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Reforming Dodd-Frank from the Whistleblower's Vantage

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Whistleblowing is a critical component of corporate integrity and economic stability in the United States. It is unsurprising, then, that policy makers and observers have directed considerable attention to the improvement of whistleblower laws. This article assesses potential improvements to the most visible recent addition to the federal whistleblower regime—the Dodd-Frank Act, passed in the wake of the Great Recession to combat securities fraud. The article makes two overarching claims. First, the Securities and Exchange Commission's (SEC) recently adopted changes to the administrative rules governing the Dodd-Frank whistleblower program (WBP) are incomplete since they were formulated without reference to the experiences of whistleblowers and their counsel. Moreover, at least three of the SEC's adopted changes will undermine the WBP and should be repealed. Second, the time is right to experiment with improvements to the WBP. If the SEC's new rules are not the optimal path forward, the question remains what alternative changes should be adopted. To that end, the article utilizes an original qualitative data set consisting of in-depth interviews with two dozen whistleblower counsel, two whistleblowers, a former SEC commissioner, and a former chief of the SEC's Office of the Whistleblower to propose its own set of changes. Congress and the SEC should embrace these changes to reform Dodd-Frank from the whistleblower's vantage and to move the WBP closer to its full potential as a deterrent and remedy for securities fraud.

Introduction

When Darren Sewell died nearly destitute in 2014, he had been a whistleblower and plaintiff in a False Claims Act (FCA) *qui tam* action for more than five years.[1] The E.R. doctor turned health insurance executive had worked extensively with the FBI as it investigated his employer for Medicare fraud. Company executives became aware of the investigation two and a half years after Sewell had filed a complaint under seal, and he soon thereafter submitted his "involuntary resignation."[2] He then found it impossible to obtain work in the Medicare insurance industry and heard that his former employer was telling others to avoid him.[3] In

[1] *Qui tam* provisions "allow private citizens to bring civil actions in the name of the government." Christina Orsini Broderick, Qui Tam *Provisions and the Public Interest: An Empirical Analysis*, 107 Colum. L. Rev. 949, 949 (2007); *see also infra* Part III (arguing for the addition of *qui tam* to the Dodd-Frank Act).

[2] *See* Sheelah Kolhatkar, *The Personal Toll of Whistle-Blowing*, The New Yorker (Feb. 4, 2019), https://www.newyorker.com/magazine/2019/02/04/the-personal-toll-of-whistle-blowing.

desperation, Sewell began to tap his retirement accounts; when he died, little was left for his daughter.[4] His lawsuit continued only when the executor of his estate agreed to stand in.[5] Seven years after Sewell filed suit and two years after he passed, the U.S. Department of Justice joined the claim; only then did his former employer settle.[6] Sewell's protracted struggle suggests that fraudsters can wield even the passage of time to the decided detriment of whistleblowers and the public alike.[7]

Yet Sewell's case also illustrates the promise of whistleblowing as an integral element of corporate accountability in the United States and abroad. In recognition of its significance, numerous federal and state statutes have been enacted to protect and encourage those who report corporate misdeeds. Perhaps the most prominent recent addition to the federal whistleblower regime is the program directed by the Securities and Exchange Commission (SEC), created by the Dodd-Frank Act[8] to combat securities fraud following the Great Recession—the whistleblower program, or WBP.[9] Whistleblowing is especially crucial in the securities context since "[i]n the absence of a whistleblower or luck, most fraud would go undetected."[10] Despite the law's development, however, perpetrators continue to commit fraud, and stories of hardship and ruin for whistleblowers like Darren Sewell continue to multiply.[11]

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[3]*Id.*

[4]*Id.*

[5]*Id.*

[6]*Id.*

[7]Whistleblowers commonly grapple with these and other challenges. *See infra* Part I.

[8]Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376 (2010) (codified at 15 U.S.C.A. § 78u-6 (2020)).

[9]17 C.F.R. §§ 240.21F-1 to -17 (2020).

[10]Louis L. Straney, Securities Fraud 102 (2011).

[11]This is reflected in part by the recent proliferation of commercial publications on whistleblowing. Some whistleblowers have written personal accounts of their experiences. *See, e.g.*, Carmen Segarra, Noncompliant (2018); Cynthia Cooper, Extraordinary Circumstances (2008). Several guides for whistleblowers have been published. *See, e.g.*, Stephen Martin Kohn, The New Whistleblower's Handbook (2017); Tom Devine & Tarek F. Maassarani, The Corporate Whistleblower's Survival Guide (2011). Some authors approach the topic from a contextual vantage. *See, e.g.*, Watchdogs and Whistleblowers: A Reference Guide to Consumer Activism (Stephen Brobeck and Robert N. Mayer eds.,

In this light, it is not surprising that observers have directed considerable attention to the improvement of whistleblower laws. The SEC is anxious to enhance its methods: in 2020, it adopted several significant changes to the administrative rules governing the WBP. The SEC's proposal attracted lively scrutiny during the public comment period, indicating that observers outside of government are also concerned about the state of whistleblower law. This interest is further reflected in the scholarly law literature, where leading outlets—including the *American Business Law Journal*—have energetically published work on the subject.[12] Congress and the courts have been active in this area as well.[13]

The SEC's recent rule changes have furnished an opportunity to reexamine how the WBP might be enhanced. This article does so by juxtaposing two competing sets of perspectives: the SEC's view as manager of the WBP, and the views of "end users" represented by Dodd-Frank whistleblowers, prospective whistleblowers, and their counsel. Although the SEC's role as manager of the WBP is indeed valuable—and some of its changes meritorious—the SEC's changes harbor two critical flaws. First, three of the most significant changes are likely to discourage whistleblowing or otherwise undercut Congress's intent for the WBP. These three changes should be repealed.[14] Second, the SEC's changes do not adequately account for the perspectives of whistleblowers and are thus incomplete. The WBP is now mature enough that we can meaningfully reflect on it, and the time is right to implement improvements. Additional evidence that should inform any changes to the WBP—the lived experiences and perspectives of whistleblowers and their counsel—has long been available. To that end, we draw on an original qualitative data set collected through interviews with two dozen attorneys expert in the representation of whistleblowers (including Dodd-Frank whistleblowers). We also spoke with a former SEC commissioner, a former director of the SEC's Office of the Whistleblower (OWB), and a few whistleblowers directly. From their views emerge several themes on which we

2015); Frederick D. Lipman, Whistleblowers (2012); Harry Markopolis, No One Would Listen (2010).

[12]*See infra* Part I.B (discussing such works).

[13]*See infra* Part I.A (discussing bills currently pending in Congress and the Supreme Court's *Digital Realty* decision).

[14]*See infra* Part II (discussing the SEC's rule changes).

base our recommendations. These changes are indispensable if public policy is to benefit from the sober lessons of the whistleblower's experience.[15]

Part I contextualizes the opportunities for improving the WBP by assessing federal policy makers' recent activities as well as scholarly commentary. Part I also describes the study's methodology and further develops the WBP's strengths and weaknesses based on our participants' experiences. Part II then analyzes the SEC's rule changes and accompanying public comments to argue that three of the most significant changes should be repealed. Finally, Part III draws on interviews with leading authorities to offer WBP reforms grounded in the experiences of whistleblowers and their counsel. These improvements would substantially mitigate the deprivations that Darren Sewell and other courageous reporters have endured all too often, through the strain of a process that—in principle, at least—aims instead to reward a whistleblower's initiative and integrity.

I. Context for Reform: Assessing the WBP's Shortcomings

A natural starting point for any discussion of WBP reform is its shortcomings. Such an inquiry must also consider the program's strengths, or the areas in which change would be unnecessary and undesirable. To establish the context for reform, Part I considers three categories of information. Part I.A. provides a brief overview of Dodd-Frank and discusses the perspectives of various policy makers as reflected by recent events within the federal government. Part I.B. then surveys the scholarly literature. Of course, works that directly address the WBP are of interest, but this part also incorporates studies relevant to the field of whistleblower law generally. Finally, because our study contributes to the identification of areas for improvement, Part I.C. sets out the study's methodology and discusses the WBP's strengths and weaknesses based on our participants' experiences. Part I thereby provides a proper context in which to assess the merits of potential WBP reforms by accounting for the views of federal policy makers, scholars, and whistleblowers and their counsel.

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[15] *See infra* Part III (discussing this article's proposed changes).

A. Federal Policy Makers

Congress passed the Dodd-Frank Act in 2010 in response to the Great Recession.[16] Fraud was a defining aspect of the corporate behaviors that gave rise to the recession. Congress created the WBP to encourage employees to report suspected securities violations to the SEC.[17] Although securities laws offer varying definitions of *fraud*, generally, the "antifraud provisions of the securities laws are violated when a defendant makes a material misrepresentation or a material omission as to which he or she had a duty to speak or used a fraudulent device with scienter in connection with the purchase or sale of securities."[18] As such, *securities fraud* "covers a wide range of illegal activities, all of which involve the deception of investors or the manipulation of financial markets."[19] Per the SEC's guidance, securities fraud and related wrongdoing includes such activities as the fraudulent or unregistered sale of securities, the misappropriation or theft of securities, insider trading, the manipulation of a security's price or volume, and making false or misleading statements about a company.[20]

Securities constitute one of the primary substantive areas addressed by federal whistleblower law.[21] Federal whistleblower statutes prior to

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[16]*See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841–49 (2010) (codified at 15 U.S.C.A. § 78u-6 (2020)); *see also, e.g.*, Daniel Gilpin, *Hiding Behind the Veil of Ambiguity: Why Courts Should Apply the Plain Meaning of the Dodd-Frank Whistleblower Provisions*, 90 St. John's L. Rev. 851, 855–56 (2016) (noting that the Act endeavors to promote economic stability through accountability and transparency in the financial system).

[17]*See, e.g.*, Evan J. Ballan, *Protecting Whistleblowing (and Not Just Whistleblowers)*, 116 Mich. L. Rev. 475, 483 (2017) (noting the centrality of fraud in the Recession and the WBP's adoption). For an enlightening discussion on the problem of defining securities fraud and its ambivalent connection to the underlying construct of fraud, see generally Samuel W. Buell, *What Is Securities Fraud?*, 61 Duke L.J. 511 (2011).

[18]79A C.J.S. *Securities Regulation* § 76 (2019).

[19]*Securities Fraud Awareness & Prevention Tips*, Fed. Bureau of Investigation, https://www.fbi.gov/stats-services/publications/securities-fraud (last visited Feb. 6, 2020).

[20]*See Report Suspected Securities Fraud or Wrongdoing*, U.S. Sec. & Exch. Comm'n, https://www.sec.gov/tcr (last visited Feb. 6, 2020).

[21]*See* Stephanie R. Sipe, Cheryl T. Metrejean, & Timothy A. Pearson, *The SEC, the Courts, and Whistleblowers: An Examination into the Strength of the Anti-Retaliation Provisions of the Dodd-Frank Act as Defined by Recent Federal Court Decisions*, 19 J. Legal Stud. Bus. 1, 3 (2014).

Dodd-Frank had generally fallen into one of two categories: those that afford financial incentives to whistleblowers and those that protect them from retaliation.[22] The WBP embraces both awards and antiretaliation protections. As the WBP's administrator, the SEC is authorized to engage in rulemaking "to implement [Dodd-Frank's whistleblower] provisions," so long as the rules are "consistent with the purposes of" the statute.[23] The SEC promulgated a series of regulations in 2011 to carry out this mandate.[24] The WBP process is thus a product of the Dodd-Frank statute, the SEC's rules, and the SEC's implementation of its rules in practice. While the WBP has been detailed elsewhere[25] and need not be exhaustively recounted here, Figure 1 provides a visual summary of the process.[26]

All three branches of the federal government have recently been active in matters related to the WBP.[27] In *Digital Realty Trust, Inc. v. Somers*,[28] the U.S. Supreme Court determined that an employee who had reported securities violations to his senior management—but who had not reported to the SEC—fell outside of Dodd-Frank's definition of "whistleblower" and, as such, was not covered by the statute's antiretaliation protections. The Court found this reading necessitated by the statute's plain language and consistent with Congress's intent of

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[22]*See* Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 Am. Bus. L.J. 99, 100 (2000). Economically, these options correspond to increasing the benefits and reducing the costs of whistleblowing. *See* Masaki Iwasaki, *Relative Impacts of Monetary and Non-monetary Factors on Whistleblowing Intention: The Case of Securities Fraud*, 22 U. Pa. J. Bus. L. 591, 594 (2020).

[23]15 U.S.C.A. § 78u-6(j).

[24]17 C.F.R. §§ 240.21F-1 to -17 (2020).

[25]*See generally, e.g.*, Michael H. Hurwitz & Jonathan Kovacs, *An Overview of the SEC's Whistleblower Award Program*, 21 Fordham J. Corp. & Fin. L. 531 (2016).

[26]Like many models, Figure 1 greatly simplifies its subject. In reality, each phase of the WBP process entails contingencies, uncertainties, and factors outside of the whistleblower's control. For a full account, *see generally* Hurwitz & Kovacs, *supra* note 25. Whistleblowers may convey information as a "tip," "complaint," or "referral" (TCR). *Id*. at 533 n. 5. A "notice of covered action" (NCA) is a document published to the SEC's website that announces a monetary sanction and puts whistleblowers on notice that they must apply for an award within ninety days. *Id*. at 562.

[27]The merits of these developments are considered at length in Parts II and III, *infra*.

[28]138 S. Ct. 767 (2018). For an excellent assessment predating the *Digital Realty* decision, see generally Matt Reeder, *Proceeding Legally: Clarifying the SEC/Dodd-Frank Whistleblower Incentives*, 7 Harv. Bus. L. Rev. 269 (2017).

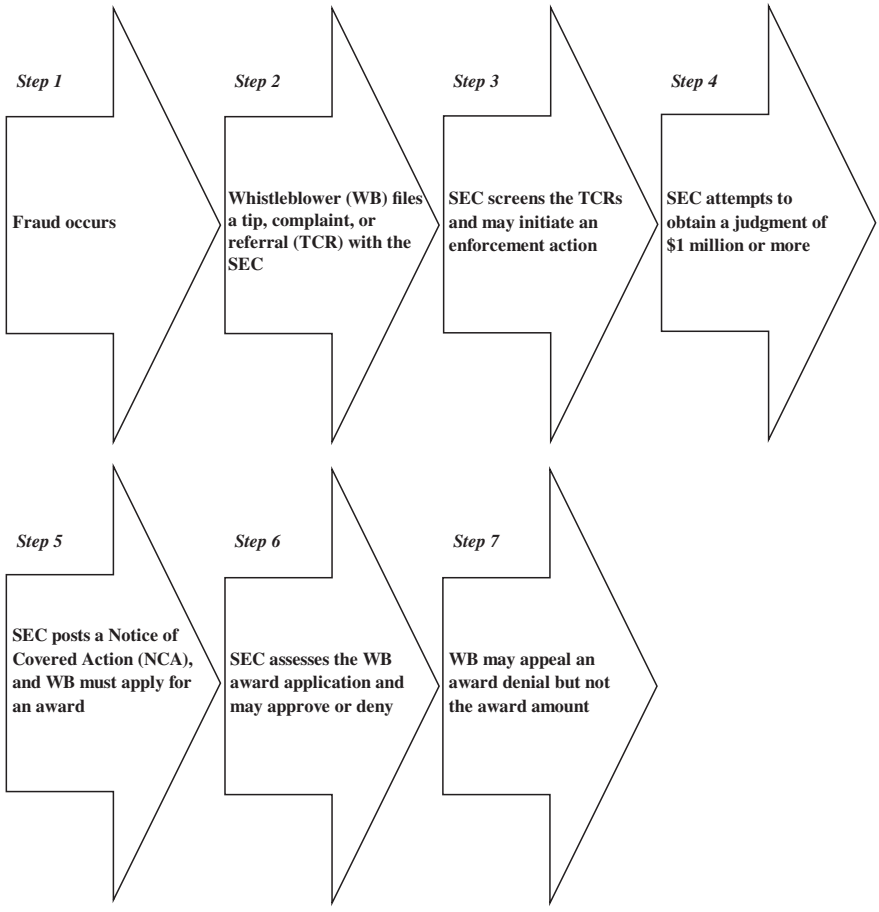

Figure 1. Major Steps in the Dodd-Frank Whistleblower Bounty Award Process.

encouraging whistleblowers to share their information with the SEC. Rule 21F-2 had provided separate definitions of the term "whistleblower"—one for purposes of the award program and the other for purposes of antiretaliation protection.[29] Specifically, the rule required an employee to have reported original information to the SEC to count as a whistleblower under the award program, but did not require an SEC report to count as a whistleblower under the antiretaliation

[29]17 C.F.R. § 240.21F-2.

provisions. *Digital Realty* negated the second of these definitions;[30] thus, to qualify now for either an award or antiretaliation protection, an employee must report their information to the SEC.[31]

Congress, too, has recently cast its gaze upon the WBP. Senator Chuck Grassley, a leading proponent of whistleblower protections, introduced a bill in September 2019 that would amend the WBP in several important ways.[32] First, in response to *Digital Realty*, the bill would expand Dodd-Frank's definition of "whistleblower" to include internal reporters for purposes of the statute's antiretaliation protections. Second, the bill would require the SEC to consider award applications in a timelier manner. And third, the bill would abrogate contracts that waive whistleblowers' rights and remedies under the Dodd-Frank Act. A bill that addresses internal whistleblowers passed in the House of Representatives in July 2019.[33] As of this writing, however, the Senate has simply referred the House bill and Senator Grassley's bill to committee.[34]

Finally, the SEC has adopted several changes to the administrative rules governing the WBP. Part II will address the SEC's changes in detail. First, however, we examine the scholarly literature and the insights of this study's participants to continue defining the context for WBP reforms.

B. Scholarly Commentary

Broadly speaking, most scholarly critiques of whistleblowing fall into one of two categories. The first group is fundamentally skeptical of whistleblowing or one of its basic elements, which this body of work finds undesirable or unworkable.[35] The second category is fundamentally supportive and

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[30]*Id*. § 240.21F-2(b).

[31]*See infra* Part III (criticizing the exclusion of internal whistleblowers from the statute's antiretaliation protections).

[32]Whistleblower Programs Improvement Act, S. 2529, 116th Cong. (2019).

[33]Whistleblower Protection Reform Act of 2019, H.R. 2515, 116th Cong. (2019).

[34]*See supra* notes 32 & 33.

[35]*See*, *e.g.*, 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, 121 (2012) [hereinafter *Mutiny*] (arguing that "bounties encourage frivolous claims or claims regarding ambiguous behavior that may or may not be fraud"); 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 (2012) (arguing that the WBP would tempt

searches for ways to improve upon the law to better promote whistleblowing. We assume the desirability and workability of whistleblowing,[36] so this section focuses on the second category of critique.

Whistleblowing is unavoidably jarring. Whistleblowers owe a duty of loyalty to their employer and also a citizen's duty to further the public interest—and these duties almost invariably clash in whistleblower scenarios.[37] Because the "central dilemma is *not* loyalty versus disloyalty but loyalty to whom and under what circumstances[,]"[38] American law has grappled with the very definition of who counts as a whistleblower and the means by which whistleblowers should be incentivized and protected. Legal scholarship reflects these tensions and affords a rich basis from which to contextualize the strengths, flaws, and possibilities for reform in federal whistleblower law.

Employees are often discouraged from blowing the whistle because of the negative consequences[39] and the perceived uncertainties or incompleteness of the legal protections afforded to them.[40] For instance, although Dodd-Frank provides antiretaliation protection from one's current employer, no federal anti-fraud statutes provide legal recourse for retaliation carried out by future employers.[41] To alleviate this uncertainty, Professors Eisenstadt

whistleblowers to submit incomplete or frivolous claims and even induce companies' violations); 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 (2011) (making similarly ominous predictions).

[36]For a helpful empirical discussion of these issues in the business literature, see Kelly Richmond Pope & Chih-Chen Lee, *Could the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 Be Helpful in Reforming Corporate America? An Investigation on Financial Bounties and Whistle-Blowing Behaviors in the Private Sector*, 112 J. Bus. Ethics 597, 598–602 (2013).

[37]*See* Nicholas M. Rongine, *Toward a Coherent Legal Response to the Public Policy Dilemma Posed by Whistleblowing*, 23 Am. Bus. L.J. 281, 282 (1985).

[38]*Id*. at 286.

[39]Because whistleblowing is often viewed as a breach of loyalty, "[w]histleblowers pay a personal and psychological price that should be acknowledged by society." Rachel Goodson, *The Adequacy of Whistleblower Protection: Is the Cost to the Individual Whistleblower Too High?*, 12 Hous. Bus. & Tax L.J. 161, 163 (2012).

[40]No general whistleblower statute exists, though scholars have proposed the idea. Callahan & Dworkin, *supra* note 22, at 105.

[41]*See* Leora F. Eisenstadt & Jennifer M. Pacella, *Whistleblowers Need Not Apply*, 55 Am. Bus. L.J. 665, 699 (2018).

and Pacella propose the extension of antiretaliation protections to whistleblowers in their subsequent careers.[42]

The patchwork nature of federal whistleblower law is problematic.[43] For example, the *Digital Realty* court concluded that "Congress may well have considered adequate the safeguards already afforded by Sarbanes-Oxley"[44] (SOX) for internal whistleblowers. Yet numerous scholars have shown that SOX protects whistleblowers from retaliation in rather limited ways.[45] In addition, securities whistleblowers often remain subject to retaliation despite the immense growth of compliance programs and the broader compliance industry.[46]

Certain aspects of the WBP have also invited scholarly critique. For instance, the SEC's rules prohibit mandatory confidentiality agreements used to preempt would-be whistleblowers, but the rules do not address whether employers can block whistleblowers from conveying documentary evidence to the SEC.[47] This question is especially critical since the SEC tends to prioritize tips that substantially develop a case of wrongdoing.[48] Professor Pacella argues persuasively that Congress passed Dodd-Frank to encourage individuals with inside knowledge to assist the government in identifying and prosecuting securities fraudsters.[49] It therefore behooves whistleblowers to submit information that is as specific and comprehensive as possible.[50] Accordingly,

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[42]*See generally id*.

[43]*See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 440 (2006) (Stevens, J., dissenting) (characterizing American whistleblower law as "a patchwork").

[44]Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 780 (2018).

[45]*See, e.g.*, Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 Mich. L. Rev. 1757 (2007) (pointing to SOX's lack of award incentives); Beverley H. Earle & Gerald A. Madek, *The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change*, 44 Am. Bus. L.J. 1 (2007) (arguing that certain features of SOX limit its effectiveness in protecting whistleblowers); Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 Wm. & Mary L. Rev. 65 (2007) (showing that SOX had not protected most employees in antiretaliation claims and attributing this to administrative misinterpretations and misapplications of the statute).

[46]*See generally* Jeffrey R. Boles, Leora Eisenstadt, & Jennifer M. Pacella, *Whistleblowing in the Compliance Era*, 55 Ga. L. Rev. 147 (2020).

[47]*See* Jennifer M. Pacella, *Silencing Whistleblowers by Contract*, 55 Am. Bus. L.J. 261 (2018).

[48]*See infra* Part III.

[49]Pacella, *supra* note 47, at 274–75.

[50]*Id*. at 281; *see also infra* Part III.

Professor Pacella proposes to amend Rule 21F-17 to clarify that employees may submit documentary evidence to the SEC so long as certain standards are met.[51]

Scholars have criticized Dodd-Frank's omission of antiretaliation protections for internal whistleblowers.[52] Companies themselves benefit from internal reporting,[53] and whistleblowers are typically loyal employees hesitant to report externally (thereby unwittingly exposing themselves to retaliation).[54] For some scholars, there "is no sound theoretical reason for distinguishing whistleblowers who complain to someone within the organization from those who complain to someone outside the organization."[55] Nevertheless, the law may prioritize the *revelation* of otherwise inaccessible information to equip government agencies

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[51]Pacella, *supra* note 47, at 285–307; *cf*. Ballan, *supra* note 17 (arguing that the FCA should be amended to incorporate SEC Rule 21F-17 to prevent employers from interfering with employees' reports of fraud).

[52]*See supra* Part I.A (discussing *Digital Realty*). This fact, and the alarming pervasiveness of retaliation against whistleblowers, disincentivize internal reporting. *See generally, e.g*., Ted Uliassi, *Addressing the Unintended Consequences of an Enhanced SEC Whistleblower Bounty Program*, 63 Admin. L. Rev. 351 (2011). Ideally, companies would strengthen their internal reporting channels to obviate the need for antiretaliation protections. *See, e.g*., Michael D. Greenberg, *Whistleblowers and Internal Reporting in the Shadow of Dodd-Frank*, Corp. Fin. Rev., March/April 2012, at 11.

[53]*See* Terry Morehead Dworkin & Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 Am. Bus. L.J. 241, 242 (1987); Alisa G. Brink, D. Jordan Lowe, & Lisa M. Victoravich, *The Effect of Evidence Strength and Internal Rewards on Intentions to Report Fraud in the Dodd-Frank Regulatory Environment*, 32 Auditing 87, 89 (2013). Internal reporting often precludes the negative publicity, investigations, and litigation that often accompany external whistleblowing. *Id*.; *accord* Daniel D. McClurg, *Whistleblower Protections: Internal Reporting and Dodd-Frank's Anti-Retaliation Provision*, 68 Labor L.J. 156, 162–63 (2017); *see also* Mark Brinkley, *The Serious Tone of Whistleblowing*, Internal Auditor, April 2015, at 62 (urging companies to embrace whistleblowers for the companies' own interests); Stephen R. Stubben & Kyle T. Welch, *Evidence on the Use and Efficacy of Internal Whistleblowing Systems*, 58 J. Acct. Rsch. 473 (2020) (providing empirical evidence that internal whistleblowing is associated with fewer and lower government fines and litigation).

[54]*See, e.g*., Elletta Sangrey Callahan, Terry Morehead Dworkin, Timothy L. Fort, & Cindy A. Schipani, *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 Am. Bus. L.J. 177 (2002). Experimental studies suggest that internal reporting will remain predominant, and that employees who pursue both paths will more often report internally first. *See generally* Brink et al., *supra* note 53.

[55]Dworkin & Near, *supra* note 53, at 243.

to take action.[56] Internal whistleblowing is severely hampered when those to whom a whistleblower would report are complicit.[57] Still, scholars have argued persuasively that internal whistleblowers can be shielded from retaliation and that society's interest in deterring fraud can yet be safeguarded.[58]

Professor Baer argues that the SEC wields too much discretion in deciding how to handle tips; that the SEC's rules unduly restrict the numbers and types of people who may seek bounties; and that the ease of filing tips has facilitated frivolous complaints.[59] Moreover, the WBP may be less effective than hoped at deterring fraud. White-collar prosecutions are relatively rare, in part because of the challenge of establishing a defendant's state of mind.[60] Whistleblowers can often alleviate this problem.[61] But because complicit employees are likely to value the avoidance of legal sanctions more than the promises of financial rewards, the

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[56]*See* Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 Am. Bus. L.J. 267, 284 (1991) [hereinafter *Internal Whistleblowing*]. Indeed, the *Digital Realty* court drew this conclusion on the basis of Dodd-Frank's definition of "whistleblower." Congress limited the availability of bounty awards and antiretaliation protections precisely to encourage the flow of information to the SEC. *See supra* Part I.A. This article does not question the soundness of *Digital Realty*'s interpretation of the statutory language, but instead questions the wisdom of excluding internal whistleblowers from protection and of affording the SEC a monopoly on the enforcement of securities fraud actions. *See infra* Part III (discussing these and other reforms).

[57]*Internal Whistleblowing*, *supra* note 56, at 307; *accord* Dan Hargrove & Cecily Raiborn, *The Problem Is Fraud: Is the Solution Government Bounties?*, 118 Bus. & Soc. Rev. 299, 308 (2013) (noting that since most large frauds are perpetrated at or near the top of an organization, a rule that *mandates* internal reporting prior to external reporting would discourage reporting overall while failing to disincentivize the underlying fraud).

[58]These arguments have extended to whistleblower reward programs as well. *See, e.g.*, Claire Sylvia & Emily Stabile, *Rethinking Compliance: The Role of Whistleblowers*, 84 U. Cin. L. Rev. 451 (2016) (arguing, inter alia, that whistleblower award programs do not undermine but instead complement internal programs).

[59]*See* Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 U.C. Davis L. Rev. 2215, 2217–18 (2017). Several of our participants corroborated these concerns. *See infra* Part III.

[60]Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 Duke L.J. 823, 841 (2014) (noting that "a prosecution that . . . turns on the unobservable phenomenon of mental state, can be more difficult. . . .").

[61]Baer, *supra* note 59, at 2221.

effectiveness of whistleblowing is stymied: some employees who have access to the best information concerning securities fraud are themselves culpable.[62] Professor Baer thus suggests that Congress could better deter fraud by narrowing the criminal law or through amnesty for first disclosure.[63]

Relatedly, observers have questioned whether the WBP sufficiently incentivizes would-be whistleblowers.[64] For example, one experimental study concluded that although awards encourage whistleblowing, financial incentives can reduce the moral motivations for reporting in situations that fall below the award threshold.[65] And because the personal costs that whistleblowers incur can be high, some have called for allowing nonpecuniary damages for those who suffer retaliation.[66]

As this sampling of the literature reveals, scholars have been active in identifying the shortcomings and potential reforms of both whistleblower laws generally and the Dodd-Frank WBP specifically. In addition to the many excellent grounds for whistleblower reforms suggested in the literature, certain prospects for reform have not yet been considered. To that end, the next section further develops this context by considering the insights of the study's participants.

C. Participants' Experiences

As noted above, this article examines whether the SEC's reforms of the Dodd-Frank WBP are desirable and sufficient in themselves—and if not, how the WBP may otherwise be enhanced to strengthen America's fight

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[62]*Id*. at 2219.

[63]Each of these ideas faces problems, however, *id*. at 2267–78, and Professor Baer does not suggest alternatives, *id*. at 2279–80.

[64]*See, e.g*., Mary-Jo Kranacher, *Whistleblowing: Can New Incentives Overcome Apprehension?*, CPA J., July 2011, at 80.

[65]*See* Leslie Berger, Stephen Perreault, & James Wainberg, *Hijacking the Moral Imperative: How Financial Incentives Can Discourage Whistleblower Reporting*, 36 Auditing 1 (2017). Of course, "[a]s a matter of law, a whistleblower's motivations are irrelevant. . . . Only the facts matter." Tom Mueller, *The Law Doesn't Care About Whistleblowers' Grudges*, Wash. Post (Oct. 18, 2019), https://www.washingtonpost.com/outlook/the-law-doesnt-care-about-whistleblowers-grudges/2019/10/18/b6b29a10-f100-11e9-b648-76bcf86eb67e_story.html.

[66]*See, e.g*., Nina Schichor, *Does Sarbanes-Oxley Force Whistleblowers to Sacrifice Their Reputations? An Argument for Granting Whistleblowers Non-pecuniary Damages*, 8 U.C. Davis Bus. L.J. 272, 274, 293–95 (2008).

against securities fraud. Part II will note that the public comment process surrounding the SEC's rule changes was reactive in that it focused on the particulars of the SEC's proposal and not on creative thinking beyond the proposal's boundaries. Neither the SEC's process nor the scholarly literature have attempted in any systematic way to learn directly from the experiences of whistleblowers or the expert counsel who represent them. For this reason, we collected qualitative data through interviews with leading whistleblower attorneys and other uniquely qualified participants.[67] Among their many insights, these participants contributed to our understanding of the context for WBP reforms. Before discussing the participants' perceptions of the WBP's strengths and shortcomings, however, we first describe our study's methodology.[68]

1. Study Methodology

Qualitative work "embraces research methodologies that deal with phenomena by analyzing experiences, behaviors and relations without the use of statistics,"[69] such that "the [quantitative] goal of global generalization is replaced by a transferability of knowledge from one situation to another, taking into account the contextuality and heterogeneity of social knowledge[.]"[70] This is helpful in the present study, since we contend that the existing WBP (and the SEC's revisions) do not sufficiently account for the perspectives of whistleblowers or their counsel. Indeed, whistleblowers' perspectives are perhaps the most important component of the WBP's efficacy, since the WBP elicits the participation of otherwise reluctant actors and can only fail without their willing participation.

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[67]Qualitative data are "non-numerical data. . . ." Mark Saunders et al., Research Methods for Business Students 724 (7th ed. 2016). Qualitative research explores "how" and "why" questions. Jane Ritchie et al., Qualitative Research Practice 3 (2nd ed. 2014).

[68]As with other disciplines, empirical legal studies generally present their methods. *See, e.g.*, Ronit Dinovitzer, Hugh P. Gunz, & Sally P. Gunz, *Reconsidering Lawyer Autonomy: The Nexus Between Firm, Lawyer, and Client in Large Commercial Practice*, 51 Am. Bus. L.J. 661, 684–88 (2014) (providing a lucid example).

[69]Nikolaos Basias & Yannis Pollalis, *Quantitative and Qualitative Research in Business & Technology: Justifying a Suitable Research Methodology*, 7 Rev. Integrative Bus. & Econ. Rsch. 91, 94 (2018).

[70]Svend Brinkmann & Steinar Kvale, InterViews 199 (3rd ed. 2015).

Qualitative research is now widely endorsed and utilized across the academic disciplines.[71] Statistical methods have historically predominated—particularly in the social science and business domains—but in recent decades, scholars across these fields have come to appreciate the value and validity of qualitative methods.[72] Methodological choices concerning experimentation and the systematization of data gathering "should not be considered good or bad, but viewed as strategic options that are chosen with reference to the situation."[73] Fundamentally, a good qualitative analysis is "plausible, coherent and grounded in the data."[74]

Interviews are an apt means to "[understand] the lived experience of other people and the meaning they make of that experience," since individuals' experiences afford valuable empirical insights into a phenomenon.[75] Otherwise stated, the "purpose of the qualitative research interview . . . is to understand themes of the lived daily world from the subjects' own perspectives."[76] Qualitative work focuses on knowledge as expressed in language (rather than in numbers); is descriptive and specific; invites the interviewer to exhibit openness to new and unexpected phenomena; focuses on particular themes; embraces ambiguities,

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[71]*See, e.g.*, Pratima (Tima) Bansal & Kevin Corley, *Publishing in AMJ—Part 7: What's Different About Qualitative Research?*, 55 Acad. Mgmt. J. 509 (2012) (discussing the value of qualitative contributions in the leading empirical journal of business scholarship); *see also* Brinkmann & Kvale, *supra* note 70, at 15 (observing that qualitative research is now common across the disciplines). Legal scholarship, too, has embraced qualitative work as a means of empirical exploration. Qualitative methods "are particularly well suited for analyzing the types of evidence, and developing the types of arguments, we typically see in law reviews." Katerina Linos & Melissa Carlson, *Qualitative Methods of Law Review Writing*, 84 U. Chi. L. Rev. 213, 214 (2017).

[72]*See* Alf H. Walle, Qualitative Research in Business: A Practical Overview 3–25 (2015).

[73]*Id*. at 1. Each approach contributes distinctive value to our understanding of the world. *See id*. at 8–12 (observing that some quantitative scholars view qualitative methods as unrespectable, but that this "is counterproductive because [it] might discourage the use of a range of legitimate and valuable analytic tools."). As Professor Seidman puts it, "[t]he adequacy of a research method depends on the purpose of the search and the questions being asked." Irving Seidman, Interviewing as Qualitative Research 10 (5th ed. 2019).

[74]Virginia Braun & Victoria Clarke, Successful Qualitative Research 21 (2013).

[75]Seidman, *supra* note 73, at 9.

[76]Brinkmann & Kvale, *supra* note 70, at 27.

contradictions, and tensions in the subjects' lives; and can track changes across time.[77]

The present study was mindful of these best practices.[78] We began by drafting a list of semi-structured questions[79] to elicit participants' observations and experiences on a range of topics related to the WBP.[80] We sought to elicit our participants' insights in a way that might be useful for both experiential and critical purposes.[81] Hence, in formulating our questions, we accounted for the whistleblower literature discussed above[82] but avoided leading questions that might bias participants' responses. The first set of questions, which we utilized in the summer of 2018, focused on participants' perceptions of the broadest dimensions of the WBP and on possible reforms.[83] After receiving rich feedback on the resulting narrative at a leading scholarly business law colloquium,[84] we drafted an additional set of questions that we asked of a second series

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[77]*Id*. at 32–35.

[78]For more on best practices in thematizing and designing interview studies, see *id*. at 128–43 (discussing the features of quality interview studies), 196–99 (discussing common objections to qualitative methods).

[79]Semi-structured interviews begin with a script of questions or themes that provides the general structure for the conversation. However, if a participant introduces novel or unanticipated insights, the interviewer is free to explore them before returning to the script. Michael D. Myers, Qualitative Research in Business & Management 121–22 (2013).

[80]Copies of these question scripts are on file with the authors.

[81]Experiential research seeks to "get inside" participants' heads and thus validates the meanings and interpretations expressed in the data. Braun & Clarke, *supra* note 74, at 21. This is important here since any recommendations to enhance a process from the vantage of its participants must necessarily comprehend the participants' relationship to the process. Critical qualitative research interrogates "the meanings or experiences expressed in the data, and uses them to explore some other phenomenon." *Id*. at 21. Critical research, then, examines how participants' experiences reflect the reality surrounding the phenomenon at issue. *Id*. at 25. This is important here since the WBP can hope to be effective only if whistleblowers voluntarily participate, which will be driven in part by the reality that prospective whistleblowers attach to the WBP process.

[82]*See supra* Part I.B.

[83]We asked the first set of participants about such topics as the ways in which the WBP had been successful or not, whether the WBP effectively incentivized whistleblowing, which substantive features of the law might discourage whistleblowing, and which reforms might improve either the process or incentives for whistleblowers.

[84]*ABLJ* Invited Scholars Colloquium, Academy of Legal Studies in Business, Annual Conference, Academic Session D1, Portland, Or. (Aug. 11, 2018).

of participants in the summer of 2019.[85] This second set of questions attempted to further illuminate the fault lines in the current WBP as well as the rationales for participants' positions (or ambivalence) toward a variety of possible WBP reforms.

Like most interview-based studies, this project utilized purposeful sampling to recruit participants.[86] Statistical studies are valid in part because the people or objects included in a sample are chosen randomly (i.e., each member of the population has an equal chance of being selected for inclusion),[87] which makes the resulting inferences more likely to accurately reflect the population.[88] This, in turn, can enable the researcher to test hypotheses.[89] In contrast, qualitative research is not intended to make population-level inferences, nor to test hypotheses in a statistical way. Instead, interviews seek "to understand the experience of those who are interviewed, not to predict or to control that experience."[90] The goal of this study was not to establish uniformity among whistleblowers' experiences, nor to infer homogeneity among

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[85]We asked the second set of participants about topics such as the WBP's deterrent effect, how greater transparency might be accomplished without compromising the legitimate interests of employers and the government, why potential whistleblowers might decline to file a tip, the characteristics of the strongest securities whistleblower cases, and whether certain ideas for reforming the WBP are tenable.

[86]*See* Joseph A. Maxwell, Qualitative Research Design 70–72 (1996) (discussing purposeful sampling); Seidman, *supra* note 73, at 58–59. A focused study within a broader population is not "bias" in the methodological sense. *See, e.g.*, James H. Price & Judy Murnan, *Research Limitations and the Necessity of Reporting Them*, 35 Am. J. Health Edu. 66 (2004) (distinguishing limitations and delimitations in scholarly studies). This study, for instance, developed the perspectives of whistleblowers and their counsel, since Parts I.A and I.B illustrated that this key group has been less directly studied than other WBP stakeholders. "In most quantitative studies, the goal is to obtain a representative sample, which may enable researchers to generalize from the sample to the general population." Svend Brinkmann, Qualitative Interviewing 57 (2013). "This can also be a goal in qualitative research, but because most qualitative projects aim for thorough analyses in depth—rather than larger and broader analyses—they often employ other sampling strategies." *Id. Cf.* Matthew B. Miles, A. Michael Huberman, & Johnny Saldaña, Qualitative Data Analysis 290–91 (4th ed. 2020) (discussing representativeness of qualitative samples).

[87]Peter C. Bruce, Introductory Statistics and Analytics 107 (2015).

[88]*Id.* at 106.

[89]*See, e.g.*, Max Vercruyssen & Hal W. Hendrick, Behavioral Research and Analysis 2–6 (2012) (discussing the formulation and testing of statistical hypotheses).

[90]Seidman, *supra* note 73, at 56.

whistleblowers. Rather, this study sought to develop ideas, grounded in the experiences and perspectives of whistleblowers, for improving the WBP process.[91] The revelations in this study's data illustrate how the WBP's design and implementation can be enhanced by accounting for whistleblowers' perspectives.[92]

These considerations led us to seek attorneys with substantial experience representing whistleblowers. We first used an Internet search to identify law firms that advertised their representation of Dodd-Frank whistleblowers. We subsequently created a database ranging from solo practices to international firms. Examining the partner profiles within these firms, we produced a list of attorneys who self-identified as having expertise in Dodd-Frank whistleblower matters and for whom we could match an e-mail address. In our second round of interviews, we relied on the Taxpayers Against Fraud directory[93] and additional Internet searches to expand the database.

Following Institutional Review Board (IRB) approval, we e-mailed the individuals in each database with a description of the project and an invitation to participate as an interview subject. Interviews were conducted by phone with one or two of the authors participating on each call. We elected to take notes rather than to record the conversations.[94] In

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[91]*See id*. at 57–58. "In interview studies . . . it is not possible to employ random sampling. . . . The job of an in-depth interviewer is to go to such depth in the interviews that surface considerations of representativeness and generalizability are replaced by a compelling evocation of an individual's experience." *Id*. A qualitative researcher "may find connections among the experiences of the" participants, and the "researcher calls those connections to the readers' attention for inspection and exploration." *Id*.

[92]"*Information-oriented* selection is normally more relevant [than random selection] in qualitative inquiry. The goal is . . . to maximize the utility of information from small samples. . . . Cases are selected on the basis of expectations about their information content. . . ." Brinkmann, *supra* note 86, at 57 (internal citation and quotation marks omitted); *accord* Martin N. Marshall, *Sampling for Qualitative Research*, 13 Family Practice 522 (1996) (discussing why random sampling is inappropriate for qualitative studies).

[93]*Membership Directory*, Taxpayers Against Fraud, https://member.taf.org/directory (last visited May 24, 2020). We furthered narrowed our list of potential interviewees by reviewing individual webpages and removing those profiles from the Taxpayers Against Fraud list that did not appear to have robust Dodd-Frank whistleblower practices.

[94]We believe that the absence of recordings fostered greater participation and candor. *See, e.g*., Justin W. Evans & Anthony L. Gabel, *Legal Entrepreneurship and the Strategic Virtues of Legal Uncertainty*, 57 Am. Bus. L.J. 593, 607 n. 80 (2020) (discussing the advantages of notetaking in lieu of recording interviews with attorney participants).

addition to our attorney participants, we also communicated with Luis Aguilar (former SEC commissioner), Sean McKessy (former director of the OWB and currently counsel with Phillips & Cohen LLP), and two Dodd-Frank whistleblowers. In total, we interviewed twenty-six participants and had substantive e-mail exchanges with one additional participant.[95]

To analyze the resulting data, we applied descriptive coding and concept coding to form categories.[96] We then applied a simplified focused coding procedure to sharpen the boundaries of the categories and to build themes.[97] The themes were centered on (1) the strengths and weaknesses of the WBP (discussed later in this section) and (2) the merits of various possible WBP reforms (discussed in Part III). To preserve participants' anonymity regarding individual responses, this article will use a short form of citation to reference interviews.[98]

As with any qualitative study, certain limitations apply here.[99] Although we are convinced that our sample size (twenty-seven participants) is sufficiently large to reflect the most significant themes derived from the experiences of whistleblowers and their counsel, the question of sample size is open-ended in qualitative research. Two factors guide the judgment of qualitative sample size: sufficiency (i.e., whether there are "sufficient numbers to reflect the range of participants and sites that make up the population so that others outside the sample might have a chance to connect to the experiences of those in it"), and saturation (i.e., the point at

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[95]We sincerely thank our participants for their time and expert insights. The reforms proposed in Part III, *infra*, are based chiefly on the collective wisdom of these participants. Participants are listed in the Appendix, *infra*.

[96]Descriptive coding summarizes the basic topic of a unit of data in a word or short phrase, while concept coding assigns a word or phrase that represents a broader meaning than the unit itself. MILES ET AL., *supra* note 86, at 65–67 (discussing both types of coding).

[97]In focused coding, "data similarly . . . coded are clustered together and reviewed to create tentative category names." JOHNNY SALDAÑA, THE CODING MANUAL FOR QUALITATIVE RESEARCHERS 240 (3rd ed. 2016).

[98]*See* THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 17.2.5, at 171 (Columbia Law Review Ass'n et al. eds., 21st ed. 2020) (prescribing a citation format for interviews that includes participants' personally identifiable information). We will cite to our interviews using only the sequential interview number from our data set.

[99]Empirical studies should acknowledge their own potential limitations, as all methods and studies have limitations. JEFFREY S. BEAUDRY & LYNNE MILLER, RESEARCH LITERACY 6, 242 (2016).

which the interviewer is no longer learning anything new).[100] The qualitative researcher should "interview as many subjects as necessary to find out what [they] need to know," per the purpose and scope of the study.[101] It is possible that larger sample sizes in qualitatively driven policy studies of comparable scope could generate additional or more nuanced conclusions. For instance, the inclusion of more whistleblowers whose awards have already been paid could potentially provide different perspectives. However, that demographic represents an extremely small proportion of Notices of Covered Actions (NCAs) posted to date, and an even smaller proportion of the total tips reported to the SEC,[102] so the lack of this demographic appears to pose a low risk of bias. Relatedly, future studies might utilize surveys or other instruments amenable to statistical analysis to expand the proposals presented here.

In addition, participants may unconsciously favor proposals that would promote their own interests. However, we submit that the proposals discussed in Part III are supported by critical reasoning and corroboration by evidence independent of the participant-generated data.[103] Finally, researchers invariably bring their own biases to a study. We attempted to defend against our own unconscious biases by asking open-ended questions, fully capturing participants' responses, addressing negative cases or conflicting responses, and using member checking.[104]

2. Study Results

We turn now to consider our participants' perspectives on the WBP's strengths. The WBP has attracted increasing numbers of tips,[105] and in

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[100] Seidman, *supra* note 73, at 61.

[101] Brinkmann & Kvale, *supra* note 70, at 140.

[102] *See infra* note 166.

[103] *See infra* Part III (presenting participants' views together with primary and secondary legal sources in support of proposed changes).

[104] *Member checking* refers to the process of eliciting feedback on the write-up of one's research from the study's participants. Maxwell, *supra* note 86, at 94.

[105] The official figures concerning reported tips are available at 2019 Sec. & Exch. Comm'n Office of the Whistleblower Ann. Rep. 22 (showing increasing annual figures and noting a growth of about 74% in the tips received from FY 2012 through FY 2019) [hereinafter 2019 Ann. Rep.]. *See also, e.g.*, Interview Nos. 3, 5, 8, 9, 11, & 26. Participants also reported increasing inquiries from potential Dodd-Frank whistleblower clients.

our participants' view, the awards made to date have enhanced the program's visibility.[106] In participants' experience, the three most foundational incentives for whistleblowers—anonymity, antiretaliation protections, and awards—are crucial to the WBP's success.[107] The fact that tips may be reported anonymously[108] and electronically[109] has been "transformational" in terms of encouraging employees to report.[110] The SEC has pursued employers that have interfered with whistleblowers' rights.[111] The largest awards have proven sufficiently attractive for some employees to report[112] and have enabled the SEC to publicize the pro-

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[106]*See* Interview Nos. 3 (stating that the WBP has resulted in more people coming forward each year to report evidence of fraud), 4 (discussing the rise in cases being file each year), & 5 (observing that Wall Street is well aware of the WBP and that this participant's firm talks with hundreds of potential whistleblowers each year). This perception is often expressed in media coverage of the WBP as well. *See, e.g.*, Matt Egan, *A Government Agency Just Paid a Record $114 Million to an Anonymous Whistleblower*, CNN (Oct. 23, 2020), https://www.cnn.com/2020/10/23/business/sec-record-whistleblower-award/index.html.

[107]Interview Nos. 3, 7, 8, 9, & 11.

[108]*See* 15 U.S.C.A. § 78u-6(d)(2) (providing for anonymous whistleblower award claims); *id.* § 78u-6(h)(2) (requiring that the SEC generally not disclose information that may reveal a whistleblower's identity); 17 C.F.R. § 240.21F-7 (providing for the confidential submission of whistleblowers' information to the SEC); *see also* Interview Nos. 5, 8, & 11. This is commensurate with Professor Mark's findings, in the context of class action securities litigation, that "courts should not discount information provided by confidential witnesses for use in securities fraud complaints if the witnesses are described with sufficient particularity" and that "in general, the identities of confidential witnesses should not be discoverable unless the witnesses will testify at trial." Gideon Mark, *Confidential Witnesses in Securities Litigation*, 36 J. Corp. L. 551, 555 (2011).

[109]*See* 17 C.F.R. § 240.21F-9(a)(1) (providing for the electronic submission of whistleblowers' information to the SEC); *see also* Interview Nos. 5 & 8.

[110]Interview Nos. 5 (remarking that the Act had empowered whistleblowers to come forward, particularly for corporate insiders), 11 (stating that the number of tips is "eye-opening" and growing every year), & 26 (stating that the WBP has been a "game changer").

[111]*See* Interview Nos. 4, 5, 6, & 11. Between 2015 and 2019, for example, the SEC brought enforcement actions in ten cases where employers sought to impede reporting in violation of Rule 21F-17. *See, e.g.*, Amended Complaint & Demand for Jury Trial, SEC v. Collector's Coffee, Inc., No. 19-cv-04355-LGS-GWG (S.D.N.Y. Nov. 4, 2019) (alleging the defendant conditioned the return of funds on the investors signing a confidentiality agreement prohibiting them from disclosing securities violations to regulators).

[112]*See* Interview Nos. 3, 7, & 11.

gram.[113] In the participants' view, whistleblowers have played a vital role in uncovering fraud that would likely have remained undiscovered.[114] Investors, too, have benefited from the sanctions collected through the WBP.[115] The opportunity for whistleblowers to find support and defend their reputations has been important as well.[116]

The key role that whistleblowers play should be viewed in the wider context of an enforcement system that provides government agencies with a range of tools to detect and deter securities violations.[117] Whistleblowing operates in parallel with, and complements, regulatory actions and criminal investigations. Whistleblowers add particular value where illegal conduct is unusually complex or cloaked in impenetrable secrecy.[118] Officials have repeatedly acknowledged that in such cases, successful enforcement requires inside knowledge or other unique information that only whistleblowers can deliver.[119]

These observations apply as much to the WBP as to the whistleblower programs administered by other agencies.[120] As a result of whistleblower tips,

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[113]*See* Interview Nos. 5, 6, 8, & 11. Participants generally agreed that the SEC had effectively publicized the WBP and had prompted some employers to strengthen their internal compliance programs. In addition, other nations have copied the WBP in various ways. Interview No. 6.

[114]*See* Interview Nos. 6 (observing that the private bar can add efficiencies to the system by gathering documents and working on a case for the SEC to bring) & 20 (noting that whistleblowers often have expertise exceeding that of SEC attorneys).

[115]*See* Interview Nos. 6, 7, & 11.

[116]For one whistleblower participant, the most positive aspect of the whistleblower experience was the camaraderie shared with other victims of financial fraud. *See* Interview No. 12.

[117]Indeed, the WBP is the result of a process, beginning with the Sarbanes-Oxley Act, that fundamentally recast the role of whistleblowers. Throughout this process, federal policy makers have "increasingly sought to encourage insiders to disclose wrongdoing in a variety of ways." Richard Moberly, *Confidentiality and Whistleblowing*, 96 N.C. L. Rev. 751, 754 (2018).

[118]*See* Claire M. Sylvia, The False Claims Act: Fraud Against the Government § 1:4 (2020).

[119]In relation to financial market fraud, see *Attorney General Holder Remarks on Financial Fraud Prosecutions at NYU School of Law*, U.S. Dep't of Just. (Sept. 17, 2014), https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law.

[120]*See, e.g.*, *Acting Associate Attorney General Stuart F. Delery Speaks at Taxpayers Against Fraud Conference*, U.S. Dep't of Just. (Sept. 16, 2014), https://www.justice.gov/opa/speech/acting-associate-attorney-general-stuart-f-delery-speaks-taxpayers-against-fraud.

the SEC has obtained more than $2.5 billion in financial remedies, of which approximately $750 million has been returned or is scheduled to be returned to defrauded investors.[121] On September 23, 2020, at the meeting in which the SEC voted to amend the WBP rules, all five commissioners recognized that the agency's success in collecting sanctions is directly attributable to whistleblowers.[122] The WBP's success has even attracted the attention of foreign whistleblowers.[123]

Indeed, the SEC expected the program to enhance its enforcement capabilities: with fewer than 4000 employees to oversee 35,000 entities, the SEC understood its resource constraints when the program was introduced in 2011.[124] The OWB has since acknowledged the cost savings that whistleblowers contribute for Commission staff and

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[121]*See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Issues $3.8 Million Whistleblower Award (July 14, 2020), https://www.sec.gov/news/press-release/2020-155; *see also* Public Statement, U.S. Sec. & Exch. Comm'n, Strengthening Our Whistleblower Program (Sept. 23, 2020), https://www.sec.gov/news/public-statement/clayton-whistleblower-2020-09-23; Press Release, U.S. Sec. & Exch. Comm'n, SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program (Sept. 23, 2020), https://www.sec.gov/news/press-release/2020-219.

[122]For instance, Commissioner Lee stated that whistleblowers "display extraordinary bravery" and "take great risks to help law enforcement, never knowing when they make their decision to speak up what will happen to them." Public Statement, U.S. Sec. & Exch. Comm'n, 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. Commissioner Crenshaw said that whistleblowers brought "tremendous value" while risking their livelihoods. Public Statement, U.S. Sec. & Exch. Comm'n, Statement of Commissioner Caroline Crenshaw on Whistleblower Program Rule Amendments (Sept. 23, 2020), https://www.sec.gov/news/public-statement/crenshaw-whistleblower-2020-09-23. And Commissioner Peirce quoted Justice Ginsburg, noting that Congress "recognize[d] that 'whistleblowers often face the difficult choice between telling the truth and committing "career suicide".'" Public Statement, U.S. Sec. & Exch. Comm'n, Amendments to the Commission's Whistleblower Program Rules (Sept. 23, 2020), https://www.sec.gov/news/public-statement/peirce-whistleblower-2020-09-23.

[123]The Commission received whistleblower submissions from individuals in seventy countries in 2019 alone. The highest number of international tips came from Canada, Germany, and the United Kingdom. 2019 Ann. Rep, *supra* note 105, at 25; *see also* Anita Raghavan, *Law Firm Sees Britain as Hunting Ground for U.S. Whistle-Blower Cases*, N.Y. Times (Sept. 7, 2017), https://www.nytimes.com/2017/09/07/business/dealbook/whistle-blower-law-firm-britain.html.

[124]*See* Press Release, U.S. Sec. & Exch. Comm'n, SEC's New Whistleblower Program Takes Effect Today (Aug. 12, 2011), https://www.sec.gov/news/press/2011/2011-167.htm; *see also* Sylvia, *supra* note 118, at § 1:5.

resources.[125] The question of resources remains equally relevant today: in 2019, in addition to Chief Norberg, the OWB had only two assistant directors, eleven attorneys, and additional staff.[126] Simply put, the high cost of enforcement and the relative lack of resources dictate that whistleblowers be considered an integral part of any system designed to target fraud.

Our participants identified numerous weaknesses in the WBP as well. Part I.B. discussed many of the traditionally recognized challenges confronting whistleblowers. Our participants reiterated many of these: the fear of implicating oneself,[127] a desire not to harm coworkers,[128] a fear of causing job losses,[129] fear of negative stigmatization,[130] and the potential to be permanently blackballed in the industry.[131] Perhaps the most severe disincentive for coming forward is the fear of retaliation.[132]

In addition to these and other widely acknowledged problems, the WBP process itself poses certain challenges. As one participant put it, the WBP is "not for the faint of heart."[133] Significantly, the process of investigating and resolving tips has little transparency (what participants called the "black box problem").[134] Information sharing from the SEC to

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[125]Press Release, U.S. Sec. & Exch. Comm'n, SEC Whistleblower Program Ends Record-Setting Fiscal Year with Four Additional Awards (Sept. 30, 2020), https://www.sec.gov/news/press-release/2020-240 (noting that whistleblowers "conserved SEC time and resources").

[126]2019 Ann. Rep., *supra* note 105, at 6.

[127]*See* Interview No. 15.

[128]*See* Interview Nos. 15, 17, & 25.

[129]*See* Interview Nos. 15 & 25.

[130]*See* Interview No. 17.

[131]*See* Interview Nos. 3, 4, 6, 7, 9, 12, 13, 14, 15, 17, & 25.

[132]*See* Interview Nos. 2, 3, 4, 6, 9, 13, 15, & 17; *see also* Jennifer M. Pacella, *Inside or Out? The Dodd-Frank Whistleblower Program's Antiretaliation Protections for Internal Reporting*, 86 Temp. L. Rev. 721, 754–55 (2014) (discussing retaliation as a disincentive to whistleblowing) [hereinafter *Inside or Out*].

[133]Interview No. 24. Many prospective whistleblowers are worried about the unknowns in the WBP process, and some see it as akin to a lottery. Interview No. 25.

[134]Interview Nos. 1, 2, 4, 5, 7, 8, 9, 18, & 20. One labeled this the biggest downside of the WBP. Interview No. 23. As another participant described it, tips go into the SEC and it is then nearly impossible to obtain updates. Interview No. 6.

the bar "is a major challenge."[135] For instance, in participants' experience, inquiries from counsel concerning TCRs (tips, complaints, or referrals) are rarely answered.[136] As a result, the SEC process is opaque.[137] This stands in contrast to participants' experiences in the FCA context.[138] The SEC appears to be extremely concerned about market-moving information becoming public.[139] However, by not communicating with whistleblowers, the SEC is missing a critical opportunity: whistleblowers and their counsel could provide essential help gathering evidence and developing the case.[140] Moreover, certain safeguards could be put in place to facilitate this sort of public-private partnership.[141] The SEC's noncommunicativeness and resulting frustrations for whistleblowers undermine the confidence that potential whistleblowers place in the program.[142] And the communications that the OWB has issued are often ambiguous, difficult to understand, and otherwise problematic.[143]

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[135]Interview No. 22. However, such communication may be facilitated by personal trust between the government attorney and whistleblower counsel. *See* Interview No. 18.

[136]*See, e.g.*, Letter from Anonymous-50 to the Sec. & Exch. Comm'n (Sept. 8, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4320334-173229.htm; Interview No. 23.

[137]*See* Interview No. 2; *see also* Interview No. 10 (discussing the ineffectiveness of the OWB's public information hotline).

[138]*See* Interview Nos. 1 & 23.

[139]Still, there are ways to enable confidential communications between the SEC and whistleblowers. *See infra* Part III.A.

[140]*See* Interview No. 6; *see also* Interview No. 1 (noting that partnerships between the SEC and private counsel would benefit stakeholders); Interview No. 16 (noting apparent lack of a uniform protocol for how SEC staff is to work with whistleblowers); Interview No. 20 (noting the SEC forgoes a valuable resource when it fails to engage whistleblowers in case development); Interview No. 24 (noting the SEC could collaborate with whistleblowers, receive cost-free assistance, and still retain control); Letter from Taylor S. Amarel to the Sec. & Exch. Comm'n (Nov. 16, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4653084-176480.htm (observing that "the forms, process, and style of tips that the SEC requests differs from office to office"). The SEC could establish guidelines for regional offices concerning how to work with whistleblowers. Interview No. 24.

[141]*See infra* Part III (discussing these safeguards).

[142]"As a whistleblower, you'd like to think there's a more orderly process, to at least get a status update[.]" Interview No. 12.

[143]*See* Letter from Taylor Scott Amarel to Emily Pasquinelli, Office of the Whistleblower, and Brent Fields, Secretary, Sec. & Exch. Comm'n (Jan. 2, 2019), https://www.sec.gov/comments/s7-16-18/s71618-4858597-177309.pdf.

Another major set of problems stems from the SEC's collection and underfunding issues. The SEC has had difficulty collecting the judgments it has won against securities fraudsters, a fact that significantly constrains the funds available for whistleblowers and defrauded investors.[144] Part of this is attributable to the SEC's budget. The SEC's resources are insufficient to thoroughly investigate all of the tips generated by the WBP.[145] Our participants suspect that a large volume of tips also makes it more difficult to separate meritorious leads from the non-meritorious.[146] A "budget-constrained agency . . . must either ignore some [tips], perhaps using a triage approach . . . or else allocate fewer investigative resources to each [tip], thus degrading the accuracy of its screening efforts."[147] Perhaps for this reason, our participants report that the SEC looks for "perfect tips" in which the whistleblower has not only reported original information but also largely developed the case of securities fraud.[148] Of course, this expectation imposes a much higher burden on whistleblowers than the Dodd-Frank Act or SEC rules intimate: merely reporting quality information may not be enough to entice the SEC to investigate a tip.

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[144]*See, e.g.*, Hargrove & Raiborn, *supra* note 57, at 303 (noting that law enforcement resources are insufficient); Ezra Ross & Martin Pritikin, *The Collection Gap: Under-enforcement of Corporate and White-Collar Fines and Penalties*, 29 Yale L. & Pol'y Rev. 453, 456–58 (2011). For this reason, *qui tam* is in the public's interest. Interview No. 1; *see also infra* Part III.A (advocating for the addition of *qui tam* to the WBP); Dave Michaels, *U.S. Fines Billions for Wall Street Fraud. Nearly Half the Time It Doesn't Collect*, The Wall St. J. (May 20, 2019), https://www.wsj.com/articles/some-securities-fraudsters-escape-paying-sec-fines-11558344601.

[145]*See, e.g.*, Interview No. 22 (noting that some applications are neglected for extended periods while others are processed speedily); *see also* 2020 Sec. & Exch. Comm'n Div. of Enforcement Ann. Rep. 2 (noting that more WBP claims were processed in 2019 than 2020, and that "many staff redirected newly-freed-up time elsewhere, including by taking on whistleblower claims and distributions to injured investors."). In a sense, the WBP has been a victim of its own success. *See* Interview No. 6. Several participants agreed that the SEC appears not to have sufficient resources. *See* Interview Nos. 2, 3, 4, 5, 8, 9, 10, 16, & 23. The WBP may attract greater funding in the future since fraud prosecution generates revenue. *See* Interview No. 18.

[146]*See* Interview Nos. 3 & 16.

[147]David Freeman Engstrom, *Whither Whistleblowing? Bounty Regimes, Regulatory Context, and the Challenge of Optimal Design*, 15 Theor. Inquiries L. 605, 613 (2014).

[148]Interview Nos. 2, 8, & 9. That is, the whistleblowers deliver cases that are "gift wrapped." Interview No. 2.

For some participants, the SEC's internal communications (for instance, between the OWB and the enforcement division) are inadequate.[149] For example, the TCR system does not appear to be integrated with the NCA process, which presents a major problem for whistleblowers and their counsel.[150] In addition, the SEC seems to lack a uniform process concerning case prioritization, so these vary from office to office.[151]

As the Introduction noted, time is of the essence for whistleblowers—yet numerous time-based problems afflict the WBP. For participants, the process is too lengthy and slow.[152] Whistleblowers often never learn the fate of their tips; there is no specific time for the SEC to act once a whistleblower claims an award. Even after a preliminary award determination, the whistleblower may wait years to receive payment.[153] As participants pointed out, delays in the SEC's filing of claims can diminish awards.[154] And because the statute of limitations for SEC enforcement actions is five years,[155] tips can quickly go stale and be dropped by the SEC, leaving whistleblowers with neither a resolution to the fraud nor compensation for the risks they took to report it.[156] For some participants, the ninety-day period to file a claim after an NCA posts[157] is

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[149]*See* Interview No. 16.

[150]*See, e.g.*, *id*. (recounting one case in which NCA personnel were unaware that he was the attorney of record, despite the inclusion of that information on the TCR).

[151]*See* Interview Nos. 9 & 18.

[152]Other whistleblowers report similar experiences. *See, e.g.*, Letter from Anonymous-64 to the Sec. & Exch. Comm'n (Aug. 21, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4242707-173046.pdf.

[153]*See* 17 C.F.R. § 240.21F-10 (describing procedures to claim an award and imposing numerous deadlines on the whistleblower, but not on the SEC). One participant shared that in his experience, cases typically take two to four years to complete, and that awardees typically receive payment one to two years after the final determination. *See* Interview No. 7; *accord* Interview No. 18. Several participants find these delays frustrating and inexplicable. *See, e.g.*, Interview No. 15.

[154]*See* Interview No. 27. Such delays are effectively punitive. *See* Interview No. 10.

[155]*See, e.g.*, Kokesh v. SEC, 137 S. Ct. 1635, 1638 (2017).

[156]*See* Interview No. 1.

[157]*See* 17 C.F.R. § 240.21F-10(a).

unreasonably short,[158] which serves to heighten the stress on whistleblowers who must monitor NCA announcements.[159] These timing problems disincentivize prospective whistleblowers[160] and allow frauds to continue unabated.[161]

A few additional process-based problems are noteworthy—namely, the SEC's forms and the uncertain nature of preliminary award determinations. Some participants expressed that the SEC's forms are not user-friendly and that the SEC should attempt to streamline and ease the means by which whistleblowers convey their information.[162] In addition, a preliminary award determination is speculative because it is subject to Commission approval and to challenges by other claimants.[163] And because there is no disincentive for a whistleblower who receives less than 30% to ask for reconsideration, the process is often further drawn out.[164] Time limits could be put in place for the SEC to make award determinations.[165]

On a final note, the ratio of tips to awards in the WBP is extremely large.[166] Although the total volume of tips is robust, the percentage of tips resulting in awards is minuscule (under 1%).[167] And despite the well-publicized largest awards, many WBP awards are small compared with the salaries that whistleblowers could command over their careers[168]—a further basis for prospective whistleblowers to question whether a report to the SEC is worthwhile.

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[158]*See* Interview Nos. 3 & 6.

[159]*See* Interview No. 6. Some firms have one or more staff dedicated to monitoring NCA postings to ensure that no new announcement is missed. *Id*.

[160]*See, e.g.*, Interview Nos. 9 & 18. The SEC's understaffing, coordination among claimants, document redaction, and the appeals period all slow the WBP process at the award stage. Interview No. 19.

[161]*See* Interview Nos. 1 & 19.

[162]*See* Interview Nos. 16 & 26.

[163]*See* Interview No. 10. *See* 17 C.F.R. § 240.21F-10(e)–(h).

[164]*See* Interview No. 10.

[165]*Id*.; *see also supra* note 32 and accompanying text (noting that pending legislation would create time limits).

[166]Baer, *supra* note 59, at 2217.

[167]*Id*.

[168]*See, e.g.*, Interview No. 9.

In sum, many circumstances surrounding the WBP are discouraging to whistleblowers, such that the "headwinds against reporting as a whistleblower are still high."[169] Some clients ultimately leave their jobs rather than grapple with the hardships of whistleblowing.[170] One participant related that many clients have explored the possibility of reporting before walking away because the perceived risks were too high.[171] For those clients, negative factors include frustration with the lengthy time frame of the process, the remote chance of winning an award, the "black box problem," and fear of retaliation and blacklisting.[172] Ultimately, the perceived effectiveness of the WBP will be undermined if the foregoing issues go unaddressed.[173] The positive publicity of large payouts will be attenuated as the public gains a better grasp of the context within which those payouts have occurred—namely, that fewer than 1% of tips receive bounty,[174] and the fact that employees must weigh the very real and probable personal costs of whistleblowing against potential benefits that are, at best, quite speculative.

These same factors can also disincentivize talented counsel from taking Dodd-Frank whistleblower cases. One participant observed that he knows a number of strong FCA attorneys who decline Dodd-Frank whistleblower cases, particularly because of the lack of communication

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[169]Interview No. 11. *But see* Interview No. 19 (attributing dissatisfaction with the WBP process to whistleblowers' ignorance of the SEC and their own expectations). While most participants did not share this view, several agreed that the SEC should provide a straightforward description of the WBP process and the requirements for securing an award. *See* Interview Nos. 6 & 26.

[170]*See, e.g.*, Interview Nos. 1 & 17. The psychological dimensions of whistleblowing have been highlighted by the recent pandemic: the SEC has seen a spike in tips, attributed to workers' sense of privacy and reduced fear of retaliation while working remotely. Mengqi Sun, *Tips to SEC Surge as Working from Home Emboldens Whistleblowers*, WALL ST. J. (June 1, 2020), https://www.wsj.com/articles/tips-to-sec-surge-as-working-from-home-emboldens-whistleblowers-11591003800.

[171]*See* Interview Nos. 2, 5, & 14. Accounts like these suggest that securities fraud is underreported.

[172]Interview Nos. 2 & 7.

[173]*See, e.g.*, Dave Ebersole, Note, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 ENTREPRENEURIAL BUS. L.J. 123, 148 (2011); Hargrove & Raiborn, *supra* note 57, at 315.

[174]*See supra* note 167.

between the SEC and counsel.[175] Other participants report that their firms have become weary of moving forward with WBP cases, not because of the difficulties involved in proving securities fraud, but rather because of the process difficulties such as the lack of transparency and total reliance on the SEC.[176] In practical terms, these additional difficulties—which tend not to characterize the FCA process—heighten the risks for Dodd-Frank whistleblowers.[177]

Unfortunately, the recent SEC rule changes serve only to heighten these risks, as we discuss in the next section.

II. The SEC's Rule Changes: Problematic and Incomplete

The SEC proposed several significant changes to the administrative rules governing the WBP in 2018. It then voted to finalize most of its proposed changes in September 2020, and its final rules were published in the *Federal Register* in November 2020.[178] These recent changes afford an ideal opportunity to consider the ways in which the WBP may be improved. For several reasons, the SEC's rule changes play a significant role in this question. First, if the SEC's adopted changes are indeed the choicest means by which to bolster securities whistleblowing, then no additional investigation beyond the new rules would be necessary at this time. Second, the SEC manages the WBP and consequently brings a valuable perspective to this subject. And third, the SEC's rule changes are instructive in what they do *not* reflect: the perspectives of whistleblowers and their counsel as gleaned from an open-ended, systematic course of inquiry.[179] The public comment process was generally limited

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[175]*See* Interview No. 16. In some cases, SEC attorneys have shared information "courtesies," whereas other offices are "black boxes." *Id*.

[176]*See, e.g.*, Interview No. 4.

[177]*See, e.g.*, Interview No. 5.

[178]Whistleblower Program Rules, 85 Fed. Reg. 70,898 (Nov. 5, 2020) [hereinafter Final Rules]. The rules as originally proposed are also relevant to this discussion. *See* Proposed Whistleblower Program Rules, 83 Fed. Reg. 34,702 (July 20, 2018) [hereinafter Proposed Rules].

[179]*See supra* Part I.C (discussing the WBP's shortcomings from the perspective of this study's participants). The National Whistleblower Center provided form letters for

to the particulars of the SEC's proposal. While this is a natural focus for any dialogue concerning an administrative rule change, the public comment process is not designed to elicit creative thinking beyond the parameters defined by the agency.[180]

Some of the new rules seem likely to encourage and facilitate whistleblowing—such as the clarification that deferred prosecution agreements and nonprosecution agreements will be counted as covered actions for most purposes by assuring prospective whistleblowers that such scenarios "count" for purposes of the award program.[181] Other changes—such as the summary disposition mechanism[182]—appear to be consistent with Congress's goals but must still be implemented in a sound manner. Still other changes—certain technical revisions, for instance[183]—will likely have a negligible impact on whistleblowers. While acknowledging the foregoing aspects of the SEC's changes, this section analyzes three developments that will discourage whistleblowers.[184]

A. Multiple-Recovery Rule

The first misguided SEC change forecloses a securities whistleblower from recovering an award under both the WBP and a second award program.[185] Such a double recovery was permissible under the original definition of "related action."[186] The Dodd-Frank Act instructs the SEC to pay awards to whistleblowers who meet the statute's requirements "in

individuals to use during the public comment period, one of which observed that "[t]he SEC proposed these changes with no input from the whistleblower community. . . ." National Whistleblower Center, Letter Type B, https://www.sec.gov/comments/s7-16-18/s71618-typeb.htm.

[180]For this reason, Part III, *infra*, offers additional changes to the WBP.

[181]Final Rules, *supra* note 178, at 70,900–03.

[182]*Id*. at 70,926.

[183]*See, e.g.*, *id*. at 70,927.

[184]Our analysis accounts for the public comments that were made on the SEC's proposal. While we cite to specific comments throughout Part II, the comments in their entirety are available at *Comments on Proposed Rule: Amendments to the Commission's Whistleblower Program Rules*, Sec. & Exch. Comm'n, https://www.sec.gov/comments/s7-16-18/s71618.htm (last visited Mar. 29, 2021).

[185]Final Rules, *supra* note 178, at 70,905–09.

[186]Proposed Rules, *supra* note 178, at 34,709.

any covered judicial or administrative action, or related action. . . . "[187] A "covered judicial or administrative action" is "any judicial or administrative action brought by the Commission under the securities laws that results in monetary sanctions exceeding $1,000,000."[188] Moreover,

> [t]he term "related action" . . . means any judicial or administrative action brought by [the Attorney General, an appropriate regulatory authority, a self-regulatory organization, or a State attorney general criminal investigation] that is based upon the original information provided by a whistleblower . . . that led to the successful enforcement of the Commission action.[189]

However, despite this explicit language, the SEC argued that double recoveries are unnecessary and contrary to Congress's intent, and changed Rule 21F-3(b)(3) to include several new provisions that foreclose the possibility of double recoveries.

The new rule declares that the SEC will deem an action not to count as a related action if, in the SEC's view, some other whistleblower award program "more appropriately applies."[190] Now, such an action will count as a related action only if the SEC determines that the WBP is the more relevant award program,[191] and only then if the whistleblower has not already been granted an award under the other program.[192] The SEC thus redefines "related action" to exclude a certain subset of cases that unambiguously falls within the term's statutory meaning. Moreover, the determination of whether a particular action falls within the new definition will now be made at the subjective discretion of the SEC.[193]

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[187]15 U.S.C.A. § 78u-6(b)(1).

[188]*Id*.

[189]*Id*. § 78u-6(a)(5). The SEC has restated this definition as follows: A related action is a judicial or administrative action that is brought by: (i) The Attorney General of the United States; (ii) An appropriate regulatory authority; (iii) A self-regulatory organization; or (iv) A state attorney general in a criminal case, and is based on the same original information that the whistleblower voluntarily provided to the Commission, and that led the Commission to obtain monetary sanctions totaling more than $1,000,000. 17 C.F.R. § 240.21F-3(b)(1).

[190]Final Rules, *supra* note 178, at 70,937.

[191]*Id*. at 70,943.

[192]*Id*.

[193]*See id*. at 70,937. This mechanism's subjective nature also raises the possibility of political influence being used to reduce a whistleblower award. *See* Letter from Anonymous-135 to

Both aspects of this change—the SEC's redefinition of related action and the purely subjective authority to determine which actions fall within the new definition—are problematic. The SEC does not have the authority to reconceive which actions should count as covered actions since Congress has already made that determination.[194] The principal message in *Digital Realty* is that, where Congress has expressly defined a term statutorily, an agency may not redefine it.[195] Even the SEC acknowledges that "on its face, [the statute] does not exclude from the definition of related actions those . . . that have a less direct or relevant connection to our whistleblower program than another whistleblower scheme."[196] Yet in justifying the new rule, the SEC argues that the statute's language is ambiguous "in the context of the overall statutory scheme."[197] This argument is unavailing, however, since Congress was well aware of the context in which it formulated the Dodd-Frank Act. And despite the SEC's assertion to the contrary,[198] prospective whistleblowers *are* likely to be discouraged from participating in the WBP if they know that they could be disqualified from a WBP award—at the SEC's sole discretion—if they happen to qualify for an award under another whistleblower program in which the probable payout is much lower, or—worse still—if the other program provides for discretionary awards.

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the Sec. & Exch. Comm'n (Oct. 22, 2019), https://www.sec.gov/comments/s7-16-18/s71618-194574.htm.

[194]An agency rule "exceeds its statutory authority if it conflicts with the language of the statute or the statute's legislative intent." 2 Am. Jur. 2d *Administrative Law* § 216 (2020). Hence, "[a]n agency has no authority to promulgate a rule or regulation that is inconsistent or out of harmony with the statute implemented. In other words, a rule cannot contravene the will of the legislature and cannot contradict the enabling statute." *Id*. While "regulations may impose additional or more specific requirements . . . administrative rules may not add to, detract from, or modify the statute which they are intended to implement. Indeed, regulations or rules that limit, or impair, or enlarge the scope of an authorizing statute are invalid or void." *Id*. § 217. This is true not only with respect to the agency's enabling statute, but also for statutes generally. *Id*. § 218.

[195]*See* Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 776–77, 781–82 (2018); *see also* 15 U.S.C.A. § 78u-6(j) (empowering the SEC to issue WBP rules that are "consistent with the purposes of this section").

[196]Proposed Rules, *supra* note 178, at 34,710.

[197]*Id*.

[198]*Id*. at 34,738.

The SEC's new self-appointed discretion represents another major source of uncertainty and risk from the whistleblower's vantage, which is best illustrated by the shortcomings of the whistleblower program that the SEC operated prior to the adoption of the Dodd-Frank Act.[199] Under the prior program—which covered insider trading and where the criteria for judging award applications was overly opaque, and not subject to judicial review—the SEC received "a relatively small number of bounty applications."[200] In fact, between 1989 and 2010, only five people actually received payments totaling a mere $159,537.[201] In contrast, the SEC awarded approximately $525 million between 2012 and September 2020 under the WBP.[202] Similarly, the IRS also drew increased reports after its whistleblower reward program was made nondiscretionary in 2006.[203]

New Rule 21F-3(b)(3)(iii) also forecloses an SEC award when the whistleblower has "already been granted an award by the governmental/SRO entity responsible for administering the other whistleblower award program."[204] This provision is problematic for three reasons. First, it engrafts a restriction on the WBP that Congress neither intended nor provided for in the Dodd-Frank Act. Second, the new rule improperly

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[199]"The Dodd-Frank Act does not sufficiently address the problem of agency discretion generally, or the problem of an agency's discretion to forebear, in particular." Heidi Mandanis Schooner, *Private Enforcement of Systemic Risk Regulation*, 43 Creighton L. Rev. 993, 994 (2010).

[200]U.S. Sec. & Exch. Comm'n, Assessment of the SEC's Bounty Program, Report No. 474, at 4–5 (March 29, 2010), https://www.sec.gov/files/474.pdf.

[201]*Id*. at 5; *see also* Michael Smallberg, *Not Much Bounty for SEC Whistleblower Program*, The Project on Gov't Oversight (POGO) Blog (April 5, 2010), https://pogoblog.typepad.com/pogo/2010/04/if-the-sec-has-a-whistleblower-program-but-nobody-ever-uses-it-does-it-really-exist.html.

[202]*See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Issues Two Whistleblower Awards for High-Quality Information Regarding Overseas Conduct (Sept. 25, 2020), https://www.sec.gov/news/press-release/2020-225.

[203]*See* Theo Nyreröd & Giancarlo Spagnolo, *Myths and Numbers on Whistleblower Rewards* 11 (Stockholm Inst. of Transition Econ., Working Paper No. 44, 2019); *see also* 163 Cong. Rec. S2101 (daily ed. March 29, 2017) (statement of Senator Grassley highlighting the increasing use and effectiveness of the IRS whistleblower program after it became nondiscretionary).

[204]Final Rules, *supra* note 178, at 70,943.

expands the SEC's discretion.[205] Although the SEC exercises discretion in determining an award percentage (subject to certain statutory factors),[206] Congress in fact *requires* the SEC to pay an award once a whistleblower satisfies the statutory and administrative conditions.[207] Moreover, Congress included *both* "judicial or administrative actions" *and* "related actions" within the scope of this mandate. Third, Congress's intent was to provide compelling incentives for securities whistleblowers to expose fraud, and this change will discourage whistleblowers for the reasons discussed above.[208] We argue that a better alternative would establish a rebuttable presumption of a minimum (10%) award for those WBP whistleblowers who have already been awarded a bounty under another program.

In addition, new Rule 21F-3(b)(3) holds that "if the whistleblower was denied an award by another award program, the whistleblower would not be permitted to re-adjudicate any issues before the Commission that the government entity responsible for administering the other whistleblower award program resolved as part of the award denial."[209] This effectively outsources the SEC's mandate to adjudicate the merits of WBP award claims.

The SEC incorrectly labels multiple recoveries as "irrational."[210] However, whistleblowers fortunate enough to qualify for more than one award program can hedge their risks by pursuing multiple award claims in tandem.[211] *This* is the logical reading of the "statutory context:" in the rare cases where a whistleblower's assistance qualifies them for an award

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[205]*See, e.g.*, Proposed Rules, *supra* note 178, at 34,705 (stating that "Section 21F of the Exchange Act *authorizes us* to pay whistleblower awards" rather than stating that the law "*requires us* to pay.") (emphasis added).

[206]*See* 15 U.S.C.A. § 78u-6(c)(1)(A)–(B).

[207]The Dodd-Frank Act *requires* the SEC to pay an award when the conditions have been satisfied. *Id*. § 78u-6(b)(1) (mandating that the SEC "*shall* pay an award . . .") (emphasis added).

[208]*See, e.g.*, Letter from Robert Patten, President and CEO, Taxpayers Against Fraud, to Brent J. Fields, Secretary, Sec. & Exch. Comm'n (Sept. 18, 2018) (arguing that the proposed rule is unnecessary, disincentivizes whistleblowers, and contravenes Congress's intent to reward whistleblowers who aid multiple agencies).

[209]Final Rules, *supra* note 178, at 70,937.

[210]*Id*. at 70,908.

[211]*See, e.g.*, Letter from Americans for Financial Reform Education Fund to Secretary, Sec. & Exch. Comm'n (Sept. 18, 2018) (arguing that Congress did not intend to bar double recoveries and that the SEC has offered no logic for the new rule); *accord* Letter from

under more than one program, the whistleblower may adopt a strategy of risk mitigation by pursuing both.[212] As Aaron Greenspan aptly put it, "fraudulent activity rarely respects the boundaries of statutory slicing and dicing."[213]

In sum, proposed Rule 21F-3(b)(3) exceeds the SEC's legitimate rulemaking power, and double recoveries are not contrary to Congress's intent. The negative effects of the SEC's proposed solution to the "problem" of double recoveries greatly outweighs any benefits it might produce. The rule should be repealed.

B. Award Adjustments

Among the SEC's proposed rules was a provision that would have authorized the Commission to adjust an award percentage downward—"so that it would yield a payout . . . that does not exceed [what] is reasonably necessary to reward the whistleblower and to incentivize other similarly situated whistleblowers"—when the collected monetary sanctions in the case might reach $100 million or more.[214] This provision was not adopted in the SEC's final rules of November 2020. Nevertheless, the SEC's framing of the proposal and accompanying discussion insinuates that it might *informally* apply this standard.

New SEC rules sometimes codify practices that are already in place;[215] thus, the SEC may already be applying the practice of downward award adjustments even though it declined to adopt the proposed rule. Furthermore, the SEC defended the reasoning of its proposal in the final rules, even as it declined to adopt it.[216] A related proposal, which authorizes the SEC to consider awards in terms of absolute dollar figures and

William A. Jacobson and Basem Besada, Cornell Law School, to Brent Fields, Secretary, Sec. & Exch. Comm'n (Sept. 17, 2018); Patten, *supra* note 208.

[212]Congress can always amend the law if it determines that this form of risk mitigation is undesirable.

[213]Letter from Aaron Greenspan, President, Think Computer Foundation, to the Sec. & Exch. Comm'n (July 17, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4058984-169087.pdf (offering, inter alia, an elegant and concise showing that public policy should welcome whistleblowers whose information enables recoveries across multiple agencies).

[214]Proposed Rules, *supra* note 178, at 34,704.

[215]*See, e.g.*, Final Rules, *supra* note 178, at 70,931.

[216]*See id*. at 70,906, 70,908.

not simply as percentages, was adopted in the final rules.[217] And the SEC intimated that it might informally apply the standard, concluding that "it is not necessary to adopt the formalized mechanism for the Commission to exercise its discretion to apply the Award Factors and set Award Amounts"[218] since the proposal would merely have "formalized the exercise of the Commission's discretion in setting Award Amounts"[219]—discretion that the SEC continues to wield whether or not a formal mechanism is in place to guide it. Together, these factors leave the distinct impression that while the SEC declined formally to adopt a presumptive decrease in large awards, it may nevertheless apply such a practice informally. Doing so would be objectionable for a number of reasons.

The SEC's chief justification for its proposal—that whistleblowers are not incentivized beyond awards of a certain size—is unpersuasive. If there is a point at which the enlargement of awards does not correspondingly enhance a whistleblower's incentives, one wonders why the SEC itself has so intensively publicized the WBP's largest awards and aggregate award figures.[220] To the extent that such a cutoff for incentives exists, it would benefit public policy for the SEC to establish this dollar figure—formulaically or in absolute terms—through reliable scientific means. Moreover, the SEC's argument does not account for the fact that whistleblowers weigh the benefits of an award against the probability of actually obtaining it, while also weighing the likely size of the award against the whistleblower's lifetime earning potential (i.e., the possibility of never again working in that industry). Additionally, the SEC is supposed to consider the deterrent effect of an award when calculating a

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[217]*Id*. at 70,909–10.

[218]*Id*. at 70,913–14.

[219]*Id*. at 70,912.

[220]For instance, the SEC's proposal recited the aggregate WBP figures concerning financial remedies, disgorgement, and whistleblower awards. *See id*. at 34,703. As expected, the largest awards also attract the most media attention. *See* Letter from Stephen M. Kohn, Exec. Dir., National Whistleblower Center, to Jay Clayton, Chairman, Sec. & Exch. Comm'n (Sept. 18, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4371152-175237.pdf (showing that larger awards attract greater coverage). For example, see Jordan Valinsky, *A Whistleblower Just Took Home $50 Million—The Biggest Award the SEC Has Ever Paid*, CNN (June 5, 2020), https://www.cnn.com/2020/06/05/investing/sec-whistleblower-award/index.html.

percentage, which would generally counsel against reducing awards—and yet the SEC did not acknowledge how a consistent trimming of large awards would undercut the WBP's deterrent effect.[221]

Other difficulties would persist in this standard's informal application.[222] The SEC characterized the proposed rule in terms of a "discretionary mechanism," "common-sense adjustments," "extraordinarily large awards," award sizes "appropriate to achieve the goals and interests of the program," and "good public policy."[223] But who is to say what a "common-sense adjustment" is, or when an award becomes "extraordinarily large," or by what means we are to measure awards that are "appropriate" to the goals of the WBP? The SEC did not define what dollar figure is "reasonably necessary" to incentivize whistleblowers, and indeed concedes that such a question eludes a categorical definition; these determinations would instead have to be "based on the unique facts and circumstances of each award matter."[224] But how, then, would the SEC propose to quantify and then weigh the value of a whistleblower's career relative to the dollar amount of an award, or relative to other whistleblowers?[225] The downward adjustment mechanism is irreconcilable with Congress's intent to provide compelling incentives in favor of reporting.[226] This standard,

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[221]*See* Letter from Stephen M. Kohn, Michael D. Kohn, & David K. Colapinto, Kohn, Kohn, and Colapinto, LLP, to Jay Clayton, Chairman, Sec. & Exch. Comm'n, and Vanessa Countryman, Secretary, Sec. & Exch. Comm'n (Jan. 16, 2020), https://www.sec.gov/comments/s7-16-18/s71618-6660478-203859.pdf (noting, inter alia, the centrality of deterrence throughout the FCA's legislative history, and that large awards carry more potent deterrent effects); *accord* Letter from Stephen M. Kohn to Jay Clayton, *supra* note 220 (noting that high rewards encourage robust compliance programs).

[222]Enron whistleblower Sherron Watkins commented that proposed Rule 21F-6(d) "would gut the [WBP]." Letter from Sherron Watkins to the Chairman and Commissioners, Sec. & Exch. Comm'n (Aug. 15, 2019), https://www.sec.gov/comments/s7-16-18/s71618-190087.htm.

[223]Proposed Rules, *supra* note 178, at 34,713.

[224]*Id*. at 34,715.

[225]In addition, the federal and state governments already take back considerable proportions of large whistleblower awards as taxable events. *See* Letter from Scott Latham, CPA, to the Sec. & Exch. Comm'n (Oct. 25, 2019), https://www.sec.gov/comments/s7-16-18/s71618-6353208-195589.pdf.

[226]*See generally, e.g*., Letter from Charles E. Grassley, United States Senate, to Jay Clayton, Chairman, Sec. & Exch. Comm'n (Sept. 18, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4373264-175545.pdf.

informally applied, would introduce another layer of complexity and uncertainty that can only heighten a prospective whistleblower's personal risks.[227] This conflicts with the clear legislative intent to incentivize whistleblowing to the greatest extent possible.[228]

Under the related, modified rule 21F-6,[229] the SEC would deviate from the statutory mandate of determining awards as percentages[230] without reference to the balance of the Investor Protection Fund (IPF)[231] to instead apply the award factors in dollar terms.[232] Congress did not invite the SEC to elevate its own impressions concerning the "appropriateness" of dollar figures over the statutory factors that are to guide its percentage-based award determinations. The SEC asserted that the proposed rule was needed because the agency has a "responsibility to investors and the general public to ensure that the [IPF] . . . is used efficiently and effectively to achieve the program's objectives."[233] However, Congress expressly directed the SEC not to consider the balance of the IPF in determining awards.[234] The SEC asserted that the proposed rule would not have authorized it to consider the IPF balance, but would instead merely have authorized it to consider whether a potential award exceeds an amount that is "reasonably necessary" to achieve the program's goals.[235] This is a matter of semantics, however. Whether the SEC would reduce awards by either direct or circuitous reference to the IPF,

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[227]*See, e.g.*, Letter from Anat R. Admati & Graham S. Steele, Stanford University Graduate School of Business, to Secretary, Sec. & Exch. Comm'n (Sept. 18, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4373271-175547.pdf (arguing that this rule would introduce uncertainty and thereby disincentivize some potential whistleblowers).

[228]*See* Letter from John Kostyack, Exec. Dir., National Whistleblower Center, to Secretary, Sec. & Exch. Comm'n (Oct. 18, 2019), https://www.sec.gov/comments/s7-16-18/s71618-6340885-195292.pdf.

[229]*See* Final Rules, *supra* note 178, at 70,910.

[230]*See* 15 U.S.C.A. § 78u-6(b)(1).

[231]*See id*. § 78u-6(c)(1)(B)(ii).

[232]Final Rules, *supra* note 178, at 70,909–10.

[233]Proposed Rules, *supra* note 178, at 34,715.

[234]15 U.S.C.A. § 78u-6(c)(1)(B)(ii).

[235]*See* Proposed Rules, *supra* note 178, at 34,716.

Congress clearly intended not to impose this sort of upper-bound constraint on meritorious whistleblowers.

The SEC was adamant that this proposed rule would not be a cap on awards,[236] but whether it technically qualifies as a cap misses the point. Invariably, any reduction mechanism would further convolute the already complex calculus a whistleblower must work through when deciding whether or not to report. Observers should watch keenly whether and to what extent the SEC routinely makes awards on the lower end of the statutorily permissible range in cases of recoveries above $100 million. If it appears that the SEC is indeed applying this change in practice, Congress should clarify that the SEC may not apply downward adjustments on account of the potential size of awards.

C. Interpretive Guidance on "Independent Analysis"

The third misguided SEC change is the agency's interpretive guidance, which ostensibly clarifies who will qualify for an award when the whistleblower produces an analysis of publicly available information (as opposed to sharing nonpublic information).[237] Original information "is derived from *either* a whistleblower's 'independent knowledge' or the whistleblower's independent 'analysis.'"[238] The SEC's new interpretive guidance addresses the second scenario, in which a whistleblower provides an independent analysis of publicly available information.[239] The SEC proposes that "[i]n order to qualify as 'independent analysis,' a whistleblower's submission must provide evaluation, assessment, or insight beyond what would be reasonably apparent to the Commission from publicly available information."[240] In practice, this means that "the Commission would determine based on its own review of the relevant facts . . . whether the violations could have been inferred from the facts available in public sources."[241]

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[236]*See* Proposed Rules, *supra* note 178, at 34,714; Final Rules, *supra* note 178, at 70,914.

[237]Final Rules, *supra* note 178, at 70,927–31.

[238]*Id*. at 70,927; *see also* 15 U.S.C.A. § 78u-6(a)(3)(A).

[239]Final Rules, *supra* note 178, at 70,927.

[240]*Id*. at 70,927–28.

[241]*Id*. at 70,928.

Much of the SEC's discussion surrounding the guidance was sound. The WBP rules explain that a whistleblower's analysis can involve information that is publicly available, so long as it reveals information that is generally not publicly known.[242] Thus, in order for a whistleblower's submission to be considered an analysis, it "must include some insight—beyond the existence of the publicly available information—that is revelatory[.]"[243] In other words, the whistleblower's analysis should open up to view a possible securities violation for the SEC.[244]

These are sound principles that reward those who place actionable information in the hands of the SEC. Like the revelation of facts once buried in the opacity of an organization, a whistleblower's analysis also generates new knowledge. Consistent with this, "[t]he Commission's definitional rules . . . effectively preclude awards merely for the submission of publicly available information."[245] Whistleblowers make a "revelatory" contribution by revealing facts previously unknowable to the SEC, or by performing an analysis on facts that (in principle) were already within the SEC's grasp by virtue of their public availability. In contrast, a whistleblower does not make a sufficient contribution merely by pointing to the existence of facts in the public domain. Ultimately, these contributions reinforce the SEC's ability to detect fraud, enforce the law efficiently, and recover funds for harmed investors.[246]

The problem with this interpretive guidance arose when the SEC turned to the case law interpreting the FCA's *qui tam* provision to substantiate it.[247] Without explanation, the SEC declared that "case law

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[242]17 C.F.R. § 240.21F-4(b)(3).

[243]Proposed Rules, *supra* note 178, at 34,729.

[244]*Id*.

[245]*Id*.

[246]*See, e.g.*, Symposium, *What Would We Do Without Them: Whistleblowers in the Era of Sarbanes-Oxley and Dodd-Frank*, 23 Fordham J. Corp. & Fin. L. 379, 386–88 (2018) (comments of OWB chief Jane Norberg) (observing that whistleblowers have created value for the SEC and the public in these ways).

[247]This article also looks to the FCA for one of its proposed WBP reforms (*see infra* Part III. A)—but in doing so, also notes the ways in which the FCA is an imperfect model for Dodd-Frank, and considers the ways in which an FCA-style program must be modified to better fit the securities context. *See infra* Part III. For an excellent discussion on the problems with applying the FCA *qui tam* case law to Dodd-Frank, see Letter from Anonymous-92 to the

interpreting the False Claims Act's public disclosure bar generally suggests a helpful framework for distinguishing tips in which the whistleblower's 'independent analysis' of publicly available information reveals important information about possible violations beyond the public sources themselves."[248] Federal courts have held that a fraud is publicly disclosed (thus barring an FCA *qui tam* claim)[249] "when essential facts that are sufficient to give rise to an inference of fraud are in the public domain."[250] Importing this FCA standard into the WBP, the interpretive guidance means that a whistleblower's assessment "of publicly available information does not constitute 'analysis' if the facts disclosed . . . are sufficient to raise an inference of the possible violations alleged in the whistleblower's tip."[251] The SEC claims that when violations can be inferred from the face of public materials, the whistleblower cannot "reveal" the violations.[252] As a result, the SEC intends to consider whether public information "was sufficient to give rise to an inference of the violations . . . or whether the whistleblower's examination and evaluation of public source material revealed new, significant, and independent information that 'bridged the gap' for the staff in demonstrating the possibility of violations."[253]

The SEC moves beyond an interpretation of its former standard to create a new one. Indeed, the new standard—whether violations "could have been inferred" from public facts—divorces a whistleblower's analysis from the goals of the WBP. Of course, the WBP's ultimate goals are to prevent securities fraud, and, failing that, to punish securities fraud while redressing its victims. *Any* insight beyond simply noticing the existence of

Sec. & Exch. Comm'n (July 18, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4071218-169510.pdf.

[248]Proposed Rules, *supra* note 178, at 34,730.

[249]*See* 31 U.S.C.A. § 3730(e)(4)(A) (2020) (detailing the FCA *qui tam* public disclosure bar).

[250]Proposed Rules, *supra* note 178, at 34,730 (citing United States ex rel. Oliver v. Philip Morris USA Inc., 826 F.3d 466, 471–73 (D.C. Cir. 2016), reh'g en banc denied, 2016 U.S. App. Lexis 17,161 (D.C. Cir. 2016); Amphastar Pharms. Inc. v. Aventis Pharma SA, 856 F.3d 696, 703 (9th Cir. 2017); Cause of Action v. Chicago Transit Auth., 815 F.3d 267, 278 (7th Cir. 2016), cert. denied, 137 S. Ct. 205 (2016)).

[251]*Id*.

[252]*Id*.

[253]*Id*. at 34,731.

publicly available facts should be deemed an analysis for purposes of the WBP.[254] Whether a violation "could have been" inferred from public sources is irrelevant. "Every securities fraud is obvious when looking in the rear-view mirror. In real-time, however, the schemes are always opaque and seem plausible on the surface."[255] Where an analysis connects the dots by bringing together disparate facts, the whistleblower has provided a valuable contribution to an enforcement action.[256] While it is reasonable to construe an "analysis" as more than simply pointing out the existence of public facts, the SEC's interpretive guidance establishes a standard whereby the significance of a whistleblower's analysis can be discounted in the award phase, despite the agency's reliance in bringing a successful action.[257] This new standard is flawed for several reasons.

First, Congress recognized the SEC's inevitable need for whistleblowers' assistance in acquiring securities fraud intelligence.[258] Accordingly, an

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[254]*Cf*. Letter from Anonymous-122 to the Sec. & Exch. Comm'n (Oct. 29, 2018), https://www.sec.gov/comments/s7-16-18/s71618-176282.htm (urging that "tips utilizing publicly available information should be encouraged, as long as the tips point to a conclusion that is 'not generally known,'" and observing that, under the proposed rule, the SEC could retroactively declare information "readily apparent" even if the SEC had not actually been aware of it).

[255]Letter from Harry Markopolos, Markopolos Research LLC, to the Sec. & Exch. Comm'n (Sept. 14, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4351184-173304.pdf.

[256]Analysis whistleblowers undeniably add value, often in unique ways. *See, e.g.*, *id*.

[257]The SEC added an additional provision to the final rules such that "in the exercise of *our discretion* the Commission *may* determine that a whistleblower's [submission] . . . reveals information that is 'not generally known or available to the public'—and therefore is 'analysis' within the meaning of Rule 21F-4(b)(3)—where" certain conditions are met. Final Rules, *supra* note 178, at 70,929 (emphasis added). Those conditions include the whistleblower's use of multiple sources "not readily identified and accessed by a member of the public without specialized knowledge, unusual effort, or substantial cost," and where the inference of fraud arises from the sources together and not from any one of them. *Id*. This additional provision does not address the problems with the new guidance, however. The subjective nature of the SEC's guidance is unresolved. The Commission makes clear that its discretion will still be the guiding force, and that the SEC "may" (but then again, apparently, may not) determine that a whistleblower has made an analysis if the whistleblower meets the additional provision. The questions of how the SEC will measure whether one's sources are "not readily identified and accessed," and whether the whistleblower utilized "specialized knowledge, unusual effort, or substantial cost," remain unclear. Indeed, the SEC concedes that "there is no bright-line test." *Id*. at 70,930.

[258]*See, e.g.*, Letter from Dennis M. Kelleher, President and CEO, and Lev Bagramian, Senior Securities Policy Advisor, Better Markets, Inc., to Brent J. Fields, Secretary, Sec. &

expansive view of "analysis" is appropriate.[259] The new guidance takes an unduly restrictive view: a whistleblower could produce an analysis from public information and thereby prompt the SEC to act, only to be denied an award due to the agency's later determination that the analysis was not significant enough.[260] By introducing the possibility that a whistleblower's analysis may be deemed insignificant in the SEC's sole, retroactive discretion, the guidance injects another layer of uncertainty and complexity into the WBP that will serve only to discourage analysis by whistleblowers.[261] If an analysis is significant enough to motivate or be included in an SEC action, then the analysis should be construed per se to have "led to the successful enforcement."[262]

Second, the SEC already appears to lack the resources needed to fully scrutinize the tips it receives,[263] much less to monitor the universe of publicly available information. Information does not become valuable in combating securities fraud simply because it is in the public domain. For information to be valuable, the SEC must first become aware of it and realize its legal significance within the context of some future action. The

Exch. Comm'n (Sept. 18, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4370862-175227.pdf (providing an enlightening discussion on this and related points).

[259]For this reason, among others, the SEC's use of FCA standards as a guide for Dodd-Frank was inadvisable. The FCA limits whistleblowers to those with "direct and independent knowledge," such that an FCA whistleblower cannot recover an award on the basis of an analysis alone. Hartmann, *supra* note 35, at 1301.

[260]One forensic accountant noted that they "often use independent analysis to find companies potentially engaging in financial statement irregularities," and that private companies have offered considerable remuneration for first-viewing rights to the accountant's reports. Letter from Anonymous-136 to the Sec. & Exch. Comm'n (Nov. 18, 2019), https://www.sec.gov/comments/s7-16-18/s71618-6437607-198667.htm. The SEC's new rules, however, would deprive whistleblowers of what these private companies offer: "transparency about the process, assurance of a fixed percentage agreed upfront, a long-term agreement not subject to change at whim, and payment for actionable ideas within months." *Id*. The accountant suggested that other independent analysis whistleblowers were likewise seeking to monetize their insights in response to the proposed rules. *See id*.

[261]By analogy, see Senator Grassley's criticism of the IRS in relation to similar issues, United States Senate, Charles E. Grassley, Letter to U.S. Department of Treasury and IRS (Jan. 28, 2013), https://www.grassley.senate.gov/sites/default/files/about/upload/WB-Regs.pdf (criticizing proposals to give the IRS discretion to determine whether it may initiate action on its own).

[262]15 U.S.C.A. § 78u-6(b)(1).

[263]*See supra* Part I.C.

question therefore is not whether the SEC *could have* inferred fraud from the public information reported by the whistleblower. Congress did not task the SEC to stand as a hypothetical prosecutor of securities fraud; rather, the SEC is to serve as an *actual* prosecutor of securities fraud.[264]

Finally, a whistleblower provides an actionable analysis even when they move only slightly beyond pointing to the existence of publicly available facts. Making *connections* between facts that are scattered across the landscape of public information is itself a valuable whistleblower activity. So much information now exists in the public domain that individual facts (or their legal significance) can be hidden in plain view.[265] Any connection that renders such facts useful to the SEC is an original analysis. While courts are currently struggling to decide whether outside analysts should qualify as whistleblowers in the FCA context,[266] there should be no question in the Dodd-Frank context: the statute expressly includes those who provide "analysis" within its meaning.[267]

For all of these reasons, the SEC's interpretive guidance should be repealed. As former OWB chief Sean McKessy points out, the guidance "does not clarify anything and will likely cause valuable outside analysts . . . to abandon the [WBP] entirely."[268] The new standard will render it "factually and operationally impossible" to contribute original information on the basis of an independent analysis.[269]

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[264]*See, e.g.*, Letter from Jane Turner & Frederic Whitehurst, National Whistleblower Center, to Jay Clayton, Chairman, Sec. & Exch. Comm'n (Sept. 17, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4350890-173302.pdf ("What is important to investors is not what the Commission 'could' have done. It is what the Commission *did* do.").

[265]*See id.* ("The universe of publicly available information related to the misconduct of publicly traded companies is immense, and . . . Commission staff cannot not properly evaluate this information in the vast number of circumstances.").

[266]*See, e.g.*, Gordon Schnell & Max Voldman, *Data Analysts: A New Kind of Whistleblower to 'Catch a Rogue'?*, STATNEWS (March 16, 2020), https://www.statnews.com/2020/03/16/whistleblower-data-analyst-catch-rogue/ (discussing analysis whistleblowers and two pending cases examining whether outside analysts can be deemed "whistleblowers" under the FCA).

[267]*See* 15 U.S.C.A. § 78u-6(a)(3)(A) (2020) (defining "original information" to include "the independent knowledge *or analysis* of a whistleblower.") (emphasis added).

[268]Letter from Sean McKessy, Partner, Phillips & Cohen, to Vanessa Countryman, Secretary, Sec. & Exch. Comm'n (Oct. 25, 2019), https://www.sec.gov/comments/s7-16-18/s71618-6347981-195375.pdf.

[269]*Id.*

Assuming *arguendo* that the SEC's remaining changes are desirable, those changes are nevertheless incomplete because they were not derived from a systematic study of the experiences of whistleblowers and their counsel. The SEC's proposals were conceived solely on the basis of its own experiences and, as noted above, the public comment process was not geared toward a systematic revelation of whistleblowers' perspectives. Part III fills this gap by proposing additional changes to the WBP derived from our interviews with whistleblowers and their counsel.

III. Strengthening the Fight Against Securities Fraud: Improving the WBP for Whistleblowers

Part I documented numerous problems that whistleblowers and their counsel have experienced in the WBP.[270] These include a lack of transparency and communication from the SEC (the "black box problem"), the fact that the SEC seldom involves whistleblowers in case development, the SEC's lack of capacity to fully scrutinize the tips it receives (and the resulting unwritten standard whereby whistleblowers must largely develop a case of securities fraud on their own in order for their tips to stand out), significant timing problems, issues surrounding how whistleblowers are expected to communicate with the SEC (including difficult forms), and an extremely large tips-to-awards ratio. These facts support the view that although the WBP has been effective at generating tips, the existing system has some significant inefficiencies and barriers for whistleblowers that jeopardize its long-term viability.[271]

Part III argues that Congress and the SEC should adopt certain reforms aimed at removing these hurdles for whistleblowers. These proposals are grounded in the qualitative data generated through our interviews with whistleblower counsel and others.[272] Part III.A endorses the

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[270] *See supra* Part I (summarizing these problems).

[271] Moral intensity is one of the main factors affecting external whistleblowing intention. As such, the "SEC should allocate enough resources to the claims review process so that whistleblowers are appropriately rewarded," since, in the absence of belief in the SEC's legitimacy and reliability, the WBP is unlikely to work. Iwasaki, *supra* note 22, at 618.

[272] *See supra* Part I.C (discussing this study's methodology).

single most impactful reform that Congress could adopt—the creation of a *qui tam* mechanism for securities whistleblowers. This section contends, however, that while the FCA's example is a good starting point for Dodd-Frank, the FCA model must be tailored in certain respects to make *qui tam* a good fit for the securities context. Part III.B then considers other reforms that will require congressional action. Finally, Part III.C examines certain reforms that the SEC should adopt.

A. An FCA-Style Qui Tam *Mechanism Tailored to the Securities Context*

A *qui tam* mechanism would enhance the WBP, and the FCA's framework is a good model from which to work. However, the securities context is distinguishable in certain key respects from the fraud-against-the-government context for which the FCA was designed, and as such, a simple "copy and paste" of *qui tam* language from the FCA would create problems. Below, we take the FCA as a starting point but propose certain modifications to balance the interests of society, the government, whistleblowers, and defendants. These modifications reflect the collective insights of our participants, including both proponents and skeptics of *qui tam*.

Citizen suits—what Professor Bucy calls "private justice"—are used in many legal contexts and are essential in that they supply insider information that helps to combat fraud.[273] Private justice actions are brought not by the direct victims of fraud but instead by plaintiffs whose initiative is helpful to the public.[274] Numerous government agencies have acknowledged the value of such mechanisms.[275] Like most legal devices, private justice mechanisms involve tradeoffs: they can constrain regulators' flexibility in addressing the regulated industry and incentivize plaintiffs to push for liability rather than to exercise discretion.[276] But as Professor Bucy recognizes[277] (and as we argue below), the negative tradeoffs of

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[273] *See generally* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 5–8 (2002). These mechanisms are often grounded in public choice theory aimed at supplementing resource-constrained government agencies. *Id*. at 32–33.

[274] *Id*. at 13.

[275] *Id*. at 41.

[276] *Id*. at 64–67.

[277] *Id*. at 68–78.

private justice mechanisms can be curtailed through sound institutional design.[278]

There "is a long history in the Anglo-Saxon legal tradition of allowing private citizens to assist the state in certain enforcement matters."[279] *Qui tam* in particular originated in the thirteenth century.[280] The FCA provides a *qui tam* mechanism that, by all accounts, has been highly effective in combating fraud against the government.[281] Under the FCA, any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" to the U.S. government, or who engages in certain other related activities, is made liable to the government for a civil penalty of $5000 to $10,000 plus three times the government's actual damages on each fraudulent claim.[282] The FCA's *qui tam* provision allows a private citizen (the relator) to bring a lawsuit on behalf of the federal government.[283] The government has the option of

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[278]*Id*. at 76–78 (offering reasons why *qui tam* is desirable in the context of national financial markets).

[279]Christina Parajon Skinner, *Whistleblowers and Financial Innovation*, 94 N.C. L. Rev. 861, 898 (2016); *see also The History and Development of* Qui Tam, 1972 Wash. Uni. L. Q. 81, 83–101 (1972) (discussing *qui tam* provisions in Western law). The first national whistleblower provision was enacted by the Continental Congress in 1778. *See* Amy Deen Westbrook, *Cash for Your Conscience: Do Whistleblower Incentives Improve Enforcement of the Foreign Corrupt Practices Act?*, 75 Wash. & Lee L. Rev. 1097, 1117–18 (2018); *see also* James B. Helmer, Jr., *How Great Is Thy Bounty: Relator's Share Calculations Pursuant to the False Claims Act*, 68 U. Cin. L. Rev. 737, 738 n. 7 (2000) (discussing earliest American *qui tam* provisions).

[280]Skinner, *supra* note 279, at 897; *see also* Charles Doyle, Cong. Rsch. Serv., R40786, Qui Tam: An Abbreviated Look at the False Claims Act and Related Federal Statutes 1 (2009) (noting that "[q]ui tam comes to us from before the dawn of the common law.").

[281]31 U.S.C.A. § 3730(b)(1) (2020) (authorizing a person to "bring a civil action" for a violation of the FCA "for the person and for the United States Government."). Today, the FCA is "the federal government's most powerful and effective fraud-fighting tool." Hargrove & Raiborn, *supra* note 57, at 301; *see also* 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, 72 (2016) (characterizing the FCA *qui tam* program as "spectacularly successful").

[282]31 U.S.C.A. § 3729.

[283]"*Qui tam* . . . allows private citizens, often referred to as *qui tam* relators, to sue on their own behalf as well as for the government." Valerie R. Park, Note, *The False Claims Act*, Qui Tam *Relators, and the Government: Which Is Real Party to the Action?*, 43 Stan. L. Rev. 1061, 1061 (1991); *see also* Broderick, *supra* note 1, at 949. A relator is a whistleblower insofar as their *qui tam* suit exposes fraud. For the procedural rules surrounding an FCA *qui tam* action, see 31 U.S.C.A. § 3730.

joining the action or allowing the relator to proceed as the sole claimant.[284] In its adoption of the FCA *qui tam* provision, Congress intended for relators to "aggressively 'fish' for evidence of fraud on behalf of the government."[285] Significantly, "[t]he overwhelming majority of FCA recoveries [have] stemmed from actions filed by qui tam relators," as opposed to those initiated by the government.[286]

To maximize the benefits of whistleblowers' assistance in fighting fraud, Congress should add a *qui tam* mechanism to the WBP.[287] This position has been advanced elsewhere,[288] although it is not without controversy.[289] Prior scholars have advocated for a Dodd-Frank *qui tam* provision by emphasizing the similarities between Dodd-Frank and the

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[284]*See* 31 U.S.C.A. § 3730(b)(1) (2020) (setting forth these options and explaining that the government shall "proceed with the action, in which case the action shall be conducted by the Government; or . . . notify the court that it declines to take over the action, in which case the person brining the action shall have the right to conduct the action.").

[285]U.S. ex rel. Fry v. Health Alliance of Greater Cincinnati, 2009 WL 1324164, at *11 (S.D. Ohio 2009).

[286]O'Sullivan, *supra* note 281, at 72.

[287]Many of this study's participants endorsed *qui tam*. Some were categorical, while others preferred certain modifications to an FCA-style model. *See, e.g.*, Interview Nos. 1, 2, 3, 4, 5, 6, 8, 23, 24, & 25.

[288]*See, e.g.*, O'Sullivan, *supra* note 281, at 69 (urging the addition of *qui tam* to the WBP to better promote Foreign Corrupt Practices Act claims); *Mutiny*, *supra* note 35, at 134 (arguing that the "more serious problem with Dodd-Frank is that it does not vest whistleblowers with standing to pursue their claims against fraudsters directly"); Amanda M. Rose, *Better Bounty Hunting: How the SEC's New Whistleblower Program Changes the Securities Fraud Class Action Debate*, 108 Nw. U. L. Rev. 1235, 1290–1300 (2014) (arguing that a *qui tam* provision would prove superior to fraud-on-the-market class actions); Victor A. Razon, Note, *Replacing the SEC's Whistleblower Program: The Efficacy of a* Qui Tam *Framework in Securities Enforcement*, 47 Pub. Cont. L.J. 335, 337 (2018) (arguing that the current WBP should be replaced with an FCA-style *qui tam* program to improve informational quality and discourage regulatory capture); *see also, e.g.*, Bucy, *supra* note 273, at 5 (advocating for *qui tam* in other areas); Nathaniel Garrett, Comment, *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, 767 (2012) (suggesting that the Foreign Corrupt Practices Act should include *qui tam* since the WBP requires whistleblowers to rely on the SEC to bring claims); Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. Rev. 91, 97–98 (2007) [hereinafter *Invigorating Incentives*] (arguing for the addition of *qui tam* to SOX).

[289]*See infra* this section (discussing some participants' hesitation on adding *qui tam*).

FCA.[290] While these works provide a vitally important foundation for *qui tam*, we extend the literature by emphasizing the differences between the two statutes' contexts. This section suggests certain ways by which an FCA-style *qui tam* mechanism could be modified to better fit the securities context and thereby address the concerns of Dodd-Frank *qui tam* skeptics. A *qui tam* mechanism thus modified would address several of the WBP's existing shortcomings,[291] enhance the incentives and experiences of securities whistleblowers, and improve society's fight against securities fraud with minimal tradeoffs.

For example, former SEC commissioner Luis Aguilar agrees that improvements can be made to the Dodd-Frank whistleblower protections. He supports a change to the definition of "whistleblower" to include internal reporters, more transparency from the SEC to the whistleblower about the status of a tip, reasonable time limitations for the SEC to give notice or act on a tip, and the inclusion of a *qui tam* provision. In particular, he believes that—due to various factors, including the uncertainty of future funding appropriated for the SEC, the constant pressures on SEC resources, and the often burdensome workload of the staff dedicated to the SEC's whistleblower program—adding *qui tam* with a provision that whistleblowers be represented by a "properly qualified attorney" or even perhaps a nonattorney who can demonstrate qualifications required by the SEC is a viable approach to increasing actions on SEC violations while at the same time protecting the integrity of SEC investigations and the sensitivity of the market.[292]

Empowering whistleblowers to bring suit would drastically increase the resources at the SEC's disposal.[293] The SEC does not have nearly enough resources to fully scrutinize or act on the tips that it receives.[294]

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[290]*See, e.g.*, *supra* note 288 (citing examples).

[291]*See supra* Part I.

[292]E-mail from Hon. Luis Aguilar to the authors (March 6, 2020) (on file with the authors); *see also* Rose, *supra* note 288, at 1297 (arguing that *qui tam* would ensure that tips neglected or misjudged by the SEC could still be pursued); Mary Kreiner Ramirez, *Whistling Past the Graveyard: Dodd-Frank Whistleblower Programs Dodge Bullets Fighting Financial Crime*, 50 Loy. U. Chi. L.J. 617, 665 (2019) (noting that a *qui tam* mechanism would allow private individuals to take on "high-quality cases").

[293]It is widely accepted that the private bar plays a crucial role in helping to enforce antifraud statutes. *See, e.g.*, Interview No. 18; *see also* Sylvia, *supra* note 118, at § 1:12.

[294]*See supra* Part I.C; *accord* Interview Nos. 6 & 8. *See also* Umang Desai, *Crying Foul: Whistleblower Provisions of the Dodd-Frank Act of 2010*, 43 Loy. U. Chi. L.J. 427, 459–61 (2012)

As such, like other agencies, the SEC likely declines to act on some meritorious tips for reasons other than the merits.[295] Whether the SEC takes the initiative in a given case or allows a whistleblower to do so, a *qui tam* mechanism would foster greater collaboration between the government and whistleblower.[296] In FCA matters, *qui tam* attorneys and the Department of Justice generally have good working relationships.[297] Indeed, private counsel often act as "back offices" for government attorneys who do not have the resources to gather the evidence needed to vigorously pursue claims.[298] Though many observers were skeptical that the enhanced *qui tam* mechanism created by the 1986 FCA amendment would work, today the Department of Justice embraces partnerships with private litigants and their counsel in government fraud cases.[299] We should anticipate the same result in the securities context.

(discussing the resource constraints under which the SEC must operate); Rose, *supra* note 288, at 1295 ("[A]dding a *qui tam* feature . . . would help to sustain the [WBP] even if the SEC [could not effectively address] whistleblower tips.").

[295]*See, e.g.*, Interview Nos. 2 (noting that there are many cases in which the government does not act, and that each agency has a different agenda and that agencies select cases that fit their agendas) & 6 (opining that the SEC cannot bring forward all meritorious cases); *see also* U.S. Sec. & Exch. Comm'n, *Enforcement Manual*, at 26 (Nov. 28, 2017) (setting out a list of factors to consider, including the staff resources available to pursue the investigation). In the FCA context, *see* U.S. Department of Justice, Memorandum from Michael D. Granston, Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (Jan. 10, 2018), https://www.insidethefca.com/wp-content/uploads/sites/300/2018/12/Granston-Memo.pdf (noting that a "decision not to intervene in a particular case may be based on factors other than merit, particularly in light of the government's limited resources").

[296]*See* Rose, *supra* note 288, at 1291 (noting the value that whistleblower counsel bring in terms of tip quality).

[297]*See, e.g.*, Interview No. 1 (stating that the DOJ and private *qui tam* lawyers have good relationships and that private counsel act as "back offices" for U.S. attorneys who are resource-constrained); *accord* Interview No. 13 (stating that other agencies, including the IRS, are more cooperative than the SEC). As with other enforcement areas, the Department of Justice sometimes declines to bring an FCA claim not because of a lack of merit, but rather on account of resources. Interview No. 13; *see also* Memorandum from Michael D. Granston, *supra* note 295. This likely holds true in the Dodd-Frank context as well.

[298]*See* Interview Nos. 1 (stating that the DOJ and private *qui tam* lawyers have good relationships and that private counsel act as "back offices" for U.S. attorneys who are resource-constrained) & 6 (stating that private attorneys can add efficiencies to the system by working on cases for the SEC to bring); *see also* Sylvia, *supra* note 118, at § 1:12.

[299]*See* Interview No. 5; *see also* Edward Baker & Jack Kolar, *How Pennsylvania Can Win the Battle Against COVID-19 Fraud*, Gov't Accountability Proj. Blog (Sept. 11, 2020), https://

A whistleblower's ability to act as a *qui tam* litigant would have far-reaching effects on how the government addresses claims.[300] Apart from the statute of limitations, the SEC is not required to make WBP decisions within particular deadlines.[301] An action-forcing system would generally be positive.[302] One participant in our study remarked that the plaintiff's bar is likely to evaporate in the securities whistleblower area if the SEC does not become considerably faster in addressing whistleblower tips and award claims.[303]

A *qui tam* option would also increase whistleblowers' incentives and psychological investment in the WBP process. Whistleblowers would have "a seat at the table," becoming a copilot in any action in which the SEC joins, and the pilot where the SEC declines to join.[304] By proceeding in close coordination with or independently of the SEC, a *qui tam* whistleblower would no longer be confronted with the complications of the black box that characterize the current WBP.[305] And in light of the FCA's success, the SEC would likely achieve more recoveries with the assistance of *qui tam* WBP litigants.

A *qui tam* mechanism could also enhance Dodd-Frank's deterrent effect. In addition to removing the SEC's resource constraints as a factor

whistleblower.org/blog/how-pennsylvania-can-win-the-battle-against-covid-19-fraud/ (urging Pennsylvania to adopt a *qui tam*–enabled false claims act).

[300]*See* Interview No. 1; *see also* Rose, *supra* note 288, at 1298 (discussing the disciplining influence that a *qui tam* mechanism would exert on the SEC).

[301]However, pending legislation would impose certain deadlines related to whistleblower awards. *See supra* note 32 and accompanying text.

[302]*See, e.g.*, Interview Nos. 5 (recounting that one client waited more than two years for a bounty payment after the SEC had collected funds, and stating that this was unnecessary and unfair), 15 (noting that the SEC needs a time frame for acting), 22 (opining that there should be a time frame to require administrative action in these matters), & 27 (stating that the courts could enforce time limits to enhance the fairness of the process for whistleblowers).

[303]*See* Interview No. 15; *see also* Interview Nos. 4 (stating that their firm had become far more cautious about taking cases due to lack of transparency and total reliance on the SEC) & 5 (stating that they had heard of other firms drawing back from the WBP cases because of risk and the perception that FCA cases are less risky).

[304]*See* Interview Nos. 6, 12, & 24.

[305]*See* Interview No. 6.

in the fraudster's mind, the WBP could utilize corporate integrity agreements to discourage recidivism.[306]

As noted above, however, the notion of a securities *qui tam* provision raised concerns among some of our participants.[307] These concerns should be taken seriously in any proposal for WBP reform. They can be addressed effectively by modifying an FCA-style *qui tam* mechanism to the particulars of the securities context.

The first source of anxiety about a WBP *qui tam* mechanism concerns information management. The SEC understandably wants to avoid moving the market.[308] An investigation may lead to nothing, but the public revelation of an investigation could do serious harm to the company and investors as well as enable insider trading or other unlawful behaviors.[309] Moreover, a *qui tam* claim should not interfere with an SEC investigation.[310] These are valid concerns, but they can be addressed.[311] An FCA relator and their counsel are often prohibited from disclosing information shared by the Department of Justice through the use of nondisclosure agreements (NDAs);[312] hence, NDAs can and should be made

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[306]For example, the Department of Health and Human Services utilizes such agreements "as part of the settlement of Federal health care program investigations arising under a variety of civil false claims statutes." U.S. Dept. of Health & Human Services, Office of Inspector General, *Corporate Integrity Agreement Enforcement*, https://oig.hhs.gov/compliance/corporate-integrity-agreements/index.asp (last visited June 14, 2020). These agreements impose monetary penalties for a company's breach and often disqualify the company from further participation in federal programs. *Id*. One of our participants observed that settlements in nonintervened FCA cases often include corporate integrity agreements, which can have a significant and constructive impact on how a company behaves moving forward. Interview No. 1.

[307]*See, e.g.*, Interview No. 20 (stating that *qui tam* is not a good tool for regulatory compliance).

[308]*See* Interview Nos. 11, 15, 23, & 26.

[309]*See* Interview Nos. 9 & 11.

[310]*See* Interview No. 3.

[311]As one participant put it, the gains in transparency and cooperation between the SEC and whistleblowers would far outweigh the costs. Interview No. 15.

[312]Several participants indicated that it is customary for whistleblowers and their counsel to enter into NDAs with the Department of Justice. *See* Interview Nos. 5, 6, 9, & 22. At least one federal court has adopted a model whereby whistleblowers are required to keep all information shared by the SEC confidential. *See* Interview No. 5. An effective penalty for violating this mandate could include the forfeiture of the award.

applicable to a WBP *qui tam* arrangement.[313] The SEC has used NDAs before,[314] and their use could be made routine.[315] NDAs would facilitate the whistleblower's involvement, whether in *qui tam* or with the SEC as lead plaintiff.[316] This protection would reduce the odds of market-moving information becoming public or otherwise spoiling an SEC investigation and would foster trust and more transparent communication between the SEC and the whistleblower.

We also agree with other participants who were unmoved by these objections, arguing persuasively that the risks flowing from public revelations of investigations are generally minimal. Other types of potentially market-moving claims proceed frequently, and other legal mechanisms may cause information to surface. For instance, certain reporting requirements applying to publicly traded companies may result in the public disclosure of an investigation.[317] Many FCA claims are against large, publicly traded companies and could potentially move the market—yet those claims are allowed.[318] The same is true of SOX retaliation claims[319] and shareholder derivative suits.[320] Shareholders have the

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[313]*See* Interview No. 9; *accord* Interview Nos. 23, 24, & 25 (arguing that NDAs are effective). As an added incentive, the law could render a whistleblower ineligible for an award upon their disclosure of any information covered by an NDA. Interview No. 24.

[314]*See, e.g.*, Interview No. 19.

[315]*See* Interview Nos. 16 & 27. One participant described a client who had secured an NDA and collaborated with the SEC, leading to a settlement. Interview No. 16. The WBP rules already state that whistleblowers may be required to sign confidentiality agreements concerning any nonpublic information that the OWB provides to the whistleblower. *See* 17 C.F.R. §§ 240.21F-8(b)(4), 240.21F-12(b).

[316]*See, e.g.*, Interview Nos. 16 (noting that the use of NDAs would allow whistleblowers to collaborate constructively with the SEC on how to build a case) & 22 (stating that the level of collaboration between the SEC and whistleblower counsel needs to be enhanced in order to speed the process up).

[317]*See* Interview No. 20; *see also, e.g.*, Legg Mason Letter to Stakeholders (June 4, 2018), https://www.leggmason.com/content/dam/legg-mason/documents/en/corporate-press-releases/corporate-announcement/2018/lm-joe-sullivan-doj-letter.pdf (discussing settlements with the DOJ and SEC in connection with bribes paid to Libyan government officials).

[318]*See* Interview No. 15.

[319]*See* Interview No. 18.

[320]*Id.* (discussing the fact that the market-moving concern could be raised in the context of shareholder derivative suits and pointing out that derivative suits proceed often without such concerns coming to fruition).

right to sue a company for the same type of activity that would form the heart of a *qui tam* whistleblower claim; this does not make shareholder derivative suits unsound. The markets have not fallen apart when shareholder derivative suits come to light.[321] Moreover, by virtue of the lengthier investigations associated with securities fraud, there is ordinarily a substantial delay between an allegation and public disclosure of the allegation. By the time the public learns of an investigation, it is often several years old. This minimizes the contemporaneous impact of the disclosure on the market.[322] Also, such corrections may actually be healthy and boost investors' confidence that bad behavior will be discovered and corrected.[323] Investors and society have an interest in knowing about fraud and that it is punished.[324]

A second source of anxiety about a WBP *qui tam* mechanism concerns the SEC's ability to control the process. Some skeptics of *qui tam* do not think that the SEC should be forced to make a decision on a tip or case in haste.[325] Investigating securities fraud and building a viable case is a complex and time-intensive process.[326] Moreover, the selection of cases

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[321]*Id*.

[322]*Id*.

[323]*Id*. "I don't see how [anyone] can make that argument [that markets would be adversely disrupted through a WBP *qui tam* mechanism] in a world with shareholder derivative suits." *Id*.

[324]*Id*.; *see also* Rapp, *Invigorating Incentives*, *supra* note 288, at 135–36 (arguing that information enhances market efficiency and that whistleblowers can aid other corporate monitors by bringing information to light).

[325]*See* Interview No. 23 (expressing concern that *qui tam* would empower plaintiffs to bring claims to the public without adequate investigation unless the SEC has veto power); *see also* Interview Nos. 8 & 19. James Helmer points out that the FCA's *qui tam* provision was originally weakened on the grounds that the government should be in sole control of FCA litigation. Helmer, *supra* note 279, at 740.

[326]*See, e.g*., Interview Nos. 3 & 19 (comparing the complexity of FCA and Dodd-Frank cases); *see also* Interview No. 9 (stating that an FCA-modeled *qui tam* mechanism would fit the securities context poorly given the complexity of the securities laws and concerns about the impact of investigations on the market). Importantly, however, at least one scholar has argued persuasively in other legal contexts that "concerns regarding the competence and motivations of private plaintiffs are unfounded in the present U.S. legal system" and that the "argument that private citizens are not capable of interpreting complex laws . . . and predicting whether a violation occurred has been significantly weakened by the emergence of an extremely well-developed plaintiffs' bar." Franziska Hertel, Note, Qui Tam *for Tax? Lessons from the State*, 113 Colum. L. Rev. 1897, 1925–26 (2013).

is sacred to a prosecutor,[327] and society would not benefit from frivolous claims. Underprepared attorneys could set bad precedent, not only in terms of court decisions but also in terms of settlement figures.[328]

In response to this second set of concerns, participants suggested ways in which the SEC could retain some control in *qui tam* actions. The FCA gives the Department of Justice the ability to dismiss frivolous claims.[329] A Dodd-Frank *qui tam* mechanism could similarly empower the SEC to move the court to dismiss any claim it considers frivolous.[330] Allowing an impartial court to weigh each side's arguments and to have the final say would balance the government's and whistleblower's interests. This would incentivize *qui tam* whistleblowers to avoid pursuing claims recklessly or prematurely.[331] By acting as a gatekeeper, the SEC would also retain a significant degree of control, even in those actions it does not join. Alternatively, the law could require a whistleblower to obtain the SEC's consent before filing the claim, with a right for the whistleblower

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[327]*See* Interview No. 19.

[328]*Id*. Whistleblower attorneys lacking securities law expertise would be run over as *qui tam* counsel or settle cheap. *Id*. Society should not want *qui tam* to be subject to the bad reputation that class actions have sometimes drawn: companies will settle to avoid the nuisance, and the only ones who come away well are the attorneys. *Id*.

[329]31 U.S.C. § 3730(c)(2)(A). In January 2018, the DOJ issued the Granston Memo encouraging government attorneys to examine nonintervened cases more closely and to consider exerting their authority to dismiss them. *See* Eric Christofferson, Andrew Hoffman II, & Colleen McElroy, *Consequences of DOJ's Granston Memo—Dismissals Are Up, Circuits Split*, Bloomberg L. (Nov. 25, 2019), https://news.bloomberglaw.com/health-law-and-business/insight-consequences-of-dojs-granston-memo-dismissals-are-up-circuits-split.

[330]*See* Interview No. 18. "Rogue" whistleblowers could arise under *qui tam*. Interview No. 7. To balance the incentives and rights of *qui tam* whistleblowers, a motion to dismiss should require a showing of good cause. Hertel, *supra* note 326, at 1931 (suggesting the addition of such language to the FCA).

[331]As one participant expressed, the typical length of securities fraud investigations affords enough time to separate the good claims from the weak. *See* Interview No. 18. The SEC and private counsel look for essentially the same features in a claim: timeliness, specificity, credibility, and materiality. *See* Interview No. 11. The SEC could also publish guidance on what the best cases look like from the agency's perspective. *See* Interview No. 25. Scholars, too, have recognized that the FCA *qui tam* program encourages top-quality work early in the development of a case. Bucy, *supra* note 273, at 51, 68–74; *see also* Robin Page West, Qui Tam *Litigation*, 28 Litigation 21, 23–24 (2001) (listing factors that government and plaintiffs' attorneys are concerned about in *qui tam* matters).

to appeal an SEC denial to a court.[332] Such a provision would ensure that the SEC has a reasonable period of time in which to investigate a claim, or that the whistleblower has invested sufficient time to develop the claim before filing a *qui tam* action. Confidentiality agreements could be required in the settlement of *qui tam* actions. Plaintiffs could also be required to retain counsel[333] and to meet elevated pleading requirements.[334] Empowering the SEC in this way would minimize the odds of *qui tam* plaintiffs and their counsel setting bad precedent.

Significantly, Professor Engstrom—who conducted the first extensive empirical study of the FCA's post-1986 *qui tam* program—"squarely contradicts the claim that the [FCA] relators' bar has engaged in systemic abuses by adopting a 'filing mill' strategy."[335] Moreover, repeat relators (who are generally corporate outsiders) are likely more effective at returning funds to the federal treasury than are one-shot, inside relators.[336] These findings suggest that bad precedents and frivolous filings are unlikely to result from a WBP *qui tam* mechanism.

As an additional precaution against market-moving slippages, a Dodd-Frank *qui tam* mechanism could require—as does the FCA[337]—that plaintiffs file their complaint in camera and under seal.[338] The complaint would not be immediately served upon the defendant; this way, the government can decide whether to intervene, allow the plaintiff to proceed

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[332]*See* Interview No. 25; *cf*. Rose, *supra* note 288, at 1294 (noting that a healthy alternative might be to require whistleblowers to "obtain a letter of standing from the SEC prior to filing suit").

[333]In the tax context, the "need for legal counsel in a qui tam action further suggests that harassing lawsuits are unlikely to constitute as large a percentage of all qui tam actions as some critics fear." Hertel, *supra* note 326, at 1926.

[334]*See* Interview No. 9; *see also* George L. Blum, *Heightened Pleading Requirements for Alleging Securities Fraud—Post-*Iqbal/Twombly *D.C. Circuit Cases*, 37 A.L.R. Fed. 3d Art. 1 (2018) (discussing the heightened pleading requirements for alleging fraud under the Federal Rules of Civil Procedure, including sufficiency with respect to scienter).

[335]David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from* Qui Tam *Litigation*, 112 Colum. L. Rev. 1244, 1318 (2012).

[336]*Id*. at 1319.

[337]31 U.S.C.A. § 3730(b)(2).

[338]*Id*.

alone, or move to dismiss.[339] And should the government require additional time, it can so move the court.[340] Because securities fraud investigations often take longer than do FCA investigations, a Dodd-Frank *qui tam* provision could authorize the SEC to request periods—perhaps three- or six-month blocks—to secure any additional time needed for investigatory purposes.[341] Such an option would again balance the interests of the whistleblower and the SEC. It would compel the SEC to act so that claims do not become stale, and would promote transparency as the SEC would need to share with the whistleblower why it needs more time.[342]

In the spirit of collaboration, the law should also allow the whistleblower and the SEC to agree to extend the investigatory period, thereby obviating the need for a judicial ruling in situations in which the collection of additional evidence is mutually desired. This provision would protect the government's interest in having a reasonable time to investigate and would also reduce or eliminate many of the whistleblower's frustrations with respect to lack of transparency, lack of influence, and agency inertia.

As for the adequacy of *qui tam* counsel, the law could require a "certification" process for attorneys to represent Dodd-Frank whistleblowers.[343]

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[339]West, *supra* note 331, at 22 (explaining that the "purpose of the seal is to allow the government to investigate the allegations in secret so that it can decide whether or not it wishes to intervene").

[340]31 U.S.C.A. § 3730(b)(2)–(3).

[341]Under the FCA, the complaint remains under seal for at least sixty days and is not served on the defendant until the court so orders. During the seal period, documents related to the lawsuit, and the existence of the lawsuit itself, cannot be disclosed. Upon expiration of the sixty days, the government may request extensions. *Id*. In practice, courts routinely grant extensions as the government may require, up to a point. Any future Dodd-Frank *qui tam* provision should consider this practice and perhaps introduce a limit on the extensions that may be granted.

[342]*See* Interview No. 24; *see also* Rose, *supra* note 288, at 1298–99 (highlighting the disciplining influence a *qui tam* mechanism would exert on the SEC).

[343]Analogous models exist for this type of specialized certification, particularly in high-stakes and technical litigation scenarios. For example, admission to practice before the U.S. Supreme Court requires the attorney to have been admitted to the practice of law for at least three years prior to one's application for admission, with no adverse disciplinary record during that period, to be of good moral character, and to have two sponsors (attorneys already admitted before the Court). *See* Supreme Court of the United States, *Instructions for Admission to the Bar*, https://www.supremecourt.gov/bar/barinstructions.pdf. Another

The law could require minimum legal and financial service industry knowledge, experience with securities litigation, work in the financial services industry, passing an exam, apprenticing with a certified securities whistleblower attorney, or some combination of these, as options to become certified.[344] Whistleblowers and their counsel often bring expertise that SEC attorneys do not necessarily have, especially on financial issues;[345] the government may not be cognizant of its own limitations.[346] As Professor O'Sullivan showed, one of the greatest benefits of *qui tam* is that it would enhance the quality of the tips that make their way to the SEC.[347] In contrast to the FCA—which allows pro se actions—a WBP *qui tam* mechanism should require the whistleblower to be represented by counsel.[348]

A third source of hesitation voiced by one of our participants is that defendants in securities fraud cases are typically large companies with vast resources to marshal in their defense, which could leave *qui tam* plaintiffs outgunned.[349] However, many defendants in FCA cases fit a similar profile. The judgment of whether success is feasible should be left to the *qui tam* plaintiff and their counsel. In addition, the SEC could still be involved in the investigatory process.

Qui tam skeptics' fourth concern is that, at some point, plaintiffs would lose the anonymity they enjoy when the SEC brings the action, which may discourage whistleblowers from using a *qui tam* provision.[350] We

example is the patent bar exam, which is required of an attorney who represents clients before the U.S. Patent and Trademark Office. *See Becoming a Patent Practitioner*, U.S. Pat. & Trademark Off., https://www.uspto.gov/learning-and-resources/patent-and-trademark-practitioners/becoming-patent-practitioner (last visited April 1, 2021). An exam that tests one's knowledge of securities laws, or a substitutable set of experiences akin to Supreme Court admission, could be used to vet the attorneys who represent Dodd-Frank *qui tam* relators. Further, attorneys less experienced in securities law could apprentice with certified counsel to acquire the necessary skills and knowledge. *See* Model R. Prof. Conduct 5.5(d) (Am. Bar. Ass'n 2019) (allowing for lawyers admitted elsewhere to provide legal services in conjunction with a lawyer who is admitted in the jurisdiction).

[344]*See* Interview No. 7.

[345]*See* Interview No. 20.

[346]*See* Interview No. 22.

[347]*See* O'Sullivan, *supra* note 281, at 69, 90–91.

[348]*See, e.g.*, Interview No. 9. Congress already requires anonymous tipsters to be represented by counsel. 15 U.S.C.A. §78u-6(d)(2)(A).

[349]*See* Interview No. 19.

have two responses to this concern. First, whistleblowers would not necessarily have to forfeit their anonymity to litigate their claim.[351] As Mark Debofsky observes,[352] the Federal Rules of Civil Procedure require that a complaint must name all parties to the lawsuit, but several federal circuits allow the use of pseudonyms "when nondisclosure of the party's identity is necessary . . . to protect a person from harassment, injury, ridicule or personal embarrassment."[353] In those situations, "a district court must balance the need for anonymity against the general presumption that parties' identities are public information and the risk of unfairness to the opposing party."[354] Second, even where whistleblowers would be required to reveal their identities, the choice of whether the loss of anonymity is worthwhile is best made by whistleblowers themselves. Counsel would advise those whistleblowers who elect to proceed as *qui tam* plaintiffs that they may be required to reveal their identities in the pleadings.

Anecdotally, by the time a *qui tam* plaintiff has advanced to the point of filing a complaint, the evidence in the case is likely to be fairly well developed, and a reasonable whistleblower could very well have much greater confidence in their chances for success at that point in time than the average person has at the time of reporting a tip to the SEC. As Professor Kovacic pointed out in the FCA context, a potential *qui tam* plaintiff "with a promising professional future" will sue only if "the prospective gain from the suit exceeds the expected gains from continued service . . . in

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[350]*See, e.g.*, Interview Nos. 3 & 13.

[351]In FCA practice, many whistleblower lawyers help their clients to form a corporation or partnership to protect their identities. *See Protecting Whistleblowers from Retaliation: Using a Corporation or Partnership as the Whistleblower*, TheWhistleblower.com (Oct. 25, 2018), https://thewhistleblower.com/protecting-whistleblowers-from-retaliation-using-corporation-or-partnership-as-the-whistleblower/.

[352]Mark Debofsky, *Examining When a Plaintiff Can Remain Anonymous and When He/She Can't* (Mar. 8, 2018), https://www.debofsky.com/articles/examining-when-a-plaintiff-can-remain-anonymous-and-when-he-she-can-t/#:~:text=Federal%20Rule%20of%20Civil%20Procedure,injury%2C%20ridicule%20or%20personal%20embarrassment.

[353]Does I Thru XXIII v. Advanced Textile Corp., 214 F.3d 1058, 1067–68 (9th Cir. 2000) (internal citation and quotation marks omitted). The Sixth Amendment right to confront one's accuser applies only in criminal proceedings. *See, e.g.*, Parkhurst v. Belt, 567 F.3d 995, 1003 (8th Cir. 2009).

[354]*Does I Thru XXIII*, 214 F.3d at 1068.

the profession," and those who have been dismissed or face layoffs will demand a smaller return from a *qui tam* suit.[355]

The fifth and final concern voiced by skeptics of a Dodd-Frank *qui tam* mechanism is that the SEC has a different end game—remediation goals and powers that cannot be delegated to the public.[356] Unlike the SEC, *qui tam* plaintiffs do not necessarily weigh the stability of the securities market in their decisions to bring claims. However, with sufficient control reposed in the SEC, as we argued above, those concerns would be represented in the process of determining whether a particular *qui tam* claim may be filed and, eventually, unsealed.[357]

In sum, Congress should add *qui tam* to the WBP. The Dodd-Frank *qui tam* mechanism would take the tremendously successful FCA model as a starting point and then add certain other features to ensure that it functions well in the securities context. Specifically, the WBP *qui tam* provision proposed here would mandate NDAs to facilitate communication, cooperation, and trust between the SEC and whistleblowers, and it would render a whistleblower ineligible for an award should they violate the NDA. It would empower the SEC to intervene in a case, allow the *qui tam* whistleblower to proceed alone, or move the court to dismiss a case for good cause. The provision would require confidentiality agreements for *qui tam* settlements and require *qui tam* plaintiffs to retain counsel (who must be certified), file the complaint under seal and in camera, and meet heightened pleading requirements. These features would address many of the problems in the existing WBP[358] and appropriately balance the interests of society, government, whistleblowers, and defendants, while bringing the numerous advantages of *qui tam* to bear in the fight against securities fraud.

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[355]William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 Loy. L.A. L. Rev. 1799, 1819 (1996).

[356]*See* Interview Nos. 3, 11, & 19; *see also* Ben Depoorter & Jef De Mot, *Whistleblowing: An Economic Analysis of the False Claims Act*, 14 S. Ct. Econ. Rev. 135, 161–62 (2006) (arguing that "[w]histle blowing is overprovided when the autonomy of whistle blowers to pursue claims without government involvement weakens the government's bargaining position and obstructs the government's ability to weigh in wider factors of enforcement").

[357]*See, e.g.*, Interview No. 25.

[358]*See supra* Part I.

B. Other Congressional Reforms to the WBP

In addition to adding a *qui tam* mechanism, Congress should adopt two further changes to the WBP: extend antiretaliation protections to internal reporters and impose certain time frames on the award phase of the WBP.

Congress should amend the law to protect internal whistleblowers from retaliation.[359] Internal reporting is a crucial preventative against securities violations.[360] And as a practical matter, most whistleblowers report internally first.[361] A large proportion of one participant's clients come to him having already reported internally and suffered retaliation.[362] The average employee is not aware of the significance of timing issues or the minutiae of the WBP's requirements because most do not set out to become whistleblowers or to strategize about reporting.[363] Senator Grassley has also detailed the policy rationales for protecting internal whistleblowers. Some employees are prohibited from making contemporaneous reports to regulators, and also:

> [M]any of the salutary benefits of internal reporting would be lost if employees were required to make a simultaneous report to the government: some employees would be deterred from coming forward, while others would feel compelled to over-report in order to ensure access to Dodd-Frank's robust anti-retaliation provisions. Companies would lose valuable opportunities for voluntary compliance. . . . Indeed, the obvious effect of [denying protection] will be to discourage internal reporting[.][364]

When the original WBP rules were proposed in 2010, several companies and organizations, including the U.S. Chamber of Commerce, participated in the public comment process. At that time, the Chamber stated

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[359]*See supra* Parts I.A. & I.B.

[360]Pacella, *Inside or Out*, *supra* note 132, at 754–55. For a helpful history of internal whistleblower protections, see Brief of *Amicus Curiae* National Whistleblowers Center Urging Reversal in Support of Appellant at 10–18, *Schroeder v. Greater New Orleans Federal Credit Union*, 664 F.3d 1016 (2011) (No. 10-31169).

[361]2019 Ann. Rep., *supra* note 105, at 18 (approximately 69% of SEC award recipients have been insiders, around 85% of whom reported their concerns internally first).

[362]*See* Interview No. 17.

[363]*Id*.

[364]Brief of Senator Charles Grassley as *Amicus Curiae* in Support of Respondent at 2–3, *Digital Realty Trust, Inc., v. Paul Somers*, 138 S. Ct. 767 (2018) (No. 16-1276).

that internal compliance programs are vitally important for companies, and that "if the effectiveness of corporate compliance programs in identifying potential wrongdoing is undermined, their attendant benefits, such as promotion of a culture of compliance within corporations, as well as their value to enforcement efforts, will likewise be diminished."[365]

As lawmakers expand who is protected from retaliation, they should also (1) clarify which actions are protected; (2) further clarify the "reasonableness" component of a retaliation claim; and (3) explicitly embrace emotional distress and loss of reputation as redressable harms.[366] One participant suggested that current protections do not afford a sufficient disincentive against retaliation, and that the addition of administrative fines (over and above any civil liability owed to the whistleblower) could help further discourage retaliation.[367]

Congress should also establish timetables by which the SEC must act on awards.[368] Earlier, we observed that time is a critical factor for whistleblowers that often works to their disadvantage.[369] The SEC has displayed a propensity for moving slowly on many tips. The natural temptation is to allocate resources to investigation and enforcement more so than to paying whistleblowers, but this discourages future participation in the WBP and is self-defeating.[370] Senator Grassley's pending

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[365]Letter from Americans for Limited Government et al. to Elizabeth Murphy, Secretary, Sec. & Exch. Comm'n (Dec. 7, 2010), https://www.sec.gov/comments/s7-33-10/s73310-110.pdf. The Chamber's vision was somewhat different, however. The Chamber asked the SEC to require an internal report for a whistleblower to become award-eligible, and also that the SEC clarify that an action taken by an employer subject to a whistleblower complaint is not retaliation if based on factors other than the worker's whistleblower status. *Id*.

[366]Interview Nos. 17 & 21.

[367]*See* Interview No. 5. Civil fines may also enhance the social status and reputation of whistleblowers, partially offsetting the social stigmas attached to those who report in response to financial incentives. *See* Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 Tex. L. Rev. 1151, 1205–06 (2010).

[368]*See, e.g.*, Interview Nos. 15, 16, 20, & 22. *See also, e.g.*, Letter from Anonymous-43 to the Sec. & Exch. Comm'n (Sept. 9, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4320333-173246.htm (expressing that would-be whistleblowers are discouraged by long delays in the payments of awards).

[369]*See supra* Introduction & Part I.C (discussing time-based problems).

[370]*See* Interview No. 19. Funding that is expressly earmarked for award processing would likely accelerate the award phase. *Id*.; *accord* Interview Nos. 7 & 8.

bill[371] would require the SEC to take action more promptly in the WBP award phase. Specifically, the bill would require the SEC to make an initial disposition on an award claim within one year of the whistleblower's deadline to file for the award. The bill would allow the SEC to extend its timetable for good cause but would require notice to the whistleblower if an extension is invoked. These measures would address some of the frustrations that whistleblowers face at the award stage.[372] In addition, Congress should also require prompt action between the preliminary and final award determinations,[373] on the *payment* of awards,[374] and on reconsideration of an award denial or percentage. The ninety-day limit to file a claim after an NCA posts should also be extended,[375] though the need for this change may be obviated if the SEC adopts the recommendations in Part III.C. These deadlines could be subject to court-approved extensions to ensure that the SEC has a reasonable period of time within which to comply.[376]

C. SEC Reforms to the WBP

A final set of desirable reforms would most appropriately be implemented by the SEC. As noted in Part I, the black box problem is centered on information management and a lack of communication between the SEC and whistleblowers. A *qui tam* mechanism would resolve this; but for those who would prefer that the SEC take the lead, and for all whistleblowers so long as *qui tam* is not adopted, the SEC could greatly enhance the transparency of the WBP without investigations or other sensitive information becoming public. We have argued that mandatory NDAs would facilitate greater communications and whistleblower involvement in the development of cases.[377] Other reforms should be implemented in tandem.

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[371] *See supra* Part I.A. (discussing this legislation).

[372] *See, e.g.*, Interview No. 20.

[373] *See* Interview Nos. 23, 25, & 27. This limit should be subject to court supervision.

[374] Making the whistleblower wait for a payout following a final determination is unnecessary and unfair. *See, e.g.*, Interview Nos. 5 & 8.

[375] *See, e.g.*, Interview No. 6.

[376] *See* Interview No. 11 (expressing concern that a uniform, immovable deadline would do a disservice to the process given the variable nature of securities fraud cases).

[377] *See supra* notes 313–16 and accompanying text.

The most impactful reform would be a system that tracks a tip from submission to award determinations.[378] Such a system could be as simple as indicating whether a tip is "active" or "inactive."[379] The SEC's system could allow a whistleblower to log into a website to see the status of their tip, the investigation, or their award application[380] using the whistleblower's unique TCR number, thereby eliminating the need for any market-moving information to be included.[381] This would also likely reduce whistleblowers' temptation to call the SEC seeking status updates.[382] Indeed, the tracking system could display (1) the status of a tip; (2) whether and when a tip has proceeded to NCA status; (3) when an award petition has been received; (4) when a preliminary award determination has been made; and (5) when a final award decision has been made. Perhaps the strongest objection to the sharing of this information is that it could be market moving if publicized.[383] However, this is an unlikely problem, especially if NDAs are used as we have argued above, and would be outweighed by the benefits of transparency.[384]

Since the SEC is already aware of whose tips it incorporates into successful actions and the significance of that information, some participants questioned whether a whistleblower should need to file an award claim, at least in its present form.[385] For one participant, the NCA approach is the worst possible procedure: it puts a call out to the entire world for award applications, inviting substantial delays by flooding the SEC with large volumes of tips.[386] The SEC could instead provide direct notice of covered

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[378]*See, e.g.*, Interview Nos. 5, 11, 15, & 25. The status of tips matters for other reasons, too, such as whether an attorney will continue to represent a client. *See* Interview Nos. 19, 22, & 24.

[379]Interview No. 15. Such updates would not necessarily need to include an explanation or rationale as to why the SEC closed a tip or a case. Interview No. 11.

[380]*See* Interview No. 26.

[381]*See, e.g.*, Interview Nos. 12 & 13.

[382]*See* Interview No. 12.

[383]*See supra* notes 308 & 309 and accompanying text.

[384]The SEC could use NDAs and penalize disclosures with the forfeiture of potential awards. *See supra* notes 313–16 and accompanying text.

[385]*See* Interview No. 23.

[386]*See* Interview No. 27.

actions to those whistleblowers who contributed tips.[387] Only whistleblowers who believe they have wrongfully been excluded from receiving notification of an NCA would need to file an award application from scratch.

For the sake of transparency, the SEC could also 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. For example, the SEC could report on the percentage of its successful cases that are initiated by whistleblower tips.[388]

Greater specificity required on the TCR form, and a corresponding clarification of the SEC's expectations, would help to guide whistleblowers, encourage higher quality tips, and reduce frivolous and incomplete tips.[389] In addition, where multiple meritorious claimants are involved, the SEC could require the claimants to work together to determine how the award should be distributed.[390] Alternatively, a rebuttable presumption that multiple claimants will share an award equally could be adopted, and any claimant who believes that their information was disproportionately valuable to the SEC's action could be given the opportunity to make a claim for a larger share. The SEC's new summary disposal tool for meritless claims could also help to streamline the process.[391]

Finally, the SEC should consider how (and how often) it communicates to the public about the WBP.[392] One whistleblower participant recounted

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[387]*Id*. This would represent a low burden on the SEC given the modest numbers of NCAs. Interview No. 6.

[388]*See* Interview No. 6. James McDonald, the former director of enforcement of the Commodity Futures Trading Commission (CFTC), has publicly recognized that at least 40% of the agency's ongoing investigations followed a whistleblower tip. *See* Press Release, U.S. Commodity Futures Trading Commission, CFTC Announces Approximately $7 Million Whistleblower Award (Sept. 27, 2019), https://www.cftc.gov/PressRoom/PressReleases/8022-19.

[389]*See* Interview No. 13. If the award claim form were to require the TCR number and date on which the claim was submitted, this would save the SEC time in making decisions on NCAs. *See* Interview No. 11. *See also, e.g*., Letter from Anonymous-48 to the Sec. & Exch. Comm'n (Sept. 9, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4320328-173227.htm (noting the confusing and difficult nature of the existing WBP forms).

[390]*See* Interview No. 27.

[391]*See supra* Part II (mentioning this change); *accord* Interview No. 11 (endorsing a summary disposition tool).

[392]Sizable awards attract potential whistleblowers' attention and raise awareness of the WBP among the public. For example, in 2018, following the SEC's announcement that it had

Congressional Reforms	*SEC Reforms*
➢ Congress should add a *qui tam* mechanism modeled after the FCA, with the following features included: • Mandatory nondisclosure agreements • SEC option to intervene, allow the *qui tam* plaintiff to proceed alone, or to move the court to dismiss the action for good cause • Mandatory confidentiality agreements for settlements of *qui tam* actions • Require *qui tam* plaintiffs to retain counsel, file under seal and in camera, and meet heightened pleading requirements • Require *qui tam* counsel to become certified ➢ Congress should extend antiretaliation protections to those who report only internally and clarify certain aspects of retaliation claims ➢ Congress should impose certain deadlines for the SEC to act on whistleblower awards	➢ The SEC should develop and implement a tracking system, akin to a pizza tracker, that would enable whistleblowers and their counsel to use their unique TCR numbers to access the status of their tips, an investigation, and their award applications ➢ The SEC should remove the requirement of award applications from scratch, and instead provide direct notices of covered actions to any whistleblowers who contributed tips ➢ The SEC should publish statistics that would enable whistleblowers to make more informed decisions as to whether their participation in the WBP is worthwhile for them individually ➢ The SEC should simplify and clarify the forms for whistleblowers to communicate information to the agency, enable multiple claimants the opportunity to determine how an award is to be allocated, or craft a rebuttable presumption that multiple claimants will share an award equally ➢ The SEC should standardize frequent communications with those who submit tips and with the public to better convey the WBP's protections and incentives

Figure 2. Our Proposed Reforms to the WBP.

knowing nothing about the WBP when he approached the SEC, and that, even after interactions with the SEC spanning more than a year, he was unaware that the OWB existed: no one in the agency had ever mentioned the WBP protections or award program.[393] The SEC could take simple steps to ensure that whistleblowers understand that incentives are

awarded $83 million to whistleblowers in the Merrill Lynch case, traffic to the SEC's website increased by approximately 300% and Google searches for the term "SEC whistleblower" tripled. *See* Letter from Taxpayers Against Fraud to Secretary Fields, U.S. Sec. & Exch. Comm'n, at 7 (Sept. 18, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4373287-175492.pdf. The SEC should also consider engaging in more road show presentations targeting industry-specific sectors. The CFTC Office of the Whistleblower regularly engages in outreach efforts to publicize its whistleblower program. For example, Melanie Devoe, an attorney advisor in the CFTC's Whistleblower Office, spoke at the 2020 Whistleblower Law Symposium. *See 2020 Whistleblower Law Symposium*, State Bar of Georgia (Feb. 5, 2020), https://www.gabar.org/membership/cle/cledetail.cfm?id=0640020520.

[393]This participant is waiting to learn of the SEC's Preliminary Award and wishes to remain anonymous at this time.

available to assist with the development of the case.[394] For example, potential SEC witnesses are required to read and sign federal form 1662, which warns a witness of the consequences of giving false information, describes how the witness's testimony will be taken and used, and provides other information related to the individual's role as a witness. The SEC could add easy-to-understand information to this form for the whistleblower's benefit or create another form that is conveyed automatically upon the submission of an online tip. In a related vein, the SEC should allow pro se whistleblowers to file a "placeholder" TCR with leave to amend in a timely manner.[395]

In sum, Figure 2 provides a visual representation of our proposal to reform Dodd-Frank from the whistleblower's vantage.

Conclusion

This article documents the myriad challenges that securities whistleblowers continue to face and the corresponding shortcomings of the WBP as it is currently implemented. The article shows that the SEC's recent changes to the administrative rules that govern the WBP are incomplete because the changes were developed solely from the SEC's own experiences without incorporating a systematic study of whistleblowers' perspectives. In addition, the article shows that at least three of the SEC's changes will undermine Congress's intent and the effectiveness of the WBP, and that these changes should therefore be repealed.

Finally, the article offers several proposed changes of its own. In particular, we urge Congress to craft a WBP *qui tam* mechanism modified from the FCA's example, extend antiretaliation protections to those who report only internally, and impose certain deadlines on the SEC to act on WBP awards. Congress or the SEC should mandate the use of nondisclosure agreements to facilitate communication and collaboration between the SEC and whistleblowers and their counsel. We further urge

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[394]The CFTC regularly sets up trade show booths for its Office of the Whistleblower at industry conferences. For instance, the CFTC's events page shows that on February 5–7, 2020, the CFTC's Whistleblower Office "exhibited at the 6th Annual FIA-SIFMA Asset Management Derivatives Forum" in Dana Point, California. *Whistleblower Program, Past Events*, CFTC, https://www.whistleblower.gov/news/events (last visited Nov. 19, 2020).

[395]Interview No. 16.

the SEC to implement a tracking system to enable whistleblowers and their counsel to check on the status of a tip, investigation, or award application, and to provide direct notice of the posting of NCAs, requiring award applications from scratch only from those whistleblowers who believe they have been wrongfully excluded from the direct notification. The SEC should publish certain statistics that would empower prospective whistleblowers to make more informed decisions as to their participation in the WBP, simplify and clarify the forms that whistleblowers use to communicate with the SEC, and modify the procedures surrounding multiple claimants. Finally, we propose that the SEC should standardize frequent and clear communications with the public and with those who submit tips to ensure that everyone understands the protections and incentives involved with the WBP.

The changes proposed in Part III are built on in-depth interviews with whistleblowers, whistleblower counsel, and former SEC leaders and reflect the experiences and collective wisdom of these participants. One of the most revealing interviews occurred when we asked a whistleblower what advice they would offer to prospective reporters. The participant replied that their most important suggestion is to ensure that whistleblowers have a support system in place, since they will feel like the world is crashing down upon them.[396] Many whistleblower counsel and prospective reporters are growing increasingly cautious because of the many difficulties involved with the WBP. This is commensurate with the experiences of myriad other whistleblowers, including Darren Sewell,[397] and speaks to the depths to which this article's proposed reforms are needed for the WBP to realize its full potential. The SEC must accelerate the process, further involve whistleblowers to give them a greater stake, and fundamentally embrace whistleblowers and their counsel as indispensable allies who share the SEC's goals. Although frenzied news headlines have trumpeted the largest SEC awards—which are indeed positive steps in the fight against securities fraud—an extremely large tips-to-awards ratio suggests that the WBP's design has yet to be optimized. The experiences of whistleblowers and their counsel show that the reforms proposed here will strengthen the WBP. Congress and the SEC should adopt these proposals without delay.

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[396] *See* Interview No. 1.

[397] *See supra* Introduction.

Appendix I

Interview Participants

Hon. Luis Aguilar (former SEC commissioner)
Gary L. Azorsky, Cohen Milstein Sellers & Toll PLLC, Washington, D.C.
Michael A. Filoromo III, Katz, Marshall & Banks LLP, Philadelphia, PA
Adam Gana, Gana Weinstein LLP, New York, NY
Joseph Gentile, Sarraf Gentile LLP, Great Neck, NY
Mary Inman, Constantine Cannon, LLP, London, UK
Bruce C. Judge, Whistleblower Law Collaborative, Boston, MA
Erika Kelton, Phillips and Cohen, Washington, D.C.
Cleveland Lawrence III, Mehri & Skalet PLLC, Washington, D.C.
Tammy Marzigliano, Outten & Golden LLP, New York, NY
Sean McKessy, Phillips and Cohen, Washington, D.C. (former OWB director)
H. Vincent McKnight, Jr., Sanford, Heisler, Sharp LLP, Washington, D.C.
R. Scott Oswald, The Employment Law Group, Washington, D.C.
Mark Pugsley, Ray, Quinney and Nebeker, Salt Lake City, UT
Richard Renner, Kalivargi, Chuzi, Newman and Fitch, Washington, D.C.
Michael Ronickher, Constantine Cannnon, LLP, Washington, D.C.
Edward Scarvalone, Willens Scarvalone, New York, NY
Edward "Ted" Siedle, The Siedle Law Offices, Boca Raton, FL (Dodd-Frank whistleblower bounty recipient)
Shayne Stevenson, Hagens Berman, Seattle, WA
Matthew Stock, Zuckerman Law, Washington, D.C.
Ralph M. Stone, Stone Law Group PLLC, New York, NY
Bryan Wood, Berman Tabacco, Boston, MA
Jason Zuckerman, Zuckerman Law, Washington, D.C.
Note: Some participants declined to be identified publicly.