

The Whistleblower Industrial Complex

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Although the whistleblower programs (WBPs) created by Dodd-Frank have received universal acclaim, little is known about how they actually work. In 2021, the Securities and Exchange Commission (SEC) received an average of forty-nine 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 Article 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 appear to significantly outperform unrepresented ones, repeat-player lawyers appear to outperform first-timers, and lawyers who used to work at the SEC appear to outperform just about everybody.

The upshot is that the SEC and CFTC have effectively privatized the tip-sifting function at the core of the WBPs. Private lawyers have earned hundreds of millions of dollars in fees from these programs, with a disproportionate share going to a concentrated group of well-connected, repeat players. Unlike traditional plaintiff-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 private outsourcing program and propose reforms to realign these private actors with the public interest.

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Introduction

Although the Securities and Exchange Commission (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.¹ Out of the ensuing wreckage came Dodd-Frank Sections 748 and 922, which empowered the Commodity Futures Trading Commission (CFTC) and SEC to stand up new centralized whistleblower offices to receive tips and make financial payments (also known as “bounties”) to individuals who provide the agencies with actionable information.²

These whistleblower programs (WBPs) have been praised by SEC and CFTC Chairs,³ other Republican and Democratic political leaders,⁴ the Madoff

1. See HARRY MARKOPOLOS, *NO ONE WOULD LISTEN: A TRUE FINANCIAL THRILLER* (2010); SEC OFF. OF INVESTIGATIONS, OIG-509, *INVESTIGATION OF FAILURE OF THE SEC TO UNCOVER BERNARD MADOFF’S PONZI SCHEME* (2009).

2. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 §§ 748, 922, 124 Stat. 1376, 1739-46, 1841-1849 (2010); see also *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 773-75 (2018) (reviewing origins of the SEC program).

3. E.g., Gary Gensler, SEC Chair, Remarks at the Securities Enforcement Forum (Nov. 4, 2021) (“[W]e benefit greatly from . . . our robust whistleblower program.”); Jay Clayton, SEC Chair, Statement at SEC Open Meeting: Strengthening Our Whistleblower Program (Sept. 23, 2020) [hereinafter Clayton, *Strengthening Our WBP*] (“[T]he whistleblower program has been a critical component of the Commission’s efforts to detect wrongdoing and protect investors and the marketplace . . .”); Mary Jo White, SEC Chair, Speech at the Ray Garrett Jr. Corporate and Securities Law Institute, Northwestern University School of Law: The SEC as the Whistleblower’s Advocate (Apr. 30, 2015) (describing the SEC whistleblower program (WBP) as a “game changer”); CFTC Chair Rostin Behnam, Chair, Commodity Futures Trading Comm’n (CFTC), Keynote Address at the FIA Boca 2022 International Futures Industry Conference (Mar. 16, 2022) (emphasizing “the contributions of the CFTC’s Whistleblower Program”); Timothy Massad, CFTC Chair, Testimony Before the Senate Committee On Agriculture, Nutrition, and Forestry (Dec. 10, 2014), <https://www.cftc.gov/PressRoom/Speeches/Testimony/opamassad-6> [<https://perma.cc/49G6-Q8MV>] (describing the CFTC WBP as “an important tool”).

4. E.g., Sen. Sherrod Brown, et al., Comment Letter on Proposed Amendments to Whistleblower Rules (Sept. 17, 2020), <https://www.sec.gov/comments/s7-16-18/s71618-7801845-223661.pdf> [<https://perma.cc/C6J9-GKRY>] (describing the SEC WBP as “an unqualified success”); Letter from (Republican) Sen. Chuck Grassley to SEC Chair Gensler (Mar. 12, 2021), <https://whistleblowersblog.org/wp-content/uploads/2021/03/Sen-Grassley-Letter-to-Gensler-3-12-21.pdf> [<https://perma.cc/DTW7-9SN9>] (describing the WBP as “a critical component of the SEC’s enforcement arsenal”); Press Release, Sen. Chuck Grassley, Congress Passes Grassley Bill to Save CFTC Whistleblower Program (June 23, 2021), <https://www.grassley.senate.gov/news/news-releases/congress-passes-grassley-bill-to-save-cftc-whistleblower-program> [<https://perma.cc/8GNX-E2YD>] (“The CFTC [WBP] has become far more successful than Congress imagined when we set it up back in 2010.”); see also Samuel Rubinfeld, *Dodd-Frank Rollback to Spare SEC Whistleblower Program, Experts Say*, WALL ST. J. (Nov. 15, 2016), <https://www.wsj.com/articles/BL-252B-11567> [<https://perma.cc/6FZK-7AMP>].

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whistleblower,⁵ and academics,⁶ among many others.⁷ To many, WBPs seem to combine the best of public and private enforcement while avoiding their worst features. Calls to establish similar programs across the government have proliferated.⁸

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 and efficiently identify the good ones and assign an appropriate level of agency resources to investigate them.⁹

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 alone¹⁰ or about 49 tips per workday. Over the same period, the agency had paid out awards to just 216 tipsters,¹¹ less than 1 out of every 242 tips. For every tip that resulted in an award, 241 did not.

5. Harry Markopolos, Comment Letter on Proposed Amendments to Whistleblower Rules (Sept. 14, 2018), <https://www.sec.gov/comments/s7-16-18/s71618-4351184-173304.pdf> [<https://perma.cc/AU7X-K65R>].

6. *E.g.*, JOHN C. COFFEE, JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT 114 (2020) (characterizing WBPs as “dramatically successful”); Amanda M. 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) (describing WBPs as “the proverbial nail in the [fraud on the market] class action coffin”).

7. *E.g.*, *Somers*, 138 S. Ct. at 777 (describing Dodd-Frank’s WBP as “robust”); Robert J. Jackson Jr., SEC Comm’r, Statement on Proposed Rules Regarding SEC Whistleblower Program (June 28, 2018) (describing the SEC WBP as “crucial to our enforcement efforts” and “among our Staff’s most successful endeavors”); Kara M. Stein, SEC Comm’r, Statement on Proposed Amendments to the Commission’s Whistleblower Program Rules (June 28, 2018) (describing the program as “a resounding success”); Hester M. Peirce, SEC Comm’r, Statement at Open Meeting on Amendments to the Commission’s Whistleblower Program Rules (June 28, 2018) (describing the WBP as “a critical part of our enforcement program”); Elad L. Roisman, SEC Comm’r, Statement on the Commission’s New and Improved Whistleblower Program Rules (Sept. 23, 2020) (“To call this program a success is an understatement.”); Caroline A. Crenshaw, SEC Comm’r, Statement of Commissioner Caroline Crenshaw on Whistleblower Program Rule Amendments (Sept. 23, 2020) (“I am proud of our whistleblower program.”).

8. Financial Compensation for CFPB Whistleblowers Act, S. 2775, 117th Cong. (as introduced in Senate 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, *supra* note 6, at 119 (similar); Martin Totaro & Connor Raso, *A Brief Proposal to Expand The Scope of Whistleblower Programs*, BROOKINGS (Sept. 23, 2021), <https://www.brookings.edu/blog/up-front/2021/09/23/a-brief-proposal-to-expand-the-scope-of-whistleblower-programs/> [<https://perma.cc/L3T8-4JFK>] (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); MODEL WHISTLEBLOWER AWARD AND PROTECTION ACT (N. AM. SEC. ADM’RS ASSOC. 2020); Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2251 (2010) (arguing that monetary incentives for employee whistleblowers “should be expanded”).

9. *See infra* Section I.C.

10. Off. of the Whistleblower, *2021 Annual Report to Congress: Whistleblower Program*, SEC 28 (Nov. 16, 2021) [hereinafter *SEC WBP 2021 Annual Report*], https://www.sec.gov/files/2021_ow_ar_508.pdf [<https://perma.cc/W8T5-5WA7>].

11. Press Release, SEC, SEC Awards \$40 Million to Two Whistleblowers (Oct. 15, 2021), <https://www.sec.gov/news/press-release/2021-211> [<https://perma.cc/5LFB-37SN>].

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

This Article 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: that is, 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.

But the role of these attorneys is not necessarily benign. Private whistleblower attorneys might also *undermine* or *distort* agency tip sifting by flooding the agencies 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 agencies' 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.¹²

Given the potentially significant costs these attorneys might impose, studying how they actually perform is essential for policymakers who hope to evaluate and improve the WBPs. This Article 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 (FOIA) through a series of requests filed and repeatedly appealed over the course of nearly two years, beginning in August 2020.¹³

Key findings include the following:

12. See *infra* Part II.

13. In February 2022, 17 months after my initial request, a pair of investigative journalists from *Bloomberg* filed a virtually identical Freedom of Information Act (FOIA) request with the SEC. Email from Valerie Bauman & John Holland, Bloomberg Industry Group, to SEC FOIA (Feb. 18, 2022) (on file with author) (requesting disclosure of "1. A list of all attorneys who have been transmitted bounty monies pursuant to the SEC whistleblower regulations. 2. For each attorney listed above, specify the dates of the transmission and the amount of money transmitted."). Because of my earlier efforts, *Bloomberg* quickly obtained its requested information and published a report in July 2022. John Holland, *SEC Tip Line Was Meant to Stop Another Madoff. Is It Working?*, BLOOMBERG (July 26, 2022, 4:46 AM EDT), <https://www.bloomberg.com/news/articles/2022-07-26/sec-enriches-fraudsters-lawyers-as-secrecy-shrouds-tips-program> [<https://perma.cc/7KQT-FYP8>] (quoting an earlier draft of this Article). For a description of the FOIA process here, see *infra* Section V.B.

Lawyers Dominate – Both the SEC and CFTC awarded twice as many awards to represented tipsters as to unrepresented ones. In the aggregate, represented tipsters received 5 times more dollars from the SEC and 28 times more dollars from the CFTC than unrepresented ones. Average awards for represented tipsters also dramatically exceeded those for unrepresented tipsters in both programs.¹⁴

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.¹⁵

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.¹⁶

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 \$35-70 million to be paid to its own alumni through the end of 2020.¹⁷ The trend has accelerated in the most recent period; based on incomplete data from the SEC and the public record, *at least 42%* of all dollars awarded in the eighteen months between January 1, 2021 and June 30, 2022 went to clients of former SEC officials.¹⁸

Law Firm Types – Very small firms (≤ 5 lawyers) have done well, while traditional plaintiff-side firms¹⁹ and large defense-side firms are virtually absent.²⁰

WBPs seem to have substantially *outsourced* the tip-sifting function to private whistleblower lawyers. It is unclear whether this covert privatization has yielded enhanced tip-sifting efficiency. I estimate that private attorneys and other intermediaries have received between \$145 and \$290 million.²¹ These are public dollars that are not being used to directly incentivize whistleblowers to come forward. Had these funds instead been appropriated directly to the SEC, the agency could have expanded its tip-sifting staff by three or four hundred percent,²² while avoiding a significant amount of wasteful duplication.²³

The under-the-radar outsourcing of tip sifting has also undermined transparency and accountability for the WBPs. Whenever agency leaders report on the WBPs' performance, the first data point they invariably cite is the seemingly impressive dollar amount paid out to whistleblowers. But these

14. See *infra* Section III.B.

15. See *infra* Section III.C.

16. See *infra* Section III.C.

17. See *infra* Section III.C.

18. See *infra* Section III.C.

19. One traditional plaintiffs' firm did very well in the SEC program, but the whistleblower practice has since left the firm. See *infra* Section II.E.

20. See *infra* Section III.D.

21. See *infra* Section IV.A.2.

22. See *infra* note 246 and accompanying text.

23. See *infra* Section IV.A.2 (evaluating the efficiency costs imposed by outsourcing tip sifting).

statements conspicuously fail to account for the fact that very substantial proportions of those amounts are not actually going to whistleblowers but are instead being diverted to private attorneys and other intermediaries. As a result, Congress and the public at large are being repeatedly fed an exaggerated picture of the program's accomplishments—and an understated picture of its true costs.²⁴

When the close relationship between dominant repeat-player firms and agency-enforcement attorneys is combined with the agencies' encouragement of tipsters to provide *ongoing* support and assistance to open investigations into their employers, there is significant risk that tipsters are effectively being deputized as government agents, raising a variety of constitutional and legal concerns.²⁵

For the last decade, whistleblower lawyers have operated free from virtually any meaningful public oversight, regulation, transparency, or accountability.²⁶ 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.²⁷ 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.²⁸ It is time to reconsider whether this outsourcing without oversight serves the public interest, and whether we need some new accountability and transparency to ensure these private actors are adding value to these programs, not merely extracting it.²⁹

This Article makes four contributions:

First, it contributes to the debate over how to improve whistleblower “bounty” programs. The WBPs have received close attention from scholars³⁰ and

24. See *infra* Section IV.A.2.

25. See *infra* notes 140-141, 220-232 and accompanying text (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).

26. Of course, all lawyers are bound by duties of ethics and professional responsibility.

27. See *infra* notes 263-268 and accompanying text (discussing the legal regime that applies to traditional securities class action plaintiffs' attorneys).

28. See *infra* notes 275-286 and accompanying text.

29. See *infra* Part V.

30. See, e.g., Rose, *supra* note 6; COFFEE, *supra* note 6, at 113-21; Anthony J. Casey & Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam*, 91 WASH. U. L. REV. 1169 (2014); David Freeman Engstrom, *Whither Whistleblowing: Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*, 15 THEORETICAL INQUIRIES L. 605 (2014); Julie Rose O'Sullivan, “Private Justice” and FCPA Enforcement: Should the SEC Whistleblower Program Include a Qui Tam Provision?, 53 AM. CRIM. L. REV. 67 (2016); Usha R. Rodrigues, *Optimizing Whistleblowing*, 94 TEMP. L. REV. 255, 285-86, 302 (2022); Christina Parajon Skinner, *Whistleblowers and Financial Innovation*, 94 N.C. L. REV. 861, 908-09 (2016); Geoffrey 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 Corrupt Practices Act?*, 75 WASH. & LEE L. REV. 1097 (2018); Jennifer Pacella, *Making Whistleblowers Whole*, 12 U.C. IRVINE L. REV. 1291 (2022).

policymakers, with repeated efforts from the SEC³¹ and Congress³² to revise the program rules in recent years. But whistleblower lawyers have not been the subject of any of these debates.³³ This Article corrects this oversight, putting these lawyers front and center. I show that these attorneys are squarely at the heart of how WBPs operate and that they impose serious costs on the programs. This Article is also the first to chronicle the extensive and 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

31. See SEC Whistleblower Program Rules, 83 Fed. Reg. 34702 (proposed July 20, 2018); SEC Whistleblower Program Rules, 85 Fed. Reg. 70898 (Nov. 5, 2020) (to be codified at 17 C.F.R. pts. 240, 249); SEC Whistleblower Program Rules, 87 Fed. Reg. 54140 (Sept. 2, 2022) (to be codified at 17 C.F.R. pt. 240).

32. E.g., Press Release, Sen. Chuck Grassley, Grassley, Warren Work to Strengthen SEC Whistleblower Program (Mar. 31, 2022), <https://www.grassley.senate.gov/news/news-releases/grassley-warren-work-to-strengthen-sec-whistleblower-program> [<https://perma.cc/78XN-95LN>]; Press Release, Rep. Al Green, Congressman Al Green Introduces Sweeping Legislative Package to Protect and Reward Whistleblowers (Oct. 5, 2021), <https://algreen.house.gov/media/press-releases/congressman-al-green-introduces-sweeping-legislative-package-protect-and-reward-whistleblowers> [<https://perma.cc/64SJ-H9Q4>]; Press Release, Sen. Tammy Baldwin, U.S. Senator Tammy Baldwin Introduces Bipartisan Legislation to Boost Protections for SEC, CFTC Whistleblowers (Sept. 25, 2019), <https://www.baldwin.senate.gov/newsroom/record/press-releases/whistleblower-programs-improvement-act> [<https://perma.cc/5EVE-7PEC>].

33. An earlier version of this Article posted on SSRN generated policymaker interest on this subject. See Mark T. Uyeda, SEC Comm’r, Statement on the Final Rules Related to the Whistleblower Program (Aug. 26, 2022) (citing the working draft of this Article and calling on the SEC to consider “evaluat[ing] the role played by lawyers representing whistleblowers on a contingency fee basis and how they present tips to the Commission,” to promote “greater visibility into its claims and award determinations,” and to increase “the number of high-quality tips from unrepresented persons”); cf. Memorandum from Nicholas Padilla, Jr., Acting Inspector Gen., SEC, to Gary Gensler, Chair, SEC (Oct. 13, 2022), <https://www.sec.gov/files/inspector-generals-statement-sec-mgmt-and-perf-challenges-october-2022.pdf> [<https://perma.cc/CKX3-8S2X>] (noting that the SEC OIG is conducting an audit of the WBP). The Article also generated substantial media coverage. See, e.g., Mengqi Sun, *SEC Whistleblower Awards Program Might Have a Revolving-Door Problem, Study Says*, WALL ST. J. (Aug. 25, 2022, 5:30 AM ET), <https://www.wsj.com/articles/sec-whistleblower-awards-program-might-have-a-revolving-door-problem-study-says-11661419801> [<https://perma.cc/P5R8-UX34>]; Matt Levine, *Some Free Brokers Are Cheaper than Others*, BLOOMBERG (Aug. 25, 2022, 2:00 PM EDT), <https://www.bloomberg.com/opinion/articles/2022-08-25/some-free-brokers-are-cheaper-than-others> [<https://perma.cc/KS8S-9LVX>]; Holland, *supra* note 13; Jennifer Sor, *The SEC Has Paid Over \$1 Billion to Whistleblowers Since 2012. But a New Study Says the Agency has Outsourced the Job to High-Priced Law Firms That May Discourage More Tipsters from Coming Forward.*, BUS. INSIDER (Aug. 13, 2022, 8:30 AM), <https://markets.businessinsider.com/news/stocks/sec-whistleblower-program-law-firms-tips-regulation-reward-2022-8> [<https://perma.cc/VH7Z-NHS6>].

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 E. 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. See Christine Wiedman & Chunmei Zhu, *Do the SEC Whistleblower Provisions of Dodd Frank Deter Aggressive Financial Reporting?* (Feb. 2020) (unpublished manuscript), <https://ssrn.com/abstract=3105521> [<https://perma.cc/JKL5-W3ZQ>]; Qingjie Du & Yuna Heo, *Political Corruption, Dodd-Frank Whistleblowing, and Corporate Investment*, 73 J. CORP. FIN. art. no. 102145 (2022).

Article offers the first empirically grounded description of the role private whistleblower lawyers play in these regimes.³⁶

Second, the Article 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 agencies and the regulated industry undermines regulation,³⁷ and academics have devoted substantial attention to this criticism.³⁸ This Article highlights 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.

Third, the Article 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,³⁹ federal and state enforcers,⁴⁰ deal lawyers,⁴¹ in-house counsel,⁴² and compliance specialists,⁴³ among others. This Article is the first to extend this study to the newest group of attorneys shaping markets: the private whistleblower bar.

Fourth, the Article contributes to the debate over government outsourcing of public enforcement. Prior studies have carefully examined efficiency and

36. In a prior paper showing that attorneys surprisingly do *not* move between the SEC and the plaintiff-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-Revolving Door*, 46 J. CORP. L. 751, 802-04, 804 n.275 (2021). The present project grew directly out of this past one.

37. *E.g.*, Press Release, Sen. Chuck Grassley, SEC’s Revolving Door (Feb. 11, 2013), <https://www.grassley.senate.gov/news/news-releases/secs-revolving-door> [<https://perma.cc/H89Y-55NB>]; Press Release, Sen. Chuck Grassley, Report Shows SEC’s Revolving Door Must Be Slowed (May 13, 2011), <https://www.grassley.senate.gov/news/news-releases/grassley-report-shows-secs-revolving-door-must-be-slowed> [<https://perma.cc/78YL-Q7FY>]; Ian Wenik, *Elizabeth Warren Says SEC Rule Tainted by ‘Soft Corruption,’* CITYWIRE (Aug. 22, 2018), <https://citywire.com/ria/news/elizabeth-warren-says-sec-rule-tainted-by-soft-corruption/a1148812> [<https://perma.cc/FLW6-SML5>]; *see also* Patrick Radden Keefe, *Jordan Thomas’s Army of Whistle-Blowers*, NEW YORKER (Jan. 17, 2022), <https://www.newyorker.com/magazine/2022/01/24/jordan-thomas-army-of-whistle-blowers> [<https://perma.cc/S4SQ-LY3X>] (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, Simi Kedia, Kevin Koh & Shivaram Rajgopal, *The Revolving Door and the SEC’s Enforcement Outcomes: Initial Evidence from Civil Litigation*, 60 J. ACCT. & ECON. 65 (2015); James D. Cox & Randall S. Thomas, *Revolving Elites: The Unexplored Risk of Capturing the SEC*, 107 GEO. L.J. 845 (2019).

39. *E.g.*, JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION* (2015); Morris Ratner, *A New Model of Plaintiffs’ Class Action Attorneys*, 31 REV. LITIG. 757 (2012); Stephen J. Choi, Jessica Erickson & Adam C. Pritchard, *Coalitions Among Plaintiffs’ Attorneys in Securities Class Actions*, 24 AM. L. & ECON. REV. 278 (2022).

40. *E.g.*, Stephen J. Choi, Mitu Gulati & A.C. Pritchard, *Should I Stay or Should I Go? The Gender Gap for Securities and Exchange Commission Attorneys*, 62 J. L. & ECON. 427 (2019); Andrew Jennings, *State Securities Enforcement*, 47 BYU L. REV. 67, 128-29 (2021).

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

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

43. Miriam Baer, *Compliance Elites*, 88 FORDHAM L. REV. 1599 (2020).

accountability tradeoffs arising in various forms of private outsourcing of government litigation and enforcement.⁴⁴ This Article is the first to examine these tradeoffs in the context of WBP tip sifting.

This Article 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.⁴⁵

I. Background: The Case-Selection Challenge

The universe of corporate misconduct is vast.⁴⁶ 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 offenders on behalf of victims. More recently, an alternative hybrid model has been gaining steam: whistleblower programs.

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 I.A and I.B, respectively). It then turns in Section I.C to whistleblower programs, which do not avoid the case-selection problem, but reconstitute it as a problem of tip sifting. Section I.C also shows why tip sifting

44. E.g., Margaret H. 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 J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016); Kiel Brennan-Marquez, *Outsourced Law Enforcement*, 18 U. PA. J. CONST. L. 797 (2016); Jennifer M. Chacón, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1 (2017).

45. 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. Indeed, out of an abundance of caution and respect for the importance of preserving whistleblower anonymity, this Article generally does not identify *particular* law firms or lawyers or match them to particular awards (other than in the few cases of very high-profile, dominant firms that have already voluntarily taken on an aggressive and active media role in promoting the WBPs). Instead, it focuses on identifying aggregate-level trends and patterns. My criticisms focus on the effects private attorneys have on the WBPs, not their subjective intentions or character. This Article focuses on whistleblower attorneys, not attorney whistleblowers. Cf., e.g., Jennifer M. Pacella, *Conflicted Counselors: Retaliation Protections for Attorney-Whistleblowers in an Inconsistent Regulatory Regime*, 33 YALE J. ON REGUL. 491 (2016) (discussing the latter); Dennis J. Ventry, Jr., *Stitches for Snitches: Lawyers as Whistleblowers*, 50 U.C. DAVIS L. REV. 1455 (2017) (same).

46. See Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923, 924 (2019) (showing, based on internal compliance data obtained from large corporations, that violations committed exceed the public enforcement by an enormous margin).

poses 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;⁴⁷ coordination with other enforcers;⁴⁸ cooperation with targets;⁴⁹ and regular review of regulatory filings,⁵⁰ investigative journalism,⁵¹ and other public information.

These professionals typically act with broad discretion over how to allocate investigatory resources over the universe of potential wrongdoing.⁵² However, this independence is not unlimited; staff operate under the supervision of leaders who are democratically accountable through appointment and removal by elected officials, legislative oversight, and/or direct elections.⁵³ 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.⁵⁴

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.

47. See, e.g., 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).

48. See Verity Winship, *Enforcement Networks*, 37 YALE J. ON REGUL. 274 (2020).

49. See Miriam Baer, *Designing Corporate Leniency Programs*, in THE CAMBRIDGE HANDBOOK OF COMPLIANCE 351 (Benjamin van Rooij & D. Daniel Sokol eds., 2021).

50. See Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REGUL. 499, 509 (2020).

51. Off. of Chief Couns., Div. of EnF't, *Enforcement Manual*, SEC 12 (Nov. 28, 2017) [hereinafter *SEC Enforcement Manual*], <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf> [<https://perma.cc/4B6Z-EXD7>].

52. Margaret H. Lemos, *Democratic Enforcement: Accountability and Independence for the Litigation State*, 102 CORNELL L. REV. 929, 942 (2017).

53. *Id.* at 968-79.

54. Urska Velikonja, *Politics in Securities Enforcement*, 50 GA. L. REV. 17, 19-20 (2015). Compare, e.g., Tom Driesbach, *Under Trump, SEC Enforcement of Insider Trading Dropped to Lowest Point in Decades*, NPR (Aug. 14, 2020, 4:12 PM ET) (discussing the Trump administration's deprioritization of insider-trading enforcement), with Press Release, SEC, SEC Announces Enforcement Task Force Focused on Climate and ESG Issues (Mar. 4, 2021), <https://www.sec.gov/news/press-release/2021-42> [<https://perma.cc/5T62-KWZY>] (prioritizing environmental issues, in line with the Biden administration's goals).

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Further, public enforcers may operate under severe budget and staffing constraints.⁵⁵ 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.

Structural issues can also 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, "bureaucratic slack" may skew case selection; 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.⁵⁶

The forces of "regulatory capture" may also skew case-selection priorities of enforcement professionals. Enforcers may decline to pursue certain potential misconduct because they do not want to anger a prospective future employer when they hope to walk through the "revolving door" to the private sector or because they have come to internalize the views of the industry.⁵⁷

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) cases⁵⁸ or cases against disfavored companies (and look the other way when violations occur within favored companies)⁵⁹ and to rack up impressive-seeming (but meaningless) enforcement statistics.⁶⁰

In sum, the public-enforcement model is likely to fail to uncover some important cases of significant misconduct. A widely cited 2010 study of

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

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

57. See Cox & Thomas, *supra* note 38, at 853-69 (reviewing literature); see also Panel Discussion at the Fordham Journal of Corporate and Financial Law Symposium: What Would We Do Without Them: Whistleblowers in the Era of Sarbanes-Oxley and Dodd-Frank (Oct. 27, 2017) [hereinafter Panel Discussion], in 23 FORDHAM J. CORP. & FIN. L. 400, 433 (statement of 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.").

58. Jonathan R. Macey, *The Distorting Incentives Facing the U.S. Securities and Exchange Commission*, 33 HARV. J. L. & PUB. POL'Y 639, 639-40 (2010).

59. Several studies find that the SEC is less likely to pursue enforcement actions (or, where they do pursue enforcement, to extract high settlements) against targets based in districts or states of Representatives or Senators serving on SEC oversight committees. See Mihir Mehta & Wanli Zhaob, *Politician Careers and SEC Enforcement Against Financial Misconduct*, 69 J. ACCT. & ECON. art. no. 101302, at 25 (2020); Jonas Heese, *The Political Influence of Voters' Interests on SEC Enforcement*, 36 CONTEMP. ACCT. RSCH. 869, 870 (2019); Maria M. Correia, *Political Connections and SEC Enforcement*, 57 J. ACCT. & ECON. 241, 259 (2014).

60. Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 968-70 (2016).

corporate frauds that took place in large U.S. companies found that public enforcers accounted for initial revelation in just 20% of cases.⁶¹

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

The private-enforcement model remedies 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 are at their disposal to reinvest in new ones. 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 ameliorates the problems of "regulatory capture" and the political forces that may distort public enforcement. Unlike public enforcers, private enforcers rarely join the regulated industry or a defense firm, and therefore have no reason to "trim their sails" in the hopes of doing so.

But private enforcement faces some fundamental flaws 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 only a small group knows of the misconduct, no amount of zealous advocacy or investigation by entrepreneurial attorneys is likely to help.

Further, because private attorneys will rationally maximize their own profits rather than achieve the socially optimal level of enforcement, they may not pursue some significant cases of misconduct.⁶² 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.⁶³ This model thus tends to underemphasize some important

61. Dyck et al., *supra* note 8, at 2214, 2225 tbl.2.

62. Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 589-91 (1997).

63. See Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 287-89 (2016); Alexander Platt, "Gatekeeping" in the Dark: SEC Control over Private Securities Litigation Revisited, 72 ADMIN. L. REV. 27, 48-50 (2020) (discussing specific legal mechanisms by which the SEC Enforcement Division can encourage piggyback private litigation).

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.⁶⁴

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 because of their tipping. Although these programs harness private incentives to bring information to an agency’s attention, the agency retains complete prosecutorial discretion—it alone decides 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.

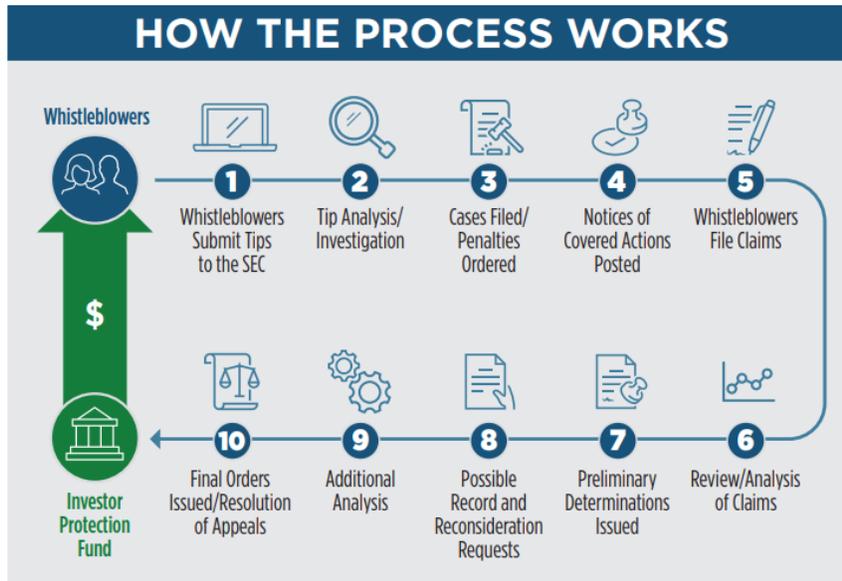
Figure 1 depicts the SEC’s whistleblower process. After a tipster submits a tip (Step 1), it is evaluated by agency officials who work for a subdivision of the SEC’s Division of Enforcement called the Office of Market Intelligence (OMI) (Step 2).⁶⁵ OMI officials select some tips for further investigation,⁶⁶ some of which lead to actual enforcement actions. A subset of enforcement actions results in the payment of over \$1 million 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 for up to 30% (Step 4). Any whistleblowers who believe their tips helped the agency pursue the action then file claims seeking a bounty payment (Step 5). The agency then processes these claims, makes award determinations,⁶⁷ resolves objections (if any) from affected whistleblowers, and then issues the award (Steps 6-10).

64. Dyck et al., *supra* note 8, at 2214, 2225 tbl.2.

65. *SEC WBP 2021 Annual Report*, *supra* note 10, at 28.

66. Off. of the Whistleblower, *Frequently Asked Questions*, SEC § 7 (Nov. 22, 2022) [hereinafter *SEC OWB FAQ*], <https://www.sec.gov/whistleblower/frequently-asked-questions> [<https://perma.cc/4KHY-8BBY>]. For a description of the process for declining to pursue a tip, see U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-115, SEC: SYSTEMATICALLY ASSESSING STAFF PROCEDURES AND ENHANCING CONTROL DESIGN WOULD STRENGTHEN INTERNAL OVERSIGHT 37-38 (2019).

67. The agency considers various factors when determining award amounts but may award no more than 30% of the amount recovered. *See* 17 C.F.R. § 240.21F-6 (2022) (listing factors).

Figure 1. The SEC Whistleblower Process⁶⁸

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.⁶⁹ And whereas traditional public enforcers are strictly constrained by limited investigatory resources, whistleblower programs magnify the power of those limited resources by having the actionable information dropped right on their doorstep.⁷⁰

These programs have been gaining traction.⁷¹ Under 2006 legislation, the Internal Revenue Service (IRS) has a Whistleblower Office to receive and review tips regarding tax noncompliance and to pay “monetary awards to eligible

68. *SEC WBP 2021 Annual Report*, *supra* note 10, at 13. The CFTC process is substantially similar. See *Program Overview*, CFTC WHISTLEBLOWER PROGRAM, <https://www.whistleblower.gov/overview> [https://perma.cc/LYT8-9P7T].

69. Rose, *supra* note 6, at 1238; see also Dyck et al., *supra* note 8, at 2225 tbl.2, 2226 (finding, in the pre-Dodd-Frank 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).

70. See *SEC Oversight: Current State and Agenda: Hearing Before the Subcomm. on Cap. Mkts., Ins. & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 111th Cong. 2 (2009) [hereinafter *SEC Oversight Hearing*] (statement of Rep. Paul E. Kanjorski, Chairman, Subcomm. on Cap. Mkts., Ins. & Gov't Sponsored Enters.) (noting that the WBP will “leverage the Commission’s limited resources and increase the number of cops on the beat”).

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

individuals whose information is used by the IRS.”⁷² The Financial Crimes Enforcement Network, a bureau of the Treasury Department, has set up a program focused on anti-money-laundering laws.⁷³ The National Highway Traffic Safety Administration recently issued its first ever whistleblower award.⁷⁴ And proposals to create new whistleblower programs abound.⁷⁵

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.⁷⁶ This challenge becomes more difficult and more time-consuming as the program successfully attracts more tips. Thus, a very large number of tips received is potentially a bug, rather than a feature.⁷⁷ Indeed, this point was made repeatedly

72. *Whistleblower Office*, IRS (Sept. 30, 2022), <https://www.irs.gov/compliance/whistleblower-office> [<https://perma.cc/VZ46-MY8S>]. 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).

73. 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).

74. Press Release, Nat’l Highway Traffic Safety Admin., NHTSA Makes Its First Ever Whistleblower Award (Nov. 9, 2021), <https://www.nhtsa.gov/press-releases/first-whistleblower-award> [<https://perma.cc/5Y6W-N7PA>]. But see Ben Foldy, *Whistleblower Program for Auto Safety Has Yet to Launch, Years After Congress Mandated It*, WALL ST. J. (Apr. 4, 2021, 9:00 AM ET), <https://www.wsj.com/articles/whistleblower-program-for-auto-safety-has-yet-to-launch-years-after-congress-mandated-it-11617541200> [<https://perma.cc/3SKC-AHW2>] (noting that NHTSA took six years to set up the program).

75. See *supra* note 8 and accompanying text.

76. See Justin W. Evans, Stephanie R. Sipe, Mary Inman & Caroline Gonzalez, *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, *supra* note 6, at 1280, 1282; Casey & Niblett, *supra* note 30, at 1175; Engstrom, *supra* note 30, at 613-16; O’Sullivan, *supra* note 30, at 90-91; Victor Razon, Note, *Replacing the SEC’s Whistleblower Program: The Efficacy of a Qui Tam Framework in Securities Enforcement*, 47 PUB. CONT. L.J. 335, 346-47 (2018); COFFEE, *supra* note 6, 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 30, at 285-86, 302; Skinner, *supra* note 30, at 908-09; Westbrook, *supra* note 30, at 1165-66; Miriam H. Baer, *Reconceptualizing the Whistleblower’s Dilemma*, 50 U.C. DAVIS L. REV. 2215, 2217, 2227-32 (2017).

77. See sources cited *supra* note 76; see also Gregory Zuckerman & Dave Michaels, *Bernie Madoff’s Legacy: Whistleblower Inc.*, WALL ST. J. (Dec. 8, 2018, 12:01 AM ET), <https://www.wsj.com/articles/bernie-madoffs-legacy-whistleblower-inc-1544245273> [<https://perma.cc/EBW4-4N8H>] (“Critics say the deluge of those seeking rewards is now overwhelming the system.”).

in Congress⁷⁸ and at the agencies⁷⁹ as they set up the programs. It runs contrary to the assertion by many WBP supporters who insist that the large number of tips received signals success.⁸⁰

The SEC's whistleblower program exemplifies the extreme tip-sifting burden, as Figure 2 shows. From its inception in 2011 through September 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. A relatively small group of staff in OMI sift and investigate those tips, and the same limited budget that constrains the agency's traditional public-enforcement program also constrains its ability to investigate tips.⁸¹ Under FOIA, I obtained a list of all SEC employees assigned to OMI from 2011 through 2021. As Figure 3 shows, only between 30 and 50 staff were assigned to that tip-sifting function during that time period. In 2021,

78. See *SEC Oversight Hearing*, *supra* note 70, at 23 (statement of Hon. Mary L. Schapiro, Chairman, SEC) (“[V]ery shortly after I arrived, I learned that we receive between 700,000 and 1.5 million tips every year at the SEC. We are a tiny agency to handle that kind of volume.”); *Strengthening the SEC’s Vital Enforcement Responsibilities: Hearing Before the Subcomm. on Sec., Ins. & Inv. of the S. Comm. on Banking, Hous. & Urb. Affs.*, 111th Cong. 70 (2009) (statement of Mercer E. Bullard, Assoc. Prof. of L., Univ. of Miss. Sch. of L.) (“[W]histleblower tips are an inherently inefficient means of achieving enforcement goals. It would be impossible for the SEC to conduct a complete investigation of every one of the hundreds of thousands of complaints that it receives each year.”); *Capital Markets Regulatory Reform: Strengthening Investor Protection, Enhancing Oversight of Private Pools of Capital, and Creating a National Insurance Office: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 33 (2009) (statement of Denise Voigt Crawford, Tex. Sec. Comm’r & Pres., N. Am. Sec. Adm’rs Ass’n).

79. Troy A. Paredes, SEC Comm’r, Statement at Open Meeting to Propose WBP Rules (Nov. 3, 2010), <https://www.sec.gov/news/speech/2010/spch110310tap-whistleblowers.htm> [<https://perma.cc/6RFG-BLYJ>]; Kathleen L. Casey, SEC Comm’r, Statement at Open Meeting to Adopt WBP Rules (May 25, 2011), <https://www.sec.gov/news/speech/2011/spch052511klc-item2.htm> [<https://perma.cc/P7W5-PE6U>]; Troy A. Paredes, SEC Comm’r, Statement at Open Meeting to Adopt WBP Rules (May 25, 2011), <https://www.sec.gov/news/speech/2011/spch052511tap-item2.htm> [<https://perma.cc/JKD2-WTFN>].

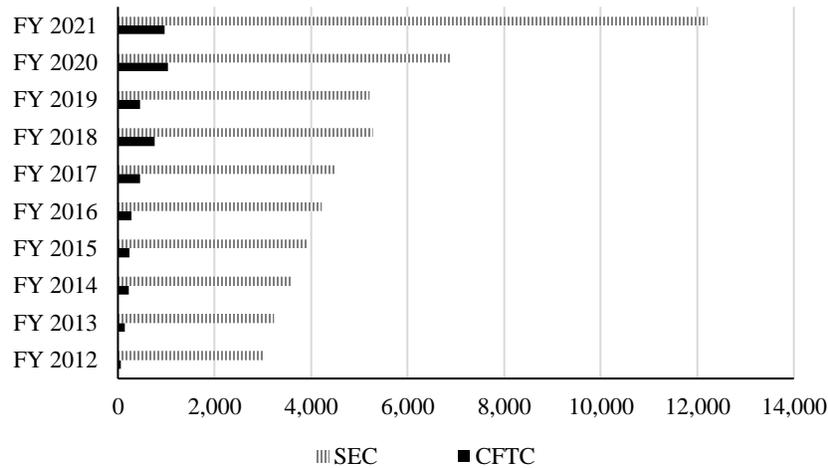
80. E.g., Allison Herren Lee, SEC Comm’r, Statement: June Bug vs. Hurricane: Whistleblowers Fight Tremendous Odds and Deserve Better (Sept. 23, 2020), <https://www.sec.gov/news/public-statement/lee-whistleblower-2020-09-23> [<https://perma.cc/H532-9LDW>] (“The value of the program is evident from the staggering volume of tips we receive . . .”); Kara M. Stein, SEC Comm’r, Statement on Proposed Amendments to the Commission’s Whistleblower Program Rules (June 28, 2018), <https://www.sec.gov/news/public-statement/statement-stein-whistleblower-062818> [<https://perma.cc/GWS4-9XSC>] (similar); Hester M. Peirce, SEC Comm’r, Statement on Proposal to Revisit Recently Adopted Whistleblower Rule Amendments (Feb. 10, 2022), <https://www.sec.gov/news/statement/peirce-statement-adopted-whistleblower-rule-amendments-021022> [<https://perma.cc/XML3-7GPL>] (similar); Complaint ¶ 2, *Thomas v. SEC*, 21-cv-108 (D.D.C. dismissed Sept. 7, 2022) [hereinafter Complaint, *Thomas v. SEC*], <https://www.courtlistener.com/docket/29101676/1/thomas-v-securities-and-exchange-commission> [<https://perma.cc/Y8V9-HVMW>] (similar); *SEC WBP 2021 Annual Report*, *supra* note 10 (similar); *Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations for 2019: Hearings Before a Subcomm. of the H. Comm. on Appropriations*, 115th Cong. pt. 2, at 14 (2018) (statement of J. Christopher Giancarlo, Chairman, CFTC) (asserting that recent reforms to the whistleblower program “are working” because “[i]n 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”); 167 CONG. REC. S985 (daily ed. Mar. 2, 2021) (statement of Sen. Chuck Grassley) (noting that “[w]histleblowers have been approaching the [CFTC] to report actionable claims of wrongdoing in far greater numbers than before, 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); TOM MUELLER, CRISIS OF CONSCIENCE: WHISTLEBLOWING IN AN AGE OF FRAUD 43 (2019) (“Whistleblowing is spreading because it works. In 2018 alone, the SEC whistleblower office received 5,282 whistleblower reports . . .”).

81. Keefe, *supra* note 37.

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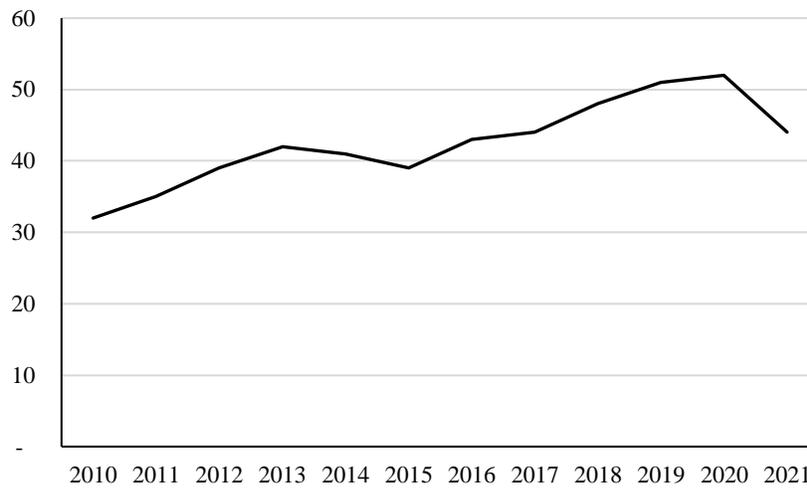
each member of the team would be responsible for fully resolving (on average) more than one tip every workday.

Figure 2. Tips Received⁸²



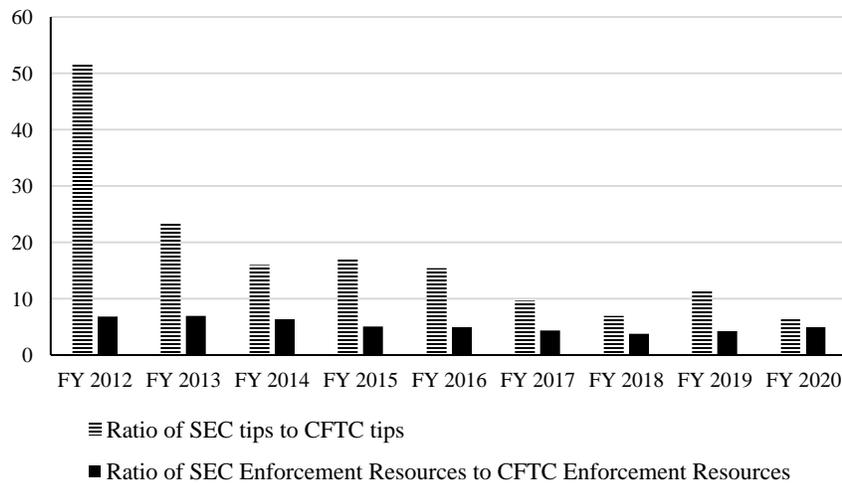
82. SEC WBP 2021 Annual Report, *supra* note 10 at 28; *Whistleblower Program & Customer Education Initiatives: 2021 Annual Report*, CFTC 5 (Oct. 2021), https://www.whistleblower.gov/sites/whistleblower/files/2021-10/FY21%20Customer%20Protection%20Fund%20Annual%20Report%20to%20Congress_0.pdf [<https://perma.cc/3NNB-2VRF>]; *Annual Report on the Whistleblower Program and Customer Education Initiatives*, CFTC 3 (Oct. 30, 2015), https://www.whistleblower.gov/sites/whistleblower/files/Reports/wb_fy2015reporttocongress.pdf [<https://perma.cc/8U2N-PG7G>]; *Annual Report on the Whistleblower Program and Customer Education Initiatives*, CFTC 2 (Oct. 30, 2014), https://www.whistleblower.gov/sites/whistleblower/files/Reports/wb_fy2014reporttocongress.pdf [<https://perma.cc/V7BF-UKU4>]; *Annual Report on the Whistleblower Program and Customer Education Initiatives*, CFTC 2 (Oct. 30, 2013), https://www.whistleblower.gov/sites/whistleblower/files/Reports/wb_fy2013reporttocongress.pdf [<https://perma.cc/L7CY-B6ET>]; *Annual Report on the Whistleblower Program and Customer Education Initiatives*, CFTC 2 (Oct. 2012), https://www.whistleblower.gov/sites/whistleblower/files/Reports/wb_fy2012reporttocongress.pdf [<https://perma.cc/3KXF-ARKF>].

Figure 3. SEC Staff Assigned to OMI⁸³



The CFTC 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.

Figure 4. Whistleblower Tips and Enforcement Resources



Ideally, agencies could tweak formal aspects of whistleblower programs to encourage high-quality tips, discourage low-quality ones, and facilitate the

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

government's ability to distinguish easily between the two.⁸⁴ Unfortunately, the toolkit of formal whistleblower-program design does not offer any easy solutions.

1. Whistleblower Benefits

Whistleblower programs motivate individuals to come forward with information by offering “bounties”—financial rewards for actionable information. Substantial financial rewards are necessary to attract high quality tipsters to come forward.⁸⁵ In many cases, the individuals with access to the best information about misconduct are 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.⁸⁶

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.⁸⁷ To the extent high payouts encourage more low-quality tips, they may actually *undermine* the efficacy of the program.⁸⁸

The result is a seemingly no-win situation.⁸⁹ If agencies increase the magnitude of payouts, they 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. If agencies decrease the payouts, they may lose the best quality tips from high-income, high-access individuals, who will no longer be incentivized to risk their livelihood to expose misconduct, and therefore also potentially increase the level of underlying fraud.

2. Whistleblower Protections

Additional key features 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

84. See Casey & Niblett, *supra* note 30, at 1189; Rose, *supra* note 76, at 2065; Engstrom, *supra* note 30, at 613.

85. See Evans et al., *supra* note 76, at 474.

86. See, e.g., Jackson, *supra* note 7.

87. See Rose, *supra* note 76, at 2067 n.97; Casey & Niblett, *supra* note 30, at 1196; Rapp, *supra* note 30, 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. ON LEGIS. 105, 124-25 (2018).

88. See Rose, *supra* note 76, at 2065; Casey & Niblett, *supra* note 30, at 1186; Lee, *supra* note 76, at 321.

89. See Engstrom, *supra* note 30, at 613.

provide legal antiretaliation protections.⁹⁰ Just like the prospect of a high financial payout, these protections are understood as a key prerequisite to attract high-quality tips.⁹¹ 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 strong legal protections against retaliation by her employer.⁹²

But again, these same protections also tend to attract low-quality tips.⁹³ An employee on the verge of being fired for legitimate reasons may attempt to manufacture an antiretaliation lawsuit by submitting a phony tip. Less extremely, an employee with borderline information about borderline conduct may err on the side of submitting the tip if she can do so anonymously.⁹⁴

So, again, there is a seemingly no-win situation: reduce anonymity or antiretaliation protections, and programs risk losing the best quality tips. Increase the same, and programs may be flooded by low-quality tips that make it more difficult for the agencies to find the good ones.

3. Whistleblower Sanctions

Another possible design mechanism is the imposition of administrative sanctions or other penalties on individuals who submit undesired tips.⁹⁵ These

90. Evans et al., *supra* note 76, at 474-75. For an argument in favor of expanding antiretaliation protections in the WBPs, see Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 AM. BUS. L.J. 665, 699 (2018).

91. See Casey & Niblett, *supra* note 30, at 1200.

92. *But cf.* Scott Patterson & Jenny Strasburg, *Source's Cover Blown By SEC*, WALL ST. J. (Apr. 25, 2012, 9:22 AM ET), <https://www.wsj.com/articles/SB10001424052702303459004577363683833934726> [<https://perma.cc/6XKV-5ARF>] (“SEC officials said there is *always* a risk a whistleblower’s identity might be disclosed during an investigation . . .” (emphasis added)); Fraud in Am. Podcast, *The SEC Whistleblower Program*, SIMPLECAST, at 41:00 (Oct. 6, 2021), <https://fraudinamerica.simplecast.com/episodes/the-sec-whistleblower-program> [<https://perma.cc/6M59-VAPS>] (statement of former SEC Whistleblower Office chief and current whistleblower 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, *supra* note 30; and Nizan Geslevich Packin & Benjamin Edwards, *Regulating Culture: Improving Corporate Governance with Anti-Arbitration Provisions for Whistleblowers*, 58 WM. & MARY L. REV. ONLINE 41 (2016).

93. Casey & Niblett, *supra* note 30, at 1200-01; *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) (noting that “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 “extract a measure of revenge”); see also DONALD LANGEVOORT, *SELLING HOPE, SELLING RISK: CORPORATIONS, WALL STREET, AND THE DILEMMAS OF INVESTOR PROTECTION* 100 (2016) (“[E]x-girlfriends and ex-spouses seem especially motivated to share their stories.”); Heidi L. Hansberry, Comment, *In Spite of Its Good Intentions, the Dodd-Frank Act Has Created an FCPA Monster*, 102 J. CRIM. L. & CRIMINOLOGY 195, 209 (2012) (“Thus, an influx of ‘tips’ from overeager or fraudulent whistleblowers could launch a series of fishing expeditions that would, at best, reduce the efficiency of the oversight system and, at worst, unjustly put innocent corporations in compromised positions.”); Lucienne M. 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, 1305-07 (2011) (discussing the “lottery” mentality that leads some tipsters to file frivolous claims).

94. See Casey & Niblett, *supra* note 30, at 1201.

95. *Id.* at 1204-06.

sanctions could range from bars on 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, imposing sanctions introduces two problems. First, the same fundamental challenge of avoiding over- and under-deterrence arises. If the penalties are too severe and too broadly applicable, the agencies 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, sanctions themselves are 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, investigation, adjudication, appellate rights, and more. The costs of implementation all must come out of the same limited budget.⁹⁶

Perhaps for these reasons, agencies have made only scarce use of direct sanctions against whistleblowers. In 2020, the SEC adopted a new rule authorizing the agency to permanently bar individuals who submit too many frivolous award applications from submitting further applications for awards.⁹⁷ To date, however, the SEC seems to have imposed permanent bars on just two individuals.⁹⁸ In any case, the mild nature of a permanent-bar sanction is unlikely to deter others from frivolous filing. On the upside, frivolous filers still have the remote chance of a potential win; on the downside, they face, at worst, the prospect of being excluded from the program.

4. Sifting Budget

Another design mechanism would be to simply allocate more resources to the task of sifting through tips.⁹⁹ More resources would give the agencies more person-hours, or more sophisticated technology to sift through the new tips. But this solution faces limits as well. It would either involve more appropriations or reallocation within the agencies' budgets away from other priorities. There are familiar practical and political limits to both.

96. Cf. *id.* at 1204 (noting that the WBP could “in theory” adopt a “fee (or fine) imposed on tipsters who do not prevail” but that this might be “difficult to implement”). *But see* Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEX. L. REV. 285, 328-29 (2021) (expressing optimism that various features of the WBPs “somewhat check the rate of false positives”).

97. Whistleblower Program Rules, 85 Fed. Reg. 70898 (Nov. 5, 2020) (to be codified at 17 C.F.R. pts. 240, 249).

98. Press Release, SEC, SEC Bars Two Individuals from Whistleblower Award Program (Sept. 28, 2021), <https://www.sec.gov/news/press-release/2021-199> [<https://perma.cc/9Q9Y-C4KR>]; *SEC WBP 2021 Annual Report*, *supra* note 10, at 21.

99. See, 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).

The toolkit of formal whistleblower-program design does not provide any easy fixes for the case-selection challenge. But other possible mechanisms outside that toolkit may shape agency sifting of tips.¹⁰⁰ The remainder of this Article 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 WBPs. Many of these lawyers helped draft the Dodd-Frank whistleblower legislation and the initial rules for the program.¹⁰¹ Whenever the SEC or CFTC has proposed new or amended rules for the program, these lawyers are among the first in line to file comments,¹⁰² lobby commissioners,¹⁰³ and sue to shape the program in

100. Many have called for one external change: shifting to a *qui tam* regime. *E.g.*, Casey & Niblett, *supra* note 30, at 1202; Rose, *supra* note 6, at 1290-1300; O’Sullivan, *supra* note 30; Evans et al., *supra* note 76, at 500; Ramirez, *supra* note 99, 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 76, at 337. Congress directed the SEC Office of the Inspector General (OIG) to specifically evaluate this possibility. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 922(d)(1)(G), 124 Stat. 1376, 1849 (2010). The OIG report recommended against it, at least in the short-term. SEC OFF. OF INSPECTOR GEN., REP. NO. 511, EVALUATION OF THE SEC’S WHISTLEBLOWER PROGRAM 28-40 (Jan. 18, 2013), <https://www.sec.gov/about/offices/oig/reports/audits/2013/511.pdf> [<https://perma.cc/Y5YR-7BGT>].

101. *SEC Whistleblower Attorney*, KOHN, KOHN & COLAPINTO (KKC) LLP (WEB ARCHIVE) (captured Nov. 27, 2022) [hereinafter *SEC Whistleblower Attorney*, 2022 version], <https://web.archive.org/web/20221127142017/https://kkc.com/whistleblower-services/sec-whistleblower-attorney/> [<https://perma.cc/8L9K-SNVY>] (“[O]ur SEC whistleblower lawyers helped write and modernize whistleblower rules . . .”); Jordan A. Thomas, SEC WHISTLEBLOWER ADVOCATES, <https://secwhistlebloweradvocate.com/our-attorneys/jordan-thomas/> [<https://perma.cc/XK8A-XVXU>] (describing Thomas as a “principal architect” of the SEC WBP); Eric R. Havian, CONSTANTINE CANNON, <https://constantinecannon.com/attorney/eric-r-havian/> [<https://perma.cc/C7AR-RR94>] (describing Havian as “actively involved in the legislation”); Sean X. McKessy, PHILLIPS & COHEN, <https://www.phillipsandcohen.com/attorney/sean-x-mckessy/> [<https://perma.cc/J4M3-CXAA>] (describing McKessy as “the principal architect of the [WBP]”); MEISSNER ASSOCIATES, <https://www.secwhistleblowerattorney.net> [<https://perma.cc/KRJ8-R4AY>] (describing founder Stuart Meissner as “involved in crafting the Dodd-Frank regulations that reward and protect whistleblowers”). KKC has updated its website since an earlier draft of this paper was posted online, and now notes only that its “lawyers were actively involved in the creation of the Dodd-Frank Act, having met with all five SEC Commissioners to present detailed reports and proposals for effective whistleblower protections.” *SEC Whistleblower Attorney*, KKC LLP, <https://kkc.com/whistleblower-services/sec-whistleblower-attorney/> [<https://perma.cc/U8DX-X57N>].

102. *See, e.g., Comments on Proposed Rule: Amendments to the Commission’s Whistleblower Program Rules*, SEC (Dec. 5, 2022), <https://www.sec.gov/comments/s7-16-18/s71618.htm> [<https://perma.cc/BML3-2SHS>] (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); *Comments for Proposed Rule 81 FR 59551*, CFTC, <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=1733> [<https://perma.cc/C7Q6-T2FG>] (listing comments on 2017 amendments to WBP rules from GS2 Law and Stephen Kohn).

103. *See, e.g.*, SEC, *supra* note 102 (noting numerous meetings between Commissioners and SEC whistleblower lawyers from KKC LLP, National Whistleblower Center, Zuckerman Law Firm, Labaton Sucharow, and Phillips & Cohen); KKC LLP, Comment Letter on Proposed Amendments to Whistleblower Rules 2 & n.6 (July 24, 2018), <https://www.sec.gov/comments/s7-16-18/s71618-4107169-170275.pdf> [<https://perma.cc/PZV5-QSJ8>] (listing seven meetings between KKC attorneys and SEC officials between January and March 2011 regarding the new whistleblower program rules).

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line with their interests.¹⁰⁴ And these private actors also dominate public dialogue regarding WBPs through broadly favorable media coverage,¹⁰⁵ frequent public

104. See Complaint, *Thomas v. SEC*, *supra* note 80.

105. E.g., Keefe, *supra* note 37; Jacob Goldstein, *Planet Money: The Whistleblower Whisperer*, NPR (May 29, 2019), <https://www.npr.org/transcripts/728001911> [<https://perma.cc/9HUL-T7F7>]; Randall Smith, *Once an S.E.C. Regulator, Now Thriving as a Lawyer for Whistle-Blowers*, N.Y. TIMES (Mar. 20, 2018), <https://www.nytimes.com/2018/03/20/business/jordan-thomas-sec-whistleblower-settlement.html> [<https://perma.cc/V86Y-DAWR>]; Gretchen Morgenson, *S.E.C.'s Whistle-Blower Program's First Chief Joins Law Firm*, N.Y. TIMES (Sept. 5, 2016), <https://www.nytimes.com/2016/09/06/business/sec-whistle-blower-programs-first-chief-joins-law-firm.html> [<https://perma.cc/J68H-7A3R>]; *Labaton Partner Jordan Thomas on the SEC's Whistleblowing Program and See Something, Say Something*, CORP. CRIME REP. (May 14, 2015, 10:46 AM), <https://www.corporatecrimereporter.com/news/200/labaton-partner-jordan-thomas-on-the-secs-whistle-blowing-program-and-see-something-say-something/> [<https://perma.cc/UF87-GYSH>]; Stacey Vanek Smith, *The Indicator from Planet Money: Whistleblower Protection Program*, NPR (Mar. 29, 2022), <https://www.npr.org/transcripts/1089572956> [<https://perma.cc/LP2T-TXD6>]; Tala Hadavi, *How Corporate Whistleblowers Make Millions*, CNBC (Nov. 12, 2019, 12:27 PM EST), <https://www.cnbc.com/video/2019/11/12/how-corporate-whistleblowers-make-millions.html> [<https://perma.cc/NNJ9-5A52>] (TV segment featuring whistleblower attorneys); *Stephen M. Kohn*, KKC LLP, <https://kkc.com/our-whistleblower-law-firm/our-whistleblower-lawyers/stephen-m-kohn/> [<https://perma.cc/6SHF-8WRC>] (listing media appearances on TV shows).

appearances,¹⁰⁶ op-eds and blogs,¹⁰⁷ academic articles,¹⁰⁸ amicus briefs,¹⁰⁹ practice guides,¹¹⁰ law school teaching,¹¹¹ congressional advocacy,¹¹² and even a “national whistleblower day.”¹¹³

106. E.g., Docket Media LLC, *Whistleblower Update—The Impact on Corporations and SEC Enforcement*, YOUTUBE (Dec. 4, 2020), https://www.youtube.com/watch?v=b_rORKB8r5g [<https://perma.cc/D89U-EC57>]; Stanford L. Sch., *Rock Center Lunch Event: Whistleblowers, Ethics and Compliance*, YOUTUBE (Jan. 19, 2021), https://www.youtube.com/watch?v=6oO3vxh_Ss4 [<https://perma.cc/F4F3-ZK45>]; Anti-Corruption Law Program, *ACLP: Roundtable Discussion on Whistleblowing – Protections, Abuses, and Reporting Systems*, YOUTUBE (May 28, 2021), <https://www.youtube.com/watch?v=8KHOGzP5uc> [<https://perma.cc/PMZ9-2LML>]; *Whistleblowers & Corporate Accountability: Under 30 Summit 2019*, FORBES (Nov. 15, 2019, 2:20 PM EST) <https://www.forbes.com/video/6104539762001> [<https://perma.cc/YT5R-Q44T>]; Berkeley L. Exec. Educ., *The SEC and CFTC Whistleblower Reward Programs—Their Impact and Success: Berkeley Boosts*, YOUTUBE (Aug. 2, 2021) [hereinafter *Berkeley Panel*], <https://www.youtube.com/watch?v=j2GyHTfNTE> [<https://perma.cc/52XT-5F6Z>]; see also Keefe, *supra* note 37 (describing frequent speaking engagements of prominent SEC whistleblower lawyer).

107. E.g., Jason Zuckerman & Matt Stock, *One Billion Reasons Why the SEC Whistleblower-Reward Program Is Effective*, FORBES (July 18, 2017, 4:36 PM EDT), <https://www.forbes.com/sites/realspin/2017/07/18/one-billion-reasons-why-the-sec-whistleblower-reward-program-is-effective> [<https://perma.cc/7U37-3GCW>]; Jordan A. Thomas, *‘Impossible Position’ for Corporate Fraud Gatekeepers*, CFO (Mar. 15, 2018), <https://www.cfo.com/risk-compliance/2018/03/impossible-position-for-corporate-fraud-gatekeepers> [<https://perma.cc/6EUG-WM74>]; Sean X. McKessy, *SEC’s Misguided “Solution” in Search of a Problem: Proposed Rule Would Hurt Whistleblower Program*, NYU PROGRAM ON CORP. COMPLIANCE & ENF^T (Jan. 31, 2019), https://wp.nyu.edu/compliance_enforcement/2019/01/31/secs-misguided-solution-in-search-of-a-problem-proposed-rule-would-hurt-whistleblower-program [<https://perma.cc/52MX-BBC4>]; Rebecca M. Katz & James M. Weir, *Plaintiffs’ Perspective: The SEC’s Final Rules for Whistleblowers Offer a Balanced Approach to an Important New Program*, SEC. LITIG. REP., July/Aug. 2011, at 11; Stephen M. Kohn, *Will the SEC’s Proposed Whistleblower Rules Undermine the Deterrent Effect of the Dodd-Frank Act?*, NAT’L L. REV. (Aug. 19, 2020), <https://www.natlawreview.com/article/will-sec-s-proposed-whistleblower-rules-undermine-deterrent-effect-dodd-frank-act> [<https://perma.cc/LHA6-23A4>]; Erika A. Kelton & Eric R. Havian, *Whistle Stop*, N.Y. POST (Feb. 27, 2011, 5:00 AM), <https://nypost.com/2011/02/27/whistle-stop/> [<https://perma.cc/8RL9-6A9D>]; *Whistleblower Protection Law and SEC Whistleblower Awards Blog*, ZUCKERMAN L., <https://www.zuckermanlaw.com/whistleblower-protection-law-blog> [<https://perma.cc/ZDX6-99AL>].

108. E.g., Evans et al., *supra* note 76 (academic article on the SEC WBP co-authored by two SEC whistleblower attorneys and based on interviews with numerous other whistleblower attorneys); Tanya M. Marcum & Jacob A. Young, *Defining the Whistleblower: The Digital Realty Case and Proposed Legislation*, 26 RICH. 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, Jordan A. Thomas & Jason Zuckerman, *De Facto Gag Clauses: The Legality of Employment Agreements that Undermine Dodd-Frank’s Whistleblower Provisions*, 30 A.B.A. J. LAB. & EMP. L. 87 (2014) (academic article on WBP coauthored by two whistleblower lawyers).

109. E.g., Brief for the National Whistleblower Center et al. as Amici Curiae in Support of Respondent, *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018) (No. 16-1276); Brief of Taxpayers Against Fraud Education Fund as Amicus Curiae in Support of Respondent, *Somers*, 138 S. Ct. 767 (No. 16-1276); Brief of Amicus Curiae National Whistleblower Center in Support of Petitioners, *Lawson v. FMR LLC*, 571 U.S. 429 (2014) (No. 12-3).

110. Lisa J. Banks & Michael A. Filoromo, *The SEC Whistleblower Practice Guide*, KATZ BANKS KUMIN (Apr. 2021), <https://www.kmblegal.com/sites/default/files/SEC-Whistleblower-Practice-Guide.pdf> [<https://perma.cc/FZZ7-9TNF>]; STEPHEN MARTIN KOHN, *THE NEW WHISTLEBLOWER’S HANDBOOK: A STEP-BY-STEP GUIDE TO DOING WHAT’S RIGHT AND PROTECTING YOURSELF* (2017); *Reporting Without Regrets: The SEC Whistleblower Handbook*, SEC WHISTLEBLOWER ADVOCATES (2022), https://secwhistlebloweradvocate.com/pdf/SEC_Whistleblower_Program_Handbook.pdf [<https://perma.cc/P3UX-G24Z>].

111. E.g., Erika E. Kelton, PHILLIPS & COHEN, <https://www.phillipsandcohen.com/attorney/erika-a-kelton/> [<https://perma.cc/NC59-L3VV>] (describing courses Kelton has taught on whistleblower law at NYU and Berkeley Law); David R. Chase, U. MIA., <https://people.miami.edu/profile/d.chase@miami.edu> [<https://perma.cc/8N92-ZJ98>].

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.¹¹⁴ 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.

The truth, however, is more complicated. It is impossible to know the extent to which private whistleblower lawyers are *adding* value to the program, or *extracting* it. This Part outlines five different channels by which 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 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.¹¹⁵ 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 by including independent verification, expert opinions, fact gathering, or other

112. E.g., *Putting Investors First: Examining Proposals to Strengthen Enforcement Against Securities Law Violators: Hearing Before the Subcomm. on Inv. Prot., Entrepreneurship & Cap. Mkts. of the H. Comm. on Fin. Servs.*, 116th Cong. 4-19, 40-47 (2019) (statement of Jordan A. Thomas, Partner, Labaton Sucharow); Rubinfeld, *supra* note 4 (noting a whistleblower attorney “working with Sen. Chuck Grassley” on legislation regarding the WBP); Press Release, Grassley, *supra* note 32 (announcing a new legislative proposal and quoting a whistleblower lawyer); see also *supra* note 101 (collecting whistleblower-lawyers’ statements that they helped draft the legislation authorizing the WBPs).

113. NAT’L WHISTLEBLOWER DAY, <https://www.nationalwhistleblowerday.org> [<https://perma.cc/8FUP-5ZRW>].

114. COFFEE, *supra* note 6, 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 30, 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. Lund & Sarin, *supra* note 96, at 327 (claiming that law firms “have begun to advise whistleblowers to file complaints in the past few years”).

115. My focus here is on tip sifting, but I do not mean to suggest that this is the only function of whistleblower lawyers.

indicia of credibility along with the tip to the agency.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸

This seems like a salutary effect. The agency effectively outsources some of its up-front investigative and analytical burden to these entrepreneurial private attorneys, and everyone benefits from their efforts.¹¹⁹

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 *not* worth pursuing after all. Moreover, a high-quality tipster might not want to secure additional documents or direct evidence: perhaps it is too costly or poses too great a risk that the individual will be exposed. And to the extent the agency relies on costly external validation, investigation, or analysis as a prerequisite for serious investigation, it may wrongly overlook fundamentally strong and socially important tips that lack such attributes because they were filed by unrepresented tipsters, tipsters represented by less well-resourced counsel, 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 do so through its own formal processes).

The ongoing communication between a private whistleblower lawyer and the agency enforcement attorneys during an open investigation also risks transforming the attorney’s whistleblower client into a kind of undercover agent, one who operates under the indirect direction of the government to gather particular information on a target outside the bounds of ordinary investigatory

116. O’Sullivan, *supra* note 30, at 103; Rapp, *supra* note 30, at 121; *Legislative Proposals to Address the Negative Consequences of the Dodd-Frank Whistleblower Provisions: Hearing Before the Subcomm. on Cap. Mkts. & Gov’t Sponsored Enters. of the H. Comm. on Fin. Servs.*, 112th Cong. 57-63 (2011) [hereinafter *Negative Consequences Hearing*] (statement of Geoffrey Christopher Rapp, Professor of L., Univ. of Tol. Coll. of L.); Skinner, *supra* note 30, at 919; Engstrom, *supra* note 30, at 614 n.25; Rodrigues, *supra* note 30, at 283; Baer, *supra* note 76, at 2233-34; *see also* Keefe, *supra* note 37 (describing a case where an elite whistleblower lawyer had a client’s scientific papers reviewed by “ten prominent experts” including a Nobel Laureate).

117. *See infra* Section IV.A.1.

118. *See* O’Sullivan, *supra* note 30, at 103 (quoting former SEC official Rob Khuzami 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.”).

119. *See, e.g.*, Rose, *supra* note 6, at 1280-81; O’Sullivan, *supra* note 30, 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 77 (quoting SEC whistleblower lawyer Jordan Thomas) (“The program has established the equivalent of an auxiliary fire department.”).

processes and rules.¹²⁰ 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.¹²¹

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.¹²² 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.¹²³

This knowledge benefits 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 result in the SEC ignoring high-quality tips filed by unrepresented tipsters or tipsters with less well-experienced or well-connected counsel.

120. This concern was flagged at the outset. *See* Apache Corp. et al., Comment Letter on Proposed Rules Implementing the SEC WBP 11 (Dec. 17, 2010), <https://www.sec.gov/comments/s7-33-10/s73310-150.pdf> [<https://perma.cc/82AH-55J3>]; Arent Fox LLP, Comment Letter on Proposed Rules Implementing the SEC WBP 1 (Dec. 15, 2010), <https://www.sec.gov/comments/s7-33-10/s73310-128.pdf> [<https://perma.cc/SP6B-HQZ6>]; Assoc. of Corp. Couns., Comment Letter on Proposed Rules Implementing the SEC WBP 4 (Dec. 17, 2010), <https://www.sec.gov/comments/s7-33-10/s73310-144.pdf> [<https://perma.cc/E595-JXFX>].

121. *See infra* Section IV.A.1.

122. *See* Banks & Filoromo, *supra* note 110, at 23 (suggesting whistleblower attorneys determine whether their "client's information might advance the SEC's current enforcement agenda, which is not a constant").

123. *SEC Whistleblower Program*, CONSTANTINE CANNON, <https://constantinecannon.com/practice/whistleblower/whistleblower-types/whistleblower-reward-laws/sec> [<https://perma.cc/MY39-CX67>] ("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*, ZUCKERMAN LAW (OCT. 9, 2022), <https://www.zuckermanlaw.com/5-tips-sec-whistleblowers-lessons-learned-sec-whistleblower-awards/> [<https://perma.cc/GBT6-KGSS>] (stating that they could "write a book" about how to craft "tips to quickly grab the whistleblower office's attention"); *SEC Whistleblower Reports & Awards*, HALPERIN BIKEL PLLC, <https://www.uswhistleblowerlawyer.com/sec-whistleblower-attorneys> [<https://perma.cc/5RQ3-PK4E>] ("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 110, at 24 ("If the [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, a percentage of which they will keep for themselves. In many cases, attorneys have established practices 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 potential whistleblowers through marketing, networking, media appearances, and more.¹²⁴

The upshot could benefit or harm agency tip sifting. At the top of the market, whistleblower-attorney participation creates an entrepreneurial incentive to seek out the best tips, screen out all others, and spend time perfecting and completing expensive external validations of the tip before submission. Down the chain, though, the involvement of entrepreneurial attorneys may tend to 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.¹²⁵ For instance, one attorney's website advertises that he has "submitted more than 200 cases under the Dodd-Frank reward program,"¹²⁶ another firm has "more than 100 pending cases,"¹²⁷ and another lawyer claims to have blown the whistle "hundreds of times to the SEC."¹²⁸

Attorneys may also depress tip volume by serving as a screening function.¹²⁹ A tipster may solicit a respected firm for advice. If the 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 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, private attorneys may depress tip volume by charging sufficiently high fees and expenses that deter 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 keep some percentage of that award,

124. See *supra* notes 105-113 and accompanying text (describing the extensive marketing and publicity efforts of whistleblower lawyers).

125. See Rose, *supra* note 6, 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 *Negative Consequences Hearing*, *supra* note 116, at 27 (statement of Robert J. Kueppers, Deputy CEO, Deloitte LLP) (expressing concerns about whistleblower lawyers "soliciting large groups of people who have just been recently laid off and so forth").

126. RICKMAN LAW GROUP, <https://rickmanlegal.com/> [<https://perma.cc/TU8W-N36T>].

127. Diana Novak Jones, *Surge in SEC Whistleblower Awards Sparks Legal Practice Boomlet*, REUTERS (Feb. 8, 2022, 1:53 PM EST), <https://www.reuters.com/legal/litigation/surge-sec-whistleblower-awards-sparks-legal-practice-boomlet-2022-02-08> [<https://perma.cc/5KXU-KSBQ>].

128. Hadavi, *supra* note 105, at 4:03.

129. See O'Sullivan, *supra* note 30, at 99-102; Rapp, *supra* note 30, at 121.

reportedly between 20% and 40%.¹³⁰ 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.¹³¹ A prospective tipster may take this into account when deciding whether the risk of coming forward is worth his time.¹³²

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 with worse prospects. For instance, all else equal, whistleblower attorneys may prefer clients with information relevant to already-opened SEC investigations and financial-services firms,¹³³ which may correlate with a higher likelihood of a payday, but not necessarily the most 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 with which they have less

130. Several public sources (including one whistleblower firm website) state that the standard whistleblower contingency fee runs between 30% and 40%. *SEC Whistleblower Attorney*, 2022 version, *supra* note 101 (providing percentages on an older version of the website, which have since been removed); Keefe, *supra* note 37; see also Lydia DePillis, *The SEC Undermined a Powerful Weapon Against White-Collar Crime*, PROPUBLICA (Jan. 13, 2021, 6:05 AM EST), <https://www.propublica.org/article/the-sec-undermined-a-powerful-weapon-against-white-collar-crime> [<https://perma.cc/ZN2X-9GUU>] (describing WBP attorneys’ contingency fee as “usually about a third”). However, since I posted a draft of this Article to SSRN, I have heard from numerous whistleblower firms and whistleblower clients that, in some cases, the percentage is lower—25%, 20%, and maybe even lower still. As I understand it from these conversations, circumstances that may contribute to a lower percentage fee include: (1) the whistleblower is a sophisticated repeat player (such as a professional short seller or other market participant) who is savvy enough to negotiate fees and perhaps make multiple firms compete for his/her business; and (2) the whistleblower has already compiled the initial tip and is looking for representation only to handle the award process.

131. See, e.g., Silver Law Group, *How Attorney Contingency Fees Work for Whistleblowers*, SEC WHISTLEBLOWER LAW. BLOG (Sept. 14, 2016), <https://www.secwhistleblowerlawyers.net/CONTINGENCY-FEES-WORK-WHISTLEBLOWERS> [<https://perma.cc/U3L2-B7DH>]. The magnitude of these costs likely varies widely by case. Cf., e.g., Keefe, *supra* note 37 (discussing a case in which the whistleblower lawyer hired a Nobel Laureate as an expert to assess the evidence and provide support along with the SEC filing).

132. 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 attorneys’ fees and expenses, the tipster won’t come forward unless the expected value of the agency’s bounty is at least \$20.

133. David Rosenfeld, *Civil Penalties Against Public Companies in SEC Enforcement Actions: An Empirical Analysis*, 22 U. PA. J. BUS. L. 135, 170 (2019) (reporting that financial-services firms were more likely than non-financial-services firms to be assessed a civil penalty); see also *Our Clients*, SEC WHISTLEBLOWER ADVOCATES, <https://secwhistlebloweradvocate.com/sec-whistleblower-clients/> [<https://perma.cc/2X8X-YJUS>] (leading whistleblower firm reporting that 66% of its clients are in the financial-services sector).

familiarity, 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 may be less eager to take on a client whose tip deals with certain companies because their spouse, child, friend, or college roommate works there, or because they invest in that company's stock, because they are a loyal customer of that company, or some other idiosyncratic reason. Perhaps the lawyer has particularly strong relationships with a set of expert witnesses or investigators who all happen to have conflicts of interest in a given case. All of these factors and others might filter down to the law firm's ultimate decision 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 a rejection from one or two high-quality whistleblower firms may lead the tipster to decide that the matter is not worth pursuing further. Further, it takes a great deal of courage for many 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 exposure. A tipster rejected by one firm may be discouraged from continuing to shop their case around.

E. Reputational Effects

A final critical way whistleblower attorneys may reduce agency screening costs has nothing to do with the substance of the tip, or the quality of its presentation, but rather may follow simply from who they are.¹³⁴

A generally well-known and highly respected law firm that 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 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.¹³⁵

134. See Evans et al., *supra* note 76, 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 Am. Podcast, *supra* note 92, at 18:55-19:20 (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 not to “worry about who’s going to get paid” and instead, “focus on the information”).

135. See, e.g., *Five Tips for Choosing a Whistleblower Attorney*, HAGENS BERMAN, <https://www.hbsslaw.com/whistleblower/5-tips-for-choosing-a-whistleblower-attorney> [<https://perma.cc/CDB4-B7YH>] (“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.”); *Whistleblower Law*, GS2LAW (WEB ARCHIVE) (captured Aug. 12, 2022), <https://web.archive.org/web/20220812135821/https://www.gs2law.com/whistleblower-law>

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More specifically, a repeat-player effect may emerge. Agency officials may regard a lawyer who has already submitted a useful tip as more likely to submit a high-quality tip going forward.¹³⁶ Lawyers or firms who have submitted false, misleading, or weak tips may have a harder time catching the agency's attention in subsequent attempts.¹³⁷

Finally, a lawyer who used to work for the agency may be more trusted by the staff, such that tips submitted by ex-agency attorneys may receive additional attention and credence. Numerous reports detail attorneys moving from the agency to the private whistleblower bar.¹³⁸ Clients represented by these attorneys may have an advantage in getting the agency's attention.¹³⁹ 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

[<https://perma.cc/LH7S-YA8S>] (archiving an earlier version of the webpage stating, “All of our whistleblower partners have developed close relationships with the various offices of whistleblower (CFTC, SEC, IRS)”).

136. See, e.g., *SEC Whistleblower Lawyers: Tier 1 Law Firm*, ZUCKERMAN LAW, <https://www.zuckermanlaw.com/sec-whistleblower-lawyers> [<https://perma.cc/DP6B-S2L2>] (“[T]he 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.”).

137. See O’Sullivan, *supra* note 30, at 105; Rose, *supra* note 6, at 1289-90.

138. Aruna Viswanatha, *Out of the SEC, Into the Whistleblower Industrial Complex*, WALL ST. J. (Sept. 5, 2016, 9:00 PM ET), <https://www.wsj.com/articles/out-of-the-sec-into-the-whistleblower-industrial-complex-1473123602> [<https://perma.cc/3C7M-MRRE>]; Smith, *supra* note 105; Keefe, *supra* note 37; Gretchen Morgensen & Emily Glazer, *Wells Fargo Improperly Kept a Pension Fund’s Fee Rebates*, WALL ST. J. (May 9, 2018, 7:29 PM ET), <https://www.wsj.com/articles/wells-fargo-improperly-kept-a-pension-funds-fee-rebates-1525908574> [<https://perma.cc/87FC-PXS4>]; Jenny Strasburg & Scott Patterson, *SEC Faces Questions About Tipster Policy*, WALL ST. J. (Apr. 26, 2012, 9:41 AM ET), <https://www.wsj.com/articles/SB10001424052702303990604577366323845489262> [<https://perma.cc/HM7P-P536>]; Jones, *supra* note 127; see also Platt, *supra* note 36, at 802-08 (collecting reports).

139. Many firms claim this. See, e.g., *SEC Whistleblower Lawyers*, PHILLIPS & COHEN, <https://www.phillipsandcohen.com/whistleblower-practice-areas/sec-whistleblower-program-lawyers> [<https://perma.cc/8ZGS-35BW>] (“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.”); *A Client-First Approach*, SEC WHISTLEBLOWER ADVOCATES, <https://secwhistlebloweradvocate.com/a-client-first-approach> [<https://perma.cc/GJ6E-3AAC>] (“[O]nly former senior SEC prosecutors work on our whistleblower matters. 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.”); *SEC Whistleblower Representation*, LAW FIRM DAVID R. CHASE P.A., <https://www.securitiesfrauddefense.net/practice-areas/sec-whistleblower-representation> [<https://perma.cc/U9ED-VX2E>] (“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.”); *Rebecca M. Katz*, MOTLEY RICE LLC, <https://www.motleyrice.com/attorneys/rebecca-m-katz> [<https://perma.cc/6EA3-E4E6>] (“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.”).

investigations¹⁴⁰ and has on occasion, been given access to the SEC's entire investigative files, both to the great advantage of his clients and his practice.¹⁴¹

This reputational function has ambiguous effects. On the one hand, it may effectively improve the efficiency of agency tip sifting by outsourcing much of the screening work to trusted and expert private lawyers. On the other hand, it may introduce various distortions into the process. The agency may attach more credibility to weaker tips (and overlook stronger ones) solely based on the reputation of counsel. And it may also undermine 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 FOIA 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.

140. *Berkeley Panel*, *supra* note 106, at 1:03:40-1:04:21 (statement of Sean McKessy) ("I've had clients come to me about something that 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, let's say, in this instance it was a cyber case, and I called the head of the Cyber Unit, and I said, 'I've got somebody who's got what I think is really great information about, you know, 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 the agency is working on, and then direct it to the right folks . . .").

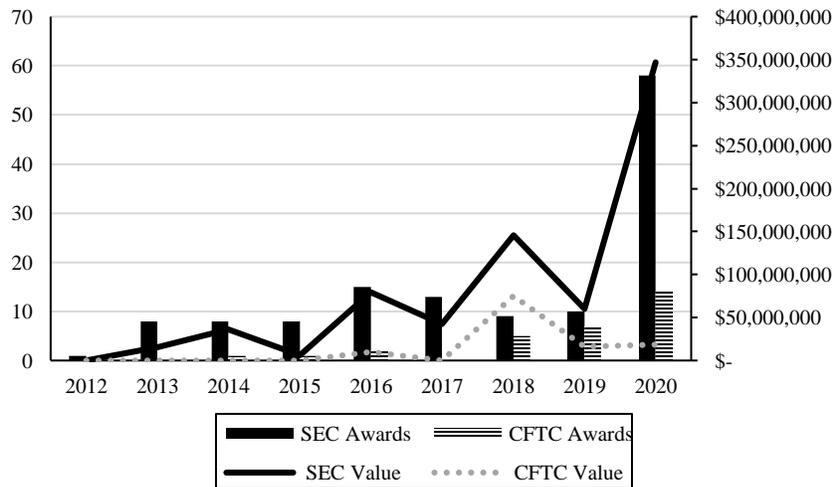
141. *Fraud in Am. Podcast*, *supra* note 92, at 25:40 (former SEC whistleblower chief and current private whistleblower lawyer Sean McKessy, stating that in some cases, the SEC enforcement staff is "willing to just turn over their entire file to me and my client to say: 'Can you help us contextualize what we were told by the company?'"). The SEC Enforcement Manual instructs, "All information obtained or generated by SEC staff during investigations or examinations should be presumed confidential and nonpublic unless disclosure has been specifically authorized," and explains that disclosure is authorized under Rule 24c-1 to specified classes of requesters, which do not include private whistleblower counsel. *SEC Enforcement Manual*, *supra* note 51, at 82-83; 17 C.F.R. § 240.24c-1 (2022).

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Table 1. Descriptive Statistics

	<i>SEC</i>	<i>CFTC</i>
Awards ¹⁴²	130	30
Orders ¹⁴³	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

Figure 5. SEC and CFTC Whistleblower Awards Over Time



The findings presented are bolstered by the fact that, since I first posted a draft of this Article, the data underlying this study has been obtained and evaluated by at least two independent sources—(1) a team of investigative journalists and lawyers from *Bloomberg*;¹⁴⁴ and (2) a team of attorneys and staffers from the *National Whistleblower Center*.¹⁴⁵ These independent analyses

142. 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. See Mark Maremont, *Whistleblower Thought He Would Get a Big Payout. Instead He Got Nothing and Went Broke*, WALL ST. J. (June 27, 2021, 7:00 AM ET), <https://www.wsj.com/articles/whistleblower-thought-he-would-get-a-big-payout-instead-he-got-nothing-and-went-broke-11624791602> [<https://perma.cc/AUK3-S4W4>].

143. Some orders cover multiple awards.

144. Holland, *supra* note 13.

145. See Geoff Schweller & Grace Schepis, *WNN Exclusive: FOIA Documents Discredit Articles Attacking SEC Whistleblower Program*, WHISTLEBLOWER NETWORK NEWS (Oct. 12, 2022) [hereinafter Schweller & Schepis, *Documents Discredit*], <https://whistleblowersblog.org/exclusives/wnn-exclusive-foia-documents-discredit-articles-attacking-sec-whistleblower-program> [<https://perma.cc/MAX6-993X>]; Grace Schepis & Geoff Schweller, *WNN Exclusive: SEC FOIA Documents Reveal Big Law Defense Firms Are Confidentially Representing Dodd-Frank Whistleblowers*, WHISTLEBLOWER

of the data have either reaffirmed my findings or failed to specifically address them.¹⁴⁶

At the same time, the data has 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.¹⁴⁷ 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 5 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.¹⁴⁸

Third, the data covers the period from the creation of the programs (2011) through 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 FY 2021,¹⁴⁹ and the significant time lags involved, this is a significant limitation. I have a FOIA request pending with the SEC for all data through 2022 and so far have received partial disclosure of data from that period, which I draw on in parts of the analysis below.

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 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 suggests 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

NETWORK NEWS (Oct. 12, 2022) [hereinafter Schepis & Schweller, *Defense Firms*], <https://whistleblowersblog.org/exclusives/wnn-exclusive-sec-foia-documents-reveal-big-law-defense-firms-are-confidentially-representing-dodd-frank-whistleblowers> [<https://perma.cc/VL9S-GED2>].

146. To be sure, the National Whistleblower Center (which is closely affiliated with the whistleblower law firm, Kohn, Kohn & Colapinto) does not accept all of my interpretations of these findings, but they report data that is consistent with what I describe below.

147. For discussion of the FOIA process, see *infra* Section V.B.2.

148. The SEC possesses all relevant data. I requested broader data regarding tips and tips that led to investigations but not awards, but the SEC denied the FOIA request. Below, I call on the SEC to release aggregated data revealing trends and patterns in the program. See *infra* Section V.B.2.

149. SEC WBP 2021 Annual Report, *supra* note 10, at 1.

ones. However, at the SEC (but not the CFTC), the median award is the same for represented and unrepresented tipsters, which suggests attorneys play an outside role in the largest awards issued by that agency.

Table 2. Represented vs. Pro Se

	SEC		CFTC	
	<i>Represented</i>	<i>Pro Se</i>	<i>Represented</i>	<i>Pro Se</i>
Awards	87	43 ¹⁵⁰	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 a 20-40% contingency fee,¹⁵¹ the SEC and CFTC have effectively paid out \$122-\$244 million and \$23-\$46 million, respectively, to attorneys over this period—in both cases, equivalent to about 3%-5% of the agencies’ respective enforcement budgets during this period.¹⁵²

Big-time awards, in particular, are especially likely to go to tipsters represented by counsel. Of the 20 awards issued by the SEC for \$10 million or more, only 4 went to pro se tipsters. Thus, the overwhelming majority of the most important whistleblowers rely on lawyers. The difference in amounts awarded to represented tipsters versus unrepresented tipsters becomes all the more extreme if one assumes that the vast majority of the thousands of unsuccessful tips comes from unrepresented whistleblowers. Unrepresented tipsters may outnumber represented ones because (1) finding a qualified and willing whistleblower lawyer requires significant effort; (2) waiting for a lawyer to review and process a tip can take a long time; (3) lawyers will insist on payment, and some tipsters may not be willing to pay even a contingency on the back end; and (4) finding a lawyer means sharing highly sensitive information with an additional unfamiliar person who tipsters may not trust to keep the information a secret.

150. The independent review of the data by the National Whistleblower Center (NWC) is not inconsistent with this finding. *Final Orders Including Pro Se Whistleblowers, According to SEC Materials*, WHISTLEBLOWER NETWORK NEWS (Sept. 2022), <https://whistleblowersblog.org/wp-content/uploads/2022/09/SEC-Program-FOIA-Pro-Se-List.pdf> [<https://perma.cc/RL3A-PR8E>] (listing 41 orders through 2020 involving at least one pro se claimant).

151. See *supra* note 130.

152. For this calculation, I relied on the agencies’ enforcement budgets as disclosed in annual reports to Congress. See *Reports and Publications*, SEC, https://www.sec.gov/reports?field_article_sub_type_secart_value=Reports+and+Publications-BudgetReports [<https://perma.cc/FXG6-SJEY>]; *CFTC Reports Archive*, CFTC, https://www.cftc.gov/About/CFTCReports/cftcreports_historical.html?combine=&tid=4096&year=all [<https://perma.cc/G6SE-23GB>]. This calculation 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. See *supra* note 131.

These findings are consistent with the idea that the agencies effectively outsource tip sifting to private lawyers. However, the data cannot definitively prove this. It's theoretically possible, for instance, that the agencies know how to find the high-quality tips regardless of whether they are represented by lawyers, and that these high-quality tipsters just happen to be more likely to hire lawyers. More importantly, even assuming the agencies rely on lawyers to identify and screen tips, these findings cannot establish whether the lawyers add positive value to the program by screening for the highest-quality tips, dress up mediocre tips in attractive wrapping to get the agencies' attention, or capitalize 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 successful tipsters receive nearly twice as many dollars on average from the SEC as unrepresented ones may seem like a strong signal that lawyers add value for their clients. But after accounting for fees and costs, the average successful SEC whistleblower may not be left much better off than his or her unrepresented counterpart, and the median successful SEC whistleblower is worse off.

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 firms/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.

Table 3. Repeat Players vs. First Timers

	SEC		CFTC	
	<i>Repeat Players</i>	<i>First Timers</i>	<i>Repeat Players</i>	<i>First Timers</i>
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

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whistleblowers included at least one former SEC official.¹⁵³ 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 *all* dollars paid under the program.¹⁵⁴ Assuming these lawyers charge the standard 20%-40% contingency fee, the SEC has effectively paid out between \$35 million and \$70 million to its own alumni.

By contrast, none of the successful CFTC whistleblower attorneys formerly worked at that agency.

Table 4. Revolvers vs. Non-Revolvers (SEC only) (through 2020)¹⁵⁵

	<i>Revolver</i>	<i>Non-Revolver</i>
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

The remarkable success of SEC alumni in this program seems to be accelerating. I am awaiting the agency’s complete disclosure of records covering 2021 and 2022. But based on partial disclosure of data from this period (supplemented by a review of the public record),¹⁵⁶ I find that the SEC has

153. 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. *Cf.* Schweller & Schepis, *Documents Discredit*, *supra* note 145 (suggesting, consistent with this analysis, that nearly 20% of the law firms who won at least one award employed at least one former SEC official).

154. *Bloomberg’s* analysis found that former SEC officials had won even *more* money—at least \$205 million—during this period. Holland, *supra* note 13. The source of the discrepancy is unknown. The NWC does not make findings regarding the amounts awarded to ex-SEC officials.

155. I define “revolvers” to include both firms where the specifically named lead counsel is a former SEC official and firms where someone else within the firm’s SEC whistleblower practice was a former SEC official. For instance, whistleblowers represented by the law firm Phillips & Cohen received (at least) five 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.

An important limit to this categorization is that it fails to distinguish between different types of “revolvers.” For instance, both of the following attorneys would be treated as “revolvers” despite their differences: (1) an attorney who spent his entire career at the SEC, culminating in multiple years in senior positions inside the SEC’s whistleblower program, before jumping into private whistleblower representation; (2) an attorney who has been in private practice for decades, and only worked at an SEC regional office for two years at the very beginning of her law career several decades ago.

156. Some revolver firms issue press releases about awards. *E.g.*, Press Release, Phillips & Cohen LLP, \$3 Million SEC Whistleblower Award Goes to Phillips & Cohen’s Clients (Apr. 25, 2022), <https://www.phillipsandcohen.com/3-million-sec-whistleblower-award-goes-to-phillips-cohens-clients>

awarded at least \$239 million to clients of former SEC attorneys between January 1, 2021 and June 30, 2022, amounting to 42% of the money awarded in that time period.¹⁵⁷ This calculation may understate the dominance of revolver firms because I have not yet received from the SEC any data for 6 out of the 18 months in this period, and the 12 months of data I did receive are materially incomplete, pending resolution of numerous confidential treatment requests.

In the main sample (ending in 2020), a single dominant “revolver” practice accounts for an overwhelming portion of these payments. 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,¹⁵⁸ is responsible for 10 awards in my dataset, accounting for \$152,575,000—about 20% of all dollars awarded. In the more recent period, the remarkable success of revolver firms has been more evenly distributed among a small top tier of elite firms.

The findings appear consistent with the theory that reputational effects impact the tip-sifting process. But, again, these findings cannot definitively show that reputational effects drive these results. It could be that better tipsters find their way to repeat-player or revolving door firms.¹⁵⁹ 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 views them more favorably because of their reputations or whether these firms are just more skilled at the work. Moreover, even if these revolver firms leverage connections inside the agency (rather than skill or reputation) to achieve more favorable results, one may ask whether this provides a useful counterbalance to the effects of the revolving door

[<https://perma.cc/CH7P-UZKK>]; Press Release, Phillips & Cohen LLP, SEC Whistleblower Award for \$37M Goes to Phillips & Cohen’s International Clients (Feb. 4, 2022), <https://www.phillipsandcohen.com/sec-whistleblower-award-for-37m-goes-to-phillips-cohens-international-clients> [<https://perma.cc/R737-7G2E>]; Press Release, Phillips & Cohen LLP, Ex-SEC Whistleblower Office Chief Wins Client a Whistleblower Award (Mar. 28, 2022), <https://www.phillipsandcohen.com/ex-sec-whistleblower-office-chief-wins-client-a-whistleblower-award> [<https://perma.cc/QLQ8-DZB4>]. In other cases, I rely on journalistic accounts revealing the award. *E.g.*, Mengqi Sun, *Short Seller Carson Block Sued Over \$14 Million Whistleblower Award*, WALL ST. J. (July 28, 2022, 7:10 PM ET), <https://www.wsj.com/articles/short-seller-carson-block-sued-over-14-million-whistleblower-award-11659049816> [<https://perma.cc/37YP-DUCZ>] (reporting that Jordan Thomas represented Carson Block in his whistleblower claim); Jack Newsham, *Short Seller Carson Block Scored \$14 Million from the SEC for Exposing a Fraud. Here’s How It Happened—And Why Another Short Seller Now Claims He Deserves a Cut.*, INSIDER (July 27, 2022, 12:35 PM), <https://www.businessinsider.com/carson-block-14-million-sec-whistleblower-award-2022-7> [<https://perma.cc/7LYS-CFM7>] (reporting that Block won his award in March 2022).

157. At least 15% of awards (21) issued during this period went to clients of former SEC officials.

158. 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 37; David Thomas, *Labaton’s Jordan Thomas Splits to Form SEC Whistleblower Law Firm*, REUTERS (Jan. 4, 2022, 2:45 PM EST), <https://www.reuters.com/legal/legalindustry/labatons-jordan-thomas-splits-form-sec-whistleblower-law-firm-2022-01-04> [<https://perma.cc/6V6U-8HWW>].

159. *See* Sun, *supra* note 33 (“[L]awyers who market get more clients.” (citing revolver whistleblower attorney Rebecca Katz)).

between the SEC and the regulated industry and its representatives in the defense bar.¹⁶⁰

But anecdotal evidence suggests that the playing field may unfairly tilt in favor of ex-SEC whistleblower lawyers and other insiders; these revolver firms may obtain favorable treatment due to personal connections and insider knowledge. For instance, one prominent revolver whistleblower attorney (the first director of the SEC whistleblower program) stated that sometimes the SEC enforcement staff has 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?’”¹⁶¹ This is a significant advantage to this lawyer’s clients: by learning what evidence the agency has and does not have on the target, the whistleblower gains an opportunity to target further evidence-gathering efforts towards evidence that would most directly benefit the government’s case, thereby increasing the prospects of a large award. Given the strict confidentiality with which materials in the SEC investigative files are ordinarily treated,¹⁶² it seems doubtful that that the same courtesy is extended to many other less well-connected whistleblower attorneys—not to mention pro se whistleblowers.

The same revolver whistleblower lawyer has stated that he can learn whether the agency will be interested in a potential client’s prospective tip before even submitting:

I’ve had clients come to me about something that 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, let’s say, in this instance it was a cyber case, and I called the head of the Cyber Unit, and I said: “I’ve got somebody who’s got what I think is really great information about, you know, 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 the agency is working on, and then direct it to the right folks¹⁶³

Again, this is undeniably a tremendous benefit. Before making the difficult decision about whether to become a whistleblower, this lawyer’s clients get the advantage of learning from the agency itself whether or not their information is likely to lead to an investigation (and, thus, an award). Any prospective whistleblower would love to have this information before deciding whether to proceed. But, given the intense confidentiality surrounding open investigations

160. See Sun, *supra* note 33 (“I think the rotation from the SEC to the defense bar is a much bigger problem.” (quoting Katz)).

161. Fraud in Am. Podcast, *supra* note 92, at 25:40 (statement of Sean McKessy).

162. SEC Enforcement Manual, *supra* note 51, at 82-83 (providing that “[a]ll information obtained or generated by SEC staff during investigations or examinations should be presumed confidential and nonpublic unless disclosure has been specifically authorized” and explaining that disclosure is authorized under Rule 24c-1 to specified classes of requesters which do not include private whistleblower counsel); 17 C.F.R. § 240.24c-1 (2022). See also *infra* notes 213-242 (discussing constitutional and other legal concerns posed by private whistleblowers’ investigations).

163. Berkeley Panel, *supra* note 106, at 1:03:40-1:04:21 (statement of Sean McKessy).

and enforcement generally, it seems unlikely that this courtesy is extended to many other whistleblower lawyers.

Or consider the behavior of prominent whistleblower firm Constantine Cannon, which, through 2020, had struggled with the SEC program—winning just a single, relatively small (\$1.7 million) whistleblower award. The firm evidently decided in late 2021 to make a strategy change: they hired the former director of the SEC’s Chicago office to join their team.¹⁶⁴ Perhaps the firm saw that peers were outperforming them because of strong personal connections inside the SEC and decided to fight fire with fire.

In a similar vein, consider the behavior of whistleblower firm Kohn, Kohn & Colapinto. Following the initial posting of an earlier draft of this Article in Fall 2022, the firm and its various affiliates¹⁶⁵ emphatically objected to the suggestion that former SEC lawyers seemed to be doing especially well in the program. Attorney Stephen Kohn stated that “there is no direct evidence that [the SEC] plays favorites with firms that have former SEC employees on staff,”¹⁶⁶ and that, to the contrary, the SEC has “work[ed] closely with attorneys who had no ‘friends’ in the agency.”¹⁶⁷ Yet, a few months later, the firm proudly announced its latest hire: former SEC Commissioner Allison Herren Lee.¹⁶⁸ It seems worth paying more attention to what these firms are actually doing, rather than merely what they are saying.

Finally, consider the still-unfolding whistleblower saga of activist short-seller Carson Block.¹⁶⁹ In 2011, Block determined that a company called Focus Media was committing accounting fraud (among other things), took a short position, published reports disclosing the fraud to the market, and then shared the reports informally with SEC officials not involved in the whistleblower

164. Press Release, Constantine Cannon, Former Regional Director of the SEC’s Chicago Office Joins Constantine Cannon’s Whistleblower Practice (Dec. 3, 2021), <https://constantinecannon.com/firm-news/former-regional-director-of-the-secs-chicago-office-joins-constantine-cannons-whistleblower-practice> [<https://perma.cc/4HCX-REX6>].

165. See *infra* note 208 and accompanying text (discussing the close relationship between KKC and the NWC, which is closely affiliated with Whistleblower Network News).

166. See Schweller & Schepis, *Documents Discredit*, *supra* note 145.

167. Stephen M. Kohn, *The “Iron Curtain” Has Fallen: A Radical Shift in Lawyers Representing Whistleblowers*, NAT’L L. REV. (Sept. 30, 2022), <https://www.natlawreview.com/article/iron-curtain-has-fallen-radical-shift-lawyers-representing-whistleblowers> [<https://perma.cc/7KXD-J7RL>].

168. Mengqi Sun, *Former SEC Commissioner Allison Herren Lee Joins Whistleblower Law Firm*, WALL ST. J. (Mar. 9, 2023, 5:09 PM ET), <https://www.wsj.com/articles/former-sec-commissioner-allison-herren-lee-joins-whistleblower-law-firm-2a621385> [<https://perma.cc/RUE9-Z652>].

169. Block and his firm Muddy Waters specialize in spotting fraudulent companies, taking large short positions (betting against the company), disclosing the fraud, and then profiting when the stock tanks. See Complaint ¶¶ 2-3, Block v. Barnes, No. 22-cv-869 (W.D. Tex. filed Aug. 25, 2022), <https://www.courtlistener.com/docket/64923008/1/block-v-barnes> [<https://perma.cc/WT67-5N72>]. For background on activist short selling, see, for example, Barbara A. Bliss, Peter Molk & Frank Partnoy, *Negative Activism*, 97 WASH. U. L. REV. 1333 (2020); Joshua Mitts, *Short and Distort*, 49 J. LEGAL STUD. 287 (2020); and Carson Block, *Distorting the Shorts* (Feb. 23, 2022) (unpublished manuscript), <https://ssrn.com/abstract=4041541> [<https://perma.cc/X4PT-XL9K>].

program.¹⁷⁰ Based largely on Block’s report, the SEC launched an investigation and, in 2015, settled with company for \$55.6 million.¹⁷¹ Block applied for a whistleblower award. Critically, however, it was only at this point—four years after the initial release of the reports—that Block did what the SEC ordinarily requires whistleblowers do at the outset: file the official tip on “Form TCR.” As a result, the SEC staff denied Block’s application for an award; under the program’s regulations, Block could not be a “whistleblower” because he had not submitted the required form until after the agency’s investigation had already concluded.¹⁷²

Block appealed this denial to the full Commission and won. The Commission reversed the staff and awarded Block a \$14 million bounty—25% of the amount recovered in the enforcement action. In reversing the staff, the Commission reaffirmed the importance of the Form TCR requirement—which is “not a mere formality but, rather, . . . critical to the trackability, management, and reliability of tips”¹⁷³—explained that Block’s failure to follow that process “does not serve the programmatic goals of ensuring that information is properly tracked, reviewed and assessed,”¹⁷⁴ and acknowledged that Block also failed to qualify for the “limited exception” to the Form TCR requirements in the program regulations.¹⁷⁵ Nevertheless, the Commission concluded that “it would be in the public interest and consistent with the protection of investors for the Commission to exercise our discretionary authority under Section 36(a) of the Exchange Act to waive the TCR filing requirements . . . in light of the unusual facts and circumstances present here.”¹⁷⁶

One might wonder why the Commission would seemingly bend over backwards to reward Block. Nothing in the program rules explains how the Commission should exercise this general discretion.¹⁷⁷ Block had likely already made a substantial profit from his fraud-detection efforts on Focus Media through his short position—the company’s stock reportedly fell by 40% (or more) the day he released his initial report.¹⁷⁸ For another thing, Block was and remains a controversial figure—he was apparently the subject of a federal

170. Complaint ¶¶ 8-9, *supra* note 169; John Holland, *Carson Block SEC Payout Mystery Deepens with Suit Outing Him*, BLOOMBERG (July 29, 2022, 10:57 AM), <https://www.bloomberg.com/news/articles/2022-07-29/mystery-of-carson-block-sec-payout-deepens-with-suit-outing-him> [<https://perma.cc/MNX3-Q7VM>].

171. Focus Media Holding Ltd., Securities Act Release No. 9933, Exchange Act Release No. 76030, 2015 WL 5718168 (Sept. 30, 2015).

172. *See* Order Determining Whistleblower Award Claims, Exchange Act Release No. 94398, 2022 WL 768309 (Mar. 11, 2022) at 2-3.

173. *Id.* at 5.

174. *Id.* at 6.

175. *Id.*

176. *Id.* (footnote omitted).

177. Complaint ¶ 107, *Barnes v. Block*, No. 22-cv-7236 (S.D.N.Y. filed Aug. 24, 2022), <https://www.courtlistener.com/docket/64919994/13/barnes-v-block> [<https://perma.cc/582D-9SX8>].

178. Holland, *supra* note 170; John Holland, *Mystery of Carson Block SEC Payout Deepens With Suit Outing Him*, BLOOMBERG L. (Jul. 29, 2022, 10:56AM), <https://news.bloomberglaw.com/securities-law/lawsuit-sheds-light-on-secret-sec-payment-to-shortseller-block> [<https://perma.cc/6DHM-3W6R>]; *see also* Complaint, *supra* note 177, ¶ 69 (alleging a drop of “as much as 66% intraday”).

criminal investigation at the time of this award—and not necessarily the type of whistleblower who would enhance the program’s popularity or political support.¹⁷⁹

One possible answer is that Block hired the right lawyer. Block was reportedly represented by Jordan Thomas—the single most dominant revolver whistleblower attorney.¹⁸⁰ The idea that Thomas leveraged his insider status and connections to get the Commission to bend the rules for his client has been aggressively advanced in litigation by Kevin Barnes, an associate of Block’s who had some (disputed) involvement in the preparation of the Focus Media report, separately sought a whistleblower award from the SEC, was denied, and is now involved in litigation against both Block and the SEC to claim some part of the \$14 million award.¹⁸¹ Barnes has argued that the Commission’s decision to deny him an award while giving one to Block was “based on reasoning that was so mystifying, incoherent, and lacking in transparency, that it raises the specter of favoritism for a former colleague”¹⁸² and that Block was “granted more access to, and opportunity to be heard before the SEC” due to his being represented “by a former senior SEC official involved in the whistleblower program.”¹⁸³ The Third Circuit recently rejected Barnes’ petition—but agreed that the SEC’s proffered justification for awarding Block \$14 million “leaves something to be desired.”¹⁸⁴

179. Holland, *supra* note 170.

180. Sun, *supra* note 156.

181. Barnes sued Block in the Southern District of New York for a share of the \$14 million award, *see* Complaint, *supra* note 177, and petitioned the Third Circuit for review of the SEC’s denial of his request for a whistleblower award, Holland, *supra* note 178; Redacted Petitioner’s Opening Brief, *Doe v. SEC*, No. 22-1652 (3d Cir. filed Aug. 22, 2022), <https://www.courtlistener.com/docket/67001058/26/jamie-doe-v-sec> [<https://perma.cc/LND6-2XN5>]. Block sued Barnes in the Western District of Texas for defamation related to those lawsuits and related claims Barnes made to journalists, *see* Complaint, *supra* note 169.

182. Redacted Petitioner’s Opening Brief, *supra* note 181, at 3.

183. (Redacted) Brief of Respondent at 40, *Doe v. SEC*, No. 22-1652 (3d Cir. filed Apr. 8, 2022), <https://www.courtlistener.com/docket/67001058/39/jamie-doe-v-sec> [<https://perma.cc/D7DR-YKD7>] (quoting redacted portions of petitioner’s brief). It should be noted, however, that Barnes is not a neutral party, as he has a direct financial incentive to identify flaws in the bounty award process. Further, Block and the SEC have argued that Block’s success and Barnes’s failure can be explained by differences in their positions and actions.

184. *Doe v. SEC*, 2023 WL 3562977, at *3 n.3 (3d Cir. Mar. 23, 2023) (holding that any concerns about the SEC’s award to Block were “beyond the scope of this appeal,” which concerned only the SEC’s denial of an award to Barnes). While the opinion does not refer to Block or Barnes by name, several outlets have confirmed that it relates to Block and Barnes. *See* Mengqi Sun, *Court Questions Criteria for Carson Block’s \$14 Million SEC Whistleblower Award*, WALL ST. J. (May 23, 2023, 5:07PM ET), <https://www.wsj.com/articles/court-questions-criteria-for-carson-blocks-14-million-sec-whistle-blower-award-42829afd> [<https://perma.cc/YG2E-ZFCF>]; John Holland, *Bass, Block Cases Add to Questions on SEC Whistleblower Rules*, BLOOMBERG L. (May 23, 2023, 11:58AM), <https://news.bloomberglaw.com/securities-law/bass-block-cases-add-to-questions-on-sec-whistleblower-rules> [<https://perma.cc/AGS6-DGML>].

D. Law Firm Characteristics

One theory discussed above is that high-reputation law firms may have an easier time getting an 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 consists of 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 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 5 reports, big defense firms have not performed well in either WBP. 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 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 attract the agencies' attention for their good tips, because they submit 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.¹⁸⁵

A number of commentators have predicted or claimed that traditional plaintiff-side securities-litigation firms would take a dominant role in these programs.¹⁸⁶ This has turned 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—

185. The NWC purports to identify three additional “large ‘Big Law’ corporate law firms” that won awards: Levine Lee LLP, Leader Berkon Colao & Silverstein LLP, and Sallah Astarita & Cox, LLC. See Schepis & Schweller, *Defense Firms*, *supra* note 145. But none of these firms appears on the AmLaw 200, nor are they particularly “large”—the biggest of these “big law” firms has, as of this writing, 22 attorneys (Leader Berkon), *Our Team*, LEADER BERKON COLAO & SILVERSTEIN LLP, <https://www.leaderberkon.com/?p=6769> [<https://perma.cc/EU98-49C6>], the others have 12 (Levine Lee), *Team*, LEVINE LEE LLP, <https://levinelee.com/levine-lee-team.html> [<https://perma.cc/6ZTZ-539E>], and 6 (Sallah), *Attorneys*, SALLAH ASTARITA & COX LLC, <https://www.sallahlaw.com/attorneys.html> [<https://perma.cc/F5D5-TTHG>]. The NWC also does not mention that one of the awards issued to the three AmLaw 200 “biglaw” firms I previously identified was for \$0.

186. See, e.g., Engstrom, *supra* note 30, at 614 n.25; Rose, *supra* note 6, at 1299; Baer, *supra* note 76, at 2234; Joe Palazzolo, *First Comes the Whistleblower, Then Comes the Securities Class Action?*, WALL ST. J. (Nov. 17, 2010, 5:49 PM ET), <https://www.wsj.com/articles/BL-CCB-1868> [<https://perma.cc/H47U-QTUG>].

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.¹⁸⁷

Table 5. Law Firm Characteristics¹⁸⁸

(in thousands)

	SEC			CFTC		
	<i>ISS Top 50</i>	<i>AmLaw 200</i>	<i>≤ 5 Lawyers</i>	<i>ISS Top 50</i>	<i>AmLaw 200</i>	<i>≤ 5 Lawyers</i>
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

IV. Implications: Re-evaluating Private Whistleblower Lawyers

Private whistleblower lawyers appear to serve 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 may have turned to the private whistleblower bar to resolve this challenge. At both the SEC and the 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 seem to 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 appear to significantly outperform first timers. And at the SEC, firms staffed with former SEC officials appear to outperform others.

187. See Ratner, *supra* note 39, at 773 & n.39, 774.

188. All are mutually exclusive except one award which appears on both the ISS Top 50 list and the ≤ 5 lawyer list.

The Whistleblower Industrial Complex

The WBPs effectively pay private actors to receive, sift, and investigate whistleblower tips and make recommendations. They are, in other words, akin to familiar 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 IV.A highlights accountability and efficiency deficits caused by this outsourcing. Section IV.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 the government might have otherwise exclusively performed: receiving, reviewing, evaluating, and investigating tips from potential whistleblowers. In exchange for their labor, these private intermediaries have received hundreds of millions of dollars from the government.

Imagine an alternative universe in which, instead of authorizing the agencies to pay 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.¹⁸⁹ 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.

This policy choice has gone unnoticed for several reasons. Most generally, the lack of discussion speaks to the deep entrenchment and acceptance of formerly controversial policy-design methods of privatization and outsourcing.¹⁹⁰ This general acceptance is bolstered by what appears to be a deliberate and robust public-relations strategy by whistleblower attorneys to obscure the costs they impose on the system.¹⁹¹ And, finally, keeping the

189. Imagine further that, in this alternative regime, private intermediaries were prohibited from being paid more than a nominal fee for filing tips.

190. See Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES 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: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC 99 (2017) (“We’re all privatizers now.”).

191. 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

privatization under the radar has allowed the agencies 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 re-evaluate the role played by whistleblower lawyers. Drawing from the literature on privatization and outsourcing, I highlight the significant and too-long overlooked accountability and efficiency costs they impose.

1. The Accountability Deficit

Scholars have warned that replacing public officials with private actors in performing public functions can weaken accountability.¹⁹² Private actors may be able to circumvent rules that ordinarily apply to their government counterparts regarding transparency,¹⁹³ administrative procedure,¹⁹⁴ employment,¹⁹⁵ and constitutional boundaries.¹⁹⁶ And some forms of privatization can also undermine accountability by facilitating agency capture, pay-to-play, or other forms of corruption.¹⁹⁷ The WBP outsourcing regime is likely vulnerable to these same criticisms.

i. 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

prosecute their cases at *no additional cost to the commission*." Zuckerman & Michaels, *supra* note 77 (emphasis added); *see also infra* notes 198-212 and accompanying text (describing transparency deficits in the agencies' and whistleblower attorneys' discussions of WBPs); *supra* notes 105-113 and accompanying text (describing ways in which whistleblower attorneys have driven public dialogue around WBPs).

192. *See, e.g.*, PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 4 (2007); KEVIN R. KOSAR, CONG. RSCH. SERV., RL33777, *PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION* 10 (Dec. 28, 2006); Jack M. Beermann, *Privatization and Political Accountability*, 28 *FORDHAM URB. L.J.* 1507, 1525-26 (2001); Kimberly N. Brown, "We the People," *Constitutional Accountability, and Outsourcing Government*, 88 *IND. L.J.* 1347 (2013).

193. *See* Alfred C. Aman, Jr. & Landyn W. Rookard, *Private Government and the Transparency Deficit*, 71 *ADMIN. L. REV.* 437 (2019).

194. Alfred C. Aman, Jr., *Privatization and Democracy: Resources in Administrative Law*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 261 (Jody Freeman & Martha Minow eds., 2009); Nina Mendelson, *Six Simple Steps to Increase Contractor Accountability*, in *GOVERNMENT BY CONTRACT*, *supra*, at 241; Van Loo, *supra* note 44, at 517.

195. Jon D. Michaels, *The American Deep State*, 93 *NOTRE DAME L. REV.* 1653, 1668-70 (2018).

196. Gillian E. Metzger, *Privatization as Delegation*, 103 *COLUM. L. REV.* 1367 (2003); MICHAELS, *supra* note 190; David S. Rubenstein, *Supremacy, Inc.*, 67 *UCLA L. REV.* 1130 (2020).

197. Beermann, *supra* note 192, at 1529, 1537; Lemos, *supra* note 44, at 542-46; Paul Starr, *The Case for Skepticism*, in *PRIVATIZATION AND ITS ALTERNATIVES* 25, 30-31 (William T. Gormley, Jr. ed., 1991); PAUL C. LIGHT, *THE GOVERNMENT-INDUSTRIAL COMPLEX: THE TRUE SIZE OF THE FEDERAL GOVERNMENT, 1984-2018*, at 117-18 (2019).

awarded to whistleblowers.¹⁹⁸ But, as these officials know (or should know), a very substantial portion of these funds went to private intermediaries, not the whistleblowers themselves. 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.”¹⁹⁹ Once the true costs of intermediation—that is, the hundreds of millions of dollars that the SEC pays *not* to whistleblowers but to private lawyers, experts, investigators, and others—are factored in, 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 the 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 they have paid for the private intermediation of whistleblower tips do not appear anywhere in these budget reports. No one is held accountable for the expenditure of these funds because they are effectively invisible.²⁰⁰ Privatization has not allowed the government to avoid paying for tip sifting; it has allowed the government to avoid admitting that it pays, indeed likely overpays, for these services.

Whistleblower lawyers contribute to the transparency deficit by frequently making statements that obscure the high costs they impose. For example, one told the *Wall Street Journal* that the services whistleblower lawyers provide

198. See, e.g., SEC, *SEC Chair Gary Gensler on SEC Surpassing \$1 Billion in Awards to Whistleblowers*, YOUTUBE, at 0:01 (Sept. 16, 2021), <https://www.youtube.com/watch?v=kgwqO5GrDZY> [<https://perma.cc/5338-DJ6Z>] (“A total of a billion dollars has been awarded to whistleblowers. . . .”); Clayton, Strengthening our WBP, *supra* note 3 (“[W]e have awarded approximately \$368 million to eligible whistleblowers. . . .”); Mary Jo White, SEC Chair, Speech at the NYU School of Law Program on Corporate Compliance and Enforcement: A New Model for SEC Enforcement: Producing Bold and Unrelenting Results (Nov. 18, 2016), <https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816> [<https://perma.cc/VXJ4-JGHB>] (“We recently surpassed the \$100 million mark for awards to whistleblowers. . . .”); *SEC WBP 2021 Annual Report*, *supra* note 10, at 1 (“[T]he SEC has awarded more than \$1.1 billion to 214 individuals. . . .”); Off. of the Whistleblower, *2020 Annual Report to Congress: Whistleblower Program*, SEC 2 (Nov. 16, 2020) [hereinafter *SEC WBP 2020 Annual Report*], https://www.sec.gov/files/2020_owb_annual_report.pdf [<https://perma.cc/Q8TB-DYAT>] (“[T]he Commission has awarded approximately \$562 million to 106 individuals.”); Off. of the Whistleblower, *2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, SEC 1, <https://www.sec.gov/files/owb-annual-report-2015.pdf> [<https://perma.cc/Q35E-S9BY>] (“The Commission has paid more than \$54 million to 22 whistleblowers. . . .”).

199. E.g., Press Release, SEC, SEC Whistleblower Program Ends Record-Setting Fiscal Year with Four Additional Awards (Sept. 30, 2020), <https://www.sec.gov/news/press-release/2020-240> [<https://perma.cc/JS5F-RXR5>].

200. See PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* 2-9 (1999) (discussing the “illusion of smallness” created by privatizing and outsourcing, which allows “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).

come at “no additional cost to the commission.”²⁰¹ 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”—but did not mention that a substantial proportion of those dollars never made it to those peoples’ pockets.²⁰² Another prominent whistleblower told an NPR reporter that “three of [his] clients received \$83 million.”²⁰³ But, again, if he collected a 20-40% fee and deducted additional costs on top, the net amount actually “received” by these three clients would be significantly lower.

Whistleblower lawyers also hide the costs they impose by speaking out under the umbrellas of organizations with attractive names like “The National Whistleblower Center,”²⁰⁴ the “Whistleblower Law Collaborative,”²⁰⁵ “SEC Whistleblower Advocates,”²⁰⁶ or “Taxpayers Against Fraud”²⁰⁷—names that sound more like non-profit NGOs than 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 a member of the private whistleblower firm

201. Zuckerman & Michaels, *supra* note 77. At least one whistleblower firm has acknowledged the true costs they impose on the program. Wampler Buchanan Walker Chabrow Banciella & Stanley, P.A., Comment Letter on Proposed Amendments to Whistleblower Rules 2 (Sept. 14, 2018) [hereinafter Wampler Buchanan, Comment Letter], <https://www.sec.gov/comments/s7-16-18/s71618-4351183-173303.pdf> [<https://perma.cc/AUQ3-UQ87>] (“[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.”).

202. *Berkeley Panel*, *supra* note 106, at 23:27 (statement of Sean McKessy) (emphasis added); *see also* Sean X. McKessy, *A Look Back on the Success of the SEC Whistleblower Program*, TAXPAYERS AGAINST FRAUD (“[T]he SEC has paid approximately \$1.2 billion to 256 individuals . . .”), <https://www.taf.org/the-success-of-the-sec-whistleblower-program> [<https://perma.cc/CU29-4EV8>].

203. Vanek Smith, *supra* note 105 (statement of Jordan Thomas).

204. *See Mission & History*, NAT’L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/mission-history> [<https://perma.cc/ZY48-RRJ3>] (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 whistleblowers,” 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). 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 its donors. *Transparency & Accountability*, NAT’L WHISTLEBLOWER CTR., <https://www.whistleblowers.org/transparency-accountability> [<https://perma.cc/45U8-GJXD>]; *National Whistleblower Center Policy on Donor Privacy*, NAT’L WHISTLEBLOWER CTR. (Dec. 2, 2019), <https://www.whistleblowers.org/wp-content/uploads/2019/12/NWC-Donor-Privacy.pdf> [<https://perma.cc/N8FN-9L3W>].

205. WHISTLEBLOWER L. COLLABORATIVE, <https://www.whistleblowerllc.com> [<https://perma.cc/D7N8-WYQR>].

206. SEC WHISTLEBLOWER ADVOCATES, <https://secwhistlebloweradvocate.com/> [<https://perma.cc/V66U-35NE>].

207. *About TAF*, TAXPAYERS AGAINST FRAUD, <https://www.taf.org/mission> [<https://perma.cc/59WX-VVVT>]; *Membership*, TAXPAYERS AGAINST FRAUD, <https://member.taf.org/become-a-member> [<https://perma.cc/3RFB-LV4M>] (“The TAF False Claims Act membership is currently held by more than 400 experienced whistleblower attorneys who focus on the representation of whistleblowers in False Claims Act matters.”).

Kohn, Kohn & Colapinto—as are all of the Center’s founders, its President, its General Counsel, and its Treasurer/Secretary.²⁰⁸

Consider also 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 counsel” and only two actual whistleblowers.²⁰⁹ Further, two of the four authors are, themselves, whistleblower lawyers.²¹⁰ The article 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 the SEC and CFTC both release annual reports to Congress with information about the number of tips received, the number of awards issued, total dollar amounts distributed, and other information about the program.²¹¹ Congressional overseers, tipsters, and the public at large depend on these reports to learn about how the program functions. But these reports fail to capture relevant activity that occurs beyond the agencies’

208. Press Release, Grassley, *supra* note 32. Journalists and scholars similarly often attribute views to the “National Whistleblower Center” without acknowledging that the founders, leaders, and trustees of that organization are partners of a single private whistleblower law firm, *see supra* note 204. *E.g.*, Rapp, *supra* note 30, 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 Sun, *With Its Whistleblowing Directive, EU Charts a Different Course from U.S.*, *WALL ST. J.* (Mar. 15, 2021, 5:30 AM ET), <https://www.wsj.com/articles/with-its-whistleblowing-directive-eu-charts-a-different-course-from-u-s-11615800602> [<https://perma.cc/U5H7-ENQD>]; Daniel S. Wittenberg, *The SEC’s Whistleblower Program: A Growing Legal Cottage Industry*, *AM. BAR ASS’N* (May 3, 2018), <https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/the-secs-whistleblower-program-growing-legal-cottage-industry> [<https://perma.cc/ZTM6-MYSJ>]. The National Whistleblower Center’s 2019 tax return (the most recent available) shows that the organization’s president, Treasurer/Secretary, General Counsel, and Chairman of the Board are all lawyers from the same private whistleblower law firm. *Compare* National Whistleblower Ctr., 2019 Return of Organization Exempt from Income Tax (Form 990) 7 (Nov. 13, 2020), https://projects.propublica.org/nonprofits/display_990/521770068/04_2021_prefixes_52-54%2F521770068_201912_990_2021040517879127 [<https://perma.cc/JS56-4RPT>] (listing officers, directors and key employees of NWC), *with Our Whistleblower Lawyers*, KKC LLP, <https://kcc.com/our-whistleblower-law-firm/our-whistleblower-lawyers> [<https://perma.cc/FR7D-ML94>] (listing attorneys of KKC LLP).

Similarly, the most recent publicly available (2019) tax return of the organization “Taxpayers Against Fraud” shows that four of the seven members of the organization’s board of directors (including its chairman) are or were private whistleblower lawyers. *See* Taxpayers Against Fraud Legal Educ. Fund, 2019 Return of Organization Exempt from Income Tax (Form 990) 7 (Nov. 16, 2020), https://projects.propublica.org/nonprofits/display_990/311778598/04_2021_prefixes_31-32%2F311778598_201912_990_2021040117850526 [<https://perma.cc/C5ER-XVQ3>].

209. Evans et al., *supra* note 76, at 454 (emphasis added).

210. *Id.* at 453.

211. *E.g.*, *SEC WBP 2021 Annual Report*, *supra* note 10; *Whistleblower Program & Customer Education Initiatives: 2022 Annual Report*, CFTC (2022), <https://www.whistleblower.gov/sites/whistleblower/files/2022-10/FY22%20Customer%20Protection%20Fund%20Annual%20Report%20to%20Congress.pdf> [<https://perma.cc/EBM5-NHYL>]; *see* 15 U.S.C. § 78u-6(g)(5) (2018) (requiring annual reports on the SEC WBP); 7 U.S.C. § 26(g)(5) (2018) (same for the CFTC); Rose, *supra* note 6, at 1288 (highlighting these annual reports as a source of accountability). *But see* Alexander I. Platt, *Going Dark(er): The SEC Whistleblower Program’s FY 2022 Report Is the Least Transparent in Agency History*, 2023 U. ILL. L. REV. ONLINE (forthcoming 2023), <https://srn.com/abstract=4350144> [<https://perma.cc/S4RE-B6YL>] (showing that the first SEC report published following the initial posting of this Article was the least transparent in agency history, omitting without explanation six classes of statistical information that the agency had been consistently disclosing in every report from the program’s inception).

direct purview. Private whistleblower attorneys are not required to disclose information regarding the number of tips they receive, the number they choose to pass along to the agencies, 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 way to verify these statements' accuracy or to hold the firms accountable if they were found to be false. 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 grant or not grant an award to a given whistleblower, it issues an opinion explaining the reasoning behind its decision.²¹² Although the opinions are 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 to take on a client, they never have to provide any kind of justification.

ii. Constitutional and Legal Deficits

The WBPs' 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 receive (and legally contest) subpoenas for documents,²¹³ a right to receive (and legally contest) subpoenas compelling testimony before having testimony taken, a right to be notified before certain conversations are recorded,²¹⁴ a right against self-incrimination,²¹⁵ a right to counsel,²¹⁶ a right to receive exculpatory information in the government's possession,²¹⁷ 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,²¹⁸ enforcement manuals,²¹⁹ and other internal guidance documents. A failure to adhere to these rules 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 gather information to support their tips. They may secretly record conversations, take 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.

212. See Off. of the Whistleblower, *Final Orders of the Commission*, SEC (Mar. 7, 2023), <https://www.sec.gov/whistleblower/final-orders-of-the-commission> [<https://perma.cc/RWW6-LB7T>].

213. *E.g.*, 17 C.F.R. §§ 203.8, 201.232(c), 201.150(b)-(d) (2022).

214. *SEC Enforcement Manual*, *supra* note 51, at 61.

215. *Id.* at 73.

216. *Id.* at 64; 17 C.F.R. § 203.7(b) (2022).

217. 17 C.F.R. § 201.230(b)(3) (2022); *Brady v. Maryland*, 373 U.S. 83 (1963).

218. *SEC Enforcement Manual*, *supra* note 51, at 2.

219. *E.g.*, *id.*

The Whistleblower Industrial Complex

But the purely private nature of these investigations may be called into question by the major role played by whistleblower attorneys—especially given the seeming dominance of a small group of well-connected, repeat-player firms. These whistleblower lawyers emphasize that they are in constant communication with agency enforcement attorneys throughout the investigation;²²⁰ that they are trusted by agency enforcement attorneys;²²¹ and, in many cases, they actually used to work at the agency alongside those attorneys.²²² And this makes perfect sense given that SEC rules provide that that a whistleblower who provides such “ongoing” cooperation and assistance may receive a larger bounty than one who does not,²²³ and, in announcing awards, the SEC often emphasizes whistleblowers’ ongoing assistance beyond the initial tip.²²⁴ But all of this creates a risk that the nominally private whistleblower is, in reality, deputized as an undercover agent of the government.²²⁵

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.”²²⁶ 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”; and 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.”²²⁷ The lawyer stated: “It was like something from the movie ‘The Firm.’”²²⁸

220. Complaint, *Thomas v. SEC*, *supra* note 80, ¶ 29 (explaining that, after submitting a tip, Thomas and his clients, inter alia, “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”); *SEC Whistleblower Lawyer*, CUTTER LAW P.C., <https://cutterlaw.com/whistleblower/sec-fraud/> [<https://perma.cc/DE3K-F9V9>] (“[We] [a]ct as [our] client’s representative with the SEC’s enforcement office and field all communications . . . [and] [w]ork with the Securities and Exchange Commission on gathering all necessary evidence to prove the securities fraud and violations of federal securities law.”).

221. *See supra* notes 138-141.

222. *See supra* Section III.C.

223. 17 C.F.R. § 240.21F-6(a)(2)(i) (2022) (listing “[w]hether the whistleblower provided ongoing . . . cooperation and assistance” among various factors that “may increase the amount of a whistleblower’s award”).

224. *E.g.*, Press Release, SEC, *supra* note 11 (crediting “extensive, ongoing cooperation”); Press Release, SEC, SEC Awards over \$500,000 to Two Whistleblowers (Mar. 1, 2021), <https://www.sec.gov/news/press-release/2021-37> [<https://perma.cc/898K-VWMX>] (“substantial, ongoing assistance”); Press Release, SEC, SEC Issues Awards Totaling Approximately \$3 Million to Three Whistleblowers (Mar. 18, 2022) (“substantial ongoing cooperation”); Press Release, SEC, SEC Awards More than \$1.8 Million to Whistleblower (Aug. 29, 2019) (“ongoing assistance”).

225. *Cf. Rose*, *supra* note 6, at 1280-81 (“The SEC can . . . lean on whistleblowers and their counsel . . . for assistance in investigations.”).

226. Keefe, *supra* note 37.

227. *Id. See* Fraud in Am. Podcast, *supra* note 92, at 39:50 (statement of whistleblower lawyer Jason Zuckerman, discussing a successful case where client made many audio recordings).

228. Keefe, *supra* note 37 (quoting Jordan Thomas).

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.²²⁹ As noted above, 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?’”²³⁰ The same former SEC official also said he “get[s] calls from [his] former colleagues all the time, like, send me some more good whistleblower cases.”²³¹

A former SEC lawyer in constant communication with current SEC enforcement lawyers during an open investigation while directing his client to investigate private companies starts to sound an awful lot like government activity.²³² 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 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, “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.”²³³ It seems possible to characterize a private individual as an “instrument or agent of the Government” where she takes sensitive documents from her employer at the direction of her (former SEC) lawyer who had received information from an SEC enforcement attorney actively investigating the employer.²³⁴

A similar line blurring has bubbled up lately in the context of government-directed internal corporate investigations. A 2019 S.D.N.Y. 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.²³⁵ The court explained that, in the course of the

229. *Planet Money: The Whistleblower Whisperer*, *supra* note 105.

230. *Fraud in Am. Podcast*, *supra* note 92, at 25:40 (statement of Sean McKessy).

231. *Berkeley Panel*, *supra* note 106, at 23:00 (statement of Sean McKessy).

232. *Cf. Keefe*, *supra* note 37 (quoting a leading whistleblower lawyer as emphasizing that the SEC can use illegally obtained evidence “as long as it’s something they didn’t ask for”).

233. *Skinner v. Ry. Lab. Execs.’ Ass’n*, 489 U.S. 602, 614 (1989).

234. *See also SEC Enforcement Manual*, *supra* note 51, at 34 (“When staff is aware that a private entity is investigating conduct that is the same or related to the conduct involved in the staff’s investigation, staff should keep the following guidelines in mind: In fact and appearance, the SEC and the private entity’s investigations should be parallel and should not be conducted jointly. Staff should make investigative decisions independent of any parallel investigation that is being conducted by a private entity. Do not take any investigative step principally for the benefit of the private entity’s investigation or suggest investigative steps to the private entity.”).

235. No. 16-cr-0370, 2019 WL 2120523, at *1 (S.D.N.Y. May 2, 2019).

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.”²³⁶ The court 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, “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.”²³⁷ And, the court emphasized that it was “fully aware that this ruling may have implications that extend well beyond this particular case.”²³⁸ 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.²³⁹

iii. 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.²⁴⁰ As discussed above, the WBPs have disproportionately benefitted these well-connected private parties. At the same time, current government officials increasingly see private whistleblower practice as an attractive and lucrative career path to pursue following their government

236. *Id.* at *12.

237. *Id.* at *14.

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

239. *See, e.g.*, *Jarkesy v. SEC*, 34 F.4th 644 (5th Cir. 2022) (finding constitutional defects with Dodd-Frank’s expansion of SEC enforcement powers); *Seila L. v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (finding constitutional defects with the CFPB); *Lucia v. SEC*, 138 S. Ct. 2044, 2050-51 (2018) (finding constitutional defects with SEC administrative law judges in a case brought under Dodd-Frank’s expanded SEC enforcement powers); *Nat’l Ass’n Mfrs. v. SEC*, 800 F.3d 518 (D.C. Cir. 2015) (finding constitutional defect with “conflict minerals” disclosure requirement); *cf. State Nat’l Bank Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015) (finding a lack of jurisdiction to hear constitutional challenge to the Financial Stability Oversight Council); *see also* Eric Spitler, *The Long Game: The Decade-Long Effort to Dismantle the Dodd-Frank Act*, 24 N.C. BANKING INST. 1, 28-38 (2020) (collecting constitutional challenges to Dodd-Frank). For an interesting analysis of some of the Fourth Amendment issues that may arise in this context, see Christopher A. Brown, Note, *Why Whistleblowing Walter May Be Helping the SEC Violate the Fourth Amendment*, 49 J. CORP. L. (forthcoming 2023) (draft on file with author).

240. *Cf.* Mengqi Sun, *SEC Names Nicole Creola Kelly as Whistleblower Program Chief*, WALL ST. J. (Nov. 5, 2021, 9:02 PM ET), <https://www.wsj.com/articles/sec-names-nicole-creola-kelly-as-whistleblower-program-chief-11636148546> [<https://perma.cc/DP46-VBKK>] (quoting former SEC officials in private whistleblower practice praising the newly appointed head of SEC OWB as “a great pick” with “an excellent reputation” and stating that the appointment was “a testament to her skills and work ethic”).

service.²⁴¹ 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.²⁴²

Privatization has the potential to *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.²⁴³ 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

WBP outsourcing still may be worth it if the private actors produce better results at a lower cost. Privatization and outsourcing programs have gained popularity primarily on efficiency grounds, based on the theory that the incentives of a competitive marketplace will tend to generate more cost-effective, innovative approaches and attract a more talented, dynamic workforce than the rigid, slow-moving bureaucracy.²⁴⁴ As to private whistleblower lawyers, however, there are reasons to doubt this is the case.

i. Costs

Private intermediaries extract a large amount of money for their services. Based on the findings above, and assuming whistleblower lawyers charged a standard contingency fee (20%-40%), this would mean between \$145 and \$290 million paid out by the SEC and CFTC went to people other than the actual whistleblowers.

In the alternative universe in which tip sifting was kept “in-house,” this money could have expanded by several orders of magnitude the agencies’

241. See, e.g., Viswanatha, *supra* note 138 (“[C]urrent and former SEC attorneys now regularly ask me how they can do what I do.” (quoting a prominent former SEC official now in private whistleblower practice)).

242. 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. See Rose, *supra* note 6, at 1288.

243. 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 A. Dickinson, *Public Values/Private Contract*, in *GOVERNMENT BY CONTRACT*, *supra* note 194, at 335, 336.

244. See DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 15-20 (1992); E.S. SAVAS, *PRIVATIZATION: THE KEY TO BETTER GOVERNMENT* 288-91 (1987); JOHN D. DONAHUE, *THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS* 57-78, 80-81 (1989).

resources devoted to tip screening over the program's first decade.²⁴⁵ While it is impossible to know whether the supercharged agencies would have outperformed the real-life versions, the point is to illustrate the high bar for efficiency gains from privatization that would have to be met for the outsourcing to be worthwhile.

There are reasons to doubt that WBP outsourcing reduces overall costs of the program. First, these private intermediaries dilute the incentive effect of any given bounty, forcing the agencies to pay substantially more “bucks” to get the same incentive “bang.” If an executive is aware of significant wrongdoing at her company, her decision about whether to blow the whistle will depend, in part, on the expected payout. If the executive believes that hiring a lawyer is necessary to interest an agency, and that a lawyer will extract over 20-40% in fees and costs from any bounty payment issued, the executive will require a higher expected bounty payout to motivate her to come forward than a world in which no lawyers were necessary. This may tend to increase the overall costs of the program.

The likely efficiency losses caused by overly high private intermediation fees can be inferred from statements from the whistleblower lawyers themselves. Whistleblower lawyers have repeatedly emphasized the importance of large monetary awards in incentivizing high-quality whistleblowers to come forward.²⁴⁶ And, when the SEC proposed rules in 2018 that would have potentially curtailed some of these large awards, the whistleblower bar objected vigorously that doing so would destroy the program by destroying incentives for whistleblowers to come forward.²⁴⁷ But if smaller awards would disincentivize

245. A rough calculation suggests that the SEC could have nearly tripled its tip-sifting operation with these funds. Even on the conservative assumption that whistleblowers recover 20% of awards, I estimate the SEC has effectively paid about \$122 million to private intermediaries. That sum would cover \$150,000 salaries for 81 people for 10 years. *Cf. SEC Compensation Program*, SEC (May 3, 2022), <https://www.sec.gov/about/careers/sec-compensation> [<https://perma.cc/BX8A-5CVH>] (setting out SEC employee salaries). Based on a separate FOIA request, *see supra* Section I.C, I determined that an average of 43 SEC employees were assigned to its tip-sifting office each year. Had \$122 million been appropriated to the agency instead of spent on private intermediation, the SEC could have nearly tripled its tip-sifting operation from 43 to 124 people (ignoring, for these purposes, other costs of expanding staff).

246. *See, e.g.*, Complaint, *Thomas v. SEC*, *supra* note 80, ¶ 102 (“[T]he potential for large monetary awards is the primary motivation for individuals to blow the whistle”); Panel Discussion, *supra* note 57, at 413 (“The award is very helpful because [whistleblowers] have to put a lot on the line when they come forward.”); Evans et al., *supra* note 76, at 481; *FCPA Compliance Report: Mary Inman on an International Whistleblower Practice*, COMPLIANCE PODCAST NETWORK, at 3:50-4:05 (Nov. 15 2021), <https://compliancepodcastnetwork.net/mary-inman-on-an-international-whistleblower-practice> [<https://perma.cc/6R3L-96PR>] (explaining how the whistleblower award needs to compensate for “career-long blacklisting,” by putting a “financial safety net below the whistleblower”); McKessy, *supra* note 202; *FCPA Compliance Report*, *supra* note 246, at 9:20 (Nov. 2021); Climate Money Watchdog, *Enforcing ESG Claims Through the SEC’s Whistleblower Program: Poppy Alexander*, APPLE PODCASTS, at 36:30 (July 7, 2022), <https://podcasts.apple.com/us/podcast/enforcing-esg-claims-through-the-secs-whistleblower/id1619637596?i=1000569096622> [<https://perma.cc/7K35-UFK2>].

247. *See, e.g.*, Complaint, *Thomas v. SEC*, *supra* note 80, ¶¶ 1-15; Evans et al., *supra* note 76, at 490-93; KKC LLP, Comment Letter on Proposed Amendments to Whistleblower Rules 2 (Sept. 21, 2020), <https://www.sec.gov/comments/s7-16-18/s71618-7797952-223596.pdf> [<https://perma.cc/B3RN-A2SW>]; KKC LLP, Comment Letter on Proposed Amendments to Whistleblower Rules (Jan. 16, 2020), <https://www.sec.gov/comments/s7-16-18/s71618-6660478-203859.pdf> [<https://perma.cc/5ZZ3-7R2E>]; Sean McKessy, Phillips & Cohen LLP, Comment Letter on Proposed Amendments to Whistleblower

whistleblowing, then 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, outsourcing tip sifting does not completely substitute for government tip sifting and so adds an additional layer of administrative costs. After a tip has passed through the screening provided by a private attorney, a government attorney will subject it to a second round of screening. This doubling up of sifting may increase overall costs and lead to wasteful duplication of work. Government attorneys replicate much of what private attorneys have already done (investigation, interviews, legal analysis) during 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 officials who screen 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 the agencies conducted all tip sifting. On the other hand, private intermediation may enable the agencies to accord significantly less investigatory resources to tips they receive that seem to have “failed” the private tip-sifting process: for example, pro se tips or tips submitted by less reputable, non-repeat player, non-revolver firms. And, even if the government has 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.

ii. Sifting Quality

Proponents of outsourcing often point out that these programs may attract higher-quality, better-skilled workers than government jobs.²⁴⁸ But the attorneys leading the highest-performing firms are themselves former SEC lawyers. That is, the best actors in the private firms have precisely the same background 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 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, some firms may

Rules (Oct. 25, 2019), <https://www.sec.gov/comments/s7-16-18/s71618-6347981-195375.pdf> [<https://perma.cc/86FS-GXNQ>]; Cohen Milstein Sellers & Toll PLLC, Comment Letter on Proposed Amendments to Whistleblower Rules (Sept. 17, 2018), <https://www.sec.gov/comments/s7-16-18/s71618-4363691-174418.pdf> [<https://perma.cc/V83C-77ZH>]; Wampler Buchanan, Comment Letter, *supra* note 201.

248. See Lemos, *supra* note 44, at 539 (discussing the Department of Justice hiring David Boies to prosecute Microsoft); see also Van Loo, *supra* note 44, at 511 (“Given large firms’ resources, talent, information access, and expertise, they will in many contexts deliver a monitor better situated [than regulators] to keep pace.”).

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 failures is almost always nonpublic, resulting in a dearth of objective criteria on which to evaluate and compare these firms.

iii. Competitive Pressure

Privatization scholars have repeatedly pointed out that, where outsourcing programs operate in noncompetitive markets, the purported efficiency justifications for outsourcing become implausible.²⁴⁹ The market for whistleblower lawyers bears many of the indicia of a noncompetitive market. For one thing, tipsters may lack sufficient information to make an informed choice between potential lawyers. Although firms may advertise their successes, failures of firms are generally not public, so there is no straightforward way for prospective tipsters to compare the success rate of one prospective lawyer against another.²⁵⁰ Nor can prospective tipsters easily evaluate the past work product of these lawyers or even talk to past clients, since much of their work is necessarily secret. For another, unlike ordinary clients, who may tend to engage in preliminary discussions and negotiations with several lawyers to compare fees and approaches, an insider whistleblower might be reluctant to engage in such comparisons for fear that each additional conversation raises their risk of exposure.²⁵¹ These high information costs may make reputation—especially the ability to tout some big awards—a substantial barrier to entry that keeps out upstart firms: a tipster may conclude that he must hire one of the few firms that have dominated both programs if he wants any reasonable chance of success—which further undermines any real ability for the tipster to bargain on fees.²⁵² The revolving door and repeat player effects documented above make it harder for new firms to win clients away from the industry leaders, even if they charge lower fees. Accordingly, private competitive pressure likely does not suffice to produce optimal results or efficient pricing in the whistleblower-lawyer market.

249. See John D. Donahue, *The Transformation of Government Work: Causes, Consequences, and Distortions*, in GOVERNMENT BY CONTRACT, *supra* note 194, at 41, 45; Stan Soloway & Alan Chvotkin, *Federal Contracting in Context: What Drives It, How to Improve It*, in GOVERNMENT BY CONTRACT, *supra* note 194, at 192, 219; ELLIOT D. SCLAR, YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION 69-93 (2000); KOSAR, *supra* note 192, at 11; DONAHUE, *supra* note 244, at 218.

250. See KOSAR, *supra* note 192, 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”).

251. Outsider whistleblowers, such as short sellers, may be repeat players and thus more willing and able to “shop” different potential lawyers and bargain for a better rate.

252. See KOSAR, *supra* note 192, at 11 (noting, for purposes of efficient privatization, the important condition for competitive markets that “firms must not face barriers to entry”).

iv. 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 an additional \$145 to 290 million at their disposal, surely they could use appropriate funds to retain a marketing firm to engage in equally effective public education efforts.²⁵³

v. Innovation, Risk-Taking

A more compelling efficiency justification for incorporating private attorneys into the tip-sifting process is that, precisely because they sit outside the governmental hiring, training, and supervision mechanisms, they may bring a useful diversity of substantive approaches and instincts to the sifting process. As a result, they may identify promising cases that government attorneys would overlook.²⁵⁴ The fact that the most dominant firms in the SEC's program are staffed by 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 above, this behavior should not be encouraged.

B. WBPs as Lawyer-Driven Enforcement

A perennial critique of traditional private securities-fraud class actions is that lawyers drive these cases.²⁵⁵ Critics have identified significant divergences between the interests of lawyers and 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, and claim that lawyers can freely abuse their role, resulting in negative social consequences.²⁵⁶

253. Cf. *Rock Center Lunch Event*, *supra* note 106, at 1:09:57-1:10:40 (statement of Mary Inman) (describing the CFTC's extensive whistleblower-program outreach efforts including attending relevant conferences and handing out whistles).

254. Cf. Lemos, *supra* note 44, at 554-55 (noting that, "private lawyers may help correct for 'tunnel vision' on behalf of government litigators").

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

256. For foundational contributions to the "agency-cost" interpretation of securities class actions and plaintiffs' attorneys, see John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987); and Jonathan R. Macey & Geoffrey P. 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).

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.²⁵⁷ The findings above put some pressure on this sharp distinction. Just as in the class-action context, entrepreneurial, repeat-player attorneys take on a central role in WBPs, influencing which tips get filed and 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 securities 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.²⁵⁸ 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.”²⁵⁹

The WBPs may be vulnerable to the same criticism. Based on the study above, I estimate that the involvement of these private intermediaries has redirected hundreds of millions of dollars *away* from actual whistleblowers. This tax either saps the willingness of some well-placed whistleblowers to come forward, forces the agencies 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 to obtain institutional investor clients, including pay-to-play²⁶⁰ and undisclosed referral payments.²⁶¹ These problems may also affect WBPs. First, the study above suggests possible outperformance of well-connected, repeat-player firms that openly advertise their close trusted relationships and constant communications with agency

257. See Rose, *supra* note 6, at 1286-87; Amanda M. 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).

258. See, e.g., Stephen J. Choi, Jessica Erickson & A.C. Pritchard, *Working Hard or Making Work? Plaintiffs’ Attorney Fees in Securities Fraud Class Actions*, 17 J. EMPIRICAL LEGAL STUD. 438, 464 (2020) (finding evidence suggesting that attorneys perform unnecessary work to justify large fee amounts); Bratton & Wachter, *supra* note 55, at 162 (finding that high fees make private securities enforcement less efficient than SEC enforcement); Platt, *supra* note 36, at 771 tbl.3, 772 (finding that the revenues per lawyer of one leading securities class action firm would put it at or near the top of the AmLaw 200 in several recent years); M. Todd Henderson & Adam C. Pritchard, *From Basic to Halliburton*, REGULATION, Winter 2014-2015, at 20, 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”).

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

260. See Stephen J. Choi, Drew T. Johnson-Skinner & A.C. Pritchard, *The Price of Pay to Play in Securities Class Actions*, 8 J. EMPIRICAL LEGAL STUD. 650, 651 (2011).

261. Benjamin P. Edwards & Anthony Rickey, *Uncovering the Hidden Conflicts in Securities Class Action Litigation: Lessons from the State Street Case*, 75 BUS. LAW. 1551, 1559-63 (2019).

personnel. Second, public records confirm that these dominant whistleblower firms devote substantial resources to influence policymakers through direct lobbying and public messaging. Third, as in the plaintiffs' bar, the leading firms appear to rely on referrals for their best clients.²⁶² 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.

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 a substantive cap on fees;²⁶³ a process for selecting a "lead plaintiff" to represent the interests of the class;²⁶⁴ a requirement that attorney fees and expenses be disclosed and subjected to review by a court after an opportunity for class members to object;²⁶⁵ an orderly procedure that allows firms to compete to serve as lead counsel in any given case;²⁶⁶ legally mandated communications between attorneys and class members regarding settlements and fees;²⁶⁷ and the potential to have fees cut dramatically or strip firms of the lead counsel role if the court determines the firm has behaved inappropriately.²⁶⁸ 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 partially addressed the case-selection challenge by deputizing private whistleblower lawyers as informational intermediaries. This outsourcing, however, may bring substantial accountability deficits and other distortions and costs into the tip-sifting process. 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.²⁶⁹ But while the available

262. See Complaint, *Thomas v. SEC*, *supra* note 80, ¶ 88.

263. 15 U.S.C. § 78u-4(a)(6) (2018).

264. *Id.* § 78u-4(a)(3).

265. FED. R. CIV. P. 23(h).

266. See Choi et al., *supra* note 39, at 279.

267. 15 U.S.C. § 78u-4(a)(7) (2018).

268. See, e.g., *In re Grupo Televisa Sec. Litig.*, No. 18-cv-1979, 2021 WL 2000005, at *3 (S.D.N.Y. May 19, 2021); *Ark. Tchr. Ret. Sys. v. State St. Bank & Tr. Co.*, 512 F. Supp. 3d 196, 208-09, 218-19 (D. Mass. 2020).

269. It seems reasonably easy to conceive of a substitute minimalist method to enable anonymous tip filing without the high costs of lawyer-intermediaries. For instance, the SEC could appoint

evidence raises profound questions about the net value of private attorneys, it has not definitively established that these attorneys do more harm than good. Moreover, given how well-funded, organized, and connected these attorneys are, such an option seems politically implausible.

This Part turns to more moderate reforms. Section V.A considers reforms directed at private lawyers. Section V.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 state bar authorities and to contractual arrangements between prospective whistleblowers and their attorneys.”²⁷⁰ The SEC concluded that these private-market arrangements (and state bar authorities) were “better equipped than the Commission to make determinations regarding the appropriate amount of attorneys’ fees.”²⁷¹

This philosophical embrace of private market-driven arrangements is prototypical of many privatization programs and reflects the philosophy underlying the broader privatization movement.²⁷² But, as many privatization critics have pointed out, this justification weakens when the market in question is not competitive.²⁷³ 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 faith in private negotiations is not only out of step with the extensive regulatory regime governing fees in private securities litigation (discussed above),²⁷⁴ it is also out of step with how attorneys’ fees are regulated in many other contexts in which a private party seeks funds from the federal government.²⁷⁵ 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 \$7,200,

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.

270. Securities Whistleblower Incentives and Protection, 76 Fed. Reg. 34300, 34333 (June 13, 2011) (to be codified at 17 C.F.R. pts. 240, 249).

271. *Id.*

272. See KOSAR, *supra* note 192, at 4; MINOW, *supra* note 243, at 22-23.

273. See *supra* notes 249-252 and accompanying text.

274. See *supra* notes 263-268 and accompanying text (mapping out regime).

275. *But cf.* Am. Ass’n for Just., Comment Letter on Proposed Rules Implementing the SEC WBP 2 (Dec. 16, 2010), <https://www.sec.gov/comments/s7-33-10/s73310-132.pdf> [<https://perma.cc/S83G-L9FK>] (urging the SEC not to restrict contingency-fee arrangements for whistleblower lawyers and arguing that such restrictions are “fundamentally a state issue and should be dealt with as such”).

whichever is lower.²⁷⁶ For well over a century, a lawyer representing a veteran seeking benefits was prohibited from charging her client more than \$10²⁷⁷ and now may charge no more than 20% of past-due benefits.²⁷⁸ A lawyer representing a victim suing the government under the Federal Tort Claims Act may charge her client no more than 25% of any judgment or 20% of any settlement.²⁷⁹ There are many other examples.²⁸⁰

Beyond caps, these programs police fee arrangements in other ways. 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.²⁸¹ Under the veterans-benefits program discussed above, the Department of Veterans Affairs (VA) also has express statutory authority to review and reduce any fee arrangement that it determines to be “excessive or unreasonable.”²⁸²

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 “[e]xcept 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.”²⁸³ 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.”²⁸⁴ Similarly, Congress has capped compensation for certain private contractors.²⁸⁵ As Senator Grassley explained, “Government

276. 42 U.S.C. § 406(a)(2)(A) (2018) (providing for the approval of fee agreements that do not exceed the lesser of 25% or \$4,000, and authorizing the Commissioner of Social Security to increase the cap from time to time by regulation); Maximum Dollar Limit in the Fee Agreement Process, 87 Fed. Reg. 39157 (June 30, 2022) (increasing the limit to \$7,200).

277. 38 U.S.C. § 3404(c) (1982) (amended 1988; current version at 38 U.S.C. § 5904); *see* Walters v. Nat’l Ass’n Radiation Survivors, 473 U.S. 305, 307 (1985) (upholding the constitutionality of the restriction).

278. 38 U.S.C. § 5904(d)(1) (2018).

279. 28 U.S.C. § 2678 (2018).

280. *E.g.*, 22 U.S.C. § 1623(f) (2018) (providing a 10% fee cap for claims before the Foreign Claims Settlement Commission); 38 U.S.C. § 1984(g) (2018) (10% fee cap on veterans insurance claims); 50 U.S.C. § 4317 (2018) (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, 802-03, 803 n.12 (2002) (discussing various federal fee caps); Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2076 n. 136 (2010) (same); David A. Hyman, Bernard Black & Charles Silver, *The Economics of Plaintiff-Side Personal Injury Practice*, 2015 U. ILL. L. REV. 1563, 1572-73, 1574 tbl.1 (2015) (discussing state and federal contingency-fee caps); Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 668 n.190 (2013) (same); 1 ROBERT L. ROSSI, ATTORNEYS’ FEES § 2:11 (3d ed. 2022) (same).

281. *See* U.S. Dep’t Lab. v. Triplett, 494 U.S. 715, 717-18, 727 (1990) (upholding that scheme).

282. 38 U.S.C. § 5904(c)(3) (2018).

283. 15 U.S.C. § 77t(f) (2018).

284. SEC v. Pritzker Levine LLP, No. 20-17419, 2022 WL 671020, at *2 (9th Cir. Mar. 7, 2022) (Baker, J., dissenting) (quoting the SEC brief); *see also* Donna M. Nagy, *The Statutory Authority for Court-Ordered Disgorgement in SEC Enforcement Actions*, 71 SMU L. REV. 895, 911-12 (2018) (discussing the history of this provision).

285. 41 U.S.C. § 4304(a)(16) (2018).

contractors should be compensated fairly for their work but they shouldn't be allowed to featherbed their salaries at taxpayer expense.”²⁸⁶

In sum, there are good reasons to reconsider the agencies' laissez-faire approach to fees that they took a decade ago, and the agencies have an abundance of regulatory precedents to follow. Several different reform approaches are possible.

Graduated Fee Schedule – One approach would be to impose a cap on contingency fees. A flat cap on the percentage or amount of fees is one option. A different plan would be a graduated marginal-rate scale with the percentage declining as the magnitude of awards increases. 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 more in line with securities class actions.²⁸⁷

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

Fee Disclosure – A softer approach would be for the agencies to adopt 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 before having to communicate with anyone. Another alternative would be to require the lawyers to disclose this information to the agency, who could then release it, either

286. Press Release, Sen. Chuck Grassley, Grassley Welcomes Federal Government Contractor Salary Cap (June 23, 2014), <https://www.grassley.senate.gov/news/news-releases/grassley-welcomes-federal-government-contractor-salary-cap> [https://perma.cc/RR4V-3W7H].

287. See Choi et al., *supra* note 258, at 448 & tbl.2; Janeen McIntosh & Svetlana Starykh, *Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review*, NERA ECON. CONSULTING 27 fig.25 (Jan. 25, 2022), https://www.nera.com/content/dam/nera/publications/2022/PUB_2021_Full-Year_Trends_012022.pdf [https://perma.cc/E4CE-NU66].

alongside other information about the award or in the aggregate in annual reports.²⁸⁸

2. 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 “[n]ot to possess the requisite qualifications to represent others; [t]o be lacking in character or integrity, or to have engaged in unethical or improper professional conduct; or [t]o have willfully violated or willfully aided and abetted the violation of any provision of the Federal securities laws”²⁸⁹ 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 with all the legal and constitutional problems that raises. This was proposed by some commentators back in 2010,²⁹⁰ and a similar rule has been imposed in the IRS’s whistleblower program.²⁹¹

B. Regulating the WBPs

1. End Misleading Statements

Going forward, agency leaders should immediately stop making misleading statements about the total dollars the program has paid out to whistleblowers by

288. 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. Such proposals 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 make it more likely that tipsters will come forward and use an attorney rather than filing pro se.

289. 17 C.F.R. § 201.102(e) (2022); see Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34333 (June 13, 2011) (noting Rule 102(e)’s applicability to whistleblower lawyers).

290. See Apache Corp. et al., Comment Letter, *supra* note 120, at 11; Arent Fox LLP, Comment Letter, *supra* note 120, at 1.

291. The IRS rule has been weakened somewhat over the years. See Karie Davis-Nozemack & Sarah J. Webber, *Lost Opportunities: The Underuse of Tax Whistleblowers*, 67 ADMIN. L. REV. 321, 338-41 (2015). Earlier versions of this Article discussed possible reforms targeting the referral and screening practices of private whistleblower law firms. After consideration and discussion with many whistleblower lawyers, I have taken those proposals out of the Article because they have too many problems, including conflicts with lawyers’ duty of confidentiality.

distinguishing the portion whistleblowers actually receive from their attorneys' fees. As explained above, statements suggesting that the total amount of payouts under the program have accrued to whistleblowers fail to account for the substantial proportion of these total sums that instead pay the private intermediaries.

Ideally, the agencies would position themselves to make accurate statements about how much money whistleblowers actually receive. This would enhance the positive incentives to volunteer actionable information, insofar as it would give would-be tipsters a greater degree of clarity as to their actual compensation in the event of an award.

Short of this, however, agency officials should explain, when they state the total amount of bounty payments made, that a substantial proportion of those dollars ultimately ended up with 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 of 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 learned that the SEC's system to track awards was, at best, disorganized. The first response to my FOIA request seeking the names of attorneys and firms who'd represented successful whistleblowers failed to locate any relevant records.²⁹² The second response after an appeal claimed that gathering the records would be "unreasonably burdensome."²⁹³ The third response produced 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.²⁹⁴ Many months of appeals, follow-on requests, cross-checks, and consultation with SEC lawyers suggested 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

292. Letter from Mark P. Siford, Couns. to the Dir./Chief FOIA Officer, Off. of Support Operations, SEC, to author, at 1 (Sept. 17, 2020) (on file with author) ("After consulting with the Division of Enforcement, I was unable to locate any records that are responsive to your request.").

293. Letter from Mark P. Siford, Couns. to the Dir./Chief FOIA Officer, Off. of Support Operations, SEC, to author, at 1 (Nov. 3, 2020) ("I have determined that the search for records responsive to your request would require an excessive amount of time and work to complete. The SEC's TCR system does not track the information you seek. In order to provide responsive records, staff would need to search for correspondence that provides the information. Such correspondence is not maintained in a centralized file. To locate responsive correspondence would require a search of voluminous investigative files within the Division of Enforcement. Consequently, I have determined that such a search would be unreasonably burdensome.").

294. Letter from Mark P. Siford, Couns. to the Dir./Chief FOIA Officer, Off. of Support Operations, SEC, to author (Feb. 3, 2021) (on file with author).

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.²⁹⁵

Although slow rolling is par for the course for FOIA requests, my communications with SEC staff while pursuing these requests over the course two years may suggest something more problematic: the agency does not adequately track and maintain records regarding its whistleblower program. 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 by 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.²⁹⁶ Systematic tracking of tipsters, tips, investigations, actions, awards, counsel, and other variables would enable the SEC to learn about how the program actually operates and how it might be further improved. For instance, 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. The SEC should have access to this information. The SEC's economists, who already closely engage with the agency's tip-sifting process,²⁹⁷ could perform numerous valuable studies comparing different whistleblower and counsel characteristics with different results without compromising the anonymity of the whistleblowers themselves.²⁹⁸

Here are some potentially useful studies the agencies might conduct:²⁹⁹

295. 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.

297. *Fiscal Year 2017 Congressional Budget Justification and Annual Performance Plan; Fiscal Year 2015 Annual Report*, SEC 80 (Feb. 9, 2016), <https://www.sec.gov/about/reports/secfy17congbudjust.pdf> [<https://perma.cc/N9DQ-YBW5>] (noting the Division of Economic and Risk Analysis's "responsibility for management of the SEC's Tips, Complaints [sic] and Referral (TCR) system").

298. *SEC WBP 2021 Annual Report*, *supra* note 10, at 24 ("[A]ggregated data that does not reveal the identity of the underlying whistleblowers can yield a fuller picture about the program . . ."). Before FY 2022, in its annual reports, the SEC disclosed only very limited statistical data. *See SEC WBP 2021 Annual Report*, *supra* note 10; *see also* 15 U.S.C. § 78u-6(g)(5) (2018) (requiring the SEC to 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"). The agency's most recent report has dialed back this limited transparency even further, omitting numerous classes of statistical information that the agency had previously disclosed in every prior report. *See* Platt, *supra* note 211.

299. *See also* Evans et al., *supra* note 76, at 519 (calling on the 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").

i. Pro Se vs. Represented Tipsters

Above, I showed that both the SEC and CFTC awarded significantly more dollars to represented tipsters than to unrepresented ones. These statistics may understate the advantage of represented tipsters if unrepresented tipsters significantly outnumber represented ones in the total pool.

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.³⁰⁰ As stated above, the overall odds of obtaining an award at the SEC are around 1 in 242.³⁰¹ 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 lower. This would be 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,³⁰² gender, etc.) and compare it 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.

ii. Tricks of the Trade

Above, I stated that one potential advantage that savvy lawyers could give to their clients is additional external verification for their tips that would make the tip more attractive to the agency. Relatedly, I also suggested that, even aside from the substantive additional material, these lawyers could provide an advantage by knowing how to package and present the tips to the agency in a preferred format.

The agencies could study the information included in such packages submitted to the agencies, focusing on (a) all whistleblowers who received an award; (b) a random sample of all whistleblowers whose tips led to further

300. 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 with an unknown foreign or domestic geographical categorization" and tips "submitted anonymously through counsel." *SEC WBP 2021 Annual Report*, *supra* note 10, at 37; *SEC WBP 2020 Annual Report*, *supra* note 198, at 41; Off. of the Whistleblower, *2019 Annual Report to Congress: Whistleblower Program*, SEC 32 (Nov. 15, 2019), <https://www.sec.gov/files/sec-2019-annual-report-whistleblower-program.pdf> [<https://perma.cc/N3T5-H2LD>]; Off. of the Whistleblower, *2018 Annual Report to Congress: Whistleblower Program*, SEC 33 (Nov. 14, 2018), <https://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf> [<https://perma.cc/48WX-D6GH>]. This statistic would include some unrepresented tipsters (who left off their geographic locations) and would also leave out some represented ones (who chose, for whatever reason, not to be anonymous).

301. *See supra* note 11 and accompanying text.

302. *Cf.* Maxwell Murphy, *Meet the SEC's 6,500 Whistleblowers*, WALL ST. J. (July 28, 2014, 7:45 PM ET), <https://www.wsj.com/articles/meet-the-secs-6-500-whistleblowers-1406591157> [<https://perma.cc/8P8F-XATU>] (describing the job titles of SEC tipsters based on a FOIA request).

investigation; and (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 accompanied by certain types of supplemental documents, they should share this information with the public.³⁰³ All prospective whistleblowers and their lawyers should have equal access to information about how to attract the agencies' attention.³⁰⁴

iii. Law Firm Batting Average

For each firm/lawyer that has submitted at least one tip, the agencies 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. The agencies may want to watch for signs that they are more likely to reach out, to refer the tip for further investigation, or take other favorable actions for high-batting-average firms/lawyers. Although attorney reputation and credibility can and should certainly play a role in reducing sifting costs, the agencies should take care to avoid unfair treatment of less well-connected firms or inappropriate favoritism of well-established ones. Further, if certain types of firms provide a disproportionate share of weak tips, this information could assist in designing reforms to streamline the tip-sifting process.

* * *

This is just a sample of the valuable studies the SEC and CFTC could conduct to better understand and improve their programs. The agencies could use some 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 and 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 conduct these studies because it may not keep track of the data. SEC and CFTC leadership should focus on implementing sound data collection policies; barring that, other external actors could intervene. Perhaps the Government Accountability Office or the SEC's

303. Cf. Evans et al., *supra* note 76, at 509 n.331 (proposing that the SEC provide "guidance on what the best cases look like from the agency's perspective"); Letter from Taylor Scott Amarel to Brent Fields, Sec'y, SEC 2 (Dec. 18, 2018), <https://www.sec.gov/rules/petitions/2018/petn4-735.pdf> [<https://perma.cc/HTR2-XSUX>] (calling on the SEC to "[c]reate standards and publish examples of what a quality whistleblower tip looks like").

304. If the agencies find that successful tips tend to be accompanied by documents or information gathered through questionable means, including means that would have been illegal if carried out by the government, this would also be critical information.

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. Perhaps the Administrative Conference of the United States could commission a more general study of how whistleblower programs collect, analyze, and disclose aggregate level information to the public.

Troublingly, the agency seems to be moving in precisely the wrong direction. The WBP's most recent annual report (FY 2022)—released after a draft of this Article was initially posted to SSRN and circulated—is the least transparent in program history, omitting without explanation numerous categories of statistical information that the agency had routinely disclosed in every single prior annual report since the beginning of the program.³⁰⁵

3. Encouraging Tipsters to Hire Lawyers

If the agencies confirm that represented tipsters significantly and systematically outperform unrepresented ones, it is possible that they should more actively encourage serious tipsters to hire a lawyer before submitting and discourage tipsters from filing without a lawyer. Doing so could further economize and enhance tip sifting both by increasing the quality of submitted tips (because they have been screened and processed by a lawyer) and decreasing the quantity of low-quality pro se tips.

Several potential policy changes might encourage tipsters to retain 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 borrow from many federal courts' models of handling pro se cases—adopt a formally separate track and a separate staff devoted to handling these cases.³⁰⁶ 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 garner the most careful attention.

Another option would be for the agencies to consider appointing private counsel for the most promising pro se tipsters. Today, if an agency identifies a pro se tip that raises serious concerns but leaves important questions unanswered or is materially incomplete, the agency might reject the tip in favor of more complete or robust submissions. Instead, the agency could offer to appoint an

305. See Platt, *supra* note 211.

306. Marin K. 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).

attorney for that whistleblower, 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 below-market contingency fee, because it could expose them to potentially promising tips inaccessible through pure private practice. Alternatively, the agency could at least reach out to the pro se claimant and directly encourage them to bring their tip to a qualified whistleblower attorney.

Conclusion

In a 2021 panel on the WBPs, a former SEC Enforcement Director quipped: “whether you believe in it or not, it doesn’t really much matter because it’s here to stay.”³⁰⁷ 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 components of it.

The time has come to update these programs. The “move fast and break things” disruptive approach may have had utility in jump starting the programs, but that approach may now create more harms than benefits. It’s time to adopt a more sustainable, accountable, and efficient model.

This Article has highlighted one significant variable that may currently impede the programs’ efficiency and accountability: the private attorneys who represent whistleblowers. The FOIA data reviewed above shows that the WBPs have effectively outsourced much of 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 assigned to these lawyers and the significant fees they extract for their services, the WBPs have licensed them to operate largely free from meaningful transparency, accountability, or regulation. This model of outsourcing without oversight should be reexamined. Reasonable and moderate reforms—including mandatory disclosure for private whistleblower firms and better data collection, analysis, and transparency for the agencies—would substantially improve the program.

307. *Rock Center Lunch Event*, *supra* note 106, at 53:25 (statement of Steven Peiken).