, investigators, etc – it is much less clear whether SEC resources have truly been conserved or whether this is really just a kind of accounting trick, where the real costs are kept "off the books."

And, when SEC and CFTC make extensive annual financial reports to Congress, detailing their expenditures and explaining their plans for the future, the hundreds of millions of dollars that have paid for the private intermediation of whistleblower tips does not appear anywhere in these budget reports. No one is being held accountable for the expenditure of these funds because they are effectively invisible.[177] Privatization has not allowed the government to avoid paying for tip-sifting; it has allowed the government to avoid admitting that it is paying for these services – and likely overpaying for them.

The government's failure to recognize the financial implications of whistleblower lawyers for WBPs may be attributable in part to these lawyers' savvy efforts to hide the true costs of their work from

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whistleblowers"); SEC Chair Mary Jo White, *A New Model for SEC Enforcement: Producing Bold and Unrelenting Results* (Nov. 18, 2016) ("We recently surpassed the $100 million mark for awards to whistleblowers"); SEC OWB Annual Report FY 2021 at 1 (statement of OWB Acting Chief Emily Pasquinelli) ("SEC has awarded more than $1.1 billion to 214 individuals . . ."); SEC OWB Annual Report FY 2020 at 2 (statement of OWB Chief Jane Norberg) ("the Commission has awarded approximately $562 million to 106 individuals"); SEC OWB Annual Report FY 2015 at 1 (statement of OWB Chief Sean McKessy) ("The Commission has paid more than $54 million to 22 whistleblowers . . . ").

[176] SEC, Press Release, *SEC Whistleblower Program Ends Record-Setting Fiscal Year With Four Additional Awards* (Sept. 30, 2020).

[177] *See* PAUL LIGHT, THE TRUE SIZE OF GOVERNMENT 2-9 (1999) (discussing the "illusion of smallness" created by privatizing and outsourcing, which allow "presidents to claim that the era of big government is over" and advantages both the executive and the legislative branches, but effectively creates a "shadow" government of less accountable private actors doing work formerly performed by public officials).

the public.[178] Whistleblower lawyers frequently make statements that seem calculated to obscure the high costs they impose. One told the *Wall Street Journal* that the services whistleblower lawyers provide come at "no additional cost to the commission."[179] Similarly, one former head of the SEC's whistleblower program, now a private whistleblower lawyer, stated in August 2021 that "over a billion dollars is now ***back in the pockets of people*** who were victimized in the 153 cases – or the 153 people who've been paid under the program" – ignoring that a substantial proportion of those dollars never made it to those peoples' pockets.[180] Another prominent whistleblower told an NPR reporter that "three of [his] clients received $83 million."[181] But, again, if he collected a 30-40% fee and deducted additional costs on top, the actual amount actually "received" by these three clients would be closer to *half* that amount.

Another way whistleblower lawyers hide the costs they impose is by speaking out under the umbrellas of organizations with attractive names like "The National Whistleblower Center"[182] the "Whistleblower Law Collaborative,"[183] "SEC Whistleblower

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[178] *Supra* Part III (discussing extensive publicity and lobbying efforts by whistleblower lawyers).

[179] Zuckerman & Michaels, *supra* note_. At least one whistleblower firm has acknowledged the true costs they impose on the program. Letter from Wampler Buchanan to SEC, Re: File Number S7-16-18 (Sept. 14, 2018) ("a $100 million award is not what a whistleblower would retain. In the vast majority of award applications the award to the whistleblower will be reduced by attorneys' contingency fees, costs, and significant federal, state and local income taxes, leaving the whistleblower a net of less than 40% of the award.").

[180] BERKELEY PANEL, *supra* note _ at 23:30 (statement of Sean McKessy); *see also* Sean McKessy, *A Look Back on the Success of the SEC Whistleblower Program,* TAF EDUCATION FUND (May 18, 2022) ("SEC has paid approximately $1.2 billion to 256 individuals . . . .").

[181] Vanek Smith, *supra* note _.

[182] *See* National Whistleblower Center, https://www.whistleblowers.org/misson-history/ (noting the organization is a "tax-exempt, non-partisan organization based in Washington DC, dependent on public support for its work advocating for the rights of whistleblower" but also that the organization was founded by the three founding partners of KKC LLP, a private for-profit law firm that specializes in SEC whistleblower cases); *See* National Whistleblower Center, Trustees, https://www.whistleblowers.org/team_categories/nwldef-trustees/ (listing as the four trustees for the NWC the four partners of KKC LLP) Although the NWC website says it is "committed to being transparent and accountable in all the work we do," the organization has a policy of not disclosing where its funding comes from. https://www.whistleblowers.org/wp-content/uploads/2019/12/NWC-Donor-Privacy.pdf; https://www.whistleblowers.org/transparency-accountability/.

[183] https://www.whistleblowerllc.com/

Advocates,"[184]or "Taxpayers Against Fraud Education Fund"[185] – names that sound more like a non-profit NGO than a for-profit law firms. Thus, when Senators Chuck Grassley and Elizabeth Warren recently proposed legislation to reform the SEC whistleblower program, their press release included a ringing endorsement from the "chairman of the National Whistleblower Center" but failed to note that the chairman was also a private whistleblower lawyer – as are all the Center's founders and trustees.[186]

Or consider the recent publication of an academic article in a leading peer-reviewed business law journal entitled "Reforming Dodd-Frank From the ***Whistleblower's*** Vantage." Notwithstanding the title, the article is based on interviews with "two dozen whistleblower ***lawyers***" and only two actual whistleblowers – one of whom was *also* a whistleblower lawyer.[187] Further, two of the four authors are, themselves, whistleblower lawyers. The paper thus seems much more likely to reflect the views of whistleblower *lawyers* than whistleblowers.

Privatization of tip-sifting also causes other transparency deficits. As required by Dodd-Frank, the whistleblower programs at SEC and CFTC both release annual reports to Congress with information about (inter alia) the number of tips received broken down by allegation type and geographic origin as well as the number of awards issued and total dollar amounts distributed.[188] Congressional overseers, tipsters, and the public at large depend on

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[184] https://secwhistleblowerадvocate.com/

[185] https://www.taf.org/; https://www.taf.org/donors

[186] Chuck Grassley, Press Release, *Grassley, Warren Work To Strengthen SEC Whistleblower Program* (Mar. 31, 2022). Journalists and scholars similarly often attribute views to the "National Whistleblower Center" without acknowledging that the founders, leaders, and trustees of that organization are also partners of a single private whistleblower law firm (see prior FN). *E.g.,* Rapp, *Mutiny, supra* note _ at 72-73; Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1251 & n.38 (2009); Mengqi, *With Its Whistleblowing Directive, EU Charts a Different Course,* WALL ST. J. (Mar. 15, 2021); Daniel Wittenberg, *The SEC's Whistleblower Program: A Growing Legal Cottage Industry,* ABA MAGAZINE (Spring 2018) Vol 43 at 26.

[187] Evans et al., *supra* note_ at 453-54, 470-72 (describing qualitative methodology and types of participants in the interviews, and thanking "whistleblower Edward 'Ted' Siedle . . ." as one of the participants); The Siedle Law Offices, https://siedlelawoffices.com.

[188] Rose, *Better Bounty, supra* note _ at 1288 (highlighting these annual reports as a key source of accountability).

these reports to learn about how the program is functioning. But these reports fail to capture a huge volume of relevant activity that is occurring beyond the agency's direct purview. Private whistleblower attorneys are not required to disclose any information regarding the number of tips they receive, the number they choose to pass along to the agency, or the number (or value) of awards they ultimately receive. Some of these firms may voluntarily make some disclosures in this vein, but there is no possible way to verify these statements' accuracy or to hold the firms accountable if they were somehow found to be false. The result is, because of outsourcing, we know much less about the real tip-sifting process than we would if it were all kept in-house.

Finally, when the SEC decides to issue or not issue an award to a given whistleblower, it issues an opinion explaining the reasoning behind its decision.[189] Although heavily redacted, the public and especially prospective tipsters can learn a great deal from these decisions and shape their actions accordingly. By contrast, when private whistleblower attorneys decide whether or not to take on or decline a client, they never have to provide any kind of justification. Accordingly, tipsters remain in the dark when they are considering whether to come forward to any particular firm with their tip.

Political Accountability Deficit – The outsourcing decision may also insulate the agencies from accountability in the event of a major failure. When the SEC failed to act on the Madoff tips, this led to numerous Congressional hearings, an inspector general report, and, ultimately, the adoption of the WBP. Today, however, a new Madoff-type tipster would likely to turn first to a private law firm, not the agency directly. And there's a reasonable chance that the whistleblower could be turned down by one (or two) leading whistleblower firms. If so, then when the fraud is later uncovered, there would be no public record of these communications and no government agency directly responsible for the failure. The critical accountability cycle that ensued following the Madoff flameout may be cut short.

Constitutional Deficits – WBP's outsourcing regime also creates a risk of constitutional and other legal accountability deficits. When public enforcers investigate and pursue corporate wrongdoing, they are ordinarily constrained by various legal and institutional controls. Investigation targets may enjoy a right to

[189] See, SEC OWB Orders.

receive (and legally contest) subpoenas for documents,[190] a right to receive (and legally contest) subpoenas compelling testimony before having testimony taken, a right to be notified before certain conversations are recorded,[191] a right against self-incrimination,[192] a right to counsel,[193] a right to receive exculpatory information in the government's possession,[194] and more. Further, investigators may be required to adhere to various procedures and standards of conduct as articulated in agency statutes and regulations, ethics rules,[195] enforcement manuals,[196] and other internal guidance documents. A failure to adhere to these rights, procedures, standards may result in problems for the investigation, discipline for the government investigators, or other consequences.

Whistleblowers are private citizens and are not constrained by these factors as they go about gathering information to support their tips. They may secretly record conversations, steal documents, and engage in other intrusive techniques all without notifying the target of what they are up to or complying with any internal or externally imposed standards.

But the purely private nature of these investigations may be called into question by the major role played by whistleblower attorneys – especially given the dominance of a small group of well-connected, repeat-player firms. These whistleblower lawyers emphasize that they are in constant communication with the agency enforcement attorneys throughout the investigation;[197] that they are

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[190] *E.g.*, 17 C.F.R. §§ 203.8, 201.232(c), 201.150(b)-(d).

[191] SEC Enforcement Manual, *supra* note _ at 61.

[192] *Id.* at 73.

[193] *Id.* at 64; 17 C.F.R. § 203.7(b).

[194] Brady v. Md., 373 U.S. 83 (1963).

[195] SEC Enforcement Manual, *supra* note _ at 2.

[196] *E.g.*, SEC Enforcement Manual, *supra* note _.

[197] Compl., *Thomas v. SEC*, *supra* note _ at ¶ 29 (explaining that, after submitting a tip, Thomas and his clients assist the SEC with their investigations including the following: "respond to factual and legal inquiries, review and comment on potentially relevant documents, and participate in related investigations and prosecutions – all at the request of the staff."); Cutter Law PC, SEC Whistleblower Lawyer (We "Act as client's representative with the SEC's enforcement office and field all communications" and "Work with the Securities and Exchange Commission on gathering all necessary evidence to prove the securities fraud and violations of federal securities law").

trusted by agency enforcement attorneys;[198] and, in many cases, actually used to *work* at the agency alongside those attorneys.[199] And this makes perfect sense given that SEC rules provide that that a whistleblower who provides such "ongoing" cooperation and assistance should generally receive a larger bounty than one who doesn't[200] and, in announcing awards, the SEC often emphasizes whistleblower's ongoing assistance beyond the initial tip.[201] But all of this creates a risk that the nominally private whistleblower is, in reality, deputized as an undercover agent of the government.[202]

A recent *New Yorker* article compared a leading SEC whistleblower attorney (and former SEC official) to "a C.I.A. officer whose mission is the surreptitious recruitment and handling of well-placed insiders willing to betray their bosses."[203] The profile explained that the lawyer "relishes the intrigue of the accompanying tradecraft, describing cases in which his clients assumed generic pseudonyms—Mr. Smith and Mr. Jones—or disguised their voices with a scrambler when making phone calls"; stated that his clients "gather evidence, secretly record phone calls and meetings, even wear wires"; and, in one case, "smuggled thousands of pages of sensitive documents out of [China] and set up an office in Thailand, where the papers could be photocopied and turned over to the S.E.C." The lawyer stated: "It was like something from the movie 'The Firm.'"[204]

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[198] *Supra* note _.

[199] *Supra* note _.

[200] 17 C.F.R. § 240.21F-6(2)(i) (listing various factors that "may increase the amount of a whistleblower's award" including "Whether the whistleblower provided ongoing . . . cooperation and assistance . . . ").

[201] SEC, Press Release, *SEC Awards $40 Million to Two Whistleblowers* (Oct. 15, 2021) ("extensive, ongoing cooperation"); SEC, Press Release, *SEC Awards Over $500,000 to Two Whistleblowers* (Mar. 1, 2021) ("substantial, ongoing assistance"); SEC Press Release, *SEC Issues Awards Totaling Approximately $3 million to Three Whistleblowers* (Mar. 18, 2022) ("substantial ongoing cooperation"); SEC, Press Release, *SEC Awards More than $1.8 Million to Whistleblower* (Aug. 29, 2019) ("ongoing assistance").

[202] *Cf.* Rose, *Better Bounty*, *supra* note _ at 1280-81 (SEC will "lean on" whistleblower lawyers to support investigations).

[203] Keefe, *supra* note _.

[204] *Id.*; *see also* FRAUD IN AMERICA PODCAST, *supra* note _ at 39:50 (statement of WB lawyer Jason Zuckerman: discussing successful case where client made many audio recordings).

The same former SEC official-turned private whistleblower lawyer has also discussed his use of "non-traditional tactics" and the "gray arts" – things that the SEC is not permitted to do itself, such as covertly record conversations.[205] In 2021, a different former SEC official turned private whistleblower stated that some SEC Enforcement Attorneys have been "willing to just turn over their entire file to me and my client to say: 'Can you help us contextualize what we were told by the company?'"[206] The same former SEC official also said he "gets calls from his former colleagues all the time: send me some more good whistleblower cases."[207]

A former SEC lawyer in constant close touch with the SEC enforcement division with an open investigation directing his clients to conduct investigations into private companies in the hopes of converting the information into a substantial payment from that agency starts to sound an awful lot like government activity.[208] There is a risk that the agency's enforcement personnel could find a way to pass along specific information to a trusted former colleague about what she needs for an investigation, and that the whistleblower (under direction of his lawyer) finds a way to get the agency what it needs. One might start to question the decision to exempt these "private" investigations from 100% of the regulations and protections that apply to traditional government-directed investigations.

Consider the potential Fourth Amendment problems that could arise. The Supreme Court has held that, "although the Fourth Amendment does not apply to a search or seizure . . . effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as ***an instrument or agent*** of the Government."[209] It seems reasonably possible to characterize a private individual as an "instrument or agent of the Government" where she steals sensitive documents from his employer at the direction of his (former SEC) lawyer who'd received information

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[205] *The Whistleblower Whisperer,* NPR PLANET MONEY (May 29, 2019).

[206] FRAUD IN AMERICA PODCAST, *supra* note _ at 25:40 (statement of Sean McKessy).

[207] BERKELEY PANEL, *supra* note _ at 23:00 (statement of Sean McKessy).

[208] Rose, *Better Bounty, supra* note _ at 1278 (SEC will "lean on whistleblowers and their counsel . . . for assistance in investigations"); *cf.* Keefe, *supra* note _ (quoting leading whistleblower lawyer as emphasizing that the SEC can use illegally obtained evidence "as long as it's something they didn't ask for.").

[209] Skinner v. Ry. Lab. Executives' Ass'n, 489 U.S. 602, 614 (1989).

from an SEC enforcement attorney actively investigating the employer.

A similar line-blurring has been bubbling up lately in the context of government-directed internal corporate investigations. A 2019 SDNY decision in *United States v. Connolly* sent shockwaves by suggesting that corporate employees might be entitled to the full barrage of constitutional protections when interviewed by their company's own legal counsel as part of a government-directed internal investigation.[210] The Court explained that, in the course of the investigation at issue, the company's private lawyers "did everything that the Government could, should, and would have done had the Government been doing its own work." The opinion conceded that "it saves the Government considerable time and precious resources to permit counsel for the target of an investigation to do the heavy lifting of ferreting out the truth" but insisted that "the Court is not concerned with whether the outsourcing of investigations to private parties makes life easier for the Government or for the taxpayers; it is concerned with the protection of the defendant's constitutional right against self-incrimination, and so with the constitutional implications, if any, of such outsourcing."[211] And, the opinion emphasized that the judge was "fully aware that this ruling may have implications that extend well beyond this particular case."[212] Although the implications of *Connolly* are still being worked out, the domain of whistleblowers may raise some of the same thorny issues. That is, at some point, a nominally *private* investigation becomes essentially a public one.

In sum, the WBPs may thus prove to be yet another aspect of Dodd-Frank to generate constitutional angst. [213]

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[210] United States v. Connolly, 2019 WL 2120523 (S.D.N.Y. May 2, 2019).

[211] *Id.*

[212] *Id.* For useful discussions of the case, see Miriam Baer, *Law Enforcement's* Lochner, 105 MINN. L. REV. 1667, 1695-98 (2021); Sarah Patterson, Note, *Co-Opted Cooperators: Corporate Internal Investigations and* Brady v. Maryland, 2021 COLUM. BUS. L. REV. 417 (2021).

[213] *See Jarkesy v. SEC,* 34 F.4th 446 (5th Cir. 2022) (finding constitutional defects with Dodd-Frank's expansion of SEC enforcement powers); *Seila Law v. CFPB*, 140 S. Ct. 2183 (2020) (finding constitutional defects with the CFPB); Lucia v. SEC, 138 S. Ct. 2044, 2050 (2018) (finding constitutional defects with SEC ALJs in case brought under Dodd-Frank's expanded SEC enforcement powers); *NAM v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) (finding constitutional defect with "conflict minerals" disclosure requirement); *cf. State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015) (holding that it lacked jurisdiction to hear constitutional challenge to FSOC); *see also* Eric Spitler, *The Long Game: The Decade-Long*

Agency Capture – By spawning a concentrated group of well-connected repeat player lawyers whose livelihoods depend on the discretionary decisions of the government programs, the WBP outsourcing regime has exacerbated the risk of agency capture.[214] As discussed above, these highly-incentivized and well-connected private parties have pursued an extensive and highly effective advocacy campaign to bend the WBPs to their interests. At the same time, current government officials increasingly see private whistleblower practice as an attractive and lucrative career path to pursue following their government service.[215] All this adds up to a risk that some agency programmatic decisions could be made in the best interests of the whistleblower *bar* at the expense of *whistleblowers* and the public at large.[216]

Diversity Deficits – Some privatization critics have warned that outsourcing programs may undermine the demographic diversity of the workforce.[217] The WBP outsourcing program seems vulnerable to this criticism. Female lead lawyers represent a *tiny* fraction of the successful tipsters at both the SEC and CFTC. By contrast, the SEC's workforce is substantially more egalitarian – with around 40% of agency supervisors, managers, "senior officers," and "mission critical" positions staffed by women.[218] Although Dodd-Frank required the SEC to take steps to increase participation of "women-owned businesses in the programs and contracts of the agency," and emphasized that this directive applied to "*all* business and activities" and "*all* types of contracts" entered by the agency, including contracts for "legal services," the agency has apparently

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Effort to Dismantle the Dodd-Frank Act, 24 N.C. BANKING INST. 1, 28-40 (2020) (collecting constitutional challenges to Dodd-Frank).

[214] *Cf.* Mengqi Sun, *SEC Names Nicole Creola Kelly as Whistleblower Program Chief*, WALL ST. J. (Nov. 5, 2021) (quoting former SEC officials in private whistleblower practice lavishing praise on the newly appointed head of SEC OWB as "a great pick" with "an excellent reputation" and that the appointment was "a testament to her skills and work ethic").

[215] Viswanatha, *supra* note _ (quoting prominent former SEC official now in private whistleblower practice that "current . . . SEC attorneys now regularly ask me how they can do what I do.").

[216] On the other hand, this new interest group may serve as a valuable counterweight to the corporate defense-side interests lined up on the other side of the program. Rose, *Better Bounty, supra* note _ at 1288.

[217] Craig Becker, *With Whose Hands: Privatization, Public Employment, and Democracy,* 6 YALE L. & POL'Y REV. 88 (1988).

[218] SEC, Office of Minority and Women Inclusion*,* Annual Report to Congress (2022).

not interpreted this directive as applying to the extensive payments it makes to private lawyers for the services they provide to the whistleblower program.[219]

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To be sure, privatization has the potential to actually *expand* accountability, such as where the state requires (by contract or by law) contractors to adhere to certain rules as a condition for participation in the outsourcing program.[220] To date, however, the WBP has taken an entirely *laissez faire* approach to private whistleblower attorneys. Below, I return to the possibility of policy reforms to better align private whistleblower attorneys with public values.

2. Efficiency Deficits

Notwithstanding the foregoing, WBP outsourcing still may be worth it if the private actors are producing better results at a lower cost. Efficiency has been the main ground on which privatization and outsourcing programs have gained ground. The idea is that the incentives of a competitive marketplace will tend to generate more cost-effective, innovative approaches, attract a more talented dynamic workforce, as compared to the rigid slow-moving bureaucracy.[221] As to private whistleblower lawyers, however, there are reasons to doubt this is the case.

Costs – Private intermediaries are extracting an extremely large amount of money for their services. Based on the findings above, and assuming whistleblower lawyers charged a standard contingency fee and that expenses (which are typically deducted separately and on top of contingency fees) are about 5% of the award, this would mean as much as ***one third*** of SEC's and CFTC's aggregate bounty payments (about $300 million) went to people other than the actual whistleblowers.

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[219] Dodd Frank § 342.

[220] *See* Jody Freeman, *Extending Public Law Norms Through Privatization,* 116 HARV. L. REV. 1285 (2003); MARTHA MINOW, PRIVATIZATION AND THE PUBLIC GOOD 142 (2002); Laura Dickinson, *Public Values/Private Contract,* in GOVERNMENT BY CONTRACT, *supra* note _.

[221] DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT (1992); E.S. SAVAS, PRIVATIZATION: THE KEY TO BETTER GOVERNMENT 288-91 (1987); JOHN DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 57-78 (1989).

In the alternative universe in which tip-sifting was kept "in-house," the $300 million could have **expanded by several orders of magnitude** the agencies' resources devoted to tip-screening over the program's first decade.[222] While it is impossible to know whether the super-charged agency would have outperformed the real-life version, the point is to illustrate the very high bar for efficiency gains from privatization that would have to be met for the outsourcing to be worth it.

There are reasons to doubt that WBP outsourcing reduces overall costs of the program. First, these private intermediaries significantly dilute the incentive effect of any given bounty, forcing the agency to pay substantially more "bucks" to get the same incentive "bang." If an executive is aware of significant wrongdoing at his company, her decision about whether to blow the whistle will depend, in part, on the expected payout. Assuming the executive understands ahead of that hiring a lawyer is (basically) required to get the agency's attention, and that lawyers will extract 30-40% in fees plus substantial costs and expenses from any bounty payment issued, the result is that the executive will require an expected bounty payout to be almost 2x in the world of outsourced tip-sifting than she would in the hypothetical alternative universe of exclusively in-house tip-sifting. This may tend to increase the overall costs of the program.

The likely efficiency losses caused by overly high private intermediation fees is confirmed by the whistleblower lawyers themselves. Whistleblower lawyers have repeatedly emphasized the importance of large monetary awards in incentivizing high-quality whistleblowers to come forward.[223] And, when the SEC proposed rules in 2018 that would have potentially curtailed some of these

[222] A rough calculation suggests SEC could have nearly ***quadrupled*** its tip-sifting operation with these funds. I estimate SEC has effectively paid about $244 million to private intermediaries. That sum would cover $200,000 salaries for 122 people for 10 years. Based on a separate FOIA request, *see supra* Part I.C, I determined that an average of 43 SEC employees has assigned to its tip-sifting office each year. Had the $244 million been appropriated to the agency instead of spent on private intermediation, the SEC could have nearly quadrupled its tip-sifting operation from 43 to 165 people.

[223] Compl., *Thomas v. SEC*, *supra* note _ at ¶ 102 ("primary motivation"); Panel Discussion, *supra* note _ at 413 ("very helpful"); Evans et al, *supra* note _ at 481; *Mary Inman on an International Whistleblower Practice,* FCPA COMPLIANCE REPORT AT 3:30-5:00 (Nov. 2021) ("financial safety net"); Sean McKessy, *A Look Back on the Success of the SEC Whistleblower Program,* TAF EDUCATION FUND (May 18, 2022).

large awards, the whistleblower bar objected vigorously that doing so would destroy the program by destroying incentives for whistleblowers to come forward.[224] But if that is true, it must also be true that the high fees and costs incurred by private intermediation which effectively reduce the size of a potential payout for any whistleblower would similarly tend to reduce the efficacy of the program.

Further, the outsourcing of tip-sifting does not substitute for government tip-sifting, but merely adds an additional layer of administrative costs. After a tip has passed through the screening provided by a private attorney, it will then be subjected to a second round of screening by a government attorney. This doubling up of sifting may increase overall costs. It is likely that it leads to quite a lot of wasteful duplication of work. Much of what private attorneys have already done (investigation, interviews, legal analysis) would likely have to be done again by government attorneys in the course of their investigation. Further, there may be similar wasteful duplication of efforts by different private law firms who screen the same potential client, and by the government of a pro se tip that has already been screened and rejected by one or more private law firms. Such duplication would be eliminated in the hypothetical alternative system where all tip-sifting were brought in-house to the agency.[225]

Sifting Quality – Proponents of outsourcing often point out that these programs may attract higher-quality, better skilled workers

[224] *E.g.,* Compl., *Thomas v. SEC*, *supra* note _; Evans et al., *supra* note _ at 490-93; Letter from KKC LLP to Jay Clayton (SEC) re: DFA Proposed Whistleblower Rule (Sept. 21, 2020) at 2; *Mary Inman on an International Whistleblower Practice,* FCPA COMPLIANCE REPORT at 9:20 (Nov. 2021); Letter from KKC LLP to Jay Clayton (SEC) *re: Reduction of Rewards in Large Cases* (Jan. 16, 2020); Letter from Sean McKessy to Vanessa Countryman (SEC), *re: Proposed Amendments to the SEC's Whistleblower Program* (Oct. 25, 2019); Letter from CohenMilstein to Brent Fields, *Comments on Proposed Rules Relating to the Commission's Whistleblower Program* (Sept. 17, 2018); Letter from Wampler Buchanan, to SEC *re: File Number S7-16-18* (Sept. 14, 2018); *Enforcing ESG Claims through the SEC's Whistleblower Program – Poppy Alexander,* CLIMATE MONEY WATCHDOG PODCAST (Jul. 7, 2022) at 36:30-ff.

[225] On the other hand, private intermediation may enable the agency to accord significantly less investigatory resources to tips they receive that seem to have "failed" the private tip-sifting process: e.g., pro se tips, tips submitted by less reputable, non-repeat player, non-revolver firms. And, even if the government does have to duplicate some of the private efforts for high-credibility tips they receive, it may be much easier for these public employees to follow the roadmap laid out by these private intermediaries.

than government jobs.[226] But the attorneys leading the very highest-performing firms are themselves former SEC lawyers. That is, the best actors in the private firms have precisely the same background and quality as the attorneys who do this work for the agency.

When tipsters file directly with the government, they can be assured that the civil servants screening their tips are subject to the hiring, training, supervision, and conflict-of-interest policies imposed by the SEC and CFTC. By contrast, when tipsters rely on private whistleblower lawyers for this screening, investigation, and ultimate decision-making, they have no such assurances and must instead rely on the lawyer's or firm's reputation. While some self-described whistleblower firms may be truly high-quality expert operations, there are many firms that are likely to be of far lower quality and an average whistleblower may not be able to tell the difference. Meaningful reputational signals may be especially noisy in this domain, where (as mentioned above) a firm's prior record of success/failure are almost always nonpublic which means there is a dearth of objective real criteria on which to evaluate and compare these firms.

Competitive Pressure – Privatization scholars have repeatedly pointed out that, where outsourcing programs operate in non-competitive markets, the purported efficiency justifications of outsourcing become implausible.[227] The market for whistleblower lawyers bears many of the indicia of a non-competitive market. For one thing, tipsters seem to lack sufficient information to make an informed choice between potential counsel. Successes and failures of firms are not public, so there is no reasonable way for prospective tipsters to compare the quality one prospective lawyer against another.[228] Nor is there any way for prospective tipsters to actually evaluate the past work product of these lawyers, since all of their work is necessarily secret. Further, unlike ordinary clients, who may

[226] Lemos, *Privatizing, supra* note _ at 539 (discussing DOJ hiring David Boies to prosecute Microsoft); *see also* Van Loo, *supra* note _ at 512.

[227] John Donahue, *The Transformation of Government Work: Causes, Consequences, and Distortions, in* GOVERNMENT BY CONTRACT, *supra* note _ at 45; Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How to Improve it,* in GOVERNMENT BY CONTRACT, *supra* note _ at 219; ELLIOT SCLAR, THE ECONOMICS OF PRIVATIZATION 69-93 (2000); KOSAR, *supra* note _ at 11; DONAHUE, *supra* note _ at 218.

[228] *See* KOSAR, *supra* note _ at 11 (noting, for purposes of efficient privatization, the important market condition that "the buyer of the goods and services must possess sufficient information to empower it to make a rational purchase.").

tend to engage in preliminary discussions and negotiations with several lawyers to compare fees and approaches, a whistleblower is likely to be very reluctant to engage in such comparisons for fear that each additional conversation raises their risk of being exposed. Further, there appears to be a substantial barrier to entry at the elite level of this market; a tipster may reasonably conclude that she basically has to hire one of the very few firms who've been dominating both programs if he wants any reasonable chance of success – which further undermines any real ability for the tipster to bargain on fees.[229] The revolving door and repeat player effects documented above make it much harder for new firms to win clients away from the industry leaders – regardless of the lower fees they charge. Accordingly, there is little reason to expect that this is a well-functioning marketplace where private competitive pressure is sufficient to produce optimal results or efficient pricing.

Attracting More Whistleblowers – One possible advantage of private attorneys is that, by aggressively marketing their services, they may raise general awareness of the program and make it more likely for some tipsters to come forward. But, if the agencies had $300 million additional dollars at their disposal, surely they could use some of this money to retain a marketing firm to engage in equally effective public education efforts. [230]

Innovation, Risk-Taking – A more compelling efficiency justification for incorporating private attorneys into the tip-sifting process is that, precisely because they are outside the governmental hiring training and supervision mechanisms, they may bring a useful diversity of substantive approaches and instincts to the sifting process and, as a result, may identify some promising cases that government attorneys would overlook.[231] The fact that the most dominant firms in the SEC's program are, themselves, former SEC officials takes some of the force out of this argument. Further, to the extent the "innovation" used by successful private firms constitutes ethically or legally questionable tactics like the ones discussed

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[229] *Id.* (noting, for purposes of efficient privatization, the important market condition that "firms must not face barriers to entry").

[230] Rock Center Lunch (statement of Mary Inman) at 1:10:20-1:11:00 https://www.youtube.com/watch?v=6oO3vxh_Ss4&t=25s (describing CFTC's extensive whistleblower program outreach efforts including attending relevant conferences and handing out whistles).

[231] *Cf.* Lemos, *Georgetown, supra* note _ at 554-55 (noting that, "private lawyers may help correct for 'tunnel vision' on behalf of government litigators").

above (under the heading "Constitutional Deficits") it is hardly clear that this is the sort of thing that should be encouraged.

B. WBPs as Lawyer-Driven Enforcement

A perennial critique of traditional private securities fraud class actions is that these cases are driven by lawyers.[232] Critics have identified significant divergences between the interests of lawyers and those of the investors who actually suffer losses as a result of securities fraud; argue that the diffuse nature of class members' interests effectively preclude any real monitoring of lawyers to ensure they pursue the clients' best interests rather than their own; claim that this leaves these lawyers free to abuse their role and results in negative social consequences.[233]

Proponents have emphasized that a key advantage of WBPs is that they push private attorneys out of the proverbial "driver's seat" and replace them with actors whose incentives better align with society's: corporate insiders and others with original information about corporate fraud.[234] The findings above put some pressure on this sharp distinction. Just as in the class action context, entrepreneurial, repeat-player attorneys have taken on a central role in WBPs, exerting substantial control over which tips get filed and

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[232] *E.g.*, Mitu Gulati et al., *Fraud by Hindsight,* 98 NW. U. L. REV. 773, 782 (2004); Jill Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 ARIZ. L. REV. 533, 533 (1997); James Cox, *Making Securities Fraud Class Actions Virtuous,* 39 ARIZ. L. REV. 497, 499 (1997); *see also Tellabs v. Makor Issues & Rts., Ltd.,* 551 U.S. 308, 322 (2007) (describing Congress's goal "to curb frivolous, lawyer-driven" securities litigation).

[233] For foundational contributions to the "agency-cost" interpretation of securities class actions and plaintiffs' attorneys, see John Coffee, *Understanding the Plaintiffs' Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions,* 86 COLUM. L. REV. 669 (1986); John Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action,* 54 U. CHI. L. REV. 877 (1987); Jonathan Macey & Geoffrey Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform,* 58 U. CHI. L. REV. 1 (1991).

[234] *See* Rose, *Better Bounty, supra* note _ at 1286-87; Amanda Rose, *Form vs. Function in Rule 10b-5 Class Actions,* 10 DUKE J. CONST. L. & PUB. POL'Y 57, 67 (2015); Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers,* 87 B.U. L. REV. 91, 100 (2007); Gregory Christopher Rapp, *False Claims, Not Securities Fraud: Towards Corporate Governance By Whistleblowers,* 15 NEXUS 55, 60-62 (2009).

how much effort is devoted to investigating, packaging, and pursuing each tip.

Whistleblower attorneys may inject many of the same kinds of distortions and costs on the WBPs as plaintiffs' attorneys do in the context of class actions.

For instance, a foundational criticism leveled at plaintiffs' attorneys is that they extract unreasonably and unnecessarily high fees and expenses from the settlement funds to the detriment of all other parties involved.[235] According to one often-repeated line, settlements in these cases amount to corporate defendants transferring money from one pocket to the other, "with about half of it dropping on the floor for lawyers to pick up."[236]

The WBP may be vulnerable to the same criticism. Based on the study above, I estimate that the involvement of these private intermediaries has redirected roughly one-third of the programs' total bounty payments *away* from actual whistleblowers. And, as argued above, this 33% tax either saps the willingness of some well-placed whistleblowers to come forward or forces the agency to pay that much more to achieve the same level of incentive or (most likely) a little bit of both.

Another common criticism leveled at the plaintiffs' bar is that they engage in questionable, unethical, or illegal practices in order

[235] *E.g.*, Stephen Choi et al., *Working Hard or Making Work? Plaintiffs' Attorney Fees in Securities Fraud Class Actions,* 17 J. EMP. LEGAL STUD. 438 (2020) (finding that attorneys perform unnecessary work to justify large fee amounts); Bratton & Wachter, *supra* note _ at 162 (finding that high fees make private securities enforcement less efficient than SEC enforcement); Platt, *Non-Revolving Door, supra* note _ at _ (finding that the revenues per lawyer of one leading securities class action firm would put it at the very top of the AmLaw 200 in several recent years); M. Todd Henderson & Adam Pritchard, *From Basic to Halliburton,* REGULATION (Winter 2014-15) at 20 (noting that "plaintiffs' lawyers took home billions in fees" while finding "scant confidence that private litigation is striking the right balance in encouraging socially desirable suits while discouraging nuisance suits.").

[236] Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487, 1503 (1996).

to obtain institutional investor clients, including pay-to-play[237] and undisclosed referral payments.[238]

The WBPs may be potentially vulnerable to some of these same problems. First, the study above shows that outperformance of well-connected, repeat-player firms who openly advertise their close trusted relationships and constant communications with agency personnel. Second, public records confirm that these dominant whistleblower firms are devoting substantial resources to attempt to influence policymakers through direct lobbying and public messaging. Third, as in the plaintiffs' bar, the leading firms do appear to rely heavily on referrals for their best clients.[239] And, finally, a huge amount of consequential action in these programs takes place in an extremely secretive environment, in which disclosure is the exception not the rule. All of this may create opportunities and temptations for various forms of favor-trading or corruption.

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Over time, the criticisms of traditional plaintiffs' attorneys outlined above have led to the adoption of a detailed legal regime designed to curtail abuses. That regime includes, among other things: a substantive cap on fees[240]; a process for selecting a "lead plaintiff" to represent the interests of class[241]; a requirement that attorney fees and expenses must be disclosed and subjected to review by a court after an opportunity for class members to object[242]; an orderly procedure that allows firms to compete to serve as lead counsel in any given case[243]; legally mandated communications between attorneys and class members regarding settlements and fees[244]; and the potential to have fees cut

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[237] Stephen Choi et al., *The Price of Pay to Play in Securities Class Actions,* 8 J. EMP. LEGAL STUDS. 650 (2011).

[238] Benjamin Edwards & Anthony Rickey, *Uncovering the Hidden Conflicts in Securities Class Action Litigation: Lessons from the State Street Case,* 75 BUS. LAW. 1551 (2019).

[239] Compl., *Thomas v. SEC*, *supra* note _ at ¶ 88.

[240] 15 U.S.C. § 78u–4(a)(6).

[241] 5 U.S.C. § 78u-4(a)(3).

[242] FRCP 23(h).

[243] *See* Choi et al., *Coalitions, supra* note _.

[244] *See* 15 U.S.C. § 78u–4(a)(7).

dramatically or be entirely stripped of the lead counsel role if the court determines the firm has behaved inappropriately.[245]

By contrast, although they present some of the same potential problems, whistleblower lawyers are subject to essentially no restrictions or regulations. The next Part turns to ask whether it is time to revisit this laissez faire approach.

V. REFORMS

The WBPs seem to have partially addressed the case selection challenge by deputizing private whistleblower lawyers as informational intermediaries. This outsourcing, however, may be bringing substantial accountability deficits and various other distortions and costs into the tip-sifting process. And the efficiency gains from outsourcing this function are highly questionable.

What can be done? A nuclear option would be to prohibit all private intermediation of tips and bring all tip-sifting in house.[246] But while the available evidence raises profound questions about the net value of private attorneys, it has not definitively established that these attorneys are doing more harm than good. Moreover, given the how well-funded, organized, and connected these attorneys are, such an option seems politically implausible.

This Part turns to more moderate reforms. Section A considers reforms directed at private lawyers. Section B considers reforms of the agencies' own internal practices.

A. Regulating Whistleblower Lawyers

1. Fees

The SEC initially declined to regulate whistleblower attorney fees when it set up the WBP, preferring instead to leave the issue "to contractual arrangements between prospective whistleblowers and their attorneys." The SEC concluded that these private market arrangements were "better equipped than the Commission to make

[245] *In re Grupo Televisa Sec. Litig.*, 2021 WL 2000005 (S.D.N.Y. 2021); *Ark. Tchr. Ret. Sys. v. State St.*, 512 F. Supp. 3d 196, 208 (D. Mass. 2020).

[246] It seems reasonably easy to provide a substitute minimalist method to enable anonymous tip-filing without the high costs of lawyer-intermediaries. For instance, the SEC could appoint an independent body or agent to serve as a processing agent for anonymous tipsters in exchange for some modest regularized annual public funding. Or, the SEC could allow private actors to serve as tip-filing agents for some nominal fee.

determinations regarding the appropriate amount of attorneys' fees."[247]

This philosophical embrace of private market-driven arrangements is prototypical of many privatization programs and reflects the philosophy underlying the broader privatization movement.[248] But, as many privatization critics have pointed out, this justification becomes much weaker when the market in question is not competitive.[249] And as discussed above, there are reasons to doubt that the market for whistleblower lawyers is sufficiently competitive to ensure any meaningful negotiation or price pressure on fees.

Moreover, the unmitigated faith in private negotiations is not only out of step with the extensive regulatory regime governing fees in the closely related context of private securities litigation (discussed above),[250] it is also out of step with how attorneys' fees are regulated in many other contexts where a private party is seeking funds from the federal government.[251] Many federal statutes impose hard caps on the attorneys' fees that may be charged to clients seeking money from the federal government. For instance, a lawyer representing clients before the Social Security Administration seeking old-age, survivor, or disability benefits is legally prohibited from charging her clients more than 25% of past-due benefits collected or $6,000, whichever is lower.[252] For well over a century, a lawyer representing veterans seeking benefits was prohibited from charging her client more than $10[253] and now may charge no more than 20% of past-due benefits.[254] A lawyer representing a victim suing the government under the Federal Tort Claims Act may charge

[247] 76 Fed. Reg. 34,300, 34,333 (2011).

[248] KOSAR, *supra* note _ at 4; MINOW, *supra* note _ at 22-23.

[249] *Supra* note _

[250] *Supra* text accompanying notes _-_ (mapping out regime).

[251] *But cf.* Letter from American Association for Justice to Elizabeth Murphy (SEC), *re: Proposed Rules for Implementing the Whistleblower Provisions* (Dec. 16, 2010) (urging the SEC not to restrict contingency fee arrangements for whistleblower lawyers and arguing that this is "fundamentally a state issue and should be dealt with as such").

[252] 42 U.S.C. § 406(a)(2)(A).

[253] *See* Walters v. Nat'l Ass'n of Radiation Survivors, 105 S. Ct. 3180 (1985) (upholding the constitutionality of the restriction).

[254] 38 U.S.C. § 5904(d)(1).

her client no more than 25% of any judgment or 20% of any settlement.[255] There are many other examples.[256]

Beyond caps, fee arrangements are policed in other ways by these programs. For instance, the Department of Labor has claimed *exclusive* authority to set the fees a lawyer may receive for representing a client claiming Black Lung Benefits on a case-by-case basis.[257] Under the veterans benefits program discussed above, the Department of Veterans Affairs also has express statutory authority to review and reduce any fee arrangement that it determines to be "excessive or unreasonable."[258] And both the VA and the IRS flatly prohibit the use of contingency fee arrangements at certain stages.[259]

Indeed, the SEC itself already administers such a restriction. When private parties seek compensation from the agency out of disgorged funds collected through agency enforcement actions, the private parties are prohibited from using those funds to pay attorneys fees or expenses "except as otherwise ordered by the court upon motion by the Commission, or, in the case of an administrative action, as otherwise ordered by the Commission."[260] The SEC has explained that this restriction reflects "an explicit policy decision by Congress to prioritize compensating investors over private plaintiffs' attorneys in Commission actions."[261]

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[255] 28 U.S.C. § 2678.

[256] *E.g.*, 22 U.S.C. §1623(f) (10% fee cap for claims before the Foreign Claims Settlement Commission); 38 U.S.C. §1984(g) (10% fee cap on veterans insurance claims); 50 U.S.C. § 4317 (10% fee cap on claims under Trading with the Enemy Act); 50 U.S.C. § 4144 (10% fee cap on claims under the War Claims Act); *see also* Gisbrecht v. Barnhart, 535 U.S. 789, 803 & n.12 (2002) (discussing various federal fee caps); Brian Fitzpatrick, *Do Class Action Lawyers Make too Little?,* 158 U. PA. L. REV. 2043, 2076 n. 136 (2010) (same); David Hyman et al., *The Economics of Plaintiff-Side Personal Injury Practice,* 2015 U. ILL. L. REV. 1563, 1572 (federal and state); Nora Engstrom, *Attorney advertising and the Contingency Fee Cost Paradox,* 65 STAN. L. REV. 633, 668 n. 190 (2013) (same); 1 ROBERT ROSSI, ATTORNEYS' FEES § 2:11 (2022 update) (same).

[257] *See* DOL v. Triplett, 494 U.S. 715, 718 (1990) (upholding that scheme).

[258] 38 U.S.C. § 5904(c)(3).

[259] 31 C.F.R. § 10.27. *But see* Ridgely v. Lew, 55 F. Supp. 3d 89 (2014) (finding this exceeded the agency's statutory authority).

[260] 15 U.S.C. § 77t(f).

[261] SEC v. Pritzker Levine LLP, 2022 WL 671020, at *2 (9th Cir. 2022) (Baker, J., dissenting) (quoting SEC brief); *see also* Donna Nagy, *The Statutory Authority*

Similarly, Congress has capped compensation for certain private contractors.[262] As Senator Chuck Grassley explained, "Government contractors should be compensated fairly for their work but they shouldn't be allowed to featherbed their salaries at taxpayer expense."[263]

In sum, there are very good reasons to reconsider the laissez faire approach the agency took on the fee issue of fees a decade ago and there are no shortage of regulatory precedents to follow. Several different reform approaches are possible.

Graduated Fee Schedule – One approach would be to impose a cap on the contingency fees that could be charged. A flat cap on the percentage or amount of fees (say 20 or 30%) is only one option. A different plan would be a graduated marginal rate scale with percentage declining as the magnitude of awards go up. For instance, a whistleblower attorney could be allowed to take no more than 30% of the first $10 million awarded, no more than 20% of the next $40 million, and no more than 10% of the rest. Instead of taking $30 million of a $100 million award, the attorney in this imaginary scheme would take $16 million. A graduated scale would bring whistleblower attorney compensation in line with securities class actions.[264]

Fee Approval Procedure – Another option would be to adopt a formal fee approval procedure along the lines of what traditional plaintiffs' attorneys go through at the end of a securities class action. That is, after the client earns an award, but before it is actually distributed to the tipster, the attorney would have to apply to the agency for permission to take fees and expenses out of the award. The application could include providing complete documentation of the work undertaken by the attorneys and any outside experts retained in support of the tip. This process could serve (as it does in the class action context) as a check and deterrent on bad practices as

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for Court-Ordered Disgorgement in Sec Enforcement Actions, 71 SMU L. REV. 895, 911 (2018) (discussing history of this provision).

[262] 41 U.S.C. § (a)16.

[263] Sen. Chuck Grassley, Press Release, *Grassley Welcomes Federal Government Contractor Salary Cap* (Jun. 23, 2014).

[264] Choi et al., *Working Hard*, *supra* note _ at 448; Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review* at 27*,* NERA (Jan. 25, 2022).

well as a source of extremely valuable information about what these attorneys do.

Fee Disclosure – A softer approach would be for the agencies to adopt some fee disclosure rules which could enhance transparency, competition, and downward price pressure in the market for whistleblower attorneys. Perhaps they could require that each whistleblower lawyer publicly disclose their fees (or fee range) on their website. This would enable clients to shop around without having to actually communicate with anyone. Another alternative would be to require the lawyers to disclose this information to the agency, who could then release it – either individually along with the other information about the award, or in the aggregate in annual reports. [265]

2. Referrals and Screening

Suppose one highly-selective and credible law firm investigates a tip, declines to pursue it, refers the tipster to another firm with less experience less credibility and less exacting standards, and the second firm decides to move forward. Or suppose that the tipster, after being rejected by the first firm, finds the second firm on their own without a referral. There is a good reason to think that the agency would benefit from knowing that a rejection (and referral) had been made and by what firm could present a valuable signal to the agency regarding the quality of the tip. Even better, if the agency had access to the first firm's general reasoning as to why it decided not to pursue the tip, that would give the agency even more of a head start in evaluating the tip.

One possible reform would be to mandate that any whistleblower or any whistleblower lawyer submitting a tip to the agency that had previously been rejected by a whistleblower lawyer expressly acknowledge this in the submission and identify the prior firm so that the agency could reach out to the first firm. However, this proposal might raise more problems than it solves. For one thing, it may unduly place risk on the whistleblower who may be rejected by the first firm for reasons unrelated to the merits of the tip. It may also perversely encourage whistleblowers to proceed pro

[265] To be sure, any proposal that potentially reduces the profitability for attorneys may tend to reduce the number of high-quality lawyers willing to take on these cases. It may also decrease the level of investment lawyers are willing to put into firms on the front end. On the other hand, lower fees may tend to make it more likely that tipsters will come forward and use an attorney rather than filing pro se.

se. And, it may also unfairly give lawyers leverage to extract higher fees on threat of rejecting the tip.

Alternatively, the agencies could also mandate disclosures by whistleblower lawyers on their firm websites of certain statistics regarding the number of tips submitted, the number of tips screened but not submitted, the average time between initial contact and rejection or submission, the number of referrals made to other law firms, the number of awards won, and (for any awards) the time lapses between initial firm contact and dispensing of the award. Disclosing this information would allow potential tipsters to make informed judgments. It would also add valuable information for the agencies and the public regarding the role that lawyers are playing in the program – including the extent to which firms are flooding the agency with tips, how much time they spend investigating and developing tips before submitting, etc.

3. Regulating Communications Between Whistleblower Lawyers and Enforcement Officials

One possibility would be for the agencies to develop special ethics guidelines for lawyers who participate in the whistleblower program, designed to ensure that these attorneys keep their clients from crossing certain lines in their efforts to gather information. Currently, at the SEC these attorneys are subject only to the general prescriptions imposed by SEC Rule 102(e), which authorizes the Commission to deny "the privilege of practicing before the Commission" to any person who is "found not to possess the requisite qualifications to represent others, to be lacking in character or integrity, to have engaged in unethical or improper professional conduct, or to have willfully violated or willfully aided and abetted the violation of any provision of the Federal securities laws or rule."[266] The SEC could adopt specific guidance outlining some specific types of boundary-pushing investigatory techniques that, if sanctioned or directed by a whistleblower attorney, could give rise to 102(e) liability.

The agencies could also consider adopting a "one bite" rule, prohibiting interactions between the agency and the whistleblower or his counsel beyond the initial passing along of the tip. This would be the surest way to prevent the tipster from becoming an effective undercover government agent and all the legal and constitutional problems that raises. This was proposed by some commentators

[266] *See* 76 Fed. Reg. at 34,333 (applicable to whistleblower lawyers).

back in 2010,[267] and a similar rule has been imposed in the IRS's whistleblower program.[268]

B. Regulating the WBPs

1. End Misleading Statements

Agency leaders should immediately stop making any misleading statements about the total dollars the program has paid out to whistleblowers. As explained above, statements suggesting that the total amount of payouts under the program have gone to whistleblowers are fail to account for the substantial proportion of these total sums (as much as 1/3) that are likely not actually paid to whistleblowers but are instead going to pay the private intermediaries.

Ideally, the agency would be in a position to make accurate statements about how much money is actually getting to their whistleblowers. This certainty would enhance the positive incentives to come forward with actionable information, insofar as it would give would-be tipsters a greater degree of clarity regarding how much they might expect to actually receive in the event they came forward.

Short of this, however, agency officials should explain, whenever they state the total amount of bounty payments made, that a substantial proportion of those dollars actually went to persons other than the tipsters themselves. For instance, the agency officials could say something like: "Our whistleblower program has awarded $__ to whistleblowers ***and their counsel***." In addition, when the agencies report their expenditures to Congress, they should include an estimate for the amount of agency funds that went to pay for private intermediation services under the WBPs.

2. Data collection and analysis

As I worked through the FOIA process with the SEC over nearly two years, I had a unique opportunity to glimpse the agency's internal systems for tracking data. What I saw wasn't pretty. The SEC seemed to have no system in place to track awards. The first response to my FOIA request seeking the names of attorneys and firms who'd represented successful whistleblowers was to deny that

[267] *See* Letter from Covington & Burling LLP et al. to Elizabeth Murphy (SEC) re: proposed rules for implementing the whistleblower provisions (Dec. 17, 2010) at 11; Arent Fox Letter, *supra* note _.

[268] Ventry, *supra* note _ at 1483 n.125.

they had any relevant records. The second response (after I successfully appealed the initial one) was to claim that gathering the records would be "unreasonably burdensome." The third response (after I again appealed) was to produce what later turned out to be a materially incomplete list of lawyers and law firms while refusing altogether to provide the corresponding information regarding the dates of awards or award amounts. Many months of appeals, follow-on requests, consultations, cross-checks, and consultation with some of the lawyers involved revealed that the agency had (temporarily) lost track of exactly to whom it had paid hundreds of millions of dollars. During this lengthy process, the agency repeatedly disclosed information that later turned out to be false, incomplete, or both. Names were added, then removed, then added back. The agency also came to recognize that some of the information posted on its own website was incorrect and undertook revisions of these public documents.[269]

Although slow-rolling is par for the course for FOIA requests, my communications with SEC staff over the course of pursuing these requests over the course two years suggests something more problematic: the agency is not tracking and maintaining adequate records regarding its own operations. To be fair, the program is barely a decade old, so the fact that it has not perfected its administrative machinery is unsurprising. It's also extremely secretive, which is necessary to preserve anonymity of whistleblowers, but brings the risk of diminished accountability. And the program is overburdened handling the influx of tips and award requests, so it is understandable that sound administration has taken a back seat.

But, even if understandable, these possibly deficient administrative practices are cause for concern.[270] Systematic

[269] The CFTC FOIA process was comparatively straightforward. They denied my initial request, invoking various FOIA exemptions. I filed an administrative appeal, challenging the applicability of those exemptions to this information. They granted my appeal and then released the information.

[270] Nor is this the only aspect of the WBP that seems to be lacking in administrative precision. In January 2022 oral argument, Judge Tatel of the D.C. Circuit – no one's idea of an anti-administrativist – stated that the whistleblower award regulation was "one of the sloppiest . . . I've ever seen" and sent "a message back to the commission: they need to get their act together." Audio Recording of Oral Argument at 16:05-10, 17:00-17:30, Jane Doe v. SEC (D.C. Cir. Jan. 31, 2022) https://www.cadc.uscourts.gov/recordings/recordings2021.nsf/0A563D2B4B4407F3852587DB0059E869/$file/21-1097.mp3.

tracking of tipsters, tips, investigations, actions, awards, counsel, and other variables, would enable the SEC to learn about how the program is actually operating – and how it might be further improved. For instance, for my study, I was not able to access information about tips submitted, tips that led to further investigation, or tips that led to an enforcement action but no settlement or penalty. SEC should have access to all of this information. SEC's economists, who are already closely engaged with the agency's tip-sifting process,[271] could perform numerous valuable studies comparing different whistleblower and counsel characteristics with different results and learn a great deal about the realities of the program – all without compromising the anonymity of the whistleblowers themselves.[272]

Here are some potentially useful studies the agencies might conduct.[273]

Pro Se vs. Represented Tipsters - Above, I showed that both SEC and CFTC awarded significantly more dollars to represented tipsters as to unrepresented ones. These statistics may understate the advantage of represented tipsters if unrepresented tipsters significantly outnumber represented ones in the total pool.[274]

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[271] SEC Annual Budget Report FY 2017 at 80.

[272] SEC OWB FY2021 Report at 24 ("aggregated data that does not reveal the identity of the underlying whistleblowers can yield a fuller picture about the program"). In its annual reports, the SEC discloses only very limited statistical data relating to (1) the percentage of tips received and awards made to tipsters from different US states, countries, and continents; (2) the percentage of awards made to tipsters who provided information relevant to pre-existing SEC investigations as opposed to information that caused the SEC to open a new investigation; (3) the percentage of awards made to current or former corporate insiders, and the percentage of these individuals who had first reported their complaints internally; and (4) the percentage of tips received alleging different substantive securities law violations. *See* SEC FY2021 OWB Annual Report; *see also* 15 U.S.C. § 78u-6(g)(5) (requiring the SEC submit annual reports to Congress that include "a description of the number of awards granted; and the types of cases in which awards were granted during the preceding fiscal year").

[273] *See also* Evans et al., *supra* note _ at 519 (calling on SEC to "publish statistics that would help prospective whistleblowers to make a more informed decision as to whether the risks are worth the possibility of an award").

[274] Unrepresented tipsters may outnumber represented ones because (1) finding a qualified and willing whistleblower lawyer takes a lot of work, and some tipsters may be unwilling or uninterested in doing that work; (2) waiting for a lawyer to review and process your tip takes a lot of time, and some tipsters may be unwilling to wait; (3) lawyers will insist on being paid, and some tipsters may not be willing to pay, even if it's a contingency on the back end; and (4) finding a lawyer means sharing your highly sensitive information with an additional human being who

The agencies could compare pro se vs. represented tipsters regarding (a) the number of tips filed; (b) the number of tips that led to further investigations; (c) the number of tips that led to an enforcement action; and (d) the number of tips that led to an award.[275] As stated above, the overall odds of getting an award at the SEC are 1 out of 250. If unrepresented tipsters vastly outnumber represented ones in the total pool, the odds of winning an award for an unrepresented tipster are likely to be much worse than that. This would be extremely useful information for the public to have.

The agencies could also evaluate whether any special factors tend to make for a successful pro se tipster. They could compile available information about the successful pro se tipsters (education, job title,[276] gender, etc.) and compare this with a random sample of unsuccessful pro se tipsters. For instance, it may be the case that successful pro se tipsters tend to possess some special training or background that makes them unusually adept at navigating the whistleblower process.

Tricks of the Trade -- Above, I stated that one potential advantage that savvy lawyers could give to their clients is by providing additional external verification for their tips, in the form of expert reports, interview transcripts, secretly recorded conversations with culpable personnel, documents taken from the target without permission, that would make the tip more attractive to the agency. Relatedly, I also suggested that, even aside the substantive additional material, these lawyers could provide an advantage by knowing how to package and present the tips to the agency in a format that they will prefer.

The agencies could study this by compiling information regarding the information included in the package submitted to the

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you likely never met before and may not trust to keep the information a secret, and some tipsters may not be willing to do that.

[275] The SEC's annual whistleblower reports do not disclose information regarding how many tips were submitted with and without counsel. Instead, they disclose a single combined percentage that includes both tips submitted "an unknown foreign or domestic geographical categorization" and tips "submitted anonymously through counsel." SEC OWB FY2021 Report at 37; SEC OWB FY2020 Report at 41; SEC OWB FY 2019 Report at 32; SEC OWB FY2018 Report at 33. This statistic would seem to include some un-represented tipsters (who left off their geographic locations) and would also leave out some represented ones (who chose, for whatever reason, not to be anonymous).

[276] Murphy Maxwell, *Meet 6,500 Of SEC's Confidential Tipsters,* WALL ST. J. (Jul 29, 2014).

agency for (a) all whistleblowers who received an award; (b) a random sample of all whistleblowers whose tips led to further investigation; (c) a random sample of all whistleblowers whose tips did not lead to any further investigation.

If the agencies find that successful tips tend to be the ones accompanied by certain types of supplemental documents, this is vital information that should be shared with the public.[277] All prospective whistleblowers and their lawyers should have equal access to information about the way to get the agencies' attention.[278]

Law Firm Batting Average - For each firm/lawyer that has submitted at least one tip, the agency could calculate the ratio of tips submitted to (a) investigations opened; (b) enforcement actions commenced; and (c) awards issued. Then, the agencies could use the resulting batting averages to track how different types of firms are treated when they file subsequent tips. If there are signs that an agency is more (less) likely to reach out to the lawyer, to refer the tip for further investigation, or take other favorable actions for high (low) batting average firms/lawyers, the agency may want to watch this closely. While reputational and credibility can and should certainly play a role in reducing sifting costs, the agency should be careful that this doesn't cross over into unfair treatment of less well-connected firms, or inappropriate favoritism to well-established ones. Further, if certain types of firms are providing disproportionate share of weak tips, this information could be useful in designing reforms to streamline the tip-sifting process.

* * *

This is just a sample of the valuable studies the SEC and CFTC should be conducting to learn about and improve their programs. For some of these (like the last one listed), the agencies could use them solely for internal administrative purposes. For others, they could release the bottom line results without necessarily releasing the studies themselves, to provide valuable information to the public

[277] *Cf.* Evans et al. *supra* note _ at n.331 (proposing that the SEC "guidance on what the best cases look like from the agency's perspective"); Letter from Taylor Scott Amarel to Brent Fields (SEC), *Petition for Rulemaking* (Dec. 18, 2018) (calling on the SEC to "Create standards and publish examples of what a quality whistleblower tip looks like").

[278] If the agency finds that successful tips tend to be accompanied by documents or information gathered through questionable means, including means that would have been illegal if done by the government, this would also be critical information to know about the program.

and to potential tipsters about what works and what doesn't. There is much to be learned without jeopardizing the anonymity of any whistleblower.

But none of this learning will be possible without sound data practices. Today, the SEC may not be in a position to do these studies because it may not be keeping track of the data. Perhaps the Government Accountability Office, the Administrative Conference of the United States, and/or the SEC's own Office of Inspector General needs to evaluate the agency's current data storage practices and make recommendations for improvement. And perhaps those same offices could lead the charge to run a series of quantitative and qualitative studies of the whistleblower program designed to detect trends, biases, and recommend improvements.

3. Encouraging Tipsters to Hire Lawyers

Whistleblower lawyers are likely to resist many of the proposed reforms discussed above. To sweeten the deal, and if the agencies confirm that represented tipsters significantly and systematically outperform unrepresented ones, it is possible that they should do more to encourage serious tipsters to hire a lawyer before submitting and discouraging tipsters from filing without a lawyer. Doing so could, potentially, further economize and enhance tip-sifting both by increasing the quality of tips that do get submitted (because they have been screened and processed by a lawyer), and decreasing the quantity of low-quality pro se tips.

There are several potential policy changes that might encourage tipsters to go with an attorney or stay home. In addition to public education about the importance of lawyers, and reducing fees (as proposed above), the agencies could also do what many federal courts have done to handle pro se cases – adopt a formally separate track and a separate staff devoted to handling these cases.[279] The bulk of tip-sifting efforts would be officially devoted to reviewing the represented tipsters and a smaller group – like staff attorneys in federal courts – would be assigned to reviewing the *pro se* ones. For all we know, the agencies have done this already. Nonetheless, it may be beneficial to *explicitly* adopt such a program. Doing so would signal that serious whistleblowers really should hire a lawyer to ensure that their tips get the most careful attention.

[279] Marin Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 415-16 (2013).

Another option would be for the agencies could to consider actually appointing private counsel for the most promising pro se tipsters. Today, if the agency identifies a pro se tip that raises serious concerns but leaves important questions unanswered or is materially incomplete, the agency is likely to simply reject the tip. Instead, the agency could reach out to the pro se claimant and directly encourage them to bring their tip to a qualified whistleblower attorney. Alternatively, the agency could offer to actually appoint such an attorney, chosen by the agency from a "panel" of pre-qualified experienced whistleblower attorneys who have agreed to be included on this list in exchange for a fixed contingency fee (say 10%-20% of any award). Some whistleblower attorneys may agree to serve on this "panel," notwithstanding the sub-market level contingency fee, because it could give them access to potentially promising tips they might not be able to get through pure private practice. The agency could select attorneys for panel service based on a prior record of success in the program. Tipsters would not be forced into the arrangement but would be encouraged to do so.

CONCLUSION

In a 2021 panel on the WBPs, an SEC Enforcement Director quipped: "whether you believe in it or not it doesn't really much matter because it's here to stay."[280] Ten years and well over a billion dollars in, the WBPs are no longer sexy new startups disrupting the enforcement landscape; they are well-established familiar components of that landscape.

The time has come for these programs to grow up. The "move fast and break things" disruptive approach may have been useful to get the programs off the ground, but it's now past the point where that approach is doing more harm than good. It's time to adopt a more sustainable, accountable, and efficient model.

This paper has highlighted one significant variable that may be currently impeding the programs' efficiency and accountability: the private attorneys who represent whistleblowers. The FOIA data reviewed above shows that the WBPs have effectively outsourced the tip-sifting function to private lawyers, and especially the small group of well-connected repeat-player firms who dominate both programs. And yet, despite the vital public function these lawyers

[280] Rock Center Lunch: Whistleblowers, Ethics and Compliance (Jan. 2021) (statement of Steven Peiken) https://www.youtube.com/watch?v=6oO3vxh_Ss4&t=25s.

have been assigned to play and the astronomical fees they extract for their services, the WBPs have licensed them to operate free from virtually any meaningful transparency, accountability, or regulation. This model of outsourcing without oversight should be reexamined. Reasonable and moderate reforms – including mandatory disclosure (of fees, expenses, screening practices, tips filed, bounties received, etc.) for private whistleblower firms and better data collection, analysis, and transparency for the agency – seem likely to substantially improve the program.