The Non-Revolving Door

Alexander I. Platt[1]

---

1. Associate Professor of Law, University of Kansas School of Law. For helpful comments on this project at various stages I thank Jordan Barry, Miriam Baer, Steve Bainbridge, Ilya Beylin, Steve Choi, Christine Chung, Chris Drahozal, Jessica Erickson, Jill Fisch, Brian Fitzpatrick, George Georgiev, Yuliya Guseva, Joan Heminway, Renee Jones, Vikramaditya Khanna, Guha Krishnamurthi, Arthur Laby, Ann Lipton, Mohsen Manesh, Francine McKenna, Jim Park, Menesh Patel, Will Powley, Adam Pritchard, David Rosenfeld, Roy Shapira, Greg Shill, Emily Strauss, Wanling Su, Will Thomas, James Tierney, Andrew Tuch, Sarah J. Williams, Verity Winship, Dave Zaring, participants in the New Voices in Business Law panel at the AALS 2021 Annual Meeting, the New Voices in Securities Regulation panel at the AALS 2021 Annual Meeting, the Corporate and Securities Litigation Workshop, the National Business Law Scholars Conference, the University of Michigan Junior Faculty Conference, the Harvard Law School Corporate Law Fellows Workshop, the University of Oregon Law School Faculty Workshop, and several anonymous attorneys currently and formerly associated with the SEC, other enforcement agencies, and leading plaintiffs' side securities litigation firms. For excellent research assistance, I thank Ricardo Cruzat Reyes. Thanks to Steve Choi for sharing data on employment trajectories for 2004 SEC Enforcement Attorneys. Finally, thanks to the editors of this journal for all of their hard work under difficult circumstances and many excellent editorial suggestions, which I believe have materially improved this paper.

For decades, commentators have warned about the "revolving door" between the SEC and the regulated industry. So far, however, the debate has overlooked a different "door" SEC attorneys might walk through. Joining a plaintiffs' side securities litigation firm would seem to be an appealing option for SEC attorneys looking to continue pursuing the same core mission of protecting investors and holding companies accountable for fraud and misconduct. Courts, Congress, and SEC leaders consistently describe private litigation as a vital "complement" to the SEC's own work. There is substantial overlap between the legal regimes, types of cases, and legal skills relevant to both SEC enforcement and private securities litigation. As to compensation, I estimate the revenues per lawyer (RPL) at one elite plaintiffs' firm and find that this figure compares very favorably with the RPL of leading defense firms. And, in at least some other areas, attorneys seem to move easily between public and private enforcement. Given all this, one might expect that SEC attorneys regularly make their way to the plaintiffs' bar, and vice versa. But it is not so. This paper shows that the door between the SEC and the plaintiffs' bar does not revolve. Among other things, I show that none of the ten leading plaintiffs' side firms employ anyone with recent SEC experience doing plaintiffs' side litigation; none of the enforcement attorneys I identified as working for the agency in 2015 left to do plaintiffs' side litigation; none of the current upper- and middle-managers in the SEC's Enforcement Division have any prior plaintiffs' side experience; and only five of the enforcement attorneys I identified as working for the agency in 2019 had prior plaintiffs' side experience. This "non-revolving door" between the SEC and the plaintiffs' bar is an intriguing, overlooked feature of the securities enforcement in the United States. Among other things, it raises the prospect that SEC attorneys might have come to embrace the defense bar's hostile and skeptical view of the social value of securities class action litigation, with significant

consequences for the securities enforcement landscape.

I. INTRODUCTION

SEC-watchers have been debating the "revolving door" between the agency and the securities industry for a very long time.[2] Critics say the flow of personnel from regulator to regulated and back gives rise to agency "capture"[3] and has caused important regulatory and enforcement failures by the SEC, including the 2008 financial crisis,[4] the 2010 "flash crash,"[5] the Ponzi schemes of Bernie Madoff and Robert Allen Stanford,[6] and a generally "timid" enforcement record against big companies.[7] To test these claims, scholars have

2. *E.g.*, David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 510 (2013) (discussing concerns about the revolving door raised in the earliest years of the SEC).

3. "A regulatory agency is captured if, instead of the public interest, it pursues the interests of powerful firms it is intended to regulate." Matthew Wansley, *Virtuous Capture*, 67 ADMIN. L. REV. 419, 419 (2015). *But see* David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. & PUB. POL'Y 31, 33–35 (2013) (discussing challenges associated with defining the concept).

4. *E.g.*, Andrew Ross Sorkin, *Revolving Door at SEC Is Hurdle to Crisis Cleanup*, N.Y. TIMES (Aug. 1, 2011, 9:54 PM), https://dealbook.nytimes.com/2011/08/01/revolving-door-at-s-e-c-is-hurdle-to-crisis-cleanup/ [https://perma.cc/RH7U-BBV3]; Susan Beck, *How the SEC Chose Targets in Its Goldman Investigation*, AM. LAW. (Apr. 28, 2014, 12:00 AM), https://www.law.com/americanlawyer/almID/1202651709412/ [https://perma.cc/4TFT-TH5B]; Michael Siconolfi, *SEC Audit Assails Ties of Official and Lawyer*, WALL ST. J. (Oct. 18, 2008, 12:01 AM), https://www.wsj.com/articles/SB122428500742546395 [https://perma.cc/NJ7U-EG8T] (discussing SEC inspector general report raising the prospect that an SEC official may have prematurely closed an investigation into Bear Stearns related to the mispricing of CDOs due to a personal relationship with a former SEC lawyer who was representing the firm); *see also* Zaring, *supra* note 2, at 509 (discussing the claims that financial regulators' failure to prevent the 2008 financial crisis was due, in part, to the revolving door); Jill E. Fisch, *Top Cop or Regulatory Flop? The SEC at 75*, 95 VA. L. REV. 785, 785–86 (2009) (describing the "relentless criticism" targeting the agency in the wake of the 2008 financial crisis, including assertions of "industry capture at the Division of Enforcement"). *But see* Laurence Tai & Daniel Carpenter, *SEC Capture by Revolving Door: Strengths and Weaknesses in the Evidence Base*, 8 L. & FIN. MKTS. REV. 227, 232 (2014) (suggesting that "budget constraints and perhaps intrinsic uncertainty about firms' and individuals' culpability seem to provide a plausible alternative" explanation).

5. *E.g.*, Tom McGinty, *SEC Revolving Door Under Review*, WALL ST. J. (June 16, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748703280004575309061471494980 [https://perma.cc/3TQG-VESD]; Peter J. Henning, *SEC's Revolving Door Draws More Scrutiny*, N.Y. TIMES (June 18, 2010, 12:03 PM), https://dealbook.nytimes.com/2010/06/18/s-e-c-s-revolving-door-draws-more-scrutiny; Hal Weitzman, *Trading Body Hires Former SEC Official*, FIN. TIMES (June 16, 2010), https://www.ft.com/content/ae1d4910-7999-11df-85be-00144feabdc0 [https://perma.cc/RU7P-SQWK].

6. *E.g.*, Michael Lewis & David Einhorn, *The End of the Financial World as We Know It*, N.Y. TIMES (Jan. 3, 2009), https://www.nytimes.com/2009/01/04/opinion/04lewiseinhorn.html [https://perma.cc/5K9S-C3BG] (partially attributing SEC's failure to pursue credible leads regarding Madoff to the revolving door); David S. Hilzenrath, *Ex-Regulator for SEC Defends His Ethics*, HOUS. CHRON. (July 23, 2020, 12:21 PM), https://www.chron.com/business/article/Ex-regulator-for-SEC-defends-his-ethics-2521834.php [https://perma.cc/2SBQ-4H5F] (noting that a former SEC official was fined $50,000 for working for Stanford after taking part in SEC decisions not to investigate him); *see also* James D. Cox & Randall S. Thomas, *Revolving Elites: The Unexplored Risk of Capturing the SEC*, 107 GEO. L.J. 845, 851–52 (2019) (discussing the theory that SEC's failure to catch these Ponzi schemes was due to the revolving door and critics of the theory); Zaring, *supra* note 2, at 509 (arguing the same).

7. *E.g.*, Ben Protess, *Official's Remarks Attacking SEC's Timidness Cause Stir*, N.Y. TIMES (Apr. 8, 2014, 7:33 PM), https://dealbook.nytimes.com/2014/04/08/officials-remarks-attacking-s-e-c-s-timidness-causes-stir/ [https://perma.cc/5J23-XY2U]; Peter J. Henning, *SEC's Losing Streak in Court Puts Agency in Spotlight*, N.Y.

devoted substantial effort to analyzing the career paths of the individuals who work at the SEC.[8]

Nearly all of the theoretical and empirical literature assumes that SEC employees can either continue at the agency, retire, or go work for the regulated industry or its representatives (i.e., a defense-side law firm).[9] So far, scholars have failed to examine a different professional "door" open to SEC personnel: the plaintiffs' bar.

In the United States, securities enforcement operates as a kind of "public-private partnership,"[10] with private class actions recovering roughly the same amount in damages each year as what the SEC recovers in penalties and disgorgement.[11] There are good reasons to think that at least some SEC attorneys might be attracted to work on plaintiffs' side litigation.[12] For the elite plaintiffs' firms who specialize in this area, it is an extremely lucrative practice; courts regularly authorize attorneys' fees awards to these firms in the $10s or even $100s of millions.[13] There is significant overlap between the legal regimes and skills relevant to both types of work.[14] And joining a plaintiffs' side firm might allow an SEC attorney to feel as though they are continuing to pursue the same mission of holding companies accountable for fraud and protecting investors.[15] Further, in some other areas with parallel public and private enforcement regimes, attorneys do seem to move between federal enforcement agencies and private enforcement organizations.[16]

TIMES (Feb. 10, 2014, 1:33 PM), https://dealbook.nytimes.com/2014/02/10/s-e-c-s-losing-streak-in-court-puts-agency-in-spotlight/ [https://perma.cc/K9NE-FMHS]; Ross MacDonald, Note, *Setting Examples, Not Settling: Toward a New SEC Enforcement Paradigm*, 91 TEX. L. REV. 419, 434–35 (2012); *Securities Regulation—Consent Decrees—Second Circuit Clarifies that a Court's Review of an SEC Settlement Should Focus on Procedural Propriety.*—SEC v. Citigroup Global Markets, Inc., 128 HARV. L. REV. 1288 (2015); Francine McKenna, *Speed of Revolving Door Between SEC and Private Sector Is Shocking, Says Expert on Regulatory Capture*, MARKETWATCH (Dec. 7, 2018, 10:33 AM), https://www.marketwatch.com/story/speed-of-revolving-door-between-sec-and-private-sector-is-shocking-says-expert-on-regulatory-capture-2018-12-07 [https://perma.cc/28YS-LTS2] (quoting economist Luigi Zingales as stating that the revolving door between the SEC and private sector "contributes to an aura of impunity for big companies").

8. For examples of this scholarship, see generally Stephen J. Choi et al., *Should I Stay or Should I Go? The Gender Gap for Securities and Exchange Commission Attorneys*, 62 J.L. & ECON. 427 (2019); Cox & Thomas, *supra* note 6; Ed deHaan et al., *The Revolving Door and the SEC's Enforcement Outcomes: Initial Evidence from Civil Litigation*, 60 J. ACCT. & ECON. 65 (2015); Tai & Carpenter, *supra* note 4; *see also* Zaring, *supra* note 2, at 531–45 (studying revolving door at the S.D.N.Y. U.S. Attorney's Office but raising many points relevant to the debate about the SEC revolving door debate). For a discussion of these papers and a broader review of the theoretical and empirical literature on the revolving door at the SEC, see *infra* Part II.

9. *E.g.*, Tai & Carpenter, *supra* note 4, at 230 (noting that "[w]here SEC employees intend to work after they leave is an empirical question that deserves further study," but omitting the possibility of plaintiffs' side work); Choi et al., *supra* note 8 (surveying and disaggregating the employment choices of several hundred SEC enforcement attorneys but failing to disaggregate the different types of law firms that SEC attorneys join).

10. James D. Cox et al., *SEC Enforcement Heuristics: An Empirical Inquiry*, 53 DUKE L.J. 737, 738 (2003) ("A public-private partnership for the enforcement of the securities laws is now entering its eighth decade.").

11. *E.g.*, Alexander I. Platt, *"Gatekeeping" in the Dark: SEC Control over Private Securities Litigation Revisited*, 72 ADMIN L. REV. 27, 33–36 (2020) (comparing the scale and impact of private and public securities enforcement); *see also infra* Part III.

12. *See infra* Part III.

13. *Infra* Section III.B.

14. *Infra* Section III.A.

15. *Infra* Section III.B.

16. *Infra* Section III.D.

Given all this, you might expect to see attorneys regularly making their way to the plaintiffs' bar after completing their run at the SEC.

You would be wrong.

This paper shows that the door between the SEC and the plaintiffs' bar *does not revolve*. Among other things, I find that:

- *None* of the ten leading plaintiffs' side securities firms employ any attorneys with recent SEC experience to do traditional plaintiffs' side work;[17]
- *None* of the attorneys that I identified as working for the SEC's Enforcement Division in 2015 left to pursue traditional plaintiffs' side litigation, though a significant proportion of them have joined defense-side firms, financial companies, and other private sector positions;[18]
- *None* of the current (as of January 2020) upper or middle-managers in the SEC's Enforcement Division have worked inside the plaintiffs' bar, although the overwhelming majority of them (85%) have worked for defense-side firms;[19] and
- Only *five* of the attorneys that I identified as working for the Enforcement Division in 2019 had prior experience in plaintiffs' side shareholder litigation.[20]

This non-revolving door between the SEC and the plaintiffs' bar is an intriguing, overlooked feature of the U.S. securities enforcement regime. Notwithstanding the consistent refrain of courts, Congress, and SEC leadership that private securities class actions are an essential "supplement" or "complement" to SEC enforcement,[21] the

17. *Infra* Section IV.A.1.

18. *Infra* Section IV.A.2.

19. *Infra* Section IV.B.1.

20. *Infra* Section IV.B.2.

21. *E.g.*, Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 478 (2013) ("Congress, the Executive Branch, and this Court . . . have recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission.") (quoting Tellabs, Inc. v. Makor Issues & Rights Ltd., 551 U.S. 308, 313 (2007)); J.I. Case Co. v. Borak, 377 U.S. 426, 432 (1964) ("Private enforcement . . . provides a necessary supplement to [SEC] action."); H.R. REP. 104-369, at 31 (1995) (conference report on the 1995 Private Securities Litigation Reform Act) ("Private securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs."); Elisse B. Walter, Commissioner, SEC, Remarks Before the FINRA Institute at Wharton Certified Regulatory and Compliance Professional (CRCP) Program (Nov. 8, 2011), https://www.sec.gov/news/speech/2011/spch110811ebw.htm ("I believe that both the public and the private aspects of securities enforcement are critical [and] that they complement each other"); *Abandonment of the Private Right of Action for Aiding and Abetting Securities Fraud/Staff Report on Private Securities Litigation: Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing & Urban Affairs*, 103th Cong. 13–20 (1994) (statement of Arthur Levitt, Chairman, SEC), http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1990/1994_0512_PrivateRight.pdf [https://perma.cc/U7FC-4GJ] ("Legislation is also needed to restore aiding and abetting liability in private actions which are a necessary supplement to (the SEC's) overall enforcement program."); Frank v. Cooper Indus., SEC Litigation Release No. 14356, 58 SEC Docket 697 (Dec. 15, 1994) ("Private actions are a necessary supplement to the Commission's own enforcement efforts, act as a deterrent against securities fraud, and provide

attorneys working for the SEC's Enforcement Division may not actually see it that way. Rather, their professional choices indicate that they may have systematically adopted a more hostile and skeptical view of securities class action litigation—a view that is characteristic of the defense bar—raising the prospect of "cultural capture."[22]

The non-revolving door also might appear to confirm a core premise of traditional "capture" theorists—that the most valuable commodity an attorney acquires from working at the SEC is neither legal skill nor institutional knowledge, but rather personal connections within the agency that can be leveraged to obtain special advantages for high-paying clients.[23]

The stark separation between the personnel involved in public and private securities enforcement also sheds new light on debates about our decentralized, multi-enforcer system.[24] For instance, the non-revolving door might have the virtue of further supporting the independence of private securities enforcement. But it may also be a source of increased friction or "coordination costs" in the system.

A close look at the professional interchange between the SEC and the plaintiffs' bar also reveals a different "door" that *does* appear to be revolving—between the SEC and the specialized bar that represents whistleblowers.[25] The steady flow of attorneys from the SEC to whistleblower firms raises new questions and concerns about this relatively new and developing area of securities enforcement.

This Article introduces the non-revolving door and explores its implications for the institutions of securities enforcement. Part II provides background on the debate over the revolving door at the SEC. Almost all of this literature assumes there are only two options for SEC employees looking to leave the agency: stay at the agency or go work for the regulated industry and its representatives. Part III introduces a different "door" for SEC attorneys—the plaintiffs' bar. It articulates the many parallels between public and private securities enforcement in the United States, showing why one might expect to see attorneys move from one side to the other. Part IV demonstrates that the door between the SEC and the plaintiffs' bar does not revolve. Part V explores what the non-revolving door can teach us about public and private securities enforcement.

---

a mechanism for defrauded investors to obtain damages."); Brief for the United States as Amicus Curiae Supporting Neither Party at 2, Goldman Sachs Grp v. Ark. Teacher Retirement Sys., No. 20-222 (U.S. Feb. 2021) ("meritorious private securities fraud suits, including class actions, are an essential supplement to criminal prosecutions and civil enforcement actions brought by the Department of Justice and the SEC…"); Brief for the United States as Amicus Curiae Supporting Respondents at 31, Leidos Inc. v. Ind. Pub. Ret. Sys., 138 S. Ct. 2670, cert. dismissed (2018) (No. 16-581) (noting that private enforcement of section 10(b) "complements" the SEC's comment-letter process); STEPHEN J. CHOI & A.C. PRITCHARD, SECURITIES REGULATION: CASES AND ANALYSIS 243 (5th ed., 2019) ("the SEC calls private rights of actions a 'necessary supplement' to its own efforts in policing fraud"); JOHN C. COFFEE JR. ET AL., SECURITIES REGULATION: CASES AND MATERIALS 922 (13th ed., 2015) (noting that "the limited resources of the SEC for public enforcement" makes private securities class actions "arguably an important part of the enforcement regime" and noting that criticisms of securities class actions "are regularly balanced, both by the courts and Congress, that class actions provide a necessary tool in the enforcement arsenal").

22. *Infra* Section V.A.1.
23. *Infra* Section V.A.2.
24. *Infra* Section V.B.
25. *Infra* Section V.C.

II. THE REVOLVING DOOR BETWEEN THE SEC AND THE REGULATED INDUSTRY

The employment trajectories of SEC leaders and staffers have been subject to enormous scrutiny. While in government, these individuals wield substantial discretion and make decisions that shape industries, markets, and our economy.[26] Where these individuals worked before coming to the SEC and where they choose to work after completing their government service provides a glimpse of their personal incentives and attitudes, which plausibly may shape their work while they are in government.[27]

This Part reviews the literature on the SEC revolving door. Section A summarizes the leading theories for how the pre- and post-SEC employment opportunities of SEC employees may impact their work while at the agency. Section B reviews the evidence.

A. Theory

Critics have warned that the high rate of personnel interchange between the SEC and the regulated industry undermines effective regulation. Some worry that SEC personnel looking for a lucrative private sector post will "go easy" on prospective employers to curry favor with them.[28] This is typically referred to as the "rent-seeking" hypothesis, the theory being that private employers are interested in hiring regulators primarily because of their personal connections and unique ability to lobby the agency on their behalf, and so these regulators have a stronger incentive to invest in networking with potential future employers than in furthering the agency's interests.[29] A related concern, referred to as the "cultural capture"[30] or "non-materialist capture"[31] hypothesis, is that the high-degree of interchange between the SEC and the regulated industry may lead SEC personnel to adopt the attitudes and ideology of the regulated industry, leading to weakened regulation.[32] Still, others worry

26. For a review of the SEC enforcement process, see Platt, *supra* note 11, at 44.

27. *Cf.* Jon D. Michaels, *The American Deep State*, 93 NOTRE DAME L. REV. 1653, 1655 (2017) (celebrating various personal characteristics shared by the individuals who staff the American bureaucracy as conducive to "safeguarding our constitutional commitments and enriching our public policies").

28. *E.g.*, Cox & Thomas, *supra* note 6, at 863 ("The concern is that current SEC employees might encourage less aggressive enforcement as a quid pro quo for future employment prospects."); Zaring, *supra* note 2, at 512 (on this theory, "[t]he revolving door is essentially a bribe, paid through the prospect of lucrative future employment. The quid pro quo for the bribe is the promise to regulate lightly, or not at all."); U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-654, SECURITIES AND EXCHANGE COMMISSION: EXISTING POST-EMPLOYMENT CONTROLS COULD BE FURTHER STRENGTHENED 11–12 (2011) ("SEC employees may be influenced by the prospect of future employment opportunities to be more lenient or favor prospective future employers while undertaking SEC actions.").

29. Cox & Thomas, *supra* note 6, at 857 ("According to this theory, an SEC employee might sacrifice agency efficacy in an attempt to curry favor and network with prospective employers from the private sector.").

30. James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71, 79–80 (Daniel Carpenter & David A. Moss ed., 2014).

31. *E.g.*, Engstrom, *supra* note 3, at 33.

32. *E.g.*, deHaan et al., *supra* note 8, at 66 (revolving doors raise concerns that "prior experience in industry makes SEC personnel unduly sympathetic to industry's interests"); Cox & Thomas, *supra* note 6, at 883 ("Attorneys who join the SEC from employment in the regulated industry may be 'socialized' toward the industry. In other words, their prior experience may skew their perspective on regulatory issues. They may become conditioned to think in ways that favor the regulated industry.") (citations omitted); Stavros Gadinis, *The SEC and the Financial Industry: Evidence from Enforcement Against Broker-Dealers*, 67 BUS. LAW. 679, 726 (2012) ("The 'revolving door' between an agency and the industry it supervises may also affect regulatory performance

that the mere *appearance* of coziness between the regulator and the regulated will undermine public confidence in the SEC's regulatory program.[33]

On the other hand, the prospect of private sector employment may also give SEC employees some incentives to strengthen regulation. The "market-expansion" hypothesis posits that SEC employees have an incentive to increase the level and complexity of securities regulation in order to increase the demand for their services in the private sector to help navigate those regulations.[34]

Somewhat less cynically, the "human capital" hypothesis posits that the regulatory regime is strengthened by the interchange of expertise between agency and industry in various ways. Regulators with recent experience in industry might have a better understanding of the realities on the ground and might be able to craft better and more effective regulations.[35] When professionals leave the SEC and move to the regulated industry, they may be in a position to facilitate compliance with the regulatory regime because of their expertise or personal commitment to the regime.[36] A regulator

---

through socialization mechanisms."); Tai & Carpenter, *supra* note 4, at 227 (discussing recent work theorizing that regulators may "'identify[] with corporations' represented by agency alumni").

33. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 28, at 12 ("even without direct evidence that undue influence has affected an enforcement action, the appearance of a conflict of interest could undermine confidence in the enforcement process and the SEC"); *Nominations of: Mary Schapiro, Christina D. Romer, Austan D. Goolsbee, Cecilia E. Rouse, and Daniel K. Tarullo*, 111th Congress 28 (2009) (statement of Mary Schapiro, of New York, Chairman-Designate, SEC) (describing the situation of SEC regulators "walking out the door and going to a firm and leaving everybody to wonder whether they showed some favor to that firm during their time at the SEC"); *see also* Judy Sarasohn, *Under Bush, the Revolving Door Gains Speed*, WASH. POST, Oct. 27, 2005 (suggesting that the revolving door "contributes to a cynicism about government"); United States v. Dorfman, 542 F. Supp. 402, 407 (N.D. Ill. 1982) (regretting the "public's impression that public service is but a vehicle to enhance private gain and that a 'revolving door' exists between the private bar and government service"); Zaring, *supra* note 2, at 523.

34. Wenton Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265, 1280–85 (2015); *see also* Cox & Thomas, *supra* note 6, at 858–59 ("Under this model, regulators may seek to expand the rulemaking authority of the agency, actively pursue the use of flexible standards rather than bright-line rules, and may prefer the establishment of complex rather than simple policies and standards.").

35. *E.g.*, deHaan et al., *supra* note 8, at 66 ("[r]evolving doors are natural in that the SEC needs industry specific expertise to monitor and regulate effectively"); Mary Jo White, *The Future of Securities and Exchange Commission in a Changing World*, CTR. STRATEGIC INT'L STUD.19, 22 ("[M]y private sector experience provided me with knowledge about how much leverage the SEC had in using its power in appropriate cases. I would not have known that had I not been in the private sector."); Sorkin, *supra* note 4 (quoting Professor John Coffee explaining that President Roosevelt "justified appointing Joe Kennedy as chairman of the SEC with the line: 'You need to set a thief to catch a thief.'").

36. *E.g.*, deHaan et al., *supra* note 8, at 66 ("Revolving doors are natural in that . . . regulated firms need experience and knowledge of complex regulations to minimize the cost of compliance."); U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 28, at 11 ("Former SEC personnel who take positions in the regulated industry or their representatives, including law firms, may have enhanced credibility as a result of their SEC experience, and thus greatly aid in encouraging firms to adopt a culture of compliance."); William H. Allen, *Panel V: The "Revolving Door"—Should It Be Stopped?*, 32 ADMIN. L. REV. 383, 408 (1980) ("In securities law, we have a vast SEC alumni who practice in the private sector and I think that the principles of the securities laws, the problems of the agency administering it, are better understood as a result. Compliance in the private sector is improved by reason of that."); Robert H. Mundheim, *Conflict of Interest and the Former Government Employee: Rethinking the Revolving Door*, 14 CREIGHTON L. REV. 707, 709 (1981) ("I have always believed that the success of securities regulation in the United States is due in large part to the efforts of the many SEC alumni in private practice.").

contemplating a move to the private industry has the incentive to gain valuable qualifications that may be needed for the next job; in the case of SEC enforcement attorneys, the best way to maximize prospects of landing a lucrative defense-side job is by earning a personal reputation as an aggressive enforcer—perhaps by achieving trial victories or extracting large settlements in high-profile matters.[37] Finally, the prospect of a lucrative private sector career may improve the quality of candidates interested in working for the government.[38]

Table 1—"Revolving Door" Theories

Regulation-Weakening	**Regulation-Strengthening**
Rent Seeking	*Market-Expansion*[39]
Cultural Capture	*Human Capital*[40]
Legitimacy	

B. Evidence

The revolving door is a fact of life at the SEC.[41] High-profile examples are easy to come by. For instance, before being appointed by President Obama as Chair of the SEC in 2013, Mary Jo White served as chair of Debevoise & Plimpton's litigation department, focusing on "SEC and civil securities law violations"—and she promptly returned to the firm as "Senior Chair" when she stepped down from the SEC in 2017.[42] Andrew Ceresney,

37. Zheng, *supra* note 34, at 1276–77; Cox & Thomas, *supra* note 6, at 857 ("the aspiring staff member will understand that a greater investment in her human capital, as well as a successful pursuit of the agency's objectives, will attract attention in the private sector"); Zaring, *supra* note 2, at 520 ("The right way to signal worth to private prospective employers may be, among enforcement officials, at least, aggressive pursuit of wrongdoing while in the public sector.").

38. *E.g.*, Zaring, *supra* note 2, at 548 ("[T]he prospect of private-sector riches may improve the quality of the applicant pool for government work.").

39. *But see* Cox & Thomas, *supra* note 6, at 859 ("The normative implication of the market-expansion hypothesis from the SEC's perspective is less clear . . . Increased enforcement where market abuses exist certainly seems desirable, but self-serving decisions regarding the structure and quality of the typical enforcement action or agency rulemaking are likely to be detrimental to overall agency performance.").

40. *But see generally* Jonathan R. Macey, *The Distorting Incentives Facing the US Securities and Exchange Commission*, 33 HARV. J.L. & PUB. POL'Y 639 (2010) (arguing that the SEC enforcement attorney's incentive to maximize their reputation in the private sector has distorted the agency's enforcement program and undermined its efficacy).

41. *E.g.*, Sorkin, *supra* note 4 (quoting Professor John Coffee: "The revolving door is such a dominant fact about the SEC's culture . . . .").

42. Sara Randazzo, *Mary Jo White to Rejoin Debevoise & Plimpton as Senior Chair*, WALL ST. J. (Feb. 15, 2017, 6:03 AM), https://www.wsj.com/articles/mary-jo-white-to-rejoin-debevoise-plimpton-as-senior-chair-1487156400 [https://perma.cc/G765-SQQ6]; *see also* Ben Protess, *Nominee to Lead the SEC Vows an 'Unrelenting Fight' on Fraud*, N.Y. TIMES, Mar. 12, 2013, at B4 (noting that, in private practice, White represented UBS, J.P. Morgan, and other "Wall Street giants"); *see also* Cox & Thomas, *supra* note 6, at 849–50 ("Many view the tenure of former SEC Chair Mary Jo White as the paradigmatic example of the revolving door.").

who served as Enforcement Director under Chair White, followed her through each pass through the revolving door.[43] The most recent SEC Chair, Jay Clayton, spent decades in private practice at Sullivan & Cromwell, advising clients like Goldman Sachs, Deutsche Bank, and Barclays before coming to his role at the agency—and has now returned to take several high-profile jobs in the financial industry.[44] The head of the SEC's Cyber Unit who oversaw the agency's budding effort to tackle cryptocurrency fraud[45] recently left the agency after fifteen years to join Davis Polk.[46] In 2017, the SEC's director of trading and markets left the agency to become the general counsel of Citadel Securities[47]—and, a few months later, the SEC replaced him with a senior J.P. Morgan executive.[48] And on it goes.[49]

---

43. Dave Michaels, *Former SEC Enforcement Chief Andrew Ceresney to Return to Private Practice*, WALL ST. J. (Jan. 24, 2017), https://www.wsj.com/articles/former-sec-enforcement-chief-andrew-ceresney-to-return-to-private-practice-1485253803 [https://perma.cc/5MSJ-ZHRM].

44. Dave Michaels, *SEC Chair Nominee Clayton's Ethics Report Reveals Range of Possible Conflicts*, WALL ST. J. (Mar. 8, 2017, 7:06 PM), https://www.wsj.com/articles/sec-chair-nominee-claytons-ethics-report-reveals-range-of-possible-conflicts-1488988744 [https://perma.cc/9MA9-5696]; Dave Michaels & Liz Hoffman, *SEC Pick Is Attuned to Needs of Wall Street*, WALL ST. J., Jan. 5, 2017, at B1; Peter J. Henning, *Under New Chairman, SEC Enforcer Role Might Shrink*, N.Y. TIMES (Jan. 9, 2017, 5:33 AM), https://www.nytimes.com/2017/01/09/business/dealbook/under-new-chairman-sec-enforcer-role-might-shrink.html [https://perma.cc/B7V4-5JCB] (describing Clayton as "a quintessential Wall Street deal lawyer" and describing his work for Goldman Sachs and other Wall Street firms); Matthew Goldstein, *Jay Clayton, The Former SEC Chairman, Will Join Apollo's Board,* N.Y. TIMES (Feb. 23, 2021), https://www.nytimes.com/2021/02/18/business/jay-clayton-the-former-sec-chairman-will-join-apollos-board.html [https://perma.cc/FC56-MZHD]; Eric Schatzker, *Ex-SEC Chairman Clayton To Advise One River on Bitcoin*, BLOOMBERG (Mar. 29, 2021), https://news.bloomberglaw.com/banking-law/ex-sec-chairman-clayton-to-advise-brevan-backed-firm-on-crypto **[**https://perma.cc/J8XL-BHBG**]**.

45. For a review of this area, see generally James J. Park & Howard H. Park, *Regulation by Selective Enforcement: The SEC and Initial Coin Offerings*, 61 WASH. U. J.L. & POL'Y 99 (2020).

46. Dave Michaels, *Government Cryptocurrency Cop Heads to Law Firm*, WALL ST. J. (Aug. 20, 2019, 7:00 AM), https://www.wsj.com/articles/government-cryptocurrency-cop-heads-to-law-firm-11566298802 [https://perma.cc/XD4F-JQ7J] (quoting another securities lawyer stating that "[t]his is a shrewd pick up by Davis Polk" and predicting that "[a] lot of companies will be attracted to his pedigree, including traditional finance players that enter the crypto space").

47. Dave Michaels, *Citadel Securities Hires Ex-SEC Director Luparello as General Counsel*, WALL ST. J. (Apr. 4, 2017, 3:42 PM), https://www.wsj.com/articles/citadel-securities-hires-ex-sec-director-luparello-as-general-counsel-1491323109#:~:text=Stephen%20Luparello%20will%20join%20Citadel,director%20of%20trading%20and%20markets [https://perma.cc/FNP4-TRQS].

48. Dave Michaels, *SEC Names J.P. Morgan Executive as Top Regulator of Exchanges*, WALL ST. J. (Oct. 18, 2017, 5:22 PM), https://www.wsj.com/articles/sec-names-j-p-morgan-executive-as-top-regulator-of-exchanges-1508358131#:~:text=WASHINGTON%E2%80%94The%20Securities%20and%20Exchange,rise%20of%20high%2Dfrequency%20trading [https://perma.cc/A2VJ-USWW].

49. McKenna, *supra* note 7; Dave Michaels, *SEC Poised to Fill a Top Job*, WALL ST. J., May 27, 2017, at B.10 (noting that the incoming Enforcement Director Steven Peikin had worked for years at Sullivan & Cromwell where he represented clients including Barclays and Goldman Sachs); Andrew Ramonas, *New SEC Alums Swarm "Revolving Door" to Financial Law Firms*, BLOOMBERG BNA (Apr. 19, 2017, 9:59 AM), https://news.bloomberglaw.com/business-and-practice/new-sec-alums-swarm-revolving-door-to-financial-law-firms [https://perma.cc/7BCA-52PU] ("More than half the high-ranking SEC officials who left the agency since January 2016 landed at law and financial firms . . . ."); Ben Protess, *WilmerHale Partner Named as S.E.C. Deputy Enforcement Director*, N.Y. TIMES (May 29, 2014, 5:47 PM), https://dealbook.nytimes.com/2014/05/29/wilmerhale-partner-named-as-s-e-c-deputy-enforcement-director/

The SEC's revolving door goes far beyond these headline-grabbing examples. Most of the SEC's 2004 enforcement staff had left the agency to join the private sector by 2016.[50] Between 2001 and 2010, more than 400 newly departed SEC employees were representing a client before the agency within two years of their departure.[51] The SEC has also

[https://perma.cc/755P-A9N2]; Ben Protess, *Former S.E.C. Enforcer Returns to Milbank*, N.Y. TIMES, Feb. 13, 2014, at B6 (noting that outgoing SEC Enforcement Director George Cannelos was returning to Milbank); Justin Baer, *SEC's Top Litigator Joins Private Firm*, WALL ST. J., Oct. 10, 2013, at C.5 (reporting that Matthew Martens, Chief Litigation Counsel at SEC's Enforcement Division, was leaving the agency to join Wilmer Hale); Jean Eaglesham, *Former SEC's Top Cop to Join Law Firm*, WALL ST. J. (July 23, 2013, 12:06 AM), https://www.wsj.com/articles/SB10001424127887324783204578622840532431994 [https://perma.cc/DLM7-695H] (reporting that SEC Enforcement Director Robert Khuzami would join Kirkland & Ellis); Andrew Ackerman, *Ex-SEC Official Gallagher Joins Regulatory Consultant*, WALL ST. J. (Jan. 4, 2016, 8:37 PM), https://www.wsj.com/articles/ex-sec-official-gallagher-joins-regulatory-consultant-1451865600 [https://perma.cc/4XCC-6LE4] (reporting that former Commissioner Daniel Gallagher was leaving the agency to join Patomak Global Partners); Jean Eaglesham, *SEC Ex-Chief Lands at Consultant*, WALL ST. J., Apr. 2, 2013, at C.1 (reporting that former chair Mary Schapiro was joining Promontory Financial Group); Samuel Rubenfeld, *SEC's FCPA Chief Leaves for Simpson Thacher*, WALL ST. J. (June 1, 2011, 3:46 PM), https://www.wsj.com/articles/BL-CCB-4524 [https://perma.cc/H6FB-MLE9] (reporting that SEC's head of FCPA enforcement was leaving the agency to join Simpson Thacher); David S. Hilzenrath, *David Becker, Former SEC Official with Madoff Problem, Rejoins Law Firm*, WASH. POST (May 9, 2011), https://www.washingtonpost.com/blogs/political-economy/post/david_becker_former_sec_official_with_madoff_problem_rejoins_law_firm/2011/05/09/AFJs5acG_blog.html [https://perma.cc/5MPJ-EZC7] (noting that SEC General Counsel David Becker was leaving the agency to return to his former law firm, Cleary Gottlieb); Sarah N. Lynch, *Ex-SEC Aide to Represent Trader Group*, WALL ST. J., Jun. 17, 2010, at C.3 (reporting that SEC chief economist would serve as spokesman for a high-frequency trading interest group); Tom Braithwaite, *SEC Hires Goldman Alum for Enforcement Job*, FIN. TIMES (Oct. 16, 2009), https://www.ft.com/content/d1cf6c8a-ba77-11de-9dd7-00144feab49a [https://perma.cc/HEG2-XAJY] (reporting that the SEC had hired Adam Storch, previously with Goldman Sachs); Michael Schroeder & Tom Hamburger, *Accounting Reform Is Left in SEC's Lap*, WALL ST. J., Apr. 17, 2002, at C.1 (discussing the "awkward" position of SEC Chair Harvey Pitt because, under the newly enacted SOX, he was vested with significant discretion to set up new accounting regulatory regime but, before joining the agency, he was "a private lawyer who represented each of the Big Five major accounting firm at various times, including Arthur Andersen LLP, the firm responsible for Enron's flawed audits"); Zaring, *supra* note 2, at 513 (noting that Robert Khuzami started at a defense firm, then went to SDNY, then to Deutsche Bank, then to the SEC as its head of enforcement).

For a discussion of the revolving door in other federal enforcement domains such as antitrust, consumer protection, environmental law, and civil rights, *see infra* Section III.D.

50. Choi et al., *supra* note 8, at 449. Between 1998 and 2000, one-third of the SEC's staff left the agency, and almost half of all SEC officials intended to stay with the agency for less than five years. U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-947, SECURITIES AND EXCHANGE COMMISSION: HUMAN CAPITAL CHALLENGES REQUIRE MANAGEMENT ATTENTION 1 (2001).

51. PROJECT ON GOV'T OVERSIGHT, DANGEROUS LIAISONS: REVOLVING DOOR AT SEC CREATES RISK OF REGULATORY CAPTURE 2 (2013), http://pogoarchives.org/ebooks/20130211-dangerous-liaisons-sec-revolving-door.pdf [https://perma.cc/MA6D-TZ4N] [hereinafter PROJECT ON GOV'T OVERSIGHT, DANGEROUS LIAISONS]; *see also* PROJECT ON GOV'T OVERSIGHT, REVOLVING REGULATORS: SEC FACES ETHICS CHALLENGES WITH REVOLVING DOOR (2011), http://pogoarchives.org/m/fo/revolving-regulators-20110513.pdf [https://perma.cc/G832-E6GU] (later study finding that more than 200 SEC employees represented a private client within two years of departing the agency within a five year period); Tom McGinty, *SEC Lawyer One Day, Opponent the Next*, WALL ST. J., Apr. 5, 2010, at C.1 (relying on the same type of document to find that between 2008 and the first nine months of 2009 sixty-six SEC employees who had departed within the prior two years were representing clients before the agency in some form). Among other areas, SEC alumni have been documented to be extremely active and successful in representing companies seeking waivers to preserve WKSI

increasingly filled its most senior leadership positions with individuals drawn from the private sector, abandoning a historical practice of filling these positions with career government officials.[52] And, between 2001 and 2015, ninety-four former SEC employees were serving as senior executives or directors at public financial firms.[53]

As to the *effects* of the revolving door, however, empirical work has failed to resolve the debate.[54] The leading study by Ed deHaan, Simi Kedia, Kevin Koh, and Shivaram Rajgopal examined SEC federal court enforcement matters between 1990 and 2007 and found that the agency was *more* aggressive—i.e., more likely to refer a case to DOJ and to pursue individual charges against corporate officers and directors—when the SEC attorneys assigned to the particular matter subsequently exited through the revolving door to the private securities defense bar.[55] This finding generally supported the "human capital" hypothesis.[56] However, the study also found a *decrease* in enforcement aggressiveness when the departing SEC attorneys handling the matter were based in Washington D.C.[57]

Stephen Choi and Adam Pritchard tracked the employment trajectories of all attorneys working at the SEC's Enforcement Division in 2004 and found that the attorneys who excelled at the agency—i.e., those who received an award or were involved in more challenging and salient cases (involving 10b-5 and/or individual defendants)—were more likely to leave.[58] Again, this tends to support the "human capital" hypothesis.[59]

---

status after a securities fraud settlement, seeking other exemptions from the Commission, and seeking no-action letters that authorize the client to exclude shareholder proposals. *See* PROJECT ON GOV'T OVERSIGHT, DANGEROUS LIAISONS, *supra*, at 8–14.

52. Cox & Thomas, *supra* note 6, at 872–73.

53. Sophie A. Shive & Margaret M. Forster, *The Revolving Door for Financial Regulators*, 21 REV. FIN. 1445, 1452 (2017).

54. *E.g.*, Cox & Thomas, *supra* note 6, at 848 ("The research to date has been inconclusive as to whether such revolving door practices have weakened the SEC's verve."); Zheng, *supra* note 34, at 1268 ("A closer examination of the empirical evidence on the capture effect of the revolving door, however, reveals that the capture narrative has been built largely on presumptions.").

55. deHaan et al., *supra* note 8, at 67–68.

56. The study has been sharply criticized. *E.g.*, Rachel M. Hayes, *Discussion of "The Revolving Door and the SEC's Enforcement Outcomes: Initial Evidence from Civil Litigation" by deHaan, Kedia, Koh, and Rajgopal*, 60 J. ACCT. & ECON. 1, 2 (2015) ("[T]he caveats are too numerous and too critical for the study's findings to substantially advance our understanding of the revolving door phenomenon.").

57. deHaan et al., *supra* note 8, at 81. The study's authors provide this explanation of this finding:

> As the SEC's headquarters is located in Washington DC, most public firms, government agencies and private law firms that deal with the SEC are likely to have a presence in Washington DC. This will lead to greater external opportunities for SEC lawyers that are employed in the Washington DC office. Further, the potential to lobby and build social and political networks through which influence can be exercised is likely to be greater if the SEC lawyer is located in Washington DC. If such access to SEC decision makers facilitates rent seeking, then lawyers located in the DC office should be associated with less aggressive enforcement outcomes.

Id.

58. Stephen J. Choi & A.C. Pritchard, *Securities Law and Its Enforcers*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 233, 235 ("[I]nternal and external career incentives appear to be aligned.").

59. Outside the SEC, David Zaring studied the career trajectories of 151 attorneys working for SDNY as prosecutors in 2001, and found that the attorneys who left government service for the private sector were, on average, more productive than their peers, and found "no evidence" for the concern that SDNY prosecutors are

On the other hand, James Cox and Randall Thomas found a significant shift in the backgrounds of the SEC's Division Directors over time towards directors drawn directly from the private sector instead of internal promotion, raising "fears of cultural capture"[60] and "the existence of a cultural bias that arises out of these individuals' exposure to corporate clients."[61] But Cox and Thomas also found "no measurable evidence that cultural bias has placed a heavy industry thumb on the scale"[62] and concluded with "cautious[] optimis[m]" that the new trend of revolving directors was "the best approach" because it allowed the SEC to benefit from private sector expertise.[63]

Similarly, Wenton Zheng finds support for the "market expansion" theory in the rapid increase of the number and magnitude of FCPA enforcement actions initiated by the SEC (and DOJ) in recent years.[64] He notes that "the boom in FCPA enforcement has benefitted former FCPA regulators who walked through the revolving door" to private firms who specialize in defending against such actions and advising firms on compliance with the FCPA.[65] Zheng notes that these regulators "at least have *incentives* to increase FCPA enforcement if their goal is to maximize their exit opportunities."[66]

More worrisome is a 2013 report by the Project on Government Oversight (POGO), which connects several recent SEC actions going easy on the regulated industry to the revolving door.[67] For instance, POGO showed that most of the WKSI waivers granted between 2006 through 2012 were requested on behalf of the companies by SEC alumni[68] and argued that "the mere fact that so many waiver requests involve former officials could influence the way people at the agency think about regulatory relief."[69]

Similarly, Pamela Ban and Hye Young You studied the lobbying efforts of nearly 3,000 organizations who met with or submitted comments to the SEC between 2009 and 2014 regarding agency rulemaking under Dodd-Frank, and found that the agency was more likely to respond to an organization's comments or suggestions if the organization employed at least one former SEC employee.[70]

Finally, a 2010 report by the SEC's Office of Inspector General regarding the agency's failure to pursue an investigation of a large Ponzi scheme provides some reason to believe that the agency's failure may have been due, in part, to the outside influence of

---

"rewarded for going lightly on industry." Zaring, *supra* note 2, at 539–46.

60. Cox & Thomas *supra* note 6, at 889.

61. *Id.* at 899.

62. *Id.*

63. *Id.*

64. Zheng, *supra* note 34, at 1280–90.

65. *Id.* at 1290.

66. *Id.* at 1292.

67. *See* PROJECT ON GOV'T OVERSIGHT, DANGEROUS LIAISONS, *supra* note 51, at 2 (noting that the SEC has "exempted certain senior employees from a 'cooling off period' that would have restricted their ability to leave the SEC and then represent clients before the agency . . . [and has] shielded some former employees from public scrutiny by blacking out their names in documents they must file when they go through the revolving door.").

68. *Id.* at 9.

69. *Id.*

70. Pamela Ban & Hye Young You, *Presence and Influence in Lobbying: Evidence from Dodd-Frank*, 21 BUS. & POL. 267, 269–70 (2019).

a former senior SEC enforcement official involved in the representation of the accused.[71]

* * *

As to the existence of the revolving door, the evidence is unequivocal: at all levels of seniority, attorneys move rapidly between the SEC and the regulated industry and its representatives. As to the effects of this phenomenon, however, the evidence is mixed. Academics and other commentators have failed to resolve whether the movement between public and private sectors undermines effective regulation or promotes it. As researchers continue to work in this area to get to the bottom of this important public policy question, the next Part introduces an important new domain for this research.[72]

III. THE OTHER "DOOR" FOR SEC ATTORNEYS: THE PLAINTIFFS' BAR

Almost all of the prior research (surveyed above) on the revolving door has focused on personnel movement between the agency and the regulated industry and their representatives.[73] But there is a different potential professional "door" available to SEC attorneys: the private plaintiffs' bar that specializes in securities class action litigation.

SEC enforcement and private securities class actions (SCAs) each comprise a significant portion of the securities enforcement landscape.[74] Both the volume of filings and the value of monetary payments extracted are roughly parallel for both.[75] For an attorney there are many reasons why a move from one side to the other might be attractive. Section A shows that there is substantial overlap in the legal regimes, types of cases, and legal skills relevant to both private attorneys and the SEC. Section B evaluates the financial compensation available to plaintiffs' side attorneys and whether it may be enough to make this work appealing to some SEC attorneys—and vice versa. Section C outlines nonpecuniary benefits available to plaintiffs' side attorneys that might make this work particularly appealing to SEC attorneys—and vice versa. Section D shows that, at some other enforcement agencies with parallel private enforcement, movement between public and private enforcement is relatively common.

---

71. SEC. & EXCH. COMM'N OFF. OF INSPECTOR GEN., INVESTIGATION OF THE SEC'S RESPONSE TO CONCERNS REGARDING ROBERT ALLEN STANFORD'S ALLEGED PONZI SCHEME 17 (Mar. 31, 2010) ("The OIG investigation also found that the former head of Enforcement in Fort Worth, who played a significant role in multiple decisions over the years to quash investigations of Stanford, sought to represent Stanford on three separate occasions after he left the Commission, and in fact represented Stanford briefly in 2006 before he was informed by the SEC Ethics Office that it was improper to do so.").

72. There are many other important questions related to the revolving door that fall outside the scope of this paper. *E.g.*, Michael P. Vandenbergh et al., *The New Revolving Door*, 70 CASE W. RSRV. L. REV. 1121, 1121 (tracking the flow of personnel between climate advocacy groups and the corporations, institutional investment firms, and private equity firms).

73. *But see* Brian D. Feinstein & M. Todd Henderson, *Congress's Commissioners: Former Hill Staffers at the S.E.C. and Other Independent Regulatory Commissions*, 38 YALE J. ON REGUL. 175 (2021) (finding a significant increase in the number of SEC commissioners with prior service as lawmakers or congressional staffers).

74. *Cf.* Andrew K. Jennings, *State Securities Enforcement*, 47 B.Y.U. L. REV. (forthcoming 2021) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3790750 (providing a detailed account of state securities enforcers).

75. "Between 2010 and 2018, SCA settlements totaled $31 billion," while the SEC won a total of $32.06 billion in penalties and disgorgement. Platt, *supra* note 11, at 34. Each year, the SEC files around 450 standalone enforcement actions and plaintiffs file about 350 class action complaints. *See id.* at 35.

A. Professional Synergies

Private securities enforcement and SEC enforcement operate under at least some of the same statutes and regulations. Rule 10b-5 is the "bread-and-butter" for SCAs,[76] and SEC enforcement actions also often rely on the same Rule.[77] There are also other statutes that are common sources of authority for actions pursued by both public private and public enforcers.[78]

There is also substantial overlap in the *types of cases* pursued by private and public enforcement. Indeed, 20% of settled SCAs target the same company and the same misconduct as an SEC enforcement action.[79] SCAs and SEC actions against public companies both often focus on misleading financial or accounting disclosures.[80] Private securities class actions also increasingly target corporate misconduct that has seemingly nothing to do with securities regulation, but which becomes a securities law violation only because the company lies about it to investors and then, once it is revealed, it causes the value of the company's stock to drop.[81] This so-called "event-driven securities litigation"[82]

---

76. Stephen J. Choi & A.C. Pritchard, *SEC Investigations and Securities Class Actions: An Empirical Comparison*, 13 J. EMPIRICAL LEGAL STUD. 27, 36 (2016). In 2018, 45% (200/441) of SCAs stated claims under 10b-5. STEFAN BOETTRICH & SVETLANA STARYKH, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2018 FULL-YEAR REVIEW 5 (2019).

77. *E.g.*, Choi & Pritchard, *supra* note 75, at 36 (comparing the incidence of 10b-5 claims in SEC enforcement and SCAs). Stephen Choi and Adam Pritchard suggest that working on 10b-5 cases was a good way to make a name for oneself as an SEC attorney; they posit that SEC cases alleging violations of 10b-5 tended to involve "more serious violations," and found that SEC attorneys assigned to these cases were more likely to walk through the revolving door. Choi & Pritchard, *supra* note 58, at 227.

78. Choi & Pritchard, *supra* note 76, at 33–35.

79. Platt, *supra* note 11, at 30.

80. *Compare* BOETTRICH & STARYKH, *supra* note 76, at 17 (showing that roughly a third of all SCAs including a 10b-5, 11, or 12 allegation allege "accounting issues"), *and* LAARNI T. BULAN ET AL., SECURITIES CLASS ACTION SETTLEMENTS: 2018 REVIEW AND ANALYSIS 9 (noting that in 2018, 45% of settled SCAs alleged GAAP violations and 10% involved a named auditor codefendant), *with* DIVISION OF ENFORCEMENT: 2019 ANNUAL REPORT, SEC 25 (noting that in the preceding year the agency had pursued enforcement actions against sixty-one entities and eighty-three individuals in standalone actions relating to issuer financial reporting and disclosures and auditor issues).

81. Matt Levine provides a characteristically pithy summary "of how everything is securities fraud":

> 1. A public company does a bad thing.
> 2. The company does not immediately disclose the bad thing, because generally when you are doing a bad thing you are trying to be sneaky about it.
> 3. Eventually the bad thing comes out and the stock drops.
> 4. Shareholders sue, saying that the company defrauded them by not disclosing the bad thing.

Matt Levine, *It's Hard to Make Everything Securities Fraud*, BLOOMBERG OP. (July 9, 2019, 11:02 AM), https://www.bloomberg.com/opinion/articles/2019-07-09/it-s-hard-to-make-everything-securities-fraud [https://perma.cc/Y6F7-TKF8].

82. *See* ANDREW J. PINCUS, U.S. CHAMBER: INST. FOR LEGAL REFORM, A RISING THREAT: THE NEW CLASS ACTION RACKET THAT HARMS INVESTORS AND THE ECONOMY (2018) (describing how securities class action system is inundated with abusive lawsuits that provide merely costs to investors with the primary benefit derived by lawyers through attorney fees). Some plaintiffs' attorneys resist this label, Julie G. Reiser & Steven J. Toll, *Event-Driven Litigation Defense*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 23, 2019), while others seem to have embraced it. Matthew C. Moehlman, *The Ascendancy of "Event-Driven" Securities Cases*,

has produced class actions targeting a wide variety of corporate misconduct from sexual harassment,[83] to climate change,[84] to data breaches,[85] and much more.[86] The SEC also sometimes pursues enforcement actions that might be characterized as "event-driven."[87]

There is also substantial overlap regarding the process and skills relevant to each regime. Intense pre-filing fact development is critical to both practices. Before filing a securities class action, plaintiff's counsel often "spend months interviewing potential witnesses and gathering evidence in order to be able to plead an intent to defraud with the degree of particularity that the Private Securities Litigation Reform Act (PSLRA) demands."[88] SEC enforcement attorneys also spend months interviewing witnesses and gathering evidence before launching an enforcement action.[89]

Successful attorneys in both practices also need to be skilled at settlement negotiation because neither SEC enforcement cases nor SCAs typically proceed to trial. SCAs invariably settle for cash (and sometimes stock) to be distributed to injured investors.[90] Because SCA attorneys' fee awards are typically linked to the size of the settlement, they have a strong incentive to maximize the settlement amount,[91] and plaintiffs' firms are often

---

POMERANTZ MONITOR (2018), https://pomlaw.com/monitor-issues/the-ascendancy-of-event-driven-securities-cases.

83. *E.g.*, Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1583 (2018) (noting that shareholders at more than half a dozen publicly traded companies have filed lawsuits since the start of 2017 alleging that corporate fiduciaries breached state law duties or violated federal securities laws in connection with sexual harassment scandals).

84. *See, e.g.*, Michael S. Flynn et al., *Regulators Join in Event-Driven Securities Litigation*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 13, 2019), https://corpgov.law.harvard.edu/2019/04/13/regulators-join-in-event-driven-securities-litigation/ [https://perma.cc/R74K-DJUN] (explaining how the SEC is utilizing the phenomenon of "event-driven" securities litigation against defendant company Volkswagens AG as a form of environmental regulation compliance).

85. *E.g.*, Alexis Kramer, *More Companies Face Securities Fraud Suits After Data Breaches*, BLOOMBERG L. (Feb. 12, 2018, 5:57 AM), https://news.bloomberglaw.com/privacy-and-data-security/more-companies-face-securities-fraud-suits-after-data-breaches?context=article-related [https://perma.cc/E7W5-D84C] (noting that shareholders had filed nine securities class actions from Feb. 2017 to Feb. 2018 targeting data breaches).

86. For an empirical analysis of this litigation, see Emily Strauss, *Is Everything Securities Fraud?*, U.C. IRVINE L. REV. (forthcoming 2021) (Duke L. Sch. Pub. L. & Legal Theory Series No. 2021-04, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664132 [https://perma.cc/BB7X-YQTL].

87. *E.g.*, Flynn et al., *supra* note 84 (noting that "event-driven" securities litigation, pejoratively known as "everything is securities fraud," are founded on a claim that a "[defendant] company must have known that it was committing bad acts and should have told its investors of the alleged misconduct").

88. John C. Coffee, Jr., *The Changing Character of Securities Litigation in 2019: Why It's Time to Draw Some Distinctions*, CLS BLUE SKY BLOG (Jan. 22, 2019), https://clsbluesky.law.columbia.edu/2019/01/22/the-changing-character-of-securities-litigation-in-2019-why-its-time-to-draw-some-distinctions/ [https://perma.cc/69VU-WAE8]; *see also* Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427, 491 (2012) ("The 1995 enactment of the PLSRA gave a major edge . . . to firms that could invest in the intensive fact development needed to survive a pre-discovery motion to dismiss under heightened pleading standards.").

89. *See generally How Investigations Work*, SEC (Jan. 27, 2017), https://www.sec.gov/enforce/how-investigations-work.html.

90. Choi & Pritchard, *supra* note 76, at 30 ("[C]lass actions are typically limited to seeking money damages").

91. *But see* Morris Ratner, *A New Model of Plaintiffs' Class Action Attorneys*, 31 REV. LITIG. 757, 762–67 (2012) (explaining that for each individual lawyer at the large elite plaintiffs' firm, individual compensation may not be so directly linked to the size of the particular settlements they help achieve, but will rather be filtered

evaluated based on the aggregate amount of settlements they earn.[92] Similarly, SEC enforcement actions against public companies also frequently settle for monetary payments to be distributed to injured investors.[93] In fact, the SEC relies on some of the same institutional mechanisms for this distribution process as class action attorneys.[94] And, although SEC enforcement attorneys do not have the same direct profit motive as the plaintiffs' bar,[95] they have some strong incentives to maximize the amount of penalties they extract. For instance, because the SEC depends on Congress for funding and Congress's evaluation of the SEC is heavily tied to the performance of the enforcement division,[96] and the enforcement division's performance, in turn, is often evaluated based on the magnitude of the money extracted from defendants,[97] there is likely to be some degree of institutional pressure on enforcement attorneys to try to maximize monetary payments. Separately, extracting a large penalty from a corporate defendant may be a good way to bolster an individual enforcement attorney's reputation as a skilled attorney, and may possibly open the door to a lucrative private sector position.[98]

Both groups also face a significant amount of failure. SCAs are frequently dismissed by courts at the motion to dismiss stage,[99] while SEC matters under inquiry frequently fail to proceed to the formal investigation stage. Indeed, a study of SCAs and SEC investigations of public companies found that the failure rate was about the same for both types of cases.[100]

Like defense side firms, some leading plaintiffs' firms also have a well-established practice of hiring associates directly out of law school, providing an eligible pool of trained attorneys for the SEC to draw upon. For instance, at one leading plaintiffs' side firm

---

through various institutional mechanisms such as percentage ownership of the firm (if partner), base compensation, bonus formulas, etc.).

92. For instance, Institutional Shareholder Services releases an annual list of the "Top 50" plaintiffs' firms based on the largest total amount of settlements generated in the prior year. INSTITUTIONAL S'HOLDER SERVS. SEC. CLASS ACTION SERVS., THE TOP 50 OF 2019 (2020), https://www.issgovernance.com/library/the-top-50-of-2019/.

93. Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC's Fair Fund Distributions*, 67 STAN. L. REV. 331, 335 (2015) (providing a global review and empirical study of the fair funds program and finding, inter alia, that "the SEC distributes a surprisingly large amount of money to harmed investors through fair funds").

94. *See id.* at 387 (noting that in forty-eight fair funds cases where there was a parallel class action, "the SEC directed the funds to the class action account and proposed that the funds be distributed following the same or a very similar process as the distribution of the class action settlement").

95. *But see* Ratner, *supra* note 91, at 762–67 (discussing institutional intermediating forces that modify or mitigate the pure profit motive of plaintiffs' attorneys).

96. Macey, *supra* note 40, at 643 ("[I]t is clear that the SEC is largely evaluated based on how well its Enforcement Division performs").

97. Choi & Pritchard, *supra* note 76, at 28 ("the SEC works to maximize the number of cases brought, penalties, and media attention"); Macey, *supra* note 40, at 644 ("to maximize its appeal to Congress . . . the SEC focuses on the raw number of cases that it brings and on the sheer size of the fines that it collects").

98. *E.g.*, Zaring, *supra* note 2, at 521 (noting that law firms that have hired former SDNY prosecutors "trumpet[] the large fines and extensive sentences" that these lawyers meted out while working for the government).

99. *E.g.*, BOETTRICH & STARYKH, *supra* note 76, at 20 (finding that 45% of motions to dismiss in SCAs between 2000 and 2018 were granted).

100. Choi & Pritchard, *supra* note 76, at 33.

(Robbins Geller[101]), I found that a large proportion of the shareholder litigation associates came to the firm straight out of law school and/or had worked as summer associates at the firm before joining as full-time employees.

Table 2–Robbins Geller Shareholder Litigation Associates

Total	**49**
Straight from law school[102]	21
Other legal employment	18
Unknown	9
Former RGRD Summer Associates	17

To be sure, there are also important differences between the practice of public and private securities enforcement. The SEC often proceeds in administrative proceedings before an SEC ALJ—a forum that plaintiffs do not have access to.[103] The SEC regulates a host of actors and institutions that are never or rarely successfully targeted by private litigation.[104] The SEC is also charged with enforcing a number of statutes and regulations for which there is no private right of action,[105] and there are also some private rights of action (e.g., § 11) that are unavailable to the SEC.[106] The SEC's Enforcement Division includes a number of specialized teams, including some that are focused on actors and legal rules that have no analogue in private enforcement.

There are also differences within the domain of actions against public companies. The SEC tends to pursue *smaller* companies than SCAs,[107] and often produce significantly smaller settlement amounts. While SCAs often *name* individuals as defendants, their settlements almost never result in any direct out-of-pocket payments by these individuals[108]

101. For an analysis that calculates the ten leading plaintiffs' firms, including Robbins Geller, see *infra* Section IV.A.1.

102. Includes attorneys who completed a judicial clerkship after graduating law school before joining the firm.

103. *See generally* Alexander I. Platt, *SEC Administrative Proceedings: Backlash and Reform*, 71 BUS. LAW. 1 (2015).

104. For instance, the SEC has recently been pursuing a broad self-reporting initiative on mutual fund sales practices. *See* Press Release, SEC, SEC Share Class Initiative Returning More Than $125 Million to Investors (Mar. 11, 2019), https://www.sec.gov/news/press-release/2019-28 [https://perma.cc/VM5T-JTBX]. By contrast, private class actions against mutual funds on behalf of fund investors face many doctrinal limitations and obstacles. Sean M. Murphy et al., *Mutual Funds and Securities Class Actions: A Square Peg in a Round Hole*, 51 REV. SEC. & COMMODITIES REGUL. 135, 135–36 (2018).

105. Choi & Pritchard, *supra* note 76, at 35–36 (listing several causes of action that the SEC can bring against public companies that are unavailable to private litigants).

106. *Id.*; *see also* Velikonja, *supra* note 93, at 336 (noting that SEC fair funds are "[m]ore often than not" created to compensate investors for losses "where a private lawsuit is either unavailable or impractical").

107. Cox et al., *supra* note 10, at 776.

108. *See* Alexander I. Platt, *Index Fund Enforcement*, 53 U.C. DAVIS L. REV. 1453, 1475–76 (2020) (surveying literature making these findings).

while, by contrast, the SEC often targets individuals and imposes a variety of penalties on them.[109] For both entity and individual defendants, the SEC imposes a broad array of non-monetary penalties including revoked and suspended registrations, bars from the securities industry, and complex structural reforms with ongoing monitorships.[110] Merger litigation is very much dominated by private litigants.[111] And plaintiffs' work calls for a kind of entrepreneurialism that is very different from the bureaucratic context of government work.

But these differences are not obviously larger than those that separate the work of SEC enforcement from that of the defense bar and do not seem to be insurmountable. Defense-side work also requires some significant entrepreneurialism; to succeed in a defense-side firm, an SEC attorney may be expected to develop business, cultivate relationships with current or potential clients, and convince them to hire (or continue to retain) the firm to represent them—not a skill that they may have spent much time developing in government service. A defense-side lawyer may have to be prepared for professional tumult, as his employer may undergo *major* organizational changes including leadership crises, mergers, restructurings, changes in fundamental aspects of firm governance (including compensation regimes), and even dissolution. Further, SEC attorneys often join generalized White Collar or Crisis Management practice, where they are likely to work on cases outside of the securities law area altogether.[112] And even if the SEC attorney moves into a specialized securities practice, they are likely to be asked to defend against *private* litigation.[113] Most generally, the skills and strategy associated with *defending* against a government investigation are quite different than those associated with

109. *See, e.g.*, Velikonja, *supra* note 93, at 337 (observing that, in SEC cases resulting in Fair Funds, unlike class actions, "targeted individuals generally cannot shift the SEC's sanction to the firm through indemnification and directors and officers (D&O) insurance").

110. Platt, *supra* note 103, at 7 (discussing Dodd-Frank's expansion of SEC's authority to impose penalties including industry bars); Jayne W. Barnard, *Corporate Therapeutics at the Securities and Exchange Commission*, 2008 COLUM. BUS. L. REV. 793, 798 (2008); Choi & Pritchard, *supra* note 76, at 29 ("[T]he SEC has a wider range of sanctions available in its enforcement actions."). *But see, e.g.*, Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 WM. & MARY L. REV. 1749 (2010) (discussing the governance reforms imposed through private litigation).

111. *See* Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 604 n.1 (2018) ("Private litigation is the dominant mechanism for challenging the price fairness or disclosures in connection with a public company merger. SEC enforcement actions have typically been limited to particular transaction contexts such as reverse mergers and, even in such cases, are addressed exclusively to disclosure issues.").

112. For instance, since returning to private practice, former Enforcement Director Andrew Ceresney has represented, inter alia, Adidas in a private RICO lawsuit alleging that the company "prey[ed] upon the families of top-ranked high school student-athletes in order to get their children to play basketball at Adidas-sponsored universities." *See* Amended Complaint, Bowen v. Adidas America Inc., 2019 WL 4450333 (D.S.C.), (Aug. 23, 2019). McKinsey & Co. was involved in another RICO suit alleging that the firm had committed a pattern of fraud and other racketeering activity in order to harm plaintiffs' competing business of providing crisis management and consulting services to firms going through Chapter 11 bankruptcy. Complaint, Alix v. McKinsey & Co., 404 F. Supp. 3d 827 (S.D.N.Y. 2018) (No. 1:18-cv-04141).

113. For instance, former SEC Chair Mary Jo White and Enforcement Director Andrew Ceresney were hired by a FinTech company to defend them in a private securities class action lawsuit. Russ Todd, *Ripple Labs Brings on Former Top SEC Officials to Help Defend Private Securities Lawsuit*, LAW.COM (June 4, 2018, 4:16 PM), https://www.law.com/therecorder/2018/06/04/ripple-labs-brings-on-former-top-sec-officials-to-help-defend-private-securities-lawsuit/?slreturn=20210101172413#:~:text=There's%20lawyering%20up%20and%20then,against%20a% 20securities%20fraud%20lawsuit [https://perma.cc/4FPA-DSXP].

launching one.[114]

In sum, there is substantial overlap between the legal regimes and skills relevant to SEC enforcement and plaintiffs' side work such that an attorney reasonably could move between the two practices without much difficulty.

B. Financial Compensation

The standard explanation for why SEC attorneys choose to go through the revolving door to defense-side law firms is superior compensation. But some plaintiffs' firms also may offer a prospect of competitive compensation and appear to do so year after year in a relatively stable fashion, which is important for the risk-averse attorneys who may end up in government.[115] Plaintiffs' firms do not disclose information about their compensation. I collected all publicly disclosed fees earned by one leading plaintiffs' firm (Bernstein Litowitz) over the past six years,[116] estimated the firm's total Revenues Per Lawyer (RPL), and compared this figure to the RPL of the largest BigLaw firms, using the AmLaw 200 database.[117] Table 3 presents the results.

114. Some might argue that geography imposes a limitation because the SEC's enforcement work is concentrated in Washington, DC and there are only a limited number of plaintiffs' firms in that area. But the SEC also has significant numbers of enforcement staff in regional offices across the country, including in cities like New York and Philadelphia that have large concentrations of plaintiffs' firms. And leading plaintiffs' firms *do* have Washington, DC offices. *E.g.*, *Contact*, ROBBINS GELLER RUDMAN & DOWD LLP, https://www.rgrdlaw.com/contact.html (last visited Feb. 10, 2021) (listing address for Washington DC office); *Washington, DC*, COHEN MILSTEIN, https://www.cohenmilstein.com/content/washington-dc [https://perma.cc/MY9C-6W48] (listing the full contact information for its DC office); *Contact Us*, LABATON SUCHAROW, https://www.labaton.com/contact [https://perma.cc/MLR7-G2DE] (listing all of its locations' addresses and contact information, including its DC office).

115. *See* Jonathan R. Macey, *Lawyers in Agencies: Economics, Social Psychology & Process*, 61 L. & CONTEMP. PROBS. 109, 110–12 (1998) (arguing government lawyers stand out as especially risk averse in an already risk-averse profession). For a recent empirically grounded critique of attorneys' fees in securities litigation, see Stephen J. Choi et al., *Working Hard or Making Work? Plaintiffs' Attorneys Fees in Securities Fraud Class Actions*, 17 J. EMPIRICAL LEGAL STUDS. 438 (2020).

116. This includes both securities litigation and other corporate litigation matters.

117. *See*, *e.g.*, Zaring, *supra* note 2, at 542 (using AmLaw RPL rank in study of SDNY prosecutor career trajectories).

Table 3—One Plaintiffs' Firm's Fees and RPL (2014–2019)

	Estimated Fees[118]	Estimated Revenues Per Lawyer[119]	Projected AmLaw 200 Rank for RPL[120]
2014	$64,146,895	$1,257,782	11
2015	$136,239,271	$2,671,358	2
2016	$166,853,035	$3,089,871	2
2017	$115,047,706	$2,018,381	2
2018	$203,360,287	$3,910,775	1
2019	$79,197,453	$1,523,028	10

118. To identify cases where Bernstein had earned fees, I used two methods. First, I searched on Stanford Class Action database, the Bernstein Litowitz website, and Bloomberg Law to identify cases where Bernstein had been appointed lead counsel or co-lead counsel and was awarded attorneys' fees. Second, I also searched for other cases where Bernstein Litowitz submitted a declaration in support of an award of attorneys' fees that provided a lodestar for the firm's work on the matter, even though the firm was not judicially assigned any role as counsel in the case. To estimate the amount of fees received by Bernstein, I (1) determined the amount of fees awarded by reviewing the court order in each case; (2) where the order awarded a single amount including both fees and litigation expenses, I subtracted the amount of litigation expenses listed in plaintiffs' motion for fees; (3) calculated the share of plaintiffs' total lodestar (i.e., hours worked x hourly rate) attributable to Bernstein; (4) multiplied this lodestar ratio calculated in step 3 by the amount calculated in steps 1 and 2. For a list of cases and estimated fees, see Appendix A.

In some respects, this approach likely undercounts the amount of fees earned by this firm. Although I conducted a very broad search, I may have missed some cases where Bernstein may have earned fees. I also do not include the value of stock awarded as part of the attorneys' fees.

There are other limitations to the approach that could cut in either direction. I assume here that the various plaintiffs' firms (lead counsel and otherwise) involved in a case divvy up fees in proportion to the amount of work they contributed to the case measured by their disclosed lodestar contributions. But this is not necessarily always true. For instance, there are some documented cases where lawyers who did *no* work on the case still receive a sizable portion of the fee award because they helped secure the institutional investor client. Benjamin P. Edwards & Anthony A. Rickey, *Uncovering Hidden Conflicts in Securities Class Action Litigation: Lessons from the State Street Case*, 75 BUS. LAW. 1551, 1554 (2020). Another limitation is that I attributed the fees to Bernstein in the year in which they were ordered by the court—but they may not be received by Bernstein until much later.

Finally, there are some other important limitations. Bernstein is one of the most successful in this area and so may not be representative of the entire menu of plaintiffs' side opportunities available. I am working on a follow-up project that will expand this analysis to thirteen leading plaintiffs' side firms from 2014–2019. Alexander I. Platt, *How Much Do Plaintiffs' Firms Make?* (working paper on file with author). Another critical limitation in this comparison is that plaintiffs' side firms have a substantial chunk of expenses arising from cases that do not result in settlements for which they are not compensated. By contrast, defense firms are compensated for expenses incurred regardless of the outcome of cases.

119. For 2014–2018, I used law firm biographies filed by Bernstein in various cases to calculate the number of attorneys employed by the firm in each year. *See* City of Plantation Police Officers' Emps.' Ret. Sys. v. Jeffries, 14-cv-1380 (S.D. Ohio Nov. 28, 2014), Dkt. 21-2 (listing fifty-one attorneys); Barovic v. Ballmer, 14-cv-540 (W.D. Wash. Dec. 22, 2015) Dkt. 104-2 (listing fifty-one attorneys); *In re* Barrett Bus. Servs. Sec. Litig., 14-cv-5884 (W.D. Wash. Jan. 18, 2017) Dkt. 124 (listing fifty-four attorneys); *In re* SCANA Corp. Sec. Litig., 17-cv-

My estimates of Bernstein's RPL seems to be higher than almost *all law firms* in the last six years. Therefore, it appears to be realistic for an attorney to earn comparable (or even superior) compensation by working for the elite plaintiffs' firm.

One major limitation of this analysis is that the total revenues per lawyer does not indicate how money is actually divvied up. Plaintiffs' firms tend to distribute money less evenly than the defense firms do, reserving a larger proportion of firm profits to a smaller group of partners at the top of the firm's hierarchy. Thus, for an incoming attorney, the initial floor may be lower at plaintiffs' firms, and the median expected long-term total compensation may also be lower—but the ceiling on long-term possible compensation may be higher. Some SEC attorneys might not find this risk worth taking, but others might find it very attractive, especially when combined with the nonpecuniary benefits discussed below.[121]

Finally, from the perspective of a plaintiffs' lawyer looking to make a change, the SEC pays its attorneys extremely well by government standards.[122]

C. Nonpecuniary Benefits

Moving between the SEC and the plaintiffs' bar might give an attorney a way to feel as though they were continuing to pursue the same public interest mission. As securities regulation scholars have recognized, "[t]he ultimate goal of both SEC enforcement lawyers and plaintiffs' attorneys is to uncover and sanction fraud."[123] The two groups describe their missions in similar terms: protecting investors against corporate fraud, increasing the fairness of markets, holding wrongdoers accountable, and compensating defrauded

---

2616 (D.S.C. Nov. 27, 2017) Dkt. 9-9 (listing fifty-seven attorneys); *In re* Micro Focus Int'l plc. Sec. Litig., 18-cv-6763 (S.D.N.Y. Jul. 23, 2018), Dkt. 16-3 (listing fifty-two attorneys). For 2019, I used the December 2019 number of attorneys listed on the firm's website.

120. I used the AmLaw 200 data for each year. One major limitation with this comparison is that plaintiffs' side firms are likely to have very substantial uncompensated expenses associated with the prosecution of cases that end in dismissal. While defense side firms have some uncompensated expenses, if these are significantly smaller, the profit margin on each dollar of revenue would be substantially smaller for plaintiffs' firms.

121. As discussed below, *infra* Section V.C, the fact that SEC attorneys have been leaving the agency to pursue whistleblower representation seems to confirm that financial considerations do not inexorably lead SEC attorneys to prefer defense-side work.

To be sure, other long-term employment considerations may also weigh against the choice of plaintiffs' side work for an outward-bound SEC attorney. Most notably, the existence of the revolving door between the SEC and the defense bar creates a kind of self-fulfilling prophecy here. An SEC attorney who joins the defense bar can be reasonably assured that she can likely return to the agency—either for career advancement or as a fallback option. By contrast, as this paper shows, there is no such established pathway between the SEC and the plaintiffs' bar, such that an SEC attorney who joins a plaintiffs' firm may not know whether she will be welcomed back to the agency.

The risk that Congress or courts may drastically curtail private securities enforcement may also deter some attorneys from entering into this line of work. *E.g.*, Note, *Congress, the Supreme Court, and the Rise of Securities-Fraud Class Actions*, 132 HARV. L. REV. 1067, 1078–88 (2019) (adding to the long record of calls to abolish the fraud on the market class action).

Further, partners at leading plaintiffs' side securities litigation firms may skew younger than at defense side firms, which may leave less room at the top for new partners.

122. *SEC Compensation Program*, SEC (Apr. 17, 2020), https://www.sec.gov/ohr/sec-compensation.

123. Choi & Pritchard, *supra* note 76, at 28.

investors. Table 4 presents what some leading plaintiffs' firms[124] say about their work alongside archetypal self-descriptions of the SEC's mission:

Table 4—Mission Statements

SEC	Top 10 Plaintiffs' Firms
The mission of the U.S. Securities and Exchange Commission is to "protect[] investors, maintain[] fair, orderly, and efficient markets, and facilitate capital formation."[125]	"[T]he leader in the battle against corporate securities fraud"[129]
"The Division [of Enforcement] primarily supports the SEC's mission by investigating and bringing actions against those who violate the federal securities laws. By vigorously enforcing these laws, the Division furthers the Commission's efforts to deter, detect, and punish wrongdoing in the financial markets, compensate harmed investors, and—critically—maintain investor confidence in the integrity and fairness of our markets. . . . [The Enforcement Division is] focused on compensating harmed investors for losses stemming from violations of the federal securities laws."[126]	"[P]rotecting the public against corporate fraud and other wrongdoing."[130]
	[A] leading position . . . in the fight against corporate fraud."[131]
	"[We] have increased market transparency, held wrongdoers accountable and improved corporate business practices in groundbreaking ways."[132]
	"[We] specialize[] in holding large corporations accountable for their actions even though they often have significantly more resources than those damaged by their misconduct."[133]
"A strong enforcement program is at the heart of the Commission's efforts to ensure investor trust and confidence in the nation's securities markets, and the pursuit of those who have broken the securities laws."[127]	"[We] work[] diligently to improve the lives of those harmed by corporate wrongdoing."[134]
	"When . . . companies and directors violate federal securities laws, [we] make[] them *pay* for their wrongdoings."[135]
	"[We] champion shareholder and consumer rights . . . [We have won] landmark decisions that have expanded investor rights and initiated historic

124. *See infra* Section III.A (defining the top ten leading plaintiffs' firms).

125. *What We Do*, SEC (Dec. 18, 2020), https://www.sec.gov/Article/whatwedo.html.

126. *Oversight of the SEC's Division of Enforcement: Before the United States House of Representatives Comm. on Fin. Servs. Subcomm. on Cap. Mkts., Sec. and Investment*, 115th Cong. (May 16, 2018) (transcribing testimony of Stephanie Avakian and Steven Peikin).

127. *Oversight of the SEC's Division of Enforcement: Before the United States House of Representatives Comm. on Fin. Servs. Subcomm. on Cap. Mkts., Sec. and Investment*, 114th Cong. (Mar. 19, 2015) (transcribing testimony of Andrew Ceresney, Director of the Enforcement Division).

129. *Robbins Geller: The Leader in the Battle Against Corporate Securities Fraud*, ROBBINS GELLER RUDMAN & DOWD LLP (May 3, 2018), https://www.rgrdlaw.com/news-awards-Robbins-Geller-The-Leader-in-the-Battle-Against-Corporate-Securities-Fraud.html [https://perma.cc/KG8X-JELL].

130. *About Us: Who We Are*, KESSLER TOPAZ MELTZER CHECK, LLP, https://www.ktmc.com/about-us/overview [https://perma.cc/83A3-QR5F].

131. *Practice Areas: Securities*, LABATON SUCHAROW, https://www.labaton.compracticeareas/securities/index [https://perma.cc/K9U5-NKC8].

132. *Our Firm*, BERNSTEIN LITOWITZ BERGER & GROSSMAN LLP, https://blbglaw.com/our_firm [https://perma.cc/4TFR-49Y7].

133. *About Cohen Milstein*, COHEN MILSTEIN SELLERS & TOLL PLLC, https://cohenmilstein.com/about-us [https://perma.cc/95EL-UJEV].

134. *Litigation Areas: Securities Class Actions*, MOTLEY RICE LLC, https://motleyrice.com/securities-class-actions [https://perma.cc/X5WY-QRZG].

135. *Our Unique Experience*, ROSEN L. FIRM, https://www.rosenlegal.com/about-unique.html [https://perma.cc/SBB8-GQTQ] (emphasis removed).

> "[T]he enforcement staff are skilled and dedicated professionals who have chosen public service because they believe deeply in the SEC's mission to protect investors and the markets from those who would commit securities fraud."[128]

> corporate governance reform."[136]
>
> "[P]rotecting investors' rights and recovering their damages."[137]

Courts, Congress, and SEC leaders have endorsed this conception of the two forms of enforcement as working towards the same goals, describing private enforcement as "complement" or "supplement" to the SEC's efforts.[138] Of course, among scholars, the view of plaintiffs' litigation is substantially less rosy—to put it mildly.[139] But scholars have also raised fundamental questions about SEC enforcement.[140] The point is that SEC Enforcement lawyers and plaintiffs' lawyers describe the purpose and goals of their work in very similar terms, such that it is easy to see why an attorney from one might be drawn to pursue an opportunity in the other.

Another nonpecuniary benefit that an SEC attorney might be focused on is eliteness or status.[141] One study found that about half of SEC enforcement attorneys attended a top-tier law school.[142] Such attorneys might be wary of joining a group of lawyers with less fancy pedigrees. Or, put another way, they may be more inclined to join employers staffed by attorneys who were their classmates in law school.[143]

---

128. Robert Khuzami, *Column: Cynics Perpetuate SEC's "Revolving Door" Myth*, REUTERS (Aug. 29, 2012, 10:27 AM), https://www.reuters.com/article/us-robert-khuzami-sec-idCNBRE87S0RS20120829 [https://perma.cc/MX4R-26VD].

136. *The Firm*, POMERANTZ LLP, http://pomerantzlawfirm.com/the-firm (last visited Jan. 31, 2021).

137. *Practice Areas: U.S. Securities Litigation*, GRANT & EISENHOFER P.A., https://www.gelaw.com/practice-areas/securities-itigation [https://perma.cc/8H7E-MU2C].

138. *Supra* note 21 and accompanying text.

139. *E.g.*, Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207, 209 (2009) (endorsing the "conventional legal academic view" that securities litigation is "seriously compromised").

140. *E.g.*, Macey, *supra* note 40, at 667–68 (explaining that the SEC's focus on process has made its enforcement system bureaucratic).

141. Miriam H. Baer, *Compliance Elites*, 88 FORDHAM L. REV. 1599, 1614–17 (discussing reasons why firms hire "elite" actors to run compliance departments).

142. Choi et al., *supra* note 8, at 433.

143. *Cf.* Lauren Cohen et al., *Sell-Side School Ties*, 65 J. FIN. 1409 *passim* (2010) (showing that sell-side analyst stock recommendations were significantly better when the analyst had an educational link to the company).

But the plaintiffs' bar is highly stratified, with a small group of elite large firms dominating the field year after year,[144] and the legal pedigrees of attorneys in the firms at the top of the pile are pretty elite. Table 5 documents the percentage of attorneys at ten leading plaintiffs' firms[145] who attended a law school ranked in the top fourteen of the USNWR's 2021 rankings.[146]

Table 5—Lawyers with JDs from Top 14 Law Schools

BLBG	48%	Motley	25%
KTMC	16%	Rosen	67%
Labaton	27%	Pomerantz	26%
RGRD	20%	G&E	18%
Cohen	36%	Wolf	36%

Some of the attorneys at these leading plaintiffs' firms also came to the plaintiffs' bar from elite positions as federal prosecutors.[147] I examined the career trajectories of all shareholder litigation associates at one of these leading firms, Robbins Geller, and found that eight of the forty-nine had another key badge of prestige—a judicial clerkship—including several federal appellate court clerkships and one on the Delaware Chancery

144. C.N.V. Krishnan et al., *Who Are the Top Law Firms? Assessing the Value of Plaintiffs' Law Firms in Merger Litigation*, 18 AM. L. & ECON. REV. 122, 124 (2015) (finding that the top five law firms each account for between 5% and 10% of market share in merger litigation); Ratner, *supra* note 91, at 774 ("larger firms have . . . come to dominate the plaintiffs' class action bar"). Scholars attribute the concentration to two innovations of the 1995 PLSRA. First, the statute created the lead plaintiff provision, and therefore put a premium on relationships between counsel and large institutional clients who could be repeat players as lead plaintiffs in cases. Cheffins et al., *supra* note 88, at 431 ("[A]fter adoption of the [PSLRA] . . . it became hard for smaller plaintiff firms', lacking major institutional shareholders as clients, to compete for the lead counsel role in securities suits."); Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PLSRA*, 106 COLUM. L. REV. 1489, 1529 (2006) (finding that "institutional investors that potentially may act as lead plaintiffs tend to develop repeat relationships with only a handful of the top-tier plaintiff law firms"). Second, the statute elevated the pleading standards for scienter, which required firms to invest in extensive fact development and discovery necessary to survive a motion to dismiss. Cheffins et al., *supra* note 88, at 491 ("The 1995 enactment of the PSLRA gave a major edge . . . to firms that could invest in the intensive fact development needed to survive a pre-discovery motion to dismiss under heightened pleading standards.").

The concentration of power at the top of the plaintiffs' bar is in some tension with a key virtue of private enforcement—its decentralization. For instance, Brian Fitzpatrick asserts that conservatives should love private enforcement because its decentralization insulates it from "capture" (i.e., being "bought-off") by wrongdoers: "[T]he private bar is incredibly decentralized; there are thousands upon thousands of private lawyers who can sue any given wrongdoer. By contrast, there is usually only one or a small number of governments that wrongdoers must influence. This makes it impossible for wrongdoers to buy off the private bar." BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 39 (2019). The concentration at the top of the plaintiffs' bar might call this logic into question.

145. *Infra* Section III.A.1 (defining the top ten leading plaintiffs' firms).

146. The T14 are Yale, Stanford, Harvard, Chicago, Columbia, NYU, Penn, UVA, Northwestern, Berkeley, Michigan, Duke, Cornell, and Georgetown. *See 2021 Best Law Schools*, U.S. NEWS & WORLD REP., https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings (last visited Feb. 11, 2021).

147. *Infra* Table 10.

court.[148]

D. Revolving Between Public and Private Enforcement Outside the SEC

There are many other areas beyond securities regulation where a departing federal enforcement attorney might face a choice between moving to the defense side or private enforcement. To date, researchers have generally failed to examine the rate at which attorneys move between public and private enforcement. In this section, I very briefly survey a few key areas and find that, while there is significant variation in how frequently such movement occurs across different areas, some amount of movement between public and private enforcement seems to be relatively common across the board.

1. Antitrust

The Department of Justice's Antitrust Division and the Federal Trade Commission's Competition Bureau have long shared enforcement turf with a very active plaintiffs' bar.[149] Between 2013 and 2018, private antitrust class actions produced settlements totaling $19.3 billion, with an average of 420 of these complaints filed every year.[150]

It has been well documented that many of the attorneys who spend time at DOJ or FTC offices choose to subsequently pursue work on the corporate or defense side following their run of government service.[151] By contrast, the flow of attorneys between the DOJ/FTC

148. The complete list of clerkships is as follows: 9th Cir. (1), 1st Cir. (1), N.D. Cal. (1), S.D. Cal. (3), S.D. Tex. (1), Del. Chancery (1), Fla. Dist. Ct. of Appeal (1). The total is nine, not eight, because one associate had two clerkships.

149. *E.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) ("[P]rivate suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."); Bill Baer, Assistant Att'y Gen., Antitrust Div., Dep't of Just., Remarks as Prepared for Delivery to European Competition Forum 2014 (Feb. 11, 2014), ("Since the 19th Century, the United States has relied on a combination of federal, state and private enforcers to combat anticompetitive conduct. The idea has always been that these three enforcers should play different, yet complementary, roles."); Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 675 (2010) ("Private litigation is the predominant means of antitrust enforcement in the United States."); Michael Sant'Ambrogio, *Private Enforcement in Administrative Courts*, 72 VAND. L. REV. 425, 436 (2019) ("In the twelve-month period ending June 30, 2018 . . . private actions in federal courts exceeded the number of public actions dramatically . . . 605 to 14 in antitrust cases").

150. JOSHUA DAVIS & ROSE KOHLES, 2018 ANTITRUST ANNUAL REPORT 2 (2019), https://www.huntington.com/-/media/pdf/commercial/antitrust-annual-report-050819.

151. *E.g.*, Hal Singer, *As the Revolving Door Swings*, AM. PROSPECT (July 17, 2020), https://prospect.org/power/as-the-revolving-door-swings-big-tech-regulation/ [https://perma.cc/RMR4-C2RW] (tracking large numbers of FTC and DOJ Antitrust officials who have joined Big Tech companies); Adam Janofsky & Matt Drange, *We Counted the FTC Employees Who Moved over to Tech. Is Reform Needed?*, PROTOCOL (Mar. 9, 2020), https://www.protocol.com/ftc-tech-hawley-revolving-door [https://perma.cc/RG7K-3BSY] ("[o]f the nearly 700 lawyers and other employees who left the FTC between 2015 and 2018, at least 40 now work for tech companies" and "[a]t least 72 work for private law firms"); Rick Claypool, *The FTC'S Big Tech Revolving Door Problem*, PUB. CITIZEN (May 23,2019), https://www.citizen.org/article/ftc-big-tech-revolving-door-problem-report/ [https://perma.cc/S8Q8-LGY5] (finding that thirty-one out of forty-one top FTC officials over the past two decades "have either left the agency to serve corporate interests confronting FTC issues, joined the agency after serving corporate interests on these issues, or both"); Andrea Beaty, *The Top Revolving Door Jobs for Ex-FTC Lawyers and Economists*, REVOLVING DOOR PROJECT (May 28, 2020), https://therevolvingdoorproject.org/the-top-revolving-door-jobs-for-ex-ftc-lawyers-and-economists/

and the plaintiffs' bar has not been studied.

It appears that there is a slow but steady trickle of attorneys from both DOJ and the FTC to the plaintiffs' bar. I identified thirty-one of the top plaintiffs' side antitrust firms, combining lists of the top performing firms in this area from *Chambers and Partners*, *The Legal 500*, and the Antitrust Annual Report, and found that as of August 2020, almost half (14/31) of these firms employed at least one alumnus of DOJ Antirust or FTC's Bureau of Competition. Two other firms (marked by a * on the table below) had DOJ/FTC alumni recently leave the firm, which would bring the total to sixteen out of thirty-one.

To better understand how *active* the revolving door is, I also looked to see which of these thirty-one antitrust plaintiffs firms had attorneys with *recent* DOJ/FTC experience—defined as having worked at the agencies within the last decade. On that metric, eight of these thirty-one firms had attorneys with *recent* experience at DOJ Antitrust or FTC, although again, two additional firms (marked by * in the table below) had such attorneys on their staffs until very recently, which would bring the total to ten out of thirty-one.

Table 6 reports the results.

[https://perma.cc/TUU3-2MQT] (finding that fifty-two out of the seventy-three former FTC Bureau of Competition officials who left the agency between 2014 and 2020 and are still in the workforce "revolved out to positions at firms that the FTC either regularly argues against or oversees through antitrust enforcement").

Table 6: Top Antitrust Plaintiffs Firms with at Least One DOJ/FTC Alumni

Firm	DOJ/FTC Alum	Recent (10 yrs) DOJ/FTC Alum	List(s)[152]
1. Alioto Law Firm	No	No	AAR
2. Ballard Spahr LLP	No	No	Legal 500
3. Berger Montague	Yes	Yes	Legal 500; AAR
4. Berman Tabacco	Yes	No	Legal 500
5. Boies Schiller Flexner LLP	Yes	Yes	C&P; Legal 500; AAR
6. Cohen, Milstein, Sellers & Toll LLP	Yes	Yes	C&P; Legal 500; AAR
7. Cotchett Pitre & McCarthy	No	No	C&P; AAR
8. Fine Kaplan and Black RPC	No	No	AAR
9. Freed Kanner London & Millen LLC	Yes	Yes	C&P; AAR
10. Garwin Gerstein & Fisher LLP	No	No	AAR
11. Grant & Eisenhofer PA	No	No	Legal 500
12. Gustafson Gluek PLLC	Yes	No	AAR
13. Hagens Berman Sobol Shapiro LLP	Yes	Yes	AAR
14. Hausfeld LLP	Yes	Yes	C&P; Legal 500; AAR
15. Heins Mills & Olson PLC	No	No	Legal 500
16. Joseph Saveri Law Firm	No	No	Legal 500; AAR
17. Kaplan Fox & Kilsheimer LLP	Yes	No	Legal 500; AAR
18. Labaton Sucharow LLP	Yes	No	C&P; Legal 500
19. Lieff Cabraser Heimann & Bernstein LLP	Yes	Yes	Legal 500; AAR
20. Lockridge Grindal Nauen PLLP	No	No	AAR
21. Lovell Stewart Halebian & Jacobson LLP	No	No	AAR
22. Mogin Rubin LLP	No*	No*	Legal 500; AAR
23. Pearson, Simon & Warshaw LLP	No	No	C&P; AAR
24. Quinn Emanuel Urquhart & Sullivan LLP	Yes	Yes	C&P; Legal 500; AAR
25. Robbins Geller Rudman & Dowd LLP	No	No	AAR
26. Robins Kaplan LLP	Yes	No	C&P; Legal 500; AAR
27. Ruyak Cherian LLP	No	No	Legal 500
28. Scott + Scott Attorneys At Law LLP	No	No	AAR
29. Spector Roseman Kodroff & Willis PC	Yes	No	AAR
30. Susman Godfrey LLP	No	No	C&P; Legal 500; AAR
31. Zelle LLP	No*	No*	Legal 500; AAR
TOTAL	**14 (16*)**	**8 (10*)**	

Several antitrust plaintiffs' side firms (including several on this list) were actually founded by alumni of these agencies, including Freed Kanner London & Millen LLC,[153] Berman Tobacco,[154] Cuneo Gilbert & LaDuca LLP,[155] and Kaplan Fox.[156]

---

152. AAR=Antitrust Annual Report's list of top twenty-five antitrust plaintiff firms by aggregate settlement amounts between 2013 and 2018; Legal 500=Legal 500 Antitrust, Civil Litigations/Class Actions: Plaintiff, https://www.legal500.com/c/united-states/antitrust/civil-litigationclass-actions-plaintiff/ [https://perma.cc/G9Y9-ZNYM]; C&P=Chambers and Partners, USA Rankings, Antitrust: Plaintiff in USA—Nationwide, https://chambers.com/guide/usa?publicationTypeId=5&practiceAreaId=2595&subsectionTypeId=1&locationId=12788 [https://perma.cc/TD9M-GZCJ].

153. *Michael J. Freed, Founding Partner, Of Counsel*, FREED KANNER LONDON & MILLEN LLC, https://www.fklmlaw.com/our-lawyers/michael-j-freed/ [https://perma.cc/LU2M-JAK3] ("After leaving the Department of Justice Antitrust Division, where he was a trial and appellate attorney with the United States Department of Justice, Antitrust Division (Honors Program), Mr. Freed has engaged in private practice, concentrating in business class action litigation and other complex litigation.").

154. *Joseph J. Tobacco, Jr., Partner*, BERMAN TOBACCO, https://www.bermantabacco.com/professionals/joseph-tabacco/ [https://perma.cc/7QRM-WXFS] ("Prior to entering private practice in 1981, Joe was a senior trial attorney for the Antitrust Division of the U.S. Department of Justice in both the Central District of California and the Southern District of New York.").

155. *Jonathan W. Cuneo, Founding Partner*, CUNEO GILBERT & LADUCA, LLP, https://cuneolaw.com/jonathan-w-cuneo-2 [https://perma.cc/MEG8-BY33] ("Mr. Cuneo brings to his private legal practice nearly a decade of prior government service—first as an attorney in the Office of the General Counsel of the Federal Trade Commission (1978-1981) . . .").

156. *Robert N. Kaplan, Partner*, KAPLAN FOX, https://www.kaplanfox.com/about/attorneysandstaff/partners/robertnkaplan.html [https://perma.cc/6NDR-N8WV] ("Mr. Kaplan was a trial attorney with the Antitrust Division of the U.S. Department of Justice.").

This paper is not the place for a full analysis of all the factors that may explain why antitrust is or is not different than securities enforcement. However, I make two observations here:

First, one factor driving movement between public and private antitrust enforcers may be the active collaboration between the two institutions in the course of some significant cases. For instance, one attorney who left DOJ to join a plaintiffs' firm told the press that he was drawn to the particular plaintiffs' firm "after working with one of its partners . . . during discovery" in one major enforcement case he worked on while at DOJ. *See* Andrew Kragie, *Cohen Milstein Nabs Longtime DOJ Antitrust Litigator in DC*, LAW360 (Sept. 9, 2019, 5:31 PM), https://www.law360.com/articles/1196695/cohen-milstein-nabs-longtime-doj-antitrust-litigator-in-dc [https://perma.cc/6DBL-NPTY] (discussing the hiring of Daniel McCuaig); *see also Antitrust*, COHEN MILSTEIN, https://www.cohenmilstein.com/practice-area/antitrust [https://perma.cc/8AGE-85AC] ("Cohen Milstein was also co-lead counsel in the *Electronic Books Antitrust Litigation*, which alleged that Apple and five of the six biggest publishers in the U.S. conspired to raise the price of e-books. *We litigated together with the Department of Justice* and Attorneys General from 33 states and territories.") (emphasis added). *But see* UNITED STATES, RELATIONSHIP BETWEEN PUBLIC AND PRIVATE ANTITRUST ENFORCEMENT, OECD—DIRECTORATE FOR FIN. & ENTER. AFFS. COMPETITION COMM. 4 (June 9, 2015), https://www.justice.gov/atr/file/823166/download [https://perma.cc/GP7Y-4DCP] ("The Antitrust Division does not assist private plaintiffs' lawyers pursuing damages actions . . . .").

Such coordination occurs in many different ways. Consider the antitrust case against Qualcomm. In January 2017, the company was sued by FTC and Apple, in addition to a number of putative class actions. *In re* Qualcomm Antitrust Litig., 273 F. Supp. 3d 1373, 1376 (J.P.L.L. 2017). As the litigation progressed, FTC attorneys coordinated on certain aspects of the case with private plaintiffs. The FTC and Class cases were consolidated before a single district judge in the Northern District of California. The court ordered that discovery for all three plaintiffs (FTC, Apple, and class plaintiffs) be coordinated, including the conduct of joint depositions. *See* Joint Stipulation and Discovery Coordination Order, FTC v. Qualcomm Inc., No. 17-cv-00220-LHK (N.D. Cal.). *In re* Qualcomm Antitrust Litig., No. 5:17-MD-02773 (N.D. Cal. Apr. 6, 2017). *In re*: Qualcomm Litig., No. 17-cv-108 (S.D. Cal. Jan. 24, 2018). FTC and class plaintiffs joined in providing status reports on certain

2. False Claims Act

Another very active area for both public and private enforcers is litigation under the

discovery issues. *See e.g.*, Defendant Qualcomm Incorporated, Plaintiff Federal Trade Commission and MDL Plaintiffs' Joint Status Report, FTC v. Qualcomm Inc., Nos. 5:17-CV-00220-LHK-NMC, 5:17-MD-02773-LHK-NMC (N.D. Cal. May 16, 2018). Defendant Qualcomm Incorporated, Plaintiff Federal Trade Commission and MDL Plaintiffs' Joint Status Report, FTC v. Qualcomm Inc., Nos. 5:17-CV-00220-LHK-NMC, 5:17-MD-02773-LHK-NMC (N.D. Cal. Apr. 16, 2018). Defendant Qualcomm Incorporated, Plaintiff Federal Trade Commission and MDL Plaintiffs' Joint Status Report, FTC v. Qualcomm Inc., Nos. 5:17-CV-00220-LHK-NMC, 5:17-MD-02773-LHK-NMC (N.D. Cal. June 18, 2018). Defendant Qualcomm Incorporated, Plaintiff Federal Trade Commission, MDL Plaintiffs' and Non-Party Apple Inc.'s Joint Report, FTC v. Qualcomm Inc., Nos. 5:17-CV-00220-LHK-NMC, 5:17-MD-02773-LHK-NMC (N.D. Cal. Mar. 27, 2018). Numerous court proceedings were held at which attorneys for both FTC and the class made appearances. *See e.g.*, Minute Entry for proceedings of Feb. 27, 2018, FTC v. Qualcomm Inc., Nos. 5:17-CV-00220-LHK-NMC, 5:17-MD-02773-LHK-NMC (N.D. Cal. Feb. 27, 2018). The FTC and class counsel also jointly moved for the appointment of a discovery special master. FTC v. Qualcomm Inc., No. 17-CV-00220 LHK (NC), 2018 WL 3868976, at *1 (N.D. Cal. Feb. 24, 2018) (denying the motion).

Another source of coordination between public and private antitrust enforcers is that antitrust plaintiffs' law firms sometimes try to encourage federal agencies to take action that would further the interests of their own clients or cases. *E.g.*, *Antitrust*, POLSINELLI, https://www.polsinelli.com/services/antitrust [https://perma.cc/34S9-8ZCW] ("We aggressively represent plaintiffs who have been injured by antitrust violations. Our goal is to end the violation and recover compensation for injured clients. We represent parties bringing complaints to antitrust enforcement agencies and often persuade the agency to take corrective action to stop anti-competitive conduct."); *see also Antitrust and Trade Regulation*, HONIGMAN, https://www.honigman.com/practices-antitrust-and-trade-regulation-services.html [https://perma.cc/D5LS-M233] ("We have been very effective . . . representing plaintiffs in antitrust litigation, and in advocacy before state and federal antitrust enforcement agencies."). Both DOJ and FTC invite private parties to file complaints or otherwise request agency action regarding antitrust violations. *See* DOJ ANTITRUST DIVISION MANUAL § III.A (5th ed. 2021), https://www.justice.gov/atr/file/761166/download [https://perma.cc/3R5K-6JAW] ("The Division's investigations arise from a variety of sources including: Complaints received from citizens and businesses when they believe that companies or individuals are engaged in unlawful conduct."). *See also* 16 C.F.R. § 2.2 (2020) (FTC regulation inviting complaints or requests for action). *See also* Sant'Ambrogio, *supra* note 149, at 449 (showing the combination of public and private enforcement); *Report an Antitrust Violation*, FTC, https://www.ftc.gov/faq/competition/report-antitrust-violation (last visited Feb. 11, 2021); Steven Overly & Margaret Harding McGill, *FTC Went to Silicon Valley to Solicit Antitrust Complaints*, POLITICO (June 7, 2019, 2:32 PM), https://www.politico.com/story/2019/06/07/ftc-tech-scrutiny-silicon-valley-1511310 [https://perma.cc/8H7S-3TQU].

DOJ attorneys sometimes "are in contact with plaintiffs' attorneys in private cartel cases and receive status updates on the progress of the civil litigation . . . ." Baer, *supra* note 149.

Before proceeding to open an investigation, DOJ attorneys are required to weigh various considerations, including "the existence of private litigation." DOJ, *supra*, at III.9. *Cf.* Platt, *supra* note 11 (discussing the SEC enforcement manual which instructs SEC enforcers to consider various factors before opening an investigation but conspicuously omits the existence of parallel private litigation).

Second, another important factor explaining the flow from public to private enforcement is likely the fact that at least some of the leading antitrust plaintiffs' firms also do some defense side work, which might make it a more hospitable home for a government attorney looking to capitalize on their network of contacts inside the government. *E.g.*, Pallavi Guniganti, *Plaintiffs' Antitrust Bar*, GLOB. COMPETITION REV. (June 30, 2014), https://www.susmangodfrey.com/wp-content/uploads/2017/12/30-06-14_plaintiffs-_antitrust_bar.pdf [https://perma.cc/M9X5-AWAP] ("This year's survey of the US antitrust plaintiffs' bar shows how the very concept of a 'plaintiffs' bar' may be breaking down. While a few firms on our list remain wholly identified with plaintiffs, others such as Quinn Emanuel, Constantine Cannon and Robins Kaplan move easily between the two sides of the v in lawsuits' captions."). In the analysis above, I confirmed that all of the revolvers I counted in my brief survey above are doing at least some plaintiffs' side work for the firms they joined.

False Claims Act. The False Claims Act imposes liability, treble damages, and civil penalties on individuals or companies who knowingly submit false claims to the U.S. government for payment.[157] The government may itself file a civil action against the false claimant.[158] Or, a private person—a "relator"—may bring a *qui tam* civil action against the false claimant "in the name of the Government."[159] If the relator initiates an action, the government has the power to intervene and take over primary responsibility for the case, though the relator retains certain procedural rights as well as the right to recover 15–25% of any ultimate award (plus fees and costs).[160] If the government declines to intervene, the relator may prosecute the case and retain about 25–30% of the total award (plus fees and costs).[161] The Department of Justice recovers billions of dollars each year in these cases, for a total of nearly $38 billion since 2009.[162] In fiscal year 2019, there were 782 new FCA matters docketed.[163]

Leading defense firms have specialized practice groups devoted to advising companies on FCA compliance and defending them against FCA investigations and litigation, and many of the DOJ attorneys who investigate and prosecute False Claims Act violations do appear to join these practices.[164]

But some DOJ attorneys choose a different door, joining the specialized group of firms who represent "relators" in False Claims Act cases. David Engstrom found that 146 out of 4,326 relators in his sample of False Claims Act cases were represented by at least

157. 31 U.S.C. § 3729(a).

158. *Id.* at § 3730(a).

159. *Id.* at § 3730(b)(1).

160. *Id.* at § 3730(d)(1).

161. *Id.* at § 3730(d)(2).

162. *DOJ False Claims Act Recoveries Top $3 Billion, Continuing the Trends of Aggressive Health Care Industry Enforcement and Government Initiated-Actions*, WINSTON & STRAWN (Feb. 18, 2020), https://www.winston.com/en/thought-leadership/doj-false-claims-act-recoveries-top-dollar3-billion-continuing-the-trends-of-aggressive-health-care-industry-enforcement-and-government-initiated-actions.html [https://perma.cc/L5JW-M5ZD].

163. *Id.*

164. *E.g.*, Duff Wilson, *Drug Makers' Feared Enemy Switches Sides, as Their Lawyer*, N.Y. TIMES (June 4, 2011), https://www.nytimes.com/2011/06/05/business/05switch.html [https://perma.cc/MC4Y-2SGS]. *Government Program Fraud, False Claims, and* Qui Tam *Litigation*, WINSTON & STRAWN LLP, https://www.winston.com/en/what-we-do/services/litigation/index.html#!/en/what-we-do/services/litigation/false-claims-and-qui-tam-litigation.html?aj=ov&parent=3377&idx=10 [https://perma.cc/JN68-KCR9] (noting that "Leaders of our Fraud Response Team include several former government lawyers who have significant experience investigating and prosecuting fraud matters, and who offer an invaluable perspective on how the government and whistleblowers approach civil and criminal fraud, FCA claims, and *qui tam* matters"); *False Claims Act*, ROPES & GRAY, https://www.ropesgray.com/en/practices/false-claims-act [https://perma.cc/3CNU-6DVC] ("Our team, . . . includes former federal prosecutors from the U.S Department of Justice and leading United States Attorney's Offices that aggressively pursue False Claims Act cases . . ."); *False Claims Act/Qui Tam Defense*, GIBSON DUNN, https://www.gibsondunn.com/practice/false-claims-actqui-tam-defense/ ([https://perma.cc/P99W-5XF] ("[O]ur team includes former civil and criminal prosecutors who investigated and prosecuted FCA matters for the government."); *False Claims Act*, NIXON PEABODY, https://www.nixonpeabody.com/work/government-investigations-white-collar-defense/false-claims-act?Contacts=true [https://perma.cc/TG83-GU78] ("Our team, which includes former prosecutors from the DOJ's civil fraud section and criminal division, defends companies against liability in investigations and litigation, and helps them develop strategic compliance measures to avoid exposure.").

one former DOJ attorney.[165] Some relator firms are *dominated* by DOJ alumni. For example, one relator firm employed seven attorneys as of August 2020, six of whom previously served in the DOJ.[166]

3. Tax

The IRS Whistleblower Office pays monetary awards to individuals who provide actionable tips regarding companies who fail to pay taxes that they owe. The awards are up to 30% of the additional taxes and penalties that the IRS collects as a result of the tip.[167] In FY 2019 alone, the Office made 181 awards to whistleblowers totaling $120,305,278.[168]

Many of the firms representing IRS whistleblowers appear to value DOJ or IRS experience. A quick survey reveals that many of these firms employ one or more former DOJ or IRS official and prominently advertise this fact.[169]

4. Civil Rights

Attorneys who enforce federal civil rights laws on behalf of the United States often come from and move into private enforcement positions. The *New York Times* found that

---

165. David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1306 (2012); *see also id.* at 1285 n.147 (quoting from a number of prominent relator firm websites advertising the fact that they employ one or more former DOJ False Claims Act attorneys).

166. *Who We Are*, WHISTLEBLOWER L. COLLABORATIVE, https://www.whistleblowerllc.com/who-we-are/ [https://perma.cc/z8kw-v9dd].

As in antitrust, one factor behind the movement from DOJ to the relators' bar may be the collaboration between the public and private enforcers that sometimes happens in individual cases. One revolver explained that she joined a particular *qui tam* firm "having previously collaborated [with the attorneys at the firm] on the hugely successful False Claims Act qui tam litigation against biotech giant Amgen and others that settled in 2012." Press Release, Whistleblower L. Collaborative: Whistleblower News & Articles, Linda Severin and Bruce Judge, Former DOJ Attorneys, Join Whistleblower Law Collaborative (July 24, 2018), https://www.whistleblowerllc.com/whistleblower-law-collaborative-adds-two-experienced-former-doj-attorneys/ [https://perma.cc/pps9-nbby].

167. *Whistleblower-Informant Award*, IRS (Jan. 11, 2021), https://www.irs.gov/compliance/whistleblower-informant-award#:~:text=The%20IRS%20Whistleblower%20Office%20pays,and%20other%20amounts%20it%20collects [https://perma.cc/PC29-QX7M].

168. IRS WHISTLEBLOWER OFF., FISCAL YEAR 2020 ANNUAL REPORT 15 (2020), https://www.irs.gov/pub/irs-pdf/p5241.pdf [https://perma.cc/WX96-4PRL].

169. *E.g.*, Press Release, Constantine Cannon, Constantine Cannon Welcomes Former DOJ Tax Attorney, Expands Its Whistleblower Group, (Oct. 24, 2017), https://constantinecannon.com/2017/10/24/constantine-cannon-welcomes-former-doj-tax-attorney-expands-whistleblower-group/ [https://perma.cc/7TLA-BTNT] ("Constantine Cannon LLP announced today that the firm has expanded its whistleblower practice to better serve prospective whistleblowers reporting tax fraud and tax evasion, with the addition of former Department of Justice trial attorney Michael J. Ronickher, Of Counsel, in the Washington, D.C., office."); TAX WHISTLEBLOWER L. FIRM, https://twlfusa.com/3vpevswz9gykl0ztpl19oyh64t4t36 [https://perma.cc/EZ9S-QWWB] ("Our attorneys are either former IRS attorneys with a CPA license or have a Masters of Law in Taxation."); *IRS Whistleblower Program for Tax Whistleblowers*, FINCH MCCRANIE LLP, https://www.finchmccranie.com/irs-whistleblower-program-for-tax-whistleblowers.html [https://perma.cc/45VY-HV3A] ("We work with a team of the most experienced former IRS criminal and civil agents, forensic accountants, and tax lawyers with both international and U.S. tax expertise. As former federal prosecutors who have also defended criminal tax cases, we develop fully for the IRS both the factual and legal arguments needed to support our client's claims.").

during President Obama's first three years in office, almost all of the new hires in the voting rights, employment discrimination, and appellate sections of the Department of Justice's Civil Rights Division had previously been associated with non-governmental civil rights enforcement organizations like the American Civil Liberties Union, the NAACP Legal Defense Fund, and others.[170] When questioned about this in a congressional hearing, the head of the Civil Rights Division explained that he saw a background in private civil rights enforcement as "relevant" experience that was "very very helpful" to the work of the Civil Rights Division.[171]

EEOC attorneys also seem to come from and go to private civil rights enforcement with some regularity.[172] A number of recent commissioners have come from private enforcement.[173] The EEOC's litigation program is overseen by the agency's general counsel, who is appointed by the President—and three of the four individuals to serve this post most recently have had connections to private enforcement, either before or after their tenure.[174] EEOC regional attorneys—who supervise litigation conducted out of the regional

---

170. Charlie Savage, *In Shift, Justice Department Is Hiring Lawyers with Civil Rights Backgrounds*, N.Y. TIMES (May 31, 2011), https://www.nytimes.com/2011/06/01/us/politics/01rights.html [https://perma.cc/YA6S-HXA9].

171. Adam Serwer, *Grassley Attacks Civil Rights Division for Hiring Civil Rights Attorneys*, MOTHER JONES (Sept. 13, 2011), https://www.motherjones.com/politics/2011/09/grassley-attacks-civil-rights-division-hiring-civil-rights-attorneys/ [https://perma.cc/J5DR-Y3EP].

172. TIMOTHY GRUBB ET AL., VAULT GUIDE TO LABOR AND EMPLOYMENT LAW CAREERS 65 (2003) ("[T]he EEOC generally hires lawyers with a few years of experience on the plaintiffs' side of the bar").

173. *E.g.*, Press Release, EEOC, Jenny Yang Sworn in as EEOC Commissioner, (May 13, 2013), https://www.eeoc.gov/newsroom/jenny-yang-sworn-eeoc-commissioner [https://perma.cc/2MRD-925B] ("Yang was a partner of Cohen, Milstein, Sellers & Toll PLLC. She joined the firm in 2003, and she has represented thousands of employees across the country in numerous complex civil rights and employment actions."); Press Release, EEOC, Christine Griffin Takes Oath as EEOC Commissioner, (Jan. 3, 2006), https://www.eeoc.gov/newsroom/christine-griffin-takes-oath-eeoc-commissioner [https://perma.cc/5LLQ-8YUM] (noting that she previously served as Executive Director of the Disability Law Center); Press Release, LDF, Senate Confirms Jacqueline A. Berrien As Chair of the Equal Employment Opportunity Commission, (Dec. 23, 2010), https://www.naacpldf.org/press/senate-confirms-jacqueline-a-berrien-as-chair-of-the-equal-employment-opportunity-commision/ [https://perma.cc/DE4D-62X5] (noting that Berrien was former Associate Director of the NAACP Legal Defense and Education Fund).

174. Press Release, EEOC, Sharon Fast Gustafson Sworn in as General Counsel of the EEOC, (Aug. 8, 2019), https://www.eeoc.gov/newsroom/sharon-fast-gustafson-sworn-general-counsel-eeoc (noting that the new general counsel of the EEOC under President Trump, said "I have been a solo lawyer most often representing the employee of modest means or the small business employer" and highlighting her representation of an employee subject to pregnancy discrimination in a high-profile case against UPS); Judy Greenwald, *EEOC General Counsel Steps Down, Moving to Plaintiff Law Firm*, BUS. INSIDER (Dec. 13, 2016), https://www.businessinsurance.com/article/00010101/NEWS06/912310946/EEOC-general-counsel-steps-down,-moving-to-plaintiff-law-firm [https://perma.cc/7HC9-KC3M] ("David Lopez, whose last day as general counsel at the U.S. Equal Employment Opportunity Commission was Friday, will join plaintiff law firm Outten & Golden L.L.P. in January."); Press Release, EEOC, President Clinton Names Clifford Gregory Stewart as EEOC General Counsel, (Jan. 20, 1995), https://www.eeoc.gov/newsroom/president-clinton-names-clifford-gregory-stewart-eeoc-general-counsel-0 [https://perma.cc/cqn8-znkt] (noting the career path of an attorney who began his career at Lawyer's Committee for Civil Rights); *see also* Stephanie Russell-Kraft, *EEOC's Feldblum One of Few Labor Officials to Cross Party Lines*, BLOOMBERG L. (Mar. 14, 2019, 3:30 AM), https://news.bloomberglaw.com/business-and-practice/eeocs-feldblum-one-of-few-labor-officials-to-cross-party-lines [https://perma.cc/E7JH-S5N6] (finding that, out of thirty-seven general counsels, members, and commissioners who departed EEOC and NLRB in the last twenty years, eleven went to defense firms and two

offices—also seem to often have a background on the plaintiffs' side.[175]

Looking outside of the non-profit space, I found that one leading plaintiffs' side civil rights firm (Relman Colfax), employs 22 attorneys, five of whom had joined the firm from federal agencies, including two from the DOJ's Civil Rights Division, two from the Consumer Financial Protection Bureau, and one from the Department of Housing and Urban Development.[176]

5. Environmental Law

Attorneys enforcing environmental laws on behalf of the United States at the DOJ, EPA, and other agencies also appear to frequently come from and go to private enforcement organizations. For instance, in 2014, Senate Republicans sounded the alarm regarding the "green revolving-door" at President Obama's EPA, where many political appointees apparently had pre- or post-government employment at non-governmental environmental organizations, like the Environmental Defense Fund, the Natural Resources Defense Council, Earthjustice, and others.[177] A search of these organizations' current staff reveals

---

went to plaintiffs' firms).

175. *E.g.*, Press Release, EEOC, Roberta L. Steele Appointed Regional Attorney for EEOC San Francisco District Office (Oct. 13, 2015), https://www.eeoc.gov/newsroom/roberta-l-steele-appointed-regional-attorney-eeoc-san-francisco-district-office [https://perma.cc/VM9M-X9TD] ("Throughout her legal career, Steele has worked exclusively as a plaintiffs' attorney, with a significant practice in the area of employment discrimination law. For 17 years, Steele worked with a plaintiffs' firm in Oakland, California, focusing on investigating and litigating class and collective actions under federal and state employment discrimination laws, as well as other statutes such as the wage and hour and environmental laws."); Press Release, EEOC, Robert E. Weisberg Becomes Regional Attorney of EEOC's Miami District Office, (Sept. 27, 2010), https://www.eeoc.gov/es/node/20694 (quoting Weisberg: "My private practice for over 25 years has focused on representing individuals and groups whose civil rights have been violated."); Press Release, EEOC, Antonette Sewell Named New Regional Attorney For EEOC's Atlanta District, (Dec. 13, 2016), https://www.eeoc.gov/newsroom/antonette-sewell-named-new-regional-attorney-eeocs-atlanta-district?renderforprint=1#:~:text=ATLANTA%20%2D%20Antonette%20Sewell%20has%20been,Georgia%20for%20almost%20two%20decades [https://perma.cc/QKM9-ESKW] ("Prior to this position, Sewell worked at Georgia Legal Services, where she supervised attorneys litigating claims of discrimination in housing, education and employment, and at Legal Services of New York, where she worked on systemic housing litigation. Throughout her career, Sewell has been dedicated to social justice, and in particular creating meaningful access for individuals living with disabilities as well as equal opportunity in education, employment and affordable housing."); *2017 AAS Alumnus of the Year—William Tamayo, Attorney & EEOC Director*, S.F. ST. UNIV., https://aas.sfsu.edu/content/cc#:~:text=William%20R.,States%20Equal%20Employment%20Opportunity%20Commission [https://perma.cc/3TC7-6EW2] ("He is the first Asian American appointed EEOC Regional Attorney . . . . From 1979–1995 he was a staff attorney and the Managing Attorney for the Asian Law Caucus, Inc. of San Francisco, California where he emphasized the practice of immigration and nationality law (political asylum, deportation defense, exclusion, family petitioning, citizenship) and civil rights litigation and advocacy involving employment discrimination, immigrant rights, voting rights, and the Census.").

176. *Our Team*, RELMAN COLFAX, https://www.relmanlaw.com/team (last visited Aug. 5, 2020).

177. COMM. ON ENV'T. & PUB. WORKS, 114TH CONG., THE CHAIN OF ENVIRONMENTAL COMMAND: HOW A CLUB OF BILLIONAIRES AND THEIR FOUNDATIONS CONTROL THE ENVIRONMENTAL MOVEMENT AND OBAMA'S EPA iii (Comm. Print 2014) ("This report proves that the Obama EPA has been deliberately staffed at the highest levels with far-left environmental activists who have worked hand-in-glove with their former colleagues. The green-revolving door at EPA has become a valuable asset for the far-left and their wealthy donors."). By contrast, in 2018, Public Citizen warned that President Trump had "hired or nominated at least 10 lawyers who have represented or worked for polluters including coal miners, oil refiners, the Koch brothers, paper companies and

a large number of alumni of the DOJ's Environmental and Natural Resources Division, the EPA, and other government environmental regulatory agencies.[178]

* * *

For at least some SEC attorneys, it is reasonable to imagine that joining the elite plaintiffs' bar might be an attractive proposition. It is a career path that might allow the attorney to use some of the legal skills and knowledge cultivated during her time at the SEC, and earn decent and possibly very competitive compensation, while continuing to reap the non-pecuniary reward of pursuing the mission of holding corporations accountable for fraud and misconduct. Further, movement between the public and private enforcement groups appears to be relatively common in other areas of parallel federal and private enforcement.

So, do SEC attorneys join the plaintiffs' bar? Do plaintiffs' attorneys join the SEC? The next Part shows that the answer to both questions is resoundingly "No."

IV. THE NON-REVOLVING DOOR

A. Do SEC Attorneys Join the Plaintiffs' Bar?

To evaluate whether SEC attorneys join the plaintiffs' bar, I looked at both the current composition of the leading plaintiffs' side firms and at the career trajectories of attorneys who used to work at the SEC's Enforcement Division (as of 2015 and as of 2004). All analyses produce the same result: SEC attorneys do not leave the agency to pursue traditional plaintiffs' securities litigation.

1. Attorneys at Leading Plaintiffs' Side Firms with Prior SEC Experience

For this study, I first identified a set of elite plaintiffs' firms that would be the most attractive employer for outgoing SEC attorneys. I identified the top ten plaintiffs' firms who earned large fees with a high degree of regularity. Using ISS's data regarding the "Top 50" plaintiffs' firms for 2014–2018, I identified the twenty plaintiffs' firms who appeared on at least four of those top fifty lists, and then further narrowed the list to the ten firms who earned at least three top-twenty spots on each of lists. Five of these firms (the top five), who are listed on the left side of Table 7, also earned at least three top-ten finishes during this period.[179]

---

agricultural giants." Alan Zibel, *Big Law, Big Conflicts: More Than 75 Trump Administration Lawyers Present Revolving Door Concerns*, PUB. CITIZEN, 17–20 (Mar. 1, 2018), https://www.citizen.org/news/biglaw/ [https://perma.cc/2UNR-ZWSD] (reporting on political appointees); *see also* Taylor Lincoln, *EPA's Smoke Screen: How Congress Was Given False Information While Campaign Contributions and Political Connections Gutted a Key Clean Air Rule*, PUB. CITIZEN 17 (Oct. 1, 2003), https://www.citizen.org/article/epas-smoke-screen/ [https://perma.cc/CM4P-4TE6] (discussing "top-level EPA and DOJ officials who migrate between government posts, party positions and jobs affiliated with the energy industry").

178. *See, e.g.*, *Our Experts*, NAT. RES. DEF. COUNS., https://www.nrdc.org/experts [https://perma.cc/C5EM-2TES]; *Our Team*, EARTHJUSTICE, https://earthjustice.org/about/staff [https://perma.cc/F7R9-PCWS]; *Staff*, SIERRA CLUB, https://www.sierraclub.org/environmental-law/staff [https://perma.cc/B6LM-WWGX] (showing the DOJ connections of current staff at these organizations).

179. ISS's recently released top-fifty of 2019 list includes seven of these ten firms (including all of the top five) in the top ten firms of 2019: Bernstein Litowitz (1), Robbins Geller (2), The Rosen Law Firm (3), Kessler

Table 7—Top Ten Plaintiffs' Side Securities Litigation Firms (2014–2018)

Bernstein Litowitz Berger & Grossmann LLP	*Motley Rice LLC*
Kessler Topaz Meltzer & Check LLP	*The Rosen Law Firm P.A.*
Labaton Sucharow LLP	*Pomerantz LLP*
Robbins Geller Rudman & Dowd LLP	*Grant & Eisenhofer P.A.*
Cohen Milstein Sellers & Toll PLLC	*Wolf Popper LLP*

Reassuringly, many of the names on this list are also included in other efforts to identify the top plaintiffs' firms.[180] At least some of these firms have been at the top of the game for quite a while: Bernstein Litowitz was identified as one of the top five plaintiffs' firms in a study by Stephen Choi and Robert Thompson both for the 1996 to 2001 *and* 1990 to 1995 periods.[181] (Wolf Popper also appears in the top five of the Choi & Thompson 1996–2001 period.).

These ten firms account for a very large portion of the total settlement activity during the relevant period. Table 8 shows the average and median annual percentage of total

Topaz (5), Pomerantz (6), Cohen Milstein (7), Labaton (8). INSTITUTIONAL S'HOLDER SERVS., *The Top 50 of 2019* 1, 6 (Mar. 2020), https://www.issgovernance.com/file/publications/ISS-SCAS-Top-50-of-2019.pdf [https://perma.cc/2MVX-MFXV].

180. For instance, my list includes four out of the top five plaintiffs' firms identified in a study of merger litigation between 2006 and 2012. *See* Krishnan et al., *supra* note 144, at 132–33 (assessing the value of top plaintiffs' firms in merger litigation). The four overlapping firms are Robbins Geller, Grant & Eisenhofer, Bernstein Litowitz, and Kessler Topaz. *Id.* The last firm included on that list, which is absent here, is Milberg Weiss—which was the leading securities litigation firm until its leading lawyers faced prosecution for a "pay-to-play" scheme involving the lead plaintiffs in their cases. *See generally, e.g.*, Lonny Hoffman & Alan F. Steinberg, *The Ongoing Milberg Weiss Controversy*, 30 REV. LITIG. 183 (2010); Julie Creswell, *Milberg Weiss Is Charged with Bribery and Fraud*, N.Y. TIMES (May 18, 2006), https://www.nytimes.com/2006/05/18/us/18cndlegal.html#:~:text=The%20securities%20class%2Daction%20law,%2C%20perjury%2C%20bribery%20and%20fraud [https://perma.cc/A8C9-L6JS] (both covering the incident).

Another study, drawing on filings between 2009 and 2010, identifies five dominant plaintiff firms—including four on my list. *See* Ratner, *supra* note 91, at 774–75 ("Robbins Geller . . . served as lead or co-lead counsel on an estimated 30% of all securities class action settlements in 2009–2010; Bernstein Litowitz . . . served as lead or co-lead counsel in 10% of all securities class action settlements in 2009–2010; and Topaz Kessler Meltzer & Check . . . Milberg, . . . and Labaton Sucharow . . . were each named as lead or co-lead counsel in 7% of securities class action settlements in the same two-year time period."). Again, Milberg Weiss is the one firm missing from my list, which reflects its diminished status after bribery prosecutions in the intervening years. *See* Hoffman & Steinberg, *supra* note 180; Creswell *supra* note 180 (both discussing the bribery scheme).

My list includes seven of the top 15 securities litigation firms identified by the Legal500. *Securities Litigation: Plaintiff in United States*, LEGAL 500 (last visited Feb. 5, 2021), https://www.legal500.com/c/united-states/dispute-resolution/securities-litigation-plaintiff/ [https://perma.cc/52GP-3SQM] (ranking the top U.S. plaintiffs' firms regarding securities litigation).

181. Choi & Thompson, *supra* note 144, at 1515.

recoveries for each firm between 2014 and 2018. From this list, Bernstein Litowitz and Robbins Geller emerge as a dominant "Big Two," each regularly accounting for more than 20% of total annual settlements.

For most firms on the list, the average and median do not differ very much, which suggests that the firms are achieving good results in a relatively stable fashion, year after year. The big exception is Pomerantz, which owes its high average (13%) to one exceptionally large settlement in 2018.[182]

Table 8—Top Plaintiff Firms' Percentage of Total Annual Securities Settlements (2014–2018)[183]

	Average	**Median**
BLBG	24%	26%
KTMC	7%	8%
Labaton	7%	4%
RGRD	26%	27%
Cohen	8%	10%
Motley Rice	4%	3%
Rosen	1%	1%
Pomerantz	13%	3%
G&E	3%	2%
WP	4%	3%

These firms vary substantially in the number of lawyers they employ working on securities and corporate law litigation—from a low of fourteen (Wolf Popper) to a high of 172 (Robbins Geller).[184] The total number of attorneys is 511.[185] There is also substantial variation in the proportion of shareholder litigation attorneys to the total number of attorneys. Some firms are completely—or nearly completely—devoted to it (e.g., Bernstein Litowitz, The Rosen Law Firm) while others (like Cohen Milstein), it's only a minority.[186]

I examined the online biographies for all of these attorneys working on securities and corporate litigation for these ten leading plaintiff-side securities firms to determine how many had prior SEC experience before joining the plaintiffs' bar. The results are presented in the last two columns of Table 9.

182. *E.g.*, Alison Frankel, *Judge in $3 Billion Petrobras Securities Case Cuts Class Lawyers' Fees by $100 Million*, REUTERS (June 26, 2018), https://www.reuters.com/article/us-otc-fees-idUSKBN1JM2V2 [https://perma.cc/JY7K-6WPX] (reporting that "Jeremy Lieberman and his partners at the securities class action firm Pomerantz are about $171 million richer . . ."); *see also* Choi et al., *supra* note 115, at 439 (discussing this "enormous" and "eye-popping" fee award).

183. I used ISS statistics for both the total amount of securities settlements during the year and the amount that the firm was responsible for. Because the ISS method attributes entire settlements to a firm if it was lead counsel, even if there were other firms involved in the case, there is likely some "double dipping" here, and so the total percentage is more than 100%.

184. *Infra* Table 9.

185. *Id.*

186. *Id.*

Table 9—SEC Alumni at the Top 10 Plaintiffs' Firms

	Attorneys	Shareholder Litigation Attorneys	Shareholder Litigation Partners	Shareholder Litigation Attorneys with Prior SEC Experience	Shareholder Litigation Attorneys with Prior SEC Experience Within 10 years
BLBG	50	50	19	1	0
KTMC	57	51	25	0	0
Labaton	76	67	27	5	5
RGRD	175	172	86	2	0
Cohen	107	28	8	1	0
Motley Rice	108	28	15	0	0
Rosen	18	18	4	0	0
Pomerantz	43	38	12	0	0
G&E	66	45	11	0	0
WP	19	14	6	0	0
Totals	719	511	213	9	5

Only five attorneys joined the elite plaintiffs' bar from the SEC within the last ten years. All five of these attorneys joined the same firm (Labaton Sucharow) *not* to do traditional plaintiffs' side shareholder litigation (e.g., class actions or derivative litigation) but rather as part of the firm's new, specialized SEC Whistleblower practice.[187] Two of the five attorneys who made this move had been deeply involved in the development of the whistleblower program while at the SEC.[188]

Out of the 506 other attorneys in the sample, *none* worked at the SEC within the past decade. Just four worked for the SEC before joining the plaintiffs' bar—and all four did so more than ten years ago.[189]

By contrast, many of the attorneys working for the elite plaintiffs' bar had other types of prior government experience. Table 10 breaks this down.

187. *See Our Whistleblower Team*, LABATON SUCHAROW, https://www.secwhistlebloweradvocate.com/our-attorneys/ [https://perma.cc/48SS-CBLE].

188. *See Richard A. Levine*, LABATON SUCHAROW, https://www.secwhistlebloweradvocate.com/our-sec-whistleblower-attorneys/richard-a-levine [https://perma.cc/S6Y5-DPDL] ("Rich played an instrumental role in the development of the SEC Whistleblower Program"); *Jordan A. Thomas*, LABATON SUCHAROW, https://www.secwhistlebloweradvocate.com/our-attorneys/jordan-thomas [https://perma.cc/SFK7-FSL5] (stating that Jordan was a "principal architect of the SEC Whistleblower Program").

189. The four include a BLBG Senior Counsel, a RGRD Partner and Counsel, and a Cohen Milstein Partner. *Supra* Table 9.

Table 10—Other Government Alumni of Top 10 Plaintiff Firms

Shareholder Litigation Attorneys	**511**
Former Government	59
Former Prosecutor	33
Former Federal Government	29
Former Federal Prosecutor	17

Of the 511 shareholder litigation attorneys working at the top ten firms, fifty-nine (12%) had previously worked for the government—including about half (twenty-nine) for the federal government. About half (thirty-three) of the attorneys with prior government experience had worked as prosecutors—including seventeen federal prosecutors—before joining the plaintiffs' bar.

* * *

One key limitation with this analysis is that former SEC attorneys likely comprise a relatively small proportion of the pool of licensed attorneys that plaintiffs' firms could theoretically hire. To address this issue, I shift in the next two subsections to look at career movement of SEC attorneys.

2. Career Trajectories of 2015 SEC Enforcement Attorneys

Next, I analyzed the career trajectories of attorneys I identified as employed by the SEC Enforcement Division as of 2015 to determine whether any of these attorneys had subsequently joined plaintiffs' side firms. I collected all SEC Enforcement staff mentioned in 2015 SEC Press Releases,[190] SEC Complaints,[191] ALJ Initial Decisions,[192] and Commission Opinions;[193] used publicly available information to determine which of the individuals named in the Press Releases were attorneys[194] (as opposed to accountants, paralegals, compliance examiners, etc.); and for those who were confirmed to be attorneys

190. *Press Releases [2015]*, SEC, https://www.sec.gov/news/pressreleases?aId=edit-year&year=2015 [https://perma.cc/QU6U-YZ74]. I included both the individuals listed at the bottom of the press release as being involved in the SEC's investigation and/or litigation, as well as any other individuals mentioned or quoted in the Press Release. As a result, my list includes both line-level staff as well as more senior leaders.

191. *Litigation Releases Archives 2015*, SEC, https://www.sec.gov/litigation/litreleases/litrelarchive/litarchive2015.shtml [https://perma.cc/N2DL-76RC].

192. *ALJ Initial Decisions: Administrative Law Judges Archive: 2015*, SEC, https://www.sec.gov/alj/aljdec/aljdecarchive/aljdecarc2015.shtml [https://perma.cc/PL7L-P684].

193. *Commission Opinions and Adjudicatory Orders*, SEC, https://www.sec.gov/litigation/opinions/opinionarchive/opinarch2015.shtml [https://perma.cc/NY49-C7FN].

194. "Enforcement staff includes investigators, accountants, industry experts, trial attorneys and other employees . . .", *Oversight of the SEC's Division of Enforcement Testimony Before the Subcomm. on Cap. Mkts. & Gov't Sponsored Enter. of the Comm. on Fin. Sev.*, 114th Cong. 1 (2015) (statement of Andrew Ceresney, Director SEC Division of Enforcement), https://www.sec.gov/news/testimony/031915-test.html [https://perma.cc/T7AU-WCUD].

used public information to determine who was their current[195] employer.[196] Tables 11 and 12 present the results:

Table 11—Identified 2015 SEC Enforcement Staff

Total Identified	**636**
Attorneys	521
Non-Attorneys	86
Unable to Confirm	29

Table 12—Current Employers of Identified 2015 SEC Enforcement Attorneys

Academic	1	Legal Headhunting	1
Company (financial)	20	Realtor	1
Company	8	Retired or deceased	6
Government	8	SEC	384
Law Firm (Defense)	41	Unknown	49
Law Firm (Plaintiffs)	2		
		TOTAL	**521**[197]

Most of the attorneys (74%) I found working at the Enforcement Division in 2015 are still there. Two left the SEC to join plaintiffs' side firms—but both joined firms or practice

195. As of May/June 2020.

196. From the initial 2015 documents, I collected: (1) the individual's name, (2) the regional office and/or subunit they were assigned to (where provided), and (3) whether they were an attorney or non-attorney (if provided or implicit by the nature of the document). To fill in the remaining missing information, I relied on a variety of public websites, including LinkedIn, federalpay.org (to determine attorney vs. non-attorney), SEC.gov (to search for recent materials involving the individual), law firm websites, Bloomberg Law (to search for other recent filings), and state bar websites, among others. For purposes of defining "current" employer, I relied on the most current source I could find, but nothing before July 2019. Using this method, I was able to determine whether 607 out of 636 individuals were attorneys, and was able to identify the current employer of 474 out of 521 attorneys.

197. The 521 attorneys I was able to identify using this method are not a comprehensive account of all attorneys working for the Division at the time, but they do likely represent a substantial majority of the attorneys employed by the Division at the time. The SEC's annual reports disclose the number of staff employed by the Enforcement Division, but not the specific number of these employees who are attorneys. Using a more comprehensive method (the 2004 SEC Phone Book), Choi, Gulati, and Pritchard identified 542 attorneys working for the Enforcement Division in 2004. Choi et al., *supra* note 8, at 432. This represents 47% of the 1144 total staff employed by the Division that year. UNITED STATES SECURITIES AND EXCHANGE COMMISSION: CONGRESSIONAL BUDGET REQUEST: FISCAL 2006, SEC (2005), https://www.sec.gov/files/secfy06budgetreq.pdf [https://perma.cc/9ZHY-T6BS]. If the proportion of attorneys employed by the division has remained relatively constant over time, there would have been about 626 attorneys (out of 1,331 total staff). FY 2017 BUDGET JUSTIFICATION: FY 2017 ANNUAL PERFORMANCE PLAN, FY 2015 ANNUAL PERFORMANCE REPORT, SEC 1, 14 (2016), https://www.sec.gov/about/reports/secfy17congbudgjust.pdf [https://perma.cc/VAK4-JP77]) (listing those employed by the Division in 2015—or about 105 more than what I was able to identify).

groups specializing in representation of whistleblowers, not in traditional plaintiffs' side litigation.[198] The most popular destinations for attorneys leaving the agency are private sector employers who are potential *targets* of SEC Enforcement Division or their representatives: sixty-nine (13%) of the 512 enforcement attorneys working for the SEC in 2015 are now working for a defense-oriented law firm, a financial firm,[199] or other corporation.[200]

3. Career Trajectories of 2004 SEC Enforcement Attorneys

In a recent paper, Stephen Choi, Mitu Gulati and A.C. Pritchard analyzed the career trajectories of the attorneys employed by the SEC's Enforcement Division as of 2004,[201] and found, among other things, that "[m]ore than half of the attorneys employed by the [D]ivision in 2004 were working in the private sector by 2016."[202] Choi, Gulati and Pritchard do not discuss whether any of these attorneys joined plaintiffs' side law firms. However, the authors shared data with me on the immediate post-SEC employers for the attorneys in their sample. Of the thirty-one attorneys in this dataset who went to private law firms, none went to a plaintiffs' side securities litigation firm.[203]

B. Do Plaintiffs' Attorneys Join the SEC?

The revolving door is also understood to work in the opposite direction. To evaluate whether the SEC hires individuals with prior experience in the plaintiffs' bar, I performed two studies: one of the current upper- and middle-managers of the SEC's Enforcement Division, and the other of a broader set of attorneys employed by that division in 2019. The results of both studies further demonstrate that the door between the SEC and the plaintiffs' bar generally does not revolve.

1. Prior Employers of Upper and Middle Management of SEC's Enforcement Division

I first evaluated whether any of the managers inside the SEC's Enforcement Division had prior plaintiff side experience. A focus on managers, rather than all line attorneys at the Enforcement Division, makes some sense because these officials have substantial power and discretion to shape the enforcement program.[204] As James Cox and Randall

198. One is among the five attorneys discussed above as joining the whistleblower practice group of leading plaintiffs' firm, Labaton Sucharow. The other joined Phillips & Cohen, a leading whistleblower firm.

199. Including two working for a prominent activist hedge fund. *See infra* Appendix B.

200. *Id.* Some studies of SEC career trajectories control for pre-government employment as a way to answer important questions about *which* attorneys choose to exit the SEC through the revolving door. *E.g.*, Choi et al., *supra* note 8, at 429 (highlighting that men working in the SEC are more likely to make a lateral career change to private sector jobs). My study is seeking to answer a more basic question—whether *any* SEC attorneys go into the plaintiffs' bar—and so I did not need to control for the pre-SEC employment of these attorneys. However, in several studies below, I do examine the pre-SEC employment of a different set of attorneys—namely those employed by the Enforcement Division in 2019.

201. Choi et al., *supra* note 8, at 428. They obtained these names from the SEC's 2004 telephone directory. *Id.* at 432.

202. *Id.* at 449.

203. Appendix C lists the firms that these attorneys joined. *See infra* Appendix C.

204. Cox & Thomas, *supra* note 6, at 886–89 (providing examples of how different directors exercise

Thomas point out, "most enforcement efforts are collaborative with the staff subject to multiple levels of oversight by different supervisors."[205] For instance, "the decision to launch an inquiry must be approved by the Associate Director, the Regional Director, or a Unit Chief within the Division of Enforcement."[206] This structure leads Cox and Thomas to "a far greater concern" about the risk of capture from revolving personnel in the agency's top management positions.[207]

I identified 38 upper- and middle-managers working at the Enforcement Division as of January 2020.[208] The managers I include in this sample include the Regional Directors and Associate Directors for Enforcement of the eleven regional offices, and various other leadership positions within the Division including leaders of various specialized units. Unlike the individuals who are directors of various divisions, who tend to rotate in and out with new administrations and who tend to be drawn directly from the private sector,[209] these middle-managers are predominantly internal promotions. Fully 75% (28/37)[210] of the sample middle-managers have been with the agency for at least ten years *consecutively*.[211] And, among the nine individuals who have less than ten years of consecutive SEC experience, two had worked at the agency in the past before leaving, and six had other significant government prosecution experience.

Using the biographical information available in SEC Press Releases announcing the appointments of these individuals, as well as other public sources,[212] I found that *none* of the attorneys in this sample (N=33) had prior experience in the plaintiffs' bar, while 85% (28/33) had experience in the defense bar. So, there were plenty of inward revolvers from the defense bar, but none from the plaintiffs' side.

Table 13—SEC Enforcement Division Upper and Middle Management

Sample	38
Prior Defense-Side Law Firm	28 (N=33)
Prior Plaintiffs'-Side Law Firm	0 (N=33)

influence over their divisions' agendas and policies); *see also* Choi & Pritchard, *supra* note 58, at 224 (noting the data challenges associated with studying the career paths of line-level SEC enforcement attorneys).

205. Cox & Thomas, *supra* note 6, at 886.

206. *Id.*

207. *Id.* at 899. The authors conclude that the risk of agency capture caused by the increasing frequency of Division Directors being drawn from private industry is critically moderated by the fact that these directors are frequently surrounded by deputy, associate, and assistant directors with significant SEC tenures. *Id.* at 897–98.

208. To identify these individuals, I relied on the SEC's website lists of various leaders as well as searching through SEC press releases announcing the appointment of individual leaders. *Press Releases*, SEC, https://www.sec.gov/news/pressreleases (last visited Mar. 2, 2021).

209. *See* Cox & Thomas, *supra* note 6, at 869–73 (providing data to demonstrate the outsider-oriented promotion practice).

210. The denominator is 37, not 38, because I was unable to find the SEC start date for one individual in the sample.

211. This finding is consistent with Cox & Thomas's findings. Cox & Thomas, *supra* note 6, at 898.

212. Including: LinkedIn, Practicing Law Institute biographies, and other media sources.

2. Prior Employers of 2019 SEC Enforcement Attorneys

Next, I looked beyond managers to see whether any of the enforcement attorneys working for the agency in 2019 had any plaintiffs' side experience. Using the same public sources described above,[213] I identified attorneys working for the Enforcement Division in 2019 and determined immediate pre-SEC employers for as many of these attorneys as possible. In the study of outward revolvers above,[214] the law firms joined by SEC alumni all fit into an easy defense-plaintiff dichotomy. By contrast, the pre-SEC employers of 2019 SEC enforcement attorneys were not all amenable to this categorization. Some attorneys worked at firms without any litigation or enforcement practices. Others worked at firms that were focused exclusively on legal areas far removed from corporate and securities litigation. Because my goal here is to learn whether plaintiffs' lawyers join the SEC, I categorized all of these law firms as either "plaintiffs" or "other." For this stage of the analysis, I labeled a firm as a "plaintiffs" firm if it had any involvement in plaintiffs' side securities or corporate litigation, even if it *also* represented defendants in these matters.[215] The results are presented in Tables 14 and 15.

Table 14—Identified 2019 SEC Enforcement Staff

Identified Total	**604**
Attorneys	494
Non-Attorneys	69
Unable to Confirm	41

Table 15—Immediate Prior Employers of Identified 2019 SEC Enforcement Attorneys

	Immediate Prior Employer	Second Prior Employer
Company (financial)	6	2
Company (other)	3	1
Government	51	20
Law Firm (Plaintiffs)	12	5
Law Firm (Other)	237	90
None	18	-
Solo	5	2
Total	**332**	**120**

213. *See supra* Section IV.A.2.

214. *See supra* Section IV.A.2.

215. To make this categorization, I relied primarily on law firm websites and the Stanford Securities Class Action database.

I found seventeen SEC enforcement attorneys working for the agency in 2019 that had been previously affiliated with a firm that was engaged in some type of plaintiffs' side corporate or securities litigation. But, given the diversity of practice areas many of these firms are engaged in, I believe the number seventeen very likely significantly overstates the number of these attorneys who actually were involved in plaintiffs' side litigation themselves prior to joining the SEC. For all seventeen of these individuals, I looked for any type of evidence or indication as to whether the attorney had been involved in plaintiffs' side shareholder litigation.[216] I found such indications for only *five* of these attorneys.[217] These five attorneys worked at a range of plaintiffs' side firms, including major players and less well-known firms.[218]

In sum, out of all the attorneys I identified as working for the Enforcement Division in 2019, I found evidence that only five of them had previous experience in the plaintiffs' bar.

There are two important limitations of this analysis. First, the group of 494 attorneys I identified working for the Division in 2019 likely amounts to a significant majority of the total number of attorneys working for the Division in that year, but is not nearly comprehensive.[219] Second, I was able to find information regarding the pre-SEC employment (or lack thereof) for only 332 of these attorneys. It cannot be ruled out that there are attorneys with pre-SEC plaintiffs' side experience that are not captured by this analysis.

V. IMPLICATIONS FOR PUBLIC AND PRIVATE SECURITIES ENFORCEMENT

There seems to be a stark division between two of the most important sets of actors involved in enforcement of the federal securities laws in the United States. Although SEC attorneys frequently make their way to the defense bar and the regulated industry, they appear to almost universally avoid joining the ranks of the plaintiffs' law firms devoted to securities class actions or corporate derivative litigation. Nor do plaintiffs' attorneys appear to move into the ranks of the SEC's Enforcement Division, except very rarely.

This professional separation between the SEC and the plaintiffs' bar is an intriguing, overlooked feature of the U.S. securities enforcement regime. This Part explores the meaning of this phenomenon and its implications for public and private securities enforcement. Section A discusses how the findings presented above might be understood as new evidence that the SEC's Enforcement Division is subject to regulatory capture.

---

216. For this, I relied on LinkedIn, BloombergLaw Dockets, and other public sources.

217. For instance, one attorney's LinkedIn biography provides: "I represented a number of the world's largest institutional investors in cutting edge, high stakes securities class action and complex commercial litigation matters in federal and state courts across the country." Another attorney's LinkedIn biography provides, in part, that the attorney "[s]erved as lead and liaison counsel in fiduciary related and class action securities litigation in state and federal courts throughout the country," and lists various cases the attorney was involved in along with the settlement amounts.

218. The five firms are: Ajamie LLP, Berger & Montague PC, Coughlin Stoia Geller Rudman & Robbins LLP (a predecessor of Robbins Geller), Entwistle & Cappucci LLP, and Glancy Prongay & Murray LLP.

219. Again, this is not a comprehensive account of all attorneys working for the Division in 2019 but is likely a substantial majority of them. The rough estimation method as above, *supra* note 197, would project an additional 143 attorneys working for the Division in that year.

Section B evaluates how the "non-revolving door" fits into the debate over the costs and benefits of the U.S. "multi-enforcer" regime. Section C discusses another implication of the studies above—the opening of a new revolving door between the SEC and the specialized practice of whistleblower representation.

A. The Non-Revolving Door as Evidence of Regulatory Capture

The non-revolving door may help evaluate the revolving one. Subsection 1 discusses the prospect that the SEC Enforcement Division is subject to "cultural capture"—i.e., that SEC attorneys are systematically avoiding working for the plaintiffs' bar because the SEC Enforcement Division has generally internalized the hostile and skeptical view of the social value of plaintiffs' work that is broadly embraced by the defense bar. Subsection 2 shows how the non-revolving door might provide some new support for the classic "rent-seeking" theory of the revolving door.

1. The Non-Revolving Door as Evidence of Cultural Capture

While most of the early theoretical work on agency "capture" focused on regulators' concrete financial incentives to provide favorable treatment to powerful firms within the regulated industry—e.g., the prospect of a lucrative private-sector job—some more recent work has recognized that "nonmaterialist" mechanisms may have the same effect. James Kwak, the leading theorist of so-called "cultural capture," makes the case that, since regulators are human beings, their decision-making is likely to be "susceptible to nonrational forms of influence,"[220] and therefore the regulated industry may be able to "shape policy outcomes through influences other than material incentives and rational debate."[221] Kwak discusses three such mechanisms that industry can leverage to influence regulator behavior: group identification, status, and relationship networks. He posits that regulators are more likely to adopt positions advanced by people "whom they perceive as being in their in group," "whom they perceived to be of higher status in social, economic, intellectual, or other terms" and "who are in their social networks."[222]

"Cultural capture" is extremely challenging to pin down[223] because "there will always be multiple explanations for why someone forms the beliefs she has."[224] Indeed, even a regulator whose own views have been skewed via cultural capture would not necessarily be able to identify these mechanisms herself. As one critic pointed out, the theory is difficult to distinguish from "the marketplace of ideas" in which "some ideas win out [and] some do not."[225]

---

220. Kwak, *supra* note 30, at 76; *see also generally* Stephen J. Choi & Adam C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1 (2003).

221. Kwak, *supra* note 30, at 78.

222. *Id.* at 80.

223. *See id.* at 79 ("Traditional capture is already hard enough to identify, because policymakers invariably cite some justifications other than self-interest for their actions. Cultural capture, if anything, is even harder to identify empirically, because there are always multiple explanations for why someone forms the beliefs she has.").

224. *Id.*

225. Engstrom, *supra* note 3, at 33. Further, "cultural" forces can have a significant impact without any implications of capture. *E.g.*, Baer, *supra* note 141, at 1614–27 (discussing the benefits and costs of the rise of a

Still, these difficulties in identification do not defeat the importance or validity of the concept. And scholars have recently turned to the concept of cultural capture to evaluate SEC behavior.[226] Moreover even the traditional, materialist theory of agency capture has proven to be an especially slippery concept and even the most elaborate efforts to test the concept have failed to convince[227]—and yet the concept remains important for both academic and public discourse about the regulatory state.

The "non-revolving door" between the SEC and the plaintiffs' bar seems to point towards "cultural capture"[228] at the SEC. SEC attorneys' individual career choices indicate that plaintiffs' side securities work is not viewed as an attractive career option among SEC attorneys. This is so despite the substantial professional synergies between the two careers,[229] competitive compensation available at leading plaintiffs' firms,[230] and the prospect of continuing on in the same "mission" of holding companies accountable for fraud and misconduct.[231] At the same time, we know that the revolving door between the SEC and the defense bar moves quite rapidly.[232] Among defense attorneys, skepticism or hostility towards securities class actions and the lawyers who pursue those cases is commonplace. Many defense attorneys (including SEC alumni) defend companies against both SEC enforcement and private class actions.[233] One possible explanation for SEC attorneys' failure to pursue careers in the plaintiffs' bar is that they have internalized the defense bar's hostile views of plaintiffs' side securities litigation.

As defense attorneys move in and out of the ranks of the SEC enforcement division, it is easy to see how the defense bar's anti-class action bias could spread to the agency. Because skepticism of private securities litigation is separate from anything related to the SEC's work, it would be relatively easy to pass from the defense bar to the SEC. SEC attorneys have no particular reason to resist the view that securities class actions are socially wasteful. This is different from other views that might be widely held in the defense bar—for instance, a view that SEC enforcement is socially wasteful or perhaps unconstitutional.

All three of Kwak's mechanisms may be at play. As to "Group Identification" and "Social Networks," the revolving door between the SEC and the defense bar means that SEC attorneys are very likely to see defense attorneys as within their "in group" and "social

---

relatively homogeneous culture of "elite" compliance professionals, whose resumes reflect a narrow set of experiences at the highest levels of government and defense side law firms).

226. *E.g.*, Cox & Thomas, *supra* note 8, at 882–99 ("We believe we are correct in being concerned about the potential for agenda control by division directors and the SEC's general counsel, and the existence of cultural bias that arises out of these individuals' exposure to corporate clients."); *see also* PROJECT ON GOV'T OVERSIGHT, DANGEROUS LIAISONS, *supra* note 51, at 29 (the impact of the revolving door is unlikely to be "neatly quantified and measured" but rather "is likely to be found in the broader assumptions and norms" of the agency); *cf.* Baer, *supra* note 141, at 1614–27 (discussing the benefits and costs associated with the rise of a homogeneous "elite" group of professionals leading the compliance operations of major firms).

227. *See supra* notes 8–9 (discussing the leading study of the revolving door by deHaan et al., and criticism of the study); *see also* PROJECT ON GOV'T OVERSIGHT, DANGEROUS LIAISONS, *supra* note 51.

228. Kwak, *supra* note 30.

229. *Supra* Section III.A.

230. *Supra* Section III.B.

231. *Supra* Section III.C.

232. *Supra* Section II.A.

233. *Supra* note 113 (discussing examples).

networks." As to "status," plaintiffs' attorneys have long had a reputation as "ambulance-chasers"—a lower class version of lawyers than the elite "white-shoe" defense lawyers. As discussed above, at least some of today's leading plaintiffs' securities firms challenge that stereotype, employing a large number of attorneys from top law schools and offering the prospect of high compensation. Nevertheless, it is easy to imagine that most SEC attorneys may regard the defense bar as a high-status occupation, and therefore be more receptive to adopting their perspective.

To be sure, cultural capture is not the exclusive or definitive explanation for the SEC's evident skepticism towards plaintiffs' litigation, reflected both in the employment choices of agency personnel and in the agency's broader enforcement agenda. It's certainly possible that SEC attorneys have come by a skepticism of plaintiffs' side work independently.[234] Many people outside the industry and the defense bar, including many securities regulation scholars, have come to the conclusion that securities class actions are generally socially wasteful and should be abolished or sharply curtailed.[235] There are high-profile examples of plaintiffs'-side abuse that would seem to support a skeptical view of the enterprise.[236] There is the possibility of other historical and cultural forces at play that have little to do with the defense bar or the regulated industry.[237] Still, enough ingredients are present to make the cultural capture story plausible and worrisome.[238]

The SEC's retail enforcement activities can have substantial downstream effects on the flow of private securities litigation, and the agency's line attorneys wield tremendous discretion to shape those effects.[239] If the industry could exploit the mechanisms of "cultural capture" to get SEC enforcement attorneys to adopt the view that private litigation was generally socially wasteful, this might lead the agency to systematically skew the enforcement program in a manner that would undercut private litigation.

To the extent SEC attorneys have a bias against private securities litigation, one should expect them to wield their enforcement discretion in a manner that reflects those biases. Some recent trends in enforcement point in this direction. "Since Dodd-Frank, the SEC has been avoiding scienter-based charges in settlements"[240]—the kind of charges that would provide the strongest catalyzing effect for parallel private litigation.[241] The SEC has also avoided requiring admissions in settlements where such admissions would provide meaningful assistance to private litigation.[242] Both of these trends make the work of

234. *Cf.* Engstrom, *supra* note 3, at 33 ("[N]on-materialist capture begins to resemble, upon further examination, the marketplace of ideas. Some ideas win out; some do not.").

235. For a review of the debate, see Platt, *supra* note 11 (explaining consequences and benefits of securities class actions).

236. *Supra* note 180 (discussing case of Milberg Weiss).

237. *E.g.*, Lawrence E. Mitchell, *Gentleman's Agreement: The Antisemitic Origins of Restrictions on Stockholder Litigation*, 36 QUEEN'S L.J. 71 (2010) (providing examples of how Jewish lawyers were disadvantaged in the mid-1900s).

238. Further, as discussed below, SEC appears to be something of an outlier among enforcement agencies with parallel private enforcement. *Supra* Section III.D.

239. Platt, *supra* note 11, at 64.

240. Urska Velikonja, *Securities Settlements in the Shadows*, 126 YALE L.J. 124, 133 (2016).

241. Platt, *supra* note 11, at 54.

242. David Rosenfeld, *Admissions in SEC Enforcement Cases: The Revolution That Wasn't*, 103 IOWA L. REV. 113, 116, 150, 154 (2017) (stating the SEC is not requiring admissions "in the most egregious cases"); Verity Winship & Jennifer K. Robbennolt, *An Empirical Study of Admissions in SEC Settlements*, 60 ARIZ. L.

plaintiffs' attorneys harder and might reflect (among other factors) anti-private litigation sentiment among SEC enforcement attorneys and managers.[243]

2. The Non-Revolving Door as Evidence of Rent-Seeking

According to the rent-seeking hypothesis, the revolving door fosters agency capture because it leads regulators to "sacrifice agency efficacy in an attempt to curry favor and network with prospective employers from the private sector."[244] The theory is that SEC enforcement attorneys are potentially attractive hires for defense-side law firms *not* primarily because of their knowledge of the securities laws or the enforcement process, or because of their litigation, investigatory or other professional skills, but "because of their ability 'to lobby and influence decisionmakers at the agency.'"[245]

The wholesale failure of the SEC attorneys to move into plaintiffs' side work provides some additional support for this view. Joining the elite plaintiffs' bar would allow an SEC attorney to earn a good income (perhaps a very good income), continue to fight corporate fraud, and use a significant amount of the same skills and knowledge developed while in government. However, moving to the plaintiffs' side would *not* allow the SEC attorney to capitalize on the relationships that they have developed with colleagues inside the SEC. The systematic failure of SEC attorneys to pursue careers in the plaintiffs' bar lends support to what the rent-seeking theorists have suspected: the true value of SEC attorneys to the defense bar is not primarily their legal experience or skill, but rather their ability to extract unique concessions and benefits from the agency through personal connections.

3. The Non-Revolving Door and Legitimacy of Public and Private Enforcement

Even if the non-revolving door cannot be directly associated with a distortion of agency decision making, it might still undermine public confidence in the securities enforcement regime. As discussed above, commentators have raised this concern regarding the traditional revolving door. For example, a U.S. GAO report on the SEC revolving door posited that "even without direct evidence that undue influence has affected an enforcement action, the appearance of a conflict of interest could undermine confidence in the enforcement process and the SEC."[246] Former SEC Chair Mary Schapiro raised a similar point during her confirmation hearing, noting that when SEC regulators "walk[] out the door and go[] to a firm" it "leav[es] everybody to wonder whether they showed some favor to that firm during their time at the SEC."[247]

In addition to stoking revolving door anxieties like the ones articulated in the

---

REV. 1, 40 (2018) (finding only eight SEC settlements between 2010 and 2017 that included an admission of any type where the company was also facing a private class action); *id.* at 50 ("It is hard, however, to conclude that the [agency's] new approach [to requiring admissions] has been a transformation if that means large numbers of targets in big cases admitting wrongdoing.").

243. *See* Platt, *supra* note 11 (providing information about the impact of private securities class actions).

244. Cox & Thomas, *supra* note 6, at 857.

245. *Id.* (citing deHaan et al., *supra* note 8, at 66).

246. U.S. GOV'T ACCT. OFF., *supra* note 28, at 12.

247. *Securities and Exchange Commissioner Nomination Hearing: Hearing Before the Senate*, 111th Cong. (2009) (testimony from Mary Shapiro about her nomination). *See also* Zaring, *supra* note 2, at 512 (explaining generally the revolving door between the public and private sector).

preceding sections, the striking lack of personnel movement from the SEC to the plaintiffs' bar might be interpreted as a compelling vote of "no confidence" in the private litigation system by a group of well-informed, public-service minded attorneys. Outside observers may wonder about this apparent disconnect between SEC leadership's consistent praise of private litigation as a necessary complement and the total lack of interest among SEC attorneys in actually joining in that effort.

B. The Non-Revolving Door and the Multi-Enforcer Regime

There are benefits and drawbacks to the American "multi-enforcer" system of securities enforcement, in which overlapping enforcement authority is vested in multiple actors rather than unilateral authority in a single, centralized entity.[248] The evidence presented above regarding the lack of professional interchange between two of the most important groups in this regime might shed new light on this debate.

1. Independent Private Enforcement

A potential advantage of a decentralized enforcement system is that multiple independent enforcers may correct for each other's systematic limitations, weaknesses, or blind spots. For instance, if two different enforcers are systematically inclined (due to incentives, expertise, or resource-constraints) to pursue different classes of cases against different targets, a system that empowered both of them might reduce the risk that either class of violations would be under-enforced.[249] Even where two enforcers pursue the same cases, a divergence in how they tend to *resolve* these cases may provide its own valuable correction against under-enforcement.[250]

Something like this idea is implied the often-repeated statement that private securities enforcement is a valuable "complement" or "supplement" to the SEC's own enforcement efforts.[251] Scholars have gone further in defining the advantages reaped by separate, independent enforcers. James Park developed a "comparative advantage" model that identifies possible system-wide benefits linked to the fact that regulatory enforcers like the SEC are inclined to emphasize enforcement of clearly-defined "rules" while entrepreneurial enforcers like class action attorneys have strong incentives to invest in the

248. *E.g.*, Amanda Rose, *Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10b-5*, 108 COLUM. L. REV. 1301, 1357 (2008) (referring to supplement) [hereinafter Rose, *Reforming*]; Amanda Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2209 (2010) (explaining how private actions supplement SEC regulation)[hereinafter: Rose, *Multienforcer*]; James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115, 128 (2012) ("Private enforcement has a long history of being characterized as a 'supplement' to public enforcement."); Jill E. Fisch, *Class Action Reform,* Qui Tam*, and the Role of the Plaintiff*, 60 L. & CONTEMP. PROBS. 167, 200 (1997) (discussing combining the incentives of private litigation with government oversight); Maria Correia & Michael Klausner, *Are Securities Class Actions "Supplemental" to SEC Enforcement?: An Empirical Analysis* (unpublished manuscript) (on file with author); Platt, *supra* note 11, at 43.

249. *E.g.*, Zachary D Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 307–11 (2016) (discussing the theoretical advantages of "redundancy"); Park, *supra* note 248, at 120 ("the case for multiple enforcers is best made by emphasizing the comparative advantages of those enforcers").

250. *E.g.*, Clopton, *supra* note 249, at 290, 308–11; Platt, *supra* note 11, at 48–50.

251. *See supra* note 11 (collecting sources making this claim).

enforcement of more vaguely defined "principles."[252] Others have argued for different advantages provided by independent private enforcers—for instance, that they can make a positive contribution by spurring the SEC to pursue more vigorous enforcement,[253] provide valuable information above and beyond what is produced through SEC enforcement,[254] or otherwise make up for under-enforcement by the agency.[255]

The near-total professional separation between the attorneys involved in public and private enforcement may reinforce the independence of private enforcers. On top of all the other familiar reasons that cause the SEC and private attorneys to pursue different types of cases, different types of targets, and different resolutions to parallel cases, the "non-revolving door" points towards a sociological reason to expect that the two enforcers will think differently when it comes to every aspect of securities enforcement. Attorneys are not bringing their government training, values, and ideas with them to the private bar—nor the opposite. As discussed above, the two groups may not even see one another as engaging in the same enterprise, notwithstanding the similar language they use to describe their respective missions. To the extent the independence of separate enforcers is a salutary feature of the multi-enforcer system, the non-revolving door might be an important way this independence is protected.

2. Coordination Costs

A decentralized enforcement regime creates the risk that separate enforcers will interfere with and undermine each other's work. Amanda Rose catalogues some of the "coordination costs" private plaintiffs impose on the SEC's enforcement efforts. She notes that plaintiffs "can and do bring actions that the Commission would not want litigated by private enforcers, either because the Commission believes it has already adequately penalized the defendant or because, in the exercise of its discretion, it would choose not to sanction the defendant."[256] She also notes that private plaintiffs may impede effective detection of wrongdoing because "[p]ublic enforcers may have a more difficult time encouraging firms to self-report fraud if by doing so firms expose themselves to crushing

252. Park, *supra* note 248, at 130–34; *see also id.* at 179 ("The value of multiple enforcers is not just that they spur the SEC to act through competition, but that they have their own approach to enforcement that the SEC will find difficult to replicate."); *id.* at 181 ("Different enforcers have different advantages, and a decentralized system allows for specialization in enforcement approaches. . . . [A] two-tier system might allow enforcers to better define and express their comparative advantages.").

253. Rose, *Multienforcer*, *supra* note 248, at 2221 (noting that private enforcement "may have a positive effect on the SEC's own deterrence efforts, to the extent that SEC enforcement personnel fear the class action bar exposing their inadequate job performance").

254. Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 B.U. L. REV. 873, 901 (2019).

255. *E.g.*, Platt, *supra* note 11, at 36–39 (arguing that even controversial "piggyback" securities class actions—i.e., private cases that target the same actor for the same underlying misconduct as the SEC's own enforcement activities—might, in some cases, provide some social value by correcting for under-enforcement by the agency); FITZPATRICK, *supra* note 144, at 46 (responding to the critics of piggyback litigation by suggesting that "perhaps the government is better at identifying misconduct and the private bar is better at litigating the cases"); *see also* Francine McKenna, *Can Private Litigation Redeem the Accounting Profession?*, ADVOC. FOR INSTITUTIONAL INVS. 22–27 (Spring 2013) (arguing that claims against auditors increase SEC enforcement).

256. Rose, *Reforming*, *supra* note 248, at 1347; *see also* Fisch, *supra* note 248, at 198–99 (arguing that private litigation can "undercut government compliance efforts . . .").

private liability."[257] And she notes that private litigation may more generally "weaken the effectiveness of public enforcement" because "the threat of a follow-on class action may discourage individuals from cooperating with public enforcers."[258]

On the other side, the SEC also imposes (or fails to reasonably mitigate) some of these costs. In a recent paper, I argued that the SEC has unreasonably failed to account for the effect that its own enforcement activities have on "piggyback" private litigation; while the agency's own activities are directly catalyzing private litigation, the agency has refused to incorporate this effect into its enforcement calculus and decision making.[259]

Some of these frictions may be inevitable products of the economic, legal, and political structures of public and private enforcement. Plaintiffs' attorneys are not going to walk away from a potentially profitable case.[260] The SEC is unlikely to just hand over an investigative file and let a plaintiffs' firm litigate a case without getting the political "credit" for opening and settling its own enforcement action.[261] But some coordination costs may be worse than they have to be due to the professional rift between the SEC and the plaintiffs' attorneys. Opportunities for informal communication are likely limited by the lack of trust between the two groups. SEC attorneys are highly unlikely to have any trusted former colleagues at any leading plaintiffs' firms to coordinate with, exchange thinking or strategy, provide or receive off-the-record information, etc.—and vice versa.

For example, the SEC openly coordinates extensively and closely with other governmental enforcement agencies at the state, federal, and international levels[262]—but such coordination appears to be starkly absent when it comes to private enforcers.[263] Could the non-revolving door be a factor contributing to this lack of coordination?

C. A New Revolving Door?

The sole exception to the finding above that SEC attorneys do not join the plaintiffs' bar is the area of whistleblower representation. I showed that just five of the 500+ attorneys employed by the top ten plaintiffs' side firms had recent SEC experience, and that all five of these attorneys were working in a specialized whistleblower practice group. I also showed that only two out of the 500+ attorneys that I identified as working for the SEC's Enforcement Division in 2015 subsequently left the agency to join the plaintiffs' bar—and both were working for specialized whistleblower firms or practice groups.

Nor are these attorneys apparently alone in making the move from the SEC to the "whistle-blower industrial complex."[264] For instance, the first head of the SEC's Office of

257. Rose, *Multienforcer*, *supra* note 248, at 2221.

258. *Id.*

259. Platt, *supra* note 11, at 51.

260. *See* Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUDS. 575, 578 (1997).

261. Macey, *supra* note 40, at 646; *Cf.* Platt, *supra* note 11, at 64–65.

262. *E.g.*, Verity Winship, *Enforcement Networks*, 37 YALE J. ON REGUL. 274 (2020) (analyzing two decades (1998–2019) of coordination between the SEC and other enforcement agencies, both domestic and international).

263. Platt, *supra* note 11, at 53.

264. *See* Aruna Viswanatha, *Out of the SEC, into the Whistleblower Industrial Complex*, WALL ST. J. (Sept. 5, 2016), https://www.wsj.com/articles/out-of-the-sec-into-the-whistleblower-industrial-complex-1473123602 [https://perma.cc/GTU9-CKPP] ("[T]he revolving door . . . highlights the potential profitability of work that didn't even exist a few years ago.").

the Whistleblower left the agency in 2016 to join the leading whistleblower firm Phillips & Cohen LLP.[265] A former Senior Counsel in the SEC's Enforcement Division now serves as a "lead attorney" in the (non-SEC specific) whistleblower practice at another plaintiffs' firm.[266]

For purposes of this Article, one important implication of the trend of SEC attorneys choosing to join the ranks of whistleblower representatives is that it may show that financial compensation alone cannot explain why SEC attorneys have failed to join the plaintiffs' bar. The economics of elite SEC Whistleblower representation are obscure, but it does not seem likely to be categorically superior to those of elite plaintiffs' side securities litigation. From the program's inception in 2011 through June 2020, the SEC awarded a total of roughly $500 million to eighty-five individual whistleblowers.[267] Assuming that attorneys get 20%, that's a total of $100 million over the last decade that went to SEC whistleblower attorneys. By way of contrast, above I estimated that the law firm Bernstein Litowitz earned more than $100 million in fees every year in each of the last four years. And the plaintiffs' firm Pomerantz earned a $171 million fee award in a single case.[268]

But there are also broader possible implications of this new revolving door. The whistleblower firms that employ these SEC alumni emphasize this fact in their marketing materials, implying to clients that their inside connections may give them an edge over competitor firms. The language these firms use in discussing their SEC alumni employees is similar to how defense-side firms discuss their own SEC alumni. Appendix D collects some representative samples.

After the SEC proposed amendments to the Whistleblower program in 2018,[269] SEC officials met with various private parties regarding the proposed rule. Of the twelve meetings disclosed on the SEC website, five involved one or more former SEC attorneys now in private law firms representing whistleblowers.[270] Most recently, a former SEC official who is now a leader in the whistleblower bar filed a lawsuit challenging the agency's recent changes to the program.[271]

From the perspective of the attorneys involved, the emergence of a new "revolving door" inside the leading whistleblower firms is eminently reasonable. Attorneys from the SEC's office of the whistleblower and the Enforcement Division likely see whistleblower representation as an appealing setting to continue pursuing the mission of exposing and

265. *Id.*

266. *Senior Counsel Rebecca M. Katz*, MOTLEY RICE, https://www.motleyrice.com/attorneys/rebecca-m-katz [https://perma.cc/K46H-8JC2]. This attorney did not appear in the study presented in Section IV.A.1 of attorneys working for the top ten plaintiffs' firms because Motley Rice lists her as only affiliated with its general whistleblower practice and not in its list of attorneys working on securities litigation. *Id.*

267. *Whistleblower Tips over $700 Million*, SEC, https://www.sec.gov/page/whistleblower-100million [https://perma.cc/4SCE-AB3K]; Press Release, SEC, SEC Awards $125,000 to Whistleblower (June 23, 2020), https://www.sec.gov/news/press-release/2020-141 [https://perma.cc/M2U7-NWLF].

268. Frankel, *supra* note 182. On the other hand, the whistleblower firm I discuss above that employs five former SEC officials (Labaton Sucharow) seems to have been especially adept at bringing in large whistleblower awards. *See infra* note 274. As discussed in this Section, the special success of highly-connected whistleblower firms raises its own concerns.

269. Whistleblower Program Rules, 83 Fed. Reg. 34702 (proposed July 20, 2018).

270. Meetings with SEC Officials, Comments on Proposed Rule, Release No. 34-83557; File No. S7-16-18, https://www.sec.gov/comments/s7-16-18/s71618.htm#meetings [https://perma.cc/566K-8YAR].

271. Jordan Thomas v. SEC, No. 1:24-cv-108 (D.D.C. filed Jan. 13, 2021).

fighting corporate fraud, earn competitive compensation, capitalize on the insider knowledge and connections at the agency, while (possibly) keeping the door open to returning to the agency down the road.

But this phenomenon is also troubling. Consider the law firm Labaton Sucharow, whose whistleblower practice is led by five former SEC officials.[272] From the whistleblower program's inception in 2011 through Fall 2020, the SEC has awarded a total of about $523 million.[273] Almost ***one quarter*** of all awards ($124 million) have been awarded to clients represented by the former SEC officials at Labaton.[274] This may actually understate Labaton's dominance—the SEC does not disclose the names of the law firms or attorneys representing successful whistleblowers, and so this calculation includes only the successes that have been publicized.[275]

This apparently disproportionate success by an extremely well-connected whistleblower law firm raises some questions. Do a whistleblower's prospects of getting the SEC to pursue their case measurably improve if the whistleblower is represented by someone with connections at the agency?[276] Are the SEC alumni in the whistleblower practices adding value to the program by helping the agency screen for meritorious claims? Or are they merely extracting rents, effectively trading their personal connections in

---

272. *See Our Whistleblower Team*, LABATON SUCHAROW, https://www.secwhistleblowerадvocate.com/our-attorneys/ (last visited Sept. 23, 2020) (listing five attorneys—Jordan A. Thomas, Richard A. Levine, Michael Stevenson, Timothy L. Warren, and Robert G. Wilson—all of whom previously served in the SEC).

273. Press Release, SEC Adds Clarity, Efficiency and Transparency to Its Successful Whistleblower Award Program, SEC (Sept. 23, 2020), https://www.sec.gov/news/press-release/2020-219 [https://perma.cc/Y84Y-JEBS].

274. *See Labaton Sucharow Whistleblower Awarded $13 Million for Reporting Securities Violations Leading to $267 Million Enforcement Action Against JPMorgan*, LABATON SUCHAROW (Mar. 26, 2019), https://www.labaton.com/press/labaton-sucharow-whistleblower-awarded-13-million-for-reporting-securities-violations-leading-to-267-million-enforcement-action-against-jpmorgan [https://perma.cc/6EHF-7JTP] (discussing $13 million award for tips regarding JP Morgan); *Labaton Sucharow Whistleblowers Earn Largest SEC Whistleblower Awards in History*, LABATON SUCHAROW (Mar. 19, 2018), https://www.labaton.com/press/press/labaton-sucharow-whistleblowers-earn-largest-sec-whistleblower-awards-in-history [https://perma.cc/YHS8-DT56] (discussing $83 million award for tips related to Merrill Lynch); *Second Largest SEC Whistleblower Award Granted to Labaton Sucharow Client*, LABATON SUCHAROW (June 9, 2016, 2:05 ET), https://www.prnewswire.com/news-releases/second-largest-sec-whistleblower-award-granted-to-labaton-sucharow-client-300282555.html [https://perma.cc/54QL-GRNB] (discussing $17 million award for tips related to an unnamed financial services company); *Outside Financial Analysts Awarded $2.5 Million*, LABATON SUCHAROW (Sept. 1, 2020), https://www.secwhistleblowerадvocate.com/whistleblower-cases/our-clients-outside-financial-analysts-awarded-2-5-million/ [https://perma.cc/5ZS3-VRK3] (discussing $2.5 million award for tips regarding Orthofix International); *Maximum Award in Action Against Paradigm Capital*, LABATON SUCHAROW, https://www.secwhistleblowerадvocate.com/whistleblower-cases/sec-settles-2-2-million-enforcement-action-paradigm-capital/ [https://perma.cc/A9KR-4MYD] (discussing whistleblower award of "maximum" (i.e., 30%) of $2.2 million for tips regarding Paradigm Capital); *Deutsche Bank Whistleblower Must Pay Experts $2.75M*, LAW360 (Sept. 2, 2020, 5:39 PM), https://www.law360.com/articles/1306642/deutsche-bank-whistleblower-must-pay-experts-2-75m [https://perma.cc/BT9B-YWJ5] (discussing $8.25 million award for tips regarding Deutsche Bank).

275. The author has a FOIA request pending with the SEC to obtain additional information on this issue.

276. *Cf.* Engstrom, *supra* note 165, at 1314 (finding "revolving door" concerns in the context of False Claims Act litigation, where qui tam relators represented by counsel with prior DOJ experience were more likely to win DOJ intervention in their cases even as these cases produced lower damages awards); *see also* FITZPATRICK, *supra* note 144, at 38.

exchange for financial compensation? Is the SEC skewing its decision-making based on SEC alumni receiving special treatment from the agency? Are whistleblowers who fail to hire SEC alumni counsel failing to have their tips fairly considered by the agency? Future research might address these and other related questions.

VI. CONCLUSION

The "non-revolving door" between the SEC and the Plaintiffs' bar is a "dog that didn't bark"[277]—one that raises many questions about public and private securities enforcement. Given the overlap in legal regimes, skills, and missions of the two fields of practice, the compensation available to plaintiffs' side attorneys, the flow of federal enforcers to private enforcement in other areas, and the strong rhetoric supporting the social value of private securities litigation from SEC leaders, one would expect SEC attorneys to regularly make their way over to the plaintiffs' bar. The fact that this is not happening raises various implications about the institutions of public and private securities enforcement in the United States, including the prospect that SEC attorneys may have adopted a much more skeptical and hostile view regarding the merits of private securities class actions that is common among defense-side attorneys. As commentators and scholars continue to study the SEC's revolving door, they should not overlook the non-revolving one.

277. In *Silver Blaze*, Sherlock Holmes is tasked with solving the mysterious disappearance of a famous race horse. In a famous passage, Holmes is questioned by a Scotland Yard detective named Gregory:

> **Gregory:** Is there any point to which you would wish to draw my attention?
>
> **Holmes**: To the curious incident of the dog in the night-time.
>
> **Gregory:** The dog did nothing in the night-time.
>
> **Holmes**: That was the curious incident.

Holmes explains that the "silence of the dog" indicated that "the midnight visitor was someone whom the dog knew well"—a critical clue that helped him identify the horse's own trainer as the culprit. ARTHUR CONAN DOYLE, THE MEMOIRS OF SHERLOCK HOLMES 3, 23, 27 (1894).

Appendix A

Bernstein Litowitz—Estimated Lead Counsel Fees (2014–2018)

Defendant	Court	Docket No.	Date of Fee Award	Estimated Bernstein Fee
Reserve Primary Fund	S.D.N.Y.	08-cv-8060	1/13/14	$4,502,087
Lehman Brothers	S.D.N.Y.	08-cv-5523	4/1/14	$1,586,242
LSI Corp.	Del. Ch.	9175-VCN	6/10/14	$538,607
Lehman Brothers	S.D.N.Y.	08-cv-5523	7/15/14	$12,583,036
JPM Acceptance	E.D.N.Y.	08-cv-1713	7/24/14	$27,086,384
Anadarko Petroleum	S.D. Tex.	12-cv-900	9/11/14	$3,077,283
Safeway	Del. Ch.	9445-CVL	9/17/14	$1,340,711
Bankrate	S.D.N.Y.	13-cv-7183	11/25/14	$4,500,000
Morgan Stanley	S.D.N.Y.	09-cv-4414; 09-cv-2137	12/19/14	$8,932,545
ANF	S.D. Ohio	14-cv-1380	1/8/15	$1,237,137
State Street	D. Mass.	09-cv-12146	1/8/15	$5,919,351
Cheniere	Del. Ch.	9710-VCL	3/16/15	$562,968
Freeport-McMoRan Copper	Del. Ch.	8145-VCN	4/7/15	$3,925,966
Athlon Energy	Del. Ch.	10250-VCG	4/21/15	$562,239
HealthWays	Del. Ch.	9789-VCL	5/8/15	$745,542
Bear Stearns	S.D.N.Y.	08-cv-8093	5/27/15	$48,021,288
Jefferies	Del. Ch.	8059-CS	6/5/15	$4,748,371
Invacare	N.D. Ohio	13-cv-1165	11/19/15	$2,641,437

Defendant	Court	Docket No.	Date of Fee Award	Estimated Bernstein Fee
Tower Group	S.D.N.Y.	13-cv-5852	11/23/15	$2,545,455
MF Global	S.D.N.Y.	11-cv-7866	11/25/15	$17,662,091
Bank of New York Mellon	S.D.N.Y.	11-cv-9175	12/4/15	$41,324,726
OSI	C.D. Cal.	13-cv-9174	12/21/15	$3,000,000
Kinder Morgan	Del. Ch.	9318-CVN	12/22/15	$3,342,700
Microsoft	W.D. Wash.	14-cv-540	1/13/16	$1,141,325
WAMU	W.D. Wash.	08-md-1919	2/5/16	$136,563
Globe Specialty Metals	Del. Ch.	10865	2/15/16	$2,343,233
GFI Group	Del. Ch.	10136	2/26/16	$530,902
Vaalco Energy	Del. Ch.	11775	4/20/16	$250,280
JPMorgan	S.D.N.Y.	12-cv-3852	5/10/16	$10,564,355
GM	E.D. Mich.	14-CV-11191	5/19/16	$18,146,608
Penn West	S.D.N.Y.	14-cv-6046	6/28/16	$2,400,593
Merck	D.N.J.	05-cv-1151; 05-cv-2367	6/28/16	$89,548,193
Cliffs Natural Resources	N.D. Ohio	14-cv-1031	6/30/16	$7,351,855
MF Global	S.D.N.Y.	11-cv-7866	7/15/16	$2,666,550
NII Holdings	E.D. Va.	14-cv-227	09/16/16	$1,583,319.27
Genworth Financial	E.D. Va.	14-cv-682	9/26/16	$24,840,667
Lumber Liquidators	E.D. Va.	13-cv-157	11/17/16	$2,980,312

Defendant	Court	Docket No.	Date of Fee Award	Estimated Bernstein Fee
Bancorp	D. Del.	14-cv-952	12/16/16	$2,368,280
Barrett Business	W.D. Wash.	14-cv-5884	2/22/17	$2,283,980
CVB Fin. Corp	C.D. Cal.	10-cv-6256	3/13/17	$1,530,281
EZCorp	S.D.N.Y.	14-cv-6834	4/26/17	$1,475,000
Altisource	S.D. Fla.	14-cv-81156	5/30/17	$6,230,883
Dole Food	D. Del.	15-cv-1140	7/18/17	$8,914,596
BioSCRIP	S.D.N.Y.	13-cv-6922	7/26/17	$2,560,098
Salix	S.D.N.Y.	14-cv-8925	8/18/17	$38,835,647
KBR	S.D. Tex.	14-cv-1287	8/24/17	$996,008
DFC Global	E.D. Pa.	13-cv-6731	9/20/17	$3,674,291
Rayonier	M.D. Fla.	14-cv-1395	10/5/17	$9,589,162
Intuitive Surgical	Cal. Sup. Ct.	526930	10/20/17	$2,509,119
Clovis	D. Co.	15-cv-2546	10/26/17	$29,672,623
Sanchez Energy	Del. Ch.	9132-VCG	11/6/17	$1,850,730
Amedisys	M.D. La.	10-cv-395	12/19/17	$4,925,288
CTI Biopharma	W.D. Wash.	16-cv-216	2/1/18	$3,920,592
21st Century Fox	Del. Ch.	2017-0833	2/9/18	$11,986,677
Ariad Pharm	D. Mass.	13-cv-12544	5/10/18	$291,667
Sorrento	Del. Ch.	12729-VCMR	5/15/18	$2,043,973
Commvault	D.N.J.	14-cv-5628	5/21/18	$1,815,137

Defendant	Court	Docket No.	Date of Fee Award	Estimated Bernstein Fee
Comscore	S.D.N.Y.	16-cv-1820	6/7/18	$20,716,223
GT Advanced	D. N.H.	14-cv-443	7/30/18	$5,898,129
Valeant/Allergan	C.D. Cal.	14-cv-2004	8/14/18	$28,699,424
Big Lots	S.D. Ohio	12-cv-445	8/28/18	$702,953
Green Mountain Coffee	D. Vt.	11-cv-289	10/22/18	$1,965,197
Quality Systems Inc	C.D. Cal.	13-cv-1818	11/19/18	$1,544,923
Wilmington Trust	D. Del.	10-cv-990	11/19/18	$29,740,233
Facebook	S.D.N.Y.	12-md-2389	11/28/18	$3,712,755
Virtus	S.D.N.Y.	15-1249	12/4/18	$2,432,537
Wells Fargo	N.D. Cal.	16-cv-5479	12/20/18	$87,889,867
Acacia	D. Mass.	17-cv-11504	1/23/19	$ 154,452
Cobalt	S.D. Tex.	14-cv-3428	2/13/19	$15,458,088
Heartware	S.D.N.Y.	16-cv-520	4/12/19	$13,080,000
Wells Fargo	NY Sup. Ct.	656587/2016	5/7/19	$6,804,100
VW	N.D. Cal.	15-md-2672	5/10/19	$11,959,668
Alere	D. Mass.	16-cv-10766	6/6/19	$505,092
Apollo Education Group	D. Az.	16-cv-689	6/27/19	$1,375,645
New Senior	Del. Ch.	13007	7/31/19	$5,938,973

Appendix B
Private Sector Employers of 2015 SEC Outward Revolvers:
1. Defense Side Law Firms

Akin Gump Strauss Hauer & Feld LLP

Arnall Golden Gregory LLP

Arnold & Porter Kaye Scholer LLP

Ballard Spahr LLP

Cadwalader, Wickersham & Taft LLP

Cleary Gottlieb Steen & Hamilton LLP (2)

Covington & Burling LLP

Davis Polk & Wardwell LLP

Debevoise & Plimpton LLP (3)

Dechert LLP

Finn Dixon & Herling LLP

Foley & Lardner LLP

Fridman Fels & Soto PLLC

Homer Bonner Jacobs Ortiz

Jenner & Block LLP

Jones Day

King & Spalding LLP

Lowenstein Sandler LLP

McDermott Will & Emery

Morrison & Foerster LLP (2)

Morgan, Lewis & Bockius LLP

Moses & Singer LLP

Proskauer Rose LLP

Ropes & Gray LLP

Seward & Kissel LLP

Sidley Austin LLP

Simpson Thacher & Bartlett LLP

Steptoe & Johnson LLP

Thompson & Knight LLP

Willkie Farr & Gallagher LLP

Wilmer Cutler Pickering Hale & Dorr LLP

2. Financial Sector Companies

Ascendant Capital, LLC	Miller Investment Trust
The BlackStone Group Inc. (2)	Morgan Stanley (2)
Carlson Capital, L.P.	Neuberger Berman Group LLC
Cigna Investments Group Inc.	Palladium Equity Partners, LLC
The D.E. Shaw Group	Promontory Financial Group LLC
Elliott Management Corp. (2)	Silver Lake Management, LLC
IEX Group Inc.	Tegus. Inc.
Lincoln Financial Group	

3. Other Companies

Exelon Corporation (2)	Symantec
Lyft, Inc.	Western Digital
Mylan Pharmaceuticals Inc.	

Appendix C

Immediate Post-SEC Law Firm Employers of 2004 Outward Revolvers (From Choi, Gulati & Pritchard)

Cannata, Ching & O'Toole

Debevoise & Plimpton, LLP

Dentons

DLA Piper (2)

Dorsey & Whitney LLP

Faegre Drinker Biddle & Reath LLP

Fulbright & Jaworski, LLP

Greenberg Traurig, LLP

Haynes & Boone, LLP

Hohmann, Taube and Summers, LLP

Holland & Hart LLP

Kirkland & Ellis LLP (2)

Latham & Watkins, LLP

Unnamed Law Firm in London and Washington DC

Middleton-Reutlinger

Morgan Lewis

Munsch Hardt Kopf & Harr, P.C.

Nixon Peabody LLP

O'Melveny & Myers LLP

Orrick, Herrington & Sutcliffe LLP

Paul, Weiss, Rifkind, Wharton & Garrison LLP

Reed Smith LLP

Shawe & Rosenthal

Sidley Austin LLP

Sonnenschein Nath & Rosenthal

Venable LLP

WilmerHale (3)

Appendix D

How Defense Firms and Whistleblower Firms Market Their SEC Alumni

Defense	Whistleblowers
"[Attorney A's] deep understanding and first-hand experience gained while working at the SEC gives him insight into to the staff's current thinking. This strengthens his ability to anticipate how the government will respond during internal investigations, allowing him to craft the best defense strategies for his clients."	"As the former [SEC official], [Attorney E] provides singular insight and unparalleled knowledge of the SEC whistleblower program in his work with clients."
"[Attorney B] applies his firsthand knowledge of the SEC to help clients manage risk and achieve positive outcomes in matters led by financial regulators."	"With more than two decades of enforcement and regulatory experience at the Securities and Exchange Commission and the Public Company Accounting Oversight Board, [Attorney F] brings a wealth and variety of expertise to advising and advocating for whistleblowers under the federal securities laws."
"[Attorney C's] experience serving at the SEC provides him with a deep familiarity of the federal securities and commodities laws and the processes of the SEC. . . . [Attorney C] understands how the SEC identifies, investigates, evaluates and presents cases for enforcement action."	"For nearly a decade prior to entering private practice, [Attorney G] served as senior counsel for the SEC's Enforcement Division . . . Using her experience as a former SEC attorney . . ., [Attorney G] provides critical, objective legal counsel to those who need knowledge and support to ensure their confidentiality and protection in undertaking the complex and ever-changing whistleblower laws."
"[Attorney D] offers deep insight into and perspective on the SEC, how it operates, and what to expect during an SEC examination or investigation."	"With over three decades of SEC enforcement experience, [Attorney H] is a tenacious champion of SEC whistleblowers . . . Over the years, [Attorney H] gained exceptional insight about all aspects of SEC investigations and litigation, experience he calls upon to guide his whistleblower clients through every stage of the reporting process."