Why Whistleblowing Walter May Be Helping the SEC Violate the Fourth Amendment

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* J.D. Candidate, The University of Iowa College of Law, 2024. Thank you to Alexander I. Platt and everyone on the *Journal of Corporation Law* for making this possible.

I. INTRODUCTION

The Securities and Exchange Commission's (SEC) Whistleblower Award Program was enacted to prevent another 2008 financial crisis.[1] While the program has largely received praise for rooting out securities fraud,[2] congressional leaders and scholars ten years later have begun to note its shortcomings.[3] Newly obtained data has led to a hotly contested debate about whether the Office of the Whistleblower favors whistleblowers represented by former SEC attorneys turned private whistleblower attorneys (Revolving Door Attorneys).[4] Comments made by Revolving Door Attorneys may illustrate a bigger issue at hand.[5] This Note focuses on the possibility that private whistleblowers and their attorneys are acting as government agents.

First, this Note examines the procedure of the whistleblower reward program, identifies the program's primary beneficiaries, and details how a private actor becomes a government agent. The analysis section then discusses the complexity of proving that a whistleblower is a government agent, viewed against the backdrop of comments made by Revolving Door Attorneys. Relevant case law suggests that government acquiescence will likely be found if the SEC had a reasonable probability to believe that the whistleblower would provide additional information, and the SEC encouraged such. Discerning whether a whistleblower acted to assist the government, however, is a more difficult task. The presence of a financial incentive seems only to increase the difficulty for judges in deciding whether the whistleblower acted to assist the government. Second, the analysis section looks at the gigantic hurdles that defendants face in litigating an SEC enforcement action, illustrating why most companies decide to settle early on and why it is near impossible to discover an SEC Fourth Amendment violation.

Lastly, this Note recommends integrating safeguards to prevent SEC whistleblowers from becoming government agents. This Note advocates for Congress to pass laws that require the SEC to document its communications with whistleblowers or their attorneys

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1. *See Wall Street Reform: The Dodd-Frank Act*, WHITE HOUSE, https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform [https://perma.cc/-GFW4-FB4Y] ("Dodd-Frank will prevent the excessive risk-taking that led to the financial crisis.").

2. *See, e.g.*, Caroline E. Dayton, Note, *An Empirical Analysis of SEC Enforcement Actions in Light of the Dodd-Frank Whistleblower Program*, 12 N.Y.U. J.L. & BUS. 215, 216 (2015) ("In the four years since its creation, the [whistleblower program] has been considered a success."); Gary Gensler, Chair, Sec. & Exch. Comm'n, Prepared Remarks at the Securities Enforcement Forum (Nov. 4, 2021), https://www.sec.gov/news/speech/gensler-securities-enforcement-forum-20211104 [https://perma.cc/THK7-FJ3Y] ("Moreover, we benefit greatly from the tips, complaints, and referrals of our robust whistleblower program."); Press Release, Senator Chuck Grassley, Grassley, Warren Work to Strengthen SEC Whistleblower Program (Mar. 31, 2022), https://www.grassley.senate.gov/news/news-releases/grassley-warren-work-to-strengthen-sec-whistleblower-program [https://perma.cc/5L9V-3BMS] ("SEC whistleblowers are critical for rooting out fraud and protecting investors . . . .").

3. *See, e.g.*, Grassley, *supra* note 2 ("While I'm pleased that the program has been an overwhelming success, we can still do more to strengthen protections, speed up claim processing and close other loopholes . . . ."); *see generally* Justin W. Evans et al., *Reforming Dodd-Frank from the Whistleblower's Vantage*, 58 AM. BUS. L.J. 453, 457–83 (discussing the whistleblower program's shortcomings).

4. Alexander I. Platt, *The Whistleblower Industrial Complex*, 40 YALE J. ON REGUL. 688, 693 (2023) (finding that former SEC attorneys turned whistleblower attorneys have received a disproportionate share of the program's reward money).

5. *See* discussion *infra* Part II.B.2.

and to make such documents available to defendants in legal proceedings. Doing so not only mitigates the risk that the SEC is violating the Fourth Amendment, but it also works towards neutralizing the SEC's home court advantage in enforcement actions against target companies. Additionally, this Note recommends that courts give greater weight to the whistleblower program's financial incentive by considering the whistleblower's occupation and salary if courts ever get to a State Actor analysis.

II. BACKGROUND

A. The 2008 Financial Crisis and the Creation of the Dodd-Frank Act

In September 2008, corporate greed, lax financial oversight, and toxic subprime mortgage lending[6] all boiled over to usher the United States economy into its worst financial crisis since the Great Depression in 1929.[7] In an attempt to restore confidence in U.S. financial institutions, Congress and the Obama Administration responded in 2010 by passing the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[8] The Act's main purpose was "[t]o promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes."[9]

1. The Whistleblower Award Program: How It Works

One way Congress sought to improve financial stability was to include protections in Dodd-Frank for individuals who reported potential securities violations to the SEC.[10] To encourage reporting, Congress created the whistleblower program.[11] The whistleblower program, run by the SEC, provides monetary incentives for individuals who provide the SEC with information that leads to successful SEC enforcement actions.[12] A brief explanation is warranted to understand what a successful SEC enforcement action looks like and how whistleblowers can receive a monetary reward.

2. Who Is a Whistleblower?

Section 922 of Dodd-Frank, titled "Whistleblower Protection," helped improve financial stability by amending The Securities Exchange Act of 1934 to include section

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6. Henry N. Pontell, William K. Black & Gilbert Geis, *Too Big to Fail, Too Powerful to Jail? On the Absence of Criminal Prosecutions After the 2008 Financial Meltdown*, 61 CRIME L. & SOC. CHANGE 1, 1 (2014).

7. Dennis M. Kelleher, Stephen W. Hall & Frank Medina, *The Dodd-Frank Act Is Working and Will Protect the American People If It Is Not Killed Before Fully Implemented*, 20 N.C. BANKING INST. 127, 127 (2016).

8. WHITE HOUSE, *supra* note 1.

9. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376, 1376 (2010).

10. Dodd-Frank Act § 922 (codified at 15 U.S.C. § 78u-6).

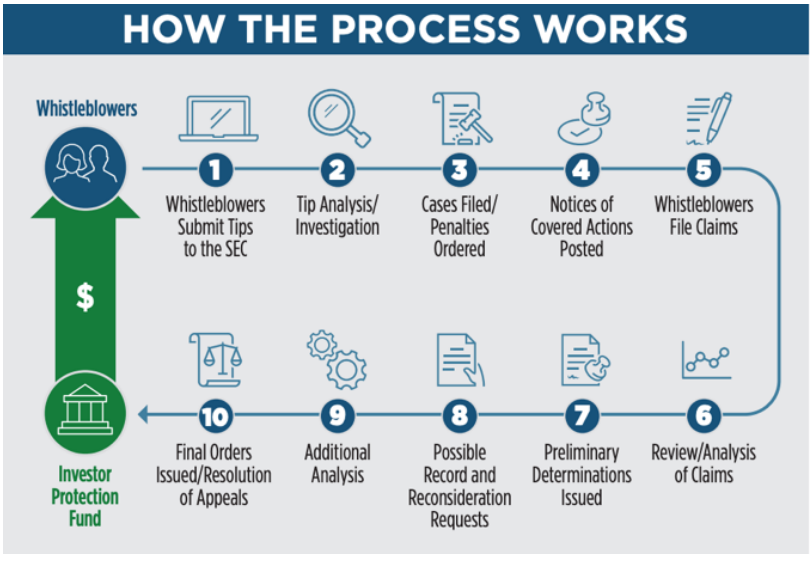
11. *Office of the Whistleblower: Frequently Asked Questions*, U.S. SEC. & EXCH. COMM'N (Apr. 6, 2023), https://www.sec.gov/whistleblower/frequently-asked-questions#:~:text=The%20Whistleblower%20Program%-20was%20created,securities%20laws%20to%20the%20SEC [https://perma.cc/73JB-ENCQ].

12. SEC. & EXCH. COMM'N, ANN. REP. TO CONG.: WHISTLEBLOWER PROGRAM 5 (2021).

21F, titled "Securities Whistleblower Incentives and Protection."[13] Section 21F(a)(6) coined a "whistleblower" as "any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission."[14] Simply, a "whistleblower" is someone who reports fraudulent securities activity to the SEC.

3. Steps 1–3: Submitting Tips and Screening

Figure 1.[15]



To incentivize reporting, Congress created a fund where whistleblowers may receive a monetary reward for their whistleblowing when they provide the SEC with original information[16] that results in a successful judicial or administrative action in favor of the SEC against the target company,[17] and leads to monetary sanctions that exceed one million

13. Dodd-Frank Act § 922(a).

14. 15 U.S.C. § 78u-6(a)(6).

15. SEC. & EXCH. COMM'N, *supra* note 12, at 13.

16. "Original information" is information derived from the whistleblower's own independent knowledge or analysis. *See* 15 U.S.C. § 78u-6(b)(1) (defining "original information" to mean information, "derived from the independent knowledge or analysis of the whistleblower" that was unknown to the SEC prior to being told, and that the information was not gleaned from a public record). Thus, whistleblowers cannot bring forth information that the SEC is already aware of or information that is publicly available unless the whistleblower uses the information to uncover unbeknownst wrongdoing. *Id.*; *see also* 17 C.F.R. § 240.21F-4(b) (2023) ("*Independent analysis* means your own analysis, whether done alone or in combination with others. *Analysis* means your examination and evaluation of information that may be publicly available, but which reveals information that is not generally known or available to the public.").

17. 15 U.S.C. § 78u-6(b)(1).

dollars.[18] This process begins with the whistleblower submitting a tip online or by mail to the SEC.[19]

After the tip has been submitted, it will be "evaluated by the Commission's Office of Market Intelligence (OMI) within Enforcement."[20] If a tip contains high-quality information, it will be forwarded to a regional office or another Division for further evaluation.[21] The investigation will begin with an informal inquiry where the SEC will develop facts to determine whether to bring a formal order of investigation.[22] A formal order of investigation allows the Division of Enforcement Staff to subpoena witnesses to testify and provide documents.[23] If the Enforcement Division believes it has sufficient evidence to bring an enforcement action, the SEC will file a civil action in a federal district court or initiate an SEC administrative proceeding.[24]

4. Steps 4–10: Claiming the Reward

Should the whistleblower's information lead to a successful enforcement action against the target company exceeding one million dollars in sanctions, they will have up to 90 days after the SEC posts a notice of covered action (NoCa) to file a reward claim.[25] Here, the Office of the Whistleblower (OWB) attorneys will gauge the level of involvement and contributions the whistleblower made in bringing about the final judgment.[26] This investigation typically takes several years, and whistleblowers are often unaware of the status of their claims.[27]

During this time, the OWB attorneys prepare a report for the Claims Review Staff suggesting whether the claimant should receive an award and, if so, how much they should receive.[28] Rewards range from 10 to 30% of the money collected by the SEC,[29] and where a whistleblower falls within that range depends on a list of factors that can increase or

18. *Id.* § 78u-6(a)(1).

19. 17 C.F.R. § 240.21F-9(a)–(b) (2023).

20. SEC. & EXCH. COMM'N, *supra* note 12, at 28.

21. *Id.* at 32.

22. SEC WHISTLEBLOWER ADVOCS., SEC INSIDER'S GUIDE: A GUIDE TO THE SEC'S INVESTIGATIVE AND ENFORCEMENT PROCESS 7 (2022), https://secwhistleblowerадvocate.com/pdf/SEC_Insiders_Guide.pdf [https://perma.cc/9E32-MK7D].

23. *Id.*

24. *Id.* ("Whether to bring a case in federal court or within the SEC before an administrative law judge (ALJ) often depends upon the type of sanction or relief that is being sought.").

25. SEC. & EXCH. COMM'N, *supra* note 12, at 13–14.

26. *Id.* at 14–15.

27. *Id.* at 15 (noting that "this process may take a significant amount of time"); *see also* John Holland, *SEC Enriches Fraudsters, Lawyers as Secrecy Shrouds Tips Program*, BLOOMBERG L. (July 26, 2022), https://www.bloomberglaw.com/bloomberglawnews/securities-law/X74GV9J8000000?bna_news_filter=securities-law#jcite [https://perma.cc/33L4-T8G2] (explaining that a claimant who helped the SEC recover $500 million from Teva Pharmaceutical Industries Ltd. "waited years without hearing from the SEC").

28. SEC. & EXCH. COMM'N, *supra* note 12, at 15.

29. Press Release, SEC, SEC Awards Approximately $18 Million to Three Whistleblowers (Jan. 19, 2023), https://www.sec.gov/news/press-release/2023-10#:~:text=Whistleblower%20awards%20can%20range%20from,could%20reveal%20a%20whistleblower%27s%20identity [https://perma.cc/FR6P-4DV8].

decrease the amount.[30] For example, a whistleblower's reward will increase if the information is significant, the whistleblower assists the SEC, the SEC is interested in deterring similar violations, or the whistleblower internally reported before or at the same time they reported the violation to the SEC.[31] Conversely, a whistleblower's reward will decrease if the whistleblower is partly culpable, unreasonably delayed reporting, or interfered with internal compliance systems.[32] Once the report is finalized, the Claims Review Staff considers the OWB attorneys' recommendation and issues a Preliminary Determination either approving the claim with a recommended recovery amount or denying the claim outright.[33]

Once the Preliminary Determination has been issued, claimants must submit a written request within 30 days to review either the basis of the Claim Review Staff's decision or the award amount.[34] In addition, the claimant must sign a confidentiality agreement preventing the claimant from sharing information outside the claims review process.[35] Claimants are then given 60 days to request a reconsideration of the decision or the reward amount.[36]

After the Claims Review Staff has either approved, denied, or not received a reconsideration request, the Claims Review Staff sends a "Proposed Final Determination" to the SEC for a final decision.[37] Here, the Commissioner can request "further review," approve the Preliminary Determination, deny the Preliminary Determination, or take no action and have the Preliminary Determination become final after 30 days.[38] Once finalized by the SEC, a claimant whose claim has been denied may appeal the decision to the United States Court of Appeals for the District of Columbia Circuit within 30 days after receiving the decision.[39]

5. Anonymity

Importantly, if a whistleblower wants to remain anonymous, they will have to hire an attorney to submit the tip on their behalf.[40] Hiring an attorney is an attractive idea for whistleblowers for multiple reasons. First, remaining anonymous greatly reduces the likelihood that an employer will retaliate against the whistleblower because there is a strong

30. Joseph Orr, *SEC Whistleblower Program: Qualifying for Awards*, KOHN, KOHN & COLAPINTO LLP (Aug. 15, 2023), https://kkc.com/frequently-asked-questions/sec-whistleblower-program/#:~:text=with%20Allison%20Lee.,Qualifying%20for%20SEC%20Whistleblower%20Awards,sanctions%20obtained%20by%20the%20SEC [https://perma.cc/7GPT-SRAV].

31. *Id.*

32. *Id.*

33. SEC. & EXCH. COMM'N, *supra* note 12, at 15.

34. *Id.* at 16.

35. *Id.*

36. *Id.*

37. *Id.* at 16–17.

38. SEC. & EXCH. COMM'N, *supra* note 12, at 17.

39. *Id.*

40. 17 C.F.R. § 240.21F-9(c) (2023).

likelihood that the employer will never know who reported.[41] Second, hiring an attorney mitigates the risk of missing deadlines or filing forms incorrectly.[42]

B. Risk, Reward, and Winners

While many individuals have risked their professional careers by whistleblowing, only a very small percentage have reaped the rewards.[43] From 2011 to 2021, the SEC received 52,400 whistleblower tips,[44] yet only 214 individuals have received a reward.[45] In other words, only 0.4% of whistleblower tips have resulted in rewards. Shockingly, of the $1.1 billion paid out to the 214 individuals, $562 million of that money was paid out to 108 individuals in 2021 alone.[46] Additionally, the time it takes to receive these rewards is anything but quick. In fact, it is common for four to five years to pass from the time enforcement actions have been resolved to the time the whistleblowers have received their reward.[47]

1. The Winners of the Whistleblower Program

Not everyone has struggled with the whistleblower reward process. Rather, a select few have done remarkably well based on newly revealed data. Following a two-year battle with the SEC in a FOIA request, Professor Alexander Platt found that whistleblowers who are represented by attorneys when submitting tips received five times more in rewards than unrepresented whistleblowers, and that the average award for represented whistleblowers "dramatically exceeded" those for unrepresented whistleblowers.[48] Additionally, Platt found that Revolving Door Attorneys have done remarkably well for themselves, earning between $53 million and $70 million based upon a 30 to 40% contingency fee estimate.[49]

2. Friends with Benefits

Revolving Door Attorneys' success may be partly due to an open line of communication between the attorney and the SEC. For example, Sean McKessy, "the first

41. Joseph Orr, *The Best Strategies for Submitting a SEC Whistleblower Tip*, KOHN, KOHN & COLAPINTO LLP (June 15, 2023), https://kkc.com/frequently-asked-questions/best-strategies-sec-whistleblower-tip/#Remain_Anonymous [https://perma.cc/CXK5-3NZF].

42. *Id.*

43. SEC. & EXCH. COMM'N, *supra* note 12, at 1.

44. *Id.* at 28.

45. *Id.* at 1.

46. *Id.* at 1–2.

47. *Id.* at 13 ("The time between the submission of a whistleblower tip and when an individual may receive payment of an award can be several years, particularly when the underlying investigation is especially complex, litigation is lengthy, there are multiple, competing award claims, or there are claims for related actions."); Erika Kelton, *The SEC Whistleblower Program: Make or Break Time*, FORBES (Feb. 26, 2020), https://www.forbes.com/sites/erikakelton/2020/02/26/the-sec-whistleblower-program-make-or-break-time/?sh=-430734385139) [https://perma.cc/Z8YS-U446].

48. Platt, *supra* note 4, at 693. Professor Platt of Kansas University School of Law is a leading scholar in the SEC's Whistleblower program. Following a two-year-long Freedom of Information Act (FOIA) request battle with the SEC to obtain information about the whistleblower program, his article *The Whistleblower Industrial Complex* adds a breadth of new data and insight into the SEC's whistleblower program. *Id.*

49. *Id.*

Chief of the SEC Office of the Whistleblower and the principal architect of the SEC whistleblower program,"[50] explained that some SEC staff members have taken to the idea of using Revolving Door Attorneys as a resource in investigating whistleblower claims and that "some [SEC enforcement attorneys] are willing to just turn over their entire file to me and my client to say 'can you help us contextualize what we were told by the company?'"[51]

In fact, it seems to be common practice for Revolving Door Attorneys to streamline communications between their whistleblower clients and the SEC. Jordan Thomas, former Assistant Director for the SEC's Enforcement Division and one of five former Revolving Door Attorneys at the whistleblower law firm "SEC Whistleblower Advocates PLLC,"[52] explained that he is "willing to use non-traditional tactics" that the SEC is not permitted to use.[53] Further, Thomas has set up phone calls between his clients and the SEC with the use of voice-changing technology to shield his clients' identities[54] and has his client help the SEC identify the relevance of documents in ongoing investigations.[55] These tactics seem to have been successful for Thomas, as three of his clients hold the record for the largest payout in whistleblower program history when they were collectively awarded $83 million in a case against Merrill Lynch.[56]

Some have questioned whether it is ethical for those who created or worked within the program to benefit from it.[57] Even McKessy himself has recognized that his ability to directly receive good cases from the SEC is an unfair advantage.[58] However, McKessy contends that his reputation and knowledge as a former SEC employee stand to benefit whistleblowers.[59] Others argue that SEC investigators should be able to turn to trusted lawyers to help sort through the thousands of tips that the SEC receives.[60] Yet, Platt suggests that this trust could be detrimental if it results in the SEC attaching more credibility to weaker tips and overlooking stronger ones.[61] Whether it is ethical for Revolving Door Attorneys to financially benefit from a government program they have unique knowledge of is a topic that is outside the scope of this Note. However, the debate

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50. *About Us: Sean X. McKessy*, PHILLIPS & COHEN, https://www.phillipsandcohen.com/attorney/sean-x-mckessy/ [https://perma.cc/C7VQ-CF4Q].

51. Fraud in America, *The SEC Whistleblower Program*, TAXPAYERS AGAINST FRAUD EDUC. FUND, at 25:20–25:58 (Oct. 6, 2021), https://www.taf.org/resources/sec-whistleblower/ [https://perma.cc/J3M8-S7CN].

52. *Our Team: Jordan A. Thomas*, SEC WHISTLEBLOWER ADVOCS., https://secwhistlebloweradvocate.com/our-attorneys/jordan-thomas/ [https://perma.cc/M75V-HAS7].

53. *The Whistleblower Whisperer*, NAT'L PUB. RADIO: PLANET MONEY (May 29, 2019), https://www.npr.org/transcripts/728001911 [https://perma.cc/887E-UHU8].

54. *Id.*

55. *See* Complaint at 7, Thomas v. SEC, No. 21-cv-108 (D.D.C. Jan. 13, 2021)

> Plaintiff and his clients assist the Staff with their investigations and any related prosecutions. During this phase, among many other things, he and his clients respond to factual and legal inquiries, review and comment on potentially relevant documents, and participate in related investigations and prosecutions—all at the request of the Staff.

56. *The Whistleblower Whisperer*, *supra* note 53.

57. *See* Holland, *supra* note 27 (describing the whistleblower program as a "financial boon for law firms that hired former agency officials"); Platt, *supra* note 4, at 693–94 (finding that large portions of whistleblower rewards are being diverted to whistleblower attorneys, who often are former SEC attorneys).

58. Holland, *supra* note 27.

59. *Id.*

60. *Id.*

61. Platt, *supra* note 4, at 720.

will likely continue as more SEC attorneys are beginning to switch over to the private sector, especially when major players like former SEC Commissioner Allison Herren Lee are the ones submitting tips on behalf of whistleblowers.[62]

C. The Players and the Rules of the Game

SEC attorneys and whistleblowers do not play by the same rules. Thus, an explanation of the rules is necessary. The SEC's Enforcement Manual warns SEC agents of the dangers of working alongside private entities because "joint action" between the SEC and private entities can implicate the State Actor Doctrine.[63] Private action "may be fairly attributable" to the SEC "if there is a sufficiently close nexus between the state, or government entity, and the challenged action of a private entity."[64] The manual explains that a "private entity's investigations should be parallel and should not be conducted jointly" and that SEC agents should not "suggest investigative steps to the private entity."[65]

In formal investigations, SEC officers need a subpoena to compel a target of an investigation to provide documents or testimony.[66] Yet, the targets of these investigations are not powerless. Targets have the right to contest subpoenas for documents and testimony,[67] the right to know how testimony will be recorded,[68] the right to counsel,[69] and more.[70]

While the SEC is constrained by rules and regulations, private actors do not have to play by the same rules.[71] Because private actors are not constrained by the Fourth Amendment,[72] whistleblowers and their attorneys are much freer to collect documents, record conversations, and obtain other information.[73] Thus, a whistleblower may photocopy documents or record private conversations that showcase their employer's securities fraud and include such in their tip to the SEC.[74] However, if the whistleblower

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62. Geoff Schweller, *Former SEC Commissioner Allison Herren Lee Joins Kohn, Kohn & Colapinto*, KOHN, KOHN & COLAPINTO LLP (Mar. 8, 2023), https://kkc.com/blog/former-sec-commissioner-allison-herren-lee-joins-kohn-kohn-colapinto/ [https://perma.cc/C88F-KT9N].

63. SEC. & EXCH. COMM'N, ENFORCEMENT MANUAL 33 (2017).

64. *Id.*

65. *Id.* at 34.

66. 17 C.F.R. § 201.232(a) (2023).

67. 17 C.F.R. § 201.232(e) (2023).

68. SEC. & EXCH. COMM'N, *supra* note 63, at 63.

69. 17 C.F.R. § 203.7(b) (2023).

70. *See* 17 C.F.R. § 203.7 (discussing rights of witnesses in SEC formal investigations).

71. Burdeau v. McDowell, 256 U.S. 465, 475 (1921)

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies . . . .

72. *Id.*

73. Samuel Crecelius, Note, Lichtenberger *and the Three Bears: Getting the Private Search Exception and Modern Digital Storage "Just Right*,*"* 4 TEX. A&M L. REV. 209, 213 (2017) ("[T]he Fourth Amendment does not apply 'to a search or seizure, even an unreasonable one, effected by a private individual' so long as the private party is truly acting in a private capacity and not as an agent of the state or with its sanction.").

74. *See* United States v. Feffer, 831 F.2d 734, 737 (7th Cir. 1987) (explaining that the employee's production of the company's tax return and other documents to the IRS was a "purely private search and thus not subject to fourth amendment constraints").

and their attorney do so at the direction of the SEC, they risk becoming government agents.[75]

Despite the Supreme Court acknowledging in *Skinner v. Railway Labor Executive Association* that a private actor may transform into a government agent when they act on behalf of the government,[76] the Court has not provided much guidance for understanding when that transition takes place. Circuit courts have used varying versions of the same test. Generally, circuit courts will find that a private citizen functions as a government agent when: (1) the government knew of, and acquiesced in the intrusive conduct, and (2) the private actor's purpose was to assist law enforcement rather than to further their own interests.[77] This is a fact-intensive inquiry,[78] and the defendant bears the burden of proving that the private actor acted as a government agent.[79]

III. ANALYSIS

Comments made by Revolving Door Attorneys raise concerns that the SEC may be violating the Fourth Amendment by encouraging whistleblowers to collect evidence under the nose of their employers.[80] Whether whistleblowers and their attorneys are acting as government agents on behalf of the SEC has yet to be explored. Caselaw suggests that a finding of government acquiescence requires some form of active government participation

75. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 614 (1989) ("Although the Fourth Amendment does not apply to a search or seizure, even an arbitrary one, effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government.").

76. *Id.* at 614–15.

77. *E.g.*, United States v. Steiger, 318 F.3d 1039, 1045 (11th Cir. 2003) ("For a private person to be considered an agent of the government, we look to two critical factors: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the private actor's purpose was to assist law enforcement efforts rather than to further his own ends."); United States v. Smythe, 84 F.3d 1240, 1242 (10th Cir. 1996) (following precedent that held that intent and knowledge were necessary components to prove the agency relationship); United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982) ("[A] certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state . . . ." (quoting United State v. Walther, 652 F.2d 788 (9th Cir. 1981))); United States v. Ginglen, 467 F.3d 1071, 1074 (7th Cir. 2006) ("To determine whether an individual was acting as a private party or as an 'instrument or agent' of the government, we examine 'whether the government knew of and acquiesced in the intrusive conduct and whether the private party's purpose in conducting the search was to assist law enforcement agents or to further its own ends.'" (citation omitted)).

78. *Skinner*, 489 U.S. at 614.

79. *See, e.g.*, United States v. Richardson, 607 F.3d 357, 364 (4th Cir. 2010) ("The defendant shoulders the burden of establishing the existence of an agency relationship . . . ."); United States v. Reed, 15 F.3d 928, 931 (9th Cir. 1994) ("The defendant has the burden of showing government action."); *Feffer*, 831 F.2d at 739 ("[I]t is the movant's burden to establish by a preponderance of the evidence that the private party acted as a government instrument or agent.").

80. *See supra* Part II.B.2.

or encouragement,[81] which may not be too difficult for target corporations to prove.[82] Proving that the private actor's purpose was to assist the government, however, seems to be a much heavier burden.[83]

A. Showing Government Acquiescence in the Whistleblower Context

In considering hypothetical litigation where a target company challenges an SEC enforcement action on the grounds that evidence was unlawfully obtained by a private actor acting as a government agent, it must be determined what level of government involvement would create an agency relationship with the whistleblower. In *Skinner*, the Supreme Court explained that whether a private actor is an agent of the government depends on the degree of the government's participation in the private actor's conduct.[84] While, according to the Court, a finding of agency does not require the government to compel a private actor to act, it requires more than a mere "passive position toward the underlying private conduct."[85] Thus, an agency relationship between the government and a private actor lies somewhere between compulsion and passive knowledge.

While the U.S. Supreme Court provided a relatively broad explanation of the level of government knowledge required for a government-private actor agency relationship, circuit courts have directly answered the question by requiring government acquiescence in the private actor's actions.[86] Generally, a court will find government acquiescence when there is active knowledge of the conduct accompanied by some affirmative encouragement or control.[87]

United States v. Feffer provides a factually similar and illustrative example of what government acquiescence might look like in the SEC whistleblower context.[88] In *Feffer*, an employee anonymously called the IRS to report her employer's tax fraud initially due to fear of being held responsible.[89] Eventually, the employee revealed her identity and subsequently met with IRS agents six to eight more times in her home, each time providing additional documents evidencing her employer's tax fraud.[90] IRS agents advised the employee that they could not encourage her to take any documents, but they would accept

81. *See, e.g.*, United States v. Jarrett, 338 F.3d 339, 345 (4th Cir. 2003) ("[W]e have required evidence of more than mere knowledge and passive acquiescence by the Government before finding an agency relationship."); *Smythe*, 84 F.3d at 1243 ("We are satisfied that knowledge and acquiescence . . . encompass the requirement that the government agent must also affirmatively encourage, initiate or instigate the private action."); United States v. Koenig, 856 F.2d 843, 850 (7th Cir. 1988) ("It is only by the exercise of some form of control that the actions of one may be attributed to another. Mere knowledge of another's independent action does not produce vicarious responsibility absent some manifestation of consent and the ability to control." (citation omitted)).

82. *Feffer*, 831 F.2d at 739–40 (explaining that there was no error in the district court's finding of government acquiescence in the whistleblower's search)

83. *See infra* Part III.B.

84. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 613–15 (1989).

85. *Id.* at 615.

86. *See* cases cited *supra* note 77 (requiring government knowledge or acquiescence in the private actor's conduct to find an agency relationship).

87. *See, e.g.*, cases cited *supra* note 81 (using an "intent" standard when analyzing the State Actor doctrine).

88. United States v. Feffer, 831 F.2d 734, 735 (7th Cir. 1987).

89. *Id.*

90. *Id.* at 735–36.

voluntarily provided documents.[91] Moreover, the IRS agents told the employee that it took a long time to obtain copies of tax returns from the IRS Kansas City Service Center which prompted the employee to later mail copies of her employer's tax returns to the IRS agents.[92]

The district court found that, after the initial meeting with the employee, the IRS agents knew or should have known the employee would be providing additional documents and therefore had acquiesced in the intrusive conduct.[93] The Seventh Circuit found no error in the district court's finding of government acquiescence but affirmed the district court's ruling in favor of the government because the defendant failed to prove that the employee's purpose was to assist law enforcement,[94] which will be discussed in Part III.B.1.

Contrast *Feffer* with the comments made by Sean McKessy and Jordan Thomas. Sean McKessy said that some SEC enforcement attorneys are willing to turn over their entire file to McKessy and his client.[95] From there, McKessy and his client help the SEC contextualize the target company's response to the SEC's allegations..[96] It is difficult to imagine courts refusing to find government acquiescence when the SEC is actively asking whistleblowers and their attorneys to help solidify their understanding if it results in the production of additional information.

Again, each case is evaluated on the particular facts of the case,[97] but if "contextualize" involves retrieval or production of additional documents, it should rise to government acquiescence. In *Feffer*, the mere knowledge that the whistleblower *would likely* produce additional documents was enough to find government acquiescence.[98] Thus, if the SEC is actively requesting assistance from whistleblowers to prove illegal conduct during the investigation stage, as McKessy's comments suggest, courts should be quick to find government acquiescence if the whistleblower produces additional documents.

Jordan Thomas's comments that he sets up phone calls for his client to speak with the SEC while shielding his clients' identities through a voice-changer[99] also sounds like government acquiescence because it can be inferred that the SEC is suggesting investigative steps to the whistleblower.[100] One can only speculate what is being discussed during these conversations, but if the conversation directly leads to the whistleblower producing additional evidence during the investigation stage, it likely meets government acquiescence. Thus, government acquiescence should be found where the SEC tells or even subtly communicates to whistleblowers that particular types of evidence would bolster their

91. *Id.* at 736.

92. *Id.*

93. *Feffer*, 831 F.2d at 737.

94. *Id.* at 739–40.

95. Fraud in America, *supra* note 51.

96. *Id.*

97. Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 614 (1989) (noting designation of a party's status as instrument or agent of the government can only be resolved "in light of the circumstances").

98. *Feffer*, 831 F.2d at 739–40 (affirming where federal agents knew, or should have known the whistleblower would produce documents, government acquiescence is found).

99. *The Whistleblower Whisperer*, *supra* note 53.

100. *See* United States v. Smythe, 84 F.3d 1240, 1243 (10th Cir. 1996) ("We are satisfied that knowledge and acquiescence . . . encompass the requirement that the government agent must also affirmatively encourage, initiate or instigate the private action.").

tips because it actively encourages the whistleblower to provide information that the SEC could only access with a subpoena.

Jordan Thomas has also stated that he and his clients help the SEC during the investigation stage by, "among many other things," "respond[ing] to factual and legal inquiries, review[ing] and comment[ing] on potentially relevant documents, and participat[ing] in all related investigations and prosecutions—all at the request of the Staff."[101] Yet, this conduct would not lead to a finding of government acquiescence because Thomas and his client are only commenting on the agency's evidence. Without furnishing additional documents or incriminating evidence, the whistleblower cannot have acted as a government agent because no joint action has been taken.[102]

Thus, in the whistleblower context, government acquiescence will likely depend on the whistleblower's production of additional evidence after the SEC has, in some way, suggested that it would be beneficial for the whistleblower to do so. SEC staff should be very careful in how they interact with whistleblowers when the whistleblower is providing evidence because even slight encouragement by the SEC could lead to a finding of government acquiescence.

B. Proving the Private Actor's Purpose Was to Assist the Government

Even where a court finds government acquiescence, the private actor must have acted with the purpose of assisting the government in order to find an agency relationship.[103] This is a fact-intensive inquiry,[104] and courts will look at the conduct the private actor engaged in and the reasons for the search.[105] In evaluating the private actor's purpose, circuit courts also consider whether the private actor was offered a reward for engaging in the search.[106] However, it is unclear whether a whistleblower must be entirely motivated by a reward or whether being partially motivated by a reward is enough.

1. The Complexities and Various Approaches of Evaluating a Private Actor's Purpose When a Financial Reward Is Present

In *United States v. Walther*, the Ninth Circuit held that an airline employee was a government agent because he expected to receive a reward from the DEA when opening a

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101. Complaint at 7, Thomas v. SEC, No. 21-cv-108 (D.D.C. Jan. 13, 2021)

> Plaintiff and his clients assist the Staff with their investigations and any related prosecutions. During this phase, among many other things, he and his clients respond to factual and legal inquiries, review and comment on potentially relevant documents, and participate in related investigations and prosecutions—all at the request of the Staff.

102. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (explaining that, for a private citizen to be a government agent, the private citizen must have acted jointly with the state or received significant aid from the state).

103. *E.g.*, United States v. Steiger, 318 F.3d 1039, 1045 (11th Cir. 2003); United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982); *Smythe*, 84 F.3d at 1242; United States v. Ginglen, 467 F.3d 1071, 1074 (7th Cir. 2006).

104. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 614 (1989).

105. *See* United States v. Feffer, 831 F.2d 734, 739–40 (7th Cir. 1987) (examining the private actor's conduct to find their purpose for reporting).

106. *See* United States v. Shahid, 117 F.3d 322, 325 (7th Cir. 1997) (explaining that "[o]ther useful criteria [is] . . . whether the government offered the private actor a reward").

suitcase that contained illegal drugs.[107] There, the private actor had previously received rewards for acting as an informant for the DEA,[108] which the Ninth Circuit found was sufficient to rule that the private actor acted with the purpose of assisting the government.[109]

Yet, other circuits seem to require private actors to be entirely motivated by a reward in order to find that their purpose was to assist the government. The Sixth Circuit in *United States v. Bruce* found that a financial incentive did not transform hotel employees into government agents when officers asked the employees to preserve a hotel guest's trash because the employees had an "independent intent" and "obligation" to clean rooms and empty trash as part of their work duties.[110] Thus, the court concluded that the employees did not become government agents just "because the police took an interest in the items they planned to remove from the room during their normal cleaning activities."[111]

Walther and *Bruce* illustrate the complexity of determining an individual's motivation for whistleblowing when a financial reward is at play. In reading *Walther*, one would assume that prior rewards for assisting the government should always be enough to show that the private actor acted with the purpose of assisting law enforcement. However, *Bruce* blurs the analysis of a private actor's purpose. While the hotel employees did have an obligation to remove trash from the room,[112] their job did not require that they preserve evidence for law enforcement. Instead, what likely motivated them to preserve the evidence for law enforcement was the hotel's policy of paying a reward to employees who assist law enforcement personnel.[113]

In both *Walther* and *Bruce*, a reward was a motivating factor for assisting the government. One possible explanation for the differing outcomes is who offered the reward. In *Bruce*, the hotel paid employees for assisting law enforcement,[114] whereas in *Walther*, the DEA directly paid the reward to the airline employee.[115] For whistleblowers, this is not an issue because the reward is offered and paid for by the government.[116]

2. The Mixed Motivations of Whistleblowers

While the SEC directly paying whistleblowers may seem to weigh in favor of finding that a private actor's purpose was to assist the government, the analysis becomes murky when considering motivating factors in reporting a securities violation. In the case of SEC whistleblowers, individuals could decide to whistleblow for fear of being held personally

107. United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981).
108. *Id.* at 790.
109. *Id.* at 793.
110. United States v. Bruce, 396 F.3d 697, 705–06 (6th Cir. 2005).
111. *Id.* at 706.
112. *Id.*
113. *Id.* at 706 n.2.
114. *Id.*
115. United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981).
116. SEC. & EXCH. COMM'N, *supra* note 12, at 1.

liable,[117] for altruistic purposes,[118] for revenge,[119] or for a host of other individual, situational, or environmental reasons.[120]

Feffer demonstrates the difficulty in ascertaining the mixed motivations of a whistleblower. There, the Seventh Circuit found that, while the government had acquiesced in the employee's searches, the employee had her own independent purposes in conducting the searches.[121] The court found that she reported for fear of being held responsible for her employer's tax fraud,[122] and continued to supply IRS agents with documents out of disdain for her boss, partly due to the firing of her boyfriend.[123] Although the IRS agents had informed the employee that she could apply for a reward for providing information,[124] she was never paid a reward,[125] and it is unclear whether she sought one out. [126] Regardless, the Seventh Circuit paid scant attention to the reward factor in affirming the district court's finding of an independent purpose.[127]

In examining *Walther*, *Bruce*, and *Feffer*, it is unclear what role a financial reward plays in analyzing a private actor's purpose. However, these cases seem to suggest that a financial reward needs to be a substantial motivating factor for it to serve as the basis for finding that a private actor's purpose was to assist the government.[128] It is likely that, for a fair amount of whistleblowers, the reward is the entire reason they report.[129] This is not

117. *See* United States v. Feffer, 831 F.2d 734, 735 (7th Cir. 1987) (reporting due to fear of being held responsible for tax fraud).

118. *See* Barbara Culiberg & Katarina Katja Mihelič, *The Evolution of Whistleblowing Studies: A Critical Review and Research Agenda*, 146 J. BUS. ETHICS 787, 795 (2016) (finding that "social consensus, magnitude of consequence, and temporal immediacy" play a key role in an individual's decision to report).

119. *See Feffer*, 831 F.2d at 739 ("In addition, there was evidence to suggest that [the whistleblower] may have also been motivated to provide the IRS with documents by a desire to get even with the defendants for firing her live-in boyfriend.").

120. *See* Culiberg & Mihelič, *supra* note 118, at 794–97 (examining individual, situational, and environmental factors that lead individuals to whistle-blow).

121. *See Feffer*, 831 F.2d at 739–40.

122. *Id.* at 739 ("[The whistleblower] testified that she had participated in the defendants' attempts to defraud the IRS for several years and that, as her involvement increased, she began to fear the possible consequences.").

123. *Id.*

124. *Id.* at 736.

125. *Id.*

126. *See Feffer*, 831 F.2d at 739 ("[I]n reviewing the record it doesn't seem to contain any evidence that a reward was actually offered or that even one was sought, or that the agents in any way promised her immunity." (alteration in original)).

127. *See id.* at 739–40 (agreeing with the lower court that the whistleblower's actions "were purely voluntary and not the result of government inducement").

128. *See, e.g.*, United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981) (finding that the airline employee had only opened the case because he thought illegal drugs were inside it, and he opened it with the expectation of receiving a reward from the DEA); United States v. Bruce, 396 F.3d 697, 705–06 (6th Cir. 2005) ("These private employees are not transformed into government agents merely because the police took an interest in the items they planned to remove from the room during their normal cleaning activities, nor does any additional monetary or public-minded incentive detract from their independent obligation to remove trash from guest rooms."); *Feffer*, 831 F.2d at 739–40 (holding that the whistleblower had an independent purpose and that her actions were voluntary).

129. *See* Press Release, SEC, SEC Bars Two Individuals from Whistleblower Award Program, Release No. 2021-199, (Sept. 28, 2021) ("The Securities and Exchange Commission today announced that it has barred two individuals from the SEC's whistleblower award program, each of whom filed hundreds of frivolous award applications.").

difficult to imagine since the SEC itself has stated that the underlying purpose of the whistleblower program is to provide financial incentives in exchange for reporting possible securities violations.[130] Moreover, the SEC seems to be aware of whistleblowers' financial motives in reporting considering its continual advertisement of large payouts.[131]

C. The SEC Has Likely Violated the Fourth Amendment

Given the foregoing, it is likely that some courts would find that the SEC has violated the Fourth Amendment in some of its enforcement actions against target companies. McKessy and Thomas's comments suggest that an open line of communication exists between the SEC and their clients.[132] It is easy to imagine that "contextualizing" the SEC's ongoing investigations[133] and setting up phone calls between the SEC and whistleblowers[134] will lead to the production of additional evidence.[135] Communications between the SEC and whistleblowers leading to the production of additional evidence should result in a finding of government acquiescence.

However, whether the whistleblower acted to assist law enforcement, as previously discussed, is a much more difficult analysis for a court. Studies show financial incentives are likely a key reason why individuals decide to blow the whistle.[136] With this in mind, courts may turn to the perceived severity of wrongdoing. For example, if the whistleblower is an individual who makes a modest salary and reports what facially appears to be a minuscule violation, courts may find that the financial incentive was the primary reason for reporting because studies show the presence of a financial incentive results in a higher likelihood that an individual will report to the SEC.[137] Yet, individuals with the greatest ability to detect a corporation's securities violations (e.g., upper management, accountants, board members, etc.)[138] are likely to be individuals who are financially well off and may

130. Securities Whistleblower Incentives and Protections, Exchange Act Release No. 64,545, 76 Fed. Reg. 34300, 2011 WL 2045838, at *90, 101 SEC Docket 630 (declared May 25, 2011) (June 13, 2021) ("The Congressional purpose underlying Section 21F of the Exchange Act is to encourage whistleblowers to report possible violations of the securities laws by providing financial incentives . . . .").

131. SEC. & EXCH. COMM'N, *supra* note 12, at 1 ("[W]e anticipate that the awards made in FY 2021 will continue to incentivize others to come forward promptly and report high-quality information regarding possible securities laws violations to the Commission.").

132. *See supra* Part II.B.2.

133. Fraud in America, *supra* note 51.

134. *See supra* Part II.B.2.

135. *See supra* Part III.A.

136. *See* Paul Andon et al., *The Impact of Financial Incentives and Perceptions of Seriousness on Whistleblowing Intention*, 151 J. BUS. ETHICS 165, 165 (2018) ("We find that a financial incentive results in a higher intention to whistleblow to a relevant external authority."); Kelly Richmond Pope & Chih-Chen Lee, *Could the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 Be Helpful in Reforming Corporate America? An Investigation on Financial Bounties and Whistle-Blowing Behaviors in the Private Sector*, 112 J. BUS. ETHICS 597, 597 (2013) ("Our results indicate that a financial bounty has the potential to increase participants' propensity to report questionable acts . . . .").

137. Paul Andon et al., *supra* note 136, at 165 ("[W]hen the perceived level of seriousness is lower, the presence of financial incentive results in a higher intention to report the financial reporting fraud externally.").

138. *See* MICHAEL R. YOUNG, FINANCIAL FRAUD PREVENTION AND DETECTION: GOVERNANCE AND EFFECTIVE PRACTICES 135 (2014) ("On the one hand, it is senior management that controls the corporate mechanisms through which the truth can be most efficiently uncovered.").

report for more altruistic purposes.[139] Thus, the severity of the securities violation and a whistleblower's financial health would likely be an important consideration in determining whether the whistleblower was financially motivated in reporting.

D. Impractical Hurdles and Stacked Odds

Under the current State Actor framework, it is possible that some corporations have had their Fourth Amendment rights violated. Unfortunately for them, it would be near impossible to know or prove. Once the SEC recommends an enforcement action against an entity, the parties will either settle the case or litigate.[140] Typically, companies will enter a settlement agreement with the SEC because it allows them to negotiate their penalty.[141] In this instance, the target company will never know whether a whistleblower helped the SEC bring the enforcement action.

Alternatively, if the target company wishes to press forward and litigate, the SEC will either bring the action in federal court or in an administrative proceeding.[142] Since Dodd-Frank broadened the SEC's authority in administrative proceedings, the SEC will usually bring the action before an SEC administrative law judge (ALJ).[143] Here, the parties will engage in limited discovery and motion practice,[144] and the SEC's Rules of Practice section 201.230 allows the SEC to withhold any document or redact any information that would disclose the identity of a confidential source.[145] However, the hearing officer may require the SEC to submit a list of documents that are being withheld to determine whether the documents should be made available to the defendant.[146]

In initiating the administrative proceeding, the SEC can direct the ALJ to issue their initial decision within 30, 75, or 120 days of either the completion of post-hearing briefing, completion of briefing on dispositive motions, or the ALJ's determination that a party has

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139. *See* Culiberg & Mihelič, *supra* note 118, at 795 (finding "social consensus, magnitude of consequence, and temporal immediacy" play a key role in an individual's decision to report).

140. PRAC. L. LITIG., ROADMAP OF THE SEC'S INVESTIGATION AND ENFORCEMENT PROCESS, Westlaw (database updated Jan. 1, 2023).

141. Rebecca Fike & Ryan Sun, *Deal or No Deal: Deciding to Settle or Litigate When Faced with a DOJ or SEC Enforcement Action Under the Current Administration*, VINSON & ELKINS LLP (Apr. 6, 2022), https://www.velaw.com/insights/deal-or-no-deal-deciding-to-settle-or-litigate-when-faced-with-a-doj-or-sec-enforcement-action-under-the-current-administration/ [https://perma.cc/66SL-KK9X]; *see also* Stephen J. Choi & A.C. Pritchard, *The SEC's Shift to Administrative Proceedings: An Empirical Assessment*, 34 YALE J. ON REGUL. 1, 22 (2017) (finding "a sharp increase in cooperation or remediation by defendants in administrative proceedings post-Dodd-Frank"); CORNERSTONE RSCH., SEC ENFORCEMENT ACTIVITY: PUBLIC COMPANIES AND SUBSIDIARIES 5 (2022) ("The vast majority of public company and subsidiary actions (93%) in FY 2022 were filed and settled concurrently.").

142. SEC WHISTLEBLOWER ADVOCS., *supra* note 24.

143. PRAC. L. LITIG., NAVIGATING SEC ADMINISTRATIVE PROCEEDINGS, Westlaw (database updated Apr. 2023) (explaining that, since 2015, the SEC has brought 89% of its enforcement actions against public companies in administrative proceedings); CORNERSTONE RSCH., *supra* note 141, at 1 ("Despite ongoing challenges to the constitutionality of the SEC's use of administrative law judges (ALJs), the SEC continued to bring the majority of actions (88%) as administrative proceedings in FY 2022.").

144. PRAC. L. LITIG., *supra* note 143.

145. 17 C.F.R. § 201.230(b)(1)(iii) (2023). "Documents" within the meaning of section 201.230 includes "writings, drawings, graphs, charts, photographs, recordings and other data complications, including data stored by computer, from which information can be obtained." *Id.* § 201.230.

146. *Id.* § 201.230(c).

defaulted.[147] Ultimately, the entire proceeding can span anywhere from two months to a little over a year.[148] The proceeding's quick deadlines have fueled critics' arguments that administrative proceedings give the SEC a home court advantage.[149] For complex cases, defendants may be forced to sort through thousands of documents before trial, which typically begins four months after filing.[150] This tight timeline is problematic in that defendants must quickly build a defense, whereas the SEC has likely spent multiple years gathering evidence and building its case.[151]

In the event that a target company seeks to try its hand at litigating against the SEC, the odds will be stacked in the SEC's favor. The SEC will most likely decide to bring the action before an ALJ that is employed by the SEC, and it will be up to the ALJ to the extent that a target company will be allowed to know what information a whistleblower provided to the SEC.[152] Additionally, the target company will have to build a winning defense in a matter of months against evidence that has been gathered over the course of years. Thus, even in an administrative proceeding, it is unlikely that a target company would be able to discover that its Fourth Amendment rights have been violated.

In the rare circumstance that a target company decides to litigate the case and the SEC decides to bring the action in federal court, the whistleblower's identity could possibly be discerned by the company in discovery.[153] Consequently, it would be hard to imagine the SEC bringing an enforcement action in federal court when a whistleblower has provided

147. *Id.* § 201.360(a)(2)(i); PRAC. L. LITIG., *supra* note 143.

148. *See* 17 C.F.R. § 201.360(a)(2) (2023) (containing guidance regarding when the ALJ's initial decision must be rendered and when the hearing can be held).

149. Choi & Pritchard, *supra* note 141, at 13.

150. *Id.*

151. *Id.*

152. The independence of ALJs is a hot topic of discussion amongst scholars. ALJs are formally regarded as independent fact-finders in administrative proceedings. *See* U.S. OFF. OF PERS. MGMT., *Administrative Law Judge Positions: Qualification Standard for Administrative Law Judge Positions*, https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/#/#:~:text=ALJs%20serve%20as%20independent%20impartial,the%20opportunity%20for%20a%20hearing [https://perma.cc/3J73-NDYT] (stating that "ALJs serve as independent impartial triers of fact in formal proceedings" (emphasis added)); Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1655 (2016) (noting that ALJs are afforded certain measures to assist the maintenance of their decisional independence, such as statutory protection from agency oversight, the Administrative Procedure Act's separation of functions, and prohibitions on ex parte contacts, among others). However, many question whether the nature of the ALJ role truly maintains independence from government agencies. *See, e.g.*, James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1192, 1195 (2006) ("Complicating [the role] is the reality of many administrative judges' particular agency roles. Often, one of the litigants before the administrative judge is the judge's employer."); Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 54 (2020) (suggesting that "shifts in administrative law doctrine and processes enhance the degree to which the President and his political appointees can control or influence, directly or indirectly, ALJ decision-making"); Kent Barnett, *Resolving the ALJ Quandry*, 66 VAND. L. REV. 797, 816 (2019) (stating that ALJs' "limited independence raises impartiality . . . concerns").

153. 17 C.F.R. § 240.21F-7(a)(1) (2023)

> [T]he Commission will not disclose information that could reasonably be expected to reveal the identity of a whistleblower . . . except that the Commission may disclose such information in the following circumstances: (1) When disclosure is required to a defendant or respondent in connection with a Federal court or administrative action that the Commission files . . . .

FED. R. CIV. P. 26(a).

information that led to the initial investigation. However, in this situation, the company would be able to know what information the whistleblower produced[154] and be able to better defend itself in a proceeding before an impartial judge. Moreover, the target company would have adequate time to assess the evidence and engage in a fairer settlement discussion with the SEC.

IV. RECOMMENDATIONS

A. Communications Between Whistleblowers and Their Attorneys Should Be Documented and Made Available to Defendants

Congress should enact a law requiring the SEC to document all communication it has with whistleblowers or their attorneys and make such communications available to target companies in legal proceedings. When a whistleblower submits a tip, they have the choice to submit anonymously through an attorney[155] or without an attorney and with the understanding that their whistleblowing may become known by their employer. In the latter, the whistleblower should have no expectation of anonymity, so policymakers should not be concerned with concealing their identity during a legal proceeding. In the former, the whistleblower's attorney will handle all direct communication with the SEC,[156] and the whistleblower's identity is still largely protected. Post-2008, Congress and the SEC rightfully should protect the identity of whistleblowers who wish to remain anonymous, but not to the extent it produces an unjust adversarial setting or Fourth Amendment violations.

Documenting all communication between the SEC and whistleblowers or their attorneys and making that communication available to target companies in discovery allows companies to investigate whether the SEC was directing an employee to produce additional evidence. Documenting the communications also mitigates the risk that the SEC is playing favorites by directly telling Revolving Door Attorneys representing whistleblowers that certain evidence would bolster their chance at a reward. Given the recent criticism of the whistleblower program, this transparent approach is a way to build public trust in the program.

Most importantly, documenting the communications presents little risk to whistleblowers. Where whistleblowers submit through an attorney, it is unlikely that their employer would discover who reported based on their attorney's communication with the SEC unless the information is such that only one person in the company could possess it. For whistleblowers working in large public companies, it is unlikely that the information reported will be possessed by one person alone. On the other hand, if a whistleblower works in a small company and is the only person to possess the information, it is likely that the company could identify the whistleblower based on the SEC's accusations alone. For defendants, however, access to the communications would trend toward leveling the

154. FED. R. CIV. P. 26(a).

155. 17 C.F.R. § 240.21F-9(c) (2023).

156. *See* Joseph Orr, *How to File Claims Anonymously as an SEC Whistleblower*, KOHN, KOHN & COLAPINTO LLP (May 30, 2023), https://kkc.com/frequently-asked-questions/reporting-anonymously-as-an-sec-whistleblower/ [https://perma.cc/82XX-QPAX] ("If a whistleblower hires an SEC whistleblower attorney, their attorney can file the disclosure on their behalf and handle all communications with SEC staff.").

playing field, where currently, the SEC has enough leverage to force companies into an early settlement.

B. Balancing Motives and Giving Greater Weight to the Whistleblower Program's Financial Incentive

If courts ever get to the State Actor analysis in a whistleblower case, they should give greater weight to financial incentives in determining whether a private actor's purpose was to assist the government. Many individuals may report their employer's securities fraud for the purpose of preventing another Bernie Madoff-esque scandal, but many may also report for the opportunity to obtain a large financial reward.[157] Courts should take a harder look and give greater weight to the individual's purpose, especially in whistleblower cases where the SEC has advertised large rewards.[158]

Courts should apply a balancing test when considering a whistleblower's purpose. As previously discussed, the decision to whistleblow is a complex decision that is often accompanied by several motives.[159] In applying a balancing test, courts should provide greater weight to a whistleblower's financial motive. Where a whistleblower is substantially motivated by a financial reward, a purpose to assist the government should be found unless the combination of other motivating factors outweighs the whistleblower's financial motive.

In weighing a whistleblower's motives, courts should begin by looking at the whistleblower's occupation and salary. If a whistleblower reports their employer for a securities violation, their role within the corporation may tip off their reasons for whistleblowing. For example, the CEO of a large corporation would likely have motives for whistleblowing that differ from those of a lower-level employee. In the case of the CEO, their motives are much more likely to be self-interested, such as wanting to avoid criminal liability or reputational harm. Additionally, upper-management individuals are more likely to be financially well-off and would not risk gambling their professional reputation in hopes of receiving a reward from the SEC.

In comparison, a lower-level employee's knowledge of the company is much more likely to be limited to their role within the company. However, knowing the potential for a big reward, lower-level employees may be willing to comb through documents in hopes of discovering wrongdoing. Thus, if a lower-level employee reports a securities violation that could not have been discovered within the scope of their employment, there should be a presumption that they are at least, in part, financially motivated. Additionally, lower-level employees typically are not as financially well-off as upper-management employees. Hence, their desire to win a big reward for whistleblowing is worth more and is less risky than it would be for an upper-management employee.

If whistleblowers are conducting private searches in the hope that they may receive a financial reward from the government, they are essentially acting as bounty hunters on a contingency fee. Providing the court with information about the whistleblower's occupation and salary allows for a better evaluation of the whistleblower's purpose and reduces the risk that whistleblowers are acting as government agents. Given the large

157. *See supra* Part III.B.2.

158. SEC. & EXCH. COMM'N, *supra* note 12, at 1.

159. *See supra* Part III.B.2 (discussing a whistleblower's potential motives).

monetary penalties imposed on corporations,[160] an in-depth examination of how the SEC received its information is warranted.

V. CONCLUSION

The SEC Whistleblower Program is an effective means of rooting out securities fraud, but recent comments made by Revolving Door Attorneys raise genuine concerns that whistleblowers are acting as government agents. Great deference has been given to the SEC in running the whistleblower program, but safeguards need to be put in place to prevent Fourth Amendment violations.

To prevent whistleblowers from acting as government bounty hunters operating on a contingency fee, Congress should pass legislation that requires disclosure of communications between the SEC and the whistleblower. Requiring that all communications between whistleblowers and the SEC be documented provides greater transparency and assurance that the SEC is not encouraging whistleblowers to produce evidence for the purpose of bolstering the SEC's case against the target company.

In the event that a judge or ALJ confronts the State Actor analysis in whistleblower litigation, courts should undergo a balancing test when examining the whistleblower's purpose for submitting the tip. The presence of a large financial reward is a reason to give greater weight to the whistleblower's financial motive in reporting, especially when the SEC has continually marketed its large payouts to whistleblowers.[161]

160. *See* SEC. & EXCH. COMM'N, *supra* note 12, at 1 ("Since the program's inception, enforcement matters brought using information from meritorious whistleblowers have resulted in orders for nearly $5 billion in total monetary sanctions, including more than $3.1 billion in disgorgement of ill-gotten gains and interest . . . .").

161. *Id.*