

**MEMORANDUM FOR THE COMMISSION
WHISTLEBLOWER PROGRAM RULE AMENDMENTS**

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**ENSURING THE INTEGRITY OF THE INVESTOR PROTECTION FUND
WHILE TIMELY AND PROPERLY PAYING WHISTLEBLOWER CLAIMS**

The National Whistleblower Center hereby submits this proposal as a formal supplemental comment to the public record regarding the Whistleblower Program Rule Amendments, Rel. No. 34-83557. This proposal is submitted in order to ensure that whistleblowers can be properly paid in accordance with the Congressional intent and plain language of the Dodd-Frank Act, without threatening the integrity of the Investor Protection Fund.

A. Understanding the “Related Action” Provision

One of the most important features of the U.S. government’s whistleblower programs is that reward payments are generated directly from sanctions obtained by fraudsters. As there is an uppermost award limit set at a percentage of the collected proceeds, which in the case of the SEC is 30%, the U.S. government profits from the ability of whistleblowers to detect frauds and provide the government with high quality information, even distinct from any other benefits that whistleblower tips provide to the government’s law enforcement capacity. When the SEC is the organ of government collecting the sanctions obtained in whistleblower cases, the process works quite well. In such situations, the SEC claims between 70% - 90% of the monies recovered as a result of whistleblower cases; as a result, there should always be ample funding for any SEC case.

In order to ensure that whistleblowers are adequately compensated, Congress established the Investor Protection Fund, as part of the Dodd-Frank Act.¹ This Fund is required to maintain a minimum balance in order to ensure the payments required under law.² When funding for the Fund

¹ 15 U.S.C. § 78u-6(g)

² 15 U.S.C. § 78u-6(g)(3)

drops below that balance, the SEC is required to use sanctions it obtains from enforcement cases to replenish the Fund.³

The SEC fulfills its obligation to provide monetary rewards to whistleblowers who voluntarily provide the SEC with original and high-quality information which results in a successful prosecution – at no expense to the taxpayer or those that have been wronged by criminal actions. When the SEC announce a whistleblower reward, the statement notes:

“The money paid to whistleblowers comes from an investor protection fund established by Congress at no cost to taxpayers or harmed investors. The fund is financed through monetary sanctions paid by securities law violators to the SEC. Money is not taken or withheld from harmed investors to pay whistleblower awards.”

However, the SEC is not always the government entity which collects the sanctions obtained in whistleblower cases in which the whistleblower voluntarily submitted the original information to the SEC. The Dodd-Frank Act also contains a provision concerning “Related Actions.”⁴ The provision authorizes the SEC to pay a financial award to a whistleblower based not only on the voluntary disclosure of the original information provided to the SEC and resulting in a successful prosecution, but also as a result of successful prosecutions (or other decisions that result in monetary sanctions) that are based on the same information but to another government enforcement entity or under another law. A whistleblower is entitled to a reward based on collected proceeds obtained from fraudsters in “related action” cases. This system rewards whistleblowers no matter how their information is used, recognizing that the law enforcement would not be possible without the assistance of the whistleblower – even if the fraud is not brought to justice by the SEC itself.

However, because the sanctions obtained by the U.S. government in a related action case are not paid directly to the SEC, the SEC does not receive the direct source of funding to pay rewards in related action cases. Instead, the money to pay a reward in a related action case must come from sanctions obtained in SEC cases. The dilemma that this creates is readily apparent. If the SEC is required to pay a large related action-based reward, the monies for that reward must come from SEC cases, in which the recoveries may be far smaller. Additionally, the related action reward requirement is triggered whenever the SEC issues a sanction of \$1 million, regardless of the size of the related action.⁵ Even if smaller, these amounts can add up and be potential problematic as well. As a result, paying such related action rewards could result in the exhaustion of monies in the Investor Protection Fund and paralyze the ability of the SEC to pay rewards, at least until the SEC collects sufficient additional funds through its own law enforcement efforts.

Here’s an example: Take a case in which the SEC has sanctioned Company “A” for \$1 million. If the SEC paid the maximum reward (\$300,000), there would be ample funds at the SEC from

³ Id.

⁴ Under the statute, the term “related action” is defined as “any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection (h)(2)(D)(i) that is based on upon the original information provided by a whistleblower...” 15 U.S.C. § 78u-6(a)(5). The use of the term “commission action” means “Covered judicial or administrative action” as defined by subsection (a)(1).

⁵ 15 U.S.C. § 78u-6(b)(2).

this very sanction to compensate the whistleblower. The amount available in the Investor Protection Fund is not at risk in this situation, as the funding mechanisms governing that Fund provide ample authority for ensuring that rewards predicated on sanctions obtained from Commission actions are available for whistleblowers. *See* 15 U.S.C. § 78u-6(g)(3). This includes a very broad worst-case scenario funding mechanism.⁶ However, if in the same case, the DOJ issues a related action sanction against the same company for \$100 million, the SEC the ability of the SEC to pay the reward could be placed in jeopardy. For example, even if the SEC only paid a 10% reward on this related action claim, the SEC would owe the whistleblower \$10 million. Yet, the SEC itself only collected \$1 million from the fraudster; the rest of the money (the \$100 million) is not part of the SEC's available funds and the risk of depleting the fund too fast is real once several related action awards are paid.

As a result, even if a related action at a different agency would result in an award larger than the total amount sanctioned by the SEC, the SEC still must pay a whistleblower reward on the related action amount.

Based on the public record, a related action collection can often be much larger than a direct SEC action. As such, the potential for related action recoveries to exhaust the Investor Protection Fund is an appropriate concern.

This concern can have a significant detrimental impact on the entire whistleblower program. It could result in the SEC attempting to narrowly construe related actions as a means to preserve funding for SEC action-based awards, even if such behavior in the determination process is in fact explicitly prohibited in the statute.⁷ Whistleblowers, who should be and are otherwise incentivized to voluntarily submit information and continue to work with the government during the case investigation, may see that their efforts with other agencies are not in their best interests. Moreover, the premature exhausting of the Investor Protection Fund would result in the delay of payments to other future whistleblowers in SEC cases, a particularly egregious result as many of those payments are small rewards to whistleblowers who have lost their jobs or otherwise need the compensation.

B. A cap is not the solution

Crucially, just as setting precedents to narrowly construe related actions cases would create problematic disincentives, a whistleblower reward cap (a hard number rather than a percentage as utilized in other U.S. whistleblower reward programs) is not a solution to this concern. Aside from

⁶ 15 U.S.C. § 78u-6(g)(3)(B) (“If the amounts deposited into or credited to the Fund under subparagraph (A) are not sufficient to satisfy an award made under subsection (b), there shall be deposited into or credited to the Fund an amount equal to the unsatisfied portion of the award from any monetary sanction collected by the Commission in the covered judicial or administrative action on which the award is based.”)

⁷ Congress has explicitly prohibited the SEC from taking into consideration the amount of money in the Investor Protection Fund when making an award determination. 15 U.S.C. § 78u-6(c)(1)(B)(ii).

risking violating the express terms of the Dodd-Frank Act itself, a reward cap would not address the core problem: it would still allow for the premature exhaustion of funds in the Investor Protection Fund in certain circumstances. As demonstrated in a comparison of FIRREA and FCA reward provisions and the efficiency of these laws over three decades, a reward amount cap pulls the rug out from any incentive a whistleblower has to step forward and has proven to be bad public policy. As a result, it is an incomplete solution that comes packaged with significant downsides as well, and as such should be wholly rejected.⁸

Reward programs with caps don't incentivize whistleblowers: There are many different types of whistleblowers. On one end of the spectrum is a whistleblower who has blown the whistle, is known to and was retaliated against by an employer, and has already filed information with the SEC. Yet other whistleblowers may be at an extremely high level in their organization or professional career. While this individual knows about wrongdoing, they are not known as a whistleblower and can remain anonymous. As a result, this individual is still in a position to choose whether to blow the whistle. In fact, this is the type of whistleblower who could be most valuable to the SEC, as this individual is likely to voluntarily come forward with high-quality information about significant wrongdoing – if motivated to do so. It is this whistleblower that tip and enforcement programs mandated by Congress are designed to target. If incentivized, this whistleblower will do the right thing and come forward. Yet, it is exactly this whistleblower who will take into consideration the reward potential when making a decision on whether to come forward. As a result, whistleblower reward caps are particularly dis-incentivizing to potential whistleblowers, as reward caps undermine the psychological surety that the government will, at the end, make sure that a whistleblower is made whole from the suffering they endure as a result of their decision to bravely blow the whistle.

The data proves that programs with caps are certain to fail: The NWC examined the data from over three decades from the Securities Financial Instruments Reform, Recovery and Enforcement Act (FIRREA), as well as the False Claims Act. The data clearly demonstrates that the reward cap built into the FIRREA whistleblower reward provision has acted as a deterrent to whistleblowers coming forward with information, muting the abilities of law enforcement to hold accountable financial fraud. In comparison, the significant successes of the FCA, specifically in providing law enforcement the ability to claw back millions and millions of dollars of illicit funds as sanctions and fines, has been powered by whistleblowers who voluntarily submit high-quality information

⁸ Arguments against any form of cap were set forth by numerous respected experts on whistleblower/fraud detection/securities enforcement during the comment period. See, e.g. See [Kohn](#), [Kohn and Colapinto, LLP Comment filed on July 24, 2018](#); [Harry Markopolos Comment filed on September 14, 2018](#); [Professor William Jacobson, Cornell University School of Law Comment filed on September 17, 2018](#); [Taxpayers Against Fraud Comment filed on September 18, 2018](#); [National Whistleblower Center Comment filed on September 17, 2018](#); [Corporations and Society Initiative, Stanford University Graduate School of Business, Comment filed on September 18, 2018](#); [Americans for Financial Reform Education Fund Comment filed on September 18, 2018](#); [Public Citizen Comment filed on September 18, 2018](#); [Chairman of the Senate Judiciary Committee Comment filed on September 18, 2018](#); [Better Markets Comment filed on September 18, 2018](#); [Law 360: The Problem With SEC's Plan To Cap Whistleblower Awards](#).

and are rewarded following the conclusion of a success case. In fact, government agencies which administer the whistleblower reward programs recognize the essential contribution of whistleblowers and oppose reward caps as ineffective. It would be extremely detrimental to the success of the existing SEC whistleblower program to implement any reward cap.

C. The SEC has discretion on timing the payout

While the SEC is prohibited from considering the balance of funds as a factor in determining the amount paid to a whistleblower, it has been granted some flexibility by Congress in structuring other aspects of its whistleblower reward program.⁹ Namely, the SEC has clear legal authority to structure the timing of payments (rather than the amount to be paid) in order to ensure that the lack of monies in the Investor Protection Fund does not result in undue delays in the payment of rewards to needy whistleblowers or other whistleblowers who have waited years for a final decision, nor create a disincentive based on delays triggered by a lack of funding available to pay rewards.¹⁰ This would also ensure that the whistleblower program be a drain on funds for the SEC, as originally intended and anticipated by Congress.

This valid concern can be resolved by spreading out the payment, rather than cutting it and running afoul with practices prohibited in the law.

Thus, the SEC should modify its current rules regarding the timing of payments in certain cases. This adjustment can be done by formal rulemaking, as is currently under consideration, or by an internal operating procedure published to the whistleblower community. With this modification to the program, the SEC's ability to control the timing of payments would mitigate any potential harm caused by the reduction of monies in the Investor Protection Fund due to large related action type awards.

Finally, such a proposal would be a familiar structure to many in the whistleblower community. Indeed, deferred payments are common in whistleblower employment cases. In these cases, a structured payment plan over time provides benefits to the whistleblower themselves, such as an opportunity to lower their tax burden, fund retirement plans over time, and provide long-term financial stability after what is often a career interrupted as a result of retaliation from blowing the whistle. It is likely that existing whistleblowers and potential future whistleblowers would welcome such a plan, just as those in the whistleblower advocacy community would understand that this proposal is both consistent with the law as well as addresses a legitimate concern for the SEC whistleblower program without unduly limiting or capping awards.

⁹ Significantly, when Congress set the criteria for payment, it clearly excluded any form of monetary cap in the definition. 15 U.S.C. § 78u-6(c)(1)(B). However, concerning the determination of the amount of reward, there is no reference to the timing of the payment.

¹⁰ Although it is clear that the SEC may not take the balance of the fund into consideration when determining the (size of) an award, it is also clear that the SEC has rulemaking authority to ensure that the program is administered "consistent with the purposes" of the Dodd-Frank Act's whistleblower reward provision. 15 U.S.C. § 78u-6(j). It is apparent that ensuring that the payment of SEC awards are not unfairly delayed because of a temporary exhaustion of the fund stemming from a higher related action reward is consistent with the aims of the Act.

D. Deferred or Bifurcated Payment Structure

The SEC should adopt a deferred partial payment rule, which would bifurcate the payment structure of rewards for whistleblowers. An amendment to the current rules could simply provide the SEC with the authority to make deferred partial payments in which payments in a related action case which could either exhaust the monies available to make payments in SEC actions and/or could reasonably be anticipated to result in undue delays in payments for SEC actions. This would allow the SEC to retain flexibility in the timing of the payments of reward, and such bifurcation would create a more effective and efficient SEC whistleblower reward program.

A deferred payment program should include the following aspects, subject to further modification by the SEC:

1. The deferred payment program would only be needed in a very small number of cases that meet the following criteria: (a) the whistleblower was immediately given a partial payment of \$30 million; (b) the reward payment above the \$30 million threshold concerned a reward that was generated pursuant to the “related action” provision of the DFA, i.e. the sanctions were collected by an agency which did not provide the SEC with the funding to cover the award; (c) the SEC staff concluded that paying the full award would deplete the monies available in the Investor Protection Fund and result in undue delays in the payment of rewards under the \$30 million threshold. All three criteria must be met before a deferred payment plan was approved.
2. In regard to setting the minimum payment threshold of \$30 million, this number is based on the amount currently being proposed by the SEC in the proposed rule. This proposal should not be construed as an endorsement of this amount, but rather a good faith proposal based on the Commission’s calculations. The NWC maintains that this amount is not sufficient to adequately incentivize potentially high-quality/well placed whistleblowers, whose annual compensation could be higher than \$15 million per/year.¹¹ But because the whistleblower would ultimately be properly rewarded in accordance with Congressional intent and the criteria approved in the 2011 rules, the adverse impact resulting from deferred payments on the incentive nature of the DFA rewards should be sufficiently mitigated. It is not uncommon in other contexts that large awards are paid other time.
3. The deferred payment program would only cover the large “related action” awards. There would be no deferred payment for Commission actions, as the monies necessary to fully and immediately pay those awards would be derived directly from sanctions obtained in the whistleblower’s case, which always result in a minimum profit to the SEC of between 70-90%.
4. For a “related action” award there would be no delay in payment for any award at the \$30 million or lower level. But if a total award was over \$30 million, the Commission would have the discretion to delay payments above the \$30 million threshold as set forth below:

¹¹ <https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>

- A. Compensation should only be delayed over a maximum period of five years. The whistleblower needs to be informed of the precise dates and procedures that would be implemented in a structured payment plan, and have an opportunity to comment on the plan. For tax planning purposes, the rule or internal operating procedure should require that the Commission staff discuss the deferred payment procedures with the whistleblower, and attempt to work out an agreeable process so that whistleblower can engage in appropriate financial planning.
- B. If a deferred payment is authorized, the Commission should increase the percentage of an award in order to compensate the whistleblower for the delay in obtaining payments.
- C. A whistleblower should always be able to obtain, up front, an amount equal to ten years front-pay. Thus, in a case in which a high-level executive is paid the average executive bonus of \$15 million per/year (as identified in fn. 10), that executive should be able to provide the Commission with documentation as to his or her executive bonus and obtain immediate compensation for any loss that exceeds \$30 million over a ten-year period.
- D. An exception should be made for hardship cases, such as if the whistleblower is terminally ill or has any legitimate need for an immediate payment.

Ultimately, Congress should amend the DFA and require that agencies that obtain collected proceeds in “related action” cases compensate the SEC’s Investor Protection Fund whenever a reward is paid. But until such time, this bifurcated or deferred payment procedure both protects the program from the valid concern of premature exhaustion of funds in the Investor Protection Fund that is necessary to timely pay whistleblowers the rewards they need and are entitled to. The NWC strongly supports the SEC attempts to ensure that its whistleblower reward program remains an effective and crucial aspect of its law enforcement capacity, and a model for whistleblower reward programs throughout other government entities.

Assessing Whistleblower Reward Incentives and Caps: What the Data Demonstrates



Evaluating the impact of whistleblower reward caps on incentives for whistleblowers to voluntarily step forward with high-quality information.

Executive Summary

- Reward laws with caps have universally failed. This is demonstrated by an in-depth analysis of the FIERRA and FCA whistleblower provisions, and the efficacy of those laws over three decades.

In fact, government agencies which administer the whistleblower reward programs recognize the essential contribution of whistleblowers and oppose reward caps as ineffective. See *Sec. E*

- The SEC rejected the cap proposal in 2011 and no commissioner dissented from that rejection. See *Sec. F*

Indeed, no publicly-traded company, bank, or financial institution has supported the 2018 SEC rule change proposal.

- The proposed cap fails the front-pay test for executive compensation. See *Sec. E*
- The overwhelming weight of authority in the materials provided to the SEC by those who filed comments on this proposal demonstrates that the cap would significantly undermine Congressional intent as well as overall efficacy of the program.

The National Whistleblower Center strongly urges the SEC to reject the whistleblower reward cap proposal.

Securities Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA)

FIRREA was passed in 1989, only two years after the False Claims Act (“FCA”). Unlike the FCA, FIRREA includes a cap on whistleblower rewards.

The law created a liability for violations of 14 underlying criminal laws as they relate to federally insured financial institutions. These laws include: 1) mail and wire fraud; 2) making false statements to government officials; and 3) financial institution fraud.

On a practical level, FIRREA means that a person can also be held liable for money damages; that is, civil charges in addition to criminal charges.

Prosecutions under FIRREA have a reduced burden of proof, from “beyond a reasonable doubt” in a criminal matter to a mere “preponderance of evidence” in a civil case. This standard of proof is often described as “more likely than not.”

FIRREA applies broadly. Courts have held that a bank could be held liable for FIRREA violations committed by its own officials, which caused harm to the institution itself. The statutory language of FIRREA (specifically the term “affected”) should be interpreted so that any federally insured financial institution could be found to be both the victim and perpetrator in an action. *United States v. The Bank of New York Mellon*.

The ability of the government to prevail in a bank fraud case under FIRREA is likely to be far easier than obtaining a criminal conviction.

Whistleblower Reward Provision: 12 U.S.C. §§ 4201(d)(1)(A)

A. The law provides for whistleblower rewards under certain circumstances, and caps the highest rewards.

The language of the law reads:

(i) The declarant shall be entitled to 20 percent to 30 percent of any recovery in the first \$1,000,000 recovered, 10 percent to 20 percent of the next \$4,000,000 recovered, and 5 percent to 10 percent of the next \$5,000,000 recovered.

(ii) In calculating an award under clause (i), the Attorney General may consider the size of the overall recovery and the usefulness of the information provided by the declarant.

This means that the most that a whistleblower can receive is \$1.6 million, provided that the whistleblower's information results in at least \$10 million recovered, and the whistleblower is awarded the maximum allowed in all segments of that award. This is a 16% reward, within the range of the FCA (the percentage gets higher as the total fine is reduced).

However, additional restrictions apply:

"As a general proposition, the maximum fine is set at \$1.1 million per violation. 12 U.S.C. § 1833a(b)(1) (1966). See 28 C.F.R. § 85.3(a) (6). For continuing violations, the penalty may not exceed the lesser of \$1.1 million each day or \$5.5 million in total. 12 U.S.C. § 1833a(b) (2) (1966), as adjusted, per 28 C.F.R. § 85.3(a) (7)." [Source](#).

This means that a \$1.1 million fine per violation could result in a maximum \$320,000 reward, which is nearly 30% of the total fine, and a \$5.5 million fine for continuing violations could result in a maximum of a \$1,150,000 reward, which is approximately 20% of the total fine. Note that this is within the range of FCA; in fact, it's on the high end of it.

A tale of two results: FIRREA

B. The effect of FIRREA on halting and holding accountable financial fraud has been muted.

The effect of FIRREA on halting and holding accountable financial fraud has been muted. Originally passed in the wake of the Savings and Loan Crisis, FIRREA has been derided as a “little-used statute” that has resulted in a “dearth of cases” during its nearly 30 year history.” Although FIRREA was enacted in 1989, scholars and policymakers have said it was virtually ignored as a vehicle to address financial fraud until the global financial crisis.

Then, for a few years, blockbuster FIRREA prosecutions targeted banks’ behavior precipitating the global financial crisis, including \$1.38B from S&P, \$5B from Bank of America, \$4B from Citigroup, and \$2B from JP Morgan Chase & Co. Yet, nearly a decade later, when noteworthy FIRREA prosecutions are compiled by notable experts in the field, they can still be counted on one hand.

Even successful FIERRA prosecutions are attributable to the incentive of un-capped whistleblower reward provisions.

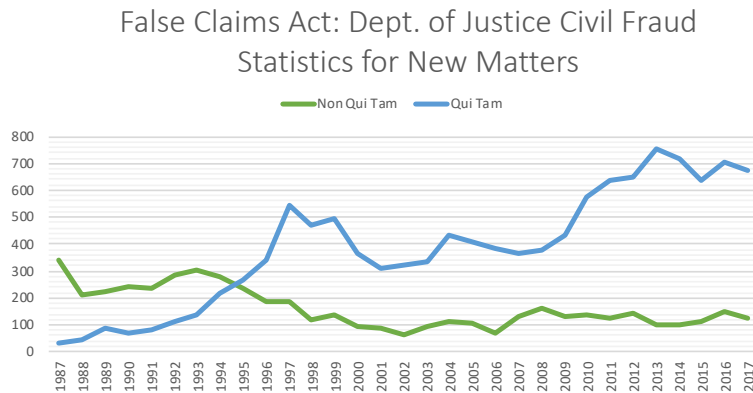
Whistleblower Edward O’Donnell, a former Countrywide Vice President, voluntarily provided original [information](#) about widespread fraud by Countrywide Bank under *qui tam* provisions of the False Claims Act. While the FCA charges were later removed, the government proceeded on FIRREA charges and the parties reached a \$1.27 billion dollar settlement, with \$57 million set aside for the whistleblower reward.

The *qui tam* provisions of the FCA triggered the disclosure, even though the case was decided under FIRREA. This is evidence that whistleblower rewards are key to the detection of large-scale financial fraud.

Whistleblowers have stayed away from FIRREA. NWC searched the entire LexisNexis database from 1996 to 2017 for all federal cases that cited to the 12 U.S.C. § 4201, the whistleblower provision of the FIRREA statute, and found only four cases. In those four cases, not a single plaintiff prevailed on their whistleblower claim. This demonstrates the surprising fact that the whistleblower provision of FIRREA has never, by itself, been successfully utilized by a whistleblower to obtain an award, beginning from the passage of the act until the present day. A prior NWC Freedom of Information Act (“FOIA”) request confirmed this finding.

False Claims Act (“FCA”):

C. At the same time that FIRREA has foundered, whistleblower cases under the FCA have increased dramatically.



In the 30 years since the passage of the False Claims Act, the DOJ has seen a substantial upward trend in the such cases, known as new matters. **The DOJ reported that there have been 5,066 new matters over the 19 years between FY 1987 and FY 2005, and 6,914 new matters in just the 12 years between FY 2006 and FY 2017.**

These instances are not just submitted tips, but cases in which the government has intervened – and, having determined the validity of these tips, is moving forward.

This trend also suggests that whistleblowers provide better information for law enforcement agents as compared to other ways of investigating or discovering information on criminal activity.

In January 2006, the U.S. Government Accountability Office (“GAO”) reported that the median whistleblower award under the False Claims Act was \$123,000. Similarly, according to data released in 2017 by the Department of Justice (“DOJ”), Civil Division, which has prosecutorial jurisdiction over the False Claims Act:

	Median number of qui tam (whistleblower) new matters, per year	Median amount of relator share awards, total per year
FY 1987 – 2005	311	\$64,392,552
FY 2006 – 2017	636.5	\$425,305,014

Note that we estimate the average whistleblower reward is \$447,830 (this is a very rough average, because of data limitations).

D. The Story of the Oct. 2018 Mega Millions Lottery

- » Worth = \$1,600,000,000
- » How many bought a \$2 ticket?
- » [Odds](#) of winning = 1 in 302.5 million
- » [Chance](#) of being struck by lightning:
1 in 700,000
- » [Chance](#) of becoming a saint:
1 in 20 million

- » In just [one year](#), the lottery raised \$16 billion for education, \$2.5 billion for state general funds, and \$1.7 billion for social programs.

Everyone knows it's true: the widespread publicity of the enormous sum results in a rush to buy tickets.

E. Dept. of Justice Advocates **Against Caps**

In 2014, Attorney General Eric Holder, on behalf of the Dept. of Justice, called for the reform of FIRREA's whistleblower reward provision. He [asked](#) Congress to increase the percentage of the reward to 30% of the sanctions imposed – equal to the False Claims Act - in order **“to increase its incentives for individual cooperation.”**

He pointed out that lifting the caps on FIRREA **“could significantly improve the Justice Department's ability to gather evidence of wrongdoing while complex financial crimes are still in progress – making it easier to complete investigations and to stop misconduct before it becomes so widespread that it foments the next crisis.”**

The Dept. of Justice's concerns about the FIRREA reward cap is equally applicable to the impact on whistleblower perceptions, and in doing so the incentive for whistleblowers to step forward, caused by any reward caps, including the current misguided SEC proposal to implement a cap.

The Dept. of Justice understood that the reward cap built in the FIRREA whistleblower provision was undermining its efficiency.

An arbitrary limit disconnected from the reality on-the-ground.



“Like the False Claims Act, FIRREA includes a whistleblower provision. But unlike the FCA, the amount an individual can receive in exchange for coming forward is capped at just \$1.6 million – a paltry sum in an industry in which, last year, the collective bonus pool rose above \$26 billion, and median executive pay was \$15 million and rising”

“In this unique environment, what would – by any normal standard – be considered a windfall of \$1.6 million is unlikely to induce an employee to risk his or her lucrative career in the financial sector. That’s why we should think about modifying the FIRREA whistleblower provision – perhaps to False Claims Act levels – to increase its incentives for individual cooperation.”

-- Dept. of Justice Attorney General Eric Holder, 2014

As A.G. Holder, on behalf of the Dept. of Justice, noted, the median executive pay in 2014 was \$15 million – and rising. An individual in this position, who has high-quality information about criminal actions, would not be incentivized to disclose that information using appropriate law enforcement avenues, for such a (relatively) small sum.

In fact, for those with the experience of litigating whistleblower cases, this number highlights why a rewards cap is such a mismatch for the industry. When a court is determining damages, front pay (or future lost earnings) is often used as an alternative to reinstatement, to ensure that a whistleblower who was retaliated against is made whole. *McNight v. General Motors*, 908 F.2d 104 (7th Cir. 1990); *U.S. v. Burke*, 504 U.S. 229, footnote 9 (1992). With a cap on whistleblower rewards at \$1.6 million in even the best of circumstances, it’s no wonder that whistleblowers are not inclined to utilize FIRREA in the way that the FCA has been utilized over the past decades. **As a result, this cap proposal fails the front-pay test for executive compensation.**

F. The SEC Should, Again, Reject a Reward Cap Proposal

FIRREA is an apt comparison for the FCA. The median reward for FCA was \$123,000 when the program was audited by the GAO in 2006, and the average awards today are similarly significant. This is less than the maximum reward amount in the FIRREA. Moreover, the reward percentages under FIRREA are within the same ranges as permitted by the FCA. Finally, the FCA and FIRREA have been law for roughly the same number of years, as FIRREA was passed only two years after the FCA.

So, why are the results so drastically different?

- » We know that there is in fact fraud at financial institutions, as demonstrated by successful prosecutions under FIRREA on the heels of the global financial crisis. Congress agreed when it passed the law.
- » Perhaps Congress intended FIRREA to be much narrower than the FCA. But, it's highly unlikely that Congress would intend for a law to be widely derided as "little used" and in need of substantial reform, including by the head of the Department of Justice. And, narrow should not mean inefficient.

The FIRREA structure implements the logic of the Chamber of Commerce in advocating for a SEC whistleblower reward cap. It reduces the total reward, using the percentage metric, for whistleblowers who tip the government to fraud that results in certain awards.

This was in fact proposed when the SEC reformed its whistleblower program in 2011 by the Chamber of Commerce and their big business allies, and it was [soundly rejected](#).

"Although we have considered the views of commenters who recommended that the presence or absence of certain criteria should have a distinct and consistent impact on our award determinations, the final rule does not establish such a methodology that would permit a mathematical calculation of the appropriate award percentage.... Accordingly, no attempt has been made to list the factors in order of importance, weigh the relative importance of each factor, or suggest how much any factor should increase or decrease the award percentage. Depending upon the facts and circumstances of each case, some factors may not be applicable or may deserve greater weight than others.... In the end, we anticipate that the determination of the appropriate percentage of a whistleblower award will involve a highly individualized review of the facts and circumstances surrounding each award using the analytical framework set forth in the final rule."

Whistleblower rewards are a crucial component of an effective program.

Whistleblower advocates who work directly on these laws, as well as the government agency officials in charge of the implementation of these laws, agree with what the data shows: whistleblower reward caps do not incentivize those with information to come forward using the appropriate legal avenues and help the government catch fraud and corruption. It would be highly destructive to the SEC's law enforcement capacity for the agency to implement any sort of cap in its whistleblower reward programs.

Moreover, the proposed SEC whistleblower cap was been largely opposed by the public; in fact, [more than 99%](#) of the comments posted on the SEC's public comment page spoke out against the limit. The groups that put forth over 3,500 comments in opposition to the proposed changes included whistleblowers, whistleblower attorneys, corporate law firms, as well as Senator Charles Grassley's office. Much of the criticism focused around the impact the proposed changes would have on the incentive for whistleblowers of large frauds to come forward.



The SEC “whistleblower program . . . has rapidly become a tremendously effective force-multiplier, generating high quality tips, and in some cases virtual blueprints laying out an entire enterprise, directing us to the heart of the alleged fraud.”

– Chairman Mary Jo White, Securities and Exchange Commission, Remarks at the Securities Enforcement Forum, Washington DC (October 2013)

G. Additional Resources

Comments in Opposition to Proposed Rule:

- [National Whistleblower Center](#)
- [National Whistleblower Center](#), extension request.
- [Sen. Charles Grassley](#), Chairman of the Senate Judiciary Committee
- [Kohn, Kohn & Colapinto](#)
- [Taxpayers Against Fraud](#)
- [Better Markets](#), Lev Bagramian,
- [Public Citizen](#)
- [Americans for Financial Reform](#)

Whistleblower Protection Blog:

- <https://www.whistleblowersblog.org/2018/09/articles/sec-whistleblowers/secs-receives-extensive-criticism-in-comments-on-proposed-changes-to-whistleblower-program/>
- <https://www.whistleblowersblog.org/2018/09/articles/sec-whistleblowers/sec-whistleblower/>
- <https://www.whistleblowersblog.org/2018/07/articles/sec-whistleblowers/action-needed-to-protect-sec-whistleblower-program/>
- <https://www.whistleblowersblog.org/2018/07/articles/dodd-frank-whistleblowers/proposed-sec-whistleblower-rule/>



“Capping awards would all but ensure that the elephant never walks through the [SEC’s] doors, only rabbits and the occasional zebra,” wrote Harry Markopolos, a financial fraud investigator well-known for exposing the Ponzi scheme perpetrated by Bernie Madoff.

Acknowledgements

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National Whistleblower Center

When Whistleblowers Get Rewards: Assessing the SEC's Whistleblower Reward Program



An analysis of the U.S. Securities and Exchange Commission ("SEC") Office of the Whistleblower program and whistleblower reward determinations.

The U.S. Securities and Exchange Commission (SEC) Office of the Whistleblower has proven to be a highly successful program over the past decade.

Over \$1.7 billion in total monetary sanctions from wrongdoers as a result of whistleblower tips.

More than \$901 million in disgorgement of ill-gotten gains and interest.

Approximately \$452 million has been or is scheduled to be returned to investors.

Over \$326 million awarded to 59 individual whistleblowers.

WHISTLEBLOWERS:

A. The U.S. Securities and Exchange Commission (“SEC”) Office of the Whistleblower’s reward program has fulfilled its obligation to compensate informants.

The National Whistleblower Center has conducted an analysis of SEC awards to whistleblowers who report crucial information for successful prosecutions. This data includes all laws enforced by the SEC which include a whistleblower reward mandate.

An approximate six-year span between 2012 to 2018 includes 131 distinct prosecutions with [documented and publicly-available whistleblower award](#) proceedings. Of these cases, 45 resulted in whistleblower awards. As some cases included several whistleblowers, these 45 cases resulted in 59 total awardees.

In contrast, during this same time period there were 86 cases in which a whistleblower petition for award resulted in the complete denial of any award to a whistleblower. Note that additionally, 32 individual claimants were denied while other whistleblowers in the same case were given awards. The courts and the SEC are clearly looking carefully at whistleblower petitions and ensuring that only the most deserving are granted a reward.

Since the first positive whistleblower award determination in 2012, the documents show that the SEC has awarded whistleblowers at least \$318.78 million, while the SEC reported to Congress that it has awarded whistleblowers over \$326 million.

Therefore, it is apparent that the lack of complete data, as a result of redactions and missing documentation, underestimates the value of whistleblowers to SEC’s enforcement capacities.

Over \$326 million has been awarded to whistleblowers.

B. The importance of whistleblowing, after under a decade of rewards data, is quite clear: those who blow the whistle are a crucial law enforcement component.

The data paints a picture of the crucial nature of whistleblowers to these prosecutions. The most common reasons for why a whistleblower should receive a reward was that the whistleblower prompted the investigation.

The words of the SEC's own law enforcement agents and policy implementers are enormously significant, and show the true power of whistleblowers. [Here's what they said:](#)

- » **Extensive or ongoing assistance**
- » **Significance of information contributed**
- » **Hardship or retaliation endured**
- » **Voluntarily offering information, including to other government agencies**
- » **Saved investigatory resources**
- » **Hard to detect violations**
- » **Information helped to end an investigation**
- » **Provided independent knowledge or analysis not otherwise available.**



The whistleblowers who bring wrongdoing to the government's attention are instrumental in preserving the integrity of government.

-- Former Principle Deputy Assistant Attorney General Stuart Delery, U.S. Department of Justice, remarks made at the American Bar Association's 10th Annual National Institute on the Civil False Claims Act and Qui Tam Enforcement (2012)



[A whistleblower] "admission often brings... [an] added measure of public accountability."

-- Chairman Mary Jo White, Securities and Exchange Commission, remarks at the Securities Enforcement Forum, Washington DC (2013)

C. A snapshot of 2018

Much can also be learned by what is happening in just the six months. NWC compiled a snapshot of all [notices of covered actions by the SEC](#) cases, regardless of the law at issue, in which whistleblowers were involved. This data is particularly useful as it covers all cases investigated and prosecuted by the SEC and involving whistleblowers where the SEC believes that a whistleblower (or several whistleblowers) may have a valid claim for a reward. The data also details whether a complaint has been filed or the case has been settled and the amount of sanctions either brought in or to be brought in by the government through each case.

In just six months, the SEC has brought in at least \$449,489,571 through 24 cases involving whistleblowers. The average case brought over \$18.7 million in fines.

This data would indicate that at least 24 foreign whistleblowers may be entitled, per case, to between \$1.21 and \$3.63 million (between 10% and 30% for each case).

These figures prove that the SEC's whistleblower program works and is necessary for effective prosecution. While these cases are not necessarily prosecutions for violations of the FCPA, the program analyzed here is the same used by some FCPA whistleblowers. The general effectiveness of the program parallels the reasonable expectations of whistleblowers' influence on successful FCPA prosecutions.

Six months
\$449,489,571
24 cases

D. Whistleblowers are a proven way to obtain high-quality information.



A strong monetary incentive to blow the whistle does motivate people with information to come forward... without the negative side effects often attributed to them.

[T]here is no evidence that having stronger monetary incentives to blow the whistle leads to more frivolous suits.

-- Alexander Dyke, et al., University of Chicago Booth School of Business

Statements from elected leaders, law enforcement officials who work directly with whistleblowers on the ground, and appointed leadership in the agencies that implemented whistleblower programs [demonstrate high regard](#) for whistleblowers. Statistics on the use of whistleblower tips by the relevant agencies verify their effectiveness.

Whistleblower tips are by far the most used detection method for U.S. agencies. See *Fig 1*. Additionally, reports released by the SEC Office of the Whistleblower on the use of whistleblower tips verify the effectiveness of these tips.

For example, [approximately 15%](#) of whistleblower tips received by the SEC lead to some form of investigation. By comparison, the DOJ has an intervention rate (including settlements) of [nearly 25%](#) in *qui tam* False Claims Act cases that are filed by whistleblowers. Further, in FY 2017, the U.S. government recovered [over \\$3.7 billion](#) through its civil fraud program. Of this amount, whistleblowers were directly responsible for the detection and reporting of over \$3.4 billion (92%), under *qui tam* provisions. As a result of this assistance, whistleblowers were awarded \$392 million (11.5%).

- » **Statements** from elected and appointed leadership in the agencies that implement whistleblower programs.
- » **Statements** from law enforcement officials who work directly with whistleblowers on the ground.
- » **Statistics** on the use of whistleblower tips by the relevant agencies.
- » **Data** on the amount of money collected by the government and distributed to whistleblowers after successful prosecutions and settlements that are only or largely possible because of whistleblower information.



The whistleblower program . . . has rapidly become a tremendously effective force-multiplier, generating high quality tips, and in some cases virtual blueprints laying out an entire enterprise, directing us to the heart of the alleged fraud.

-- Former Chairman Mary Jo White, Securities and Exchange Commission, remarks at the Securities Enforcement Forum, Washington DC (2013)

Whistleblowers play an integral role in keeping institutions honest, ethical, and safe, providing information to both law enforcement for prosecutions and to civil society for accountability to the public.

Fig 1 | Detection Method, by Region

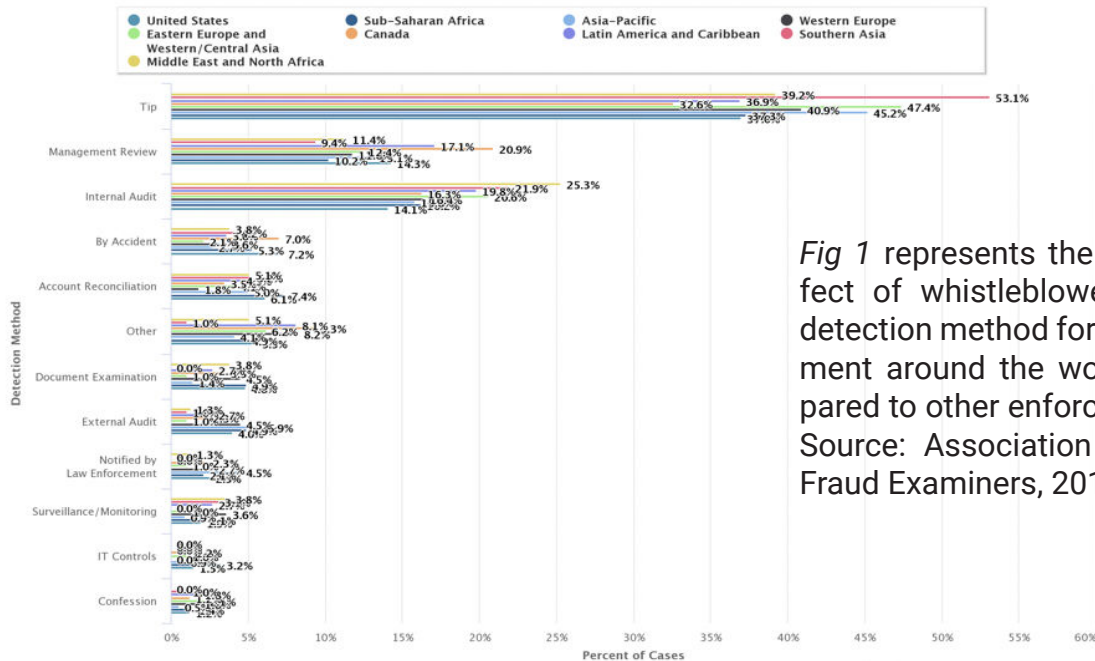


Fig 1 represents the outsized effect of whistleblower tips as a detection method for law enforcement around the world, as compared to other enforcement tools. Source: Association of Certified Fraud Examiners, 2016.

E. Internal Reporting is Strengthened by SEC Oversight.

The 2018 SEC Office of the Whistleblower Report to Congress acknowledges the interaction between internal reporting and compliance programs, and the SEC's own whistleblower reward program:

“There is no requirement under the Whistleblower Rules that an individual be an employee or company insider to be eligible for an award. However, approximately 69% of the award recipients to date were current or former insiders of the entity about which they reported information of wrongdoing to the SEC. Of the award recipients who were current or former employees of a subject entity, approximately 83% raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.”



[When the SEC] “whistleblower program was being set up, many in the securities bar... worried that the program would undermine internal compliance efforts. [But it has] the opposite effect... Companies are beefing up their internal compliance and making it clear... [that] internal reporting will be treated seriously and fairly. And most in-house whistleblowers that come to us went the internal route first.”

– Former Chairman Mary Jo White, Securities and Exchange Commission, remarks at the Securities Exchange Forum, Washington D.C. (2013).

F. Whistleblowing Outside of U.S. Borders

In Dec. 2017, a whistleblower was awarded more than \$4.1 million for stepping forward with information despite the risk he would suffer retaliation for his bravery.

This whistleblower exemplifies much of what we know about how information is kept secret and how illicit profits are made. A “former company insider,” he both alerted the SEC about a criminal enterprise “and [continued to provide important information](#) and assistance throughout the ... investigation.” This original information was critical for the SEC to even know that a violation of the law was occurring.

Yet his concerns also reflect the types of worries by the right person with the right information – that the laws wouldn’t be enough to protect him after he stepped forward. As a “foreign national working outside the” U.S., the SEC award determination notes that the whistleblowers’ concerns that American “employment anti-retaliation protections” may not be meaningful outside of U.S. borders. As a result, the financial reward provides important motivation; it incentivizes those with original insider information to come out of the shadows.

Similarly, in 2014 the [SEC announced](#) what was then its largest-ever award to a whistleblower: over \$30 million. The SEC noted that this individual “provided key original information,” and was thus a crucial component for halting this ongoing crime. And again, in 2018 a [whistleblower was awarded](#) \$4 million, and the SEC noted that the whistleblower “provided extensive assistance... throughout the course of the investigation.”

While the SEC maintained the confidentiality of these whistleblowers, the agency did disclose in all cases that the whistleblower was living in a foreign country. As a result, this was necessarily a violation of the Foreign Corrupt Practices Act (“FCPA”).



Whistleblowers from all over the world should feel similarly incentivized to come forward with credible information about potential violations of the U.S. securities laws.

-- Former Chief of the SEC’s Office of the Whistleblower, Sean X. McKessy (2018)

G. The international reach out of SEC whistleblower program.

The effectiveness of the SEC program is driven in part by the extensive allowances for international jurisdiction by U.S. law enforcement authorities. This global reach helps ensure transparency, accountability, and ethical business practices worldwide.

For example, the FCPA is often known as the law used to prosecute bribes paid abroad by companies directly or indirectly connected to the U.S. The law does something that the average layperson may think is not possible: the FCPA establishes U.S. jurisdiction for bribes paid in foreign countries by foreign nationals to foreign government officials.

According to [the SEC](#), since 2011, **a total of 3,305 whistleblowers from 119 countries outside of the U.S.** have filed claims under whistleblower reward provisions. See *Fig 2*.

It is clear that those in charge of implementing the law understand the importance of whistleblower tips to their ongoing law enforcement success. In 2017, [the SEC confirmed](#) that high-quality whistleblower tips and allegations have triggered over 700 pending or ongoing investigations.

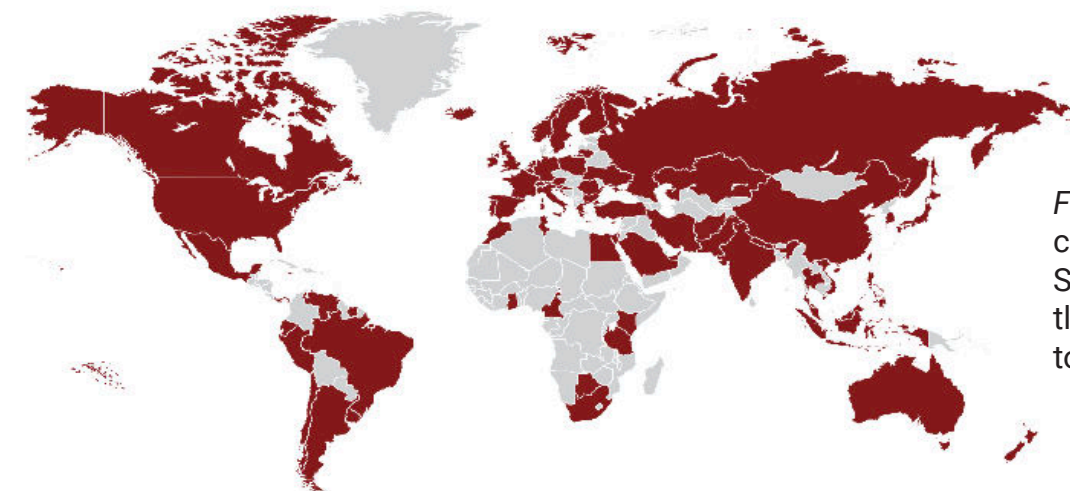


Fig 2 illustrates the 119 countries from which the SEC has received whistleblower tips from FY 2011 to FY 2018.

The SEC program has received a total of **28,100** whistleblower tips between FY 2011 and FY 2018.

The number of individuals submitting tips from abroad constitutes **11.76%** of the individuals who participated in the SEC whistleblower program. However, international whistleblowers submit particularly high-quality tips leading to more often successful prosecutions: international whistleblowers are **20.3%** of whistleblowers who receive a reward through the SEC whistleblower program.

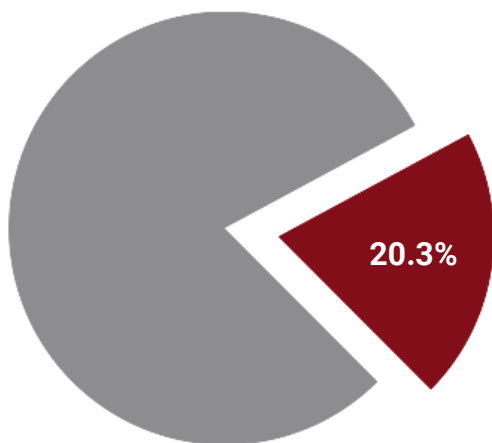


Fig 3, above, illustrates the international whistleblowers who have received awards



International whistleblowers can add great value to our investigations.

-- Former Director Andrew Ceresney, Division of Enforcement, U.S. Securities and Exchange Commission, remarks made at the Sixteenth Annual Taxpayers Against Fraud Conference (2016)

G. Conclusion

Whistleblowers are powerful tools for detecting fraud and corruption. Laws which utilize whistleblower rewards have been proven to incentivize whistleblowers to come forward using appropriate law enforcement avenues with high-quality information. These tips are crucial for the continued success of our law enforcement programs against fraud, corruption, and other criminal behavior.

Supporting protection and reward programs for brave individuals who blow the whistle should be of the utmost importance to anyone seeking to implement laws worldwide.

Acknowledgements

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