Loyola University Chicago Law Journal

Volume 50
Issue 3 *Spring 2019*

Article 10

2019

Whistling Past the Graveyard: Dodd-Frank Whistleblower Programs Dodge Bullets Fighting Financial Crime

Mary Kreiner Ramirez

Whistling Past the Graveyard: Dodd-Frank Whistleblower Programs Dodge Bullets Fighting Financial Crime

*Mary Kreiner Ramirez**

The United States' reaction to the 2008 Financial Crisis, which caused global ramifications, included the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act to address a lack of oversight and accountability in the financial industry. Among its provisions, Dodd-Frank provided incentives for whistleblowers to report misconduct and protections for those who do. Despite its success, Dodd-Frank's whistleblower programs face internal and external challenges that threaten their success. This Article discusses the current climate surrounding corporate accountability and suggests additional protections for whistleblowers and whistleblower actions: allowing private lawsuits against the government under Dodd-Frank's whistleblower provisions, similar to those allowed under the False Claims Act.

* Professor of Law, Washburn University School of Law. I thank Washburn Law librarians Barbara Ginzburg and Nancy Gray, my research assistant Raymond James, and Alexandra Harrington and the dedicated editors of the *Loyola University Chicago Law Journal* for their assistance.

INTRODUCTION

The financial crisis that erupted in 2008[1] with the freezing of credit markets[2] and collapse of Lehman Brothers[3] impacted financial markets across the globe.[4] Concurrent with the recognition that government aid would be required to quell the tidal wave of panic sweeping the financial markets in the wake of Lehman's collapse, came the insistence that greater oversight of the financial markets was necessary and that reforms should be imposed to enhance transparency in the financial marketplace and identify catastrophic risk.[5] The Dodd-Frank Wall Street Reform and Consumer Protection Act[6] was enacted two years after Secretary of the

1. The financial crisis spanned several years, culminating in the "profound events of 2007 and 2008" and continuing beyond those years with multiple bank failures, mortgage company bankruptcies, and real estate foreclosures. *See, e.g.*, FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES xv (2011) [hereinafter FCIC REPORT]. This Article refers to the "financial crisis" broadly to reference this period, or at times the "financial crisis of 2008" because 2008 is the year in which the general public became aware of the magnitude of the crisis, beginning with the major bank collapses of Bear Stearns and of Lehman Brothers, the takeover of Merrill Lynch, and most pointedly, when Secretary of the Treasury Henry Paulson went to the President and Congress to recommend a bailout for the major banking institutions, among others. *See* HENRY M. PAULSON, JR., ON THE BRINK 254 (2010); *see, e.g.*, FCIC REPORT, *supra*, at 353.

2. *See, e.g.*, FCIC REPORT, *supra* note 1.

3. *See* Report of Anton R. Valukas, Examiner, *In re* Lehman Brothers Holdings Inc., 445 B.R. 143 (Bankr. S.D.N.Y. 2011) (No. 08-13555).

4. *See, e.g.*, INSIDE JOB (Sony Pictures Classics 2010) (documentary reviewing the breadth of the worldwide 2008 financial crisis). The financial crisis is credited with threatening the destruction or at least severe weakening of the Euro as some of the financially strapped countries in the Eurozone faced the possibility of pulling out of the currency. *See, e.g.*, R.A., *The Euro Crisis: No Way Out*, ECONOMIST (May 9, 2012), https://www.economist.com/free-exchange/2012/05/09/no-way-out (discussing the imminent departure of Greece from the Eurozone and the possible contagious effect this may have on the markets of Ireland, Portugal, Spain, and Italy).

5. *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act: Hearing Before the Comm. on Banking, Hous., & Urban Affairs*, 111th Cong. 1–3 (2010) [hereinafter *Dodd-Frank Hearing*] (opening statement of Senator Chris Dodd).

6. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 7 U.S.C, 12 U.S.C., 15 U.S.C., 31 U.S.C., 12 C.F.R., 17 C.F.R. & 31 C.F.R.) [hereinafter Dodd-Frank].

Treasury Henry Paulson, along with the Chairperson of the Federal Reserve, Ben Bernanke, convinced the President of the United States and Congress that the 2008 financial crisis looming large was too urgent to await the careful review of a legislative body that could tackle reform.[7] The Troubled Asset Relief Program (TARP)[8] and other financial relief[9] was provided quickly and without strings attached for reform.[10]

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), enacted on July 21, 2010, is a sprawling piece of legislation that addresses a multitude of issues identified in its aftermath as contributing to the financial crisis.[11] It is over 2000 pages long,[12] and

---

7. *See* PAULSON, *supra* note 1, at 254 (describing the parties' reaction to the 2008 financial crisis).

8. *See, e.g.*, FCIC REPORT, *supra* note 1, at 371–76 (detailing the Treasury's contribution through TARP).

9. *See* David Goldman, *CNNMoney.com's Bailout Tracker*, CNN MONEY, http://money.cnn.com/news/storysupplement/economy/bailouttracker/ (last visited Apr. 25, 2019) (tracking the various federal programs to bailout the economy, using sources from the Federal Reserve, Treasury, FDIC, CBO, and White House); Steven A. Ramirez, *Subprime Bailouts and the Predator State*, 35 U. DAYTON L. REV. 81, 89–90 (2009) (describing the $96 billion effort to bail out government sponsored entities, Fannie Mae and Freddie Mac, and the "Temporary Liquidity Guarantee Program" by which the FDIC guaranteed all bank debt); ANDREW ROSS SORKIN, TOO BIG TO FAIL 396–99 (2009) (describing that, even prior to the Troubled Asset Relief Program (TARP) adopted by Congress in 2008, to bail out the financial markets, and despite the fact that it was an *insurance* company, AIG received $85 billion from the Federal Reserve, pulling it from the brink of bankruptcy). In all, AIG received $182 billion in federal bailout money. *See* Christian Plumb, *U.S. Drops Criminal Probe of AIG Executives*, REUTERS (May 22, 2010, 9:02 PM), http://www.reuters.com/article/2010/05/23/us-aig-doj-idUSTRE64L09W20100523.

10. The bailout of banks, insurance giant AIG, GM, and the auto industry, among others, did not save the United States from high unemployment and record housing foreclosures. *See* STEVEN A. RAMIREZ, LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW xvi (2013) [hereinafter LAWLESS CAPITALISM]; Mary Kreiner Ramirez, *Criminal Affirmance: Going Beyond the Deterrence Paradigm to Examine the Social Meaning of Declining Prosecution of Elite Crime*, 45 CONN. L. REV. 865, 877–78 (2013). *See also Dodd-Frank Hearing*, *supra* note 5 (opening statement of Senator Chris Dodd).

11. The preamble to the Dodd-Frank Act states the following: "To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes." Dodd-Frank, Pub. L. No. 111-203, 124 Stat. 1376.

12. *See Too Big Not to Fail*, ECONOMIST (Feb. 18, 2012), https://www.economist.com/briefing/2012/02/18/too-big-not-to-fail (comparing the length of the Dodd-Frank Act to the Federal Reserve Act of 1913 (32 pages) and the Glass-Steagall Act (37 pages) and nicknaming it "Dodd-Frankenstein" because its complexity will "encourage[] efforts to game the system by exploiting the loopholes it inevitably creates"). Another source reports it is 2253 pages. T. Markus Funk, *Getting What They Pay For: The Far-Reaching Impact of the Dodd-Frank Act's 'Whistleblower Bounty' Incentives on FCPA Enforcement*, 5 White Collar Crime Rep. (BNA) 640, 641 (Sept. 10, 2010).

it is criticized for statutorily mandating rulemaking by numerous federal agencies on hundreds of issues.[13] Included is legislation to support whistleblowers, as it became apparent that many insiders in the financial industry were well aware of excessive risk-taking by banking institutions and other financial giants and that fraudulent activity, insider trading, Ponzi schemes, and other criminal acts were occurring.[14] The failure of individuals to step forward to report the wrongdoing was the consequence of hostile work environments that do not tolerate naysayers in the face of potential monumental profits.[15]

The risk managers and other employees who did come forward internally to warn their bosses of the potential for financial ruin did not fare well. At Citigroup, Countrywide, JPMorgan Chase, and elsewhere, they lost their positions, their staffs, their offices, and often, their jobs.[16] After the accounting crisis of 2001, when the country learned of the failures of Enron, WorldCom, Tyco, and Adelphia, among others, Congress addressed corporate wrongdoing with legislative reform in the Sarbanes-Oxley Act (SOX).[17] That reform included provisions to protect whistleblowers to encourage them to report unlawful behavior.[18] In light

---

13. *See Too Big Not To Fail*, *supra* note 12 ("[A]ccording to Davis Polk only 93 of the 400 rule-making requirements mandated by Dodd-Frank have been finalised. Deadlines have been missed for 164.").

14. MARY KREINER RAMIREZ & STEVEN A. RAMIREZ, THE CASE FOR THE CORPORATE DEATH PENALTY: RESTORING LAW AND ORDER ON WALL STREET 6, 61–65, 68–69, 71–72, 75–76, 79, 86, 88, 90–92, 94–96, 99, 120–21, 124–27, 131, 147–48, 152, 181, 183–84, 205–07 (2017).

15. Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 773–74 (2018); S. REP. NO. 111-176, at 111 (2010); KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 172 (1985) (observing the sanctions faced in the marketplace by informants as a result of informing on business associates); Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 29–31 (2003).

16. *See* FCIC REPORT, *supra* note 1, at 19 (detailing how Richard Bowen, a manager at CitiBank, reported risky lending activity to superiors and went from supervising 220 people to supervising only two, had his bonus reduced, and was downgraded in his performance review); *see generally Hearing on Subprime Lending & Securitization & Gov't Sponsored Enters. Before the Fin. Crisis Inquiry Comm'n* (2010) (testimony of Richard M. Bowen), *available at* http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0407-Bowen.pdf. Richard Bowen sent an email to Jamie Dimon to draw Dimon's attention to the risky lending activity. *See 60 Minutes: Prosecuting Wall Street* (CBS television broadcast Dec. 4, 2011), http://www.cbsnews.com/8301-18560_162-57336042/prosecuting-wall-street/; David Benoit, *Countrywide Whistle-Blower Had Alleged Subprime Fraud*, WALL ST. J. (Sept. 15, 2011, 5:51 PM), https://www.wsj.com/articles/SB10001424053111904060604576573073620596988; RAMIREZ & RAMIREZ, *supra* note 14, at 31–40, 47.

17. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 801–1107, 116 Stat. 745, 800–10 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C. & 29 U.S.C.) [hereinafter SOX].

18. Sherron Watkins's experience at Enron is telling. Ms. Watkins waited until CEO Jeffrey

of the financial crisis of 2008, clearly the measures developed in SOX to encourage whistleblowing had been too limited and ineffective.[19]

In the financial crisis, the great risks taken in the financial industry generated vast rewards favoring a few well-placed hedge funds and money managers while foisting tremendous losses on the companies they worked for, investors, the American public, and the taxpayers that bailed out those companies.[20] In an effort to provide "more help" to the SEC "in identifying securities law violations" and in protecting investors, the Dodd-Frank Act takes a second crack at motivating whistleblowers and protecting them from retaliation.[21] The Dodd-Frank Act clarifies and enhances SOX whistleblower protections in light of the often steep professional, social, and financial costs to whistleblowers that discourage them from coming forward.[22] Significantly, Dodd-Frank provides a

---

Skilling's departure from Enron because she feared she would be fired, given that the company treasurer, Jeff McMahon, was transferred after he "complained mightily" to Skilling about the "veil of secrecy" surrounding accounting deals. Michael Duffy, *By the Sign of the Crooked E*, TIME (Jan. 19, 2002), http://www.time.com/time/business/article/0,8599,195268,00.html. After reporting her concerns to Ken Lay (Enron Chairman of the Board and Skilling's replacement as CEO), Andrew Fastow (Enron's Chief Financial Officer) reportedly wanted her fired and her computer seized. Dan Ackman, *Sherron Watkins Had Whistle, But Blew It*, FORBES (Feb. 14, 2002, 3:50 PM), http://www.forbes.com/2002/02/14/0214watkins.html (reporting on Watkins's testimony before Congress investigating Enron). Although Watkins's computer was returned to her after her request to transfer to another department, her work assignments were radically diminished. Kathleen F. Brickey, *From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L. Q. 357, 362–64, 363–64 nn.28–30 (2003). Finally, after Lay's contact with Watkins, he instructed the law firm of Vinson & Elkins to investigate Watkins's concerns, but he also requested an assessment of whether Watkins could be fired without repercussions to Enron. *Id.* at 362–63.

19. *See, e.g.*, Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 202–03 (2007) (discussing narrow interpretations of SOX legislation). When the risk of retaliation is severe, whistleblowers must have high confidence in the precision of the legal system, with a strong institutional environment offering effective protection from retaliation. Paolo Buccirossi, Giovanni Immordino & Giancarlo Spagnolo, *Whistleblower Rewards, False Reports, and Corporate Fraud* 23 (Ctr. for Econ. Policy Research, Discussion Paper No. DP12260, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3031897.

20. *See generally* Andrew G. Haldane, Exec. Dir., Fin. Stability, Bank of Eng., Address at the Institute of Regulation & Risk, Hong Kong: The $100 Billion Question, at 6 (Mar. 30, 2010), https://www.bis.org/review/r100406d.pdf (asserting that the potential financial benefits to the banks from extreme risk-taking is far exceeded by the social costs borne by the world economy when those risky investments fail). *See* Goldman, *supra* note 9 (tracking the various federal programs to bailout the economy, using sources from the Federal Reserve, Treasury, FDIC, CBO, and White House). The Bailout Tracker also tracks the amount of funds that have been repaid by various entities who received bailout money. *Id.*

21. *See* S. REP. NO. 111-176, at 38 (2010); Sean X. McKessy, Chief, Office of the Whistleblower, Speech by SEC Staff: Remarks at Georgetown University (Aug. 11, 2011) [hereinafter McKessy, Remarks at Georgetown University].

22. *See* MANN, *supra* note 15, at 172 (noting the possible repercussions of being an informant);

financial incentive to contact the SEC or CFTC, respectively, while affording protection against retaliation through whistleblower confidentiality and a private right of action against an employer who retaliates.[23]

Part I of this Article highlights the success of the SEC and CFTC whistleblower programs and reviews their structure. Part II describes the obstacles faced by the SEC in the rulemaking process and the considerations that led to such rules. Part III considers the continued challenges to the success of the Dodd-Frank whistleblower protections. Finally, Part IV offers a proposal to implement, should the current programs falter, that circumvents some of the most likely obstacles to the programs' success. The Article suggests that, should narrow judicial interpretations, resource restriction, and agency capture, among others, hit their mark and drain the vitality of the programs, individual whistleblowers could step into the role of private attorneys general to prosecute the cases on behalf of the government, similar to lawsuits brought by relators in *qui tam* actions under the False Claims Act.[24] Even as this proposal remains a viable addition to the whistleblower programs, False Claims Act *qui tam* private lawsuits are subject to dismissal of relator cases by Department of Justice (DOJ) attorneys in cases in which the DOJ has declined to intervene.[25]

Whistleblower rewards and protections offer greater oversight of the financial markets by providing greater transparency in the financial marketplace and enhancing detection, investigation, and recovery of losses. Moreover, in addition to limiting the risk of investor loss through earlier detection based on highly specific information, the program deters

---

Simons, *supra* note 15, at 29 (explaining the consequences of being a "cooperator" in an investigation).

23. *See* Part I, *infra*, describing the details of both agency programs' rewards and protections, including the opportunity for whistleblowers to receive a reward of 10 to 30 percent of the monetary sanctions when the SEC, CFTC, or related actions recover monies over $1 million due to information reported to the agencies.

24. *See* SEC. & EXCH. COMM'N, OFFICE OF INSPECTOR GEN., REP. NO. 511, EVALUATION OF THE SEC'S WHISTLEBLOWER PROGRAM 28–30 (2013), https://www.sec.gov/about/offices/oig/reports/audits/2013/511.pdf [hereinafter SEC OIG 2013 WHISTLEBLOWER PROGRAM EVALUATION] (assessing that it is too soon to evaluate whether a private right of action similar to the False Claims Act should be added to the SEC's whistleblower program given that the program has been operational for less than two years).

25. *See* Memorandum from Michael D. Granston, Dir., Commercial Litig. Branch, Fraud Section, U.S. Dep't of Justice to Attorneys in Commercial Litig. Branch, Fraud Section & Assistant U.S. Attorneys Handling False Claims Act Cases, Offices of the U.S. Attorneys 1–2 (Jan. 10, 2018) [hereinafter Granston Memorandum] (explaining the importance of dismissing False Claims Act *qui tam* private lawsuits when the DOJ has declined to intervene).

financial misconduct because the programs' anti-retaliation provisions, confidentiality rules, and potential financial rewards both protect and incentivize whistleblowers to report securities law violations to regulators.[26] Nevertheless, maintaining and increasing success of the Dodd-Frank whistleblower programs requires vigilance against persistent shots at the program that threaten to kill its success.

I. THE DODD-FRANK WHISTLEBLOWER PROGRAMS

The Dodd-Frank Act whistleblower provisions enhanced the SOX protections[27] and drew on earlier whistleblower legislation to substantially expand incentives and protections for whistleblowers who report investor-related financial crimes. Dodd-Frank required the US Securities and Exchange Commission (SEC) as well as the US Commodity Futures Trading Commission (CFTC) to implement provisions established by Congress providing whistleblowers incentives and protection.[28] Although the SEC's Office of Whistleblower Protection (OWB) was slow to develop, it has achieved notable successes, exceeding $326 million dollars in total rewards to 59 individual whistleblowers under the program, and ordering more than $1.7 billion in monetary sanctions against wrongdoers as a consequence of the program.[29] The

26. Buccirossi, Immordino & Spagnolo, *supra* note 19. On the deterrence effect, see Jaron H. Wilde, *The Deterrent Effect of Employee Whistleblowing on Firms' Financial Misreporting and Tax Aggressiveness*, 92 ACCT. REV. 247 (2017) (finding that firms subjected to whistleblower allegations show a significant decrease in financial misreporting and tax aggressiveness, and that the "deterrence effect persists for at least two years beyond the year of the allegation"); Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Remarks at the Securities Enforcement Forum (Oct. 9, 2013), *quoted in* Stephen Kohn, *The Problem with SEC's Plan to Cap Whistleblower Awards*, KOHN, KOHN & COLAPINTO, LLP (July 10, 2018), https://www.kkc.com/news/?id=651 (explaining that the SEC whistleblower provisions "deter wrongdoing by making would-be violators ask themselves—who else is watching me?").

27. 18 U.S.C. § 1514A (2012) (original version at SOX, Pub. L. No. 107-204, § 806(a), 116 Stat. 745, 802 (2002), *amended by* Dodd-Frank, Pub. L. No. 111-203, §§ 922(b), (c), 929A, 124 Stat. 1376, 1848, 1852 (2010)).

28. *See* Dodd-Frank, Pub. L. No. 111-203, § 924(d), 124 Stat. at 1850. *See also* 7 U.S.C. § 26 (2012) (commodity whistleblower incentives and protection); 15 U.S.C. § 78u-6 (2012) (securities whistleblower incentives and protection); § 78u-7 (implementation and transition provisions for whistleblower protection).

29. *See* U.S. SEC. & EXCH. COMM'N, 2018 ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 1 (2018) [hereinafter SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM]; Jason Zuckerman & Matt Stock, *One Billion Reasons Why the SEC Whistleblower-Reward Program Is Effective*, FORBES (July 18, 2017, 4:36 PM), https://www.forbes.com/sites/realspin/2017/07/18/one-billion-reasons-why-the-sec-whistleblower-reward-program-is-effective/#7558c9023009. The OWB was established in February 2011, but the rules to implement the program became effective on August 12, 2011. SEC OIG 2013 WHISTLEBLOWER PROGRAM EVALUATION, *supra* note 24, at iii. *See* Press Release, U.S. Sec. & Exch. Comm'n, Whistleblower

CFTC has had an even slower start and far less success, yet it has awarded approximately $87 million to whistleblowers since the inception of the agency's whistleblower program in 2012, including $75 million in awards in the summer of 2018.[30] Both offices continue to yield positive results, using the funds collected in successful cases arising out of the programs to fund the programs and customer education initiatives, provide restitution to harmed investors, protect and reward whistleblowers who provided significant information to the agencies, and add billions of dollars in collected fines to the US Treasury.[31]

Section 922 of the Dodd-Frank Act[32] amended the Securities Exchange Act of 1934 (Exchange Act)[33] in part by adding "Securities

---

Receives Award of Approximately $1.5 Million (Sept. 14, 2018), https://www.sec.gov/news/press-release/2018-194.

30. *See* U.S. COMMODITY FUTURES TRADING COMM'N, ANNUAL REPORT ON THE WHISTLEBLOWER PROGRAM AND CUSTOMER EDUCATION INITIATIVES 2–3 (2018) [hereinafter CFTC 2018 REPORT ON WHISTLEBLOWER PROGRAM]; *CFTC Announces Multiple Whistleblower Awards Totaling More Than $45 Million*, MONDOVISIONE (Aug. 2, 2018), http://www.mondovisione.com/media-and-resources/news/cftc-announces-multiple-whistleblower-awards-totaling-more-than-45-million/. The CFTC program is substantially smaller than the SEC program. While the numbers and quality of the tips have continued to increase over time, the first CFTC whistleblower award was in May 2014. *See* Jessica Tillipman, *Interview with Christopher Ehrman, Director of the CFTC Whistleblower Office*, FCPA BLOG (June 11, 2014, 7:28 AM), http://www.fcpablog.com/blog/2014/6/11/interview-with-christopher-ehrman-director-of-the-cftc-whist.html. Until the summer of 2018, the CFTC had only issued four rewards from 1393 whistleblower tips, totaling about $10.5 million. *See* U.S. COMMODITY FUTURES TRADING COMM'N, ANNUAL REPORT ON THE WHISTLEBLOWER PROGRAM AND CUSTOMER EDUCATION INITIATIVES 4–5 (2017) [hereinafter CFTC 2017 REPORT ON WHISTLEBLOWER PROGRAM]. The CFTC received 2153 tips since its inception through the end of fiscal year 2018 and issued nine awards overall in that time. CFTC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra*, at 3–4.

31. 15 U.S.C. § 78u-6(g) (providing an operating fund for the SEC whistleblower program that is funded by monetary sanctions collected in SEC enforcement actions arising from the whistleblower program); *Reports and Publications*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/reports?aId=edit-tid&year=All&field_article_sub_type_secart_value=Reports+and+Publications-AnnualReports&tid=59 (last visited Apr. 29, 2019) (reporting the amount collected from enforcement actions arising out of the whistleblower program, including whistleblower reward amounts, total amounts collected, and amounts turned over to the US Treasury); Kara M. Stein, *Statement on Proposed Amendments to the Commission's Whistleblower Program Rules*, U.S. SEC. & EXCHANGE COMMISSION (June 28, 2018), https://www.sec.gov/news/public-statement/statement-stein-whistleblower-062818. Mary Jo White, Chair, Sec. & Exch. Comm'n, Speech at Northwestern University School of Law: The SEC as the Whistleblower's Advocate (Apr. 30, 2015), https://www.sec.gov/news/speech/chair-white-remarks-at-garrett-institute.html (describing the SEC whistleblower program's success as a "game changer"). *See also* Zuckerman & Stock, *supra* note 29 (detailing the SEC Whistleblower-Reward Program's successes). *See* 7 U.S.C. § 26(g) (establishing the Commodity Futures Trading Commission Customer Protection Fund).

32. Dodd-Frank, Pub. L. No. 111-203, § 922(a), 124 Stat. at 1841.

33. 15 U.S.C. §§ 78a–78qq (2012).

Whistleblower Incentives and Protection" in Section 21F of the Exchange Act.[34] Section 748 of Dodd-Frank amended the Commodity Exchange Act by adding "Commodity Whistleblower Incentives and Protection" as Section 26.[35] Section 924(d) requires the SEC to establish an office within the SEC to administer a whistleblower program.[36] The SEC adopted Final Rules implementing this directive, Regulation 21F, effective August 12, 2011.[37] Aside from a few very minor points, the implementing legislation for the SEC and the CFTC is, essentially, the same.[38]

Central to creating incentives for whistleblowers, the Dodd-Frank Act requires the SEC and the CFTC to pay an award to whistleblowers[39] who voluntarily provide "original information" relating to violations of the securities laws to the SEC, or violations of Title 7, Chapter 1 to the CFTC, that leads to the "successful enforcement of the covered judicial or administrative action, or related action."[40] The amount of the award is based upon the monetary sanctions imposed upon the violator in SEC enforcement actions or related actions where such sanctions exceed $1 million.[41] The award, of not less than 10 percent, but not more than

34. 15 U.S.C. § 78u-6.

35. 7 U.S.C. § 26.

36. 15 U.S.C. § 78u-7.

37. Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 64,545, 101 SEC Docket 630 (Aug. 12, 2011). The CFTC's Final Rules became effective on October 24, 2011. U.S. COMMODITY FUTURES TRADING COMM'N, ANNUAL REPORT ON THE WHISTLEBLOWER INCENTIVES AND PROTECTION PROGRAM 3, 5 (2011), https://www.whistleblower.gov/sites/whistleblower/files/Reports/wb_fy2011 reporttocongress.pdf. The CFTC Whistleblower Office launched its web portal for receiving tips, complaints, and referrals on September 10, 2012. U.S. COMMODITY FUTURES TRADING COMM'N, ANNUAL REPORT ON THE WHISTLEBLOWER PROGRAM AND CUSTOMER EDUCATION INITIATIVES 2 (2012), https://www.whistleblower.gov/sites/whistleblower/files/Reports/wb_fy2012 reporttocongress.pdf [hereinafter CFTC 2012 REPORT ON WHISTLEBLOWER PROGRAM].

38. *Compare* 15 U.S.C. § 78u-6, *with* 7 U.S.C. § 26, *and compare* 17 C.F.R. § 240.21F (2018) (SEC Final Rule, effective Aug. 12, 2011), *with* 17 C.F.R. § 165 (2018) (CFTC Final Rule, effective Oct. 24, 2011); *see also* Whistleblower Incentives and Protection, 76 Fed. Reg. 53,172 (Aug. 25, 2011) (CFTC Final Rules).

39. *See* 7 U.S.C. § 26(a)(7); 15 U.S.C. § 78u-6(a)(6). *See also* 17 C.F.R. § 240.21F-2 (2018) (defining "whistleblower" as an "individual" (not an entity) who provides the SEC "with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the Federal securities laws," rules, or regulations, and that "has occurred, is ongoing, or is about to occur").

40. 15 U.S.C. § 78u-6(b); 7 U.S.C. § 26(b).

41. 15 U.S.C. § 78u-6(a); 7 U.S.C. § 26(a). Awards may also be based upon monetary sanctions collected by other authorities (including self-regulatory organizations) in actions related to a CFTC enforcement action, based upon information provided by a CFTC whistleblower.

30 percent of the sanctions collected, is mandatory,[42] although the specific award amount is discretionary[43] and based upon criteria that may increase[44] or decrease the award.[45] A whistleblower can be any person who provides the SEC or CFTC with original information about a violation of the securities laws or a violation of the Commodity Exchange Act, respectively, that is based upon either the person's independent knowledge or independent analysis.[46] Finally, a whistleblower may remain anonymous, but to be a whistleblower under the regulations, one must file a "tip, complaint or referral" (TCR) form with the SEC or CFTC that provides specific, timely, and credible information.[47] To be eligible for an award, the whistleblower must comply with rules that describe procedures, and among other things, potentially provide cooperation to develop the information or use it in proceedings.[48] Furthermore, certain categories of individuals are excluded as potential whistleblowers eligible for an award under the Dodd-Frank Act.[49]

The Dodd-Frank Act provides protection to whistleblowers who provide information pursuant to the Act by including anti-retaliation provisions and by keeping whistleblowers' identities confidential from employers. The Act created a private right of action against an employer who retaliates for any whistleblowing activities related to reporting securities law violations to the SEC or violations of commodities laws to

42. 15 U.S.C. § 78u-6(b); 7 U.S.C. § 26(b).

43. 15 U.S.C. § 78u-6(c)(1)(A); 17 C.F.R. § 240.21F-5(b), (c) (providing the percentage criteria, which is based in part on the criteria for determining the amount of the award as described in 17 C.F.R. § 240.21F-6, and if there is more than one whistleblower eligible for the award, the total amount of the award in the aggregate will not be less than 10 percent or more than 30 percent); 7 U.S.C. § 26(c)(1)(A); 17 C.F.R. § 165.9(a) (2018).

44. 15 U.S.C. § 78u-6(c)(1)(B); 17 C.F.R. § 240.21F-6(a) (identifying the significance of the information and the degree of assistance provided by the whistleblower, law enforcement interest in making the award, and whether or the extent to which the whistleblower participated in internal compliance systems, as reasons to increase the size of the award); 7 U.S.C. § 26(c)(1)(B); 17 C.F.R. § 165.9(b).

45. 15 U.S.C. § 78u-6(c)(2); 17 C.F.R. § 240.21F-6(b) (identifying the culpability of the whistleblower, any unreasonable reporting delay in making the report, and interference with internal reporting procedures, as reasons to decrease the size of the award); 7 U.S.C. § 26(c)(2); 17 C.F.R. § 165.9(c).

46. *See* 15 U.S.C. § 78u-6(a)(3); 7 U.S.C. § 26(a)(4).

47. *See* 17 C.F.R. § 240.21F-9; 17 C.F.R. § 165.3.

48. *See* 17 C.F.R. § 240.21F-8(a), (b) (providing that cooperation may include testifying or explaining tendered information, among other things); 17 C.F.R. § 165.5.

49. 17 C.F.R. § 240.21F-8(c) (excluding members, officers or employees of the SEC, the DOJ, an appropriate regulatory agency, self-regulatory organization, Public Company Accounting Oversight Board, or any law enforcement organization, at the time the information was received); 17 C.F.R. § 165.6.

the CFTC.[50] The agencies may also take action independently through an enforcement proceeding against an employer that retaliates against a whistleblower who provides information to the agency.[51] Moreover, the protections apply even if the whistleblower fails to satisfy the requirements, procedures, or conditions necessary to qualify for an award under the Act.[52] Finally, the Dodd-Frank Act protects whistleblower confidentiality in two possible ways: (1) by requiring that the agency not disclose information that could reasonably be expected to reveal the identity of the whistleblower, except in the limited circumstances delineated in the rules,[53] or (2) by permitting the whistleblower to submit information to the agency anonymously via an attorney representing the whistleblower and with the understanding that the whistleblower's identity must be revealed to the agency prior to receiving any award.[54]

When drafting the Final Rules, the SEC received extensive public comments from multinational corporations, national whistleblower organizations, and individuals, among others.[55] The comments are

50. *See* 15 U.S.C. § 78u-6(h)(1) (providing for relief that may include reinstatement, double back pay, litigation costs, expert witness fees, and attorney's fees). The Supreme Court held in *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767, 777 (2018), that this protection is limited to whistleblowers who experience retaliation only after externally reporting to the SEC. *See infra* Part III.A. *See also* 7 U.S.C. § 26(h)(1)(B)(i), (h)(1)(C) (providing, under the CFTC program, similar relief except that back pay is not doubled).

51. 17 C.F.R. § 240.21F-2. The Commission has used this provision to address "pre-taliation" by employers prohibiting cooperation with government inquiries or conditioning severance pay in employment contracts or separation agreements. *See infra* Part III.C. *See also* 17 C.F.R. § 165.19.

52. *See* 17 C.F.R. § 240.21F-2(b)(iii). Nevertheless, unless the person seeking protection under these provisions has either reported securities violations to the Commission or the appropriately qualified person pursuant to SOX protections (may report to the Commission, any other federal agency, Congress, or an internal supervisor), this protection is unavailable. *Dig. Realty Tr., Inc.*, 138 S. Ct. at 777, 778; *see* 15 U.S.C. § 78u-6(a)(6); 18 U.S.C. § 1514(a)(1) (2012). *But see Office of the Whistleblower: Frequently Asked Questions*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/offices/owb/owb-faq.shtml#P15_4932 (last visited Apr. 29, 2019) (see FAQ #7: "I work at a company with an internal compliance process. Can I report internally and still be eligible for a whistleblower award?").

53. *See* 15 U.S.C. § 78u-6(h)(2); 17 C.F.R. § 240.21F-7(a) (providing for disclosure when required to a defendant in connection with a federal court or administrative proceeding, or to certain investigatory, regulatory, oversight, or enforcement authorities subject to confidentiality requirements when determined to be "necessary to accomplish the purposes of the Exchange Act (15 U.S.C. 78a) and to protect investors"); 7 U.S.C. § 26(h)(2); 17 C.F.R. § 165.4(a).

54. 15 U.S.C. § 78u-6(d)(2); 17 C.F.R. § 240.21F-7(b); 7 U.S.C. § 26(d)(2); 17 C.F.R. §§ 165.4(b), 165.7(c).

55. *See* Comments on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/comments/s7-33-10/s73310.shtml (last visited Apr. 29, 2019) [hereinafter Comments on Proposed Rules for Implementing 21F] (providing responses to the SEC's call for comments in Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the

addressed in the SEC's Final Rule.[56] The Final Rule report reviews the public comments and explains the choices for the whistleblower program's various provisions. Dodd-Frank's whistleblower provisions were modeled upon the DOJ and IRS whistleblower programs.[57] Its provisions are also shaped by other laws that provide a historical perspective and have significant impact on encouraging whistleblowing as a means of detecting violations of and enforcing federal laws.[58]

Collectively, the statutory authorities create a patchwork of opportunities to support whistleblowers who choose to step forward to address questionable conduct. Each statutory scheme provides explicit rules regarding who is protected by the legislation and who is eligible for the awards, when awards are available. Each is administered in its own manner,[59] and deadlines vary depending upon which avenue is pursued. Most significantly, Congress sought to improve upon the institutional

---

Securities Exchange Act, Exchange Act Release No. 63,237, 99 SEC Docket 2417 (Nov. 3, 2010)).

56. *See* Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 64,545, 101 SEC Docket 630 (Aug. 12, 2011).

57. *See* S. REP. NO. 111-176, at 111 (2010). The Tax Relief and Health Care Act of 2006 created a formal nondiscretionary mechanism for awarding whistleblowers who provide specific substantive information leading to the detection and punishment of persons guilty of violating US internal revenue laws. 26 U.S.C. § 7623(b) (2012). The law required the IRS to create a Whistleblower Office, made awards of 15 to 30 percent of the collected proceeds mandatory so long as certain eligibility requirements were met, and added whistleblower appeal rights. *See* 26 U.S.C. § 7623(b); *History of the Whistleblower/Informant Program*, INTERNAL REVENUE SERV., https://www.irs.gov/compliance/history-of-the-whilstleblower-informant-program (last visited Apr. 29, 2019). The IRS whistleblower program only applies to cases where the taxes, penalties, interest, and other amounts in dispute exceed $2 million for an entity or, if the information pertains to an individual, that individual's annual gross income exceeds $200,000. 26 U.S.C. § 7623(b)(5). The IRS Informant Claims Program is an alternative award program for cases that do not meet the threshold dollars amounts for the whistleblower program. *See* 26 U.S.C. § 7623(a); *History of the Whistleblower/Informant Program*, *supra*. Since March 1967, the Secretary of the Treasury had discretionary authority to pay whistleblowers for information "for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same." 26 U.S.C. § 7623(a); *Whistleblower/Informant Program*, *supra*. In 1996, an amendment added authority to award payments for information regarding detecting underpayments of tax, and provided for such payments to be made from the proceeds recovered, rather than from appropriated funds. 26 U.S.C. § 7623(a); *Whistleblower/Informant Program*, *supra*. Discretionary decisions as to whether awards will be made are not reviewable. 26 U.S.C. § 7623(a); *Whistleblower/Informant Program*, *supra*.

58. *See, e.g.*, JOHN BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS (2007); *see also* text accompanying notes 224–35.

59. Under the Dodd-Frank Act, whistleblowers may proceed directly to court if retaliation is alleged, whereas under SOX, the whistleblower must first pursue a claim through a detailed administrative process. *Compare* 15 U.S.C. § 78u-6(h)(1) (providing for a private right of action for retaliation under the Dodd-Frank Act), *with* 29 C.F.R. § 1980 (2018) (setting forth the administrative procedures for filing a claim under SOX, its investigation, findings, review, and administrative appeal).

design to avoid the result of an earlier ineffective SEC whistleblower program prior to passage of Dodd-Frank, and the narrowly construed language of SOX whistleblower provisions.[60]

II. Obstacles to Legislation, Rulemaking, and Implementation

Despite the overwhelming impact of the financial crisis, which exploded just in time for the impending national elections in the fall of 2008, the need to move quickly to address predicted catastrophic failures in the financial market led to a relatively quick passage of measures to bail out the top financial institutions in the United States that were publicly dubbed "too big to fail."[61] General agreement existed that more cautiously drafted legislation would be necessary to address the greater failures in the financial marketplace and the shortcomings of the many actors quickly identified as contributing to the financial disaster.[62] Several congressional committees convened to study the crisis;[63] economists,[64] scholars,[65] and political pundits[66] weighed in to evaluate what went wrong and what should be done to avoid repetition. Nevertheless, once Congress sat down in earnest to pursue legislative remedies, the financial industry began a tireless effort to derail and curtail regulatory measures that it asserted would inhibit independent profit-making decisions and impede business as usual.[67]

---

60. *See, e.g.*, Johnson v. Siemens Bldg. Techs., Inc., ARB No. 08-032, ALJ No. 2005-SOX-015, 2011 WL 1247202 (Dep't of Labor Mar. 31, 2011) (finding that SOX covers non-publicly traded subsidiaries of publicly traded companies); R. Scott Oswald, *More Protection for Whistleblowers*, SARBANES-OXLEY COMPLIANCE J. (Feb. 14, 2013, 12:00 PM), http://www.s-ox.com/dsp_getFeaturesDetails.cfm?CID=2747; Ramirez, *supra* note 19, at 202–03.

61. *See, e.g.*, SORKIN, *supra* note 9.

62. *See* Meghan Elizabeth King, Note, *Blowing the Whistle on the Dodd-Frank Amendments: The Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes-Oxley*, 48 AM. CRIM. L. REV. 1457 (2011).

63. *See, e.g.*, FCIC REPORT, *supra* note 1.

64. *See, e.g.*, SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN (2011); PAUL KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008 (2009); NOURIEL ROUBINI & STEPHEN MIHM, CRISIS ECONOMICS: A CRASH COURSE IN THE FUTURE OF FINANCE 33–71 (2010).

65. *See, e.g.*, Steven A. Ramirez, *Lessons from the Subprime Debacle: Stress Testing CEO Autonomy*, 54 ST. LOUIS U. L.J. 1, 52–53 (2009); Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 206 (2008).

66. *See, e.g.*, Dave Itzkoff, *At Radio City, a Showdown Between Maher and Coulter*, N.Y. TIMES (Mar. 10, 2009), https://www.nytimes.com/2009/03/11/arts/television/11deba.html?_r=3&ref=politics (explaining how liberal pundit Bill Maher claimed the recession was caused by "greedy bankers" while conservative commentator Ann Coulter claimed it was caused by "yuppie-scum house flippers").

67. Opposition to statutory reform by those who would be regulated by Dodd-Frank extended

Little opposition to including whistleblower provisions in Dodd-Frank reforms[68] gave way to concerted opposition to the structure and rulemaking process.[69] The Dodd-Frank Act charged the SEC with responsibility for overseeing the whistleblower program, requiring, as discussed above, an Office of Whistleblower Protection,[70] a fund to pay out awards to eligible whistleblowers,[71] and a process by which whistleblower information could be received, reviewed, and if relevant, pursued.[72] Under the Act, the SEC was also charged with numerous other mandates involving studies, rulemaking, and deadlines, addressing all manner of matters central to the financial crisis.[73] On November 3, 2010, the SEC proposed Regulation 21F to implement the Dodd-Frank Act whistleblower provisions.[74]

It is within this context that the Office of the Whistleblower (OWB) was created. In February 2011, the SEC announced that Sean McKessy

---

well beyond any proposed whistleblower protection provisions. *See, e.g.*, Gretchen Morgenson, *At JPMorgan, the Ghost of Dinner Parties Past*, N.Y. TIMES (May 12, 2012), http://www.nytimes.com/2012/05/13/business/jpmorgan-shooting-itself-in-the-foot-fair-game.html?_r=3 (describing the financial industry's investment in undermining Dodd-Frank Act provisions that required further rulemaking through intense lobbying efforts to delay rulemaking, complicate rules proposed, and postpone effective dates).

68. *See* Richard Renner, *CNBC Notices Whistleblower Provisions of Dodd-Frank Act*, WHISTLEBLOWER PROTECTION BLOG (July 27, 2010), https://www.whistleblowersblog.org/2010/07/articles/corporate-whistleblowers/cnbc-notices-whistleblower-provisions-of-dodd-frank-act/ (noting that the new whistleblower provisions were not widely publicized).

69. *U.S. Chamber Urges SEC to Consider Potential Consequences of Whistleblower Bounty Program*, U.S. CHAMBER COM. (Nov. 2, 2010, 8:00 PM), https://www.uschamber.com/press-release/us-chamber-urges-sec-consider-potential-consequences-whistleblower-bounty-program ("We want a system that works, not a system of gotcha."); Letter from Apache Corp. et. al to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Dec. 17, 2010), *available at* http://www.sec.gov/comments/s7-33-10/s73310-150.pdf.

70. Dodd-Frank, Pub. L. No. 111-203, § 924(d), 124 Stat. 1376, 1841 (2010).

71. 15 U.S.C. § 78u-6(g) (2012).

72. 15 U.S.C. § 78u-6.

73. According to the SEC "the Dodd-Frank Act require[d] the SEC to promulgate more than 100 new rules, create five new offices, and conduct more than 20 studies and reports." *See* U.S. SEC. & EXCH. COMM'N, IN BRIEF: FY 2012 CONGRESSIONAL JUSTIFICATION 2 (2011), http://www.sec.gov/about/secfy12congbudgjust.pdf (last visited Apr. 29, 2019).

74. *See* Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act, Exchange Act Release No. 63,237, 99 SEC Docket 2417 (Nov. 3, 2010); Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300 (June 13, 2011). The Commission received more than 1541 letters responding to the Proposed Rules. The public comments are available at, Comments on Proposed Rules for Implementing 21F, *supra* note 55. In response to the comments and to meetings with many interested parties from nonprofit whistleblower organizations to multinational companies, the SEC addressed many of the significant matters raised by the letters and commentary in a detailed discussion published in the Federal Register. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300.

had been appointed chief for the new OWB.[75] By May 2011, the SEC established a whistleblower hotline,[76] provided a link on its website for lodging whistleblower complaints, and implemented its online questionnaire: the Tips, Complaints and Referrals System (TCR System).[77] The SEC published its Final Rule in the Federal Register in June 2011,[78] and it became effective on August 12, 2011, just over one year after Dodd-Frank's enactment.[79] The Commission revised the TCR System concurrently with the effective date of the Final Rule to conform to the Final Rule's substantive requirements.[80] Significant issues raised and addressed in the comments to the Final Rule are common to industry concerns about whistleblower programs in general, such as concerns that an employee may fail to speak up within the organization at early signs of violations because the employee is waiting until the losses are large enough to seek a whistleblower reward, or that the whistleblower is directing or participating in the wrongdoing.[81] Other significant issues are common concerns among whistleblowers, especially concerns about protecting them from harm or retaliation for bringing wrongdoing to the attention of employers or regulators. These positions remain in tension with each other and are borne out in the litigation discussed below, and through agency contact with the many constituencies involved in the financial markets. Thus, even as the high-dollar successes of the whistleblower programs are touted by regulators, continued success is not assured.

75. Press Release, U.S. Sec. & Exch. Comm'n, Sean McKessy Named Head of Whistleblower Office (Feb. 18, 2011), https://www.sec.gov/news/press/2011/2011-47.htm.

76. *See* U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 4–5 (2011), https://www.sec.gov/files/whistleblower-annual-report-2011.pdf [hereinafter SEC 2011 REPORT ON WHISTLEBLOWER PROGRAM]. *But see* Edward Siedle, *SEC Whistleblower Office Does Not Want to Talk to You*, FORBES (May 12, 2011, 11:03 AM), https://www.forbes.com/sites/edwardsiedle/2011/05/12/sec-whistleblower-office-does-not-want-to-talk-to-you/#76b08e057186 (criticizing the program for the inability of a whistleblower to contact someone personally to communicate a tip because the only way to lodge a whistleblower tip is to leave a message online and wait for the SEC to call you).

77. SEC 2011 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 76, at 4, 5.

78. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300.

79. The Dodd-Frank Act imposed a 270-day deadline from July 21, 2010, to issue the Final Rule. *See* Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 64,545, 101 SEC Docket 630 (Aug. 12, 2011); Funk, *supra* note 12. The Commodity Futures Trading Commission opened its Whistleblower Office in 2012. *See* 7 U.S.C. § 26 (2012) (Dodd-Frank provision directing CFTC to create a whistleblower office); CFTC 2012 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 37, at 2.

80. *See* SEC 2011 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 76, at 5.

81. *See supra* notes 55–56.

III. DODGING BULLETS: CHALLENGES THAT COULD KILL SUCCESS

Multiple challenges threaten the success of the SEC whistleblower program. Narrowing the scope of the legislation through judicial interpretation, aggressive efforts by employers to limit employee cooperation with the agencies, threats from special interest groups, limits to funding and resources, and proposed regulatory rule changes to undercut the programs are some of the threats to its potential for success. The institutional design drawn up in Dodd-Frank sought to provide credibility, legitimacy, and predictability to the programs through durable statutes to assure awards would be made, whistleblowers would be protected through anonymity, and anti-retaliation measures would have consequences. Through this design, Congress intended that whistleblowers would be incentivized to bring violations to the regulators, protect investors, and instill confidence in the market.

Congressional effort to promote credibility can be seen in all three elements of the whistleblower programs. Dodd-Frank includes definitions of key terms such as who will be eligible for awards and protection. The affirmative language setting forth the amount of the award between 10 and 30 percent of collected monetary sanctions, removes the agency discretion that hampered earlier SEC whistleblower provisions and thus assures financial recovery if conditions are met. The opportunity to report violations anonymously is explicit. Finally, the opportunity for the agency and the individual whistleblower to bring a private action to address retaliation assures both the offender and the offended that protection is durable. Despite the effort, trust in the program has been undermined, and it is up to the SEC or Congress to restore credibility in the program. While limited in scope, this Article addresses the ongoing fight to dodge the bullets aimed to maim the program, and preserve the credibility of the program, enhance its legitimacy, and promote predictability so that programs flourish.

A. Judicial Interpretation that Narrows Protections

Special interest lobbyists have threatened the SEC with potential lawsuits to strike down the whistleblower rules.[82] These are not idle

82. *See* McKessy, Remarks at Georgetown University, *supra* note 21 (asserting that he has received several threats about lawsuits to strike down the rules and citing successful efforts against other Dodd-Frank Act provisions); Matt Taibbi, *How Wall Street Killed Financial Reform*, ROLLING STONE (May 10, 2012, 12:00 PM), https://www.rollingstone.com/politics/politics-news/how-wall-street-killed-financial-reform-190802/ (entitling the second step to killing Dodd-Frank: "Sue, Sue, Sue").

threats. Industry opponents have enjoyed some success in using lawsuits to undo Dodd-Frank reforms.[83] The threat of such lawsuits may also influence the development of procedures and interpretation of statutes and rules as the agency attempts to avoid pushing the envelope and drawing the lawsuit. Inevitably, the statutory mandates of the Dodd-Frank Act, and the plain language of the rules, are subject to judicial interpretation.[84] As others have observed, judges have the ability to overturn the careful and lengthy debates about which provisions should be included in the Dodd-Frank Act, and the lengthy comment and rulemaking process that accompanied the Final Rules.[85]

Borne of the corporate accounting scandals that broke at the beginning of the millennium,[86] the Sarbanes-Oxley Act of 2002[87] faced legal challenges to limit its effort to encourage whistleblowers to step forward with information about financial corruption in publicly-traded

---

83. Taibbi described the strategy this way:

> Wall Street's first big win involved a small-but-important change known as the "proxy access" rule, which made it easier for people who own stakes in a company to remove directors from the board—giving shareholders more power to rein in corrupt or overpaid company executives.
>
> . . . In the case of the proxy access rule, Wall Street convinced its two favorite lobbying arms, the Business Roundtable and the Chamber of Commerce, to sue the Securities Exchange Commission over a technicality, claiming that the agency had not done a proper cost-benefit analysis before it instituted the new rule.

Taibbi, *supra* note 82. After the success of this first case, the same law firm was hired by

> two bank-friendly industry groups to sue the Commodity Futures Trading Commission (CFTC) to stop it from implementing "position limits" in the derivatives market.
>
> . . . But the industry sued the CFTC over the exact same issue—the supposed lack of sufficient cost-benefit analysis—that the Chamber of Commerce used to derail the proxy access rule.

Id. The case against the CFTC managed to stall progress on implementing the position limits as the banking industry sought to stay implementation of the rule. *Id.* In both cases, the attorney representing interests seeking to upend Dodd-Frank provisions was Eugene Scalia, son of the US Supreme Court Justice Antonin Scalia. *Id.*

84. *See infra* notes 93–98 and accompanying text (discussing Dig. Realty Trust, Inc. v. Somers, 138 S. Ct. 767 (2018)); *see also infra* notes 116–17 and accompanying text (discussing arbitration agreements).

85. *See* Taibbi, *supra* note 82 (observing that despite the political right-wing criticism of judicial activism, the right wing appears to have no problem searching for judges who will overturn the Dodd-Frank Act).

86. *See* FRANCIS T. CULLEN ET AL., CORPORATE CRIME UNDER ATTACK: THE FIGHT TO CRIMINALIZE BUSINESS VIOLENCE 19–23 (2d ed. 2006) (highlighting the widespread corporate accounting fraud beginning in 2001 with Enron's collapse into bankruptcy that resulted in a loss of $60 billion in market value for Enron, exposed $11 billion in fraud at WorldCom, and fueled hundreds of criminal investigations yielding even more convictions and discovery of costly crimes).

87. SOX, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C. & 29 U.S.C.); 18 U.S.C. § 1514A (Supp. V 2005).

companies.[88] The effectiveness of the provisions were immediately undermined as administrative law judges interpreted the regulations narrowly,[89] limiting access to the protections,[90] and enforcing arbitration requirements.[91] Once a narrow interpretation attaches to a rule, the parties must wait for either a higher court to overturn it on appeal, or for Congress to step in to remedy a misinterpretation. Enacted eight years after SOX, the Dodd-Frank Act amended SOX Section 806 to clarify and broaden the class of "covered employers" to include "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company," and broadened coverage to include credit rating agencies.[92]

Like with the SOX legislation, litigation persists over interpreting the new whistleblower protections applicable to securities violations. In 2018, eight years after Dodd-Frank went into effect, the Supreme Court, in *Digital Reality Trust v. Somers*, resolved a circuit split in interpreting the SEC's definition of "whistleblower" for purposes of its anti-retaliation provisions.[93] The Court rejected the agency's authority to define "whistleblower" through its rulemaking process as a person who suffered retaliation for internally reporting a violation before having the opportunity to provide the information to the SEC.[94] Ruling that the purpose of the Dodd-Frank whistleblower protections was to encourage

88. SOX, Pub. L. No. 107-204, 116 Stat. 745; 18 U.S.C. §1514A.

89. *See* King, *supra* note 62, at 1466–74 (describing the narrow construction of the statute and regulations).

90. *Id.* at 1466–70.

91. *Id.* at 1470–71.

92. *See* 15 U.S.C. § 78c(a)(1)(62) (2012).

93. *See* Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 777 (2018). The question of whether an individual could seek protection under the anti-retaliation provision of Dodd-Frank if that individual had not reported a securities law violation to the SEC arose in earnest in 2013 when two courts of appeals reached opposite results. The Fifth Circuit held that individuals must report wrongdoing to the SEC prior to any retaliation for the Dodd-Frank protections to apply, whereas the Second Circuit applied the anti-retaliation provisions to protect a whistleblower who had reported violations internally and had suffered retaliation as a consequence. *Compare* Asadi v. G.E. Energy (USA) L.L.C., 720 F.3d 620, 630 (5th Cir. 2013) (holding that the SEC's interpretation of the regulation must be rejected and should defer to Congress), *with* Berman v. NEO@OGILVY LLC, 801 F.3d 145, 155 (2d Cir. 2015) (ruling that the SEC's interpretation should be afforded *Chevron* deference).

94. In response to the circuit split, the SEC issued an interpretive rule determining that an individual was not required to submit information about a securities violation to the SEC prior to any retaliation by an employer in response to an employee's internal securities violation reporting to be protected under the anti-retaliation provisions. *See* Interpretation of the SEC's Whistleblower Rules Under 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 75,592, 80 Fed. Reg. 47,829 (Aug. 10, 2015).

making disclosures to the SEC, the Court ruled that Congress defined "'whistleblower' to mean a person who provides 'information relating to a violation of the securities laws to the Commission.'"[95]

No doubt there are whistleblowers who prefer to attempt an internal resolution to organizational misconduct, perhaps out of loyalty to the organization or coworkers, or concern about maintaining a secure business environment. The Supreme Court found the term "whistleblower" unambiguous, and its conclusion was compelling once it abandoned *Chevron* deference to the SEC's interpretation.[96] Nevertheless, it all but guarantees that an employee who would prefer to report suspected misconduct first internally, hoping for an internal remedy or for the organization to initiate SEC reporting, will no longer be protected if she exercises this option and will, by necessity, either choose to leave the organization, ignore the misconduct, or step into the uncomfortable position of placing herself in opposition to the organization by reporting its misconduct immediately to the SEC in order to secure the protective umbrella of anti-retaliation whistleblower provisions of Dodd-Frank.[97] Given the number of whistleblowers who reportedly chose to report first internally, it would appear the Court's interpretation has foreclosed this gentler option for would-be whistleblowers.[98] For them, this may be enough to dissuade them from reporting misconduct, as another bullet hits its mark undercutting the success of the whistleblower program.

B. Internal Reporting and Compliance Programs

The *Digital Realty* ruling is especially harsh for those whistleblowers who relied upon the agency's "whistleblower" definition and the rules

95. *Dig. Realty Tr., Inc.*, 138 S. Ct. at 772 (quoting 15 U.S.C. § 78u-6(a)(6)) (citing 15 U.S.C. § 78u-6(b)–(g)) (rejecting the broader agency definition that would protect a person who faces retaliation after internal reporting but before reporting the violation to the SEC).

96. In reversing the Ninth Circuit's holding in favor of Somers, the Court affirmatively rejected according *Chevron* deference to the SEC's interpretation. *Id.* at 782.

97. The Court in *Digital Realty Trust* emphasized, in response to the Solicitor General's concerns, that its interpretation of "whistleblower" offers anti-retaliation protection to an employee who reports a securities violation to both the SEC and another entity, in that the employee will not need to prove whether the employer is retaliating on account of the SEC reporting or the other entity reporting. *Id.* at 780. Moreover, "auditors, attorneys, and other employees subject to internal-reporting requirements" under Sarbanes-Oxley retain the SOX protections and may still acquire protection under Dodd-Frank once they report the securities violation to the SEC. *Id. See* 15 U.S.C. §§ 78j-1(b), 7245 (2012); 17 C.F.R. § 205.3 (2018).

98. *See Dig. Realty Tr., Inc.*, 138 S. Ct. at 779 (citing the Solicitor General's statistic that "approximately 80 percent of the whistleblowers who received awards in 2016 'reported internally before reporting to the Commission'").

encouraging whistleblowers to report first internally, because that misplaced trust leaves them without protection from retaliation that occurred prior to contacting the SEC. The Sarbanes-Oxley Act of 2002 sought to promote good corporate citizenship by urging corporations and other organizations to develop internal whistleblower protections that would encourage employees to bring concerns to the employer's attention.[99] These internal compliance programs would then be considered for their effectiveness should allegations of unlawful conduct by employees emerge.[100] One concern raised by corporations who had invested in such compliance programs was the impact the whistleblower program may have on discouraging employees to avail themselves of internal compliance procedures, given the opportunity to go directly to the SEC and potentially secure a significant financial reward for doing so.[101]

Even prior to the SOX support for internal compliance programs, employers had maintained that the law should encourage internal reporting by whistleblowers and discourage external reporting because the employer is in the best position to investigate the complaint and to address it quickly.[102] Employers argued that an internal investigation and remedy would always be less costly because it would avoid negative publicity, and more importantly, save litigation costs.[103] Whistleblowers countered that employers are just as likely to respond to internal reporting by firing the whistleblower quickly and covering up any existing evidence of the wrongdoing.[104]

---

99. *See* Cynthia A. Glassman, Comm'r, U.S. Sec. & Exch. Comm'n, Speech by SEC Commissioner: Sarbanes-Oxley and the Idea of "Good" Governance (Sept. 27, 2002), https://www.sec.gov/news/speech/spch586.htm (mentioning that Sarbanes-Oxley and the Commission's rules and penalties are designed to guarantee that "those who act on behalf of a company give life to the corporate conscience").

100. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 8B2.1, 8C2.5(f), 8D1.4(b)(1) (U.S. SENTENCING COMM'N 2018).

101. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,326 n.231 (June 13, 2011).

102. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. at 34,324. *See also* Ramirez, *supra* note 19, at 201–02 (reviewing employer preference for an opportunity to investigate and correct misconduct prior to it being reported to regulators).

103. *See supra* note 102.

104. *See* Buccirossi, Immordino & Spagnolo, *supra* note 19. *See, e.g.*, Letter from Eileen Morrell, Senior Corp. Fin. Prof'l, to Hon. Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n (Sept. 17, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4351738-173326.pdf (containing comments to rules proposed in, Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. 34,702 (July 20, 2018), from senior corporate finance professional whistleblower who was fired days after exhausting internal remedies required by the company).

The SEC does not require whistleblowers to report concerns internally. However, the Final Rules reflect a change from the proposed rules. The 2011 Final Rules encourage whistleblowers to take advantage of the internal compliance mechanisms in appropriate circumstances by favoring a higher reward amount if the employee participated in an entity's internal compliance or reporting systems, or a lower reward amount if the whistleblower interfered with internal compliance and reporting systems.[105] First, the rule recognizes that, in determining the amount of the award to the whistleblower, one factor that may increase the amount of the reward is whether the "whistleblower reported the possible securities violations through internal whistleblower, legal or compliance procedures before, or at the same time as, reporting them to the Commission."[106] Second, if the whistleblower reports internally, and that report leads to self-reporting by the employer entity, which leads to a recovery over $1 million, the whistleblower is given credit for reporting to the employer and may still recover the 10 to 30 percent of the sanction.[107] Third, in instances when the whistleblower first reports internally, the Final Rules extend the time period to report to the Commission to 120 days, so that the whistleblower will be treated as though she reported at the earlier date.[108]

The preference to offer a more favorable award for participating in internal compliance systems is undermined by the US Supreme Court's 2018 interpretation of the definition of a "whistleblower."[109] Relying upon Dodd-Frank's legislative history, the Supreme Court found the purpose of the whistleblower provisions is to create incentives for whistleblowers to supply information about securities violations to the SEC.[110] Given that the anti-retaliation protections will no longer apply, unless the whistleblower is protected under SOX, until after a person provides information about a violation to the SEC, this preference is no longer reasonable.

Despite proposing amendments to conform the rules to reflect the Supreme Court's interpretation of who is a "whistleblower" under Dodd-Frank, the SEC did not propose to alter 204.21F-6(a) to remove the preferential award assessment for those whistleblowers who participate

105. 17 C.F.R. § 240.21F-6 (2018).
106. 17 C.F.R. § 240.21F-6(a)(4)(i).
107. 17 C.F.R. § 240.21F-4(c)(3).
108. 17 C.F.R. § 240.21F-4(b)(7).
109. Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 777 (2018).
110. *Id.*

in internal compliance systems.[111] Instead, the proposed change is to the retaliation protections; it would add 17 CFR 240.21F-2(d), which would require that, for a person to receive anti-retaliation protection, they must qualify as a "whistleblower" as defined in 240.21F-2(a) "before experiencing retaliation."[112] But retaining the award preference could confuse or mislead a whistleblower without counsel. The preference should be removed from Rule 21F-6(a), especially since concurrent reporting to the SEC is also mentioned. From the Court's narrow interpretation of "whistleblower," two conclusions seem obvious. First, no whistleblower should risk losing anti-retaliation protection by reporting internally prior to reporting to the SEC. Second, for those whistleblowers with pending cases claiming retaliation under the SEC whistleblower program for acts that occurred prior to reporting to the SEC, no relief is available under the Dodd-Frank provisions unless the whistleblower also qualifies under SOX, which covers internal reporting. Moreover, the SEC's initial effort to incorporate employer's interests by favoring internal reporting via the potential for greater monetary rewards to whistleblowers has resulted in exactly that which whistleblowers feared, that is, employers are rewarded for retaliating quickly and before the unlawful activity is reported to the SEC.

Congress could restore the credibility and predictability of the whistleblower protections by expanding the definition of "whistleblower" to include internal reporting by amending the statute to adopt the SEC's rule providing access to the anti-retaliation provisions. In the meantime, the Supreme Court's narrow interpretation will heighten the hopes of employers aiming to narrow the program's incentives and protections, while slashing the expectations of those whistleblowers who experienced retaliation after internal whistleblowing but before reporting violations to the Commission.

C. Pre-taliation[113] and Arbitration: Gagging Potential Whistleblowers

Employers attempt to circumvent whistleblower efforts through

---

111. *See* Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. 34,702, 34,718, 34,720, 34,704, 34,724–28, 34,747 (July 20, 2018).

112. Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. at 34,720; *see also* 17 C.F.R § 240.21F-2(b); 17 C.F.R. § 240.21F-2(a).

113. This term was reportedly coined by then SEC Chief of the Whistleblower Office to describe efforts by big business to preemptively stop whistleblowing. *See* Erika Kelton, *The War on Dodd-Frank Whistleblowers—How Wall Street Gags, Intimidates and Fights the Fraud Fighters*, FORBES (Jan. 5, 2015, 4:50 PM), http://www.forbes.com/sites/erikakelton/2015/01/05/the-war-on-dodd-frank-whistleblowers-how-wall-street-gags-intimidates-and-fights-

restrictive agreements such as arbitration, confidentiality, and severance agreements that hamper their cooperation with the SEC or protection under Dodd-Frank.[114] In addition to clarifying terminology in SOX, Congress used Dodd-Frank to prohibit employers from enforcing mandatory predispute agreements that require employees to submit to arbitration regarding employment disputes over retaliation for whistleblowing activity.[115] While this amendment to SOX was a boost to whistleblowers reporting violations covered by SOX provisions, and although Dodd-Frank added similar antiarbitration language in the Commodity Exchange Act, the Dodd-Frank whistleblower protections for claims brought pursuant to 15 U.S.C. § 78u-6(h) have been interpreted by federal courts as "not exempt from predispute arbitration agreements."[116] Courts that reject Dodd-Frank's amendment to SOX prohibiting predispute mandatory arbitration provisions for violations that are reported to the SEC under the Dodd-Frank whistleblower protections overseen by the SEC's OWB reason that the added prohibition appears to be limited to claims under SOX due to the language, "arising under this section" appearing in 18 U.S.C. § 1514A(e)(2).[117]

---

the-fraud-fighters/.

114. *See* U.S. SEC. & EXCH. COMM'N, 2017 ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 6–7 (2017), https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf [hereinafter SEC 2017 REPORT ON WHISTLEBLOWER PROGRAM] (reviewing restrictive agreements). The SEC had pursued nine enforcement actions for Rule 21F-17 violations by the end of fiscal year 2018. SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 29, at 18.

115. Dodd-Frank, Pub. L. No. 111-203, § 922(c)(2), 124 Stat. 1376, 1848 (2010); 18 U.S.C. § 1514A(e)(2) (2012) ("No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."). Prior to Dodd-Frank, courts had concluded that, in SOX cases, an employer's mandatory arbitration agreement was enforceable and thus prohibited employees from seeking jury trials. *See, e.g.*, Guyden v. Aetna Inc., 544 F.3d 376, 379 (2d Cir. 2008) (affirming order to compel arbitration and dismiss plaintiff's case).

116. *See* Khazin v. TD Ameritrade Holding Corp., 773 F.3d 488, 491–92 (3d Cir. 2014) (holding that agreements to arbitrate Dodd-Frank claims are enforceable). *Compare* 18 U.S.C. § 1514A(e)(2) (SOX), *and* 17 C.F.R. 165.19 (2018) (regulations to implement the Commission's whistleblower program), *with* 15 U.S.C. § 78u-6(h)(1)(A) (2012) (SEC whistleblower program).

117. *See Khazin*, 773 F.3d at 491 (holding that agreements to arbitrate Dodd-Frank claims are enforceable); Pompliano v. Snap Inc., No. 2:17-cv-3664-DMG (JPRx), 2018 WL 3198454 (C.D. Cal. Apr. 11, 2018) (same); Wussow v. Bruker Corp., No. 3:16-cv-444-WMC, 2017 WL 2805016, at *4–7 (W.D. Wis. June 28, 2017) (same); Murray v. UBS Sec., LLC, No. 2:12-cv-05914, 2014 WL 285093, at *10–11 (S.D.N.Y. Jan. 27, 2014) (holding that the anti-retaliation provision does not include any prohibition against predispute arbitration agreements); Ruhe v. Masimo Corp., No. SACV 11-00734-CJC(JCGx), 2011 WL 4442790, at *4 (C.D. Cal. Sept. 16, 2011) ("The Dodd-Frank Act's whistleblower amendments to the Securities Exchange Act of 1934 and the Sarbanes-Oxley Act both contain provisions that render pre-dispute arbitration agreements

Even if an arbitration agreement restricts an individual from bringing a private action against an employer, the SEC is not bound by that agreement. The rules prohibit any person from taking any action to impede an individual's cooperation with the SEC in connection with a possible securities law violation.[118] The SEC brought its first anti-retaliation case under this provision in 2014 against a company that retaliated against a whistleblower who reported prohibited transactions to the SEC. The SEC settled the retaliation claim, among others, for $2.2 million.[119] In September 2016, the SEC addressed pre-taliation efforts by Anheuser-Busch InBev, charging it with violating whistleblower protection laws when it entered into a separation agreement with an employee that included a nondisclosure agreement to prevent the employee from continuing to voluntarily communicate with the SEC about potential Foreign Corrupt Practices Act (FCPA) violations.[120] The SEC continues to actively enforce this whistleblower

---

unenforceable for claims brought under these two sections. Unlike these other whistleblower provisions of the Dodd-Frank Act, Section 78-u contains no such provision."). *But see* Wiggins v. ING U.S., Inc., No. 3:14-CV-1089 (JCH), 2015 WL 3771646, at *6–7 (D. Conn. June 17, 2015) (holding that the SOX predispute arbitration ban also applies to plaintiff's Dodd-Frank claim because the court must consider not only the "bare text," but also "the context in which it was enacted and the purposes it was designed to accomplish" (quoting Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 377 (2004))). *Wiggins* appears to be the single case applying the predispute arbitration ban to Dodd-Frank claims.

118. *See* 17 C.F.R. § 240.21F-17(a) (2018). Prohibited acts include "enforcing, or threatening to enforce, a confidentiality agreement (other than agreements dealing with information . . . related to the legal representation of a client)." *Id.*

119. *See* Order Instituting Cease-and-Desist Proceedings, *In re* Paradigm Capital Mgmt., Inc., Exchange Act Release No. 72,393, 109 SEC Docket 430 (Sec. & Exch. Comm'n June 16, 2014) (detailing how after the employee whistleblower informed Paradigm of the SEC report, the company removed the whistleblower from the position of head trader and stripped away supervisory responsibilities, among other actions, that resulted in the whistleblower's resignation). *See also* U.S. SEC. & EXCH. COMM'N, 2014 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 18 (2014), https://www.sec.gov/about/offices/owb/annual-report-2014.pdf [hereinafter SEC 2014 REPORT ON WHISTLEBLOWER PROGRAM] (discussing the case).

120. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Anheuser-Busch InBev with Violating FCPA and Whistleblower Protection Laws (Sept. 28, 2016), https://www.sec.gov/news/pressrelease/2016-196.html. The FCPA, enacted in 1977, makes it illegal for US persons, foreign companies registered with the SEC, and foreign companies or persons that commit an act in furtherance of an improper payment or offer while in the United States, to bribe officials in order to "obtain or retain business." 15 U.S.C. § 78dd-1 (2012). In terms of bribery, the statute uses the language "anything of value," and it has been broadly construed. U.S. DEP'T OF JUSTICE & U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 14–19 (2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf; *see also* Funk, *supra* note 12, at 2. The DOJ and the SEC share concurrent authority for criminal prosecution or administrative FCPA enforcement. Arthur F. Mathews, *Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate*

protection, bringing actions against employers who included language in separation and severance agreements "specifically" targeting the whistleblower incentives and protections.[121] Remedies have included civil fines, revising agreements to remove prohibited language, and contacting former employees to inform them that the prohibited language is unenforceable.[122]

In May 2017, the CFTC strengthened its anti-retaliation protections by adopting a rule similar to the SEC's rules that prohibit acts to impede individuals from cooperating with the agency. The rules also permit the CFTC to bring suit against an employer who retaliates against a whistleblower, even if that individual is ineligible for an award under the whistleblower program.[123]

Internal Investigations: The Triton Energy/Indonesia *SEC Consent Decree Settlements*, 18 NW. J. INT'L L. & BUS. 303, 312 (1998) (explaining that pursuant to the FCPA a "split of enforcement authority between the DOJ and the SEC leads to parallel and overlapping SEC and DOJ/grand jury investigations of corporate FCPA compliance"). Despite early lack of success, the DOJ and SEC have increased enforcement of the FCPA. *See* Funk, *supra* note 12, at 3 (reporting that FCPA penalties and settlements have yielded billions of dollars for the US government, including a 2009 settlement in which Halliburton agreed to pay $559 million, and a 2008 agreement by Siemens to pay $800 million to settle charges). Dodd-Frank's whistleblower provisions apply to activities covered by the FCPA and have spurred insiders to come forward with reports of fraud. *See* SEC 2017 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 114, at 18 (reporting that 22 percent of the primary securities violations for covered actions involved corporate/issuer disclosure violations, including FCPA, accounting, and offering document violations).

121. *See, e.g.*, Order Instituting Cease-and-Desist Proceedings, *In re* BlackRock, Inc., Exchange Act Release No. 79,804, 115 SEC Docket 5758 (Sec. & Exch. Comm'n Jan. 17, 2017) (explaining there were severance agreements signed by over 1000 employees which conditioned receiving severance payments upon waiving any right to recovery of incentives offered under the Dodd-Frank Act); Order Instituting Cease-and-Desist Proceedings, *In re* NeuStar, Inc., Exchange Act Release No. 79,593, 115 SEC Docket 4704 (Sec. & Exch. Comm'n Dec. 19, 2016) (explaining that the employer compelled at least 246 departing employees to sign severance agreements prohibiting them from engaging in communications that disparaged the company with the SEC and other regulators, and that violating the agreements could cause former employees to forfeit substantially all severance pay); Press Release, U.S. Sec. & Exch. Comm'n, Company Settles Charges in Whistleblower Retaliation Case (Dec. 20, 2016), https://www.sec.gov/news/pressrelease/2016-270.html (referencing Order Instituting Cease-and-Desist Proceedings, *In re* SandRidge Energy, Inc., Exchange Act Release No. 79,607, 115 SEC Docket 4756 (Sec. & Exch. Comm'n Dec. 20, 2016), which concerned severance agreements of over 500 employees that restricted employees "from participating in any government investigation or disclosing information potentially harmful or embarrassing to the company"). *See* SEC 2017 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 114, at 20–21.

122. SEC 2017 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 114, at 20–21.

123. *See* 17 C.F.R. § 165.19 (2018); 17 C.F.R. app. § 165.20 (2018); CFTC 2017 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 30, at 3; Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Strengthens Anti-Retaliation Protections for Whistleblowers and Enhances the Award Claims Review Process (May 22, 2017), https://www.cftc.gov/PressRoom/PressReleases/pr7559-17. The new rules went into effect on July 31, 2017. Whistleblower Awards

D. Failure to Promptly Resolve Whistleblower Award Claims

As described above, the whistleblower programs have been tremendously successful. Key to the whistleblowers' perspective of the programs may be whether awards are made in due course rather than delayed or denied routinely. Prior to the enactment of Dodd-Frank, the SEC already had a whistleblower rewards policy in place.[124] Over the twenty-year program, only five whistleblowers were found eligible to receive awards under the discretionary procedures.[125] Central to the failure of the SEC's pre-Dodd-Frank whistleblower program was the fact that awards were within the discretion of the agency, and the decisions were nonreviewable.[126] Consequently, the SEC awards program failed miserably.[127]

The Dodd-Frank Act set forth a requirement that an Investor Protection Fund be instituted from which awards will be made,[128] and the Final Rules establish the necessary steps to claim an award.[129] Under Dodd-Frank, if eligibility requirements are met, the amount of the award must fall between 10 and 30 percent of the collected monetary sanctions.[130] Within that range, the agency has discretion, although certain factors are identified as relevant to the decision.[131] To be eligible for an award, the total monetary sanctions adjudged must be more than \$1 million, but that total may be aggregated from several defendants. The percentage of the award applies to the amount of collected monetary sanctions, which could be less than \$1 million on a single judgment so long as the aggregated sanctions exceed \$1 million. After the \$1 million

Process, 82 Fed. Reg. 24,487 (May 30, 2017).

124. The Securities Exchange Act of 1934, as amended in 1988, "authorized the [Securities and Exchange] Commission to award a bounty to a person who provides information leading to the recovery of a civil penalty from an insider trader, from a person who tipped information to an insider trader[], or from a person who directly or indirectly controlled an insider trader." Whistleblower Program Rules, 83 Fed. Reg. 34,702, 34,741 (July 20, 2018). The pre-Dodd-Frank Act provisions were limited to insider trading cases, and the maximum monetary reward was 10 percent of recovered funds. *Id. See* Funk, *supra* note 12, at 2 n.5.

125. U.S. SEC. & EXCH. COMM'N, OFFICE OF INSPECTOR GEN., ASSESSMENT OF THE SEC'S BOUNTY PROGRAM, REP. NO. 474, at 5 (2010), https://www.sec.gov/files/474.pdf (explaining that under the previous SEC Whistleblower Reward Program the SEC only made five payments totaling \$159,537 between 1989 and 2009).

126. *Id.*

127. *Id.* at 4 (concluding that "the program's success has been minimal and its existence is practically unknown").

128. 15 U.S.C. § 78u-6(g) (2012).

129. 17 C.F.R. § 240.21F-10 (2018).

130. 17 C.F.R. § 240.21F-5(b), (c).

131. 17 C.F.R. § 240.21F-6(a), (b).

threshold, payments may be made to the whistleblower over time as more money is collected by the SEC on the sanctions associated with the whistleblower's claims.[132]

The Office of the Whistleblower web page tab "Claim an Award" includes links to "Notices of Covered Actions."[133] Notices of Covered Actions provide information on each "SEC action where a final judgment or order, by itself or together with other prior judgments or orders in the same action issued after July 21, 2010, results in monetary sanctions exceeding $1 million."[134] Posting the Notice does not imply that a whistleblower will be eligible to receive an award.[135] Under the Final Rule, the SEC is not obligated to provide notice to whistleblowers that a judgment has been entered on a matter to which the whistleblower's information contributed to the successful result.[136] A whistleblower may sign up to receive electronic notices when new Notices of Covered Actions are posted on the agency's website, but it remains the whistleblower's responsibility to review the website for any related notices.[137] Once posted, the rules provide a ninety-day window in which the whistleblower may apply for an award.[138] An award may be denied

132. 17 C.F.R. § 240.21F-5(b), (c) (stating that the percentage is based in part on the criteria for determining the amount of the award as described in 17 C.F.R. § 240.21F-6, and if there is more than one whistleblower eligible for the award, the total amount of the award in the aggregate will not be less than 10 percent or more than 30 percent).

133. *See Claim an Award*, U.S. SEC. & EXCHANGE COMMISSION: OFF. WHISTLEBLOWER (Aug. 26, 2017), http://www.sec.gov/about/offices/owb/owb-awards.shtml [hereinafter *Claim an Award*].

134. *See id.* July 21, 2010 is the effective date of the Dodd-Frank legislation. Information provided to the SEC prior to the enactment of the Dodd-Frank Act is not eligible for an award under the program, but information supplied in writing to the SEC after the Dodd-Frank Act was enacted but prior to the effective date of the Final Rules is potentially eligible for awards provided the tipster submits a claim pursuant to the process described in the Final Rules. *See* 17 C.F.R. §§ 240.21F-4(b)(1)(iv), 240.21F-10; SEC 2011 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 76, at 6 n.12; *Frequently Asked Questions*, U.S. SEC. & EXCHANGE COMMISSION: OFF. WHISTLEBLOWER (Oct. 29, 2018), http://www.sec.gov/about/offices/owb/owb-faq.shtml#P15_4932. Telephonic information is excluded because it is not in writing and not all telephone calls provide information about potential securities law violations; moreover, the SEC also receives tips from individuals who are not eligible for awards or do wish to be considered for awards, but the report does not provide an accounting of such tips nor include them in the appendices. *See* SEC 2011 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 76, at 5 n.10.

135. *See Claim an Award*, *supra* note 133 ("The inclusion of a Notice means only that an order was entered with monetary sanctions exceeding $1 million.").

136. *See* 17 C.F.R. § 240.21F-10.

137. *See* SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 29, at 12; *Claim an Award*, *supra* note 133.

138. *See Claim an Award*, *supra* note 133. An individual applies for an award by submitting a completed Form WB-APP to the Office of the Whistleblower. *See* SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 29, at 13.

because it is filed out of time.[139]

Providing a format through which any person who believes he has contributed to the successful collection of monetary sanctions can submit a claim is useful. This is because claims for awards are not limited to selection of recipients solely through the assessment of agency personnel, especially given that staff turnover at the agency could hamper identification of all potential eligible whistleblowers. Nonetheless, the narrow requirements may also be viewed as additional obstacles that put the onus on the whistleblowers to continuously check up on cases that may have begun years earlier or for which monetary sanctions continue to be collected years later, in order to gain the benefit of the award. The agency may also contact whistleblowers who provided substantial assistance throughout the investigation, but it is not obligated to do so. The rules are clear that responsibility for filing an award claim remains with the whistleblower.[140]

If timely filed, the claim is reviewed by SEC OWB staff, who make a written recommendation regarding whether to grant or deny an award by applying the eligibility standards. If the recommendation is positive, SEC OWB staff apply the criteria for determining the amount of award set forth in the rules to assess the percentage of the award.[141] A Claims Review Staff composed of senior SEC enforcement officers reviews the recommendations and issues a Preliminary Determination assessing whether to grant an award, and if so, the amount of the award.[142] Once issued, the award applicant has thirty days to submit a written request for a copy of the record upon which the determination was based and to request a meeting with OWB. The applicant has a limited period in which to object to the preliminary determination. The preliminary determination may be reconsidered, but eventually the Claims Review Staff will send a Proposed Final Determination to the Commission for review and a Final Order.[143] Claimants have thirty days to appeal a Final Order denying an

139. *See* SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 29, at 13. *See, e.g.*, Order Determining Whistleblower Award Claim, Exchange Act Release No. 77,368, 113 SEC Docket 3715 (Mar. 14, 2016), *pet. for rev. denied sub nom.* Cerny v. SEC, 707 F. App'x 29 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2005 (2018) (mem.).

140. *See* 17 C.F.R. § 240.21F-10(b); SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 29, at 13.

141. *See* 17 C.F.R. § 240.21F-6; SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 29, at 13.

142. *See* SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 29, at 13–15 (illustrating the review and analysis of award claims, how preliminary determinations are issued, and how final orders are issued).

143. 17 C.F.R. § 240.21F-10 (setting forth procedures for making a whistleblower award claim

award to the appropriate federal court of appeals.[144]

The programs' success depends upon certainty, and that certainty is undermined because the rewards promised to whistleblowers are slow to materialize. The tip is only the beginning of the process, and a whistleblower understands that it may never result in meeting the $1 million baseline to even become a covered action. As the number of tips to the agency increase, more resources are needed to review those tips. Promising tips are sent out to the agency's enforcement division for investigation; if violations are confirmed, the agency or related agencies must either litigate or reach a settlement before any monetary sanctions are imposed. Once collected, if monetary sanctions meet the million-dollar threshold, the notice of covered action is listed on the agency website, the whistleblower or whistleblowers must file for a claim, and the claim is reviewed through the process described above.

Award applications have reportedly lingered for years without agency resolution due in part to an absence of a timeline for the agency's review of applications, despite the rigid timeline imposed upon applicants. The SEC came under fire in 2015 when a whistleblower filed a lawsuit against the agency criticizing a three-year backlog in the agency's review of award applications that was allegedly delaying whistleblower awards.[145] In May 2015, the *Wall Street Journal* reported that 247 of the 297 whistleblowers who applied for an award since the OWB opened in 2011 had not yet received a final decision from the SEC.[146] Even though tips have continued to increase year over year, leading to increased SEC inquiries, the process had stalled, causing experts to raise concerns that the backlog would discourage whistleblowing in the long run.[147] The lawsuit was terminated in 2016, when the anonymous whistleblower notified the DC Circuit court that the SEC had responded to the whistleblower's application.[148] Although the SEC maintained that its

in SEC actions); 17 C.F.R. § 240.21F-11 (related actions).

144. 17 C.F.R. § 240.21F-13.

145. *See* C. Ryan Barber, *Whistleblower Challenges SEC Over Award Claim*, NAT'L L.J. (Dec. 18, 2015), https://www.law.com/nationallawjournal/almID/1202745246520/?slreturn=20190403121722; Rachel Louise Ensign & Jean Eaglesham, *SEC Backlog Delays Whistleblower Awards*, WALL ST. J. (May 4, 2015, 11:44 AM), http://www.wsj.com/articles/sec-backlog-delays-whistleblower-awards-1430693284.

146. *See* Ensign & Eaglesham, *supra* note 145 (noting that roughly 83 percent were still awaiting decisions on award applications).

147. Barber, *supra* note 145.

148. C. Ryan Barber, *SEC Responds to Whistleblower Who Challenged Agency Delay*, NAT'L L.J. (Feb. 9, 2016), https://www.law.com//nationallawjournal/almID/1202749155207/SEC-Responds-to-Whistleblower-Who-Challenged-Agency-Delay/?slreturn=20160724012824.

preliminary determination regarding the whistleblower's award was "serendipitous," it also meant the SEC was not forced to account publicly for the long delays in assessing whistleblower fee award petitions.[149]

The slow payouts have continued with the *Wall Street Journal* reporting that from 2014 through 2017, the delays averaged over two years and had been as long as four years based on a sample of award decisions. So, the awards process "lasts longer than the average time it takes to investigate and close an enforcement case."[150] Even though the OWB established quantitative performance measures early on, such as the "average length of time to respond to applications of awards filed by whistleblowers," it would appear it did not adopt the SEC OIG's recommendation to establish and incorporate "meaningful performance metrics" that measure process performance,[151] despite the exacting standards placed on the whistleblower award applicants. The failure to establish key performance metrics for the agency has left whistleblowers who rose to the incentive to report violations in a state of limbo waiting for justice delayed through agency inaction.

The reasons offered for the backlog range from inadequate resources to review award applications to excessive incentives prompting an increase in whistleblowing tips and complaints. Every year since the OWB opened, the number of tips and award applicants has risen.[152]

---

149. *Id. See* U.S. SEC. & EXCH. COMM'N, 2015 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 1 (2015) [hereinafter SEC 2015 REPORT ON WHISTLEBLOWER PROGRAM] (showing that more than 120 whistleblower award claims were submitted in fiscal year 2015).

150. Dave Michaels, *SEC Whistleblower Payouts Slow Amid Deluge of Reward Seekers*, WALL ST. J. (Aug. 5, 2018, 9:00 AM), https://www.wsj.com/articles/sec-whistleblower-payouts-slow-amid-deluge-of-reward-seekers-1533474001.

151. *See* SEC OIG 2013 WHISTLEBLOWER PROGRAM EVALUATION, *supra* note 24, at 21 (concluding that OWB developed "an internal control plan that identifies several quantitative and qualitative key performance measures").

152. The SEC reports that from fiscal years 2012 to 2018, the number of whistleblower tips has grown by nearly 50 percent from 3001 to 5282, climbing steadily every year, to over 28,000 in total. SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 29, at 20. Fiscal Year 2012 was the first full year the OWB was operational. *Id.* From fiscal year 2013 through fiscal year 2018, the CFTC also received whistleblower tips and complaints at an increasing rate, from 138 tips in fiscal year 2013 to 760 tips in fiscal year 2018, for a total of over 1600 tips. *See* CFTC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 30, at 4. The CFTC WBO received 74 whistleblower award claims during fiscal year 2017, but no awards were paid out in fiscal year 2017. *See* CFTC 2017 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 30, at 6. In fiscal year 2018, over $75 million collectively has been paid to a handful of claimants. Press Release, U.S. Commodity Futures Trading Comm'n, CFTC Announces Multiple Whistleblower Awards Totaling More than $45 Million (Aug. 2, 2018), https://www.cftc.gov/PressRoom/PressReleases/7767-18. Despite the historical upward trajectory in CFTC receipt of whistleblower tips, the number of enforcement

Given the yield for the agency and the benefit to investors, one would expect that more resources would be directed to the office.[153]

Some market participants and agency leadership suggest that the prominent announcements of multimillion-dollar whistleblower awards has drawn out "[f]rivolous reward seekers" whose claims distract the agency from and delay awards to legitimate claimants.[154] Yet, the well-publicized success of the program, and especially its large awards, directly serve the purpose of the whistleblower program by incentivizing whistleblowers to report violations to the SEC.[155] In June 2018, the SEC filed for notice and comment Proposed Amendments to the OWB rules that would bar award applicants who have abused the claims process by either making repeated frivolous award claims or who have submitted false information to the Commission, and permit summary dispositions for award claims that fail to meet procedural rules requirements.[156] It would appear that while frivolous filers may file a number of claims, the actual number of individuals behind such filings is low, with the OWB reporting that two claimants were responsible for 221 award claims.[157] If adopted, it remains to be seen whether this type of change in the rules will have any meaningful impact on the SEC to bring down the backlog to reasonable levels without imposing specific timelines on the agency

---

actions brought by the agency dropped significantly from FY 2016 to FY 2017, with 30 percent fewer actions and $412 million in monetary sanctions relative to the $1.29 billion obtained in fiscal year 2016. Zach Brez, Allison Lullo & Giselle Sedano, *CFTC 2018 Enforcement: Where the Puck Is Going*, N.Y. L.J. (Jan. 26, 2018, 3:50 PM), https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2018/01/26/cftc-2018-enforcement-where-the-puck-is-going/.

153. *See* Zuckerman & Stock, *supra* note 29.

154. *See* Michaels, *supra* note 150.

155. *See* SEC OIG 2013 WHISTLEBLOWER PROGRAM EVALUATION, *supra* note 24, at iv, v, 12–14 (finding, in response to Congress's directive to assure progress, that the OWB is appropriately promoting and publicizing the SEC's whistleblower program).

156. *See* Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. 34,702, 34,704–05, 34,749 (June 8, 2018) (citing and proposing amendments to 17 C.F.R. § 240.21F-8); Press Release, U.S. Sec. & Exch. Comm'n, SEC Proposes Whistleblower Rule Amendments (June 28, 2018), https://www.sec.gov/news/press-release/2018-120 [hereinafter Press Release, Proposed Amendments].

157. In May 2014, the Commission denied 143 award claims from a single individual, having previously denied 53 award claims from that same individual, while only 19 other award claims had been denied by the end of fiscal year 2014. SEC 2014 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 119, at 14, 19. In August 2015, the Commission denied 25 award claims from a different single individual, for a total of 291 claim award denials relating to two frequent award applicants. SEC 2015 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 149, at 14. Together, the two claimants filed 221 of the 415 award claims reportedly decided by the Commission between 2012 and 2017. *See* Michaels, *supra* note 150 (containing *Wall Street Journal*'s analysis of SEC releases from 2012 to 2017).

for the claims review process as was recommended previously by the OIG. As Charles Grassley, chairman of the Senate Judiciary Committee and perennial supporter of whistleblower rights has stated, "[T]he Commission's Proposed Rule fails to adequately address the long delays experienced in whistleblower cases that are not frivolous. Should the Commission allow these long delays to persist, the resulting lengthy award determination process could deter future potential whistleblowers."[158] Predictability is critical to institutional design. If whistleblowers perceive that decisions will be inconsistent or unreasonably delayed, and if it seems that the agency cannot be depended upon to resolve cases promptly, whistleblowers will discount the award incentive and factor that discount into whether the risk of whistleblowing outweighs the uncertainty of the benefits.[159]

E. Congressional Underfunding

An alternate explanation for the backlogs could be the SEC OWB's lack of resources. Congressional underfunding is a challenge across the agency. Funding and resources have not reached the levels anticipated by the Dodd-Frank legislation.[160] In the years leading up to the financial crisis—fiscal years 2005, 2006, and 2007—SEC funding was held flat or declined, and it lost 10 percent of its personnel.[161] Even as the workforce at the SEC shrunk, its responsibilities rapidly expanded.[162] In fiscal year

158. Letter from Charles E. Grassley, Chairman, Senate Judiciary Comm., to Hon. Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Regarding Amendments to the SEC's Whistleblower Program Rules 7 (Sept. 18, 2018) (footnote omitted), https://www.sec.gov/comments/s7-16-18/s71618-4373264-175545.pdf.

159. *See* Michaels, *supra* note 150 (noting that one whistleblower still awaiting a final decision on an award claim remarked, "Having a system that is slow is the same thing as having a system that is not fair.").

160. In March 2010, a few months prior to Dodd-Frank's passage, the Congressional Budget Office estimated changes in direct spending for the Securities and Exchange Commission in the Estimated Budgetary Authority of $1.5 billion for 2011 and for 2012. *See* U.S. CONG. BUDGET OFFICE, S. 3217, COST ESTIMATE: RESTORING AMERICAN FINANCIAL STABILITY ACT OF 2010 8 (2010) (anticipating budgetary needs for agencies impacted by proposals that eventually became the Dodd-Frank Act).

161. *See* U.S. SEC. & EXCH. COMM'N, IN BRIEF: FY 2011 CONGRESSIONAL JUSTIFICATION 2 (2010) (highlighting that limited resources "severely hamper[ed] key areas such as the agency's enforcement and examination programs").

162. *See id.* ("Since 2005, the number of investment advisers registered with and overseen by the SEC has grown by 32 percent, and the number of broker-dealer branch offices has grown by 67 percent. The SEC oversees a total of more than 35,000 registrants, including over 10,000 public companies, 7,800 mutual funds, about 11,500 investment advisers, 5,400 broker-dealers, 600 transfer agents, 12 securities exchanges, 10 nationally recognized statistical rating organizations (NRSROs), and self-regulatory organizations (SROs) such as the Financial Industry Regulatory

2009, the agency's workforce was still about 1 percent short of the fiscal year 2005 level.[163]

In fiscal year 2009, the SEC's budget was $960 million.[164] In 2010, the agency's budget increased to $1.2 billion.[165] With passage of the Dodd-Frank Act in 2010, the SEC sought to hire 800 new employees to implement new responsibilities assigned to it, including the directive to open an Office of the Whistleblower, and create rules for its implementation and operation.[166] Instead, key House Republicans who had opposed the Dodd-Frank Act also opposed budgetary increases to the SEC and the CFTC.[167]

In February 2011, the SEC sought to increase its budget to $1.407 billion for FY 2012, an increase of $264 million over the agency's FY 2011 budget. It also sought to increase hiring by 780 positions to meet its core mission, continue to implement the Dodd-Frank Act mandates, and expand its information technology systems.[168] Included in the budget request, the agency sought to add 43 positions to the whistleblower program "principally to expand investigations of tips received from whistleblowers."[169] The agency reported that only the Office of the Whistleblower, one of the five new offices mandated by the Dodd-Frank Act, had been implemented, and more resources were needed to establish those offices.[170]

The SEC Office of Inspector General (OIG) released an October 2018 statement on the SEC's management and performance challenges that contrasts the increasing responsibilities of the agency over the last five years with the decline in the agency's overall staffing level due to an appropriation that "has remained essentially flat since FY 2016[, and] a hiring freeze that continued throughout FY 2018 [resulting in] a decline[]

Authority, Municipal Securities Rulemaking Board, and Public Company Accounting Oversight Board. While other financial regulators have close to parity between the number of staff and the number of entities they regulate, in recent years SEC staffing and funding simply have not kept pace with industry growth.").

163. *See id.* (FTE's (full time equivalent) positions remained under 2005 levels by thirty-five positions).

164. *See* Jim Puzzanghera, *SEC Chief Warns Against Budget Cuts*, L.A. TIMES (Feb. 5, 2011), http://articles.latimes.com/2011/feb/05/business/la-fi-sec-schapiro-20110205.

165. *Id.*

166. *Id.*; Dodd-Frank, Pub. L. No. 111-203, § 924(d), 124 Stat. 1376, 1850 (2010).

167. Puzzanghera, *supra* note 164.

168. *See* U.S. SEC. & EXCH. COMM'N, *supra* note 73, at 2 (stating that, of the 780 positions, 612 would be full-time equivalents).

169. *See id.* at 3 (explaining the responsibilities that the new positions would undertake).

170. *See id.* at 8.

from 4,689 positions at the beginning of the hiring freeze to 4,459 positions at the end of FY 2018 (or about 5 percent)."[171]

One would expect the number of whistleblower tips and complaints to rise along with the higher volume of entities subject to agency oversight. With a decline in overall SEC staffing and consequently less oversight capability, there is a greater likelihood that violations will not be identified by regulators, and there is more opportunity for whistleblowers to report securities violations. Staffing at the SEC OWB is far below the forty-three positions sought by the agency to staff the office for FY 2011. Since FY 2012, the OWB has had a chief, deputy chief, one administrative assistant, as well as staff attorneys and paralegals. Staffing has increased slightly from FY 2012 to FY 2018, rising from eight attorneys and three paralegals to eleven attorneys and four paralegals.[172]

---

171. *See* Memorandum from Carl W. Hoecker, Inspector Gen., to Jay Clayton, Chairman, Regarding The Inspector General's Statement on the SEC's Management and Performance Challenges 1 (Oct. 5, 2018), https://www.sec.gov/Inspector-Generals-Statement-on-the-SECs-Mgt-and-Performance-Challenges-Oct-2018.pdf. The description of the changing markets and increasing responsibilities of the SEC is breathtaking:

> The [agency] is charged with overseeing more than 26,000 registered market participants, including investment advisers, mutual funds, exchange-traded funds, broker-dealers, municipal advisors, and transfer agents. The agency also oversees 21 national securities exchanges, 10 credit rating agencies, and 7 active registered clearing agencies, as well as the Public Company Accounting Oversight Board, Financial Industry Regulatory Authority, Municipal Securities Rulemaking Board, the Securities Investor Protection Corporation, and the Financial Accounting Standards Board. In addition, the SEC is responsible for selectively reviewing the disclosures and financial statements of more than 8,000 reporting companies.
>
> . . . [I]n the last 5 years, the number of registered advisers has grown by more than 15 percent and the assets under management of these firms has increased by more than 40 percent. In addition, both the scope and number of clearing agencies required to be examined by the SEC have grown, and the registration of municipal advisors has added responsibility for hundreds of additional registrants with increasingly complex business lines. At the same time, there has been rapid growth in distributed ledger (i.e., blockchain) technologies and in the cryptocurrency markets, and the SEC has reported that cyber threats in securities markets have continued to increase in both frequency and sophistication.

Id.

172. *See* SEC 2017 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 114, at 6 (eleven staff attorneys, four paralegals); U.S. SEC. & EXCH. COMM'N, 2016 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 6 (2016) (eleven staff attorneys, five paralegals); SEC 2015 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 149, at 6 (ten staff attorneys, five paralegals); SEC 2014 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 119, at 6 (nine staff attorneys, three paralegals); U.S. SEC. & EXCH. COMM'N, 2013 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 5 (2013) (nine staff attorneys, three paralegals); U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 2 (2012) (eight staff attorneys, three paralegals).

Limited resources to fund and train staff also risk the security of the whistleblower program because extensive training is required to implement the program effectively.[173] A widely-publicized early report of an "inadvertent" disclosure of a whistleblower's identity,[174] for example, erodes the promise of anonymity, an important feature for those contemplating whether to provide information of securities violations to the SEC. Such careless errors are believed to have undermined the SEC's predecessor whistleblower program for insider trading information.[175]

Even as the SEC struggles to secure sufficient funding to meet its historical responsibilities, staff for new oversight duties imposed by the Dodd-Frank Act, and modernize to address a changing, global financial market with far greater complex transactions and computerized trading, it is important to note that increases in SEC spending would be fully offset by increased SEC collections of fees on securities transactions and registrations.[176] One provision of the Dodd-Frank Act limited the amount

173. *See* SEC 2011 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 76, at 4. The ability to report anonymously is critical to the success of the program because about half of the whistleblowers who received awards from the SEC program reported their tips anonymously. *See* Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. 34,702, 34,715 (July 20, 2018). The Dodd-Frank Act expressed concern for the protection of whistleblowers from retaliation and mandated that whistleblower privacy be a feature of the rules, but the rules also provide for the possibility that anonymity will not be able to be maintained. *See* 15 U.S.C. § 78u-6(d)(2)(B), 6(h)(2) (2012). Once an employer becomes aware that there is a suspected unidentified whistleblower in the ranks, there is a risk that the employer will take measures to uncover the disruptor. The SEC settled an action against HomeStreet, Inc. that alleged a violation of Rule 21F-17, in part due to its announcement that it could deny indemnification for legal costs to the suspected whistleblower, an act that could impede the whistleblower's cooperation with the agency. *See* SEC 2017 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 114, at 19–20.

174. *See, e.g.*, Scott Patterson & Jenny Strasburg, *Source's Cover Blown by SEC*, WALL ST. J. (Apr. 25, 2012, 9:22 AM), http://online.wsj.com/article/SB10001424052702303459004577363683833934726.html (reporting that the SEC "inadvertently" disclosed a whistleblower's identity when an SEC attorney showed notes to an executive at Pipeline Trading Systems LLC, the subject of the whistleblower's tip, and the executive recognized his handwriting).

175. *See, e.g.*, Memorandum from H. David Kotz, Inspector Gen., to James Clarkson, Acting Reg'l Dir., N.Y. Reg'l Office, Regarding Referral of Report of Investigation: Case OIG-501, Disclosure of Nonpublic Information (Mar. 30, 2009) (finding that in 2004, SEC New York Regional Office Enforcement attorney disclosed nonpublic information, namely the name of an employee whistleblower to the employee's employer, JPMorgan Chase, and that the JPMorgan Chase employee was subsequently fired); *Pogo Letter to SEC Chairman Mary Shapiro Regarding Inspector General Recommendations for Disciplinary Action*, POGO (Mar. 8, 2011), https://www.pogo.org/letter/2011/03/pogo-letter-to-sec-chairman-mary-schapiro-regarding-inspector-general-recommendations-for-disciplinary-action/.

176. *See* James B. Stewart, *As a Watchdog Starves, Wall Street Is Tossed a Bone*, N.Y. TIMES (July 15, 2011), http://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html?_r=1 (emphasizing that "the S.E.C. isn't financed by tax revenue, but rather by fees levied on those it regulates, which include all the big securities firms").

of fees the SEC may collect to the amount budgeted by Congress, so limits on the SEC budget actually inure to the benefit of the entities regulated by the SEC that would otherwise be required to pay more fees.[177] Providing a stronger budget would actually reduce the deficit and compensate victims because any judgments collected may be paid to investors who were harmed or to the US Treasury.[178]

Beyond question, the OWB pays its own freight, awarding a total of over $326 million to a total of 59 whistleblowers, and obtaining monetary sanctions of over $1.7 billion in connection with the SEC whistleblower program between 2012 and September 2018.[179] Notably, the information received via the Dodd-Frank whistleblower program suggests that the tips are of high quality.[180] Consequently, the need to evaluate tips, and follow up on the information provided in order to exploit the value of the tips would suggest that personnel devoted to this program would yield returns.[181]

The financial success of the program and the backlog of claims reported in 2015 and 2016, continuing through 2018, justifies fully funding the office. Expanding the staff of the OWB would at once resolve the issue of backlogs and presumably allow for greater attention to the variety of tips that are submitted. Given that a single tip could result in

177. *Id.* ("[C]utting its requested budget by $222.5 million saves Wall Street the same amount, and means regulated firms will pay $136 million less in fiscal 2012 than they did the previous year, the S.E.C. projects.").

178. *Id.* (In 2010, "the S.E.C. turned over $2.2 billion to victims of financial wrongdoing and paid hundreds of millions more to the Treasury, helping to reduce the deficit.").

179. *See* SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 29, at 1, 16; Zuckerman & Stock, *supra* note 29. The Commission's Investor Protection Fund (IPF) was established by Dodd-Frank to fund the whistleblower program, including paying awards. Until fiscal year 2018, it had never required replenishing from the agency budget due to the substantial monetary sanctions that have been collected and the interest that is earned on the fund; in 2018, the SEC changed how the balance of the fund is calculated. By statute, the fund is replenished whenever it falls below $300 million, and it did so in 2018 by less than 1 percent. *See* SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 29, at 29 n.51, 29–30. The IPF also funds the Commission's OIG suggestion program. *Id.* at 29 n.49.

180. Mary L. Shapiro, Chairman, U.S. Sec. & Exch. Comm'n, Speech by SEC Chairman: Opening Statement at SEC Open Meeting: Item 2—Whistleblower Program (May 25, 2011), http://www.sec.gov/news/speech/2011/spch052511mls-item2.htm (stating that the quality of whistleblower tips has significantly improved since the passage of Dodd-Frank).

181. As of September 2018, the SEC OWB was tracking over 900 matters in which a whistleblower's tip had caused a matter to be opened or expanded. Although not all tips will yield enforcement actions or monetary sanctions exceeding $1 million, "whistleblower tips that are specific, credible, and timely, and which are accompanied by corroborating documentary evidence, are more likely to be forwarded to investigative staff for further analysis or investigation." SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 29, at 24.

monetary sanctions of millions of dollars, one profitable tip is all that is required to sustain doubling the staff devoted to the OWB. Failure to fund staffing undermines the effectiveness of the program since whistleblowers will not risk stepping forward with information if the perception is that it will be ignored.[182] Moreover, the program will not deter unlawful conduct if the likelihood that a whistleblower will be rewarded for reporting misconduct is low.[183]

F. Cognitive Capture & Revolving Doors: Pre- and Post-Agency Employment

Cognitive capture and revolving doors will necessarily impact the success of the whistleblower program. Special interest lawsuits and stall tactics, narrow judicial interpretations, pro-management rulings, and stealth attacks in the form of congressional underfunding all have the potential to undermine or even destroy the success of the Dodd-Frank whistleblower program, but each of these is external to the SEC.

The SEC has responsibility for overseeing some of the most complicated aspects of the financial system, and to be effective, the Commission requires employees with expertise, who understand the businesses they oversee, and who comprehend the transactions they review. Consequently, the agency often hires individuals with experience in the securities industry, especially for critical positions of authority.[184] The SEC is governed by five commissioners, one of whom is designated chair, and all of whom are appointed by the President of the United States to serve staggered five-year terms.[185] In an effort to avoid partisanship, no more than three commissioners may belong to the same political party.[186] Nonetheless, over time, as new commissioners are appointed,

182. *See supra* note 19.

183. The SEC OIG conducted a review of the whistleblower program in January 2013 pursuant to Section 922 of Dodd-Frank directing the OIG to assess various objectives, including the promptness of the OWB in communicating with whistleblowers. *See* SEC OIG 2013 WHISTLEBLOWER PROGRAM EVALUATION, *supra* note 24, at iv–v, 21–22. *See also* Michaels, *supra* note 150 (arguing that the SEC's two-year timeframe to process a case may deter whistleblowers).

184. *See* Andrew Ross Sorkin, *Revolving Door at S.E.C. Is Hurdle to Crisis Cleanup*, N.Y. TIMES: DEALBOOK (Aug. 1, 2011, 9:54 PM), https://dealbook.nytimes.com/2011/08/01/revolving-door-at-s-e-c-is-hurdle-to-crisis-cleanup/ (quoting John C. Coffee Jr. who stated, "'The revolving door is such a dominant fact about the S.E.C.'s culture,' . . . . 'You get people who go to Washington for one to three years and then go back to Wall Street.'").

185. *See Current SEC Commissioners*, U.S. SEC. & EXCHANGE COMMISSION (Sept. 17, 2013), www.sec.gov/Article/about-commissioners.html. The commissioner appointments are with the advice and consent of the Senate. *Id.*

186. *Id.*

the balance tends toward the party in power, and priorities within the agency may shift along with the political winds. This shifting leadership can threaten the predictability of programs under its authority. Additionally, the limited duration of their appointments guarantee that they will move back into the industry from which they were likely drawn. Their preexisting allegiances are likely to impact their leadership.[187]

These connections give rise to cognitive capture[188] that may be simply emotional, in that agency leaders are willing to provide special opportunities to meet with prior colleagues or associates, or they could be more significant in that the agency employee played an active role in a matter under investigation, a related matter, or a matter of similar substance to one under investigation.[189] Such connections may at best cloud judgment, but at worst identify a conflict of interest or the appearance of a conflict that may ultimately impede the mission of the agency.[190] Some such connections may be obvious to coworkers, such as

---

187. *See, e.g.*, Sorkin, *supra* note 184 (reporting that Adam Glass, who joined the SEC in 2009 and became co-chief counsel in 2011, previously served as outside counsel to a major New York hedge fund that made billions shorting the subprime mortgage market, and in one widely reported derivative deal (termed "Abacus"), the hedge fund was permitted to select some of the transactions that formed the basis of Abacus, intending to short the deal—that is, betting that the deal would fail; the firm paid $550 million to settle the case with the SEC, without admitting or denying guilt).

188. *See* LAWLESS CAPITALISM, *supra* note 10, at 37 ("[T]he increase in [the concentrated elites'] access to resources leads to increased access to political leaders, with all the consequent implications regarding cognitive and cultural capture."); Mary Kreiner Ramirez, *Oversight and Rule Making as Political Conflict*, *in* THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME 479, 486–87, 489 (Shanna R. Van Slyke, Michael L. Benson & Francis T. Cullen eds., 2016) ("The revolving-door temptation to please potential employers and the affinity with the industry one plans to join or rejoin emerges within the regulatory ranks as well.").

189. *See, e.g.*, Sorkin, *supra* note 184 (discussing the case of Adam Glass, an SEC lawyer who testified against a mortgage investment, "Abacus," on which Glass signed off before joining the SEC).

190. *See, e.g.*, Press Release, Dep't of Justice Office of Public Affairs (U.S.A.O. E.D. Tex.), Former Head of SEC Fort Worth Enforcement Program Agrees to Settlement with Department of Justice for Violation of Federal Conflicts of Interest Statute (Jan. 13, 2012), https://www.sec.gov/about/offices/oig/reports/reppubs/other/sec_oig_pressrelease_1_13.pdf; Edward Wyatt, *Ex-Official at S.E.C. Settles Case for $50,000*, N.Y. TIMES (Jan. 13, 2012), www.nytimes.com/2012/01/14/business/ex-sec-official-settles-conflict-case.html (reporting that Spencer Barasch, former enforcement director for the SEC's Fort Worth Regional office from 1998–2005, who was accused of discoursing or blocking three investigations into the alleged Ponzi scheme by Stanford Financial Group during his SEC tenure, agreed to a civil fine for violating federal conflict-of-interest rules by later representing Stanford Financial Group before the Commission); Louise Story & Gretchen Morgenson, *S.E.C. Hid Its Lawyer's Madoff Ties*, N.Y. TIMES (Sept. 20, 2011), https://www.nytimes.com/2011/09/21/business/sec-refers-ex-counsels-actions-on-madoff-to-justice-dept.html (reporting that the SEC's inspector general referred to the Justice Department the actions taken by the SEC's general counsel David M. Becker after rejoining the SEC in 2009, recommending a compensation plan for the victims of the Bernard Madoff Ponzi

dealing with a former employer, but other connections may not be apparent to anyone but the agency employee. The desire to protect prior professional decisions that may now be perceived as unlawful conduct could lead to actions as simple as declining to investigate a high-quality tip, or actions as underhanded as revealing the identity of a whistleblower.

The SEC has many responsibilities. Resources can be rearranged and shifted among those responsibilities as priorities change from one administration to the next or as one manager is replaced with another. The fact that personnel changes are inevitable and those working for the agency are well aware they may one day wish to be hired in a private firm may undermine the commitment of personnel to the goals of the agency.[191] One of the ways in which industries capture the interests of the agency is to offer financially rewarding job opportunities to those personnel who demonstrate their talent in investigating and pursuing enforcement actions on behalf of the SEC.[192] By hiring such talent away from the agency, not only is the agency deprived of the talent, but depending upon the status of the case, a switch in personnel could delay or even derail an investigation, especially in circumstances where there are limited resources within the agency and the cost of getting up to speed on the case must be weighed against other personnel commitments.

The challenge of cognitive capture and revolving-door personnel can easily undermine the legitimacy of the whistleblower program if whistleblowers perceive the regulator's relationship as too cozy with industry employers, because agency decisions will be viewed skeptically. Should that perception persist, it undercuts incentives to move forward with reporting securities violations.

G. Proposing Agency Rules that Undermine the Whistleblower Programs[193]

Industry efforts to undermine legislative goals in enacting Dodd-Frank

---

scheme that was favorable to Becker's personal interests in an inheritance from a Madoff account).

191. *See* Ramirez, *supra* note 188, at 486–87, 489.

192. *See, e.g.*, Matt Taibbi, *Why Isn't Wall Street in Jail?*, ROLLING STONE (Feb. 16, 2011, 2:00 PM), https://www.rollingstone.com/politics/politics-news/why-isnt-wall-street-in-jail-179414/ (discussing how more than a dozen high-ranking SEC officials have gone on to work at Wall Street).

193. This Section considers some of the recent proposed changes to the SEC whistleblower program. It does not review recent changes to the CFTC whistleblower program, including the decision by the CFTC to halt whistleblower awards throughout fiscal year 2017 while it considered changes to the rules. *See* CFTC 2017 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 30, at

can be resuscitated in later legislation to amend Dodd-Frank and in lobbying for changes to agency rules if the statute leaves rulemaking to agency discretion.[194] The SEC has proposed rule changes, some of which risk undermining the program.[195] One proposed change that has attracted considerable attention during the comment period, which ended in September 2018, involves enhanced discretion by the Commission to limit the extremely high-value awards to some whistleblowers.[196] Although this proposal, along with others, remains under consideration at the time of this writing, the comment period has ended, and the proposals represent potential internal bullets that could harm the whistleblower program. Even if the proposed changes are not adopted, the fact that the agency is open to such changes is a warning to whistleblowers of the unpredictability of the incentives and protections of the whistleblower program.

Dodd-Frank statutorily mandates that awards be between 10 and 30 percent of the total monetary sanctions collected.[197] If more than one whistleblower contributed to the success of the agency actions against a violator, and more than one whistleblower is eligible under the rules, the whistleblowers may have to share the award, but in no case will the total

2–4. The proposed rules were published in the Federal Register in August 2016, and the Final Rules went into effect on July 31, 2017. *Id.*

194. In addition to underfunding the whistleblower program, early on, legislators directly attempted to alter its provisions through proposed legislative amendments. One example is the Whistleblower Improvement Act of 2011, passed through the House Subcommittee on Capital Markets and Government Sponsored Enterprises in December 2011. The proposed legislation sought to undermine several provisions of Dodd-Frank, placing additional reporting and review hurdles on whistleblowers and increasing opportunities for retaliation against whistleblowers. Whistleblower Improvement Act of 2011, H.R. 2483, 112th Cong. (2011). Lobbyists were unsuccessful during the rulemaking process in persuading the SEC to require that whistleblowers first avail themselves of internal reporting compliance programs. Had this legislation been successful, it would have undermined the considered rulemaking process, placing some whistleblowers at greater risk of retaliation since the anonymity provisions would not be applicable; it would have undermined the purpose of the Dodd-Frank Act's whistleblower program because it would have discouraged some whistleblowers from stepping forward.

195. Press Release, Proposed Amendments, *supra* note 156. This Article does not address all of the SEC proposed rules. The agency has, however, proposed some rule changes that would not undermine the incentives and protections of the program. *See, e.g.*, Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. 34,702, 34,703, 34,705–07 (July 20, 2018) (proposing to further define "action" to expressly allow awards based upon monies collected from deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) in federal or state criminal cases, and to include SEC settlements to address securities violations that do not involve a judicial or administrative proceeding).

196. Press Release, Proposed Amendments, *supra* note 156 (discussing the Commission's discretion to increase awards).

197. 15 U.S.C. § 78u-6(b)(1) (2012).

award exceed 30 percent.[198] In any event, if substantial monetary sanctions are collected as a consequence of the whistleblower's claim, the whistleblower may receive significant rewards in the millions of dollars.[199] In June 2018, the SEC commissioners voted three to two[200] to include a proposed rule change that would permit the commissioners, in cases yielding at least $100 million in collected monetary sanctions, to grant an award for less than 30 percent but never less than 10 percent if they concluded that a lesser award amount would "not exceed an amount that is reasonably necessary to reward the whistleblower and to incentivize other similarly situated whistleblowers."[201] The proposed change to Rule 21F-6 would continue to assess the appropriate percentage of award based upon the positive and negative factors set forth in Rule 21F-6(a) and (b). But it would add a paragraph (d) that would extend the SEC's discretion to adjust potentially extraordinarily large awards based on monetary sanctions of at least $100 million to consider the "marginal" value of the actual[202] dollar amounts and whether they are reasonably necessary.[203] Within the statutory minimum and maximum percentages, the Dodd-Frank Act conferred discretion on the SEC to determine the amount of an award and for the SEC to add relevant factors for consideration, provided they were established by rule or regulation.[204] Dodd-Frank also provided a list of relevant factors the SEC "shall" consider and instances in which no award would be permitted.[205]

Concern over extraordinary awards appears overblown given that, in the agency's explanation for the proposed rule, it identified only two

198. 15 U.S.C. § 78u-6(b)(1)(B).

199. *See* Order Determining Whistleblower Award Claim, Exchange Act Release No. 73,174, 2014 WL 4678597 (Sept. 22, 2014), *available at* https://www.sec.gov/rules/other/2014/34-73174.pdf (awarding an estimated $30 to $35 million to a whistleblower); Order Determining Whistleblower Award Claim, Exchange Act Release No. 82,897, 2018 WL 1378788 (Mar. 19, 2018) (awarding $49 million to one whistleblower and $33 million to two joint whistleblowers).

200. *See* Robert J. Jackson, Jr., *Statement on Proposed Rules Regarding SEC Whistleblower Program*, SEC. & EXCHANGE COMMISSION (June 28, 2018), https://www.sec.gov/news/public-statement/jackson-statement-whistleblowers-062818 (stating Commissioner Jackson's opposition to the proposed amendment to Rule 21F-6 because it introduces uncertainty into the reward analysis); Stein, *supra* note 31 (stating Commissioner Stein's opposition to the proposed amendment to Rule 21F-6).

201. Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. at 34,703, 34,713–16; Press Release Proposed Amendments, *supra* note 156.

202. *See* Dodd-Frank, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1842–43 (2010).

203. Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. at 34,713, 34,713–14.

204. *See* Dodd-Frank, Pub. L. No. 111-203, § 922, 124 Stat. at 1842–43.

205. 15 U.S.C. § 78u-6(c)(2).

covered actions out of 50 awards to 55 individuals that actually collected monetary sanctions of at least $100 million.[206] Given that Dodd-Frank intended to spur whistleblowers to report securities violations, but only included the possibility for awards once collected monetary sanctions reached a minimum of $1 million, it would appear that Congress wanted to incentivize whistleblowers who were aware of serious violations that would warrant the agency's investigative resources. Indeed, as discussed above, the SEC has had a backlog of award decisions despite the $1 million threshold.

The Commission's focus on what award amount is reasonably necessary to incentivize whistleblowers adds in the risk of arbitrariness to awards that Congress sought to avoid. The mandatory language, "shall award," acknowledges that 30 percent of $100 million is proportional to 30 percent of $1 million, in that investors and the government recover 70 percent of the monetary sanctions at a minimum. There is no reason to diminish incentives for a whistleblower whose information can lead to $70 million versus $700 thousand being returned to harmed investors as well as ending the misconduct that led to violations justifying substantial sanctions.[207] Although speculative, one would expect that a whistleblower would hold a significant role in an organization to be privy to the type of information that could lead to monetary sanctions of $100 million or more.[208] Blowing the whistle is very likely to risk that person's job, career, and possibly more given that whistleblowers may be ostracized by their peers, suffer financial hardship through job or salary loss, and suffer emotional distress due to any of these factors.[209] The possibility of delayed whistleblower awards adds hardship because the losses are experienced early, but the rewards arrive much later, if they

206. *See* Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. at 34,714; SEC 2018 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 29, at 9.

207. As one commenter on the proposed rules observed, there is "no legislative limit on the amount of money an investment bank, Ponzi operator, or public company cooking its books can steal from investors." Letter from Harry Markopolos to SEC Comm'rs Regarding Proposed Amendments to Whistleblower Rules (Sept. 14, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4351184-173304.pdf [hereinafter Letter from Markopolos].

208. *See, e.g.*, Morrell, *supra* note 104 ("I am a[n] SEC whistleblower who fought the good fight and lost everything, having been terminated only days after exhausting all internal remedies under the Company's 'Code of Ethics for Chief Executive Officer and Chief Financial Officer'. The resulting personal financial losses and emotional trauma for protesting unlawful behavior and practices have been devastating and unrelenting with no relief or upside.").

209. Congress was addressing the sizable investor losses incurred in the years preceding Dodd-Frank's enactment, and was likely aware of the hardships suffered by whistleblowers that attempted to alert internal leadership about securities and commodities violations. *See* FCIC REPORT, *supra* note 1, at 18–19.

arrive at all.[210] Even if acting anonymously, undercover whistleblowing adds a dimension of stress that is difficult to quantify financially. It would seem impossible for the Commission to ascertain what is reasonably necessary in any situation, and that is very likely why Congress gave the Commission a firm range of 10 to 30 percent. Had Congress wanted to allow for the added discretion included in DOJ award assessments for the False Claims Act cited by the SEC in the proposed rules explanation, it certainly had the opportunity to include it in Dodd-Frank.[211]

In support of the proposed rule, the Commission also suggests that $30 million is plenty to live on, if wisely invested, although taxes might cut some of the benefit,[212] but fails to acknowledge the likelihood that the whistleblower's attorney will likely receive a percentage of the award as a fee. Dodd-Frank clearly anticipated that whistleblowers would often have counsel to aid in presenting a tip, assisting the investigation, and making an award claim. Dodd-Frank not only provides that a whistleblower "may" be represented by counsel, it also provides that anonymous tipsters are "required" to be represented by counsel.[213] Indeed, the Commission acknowledges that about 50 percent of the whistleblowers who have received awards filed their tips anonymously and took advantage of the protections of anonymity.[214] Persons and organizations who regularly represent whistleblowers expressed concern about injecting this added discretion into the awards process, highlighting that the well-publicized big-dollar awards have spurred whistleblowers to report violations while at the same time are most likely to have discouraged bad behavior due to fear of whistleblowers.[215]

Proposing discretionary caps on awards in extraordinary cases is only one of the guns aimed at the success of the whistleblower program in the Commission's proposed rules. Another proposed rule would narrow the

---

210. *See supra* Part III.D; text accompanying notes 145–51.

211. *See* Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. at 34,714 (discussing the DOJ's approach to determining the amount of an award under the False Claims Act).

212. *Id.* at 34,715 (explaining that an individual who receives $30 million would be in the top 99.5 to 99.9 percentile net worth in the United States).

213. *See* Dodd-Frank, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1843 (2010).

214. *See* Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. at 34,715.

215. *See, e.g.*, Letter from Stephen M. Kohn, Exec. Dir., Nat'l Whistleblower Ctr., to Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n (Sept. 18, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4371152-175237.pdf (citing memoranda from various law firms regarding the need for industry compliance programs due to the large whistleblower award providing incentives for whistleblowers to report violations to the agency).

definition of "related action" ostensibly to avoid multiple whistleblower awards under alternative whistleblower programs but would also potentially limit the amount of awards.[216] Some proposed rules appear to be benefits that in reality could be bullets, such as opening the possibility to award whistleblowers in situations where the collected monetary sanctions do not reach the $1 million threshold.[217] Given that the Commission cannot handle the awards claims processes efficiently at its current level, opening the door to lower sanctions has great potential to crowd out the larger cases that presumably harm a greater number of investors and lead to substantial losses. Until Congress allows for greater funding of the SEC, it would seem these awards would open the floodgates to the low-hanging fruit of small-value cases while allowing the SEC to pad its numbers in its annual reports to Congress with low-yield cases. The $1 million monetary sanctions floor reflects a desire to uncover serious violations that are costly to investors and undermine confidence in financial markets.

In another proposal, the Commission is seeking commentary on what it describes as "interpretive guidance" to clarify the meaning of "independent analysis" presently defined in Rule 21F-4 and critical to assessing the value of information provided by whistleblowers who are industry analysts and use their skill or special knowledge to bear on

---

216. *See* 17 C.F.R. § 240.21F-4(d) (2018); Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. at 34,709–11. *See, e.g.*, Letter from William A. Jacobson, Dir., Cornell Sec. Law Clinic, & Basem Besada, to Brent Fields, Sec'y, U.S. Sec. & Exch. Comm'n, Regarding Amendments to the Commission's Whistleblower Program Rules (Sept. 17, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4366409-174879.pdf (asserting that "related action" rule changes would disincentivize whistleblowing in circumstances where alternative programs cap awards at substantially lower levels than is sufficient to prompt whistleblowers to report violations); Letter from Aaron Greenspan, President, Think Computer Found., to Sec. & Exch. Comm'n, Regarding Amendments to Commission's Whistleblower Program Rules (July 17, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4058984-169087.pdf (observing that aside from claims that could fall under both the SEC and the CFTC programs, many claims are already limited on a jurisdictional basis and would necessarily be brought under other whistleblower programs). *But see* Letter from Tom Quaadman, Exec. Vice President, Ctr. for Capital Mkts., to Brent J. Fields, Sec'y, U.S. Sec. & Exch. Comm'n, Regarding Amendments to the Commission's Whistleblower Program Rules (Sept. 18, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4370851-175223.pdf (referring to the whistleblower program rules as the "Commission's bounty rules" and whistleblower rewards as "bounty payments" while urging the SEC to narrow definitions, increase summary dispositions, and limit appeals of awards decisions, among other avenues to discourage whistleblowing).

217. For the person observing securities violations at a smaller firm, the challenges, risks, and costs of blowing the whistle are similar to those observing more costly violations at larger firms. Thus, this proposal does offer positive benefits in that the rewards would incentivize reporting sooner rather than waiting for the violations to accumulate high enough to exceed the $1 million threshold, and would also cushion the personal costs to the whistleblower.

publicly available information to report potential violations to the SEC.[218] The "independent analysis" whistleblower was included by Congress in the whistleblower definition to encourage and reward persons who are not insiders in an organization, such as Harry Markopolos, who received acclaim for having detected the Bernie Madoff Ponzi scheme in 2000, years before Madoff confessed to the crime.[219] Markopolos was familiar with the industry as an accountant and competitor to Bernie Madoff, who recognized suspicious conduct by Bernie Madoff's firm, researched it using public documents and efforts to replicate outcomes, and brought the Ponzi scheme to the attention of the SEC.[220] In that case, the SEC failed to investigate and confirm the allegation despite significant documentary evidence provided by Markopolos on several occasions. Years later, when Madoff finally confessed to the Ponzi scheme, the losses to investors had grown to about $65 billion.[221]

"Encouraging 'analysts' to aid in Commission enforcement efforts was one of the major advances in whistleblower protection approved by Congress in the wake of the disastrous market collapse of 2008."[222] Despite the Commission's assessment that Markopolos's Madoff materials would have been sufficient to garner an award if the SEC's suggested interpretation of "independent analysis" were to be applied today, Markopolos commented in response to the SEC proposal that there is sufficient gray area in the Commission's interpretation for "20/20 hindsight" to foreclose an award on the basis that the SEC would have noticed the misconduct without the whistleblower's assistance if an objective standard is not applied.[223] Markopolos now investigates securities violations regularly, and so one could argue that he has an interest in avoiding a narrowed definition.[224] Yet, it would seem that if

218. Whistleblower Program Rules, Exchange Act Release No. 83,557, 83 Fed. Reg. at 34,727–31.

219. *Id.* at 34,729.

220. *Id.* at 34,729–30.

221. *See* Information, United States v. Madoff, No. 1:09-cr-00213-DC, 2009 WL 1055795 (S.D.N.Y Apr. 20, 2009), 2009 WL 596981 (charging Bernard L. Madoff with 11 criminal counts).

222. Letter from Jane Turner, Chair, Whistleblower Leadership Council, & Frederic Whitehurst, Chair of the Bd., Nat'l Whistleblower Ctr., to Jay Clayton, Chairman, Sec. & Exch. Comm'n (Sept. 17, 2018), https://www.sec.gov/comments/s7-16-18/s71618-4350890-173302.pdf.

223. Letter from Markopolos, *supra* note 207.

224. *See* Brian Ross, Matthew Mosk & Rhonda Schwartz, *Bernie Madoff Sleuth Harry Markopolos Warns of 3 New Ponzi Scams*, ABC NEWS (Feb. 5, 2016, 10:00 AM), https://abcnews.go.com/US/bernie-madoff-sleuth-harrypmarkopolos-warns-ponzi-

one person with expertise in the industry is incentivized to put his skills to use to detect major fraud, then the whistleblower program is operating exactly as intended. Rather than shooting down the program's industry analyst whistleblowers by narrowing the scope and use of public information, the SEC should be protecting the program and the investors who will benefit from industry analysts who detect securities fraud before reaching Madoff-sized losses.

Whether any of the above threats successfully kill the whistleblower program remains to be seen, but collectively they erode the program's credibility, predictability, and legitimacy. None of these threats are insurmountable, and some improvement may be available. Congress can amend statutes to address narrow judicial interpretations and better fund the agencies. The SEC could develop processes to speed up award reviews so that whistleblowers can enjoy the offered incentives.[225] Finally, the program's design can be altered by Congress to increase performance if weaknesses are quickly detected or additional rules stymie the program's effectiveness.

IV. Remedy for Success

All of the above suggests a continuing battle for the success of the whistleblower program. If it fails in its current form due either to external or internal factors, one possibility is to amend the legislation to change the program to add a basis for private litigation, similar to that of the False Claims Act (FCA).[226]

In FCA cases, a private individual called the "relator" files a civil action seeking recovery for losses incurred by the government against individuals and corporations who submitted false claims for payment of goods or services in connection with supplying the federal government.[227] Under the statute, the civil action is filed under seal on

---

scams/story?id=36578436 (explaining how Markopolos now has a private securities fraud detection business and also remains an advisor for federal law enforcement officials).

225. One possibility is to require enforcement attorneys that work on a case to keep diligent notes regarding the assistance from whistleblowers, in order to facilitate a more thorough and informed review by the OWB of whistleblower award claims. Letter from Markopolos, *supra* note 207, at 7.

226. 31 U.S.C. §§ 3729–33 (2012); *see also The False Claims Act: A Primer*, U.S. DEP'T JUST., http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf (last visited May 8, 2019) (explaining how a private individual, called a "relator," may bring a *qui tam* action on behalf of the government).

227. 31 U.S.C. § 3733. *See* TOM DEVINE & TAREK F. MAASSARANI, THE CORPORATE WHISTLEBLOWER'S SURVIVAL GUIDE: A HANDBOOK FOR COMMITTING THE TRUTH 100–01 (2011).

behalf of the relator and the government, and the government has at least sixty days in which to intervene and take over the case.[228] If it does so, then the relator's award is limited to 10 percent.[229] The False Claims Act is different from the SEC whistleblower program or the IRS whistleblower program in that, if the government does not go forward with litigation, the whistleblower (the relator) may continue the action on behalf of the government, called a "*qui tam*" action.[230] If the government declines to go forward with the case, the relator may bring the case, and if successful, the judgment is paid to the government, but the relator gets a larger percentage of the judgment as an award.[231] Despite repeated efforts to dilute the effectiveness of the FCA, it remains a powerful tool against fraud,[232] and the government has recovered over $56 billion dollars pursuant to the FCA.[233]

The benefit of *qui tam* actions is that more money is recovered for the government, and more resources are devoted to recoveries due to the

---

228. 31 U.S.C. § 3730(b)–(c).

229. *See* 31 U.S.C. § 3730(d)(1) (The government will pay 15–25 percent if it initially accepts the case and wins; however, if the relator is bringing information from a public source, his recovery will be capped at 10 percent).

230. 31 U.S.C. §§ 3729–33; *see* ROBIN PAGE WEST, ADVISING THE QUI TAM WHISTLEBLOWER: FROM IDENTIFYING A CASE TO FILING UNDER THE FALSE CLAIMS ACT 1 (2d ed. 2009) ("*qui tam*" is actually derived from a Latin phrase that means "for the king as well as himself"). The False Claims Act has a storied history, beginning with the Civil War and its enactment in 1863 in response to material frauds by suppliers to the Union Army. *See, e.g.*, DEVINE & MAASSARANI, *supra* note 227, at 100–01; HENRY SCAMMELL, GIANTKILLERS: THE TEAM AND THE LAW THAT HELP WHISTLE-BLOWERS RECOVER AMERICA'S STOLEN BILLIONS 36 (2004) ("[C]orrupt profiteering was epidemic. Gunpowder was frequently adulterated with sawdust. Rifles didn't fire. At the start of the Civil War, Union uniforms exposed to rain would often dissolve and fall from the wearer in clots of sodden fiber."); DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 3–4 (2d ed. 2004). Efforts to rein in misconduct were somewhat successful, but the FCA fell into disuse. DEVINE & MAASSARANI, *supra* note 227, at 100–01. The FCA was amended in 1986 to protect employees of federal contractors who proceed under the FCA and the amendments reinvigorated *qui tam* actions. *Id.* at 4.

231. 31 U.S.C. § 3730(d)(2) (government will pay 25–30 percent if it initially declines the case but the relator succeeds anyway); 31 U.S.C. § 3730(d)(3) (the relator will be barred from any share in the recovery if he is a violator himself); WEST, *supra* note 230, at 75 (the government will pay from 15–25 percent in an intervened case, but 25–30 percent in a declined case); FREDERICK LIPMAN, WHISTLEBLOWERS: INCENTIVES, DISINCENTIVES, AND PROTECTION STRATEGIES 145–46 (2012) (same).

232. *See, e.g.*, WEST, *supra* note 230, at 75 (explaining the percentages of awards whistleblowers may receive).

233. *See* U.S. DEP'T. OF JUSTICE, CIVIL DIV., FRAUD STATISTICS—OVERVIEW: OCTOBER 1, 1986 – SEPTEMBER 30, 2017 (2017), https://www.justice.gov/opa/press-release/file/1020126/download (indicating that between 1986 and 2017, settlements and judgments for *qui tam* actions totaled over $56 million).

additional persons willing to risk taking on litigation that could result in losses to the individual or to benefits for the government, and to a lesser degree, the individual.[234] The statute has the effect of limitless private attorneys general taking on risk for reward to the government. In practice, the FCA has proven to be rewarding for the government.[235]

Among the matters up for study in Dodd-Frank was a requirement that the SEC OIG study whether Congress should "consider empowering whistleblowers or other individuals, who have already attempted to pursue the case through the Commission, to have a private right of action to bring suit based on the facts of the same case, on behalf of the Government and themselves."[236] The import of the Dodd-Frank provision to study a private right of action suggests a *qui tam* right of action such as that encompassed in the False Claims Act.[237] The Office of Inspector General took up the question as part of its larger evaluation of the SEC's whistleblower program in early 2013.[238] At the time of the OIG evaluation, the Final Rules for the whistleblower program had only been in effect seventeen months.[239] Unsurprisingly, the OIG's evaluation concluded that adding a private right of action would be premature because it would be a fundamental change in approach that would be disruptive to the relatively new system.[240]

If the SEC and CFTC whistleblower programs were amended to adapt some of the FCA provisions, it would provide for the agencies, and

---

234. *See* BOESE, *supra* note 58.

235. *See, e.g.*, *Justice Department Recovers Over $3.7 Billion from False Claims Act Cases in Fiscal Year 2017*, U.S. DEP'T JUST. (Dec. 21, 2017), https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017 (reporting on recoveries in whistleblower suits: "Of the $3.7 billion in settlements and judgments reported by the government in fiscal year 2017, $3.4 billion related to lawsuits filed under the *qui tam* provisions of the False Claims Act. During the same period, the government paid out $392 million to the individuals who exposed fraud and false claims by filing a *qui tam* complaint."); U.S. DEP'T OF JUSTICE, FRAUD STATISTICS—OVERVIEW: OCTOBER 1, 1987 – SEPTEMBER 30, 2011 (2011), https://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf (over $20 billion dollars recovered through FCA *qui tam* suits since 1987).

236. Dodd-Frank, Pub. L. No. 111-203, § 922(d)(1)(G), 124 Stat. 1376, 1849 (2010).

237. *See* False Claims Act, 31 U.S.C. § 3730(b)–(c) (2012) (outlining the process through which a private person may bring a *qui tam* action).

238. SEC OIG 2013 WHISTLEBLOWER PROGRAM EVALUATION, *supra* note 24, at 28–30 (Question 7).

239. On February 18, 2011, the SEC announced the appointment of Sean McKessy to head the new OWB, which, with a staff of five attorneys, began in May 2011; the Final Rules became effective August 12, 2011, and the office began receiving tips on August 12, 2011. SEC 2011 REPORT ON WHISTLEBLOWER PROGRAM, *supra* note 76, at 3, 5.

240. SEC OIG 2013 WHISTLEBLOWER PROGRAM EVALUATION, *supra* note 24, at 30 (Question 7).

possibly the DOJ, to have first right of refusal to move forward on a case that used the information from a whistleblower. The amendment could retain the whistleblower protections against retaliation and add protection against pre-taliation to claims brought via 15 U.S.C. § 78u–6(h) or through a relator, so long as the relator provided the information to the agencies or rule-designated recipients prior to any retaliation.[241] The eligibility rules for an award could follow the present rules created for the SEC and CFTC whistleblower programs[242] while providing the potential to add many more private attorneys general; this would both increase the likelihood of recoveries and add another level of deterrence to violating securities laws or commodities laws as the amendment could work around some of the congressional and agency actions that threaten the success of the present programs.

Benefits of such an amendment address both internal and external obstacles. First, agency obstacles of cognitive capture would be less of a threat, because internal decisions against pursuing investigation or enforcement based upon alternative priorities or personal reluctance to pursue cases would allow for an individual to pursue the matter rather than shut out pursuit entirely. Second, stealth attacks such as underfunding the agency or under-resourcing the whistleblower program would be offset in part by private individuals and private resources taking on the high-quality cases.

Secondary benefits of increased agency enforcement, enhanced corporate governance oversight, and deterrence are also possible. Access to private enforcement under an FCA-type regime may spur the SEC and CFTC to speed up review of award claims to encourage whistleblowers to report to the agencies rather than expend personal funds to bring a *qui tam* case—a win-win for all involved. Moreover, the increased number of motivated private attorneys general pursuing the public interest and winning judgments of behalf of the public could spur business, industries, and the lobbyists they fund to support placing responsibility for regulating, investigating, and enforcing the securities laws back into the arms of the agency by ceasing to undermine their effectiveness. Finally, the threat of numerous lawsuits may motivate businesses to take employee reports of securities violations seriously, while also deterring internal actors from violating the law because they understand that any

241. *See supra* Part III.C.

242. *See* 15 U.S.C. § 78u–6(a)(6), (c)(2) (2012) (defining "whistleblower" and detailing standards that must be met for whistleblower to be eligible for an award); 7 U.S.C. § 26(a)(7), (c)(2) (2012) (defining "whistleblower" and describing when an award will be denied).

employee could be a government informant, or worse, a private attorney general not subject to cognitive capture or underfunding by Congress.

Under the FCA, the government has the option to take over a lawsuit filed by a relator, and doing so lessens the overall percentage of the proceeds of the action or any settlement that the individual may collect.[243] Given that the maximum percentage of the proceeds available to a relator is the same as available for a whistleblower under the Dodd-Frank provisions (30 percent), and that the minimum proceeds under the FCA are higher than Dodd-Frank (15 percent compared to 10 percent), it would seem that adopting a private right of action would be unlikely to sway an individual's decision regarding whether to file the case. Even so, Congress could adjust these award limits so that the minimum proceeds would be the same whether the whistleblower report violations to the agency or brings a *qui tam* action.

Critics of private rights of action under the FCA complain that such cases attract "unscrupulous bounty hunters" who will not consider whether such an action is a true benefit to the government and consistent with agency regulatory goals.[244] The FCA addresses these concerns in some respects by shifting authority over the case to the government if it decides to step in to pursue the action or by dismissing the action while it remains under seal; even though the relator remains a party to the action, the government may dismiss or settle the action notwithstanding the objections of the relator who initiated the action, and the government may limit or restrict the person's participation in the case in reasonable circumstances.[245]

Indeed, in 2018, Michael Granston, director of the Department of Justice Commercial Litigation Branch, Fraud Section, distributed a confidential memorandum to DOJ attorneys listing factors for evaluating dismissal recommendations in FCA *qui tam* actions.[246] Citing record increases in FCA *qui tam* actions, Granston observed that "the government expends significant resources in monitoring these cases and

243. *See* 31 U.S.C. § 3730(d) (2012) (explaining that, if the government proceeds with the case, the relator may receive between 15 and 25 percent of the proceeds of the action or settlement, and if the government declines the case, then the relator may receive between 25 and 30 percent of the proceeds).

244. *See* SEC OIG 2013 WHISTLEBLOWER PROGRAM EVALUATION, *supra* note 24, at 28–29 (Question 7).

245. *See* 31 U.S.C. § 3730(c)(2) (defining the rights of the parties in a *qui tam* action, especially powers retained by the government to dismiss, settle, or limit the proceedings).

246. *See* Granston Memorandum, *supra* note 25, at 1 (suggesting that government attorneys should dismiss *qui tam* lawsuits if they do no serve the interests of the government).

sometimes must produce discovery or otherwise participate" even when the government chooses against intervention in the cases.[247] Recognizing that the government rarely seeks to dismiss actions, Granston nevertheless set forth a nonexhaustive list of seven factors to consider as a basis for dismissal in FCA claims brought by *qui tam* relators, creating the list from reasons that had been used successfully previously pursuant to § 3730(c)(2)(A).[248] When the DOJ seeks dismissal in an FCA case, the relator must receive notice and have an opportunity to be heard on the motion.[249] The FCA does not set forth a standard of review for a motion to dismiss, and that has led to a split in the circuit courts with at least one court giving unfettered discretion to the government, and two other courts applying a burden-shifting rational basis review.[250]

If the so-called Granston Memo leads to more dismissals by the DOJ, it could open an opportunity for the US Supreme Court to weigh in on the standard of review. Moreover, it would suggest another administrative bullet shot at the war on whistleblowers that extends beyond SOX and Dodd-Frank. On the other hand, to the extent the memo merely calls attention to an already existing practice, it would pose no additional risk to the whistleblower programs if they were to adopt a *qui tam* private litigation measure similar to that available under the FCA. If the DOJ is indicating a plan to affirmatively increase the number of dismissal motions in FCA cases, it would almost certainly undercut to some degree

247. *Id.*

248. *Id.* Granston provided the nonexhaustive list with an explanation of each factor; there are the seven factors: curbing meritless outcomes; preventing parasitic or opportunistic *qui tam* actions; preventing interference with agency policies and programs; controlling litigation brought on behalf of the United States; safeguarding classified information and national security interests; preserving government resources; and addressing egregious procedural errors. *Id.* at 3–7. Granston also instructed DOJ attorneys to consider talking with the relator prior to filing a motion to dismiss, noting that "[s]ince January 1, 2012, more than 700 *qui tam* actions have been dismissed by relators after the government elected not to intervene." *Id.* at 8 n.5.

249. *See* 31 U.S.C. § 3730(c)(2)(A) (explaining that the government may dismiss a *qui tam* action as long as the person involved has an opportunity for a hearing).

250. *See* Granston Memorandum, *supra* note 25, at 7. *Compare* Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003) (holding that the government has "unfettered" discretion in FCA cases to seek dismissal), *with* United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998) (applying a two-part due process analysis that first requires the government to identify a valid government purpose for seeking dismissal and a rational relationship between the dismissal and accomplishing the purpose, and if met, then shifts the burden to the relator "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal" (quoting Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 397 (1990))), *cert. denied* 539 U.S. 944 (2003), *and* Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 936 (10th Cir. 2005) (adopting the Ninth Circuit standard of review for a government motion to dismiss under the FCA as comporting with legislative history and a relator's right to judicial review).

the effectiveness of any amendment to the whistleblower programs that adopts similar language to that in the FCA. Even so, DOJ litigation priorities and practices can change with the political winds, so today's memo can be swept away with tomorrow's refuse leaving a *qui tam* option available should Congress choose to adopt it for the SEC and CFTC whistleblower programs.

CONCLUSION

Given the failure of prior efforts to encourage whistleblowers in the securities industry, the Dodd-Frank whistleblower program is whistling past the graveyard. Unlike some other aspects of financial reform where the financial industry undermined the legislation before it was even enacted,[251] the Dodd-Frank Act's provisions to encourage whistleblowers and protect them against retaliation were significant improvements on prior programs such as SOX and the pre-Dodd-Frank SEC program. Nevertheless, continued efforts persist that threaten the program's vitality. Should any of those bullets hit their target, one potential reform, to draw broadly from the False Claims Act's *qui tam* provisions and add a private right of action, could breathe life into the program and potentially strengthen it.

Dodd-Frank's whistleblower reforms are a positive feature of the 2008 financial crisis because they offer the potential for accountability against those who violate securities and commodities laws. That so many persons were aware of misconduct but failed to report it during the years leading up to the financial crisis suggests that either many members of society are willing to participate in lawlessness, even when it is not to their personal benefit, or that many are afraid and stay silent in the face of lawlessness. Given the high stakes for whistleblowers who may risk their jobs at a minimum and their careers, families, homes, and sanity in many circumstances, the effort to protect them from retaliation is an important step toward imposing a rule of law upon a lawless industry. The awards offered to such whistleblowers are dwarfed by the potential to compensate victims, punish offenders, deter misconduct, and restore confidence in a financial system that has been overrun by corruption and lawlessness that disregards the welfare and security of financial investors and the global economy.

251. *See* Taibbi, *supra* note 82.