

DON'T FORGET TO TIP THE TIPSTER: HOW THE SEC'S FAILURE TO FINANCIALLY REWARD MEDIA-FIRST WHISTLEBLOWERS DEFIES DOMESTIC AND INTERNATIONAL ANTI- CORRUPTION OBJECTIVES

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The Securities and Exchange Commission (SEC) currently operates the gold standard of whistleblower reward programs. Since it was established by the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), the program has incentivized hundreds of whistleblowers to come forward with valuable insider information, resulting in over \$8 billion in penalties against fraudsters and \$2 billion in rewards to qualified whistleblowers. But a 2023 Award Denial Order raises an important question: are the program technicalities overly narrow, causing otherwise eligible whistleblowers to fall through the procedural cracks?

Specifically, this Comment looks at media-first whistleblowers, or whistleblowers who first bring their information to a journalist ahead of a government regulator. The SEC may read that news article and contact the whistleblower for more information. Even if the whistleblower is fully compliant, they cannot qualify for a program reward because they are not considered a “voluntary” source to the SEC. This current trend in denying awards to media-first whistleblowers undermines the broad goals of Dodd-Frank. Simultaneously, the SEC promotes internal whistleblowing, which is harmful to both the whistleblowers themselves and the government’s ability to catch a company amidst its wrongdoing.

Both the Biden-era White House Strategy on Countering Corruption and the Organisation for Economic Co-operation and Development’s recommendations support the collaborative

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efforts of whistleblowers and journalists in fighting corruption. Further, Dodd-Frank does not force the SEC to adopt this narrow program rule that excludes rewarding otherwise compliant sources. This Comment explores the current SEC program rules in the context of these two publications, as well as Dodd-Frank and the Supreme Court’s *Loper Bright* decision. This Comment recommends that the SEC reward media-first whistleblowers and do away with its financial incentivization of internal reporting.

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INTRODUCTION

Anti-corruption and compliance laws are often born out of chaos.¹ Following the 2008 financial crisis, triggered in part by a fractured financial regulatory system, the American people called on their government to safeguard

1. See, e.g., *Wall Street Reform: The Dodd-Frank Act*, EXEC. OFF. OF THE PRESIDENT, <https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform> [<https://perma.cc/JV6W-2BS3>] (last visited Mar. 7, 2025) (tying the 2008 financial crisis to the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)) [hereinafter *Wall Street Reform*]; Matthew R. Webber, *The Enron Scandal and the Sarbanes-Oxley Act*, THE BALANCE, <https://www.thebalancemoney.com/sarbanes-oxley-act-and-the-enron-scandal-393497> [<https://perma.cc/S44L-BCBC>] (Aug. 31, 2022) (tying the Enron scandal to the passage of the Sarbanes-Oxley Act); Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929, 934 (2012) (tying the Big Oil bribery schemes to the passage of the Foreign Corrupt Practices Act (FCPA)).

everyday investors from risky Wall Street activity.² In response, Congress passed Dodd-Frank.³ Dodd-Frank has since proven to be a regulatory powerhouse, establishing new agencies and reshaping complacent attitudes once undermined by corrupt leaders and financial institutions hailed “too big to fail.”⁴

In celebrating the enactment of Dodd-Frank, then-President Barack Obama explained how targeting corruption on Wall Street would result in increased protections for “Main Street”—where members of the general population participate in the economy through credit cards, home and student loans, and banking.⁵ Then-President Obama endorsed Dodd-Frank’s straightforward rules and safeguards that incentivized compliance and punished abuse.⁶

Perhaps Dodd-Frank’s most impactful provision was the creation of the Securities and Exchange Commission’s (SEC’s) Whistleblower Office and award program.⁷ This program is the first-of-its-kind to offer both anonymous filing and monetary awards to eligible whistleblowers.⁸ While the modern media assigns the whistleblower label to anyone from a national security leaker to an anonymous government informant,⁹ Dodd-Frank strictly defines

2. *Wall Street Reform*, *supra* note 1.

3. See Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

4. *Id.*; see also STEPHEN M. KOHN, RULES FOR WHISTLEBLOWERS: A HANDBOOK FOR DOING WHAT’S RIGHT 137–38 (2023) (detailing the “nuts and bolts” of Dodd-Frank) [hereinafter RULES FOR WHISTLEBLOWERS]. Dodd-Frank established four new agencies for purposes of financial regulation and oversight: the Consumer Financial Protection Bureau, Financial Stability Oversight Council, Office of Financial Research, and Federal Insurance Office. See *Dodd-Frank Act*, BALLOTEDIA, https://ballotpedia.org/Dodd-Frank_Act [<https://perma.cc/P2YJ-X9E4>] (last visited Mar. 7, 2025).

5. Barack Obama, President of the U.S., Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010), <https://obama.whitehouse.archives.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act> [<https://perma.cc/F756-P96A>].

6. *Id.*

7. Dodd-Frank Act, Pub. L. No. 111-203, tit. IX, subtit. B, sec. 922(a), § 21F, 124 Stat. at 1841–49; *Whistleblower Program*, SEC. & EXCH. COMM’N (SEC), <https://www.sec.gov/enforcement-litigation/whistleblower-program> [<https://perma.cc/5YCM-ZDTN>] (Nov. 21, 2024).

8. See *Whistleblower Frequently Asked Questions*, SEC, <https://www.sec.gov/enforcement-litigation/whistleblower-program/whistleblower-frequently-asked-questions> [<https://perma.cc/B3QW-WX4A>] (Aug. 23, 2024) (explaining the protections of confidentiality and anonymity).

9. See, e.g., Glenn Greenwald, Ewen MacAskill & Laura Poitras, *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, THE GUARDIAN (June 11, 2013, 9:00 AM), <https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance> [<https://perma.cc/9THB-YQHR>] (referring to Edward Snowden as “one of

an SEC “whistleblower” as “any individual who provides, or [two] or more individuals acting jointly who provide, information relating to a violation of the securities laws to the [SEC], *in a manner established, by rule or regulation, by the [SEC]*” that is “*necessary*,” “*appropriate*,” and “*consistent*” with Dodd-Frank.¹⁰

Since Dodd-Frank’s passage, the SEC has acted upon this authorization and narrowed its “whistleblower” definition to include only those “who *voluntarily* provide[] the SEC with *original information*[.] in writing[.]” through the SEC’s specific form.¹¹ Further, “the information . . . must *lead to* a successful SEC enforcement action . . . [and] order of monetary sanctions exceeding \$1 million.”¹²

The award program intends to attract insiders across industries and encourage them to share first-hand knowledge about potential frauds and wrongdoing related to broker-dealers, mutual funds and investment advisers, fraudulent securities offerings, issuer disclosure, financial fraud, foreign bribery, insider trading, and more.¹³ Whistleblower tips fast-track the SEC’s ability to identify bad behavior, build a case, and carry out agencywide enforcement

America’s most consequential whistleblowers”); Annette McDermott, *How ‘Deep Throat’ Took Down Nixon from Inside the FBI*, HISTORY, <https://www.history.com/news/watergate-deep-throat-fbi-informant-nixon> [<https://perma.cc/ZD5S-9TS8>] (July 30, 2024) (describing the conflicting views of “Deep Throat,” the Watergate whistleblower who was simultaneously seen as an “American hero for fighting for justice” or a “disloyal traitor”).

10. See Dodd-Frank Act, Pub. L. No. 111-203, tit. IX, subtit. B, sec. 922(a), § 21F(a)(6), 124 Stat. at 1842 (emphasis added); *id.* § 21F(j), 124 Stat. at 1847–48 (emphasis added).

11. *Whistleblower Frequently Asked Questions*, *supra* note 8 (emphasis added) (answering the prompt: “Who is a whistleblower?”). In many media-first whistleblower denial decisions, discussion of the “original information” standard is often intertwined with the “voluntary” status discussion, as a media-first whistleblower must first prove they were the original source to the relied upon media article. *Id.* The SEC requires that whistleblowers use a specialized form, which can be found on its website. *Information About Submitting a Whistleblower Tip*, SEC, <https://www.sec.gov/enforcement-litigation/whistleblower-program/information-about-submitting-whistleblower-tip> [<https://perma.cc/6PN6-4QXN>] (Jan. 22, 2025); SEC, SEC 2850 (8/11), FORM TCR (TIP, COMPLAINT OR REFERRAL), <https://www.sec.gov/files/formtcr.pdf> [<https://perma.cc/2JYQ-TGNX>].

12. *Whistleblower Frequently Asked Questions*, *supra* note 8 (emphasis added).

13. See John Joy, *How the SEC Whistleblower Program is Changing the Enforcement Landscape*, AM. CONST. SOC’Y (Nov. 17, 2023), <https://www.acslaw.org/expertforum/how-the-sec-whistleblower-program-is-changing-the-enforcement-landscape> [<https://perma.cc/P3R6-A5VL>] (explaining how SEC whistleblowers supplement enforcement agents’ knowledge). For an overview of SEC enforcement priorities, see LINDA CHATMAN THOMSEN, SEC, INTERNATIONAL INSTITUTE FOR SECURITIES MARKET DEVELOPMENT: 2005 PROGRAM 8 (2005), https://www.sec.gov/about/offices/oia/oia_enforce/overviewenfor.pdf [<https://perma.cc/T6BU-YYJH>] (listing the targeted violations that “form the core of the” SEC Division of Enforcement).

goals.¹⁴ The SEC levies large financial sanctions against both companies and individuals, of which qualifying whistleblowers can receive 10%–30%.¹⁵

The SEC issued its first whistleblower award in 2012: \$50,000 to an individual who helped uncover a multi-million-dollar securities fraud.¹⁶ Since the program's inception, the SEC has collected more than \$4 billion in disgorged “ill-gotten gains” and awarded more than \$2 billion to qualified whistleblowers.¹⁷ The largest whistleblower award to date totaled nearly \$279 million.¹⁸ The program has awarded hundreds of individuals, and annual tips to the SEC have increased from 3,001 in 2012 to approximately 24,980 in 2024.¹⁹ The SEC announces award decisions on its website via Final Orders and publishes the *Annual Report on the Dodd-Frank Whistleblower Program* (Annual Report), which summarizes program highlights.²⁰

14. See Press Release, SEC, SEC Awards More Than \$104 Million to Seven Whistleblowers (Aug. 4, 2023), <https://www.sec.gov/newsroom/press-releases/2023-147> [<https://perma.cc/5M3P-2NPK>] (crediting the awarded whistleblowers for “help[ing] Enforcement staff detect and prosecute wrongdoing in a timely manner.” (quoting Creola Kelly, Chief of the SEC’s Office of the Whistleblower)).

15. See Press Release, SEC, SEC Announces Enforcement Results for Fiscal Year 2024 (Nov. 22, 2024), <https://www.sec.gov/newsroom/press-releases/2024-186> [<https://perma.cc/C3L6-SKE7>] (noting \$8.2 billion in penalties during 2024 alone); Andrew Ceresney, Dir., Div. of Enft, SEC, The SEC’s Whistleblower Program: The Successful Early Years at Sixteenth Annual Taxpayers Against Fraud Convention (Sept. 14, 2016), <https://www.sec.gov/newsroom/speeches-statements/ceresney-sec-whistleblower-program> [<https://perma.cc/6L7W-9SAZ>] (applauding the large financial penalties recovered by the SEC thanks to whistleblowers); *Whistleblower Program*, *supra* note 7.

16. Press Release, SEC, SEC Issues First Whistleblower Program Award (Aug. 21, 2012), <https://www.sec.gov/newsroom/press-releases/2012-2012-162htm> [<https://perma.cc/2GL5-GMHV>].

17. Press Release, SEC, SEC Issues Largest-Ever Whistleblower Award (May 5, 2023), <https://www.sec.gov/newsroom/press-releases/2023-89> [<https://perma.cc/C9FR-A3BM>]; *Whistleblower Program*, *supra* note 7.

18. Press Release, SEC Issues Largest-Ever Whistleblower Award, *supra* note 17.

19. SEC, ANNUAL REPORT ON THE DODD-FRANK WHISTLEBLOWER PROGRAM 4 (2012), <https://www.sec.gov/files/annual-report-2012.pdf> [<https://perma.cc/6VHD-SEJQ>]; SEC, OFF. OF THE WHISTLEBLOWER, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2024 11 (2024) [hereinafter 2024 SEC ANNUAL REPORT], <https://www.sec.gov/files/fy24-annual-whistleblower-report.pdf> [<https://perma.cc/238C-AKA6>].

20. See *Final Orders for Whistleblower Award Determinations*, SEC, <https://www.sec.gov/enforcement-litigation/whistleblower-program/final-orders-whistleblower-award-determinations> [<https://perma.cc/E5F6-TPUB>] (last visited Feb. 28, 2025); *Reports and Publications*, SEC, <https://www.sec.gov/reports> [<https://perma.cc/2D8A-BCV3>] (last visited Feb. 28, 2025); e.g., 2024 SEC ANNUAL REPORT, *supra* note 19.

While the SEC whistleblower program has garnered widespread bipartisan support and cemented itself as a “model of success,”²¹ many tipsters with critical information still slip through the procedural cracks.²² The SEC’s program imposes strict criteria that leads the agency to withhold whistleblower status from otherwise cooperating and qualified individuals.²³ Notably, the narrowness of the current standard for “voluntary” information—i.e., information provided to the SEC or another qualifying law enforcement agency before a “request, inquiry, or demand that relates to the same subject matter”—has led otherwise eligible whistleblowers to face SEC program disqualification.²⁴

Those unaware of the program, or its easy-to-violate rules, may disqualify themselves without even knowing it.²⁵ While the SEC maintains a webpage dedicated to answering frequently asked questions and operates a successful call-in hotline surrounding program rules, usage of these resources still requires some awareness of the SEC and its whistleblower program.²⁶ The

21. See, e.g., Jay Clayton, Chairman, SEC, Remarks at SEC Open Meeting: Strengthening Our Whistleblower Program (Sept. 23, 2020), <https://www.sec.gov/newsroom/speeches-statements/clayton-whistleblower-2020-09-23> [<https://perma.cc/N9MU-V4LK>] (demonstrating Republican support); see also Gary Gensler, Chairman, SEC, Prepared Remarks for National Whistleblower Day Celebration (July 30, 2021), <https://www.sec.gov/newsroom/speeches-statements/gensler-whistleblower-celebration> [<https://perma.cc/3BHA-XY7E>] (demonstrating Democratic support); see also Allison Herren Lee, *A Proven Success: The SEC Whistleblower Regime Provides a Roadmap for DOJ’s New Program*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 25, 2024), <https://corpgov.law.harvard.edu/2024/04/25/a-proven-success-the-sec-whistleblower-regime-provides-a-roadmap-for-doj-s-new-program> [<https://perma.cc/GR5A-63E7>].

22. See Letter from Stephen M. Kohn, Att’y for Media Whistleblowers, Kohn, Kohn & Colapinto, LLP; Siri Nelson, Exec. Dir., Nat’l Whistleblower Ctr. (NWC) & Mary Jane Wilmoth, Publisher, Whistleblower Network News, to Vanessa Countryman, Sec’y, SEC 1 (Feb. 7, 2022), <https://www.sec.gov/files/rules/petitions/2022/petn4-783.pdf> [<https://perma.cc/N4TE-WY88>] [hereinafter NWC Petition] (explaining how media-first “whistleblowers who otherwise qualify” for financial awards are excluded from award contention due to the SEC’s narrow interpretations of “voluntary” and “original” information).

23. See Order Determining Whistleblower Award Claim, Exchange Act Release No. 97450 at 3, 5–6 (SEC May 8, 2023), <https://www.sec.gov/files/denial-order-5823.pdf> [<https://perma.cc/ZKJ5-XHWZ?type=standard>] [hereinafter Release No. 97450] (denying a “legitimate, good faith whistleblower” for lack of “voluntary” status).

24. *Id.* at 3, 6.

25. See NWC Petition, *supra* note 22, at 3 (explaining how many whistleblowers are engineers or computer specialists who instinctively report to the news media since they are likely unfamiliar with other appropriate channels or government programs).

26. *Whistleblower Frequently Asked Questions*, *supra* note 8; SEC, OFF. OF THE WHISTLEBLOWER, ANNUAL REPORT TO CONGRESS FOR FISCAL YEAR 2023 9 (2023), https://www.sec.gov/files/2023_ow_ar.pdf [<https://perma.cc/VS3R-XMD6>] (highlighting the hotline’s responsiveness).

program explicitly requires that whistleblowers bring their information to the SEC before the SEC identifies and contacts them first.²⁷ If the whistleblower first disclosed their information elsewhere, they are likely already disqualified from award eligibility upon first communication with the SEC.²⁸ Though not all prior disclosures bar a tipster from later receiving SEC whistleblower status and an award, the list of acceptable routes of first disclosure is curt and leaves out attractive reporting avenues such as the news media.²⁹ Despite other whistleblower legislation's inclusion of the news media as a qualifying source, the SEC has held firm in its bar of media-first whistleblowers from award eligibility.³⁰

Part I of this Comment explores a whistleblower's rationale in reporting to the media when internal workplace channels fail to protect them from retaliatory behaviors. Part II examines corruption detection and enforcement recommendations from the Biden-era White House and the Organisation for Economic Co-operation and Development (OECD) and discusses the domestic and foreign anti-corruption goals advanced by protecting and rewarding whistleblowers who work alongside the media. Part II also discusses the SEC's Dodd-Frank authority to author its own whistleblower award program rules and finds that the current program standards are unjustifiably narrow, opening the door for a successful challenge post-*Chevron*. Part III recommends that the SEC and other agencies increase their own anti-corruption effectiveness by considering the harms associated with incentivizing internal whistleblowing and the benefits of rewarding media-first whistleblowers.

27. See 17 C.F.R. § 240.21F-4(a)(2) (2024) ("If the Commission or any of these other authorities direct a request, inquiry, or demand as described in paragraph (a)(1) of this section to you or your representative first, your submission will not be considered voluntary, and you will not be eligible for an award . . .").

28. See Order Determining Whistleblower Award Claims, Exchange Act Release No. 97228 (SEC Mar. 31, 2023) [hereinafter Release No. 97228], <https://www.sec.gov/files/denial-orders-33123.pdf> [<https://perma.cc/T8ZE-8UGN>] (denying an award applicant who first brought their information to the news media).

29. 17 C.F.R. § 240.21F-4(a)(1) (designating the only acceptable initial reporting destinations as: the Public Company Accounting Oversight Board, self-regulatory organizations, Congress, any other authority of the federal government, a state attorney general, or a state securities regulatory authority).

30. See NWC Petition, *supra* note 22, at 4 (pointing to the False Claims Act and Internal Revenue Service's whistleblower laws, which both allow media-first whistleblowers to be financially rewarded). For instances of media-first whistleblower award denials, see, e.g., Release No. 97228, *supra* note 28 (denying Claimant 1); Order Determining Whistleblower Award Claim, Exchange Act Release No. 97408 (SEC May 1, 2023) [hereinafter Release No. 97408], <https://www.sec.gov/files/rules/other/2023/34-97408.pdf> [<https://perma.cc/RRH6-MJGX>] (denying Claimant).

BACKGROUND

While the SEC whistleblower award program has been an effective tool in dismantling and deterring fraud, it must embrace media-first whistleblowers to reach its maximum potential.³¹ Whistleblowers who first take their information to the news media should not be barred from an award just because they lacked specific knowledge of the SEC's unique program technicalities.³² A change in the SEC's rules could cure this lapse in knowledge and bring the agency in line with recommendations surrounding anti-corruption efforts from the Biden-led White House and the OECD.³³ In 2021 and 2022, respectively, the White House and the OECD called on American public and private sector leaders to protect and support whistleblowers and journalists who team up to fight corruption worldwide, fulfilling the mission of Dodd-Frank.³⁴

These were not new ideas. In the early stages of its whistleblower program, the SEC welcomed public comments regarding the program's drafted

31. See Christine Wiedman & Chunmei Zhu, *The Deterrent Effect of the SEC Whistleblower Program on Financial Reporting Securities Violations*, 40 CONTEMP. ACCT. RSCH. 2711, 2739 (2023) (concluding that the SEC program has "achiev[ed] the goal of deterring securities violations relating to fraudulent reporting"); NWC Petition, *supra* note 22, at 4.

32. See NWC Petition, *supra* note 22, at 3–5.

33. See generally EXEC. OFF. OF THE PRESIDENT, UNITED STATES STRATEGY ON COUNTERING CORRUPTION (2021) [hereinafter WHITE HOUSE STRATEGY], <https://biden-whitehouse.archives.gov/wp-content/uploads/2021/12/United-States-Strategy-on-Countering-Corruption.pdf> [<https://perma.cc/XA5C-9V9M>] (outlining the Biden-led White House's plan "to prevent, limit, and respond to corruption and related crimes" by coordinating governmental and non-governmental efforts, holding wrongdoers accountable, and improving relations with foreign law enforcement in protecting domestic and international markets); ORGANISATION FOR ECON. COOP. & DEV. (OECD), DAF/WGB(2022)43/FINAL, UNITED STATES PHASE 4: SUMMARY AND CONCLUSIONS FOR THE TWO-YEAR WRITTEN FOLLOW-UP REPORT (2022) [hereinafter OECD TWO-YEAR FOLLOW UP], [https://one.oecd.org/document/DAF/WGB\(2022\)43/FINAL/en/pdf](https://one.oecd.org/document/DAF/WGB(2022)43/FINAL/en/pdf) [<https://perma.cc/Z4XW-VVXP>] (outlining the OECD's review of the United States' implementation of its initial Phase 4 recommendations, which included more dedicated efforts by the SEC and other agencies in detecting, investigating, prosecuting, and punishing foreign bribery).

34. See WHITE HOUSE STRATEGY, *supra* note 33, at 14 ("We will protect anti-corruption actors . . . and defend the freedom of expression of anti-corruption activists, whistleblowers, and investigative journalists."); OECD TWO-YEAR FOLLOW UP, *supra* note 33, at 11 ("[T]he Working Group recommends that the United States . . . [c]onsiders how it can enhance protections for whistleblowers who report suspected acts of foreign bribery . . ."); NWC Petition, *supra* note 22, at 4 (petitioning for the SEC to "fully implement [media whistleblower] rights, as envisioned by Congress").

rules.³⁵ Charles Grassley, a U.S. Senator and longtime whistleblower advocate, was one among many who voiced concerns about the complex program technicalities.³⁶ Senator Grassley feared that the rules and exemptions would “unnecessarily constrain the applicability of the Dodd-Frank whistleblower reforms and create a non-statutory basis for denying a whistleblower award.”³⁷ Senator Grassley also expressed that many of the proposed rules limited program effectiveness by unduly burdening tipsters with complex submission requirements, predicting the very future faced by media-first whistleblowers.³⁸

In a 2011 announcement, the SEC recognized that its formerly proposed “overly-broad” definition of “voluntary” may unintentionally deter “high-quality submissions.”³⁹ But that feared chilling effect instead manifested when the SEC finalized an overly *narrow* definition of “voluntary” status that excluded media-first sources.⁴⁰ The SEC attributed this carveout to the “important relationship” between its Enforcement and Examinations divisions while failing to recognize other important relationships, such as those among investigative journalists, whistleblowers, and governmental agencies.⁴¹

Excluded categories of tipsters, such as media-first whistleblowers, have since felt the effects of this narrow rule.⁴² To avoid future reporting deterrence, the SEC must expand the program to award media-first whistleblowers, financially incentivizing them to continue their critical aid to the SEC.⁴³

35. SEC, *Comments on Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, SEC (Apr. 27, 2015), <https://www.sec.gov/comments/s7-33-10/s73310.shtml> [<https://perma.cc/PL77-DAPX>].

36. Letter from Sen. Charles E. Grassley, U.S. Senate, to Hon. Mary L. Schapiro, Chairman, SEC 3 (May 10, 2011), [hereinafter Letter from Sen. Grassley to Chairman Shapiro] <https://www.sec.gov/comments/s7-33-10/s73310-310.pdf> [<https://perma.cc/G5NR-4ZYX>]; see also Press Release, Charles Grassley, Sen., U.S. Senate, Senators Introduce Bipartisan Legislation to Close Loophole in Fight Against Fraud (July 25, 2023), <https://www.grassley.senate.gov/news/news-releases/senators-introduce-bipartisan-legislation-to-close-loophole-in-fight-against-fraud> [<https://perma.cc/CB9N-2Z2R>] (detailing Senator Grassley’s longtime commitment to whistleblowers, dating back to his lead role in the 1986 revival of the False Claims Act).

37. Letter from Sen. Grassley to Chairman Shapiro, at 4.

38. *Id.* at 3; see also Release No. 97450, *supra* note 23, at 4, 6 (denying a helpful, “good faith” whistleblower).

39. Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,307 (June 13, 2011).

40. *Id.*

41. *Id.* See generally WHITE HOUSE STRATEGY, *supra* note 33 (proposing strategies to combat corruption by protecting and utilizing actors who strengthen anti-corruption efforts).

42. See, e.g., Release No. 97450, *supra* note 23; Release No. 97228, *supra* note 28; Release No. 97408, *supra* note 30 (all denying media-first whistleblowers).

43. See NWC Petition, *supra* note 22, at 4.

I. THE CURRENT STATE OF MEDIA WHISTLEBLOWING

A. *Why Go to the Media? Common Sense & the Risk of Internal Reporting*

Despite alerting the agency to new information, media-first whistleblowers subsequently contacted by the SEC cannot qualify for a financial reward because of their non-voluntary status.⁴⁴ This rule creates a sort of loophole in which the SEC can contact sources it learned of through public media reports and then spend months, or even years, working with that source to uncover information otherwise unknown to the SEC.⁴⁵ And even after possibly sacrificing their job, family life, or mental health, the source will likely walk away without SEC whistleblower status or an award.⁴⁶

Despite these risks, whistleblowers still turn to the media for the following three reasons: (1) the media's unparalleled speed in sharing news of egregious conduct, (2) the lack of power an employee has to remedy wrongdoing internally, and (3) the threat of internal workplace retaliation against those who speak up.⁴⁷

The SEC's justification for excluding media whistleblowers stems from its preference to carry out thorough, under-the-radar investigations.⁴⁸ This allows the SEC more time to diligently uncover fraud while often utilizing still-employed informants, as a company is less likely to cover up bad behavior or interfere with the government's monitoring if it is unaware that it is even

44. *Whistleblower Frequently Asked Questions*, *supra* note 8 (answering the prompt: "What does it mean to 'voluntarily' provide information?").

45. See Release No. 97450, *supra* note 23, at 3 (Claimant 1 contends that they "voluntarily cooperat[ed] with the Commission, in a variety of matters, for a number of years"); NWC Petition, *supra* note 22, at 3 (listing scandals exposed by media-first whistleblowers who witnessed the wrongdoing first-hand).

46. See Release No. 97450, *supra* note 23, at 4 (denying a whistleblower who "allege[d] that [they] . . . suffered substantial hardship as a result of [their] whistleblowing"). Similarly, Eugene Ross lost everything when he blew the whistle on fraud at Bear Stearns, a now-defunct investment banking company. Leah McGrath Goodman, *He Waited 17 Years to Be Denied an SEC Whistleblower Award*, INSTITUTIONAL INV. (Aug. 4, 2021), <https://www.institutionalinvestor.com/article/2bswuj1vb5zxnt6uz8mps/opinion/he-waited-17-years-to-be-denied-an-sec-whistleblower-award> [<https://perma.cc/Y97N-TPSQ>]. Despite dedicating years to helping the SEC "recover[] an estimated \$54 million in penalties, disgorgement, and interest," the SEC has repeatedly denied Ross an award on the basis of program technicalities. *Id.*

47. See *infra* notes 48–70 and accompanying text.

48. Leila Shaver, *Navigating an SEC Investigation: What to Expect and How to Protect Yourself*, MY RIA LAW., <https://www.myrialawyer.com/sec-investigation> [<https://perma.cc/NZ2V-VQ65>] (last visited Mar. 3, 2025) ("The SEC prefers to keep things under wraps . . . to avoid tipping off potential witnesses or causing unnecessary panic. SEC investigations typically remain confidential until there's substantial evidence of wrongdoing.").

under investigation.⁴⁹ But when an employee discovers high-level misconduct, there is a natural urge to quickly alert others—whether that be their fellow coworkers or a prominent news outlet.⁵⁰ This employee may not consider the benefits of a slow, calculated investigation and fact-finding process.⁵¹ Thus, some whistleblowers turn to the media when the harm they uncovered seems to warrant immediate attention and intervention.⁵² For better or for worse, the media approach to whistleblowing provides a form of seemingly instant relief that the SEC cannot, and will not, compete with.⁵³

Additionally, whistleblowers often seek a change that they themselves cannot make.⁵⁴ A 1994 American Business Law Journal article hypothesized

49. See *Do I Need to Quit My Job Before Bringing a Whistleblower Claim?*, KREINDLER & ASSOCS., <https://blowthewhistle.com/need-quit-job-bringing-whistleblower-claim> [<https://perma.cc/UAP2-DDDB>] (last visited Mar. 3, 2025) (explaining the benefits of still-employed whistleblowers).

50. See Kimberly Miller, *State Parks Whistleblower Says He was Fired, but Had to ‘Stop the Madness.’ No Regrets*, PALM BEACH POST, <https://www.palmbeachpost.com/story/news/2024/09/02/florida-state-parks-whistleblower-says-he-was-fired-but-doesnt-regret-decision/75049334007/> [<https://perma.cc/2892-QX2E>] (Sept. 6, 2024, 4:01 PM) (“I was already disgusted but it just kept getting worse and worse’ . . . I said, ‘What I am mapping out here is too bad and too egregious[,] and I can’t take this anymore.’” (quoting whistleblower, James Gaddis)). The media can quickly spread information thanks to its dynamic online and social media presence. OECD, *THE ROLE OF THE MEDIA AND INVESTIGATIVE JOURNALISM IN COMBATING CORRUPTION* 8 (2018) [hereinafter *ROLE OF THE MEDIA*], https://www.oecd.org/content/dam/oecd/en/publications/reports/2018/03/the-role-of-the-media-and-investigative-journalism-in-combating-corruption_f8b5f8d9/7590ec9d-en.pdf [<https://perma.cc/RT9Y-39CT>].

51. See Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151, 163–65 (1994) (explaining how whistleblowers may not trust that their information would survive a more structured reporting channel); see also *ROLE OF THE MEDIA*, *supra* note 50, at 8 (“While criminal proceedings can take years to reach a conclusion, a journalist can draft and publish a story within days that can reach a global readership through social media platforms.”).

52. See Callahan & Dworkin, *supra* note 51, at 178–79 (“[W]histleblowers are much more likely to choose a media outlet for their reports when the wrongdoing observed threatens health or safety . . .”). This theory was exemplified by Erika Cheung, a key whistleblower in the Theranos blood test fraud case. While Cheung was unaware of government whistleblower programs when she made her media disclosure, she said her decision to speak up, like many others, was prompted “by the urgent need to mitigate and address ongoing wrongdoing,” especially in the healthcare field. Brief for The Signals Network et al. as Amici Curiae in Support of Petitioner-Appellant, No. 23-1124 (D.C. Cir. Dec. 3, 2024).

53. Cf. Shaver, *supra* note 48 (justifying the length of SEC investigations).

54. See Callahan & Dworkin, *supra* note 50, at 163 (“Whistleblowers, by definition, lack power to achieve the organizational change they seek.”).

that a low level of power within an organization, coupled with the high risk of retaliation from their employer, often drives employees to report misconduct outside the organization.⁵⁵ If an employee believed they held the organizational power to adjust the misconduct or change the complacent culture from within, then there would be no third-party whistleblowing.⁵⁶ But if a new or low-ranking employee cannot remedy the issue themselves, or lacks trust in the company to do so, then going external and to the media seems rational.⁵⁷

Outspoken employees also face the risk of workplace retaliation, which can come in many harmful forms.⁵⁸ Ninety-one percent of workplace retaliation cases involve employees who raise internal concerns—often to management, a human resources or legal department, or a company’s supposedly protected tipline.⁵⁹ The employee believes they are doing the right thing but may not anticipate the magnitude of backlash this behavior could cause.⁶⁰

55. See *id.* at 163–66 (“External reporting is certainly likely, and perhaps even necessary, in situations where effective internal channels and nonretaliatory policies are lacking.”); see also Vesile Cinceoglu & Nadine Strauß, *Unmasking Greenwashing—The Role of the News Media in Giving Voice to Whistleblowers in Sustainable Finance*, 26 JOURNALISM 445, 447 (2025) (“[W]hen internal support is low, past reports of misconduct were ignored or buried, and other whistleblowers have been punished for coming forward, outside entities such as the media become alternative arenas to make the criticism publicly heard.”) (citations omitted).

56. Callahan & Dworkin, *supra* note 50, at 163–64.

57. See *id.* at 163 (arguing that “[t]he media is one of the most commonly recognized sources” of change to organizational behavior).

58. See *Retaliation*, OCCUPATIONAL SAFETY & HEALTH ADMIN., DEP’T OF LAB., https://www.whistleblowers.gov/know_your_rights [<https://perma.cc/3EPX-A6CV>] (last visited Mar. 4, 2025) (providing examples of retaliatory behavior).

59. See Stephen M. Kohn, Alyce Petit, Kate Reeves & Geoff Schweller, *Whistleblower Disclosures: An Empirical Risk Assessment 6* (Feb. 13, 2024) (unpublished manuscript) (available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4690852 [<https://perma.cc/5D7A-FCP6>]); Carolyn Conn, Stephen M. Kohn & Grace Schepis, *Navigating the Choppy Waters of Internal Whistleblowing*, FRAUD MAG., Nov./Dec. 2022, at 24, <https://www.fraud-magazine.com/article.aspx?id=4295019788> [<https://perma.cc/E6CJ-JHEU>] (warning internal whistleblowers of retaliation following a seemingly protected disclosure); see also RULES FOR WHISTLEBLOWERS, *supra* note 4, at 65 (“[C]orporate compliance programs that are managed by attorneys working for the company are completely compromised and can lawfully throw whistleblowers under the bus.”).

60. See Callahan & Dworkin, *supra* note 51, at 166 (“Studies have shown that a primary motivation for blowing the whistle is to correct wrongdoing and get the organization ‘back on track.’ Thus, whistleblowing may be viewed as the pro-social act of a loyal employee.”) (citing FREDRICK ELLISTON, JOHN KEENAN, PAULA LOCKHART & JANE VAN SCHAICK, *WHISTLEBLOWING RESEARCH: METHODOLOGICAL AND MORAL ISSUES* (1985)); RULES FOR

Whistleblower retaliation can look like firing, demotion, a reduction in pay, non-consideration for promotions, relocation to a less desirable office or division, and harassment.⁶¹

While some employers write off whistleblowers as just disgruntled, vengeful employees, internal whistleblowers are often star employees with clean records and exemplary performance reviews.⁶² But once these employees challenge organizational norms and point out misconduct, they may instantly face retaliatory measures.⁶³ When Enron Vice President of Corporate Development Sherron Watkins brought evidence of accounting fraud to

WHISTLEBLOWERS, *supra* note 4, at 65–67 (telling the story of Ronald J. Goldstein, a nuclear power plant employee who was fired after raising safety concerns through the company's internal reporting program). In response, the Fifth Circuit ruled that private companies may use these seemingly inviting programs to lure in, identify, and fire whistleblowers. See *Ebasco Constructors, Inc. v. Martin*, No. 92-4576, 1993 U.S. App. LEXIS 40540, at *3–4 (5th Cir. 1993) (holding that only government disclosures are protected).

61. For examples of retaliatory behavior, see *Retaliation*, *supra* note 58.

62. See Alexis Ronickher, *What Motivates a Whistleblower?*, KATZ BANKS KUMIN (Mar. 15, 2023), <https://katzbanks.com/whistleblower-blog/what-motivates-whistleblower> [<https://perma.cc/BQ2K-CXSQ>] (“Far from being aggrieved and disloyal employees, many whistleblowers even believe that rooting out and reporting corporate misconduct is more beneficial to their companies than remaining quiet and letting the harm continue.”); Grace Schepis, *Jane Turner: From FBI Whistleblower to Whistleblower Advocate*, JD SUPRA (Mar. 15, 2023), <https://www.jdsupra.com/legalnews/jane-turner-from-fbi-whistleblower-to-5531813/> [<https://perma.cc/A6LD-VQ34>] (“[Those] who worked closely with Turner averred that . . . historically her work was outstanding, and that her performance showed no decline” (quoting *Turner v. Gonzales*, 421 F.3d 688, 699 (8th Cir. 2005)). Turner had won multiple awards for her Federal Bureau of Investigation (FBI) work prior to blowing the whistle. *Id.*; *Jane Turner*, KOHN, KOHN & COLAPINTO LLP, <https://kkc.com/whistleblower-case-archive/jane-turner> [<https://perma.cc/3K4J-5XE3>] (last visited Apr. 15, 2025) (emphasizing Turner won multiple awards for her FBI work in North Dakota prior to blowing the whistle). Cynthia Cooper blew the whistle on \$3.8 billion of accounting fraud while serving as the Vice President of Internal Audit at WorldCom in 2002. See Lioness, *Cynthia Cooper—WorldCom, 2022*, TECH WORKER HANDBOOK, <https://techworker-handbook.org/media/cynthia-cooper-worldcom-2002> [<https://perma.cc/7V5V-Y9LY>] (last visited Feb. 28, 2025). Prior to blowing the whistle, Cooper had spent years dedicated to a Fortune 500 company, resulting in her Vice President promotion. See *id.*; Dick Carozza, *Extraordinary Circumstances: An Interview with Cynthia Cooper*, FRAUD MAG. Mar./Apr. 2008, <https://www.fraud-magazine.com/article.aspx?id=210> [<https://perma.cc/4LPE-TVGH>]. Following her disclosure, Cooper was told her efforts were a waste of time while she was harassed and questioned both inside and outside of the workplace. See Lioness, *supra*.

63. See, e.g., Todd W. Shaw, *When Text and Policy Conflict: Internal Whistleblowing Under the Shadow of Dodd-Frank*, 70 ADMIN. L. REV. 673, 681–82 (2018) (sharing the story of Khaled Asadi, a G.E. Energy employee who received his first negative performance review following an internal disclosure concerning FCPA violations).

then-CEO Ken Lay just months before the company collapsed from the inside, she was ignored and seen as a “snitch.”⁶⁴ Jane Turner, a former Federal Bureau of Investigation (FBI) agent assigned to investigate child sex crimes in North Dakota, went from the FBI’s star student to its newest target after she called out the mishandling of cases that ultimately resulted in the return of young victims to their abusers.⁶⁵ Despite its motto of “Fidelity, Bravery, and Integrity,” the FBI shut Turner out for trying to hold her colleagues accountable.⁶⁶ Her whistleblower efforts were not a courtesy—they were a duty and an obligation.⁶⁷ While Turner pulled off a rare win of her retaliation cases in court, the trauma she endured outlived her FBI employment.⁶⁸

Altogether, internal whistleblowing cannot be marketed as a safe and necessary step in reporting fraud.⁶⁹ Currently, the SEC encourages this behavior by increasing the whistleblower award amounts of those who first report their

64. Medius, *Courageous Whistleblowers Reclaim Derogatory Terms as Data Shows 80% of Financial Professionals Stay Silent on Suspected Internal Fraud, Fearing Retaliation*, PR NEWswire (May 21, 2024, 11:13 AM), <https://www.prnewswire.com/news-releases/courageous-whistleblowers-reclaim-derogatory-terms-as-data-shows-80-of-financial-professionals-stay-silent-on-suspected-internal-fraud-fearing-retaliation-302151618.html> [<https://perma.cc/V6TD-QZMS>]; see Nance Lucas & V. Scott Koerwer, *Featured Interview Sherron Watkins, Former Vice President for Corporate Development of Enron*, 11 J. LEADERSHIP & ORGANIZATIONAL STUD. 38, 41 (2004).

65. Schepis, *supra* note 62; Charlotte Keith, *Thousands of Employees at Federal Contractors Do Not Have Whistleblower Protections Despite 2013 Law*, SPOTLIGHT PA (Apr. 25, 2024), <https://www.spotlightpa.org/news/2024/04/thousands-of-employees-at-federal-contractors-do-not-have-whistleblower-protections-despite-2013-law> [<https://perma.cc/A8ZV-S3TZ>]. Even while facing retaliation, Turner stayed on top of her caseload and continued to solve tough cases. Dan Browning, *Ex-agent Wins Lawsuit Against FBI*, THE MINN. STAR TRIB. (Feb. 5, 2007), https://www.whistleblowers.org/wp-content/uploads/2018/08/ex-agent_wins_lawsuit_against_fbi-1.pdf [<https://perma.cc/BC3E-R7SE>].

66. See *Seal & Motto*, FBI, <https://www.fbi.gov/history/seal-motto> [<https://perma.cc/TC4J-ACSD>] (last visited Feb. 28, 2025); Schepis, *supra* note 62.

67. Memorandum from Charles E. Grassley, Sen., U.S. Senate, to Reporters and Editors (Aug. 14, 2007), <https://www.grassley.senate.gov/news/news-releases/fbi-whistleblower-jane-turner> [<https://perma.cc/Y6LF-PDES>].

68. Schepis, *supra* note 62; see Keith, *supra* note 65. Turner describes the post-traumatic stress disorder she continues to deal with as “brutal.” Matthew Brown, *Anatomy of a Whistleblower: ‘If I Was to Uphold My Vow and My Oath of Office, I Had to Do It’*, DESERET NEWS (Oct. 14, 2019, 10:00 PM), <https://www.deseret.com/indepth/2019/10/14/20908644/whistleblower-fbi-agents-investigation> [<https://perma.cc/GG2R-R6LN>].

69. See RULES FOR WHISTLEBLOWERS, *supra* note 4, at 67 (referring to internal programs as “Trojan Horse[s]” disguised to encourage employees to come forward with information and out themselves as whistleblowers).

information internally.⁷⁰ But the reality of internal whistleblowing demonstrates how the practice is counteractive to SEC goals, giving wrongdoers the opportunity to punish the outspoken and protect themselves ahead of government investigation.⁷¹ With these considerations in mind, one could see how an employee may think that reporting externally, and to the media, may be in their own best interest.⁷²

B. Media-First Whistleblowers Today: Not Voluntary? Not Eligible.

An individual only meets the SEC's current definition of "voluntary" if they provide information to the SEC or another approved law enforcement agency before a "request, inquiry, or demand" from the SEC that relates to the same subject matter.⁷³ This means that a whistleblower who goes to a journalist, shares their information, triggers the release of a story, and is then contacted by the SEC is ineligible for an award. Even if the SEC opened an investigation based solely on the whistleblower's information, and the whistleblower is perfectly compliant throughout the entire partnership, an award application will likely be denied.⁷⁴

This is precisely what happened in March 2023 when the SEC denied the award application of Claimant 1, an anonymous media-first whistleblower.⁷⁵ According to the Order, the investigation "was opened by [SEC]

70. *Whistleblower Frequently Asked Questions*, *supra* note 8 (answering the prompt: "What factors does the SEC consider in determining the amount of the award?"); *see also Whistle While You Work (Part 2)! SEC Adopts Final Whistleblower Rules*, MASLON LLP (May 25, 2011), <https://www.maslon.com/whistle-while-you-work-part-2-sec-adopts-final-whistleblower-rules> [<https://perma.cc/7M5Z-EPA5>] ("[T]he SEC did alter its rule in several ways in an attempt to further encourage employees and other potential whistleblowers to use internal reporting systems"); Matthew LaGarde, *SEC Supports Protections for Dodd-Frank Whistleblowers Who Report Internally*, KATZ BANKS KUMIN (Apr. 15, 2016), <https://katzbanks.com/sec-whistleblower-blog/sec-supports-protections-dodd-frank-whistleblowers-who-report-internally> [<https://perma.cc/Q5ZH-C46X>] (detailing the two "business-friendly" reasons the SEC supports internal whistleblowing: deterrence and detection of wrongdoing and offering companies the ability to rectify the misconduct or self-report their illegal conduct, which would save government and shareholder resources).

71. *See, e.g.,* Dick Carozza, *Interview with Sherron Watkins: Constant Warning*, FRAUD MAG., Jan./Feb. 2007 [hereinafter Carozza, *Sherron Watkins*], <https://www.fraud-magazine.com/article.aspx?id=583> [<https://perma.cc/72HS-PERR>] (explaining how Enron used Watkins' internal whistleblower disclosure to cover up fraud rather than remedy the snowballing issues).

72. *See* Callahan & Dworkin, *supra* note 51, at 165–66 (explaining how external reporting is likely necessary when internal channels fail or threaten a well-intentioned employee).

73. 17 C.F.R. § 240.21F-4(a) (2025).

74. *See, e.g.,* Release No. 97228, *supra* note 28.

75. *Id.*

Enforcement staff . . . after staff reviewed news reports indicating potential misconduct by . . . (the ‘Company’).”⁷⁶ The Order explains how, once contacted by the SEC, Claimant 1 complied with the investigation and filed an award application, but was not considered a voluntary source.⁷⁷ The Order notes that Claimant 1 was a foreign national and had no prior knowledge of Dodd-Frank or the SEC whistleblower program’s filing requirements.⁷⁸

Claimant 1 argued that disclosures initially made to the news media are within the scope of Dodd-Frank and not expressly prohibited by the SEC rules.⁷⁹ In response, the SEC held firm that Claimant 1’s argument was “contrary to the plain text of the [SEC’s] rule” on voluntary sources and that the expansion of voluntary status to media-first whistleblowers would make implementation difficult.⁸⁰ In its Order, the SEC failed to address Dodd-Frank’s explicit language that covers whistleblowers who provide their information directly to the news media before having it picked up by the SEC.⁸¹

As Claimant 1 argues, regulations that create barriers for whistleblowers, and especially those abroad with counsel unfamiliar to the SEC’s program, undermine the goals of Dodd-Frank and the SEC.⁸² Claimant 1 complied with the SEC’s investigation, carrying the agency to a major enforcement action.⁸³ But as future media-first whistleblowers observe the fate of those like Claimant 1, they may not be as inclined to help the SEC.⁸⁴

76. *Id.*

77. *Id.*

78. *Id.* Claimant 1’s counsel failed to explain the SEC and Dodd-Frank Act protections to Claimant 1, who was unaware of any disqualifications that media contact may cause. *See id.* Upon learning of these requirements through new counsel, Claimant 1 filed the necessary form and appealed the award denial, noting that “there is no requirement that a whistleblower submit the same information provided to the news media to the SEC within a certain number of days to qualify for an award.” *Id.* (quoting Claimant 1).

79. *Id.*

80. *Id.*

81. *Id.* Per Dodd-Frank:

The term “original information” means information that—(A) is derived from the independent knowledge or analysis of a whistleblower; (B) is not known to the Commission from any other source, *unless the whistleblower is the original source of the information*; and (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

15 U.S.C. § 78u-6(a)(3) (emphasis added).

82. Release No. 97228, *supra* note 28.

83. *Id.*

84. Interview with Stephen M. Kohn, Partner, Kohn, Kohn & Colapinto LLP, in Wash.,

II. EXISTING SUPPORT FOR INCENTIVIZING MEDIA-FIRST WHISTLEBLOWERS

A. Domestic and International Initiatives Support Collaboration Between Whistleblowers and the News Media

1. The White House Strategy on Countering Corruption

In December 2021, President Joseph Biden's White House published the *United States Strategy on Countering Corruption* (the Strategy).⁸⁵ This thirty-eight-page report discussed the impacts of domestic and international corruption, explained what was at the time the United States' approach to fighting fraud, and introduced the White House's five "strategic pillars" and objectives going forward.⁸⁶

Notably, Pillar Five, titled "Improving Diplomatic Engagement and Leveraging Foreign Assistance Resources to Advance Policy Goals," explicitly lists both whistleblowers and investigative journalists as existing, underutilized anti-corruption tools.⁸⁷ Strategic Objective 5.2, titled "[p]rotect anti-corruption actors," recognizes the "physical threats and legal harassment" faced by whistleblowers and investigative journalists alike.⁸⁸ The Strategy expresses the United States' "solidarity" with these groups, proposing increased support, education, and legal protection for those affected.⁸⁹

The Strategy also suggests "enlist[ing] the private sector as a full-fledged partner" to the media as both are well-positioned to uncover and bring forth allegations of corruption.⁹⁰ This messaging of cross-collaboration between industries and professions in support of government enforcement efforts is consistent throughout the Strategy and provides further support for a program that embraces and rewards collaboration by and with whistleblowers.⁹¹

D.C., at 1 (Oct. 22, 2024) [hereinafter Kohn Interview] ("Media-first whistleblowers who look at the statute and at the award decisions will see a discouraging uniform denial of people just like them.").

85. WHITE HOUSE STRATEGY, *supra* note 33.

86. *Id.*

87. *Id.* at 34.

88. *Id.*

89. *Id.* at 34–35. Specifically, the *United States Strategy on Countering Corruption* suggests supporting journalists and other change agents, increasing education about existing global emergency assistance mechanisms, and countering nuisance lawsuits against journalists and activists while coordinating actions with partner countries when possible. *Id.* at 35.

90. *Id.* at 30.

91. See, e.g., *id.* at 25 ("The U.S. Government most effectively counters corruption through a whole-of-government approach and collaboration with allies and partners.").

While many of the specific policy goals and agencies central to the Biden Administration's Strategy are now threatened by President Donald Trump's various Executive Orders and attempts to strip the federal workforce of anti-corruption programs and personnel, the Strategy can still act as a guide to those committed to fighting corruption and protecting whistleblowers and journalists despite the change in executive priorities.⁹² Presently, only a small handful of government agencies have responded with concrete plans to implement these recommendations.⁹³ It is imperative that more agencies, including the SEC, legitimize the Biden Administration's powerful framework

92. See David Chase & Scott Silver, *SEC Whistleblower Program: What to Expect Under the Trump Administration*, DAILY BUS. REV. (Feb. 3, 2025, 10:09 AM), <https://www.law.com/dailybusinessreview/2025/02/03/sec-whistleblower-program-what-to-expect-under-the-trump-administration> [<https://perma.cc/Y7RW-HZ8A>] (predicting major changes to the SEC's Enforcement Division's priorities under Paul Atkins, President Trump's head of the SEC). The authors also foresee less civil penalties against corporations, both in quantity and amount, yet a minimal material impact on the success of the whistleblower program. *Id.* The Trump Administration's efforts to "shut down" United States Agency for International Development (USAID) will directly undermine the agency's anti-corruption efforts cited and applauded in the Strategy. See Jennifer Hansler, Alex Marquardt & Lex Harvey, *Elon Musk Said Donald Trump Agreed USAID Needs to be 'Shut Down'*, CNN (Feb. 3, 2025, 7:48 AM), <https://www.cnn.com/2025/02/02/politics/usaid-officials-leave-musk-doge/index.html> [<https://perma.cc/TT7N-UP4D>]; WHITE HOUSE STRATEGY, *supra* note 33, at 19–20, 24, 28–30, 32, 35–37 (discussing USAID's initiatives). At her nomination hearing before the Senate Judiciary Committee, Trump-appointed Attorney General Pam Bondi shared her support for government whistleblowers who should "come forward without fear of retaliation," providing hope for the new Administration's treatment of government whistleblowers currently protected under various statutes. Forbes Breaking News, *Pam Bondi Asked Directly: 'Will You Protect Whistleblowers From Retaliation?'*, YOUTUBE (Jan. 15, 2025), https://www.youtube.com/watch?v=UH_2c8_WPh8 [<https://perma.cc/JRN5-ZTF6>].

93. See, e.g., Press Release, Dep't of State, Implementing the U.S. Strategy on Countering Corruption (Sept. 6, 2023), <https://2021-2025.state.gov/implementing-the-u-s-strategy-on-countering-corruption> [<https://perma.cc/QT8M-N4EX>] (expressing the previous State Department's plan to create more anti-corruption programs, trainings, and toolkits for employees, and to expand partnerships with other federal agencies); *Implementation of the U.S. Anti-Corruption Strategy: Hearing Before the S. Comm. on Foreign Rels.*, 118th Cong. 10–12 (2024) (statement of Shannon Green, Assistant to the Adm'r, Bureau for Democracy, Hum. Rts., & Governance, USAID) (USAID's past plans included the expansion of investigative journalism networks that expose worldwide corruption and the continuation of their Grand Challenge, a global competition that rewards applicants with the best ideas on countering transnational corruption). For insight into USAID's future under the Trump Administration, see *supra* note 92.

by enshrining its recommendations to better recognize, investigate, and prosecute corruption at home and abroad.⁹⁴

2. *The OECD's Phase 4 Two-Year Follow Up Report*

The OECD is an international organization that acts as a “forum and knowledge hub” for countries seeking policy guidance on global issues, including human rights and economic matters.⁹⁵ In 1994, the OECD established a Working Group on Bribery (the Working Group) to act as a watchdog over countries party to the OECD's Anti-Bribery Convention.⁹⁶ The Convention sets and enforces the rules criminalizing bribery of foreign public

94. Recently, in a 52–44 vote, the Senate confirmed President Trump's nomination of Paul Atkins to chair the SEC. Danielle Wallace, *Senate Confirms Trump's SEC Chair Pick Paul Atkins*, FOXBUSINESS (Apr. 10, 2025, 8:41 AM), <https://www.foxbusiness.com/politics/senate-confirms-trumps-sec-chair-pick-paul-atkins> [<https://perma.cc/GCR7-K76U>]. Atkins, who served as an SEC commissioner between 2002 and 2008, is known for his deregulation of financial services and promise to bring a “rational, coherent, and principled approach” to policing the crypto industry. Eric Johansson, *Who is Paul Atkins? Trump's New SEC Chair has a History of Backing Crypto*, DLNEWS (Apr. 10, 2025, 1:21 PM), <https://www.dlnews.com/articles/people-culture/who-is-paul-atkin-trumps-new-sec-chair-has-a-history-of-backing-crypto> [<https://perma.cc/Y4PF-AAHG>] (quoting Paul Atkins); Frank Zarb, Louis Rambo, Nathan Schuur, Robert Sutton, Robert Pommer & Joshua M. Newville, *The SEC Under Paul Atkins—What to Expect for Registered and Private Offerings, Climate-Related Disclosure, Consolidated Audit Trail, Digital Assets, and Agency Re-Organization*, PROSKAUER (Apr. 3, 2025), <https://www.regulatoryandcompliance.com/2025/04/the-sec-under-paul-atkins-what-to-expect-for-registered-and-private-offerings-climate-related-disclosure-consolidated-audit-trail-digital-assets-and-agency-re-organization> [<https://perma.cc/8E6H-SVCZ>]. Atkins was an early skeptic of the SEC whistleblower program, raising concerns in 2011 about the effect of “disgruntled employees with ulterior motives” on shareholders. PAUL S. ATKINS, AM. ENTER. INST. FOR PUB. POL'Y RSCH., STATEMENT BEFORE THE UNITED STATES SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS ON ENHANCING INVESTOR PROTECTION AFTER THE FINANCIAL CRISIS 10–11 (2011), <https://www.banking.senate.gov/imo/media/doc/AtkinsTestimony71211.pdf> [<https://perma.cc/B8T7-LUXL>]. But now, years later, whistleblower advocates hope that Atkins' “light-touch” regulatory approach and belief in internal compliance programs do not jeopardize the success of the program thus far. Dave Jochnowitz, *SEC Whistleblower Program Must Remain a Priority for Paul Atkins*, U.S. L. WEEK (Apr. 10, 2025, 4:30 AM), <https://news.bloomberglaw.com/us-law-week/sec-whistleblower-program-must-remain-a-priority-for-paul-atkins> [<https://perma.cc/U8DP-8VD7>].

95. *About*, OECD, <https://www.oecd.org/en/about.html> [<https://perma.cc/M5KX-KTGV>] (last visited Mar. 7, 2025).

96. *Working Group on Bribery*, OECD, <https://www.oecd.org/en/about/committees/working-group-on-bribery.html> [<https://perma.cc/JU88-KNCK>] (last visited Apr. 16, 2025).

officials in international business transactions.⁹⁷ The Working Group monitors worldwide progress and publishes evaluation reports detailing whether a country has successfully implemented the OECD's recommendations.⁹⁸

In October 2022, the OECD published its Phase 4 Two-Year Follow-Up Report on the United States' progress in Implementing the OECD Anti-Bribery Convention (Two-Year Follow-Up).⁹⁹ Of the OECD's nine recommendations provided in the initial Phase 4 Report, the United States fully implemented five, partially implemented three, and failed to implement one.¹⁰⁰ Many of the recommendations center on the SEC and DOJ's ability to enforce the Foreign Corrupt Practices Act (FCPA), a novel act targeting the bribery of foreign public officials for the purpose of obtaining business.¹⁰¹ The SEC's FCPA Unit, housed within its Division of Enforcement, welcomes global whistleblower tips surrounding foreign corruption and bribery.¹⁰² The OECD had previously asked the SEC and DOJ to maintain and disclose their FCPA violation detection sources.¹⁰³ In the Two-Year Follow-Up, the OECD shared those detection sources from successful cases between October 2020 and October 2022.¹⁰⁴

97. See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, T.I.A.S. No. 99-215, <https://www.state.gov/99-215> [<https://perma.cc/3SGE-EBAP>] (listing member countries).

98. *Id.*

99. OECD TWO-YEAR FOLLOW UP, *supra* note 33.

100. *Id.* at 5–8.

101. *Foreign Corrupt Practices Act (FCPA)*, SEC (Sept. 13, 2023), <https://www.sec.gov/enforcement/foreign-corrupt-practices-act> [<https://perma.cc/35R6-G3LB>]. On February 10, 2025, President Trump signed an Executive Order directing Attorney General Pam Bondi to halt DOJ FCPA enforcement for at least 180 days with the opportunity to extend that review period. See Exec. Order No. 14,209, 90 Fed. Reg. 9,587 (Feb. 10, 2025). The Executive Order sympathized with American companies who lost out on “strategic business advantages” because of the FCPA’s “overexpansive and unpredictable” enforcement. *Id.* at § 1. While a handful of “Big Law” white collar defense firms jumped to issue client alerts, the future of FCPA enforcement following the 180-day review period remains unknown. See, e.g., Gerald M. Moody, Samuel W. Salyer, Samantha Jennifer Block, Stephanie Ondrof, James Joseph Benjamin Jr., Michael A. Asaro, et al., *Analyzing the Attorney General’s FCPA Enforcement Shift*, AKIN GUMP STRAUSS HAUER & FELD LLP (Feb. 10, 2025), <https://www.akingump.com/en/insights/alerts/analyzing-the-attorney-generals-fcpa-enforcement-shift> [<https://perma.cc/LA7K-XHE7>] (advising companies to “maintain robust antibribery compliance programs” despite the Order). Presently, this directive does not directly affect SEC FCPA action, though the SEC and DOJ often collaborate when investigating and charging these cases. *Id.*

102. *SEC Enforcement Actions: FCPA Cases*, SEC (Dec. 30, 2024), <https://www.sec.gov/enforcement/sec-enforcement-actions-fcpa-cases> [<https://perma.cc/W4RB-Z4NP>].

103. OECD TWO-YEAR FOLLOW UP, *supra* note 33, at 5–6 (Recommendation 1(a)).

104. *Id.* at 6.

SEC & DOJ FCPA Detection Sources ¹⁰⁵	
Detection Sources	% of Cases Triggered
Self-Reports	10%
Whistleblowers	40%
Media Reports	20%
Civil or Foreign Authority Referrals	20%
Other Law Enforcement Activity	10%

Whistleblowers and the news media already serve as the leading triggers of successful FCPA cases.¹⁰⁶ The Working Group credited the SEC and DOJ as the lead enforcers of their international anti-corruption mission, giving the agencies the opportunity to set a precedent that recognizes and rewards collaboration between journalists and whistleblowers.¹⁰⁷

The OECD embraces the assistance of the media in its efforts to detect bribery and “[recommends] that member countries encourage law enforcement authorities to proactively gather information from *diverse sources* to increase detection of foreign bribery and enhance investigations, *such as the media . . .*”¹⁰⁸ In the original Phase 4 Report, the OECD recommended “allowing journalists access to information from public administrations combined with comprehensive safeguards to protect journalist sources, including whistleblowers.”¹⁰⁹ The OECD, like the Biden-led White House, supports the utilization and protection of these two source types and understands how they can be used to advance domestic and international goals.¹¹⁰

105. *Id.* at 10.

106. *Id.*

107. *See id.* at 3.

108. OECD, RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 7, 13 (2009), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378%23> [<https://perma.cc/3S48-JKPC>] (emphasis added).

109. OECD, IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION PHASE 4 REPORT: UNITED STATES 30 (2020) [hereinafter OECD PHASE 4 REPORT], https://www.oecd.org/en/publications/implementing-the-oecd-anti-bribery-convention-phase-4-report-united-states_0cd34e9f-en.html [<https://perma.cc/9JMR-RVB5>]. These protections cannot be limited to physical safeguards—mental, emotional, and professional wellbeing should also be prioritized. *See The Importance of Rewards*, NWC, <https://www.whistleblowers.org/the-importance-of-rewards/> [<https://perma.cc/CS5N-PRPR>] (last visited Feb. 21, 2025) (explaining how the large financial risks associated with whistleblowing call for a financial incentive).

110. *See supra* notes 108–109 and accompanying text.

On the education front, the OECD originally recommended that the SEC rework its website to better advertise the whistleblower program and the protections it offers based on disclosure methods.¹¹¹ In the Two-Year Follow-Up, the OECD noted that the SEC complied with this recommendation in updating its website but could do even more to make program qualifications clear.¹¹² For example, it recommended that the SEC detail the different protections available to whistleblowers who first report to the SEC or other sources to help potential whistleblowers make informed choices about their next steps.¹¹³ The SEC addresses the external efforts it takes to bolster awareness about the program in its Annual Reports.¹¹⁴ This includes the regular publication of press releases; various links to whistleblower program forms and resources; and the many webinars, media interviews, and presentations the SEC participates in.¹¹⁵ While these are good practices, the SEC does not specifically mention the completion of any international or multilingual efforts necessary for compliance with the OECD's goals.¹¹⁶

The OECD is aware of the importance of protecting and educating both whistleblowers and the news media to advance its global anti-corruption goals.¹¹⁷ The SEC's expansion of its whistleblower award program requirements to include media-first whistleblowers would benefit this transnational protection and incentivization effort.

B. Conformity to Dodd-Frank's Intent

1. Excluding Media-First Whistleblowers is not Necessary, Appropriate, or Consistent with the Intent of Dodd-Frank

Dodd-Frank authorized the SEC to set its own rules in creating the whistleblower program.¹¹⁸ Specifically, Dodd-Frank states that “[t]he Commission shall have the authority to issue such rules and regulations as may be necessary or appropriate to implement the provisions of this section consistent with

111. OECD PHASE 4 REPORT, *supra* note 109, at 17–18, 22.

112. OECD TWO-YEAR FOLLOW UP, *supra* note 33, at 6.

113. *Id.*

114. *See, e.g.*, SEC, 2019 ANNUAL REPORT TO CONGRESS: WHISTLEBLOWER PROGRAM 8 (2019), https://www.sec.gov/files/OW_2019AR_FINAL_508'd.pdf [<https://perma.cc/E2KL-GE4Q>] (highlighting “Public Outreach and Education”).

115. *Id.*

116. *Id.*

117. *See* OECD PHASE 4 REPORT, *supra* note 109, at 30 (calling for “comprehensive safeguards to protect journalist sources, including whistleblowers”).

118. Dodd-Frank Act, Pub. L. No. 111-203, tit. VII, subtit. A, pt. II, sec. 748, § 23, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, and 15 U.S.C.).

the purposes of this section.”¹¹⁹ In excluding media-first whistleblowers from award eligibility, the SEC defies Dodd-Frank’s authorization of “necessary,” “appropriate,” and “consistent” rulemaking.¹²⁰

The ineligibility of media-first whistleblowers is not *necessary* in fulfilling the purposes of Dodd-Frank. The SEC prefers to work under-the-radar.¹²¹ If a company is unaware that it is being investigated, it will go about its unlawful business and allow SEC investigators to collect more robust evidence over a longer period of time.¹²² If a whistleblower is aiding in the investigation, they may stay employed throughout the process and feed information to the SEC.¹²³ While this style of investigation can be successful, it is not the only way—successful whistleblower programs both welcome and reward media-first sources without jeopardizing their own enforcement goals.¹²⁴ And whistleblowers go to journalists for a number of reasons.¹²⁵ It could be that they cannot stomach a long investigation that, while effective, may require prolonging the allowance of egregious misconduct that harms employees and investors alike.¹²⁶ If Dodd-Frank’s overarching mission is to “protect consumers from abusive financial services practices,” then media whistleblowers are justified in trying to protect those consumers as soon as possible.¹²⁷ The SEC can still prefer and incentivize its undetected investigatory approach while making space for media-first whistleblowers acting in what they believe to be the immediate public interest.¹²⁸ At that point, it is too late for the whistleblower to take back their media disclosure, but not too late for the SEC to still benefit from their unique insider information. Thus, the SEC’s exclusion of media-first whistleblowers from award eligibility is not necessary to the goals of Dodd-Frank.

119. *Id.* at tit. VII, subtit. A, pt. II, sec. 748, § 23(i), 124 Stat at 1746 (emphasis added).

120. *See id.*

121. *See* Shaver, *supra* note 48 (explaining how the SEC “prefers to keep things under wraps”).

122. *Id.*

123. *See* RULES FOR WHISTLEBLOWERS, *supra* note 4, at 27 (describing these “recruitment[s]-in-place” as trusted “high-value resource[s]”).

124. *See, e.g., Whistleblower Office, INTERNAL REVENUE SERV. (IRS)* (Oct. 18, 2024), <https://www.irs.gov/compliance/whistleblower-office> [<https://perma.cc/CFP8-HZUH>] (which allows media-first whistleblowers to receive financial awards).

125. *See supra* Part I.A.

126. *See, e.g., Miller, supra* note 50 (describing how a government cartographer could no longer wait to speak up after being asked to create building development plans that would demolish a Florida state park).

127. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

128. *See infra* Part III.A (recommending the SEC phase-in media-first whistleblowers awards by adding “interference with an investigation” as a negative award factor rather than a complete bar to program eligibility).

Media-first ineligibility is also not *appropriate* until the SEC program is sufficiently popularized. As Claimant 1 experienced, global awareness of the SEC program and its technical rules is still lacking among laypeople and lawyers alike.¹²⁹ Without increased program education both in the United States and abroad, whistleblowers should not be penalized for failing to follow the SEC's precise program technicalities when they still have a desire to help.¹³⁰ Whistleblower advocates continue to educate the global community by inviting international delegates to learn about transnational protections and award programs.¹³¹ Some invitees may be years into their anti-corruption careers but lack awareness of their ability to participate, or represent clients participating in programs like the SEC's.¹³² Thus, the SEC's program may not be sufficiently popularized to deem the overly technical rules appropriate.¹³³

Finally, the exclusion of media-first whistleblowers from the award program is not required for the SEC to be *consistent* with the purposes of Dodd-Frank. The goals of Dodd-Frank are broad, and do not limit the SEC to its current interpretation.¹³⁴ As Dodd-Frank is silent on whether media-first whistleblowers are considered "voluntary" sources, the SEC would not contradict statutory language by making this change to its own rules.¹³⁵ While the absence of Dodd-Frank's position on the matter was more of an

129. Release No. 97228, *supra* note 28 ("Claimant 1, a foreign national, contends that . . . none of his/her prior attorneys informed Claimant 1 of the existence of the Dodd-Frank Act or the TCR filing requirements.").

130. *See generally* Mary Jo White, Chair, SEC, A New Model for SEC Enforcement: Producing Bold and Unrelenting Results at New York University School of Law Program on Corporate Compliance and Enforcement (Nov. 18, 2016), <https://www.sec.gov/newsroom/speeches-statements/chair-white-speech-new-york-university-111816> [<https://perma.cc/WQP7-5RDU>] ("The whistleblower program has had a transformative impact on enforcement and that impact will only increase in the coming years as the program becomes more well-known . . .").

131. *See* Rachel Grupp & Victor Zhang, *Whistleblower Attorney Explains How US FCPA Can Help Fight Corruption in Venezuela*, WHISTLEBLOWER NETWORK NEWS (June 9, 2023), <https://whistleblowersblog.org/fcpa-rewards/whistleblower-attorney-explains-how-us-fcpa-can-help-fight-corruption-in-venezuela/> [<https://perma.cc/A6RA-2JX2>] (describing an educational program created to explain the FCPA to international delegates).

132. *See* Kohn Interview, *supra* note 84, at 1 (answering "[a]lmost every single one of the people I have talked to" when asked if international anti-corruption advocates may be unaware of the SEC program).

133. *See supra* notes 130–132.

134. Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("To promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail[.]' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.").

135. *See id.* (noting the lack of discussion on "voluntary" reporting).

advantage under *Chevron* deference, the SEC would still be able to make a case for why a rule inclusive of media-first whistleblowers is in line with Dodd-Frank.¹³⁶ Dodd-Frank's purposes are not overly narrow, and no inconsistency would occur in awarding media-first whistleblowers.¹³⁷ In fact, consistency and conformity to Congressional goals would be strengthened as more sources would be incentivized to come forward and bring misconduct to light.¹³⁸

2. *SEC Interpretations Post-Chevron*

The Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*¹³⁹ instructed courts to exercise their independent judgment in determining whether an administrative agency acted within its statutory authority rather than allow for agency deference, as was the previous standard under *Chevron*.¹⁴⁰ Government whistleblower programs immediately felt the effects of this new approach to agency review.¹⁴¹ Just days after *Loper Bright* was decided, the Supreme Court granted certiorari to a previously denied Internal Revenue Service (IRS) whistleblower and remanded the case "for further consideration in light of *Loper Bright*["."¹⁴² On remand, the United States Court of Appeals for the D.C. Circuit held that the IRS rules correctly interpreted the Internal Revenue Code's mandatory award provision, agreeing with the Tax Court's holding that the Code was ambiguous and gave the IRS "ample scope" in defining terms and creating its award laws.¹⁴³ Under *Loper Bright*, the IRS will now be on a shorter leash when interpreting its authority.¹⁴⁴

136. See *id.* (replacing *Chevron*'s reliance on agency interpretation when statutes were silent on an issue).

137. Dodd-Frank Act, 124 Stat. at 1376 (laying out the Act's broad goals).

138. See *The Importance of Rewards*, *supra* note 109 ("[I]ncentivizing whistleblowers is extremely effective in generating high quality tips . . .").

139. 144 S. Ct. 2244 (2024).

140. *Chevron*, 467 U.S. at 866, *overruled by Loper Bright*, 144 S. Ct. at 2273.

141. Maureen Leddy, *SCOTUS Revives Whistleblower's Claim After Chevron Overturned*, THOMSON REUTERS (July 5, 2024), <https://tax.thomsonreuters.com/news/scotus-revives-whistleblowers-claim-after-chevron-overturned/> [<https://perma.cc/HK73-JD4Q>] (detailing how an IRS whistleblower's case was reopened just a week after the Supreme Court decided *Loper Bright*).

142. *Lissack v. Comm'r of Internal Revenue*, 157 T.C. 63, 78 (Aug. 17, 2021), *cert. granted*, 144 S. Ct. 2707 (2024).

143. *Lissack v. Comm'r of Internal Revenue*, 125 F.4th 245, 253 (D.C. Cir. 2025) (quoting *Lissack*, 157 T.C. at 72).

144. See Geoff Schweller, *Post-Chevron Ruling, Supreme Court Remands Key IRS Whistleblower Case*, WHISTLEBLOWER NETWORK NEWS (July 10, 2024),

The SEC can face the same fate.¹⁴⁵ In prior court decisions, the SEC's whistleblower rules have benefitted from the doctrine of *Chevron* deference, allowing the SEC to justify narrowly-tailored eligibility requirements.¹⁴⁶ Under *Loper Bright*, the courts cannot defer to the SEC's interpretation of the term "voluntary."¹⁴⁷ Instead, the Supreme Court requires that courts use their "independent judgment" to evaluate agency action.¹⁴⁸ So while a court may still hear out implementing agencies like the SEC, the SEC's own reasonable interpretation of the statute is no longer exclusively sufficient to justify a rule or standard.¹⁴⁹ Instead, courts are expected to lean more on "traditional tools of statutory construction" and common sense.¹⁵⁰ Considering Dodd-Frank's goals and language, or lack thereof, on this issue, a media-first whistleblower may succeed in challenging their award denial for lack of "voluntary" status if the court finds the rule to be beyond the SEC authority granted by Dodd-Frank.¹⁵¹

III. RECOMMENDATIONS

A. Whistleblower Program Reforms for the SEC and Other Agencies

The SEC, and other agencies that run whistleblower award programs, should consider two opportunities for change—an expansion of program definitions that would stop the disqualification of media-first whistleblowers and a movement away from staunch encouragement and incentivization of internal whistleblowing practices ahead of government contact.¹⁵²

<https://whistleblowersblog.org/corporate-whistleblowers/tax-whistleblowers/post-chevron-ruling-supreme-court-remands-key-irs-whistleblower-case/> [<https://perma.cc/6L3W-8RP6>] (describing the call for a narrower standard of review under *Loper Bright*).

145. See John Holland, *SEC Tipsters' Court Appeal Gets More Heft with Chevron Dead (1)*, BLOOMBERG L. (July 9, 2024, 4:21 PM), <https://news.bloomberglaw.com/securities-law/sec-tipsters-court-appeal-carries-more-weight-with-chevron-dead> [<https://perma.cc/L3EM-DW7R>] ("Chevron will have a big impact going forward both in how the SEC makes its decisions and how it defends challenges.").

146. See, e.g., *Hong v. SEC*, 41 F.4th 83, 93–94 (2nd Cir. 2022) (stating that the court "must accord deference to the agency's interpretation of the statute so long as that interpretation is reasonable").

147. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024) ("But courts . . . may not defer to an agency interpretation of the law simply because a statute is ambiguous.").

148. *Id.*

149. *Id.* at 2262.

150. *Id.* at 2268.

151. See *supra* Part II.B.1.

152. The SEC has Dodd-Frank authority to make the following changes. See Dodd-Frank Act, Pub. L. No. 111-203, tit. IX, subtit. B, sec. 922, 124 Stat. 1376, 1847–48 (2010).

First, the SEC should expand its program award eligibility to include media-first whistleblowers.¹⁵³ This is in line with both the broad goals and intentions of Congress in creating the SEC whistleblower program and the plain meaning of “voluntary” and “original” information according to Dodd-Frank.¹⁵⁴ Agencies constantly applaud themselves for attracting new whistleblowers and look to implement new practices that generate new sources.¹⁵⁵ But they are already sitting on their own gold mine—sources that exist, yet hold back, due to a lack of statutorily-ensured financial incentives.¹⁵⁶ Whistleblowing is a sacrifice, and while the SEC expresses gratitude to those who aid in its investigations, it must pair those thanks with a guaranteed financial award.¹⁵⁷ In its recommendations, the White House Strategy talks at length about mobilizing existing resources, and one way to do so is by opening program eligibility to media-first whistleblowers who are willing to aid the SEC.¹⁵⁸ Revising this interpretation would also proactively save the SEC, and any other agency abiding by the same interpretation, from failing to fall in line with a post-*Chevron* plain meaning test if challenged in court.¹⁵⁹

The SEC is no stranger to the historical relationship between whistleblowers and journalists.¹⁶⁰ In its 2006 Policy Statement on Freedom of the Press, the SEC explicitly applauded the work of journalists in contributing to its enforcement goals:

153. See generally NWC Petition, *supra* note 22 (advocating for media-first whistleblowers).

154. See *id.* at 4–5 (petitioning for the SEC to “fully implement [media whistleblower] rights, as envisioned by Congress.”); Dodd-Frank Act, Pub. L. No. 111-203, tit. IX, subtit. B, sec. 922, § 21F, 124 Stat. at 1848.

155. See Press Release, SEC, SEC Announces Enforcement Results for Fiscal Year 2023 (Nov. 14, 2023), <https://www.sec.gov/newsroom/press-releases/2023-234> [<https://perma.cc/9DQY-7QS3>].

156. See Kohn Interview, *supra* note 84, at 1; see also *Incentives for Whistleblowers*, PRICE BENOWITZ LLP, <https://pricebenowitz.com/whistleblower-lawyer/incentives/> [<https://perma.cc/3343-ZTNX>] (last visited Mar. 3, 2025) (explaining how whistleblowers often need financial incentives to make up for attorney costs).

157. See, e.g., McGrath Goodman, *supra* note 46 (telling the story of Gene Ross, who faced a pay cut, demotion, harassment, and retaliation following his whistleblower efforts, yet whose award claim was denied after helping the SEC collect \$54 million); Schepis, *supra* note 62 (telling the story of Jane Turner, who faced constructive discharge, negative performance reviews, and numerous transfers following her whistleblower efforts).

158. WHITE HOUSE STRATEGY, *supra* note 33, at 32 (calling on federal agencies to “[b]olster existing anti-corruption frameworks and institutions”); *id.* at 12 (“[A]pplying existing laws with vigor and expanding our cooperation with additional jurisdictions.”).

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

160. See 17 C.F.R. § 202.10 (2007).

Freedom of the press is of *vital importance to the mission of the Securities and Exchange Commission*. Effective journalism *complements* the Commission's efforts to ensure that investors receive the full and fair disclosure that the law requires, and that they deserve. *Diligent reporting is an essential means of bringing securities law violations to light and ultimately helps to deter illegal conduct.*¹⁶¹

Instead of effectively severing the whistleblower-journalist relationship via program ineligibility, the SEC should harmonize its words and actions by welcoming whistleblowers who first collaborated with journalists to bravely report wrongdoing.¹⁶²

Advocacy groups that champion whistleblowers and the media share this sentiment.¹⁶³ The National Whistleblower Center's petition for rulemaking received support from the Bureau of Investigative Journalists, who view the SEC's current rule as a "threat to freedom of the press."¹⁶⁴ The news media has always played a leading role in reporting wrongdoing.¹⁶⁵ Before there was confidential and anonymous reporting protected by government regulations, there were people willing to publicly come forward and risk their lives to alert the American public to the misconduct around them.¹⁶⁶ It is wrong to ignore this historic relationship by attempting to drive journalists and whistleblowers apart.¹⁶⁷

161. *Id.* (emphasis added).

162. *Id.* In a recent amicus brief, The Signals Network—a non-profit aimed at supporting those who have spoken up in the public interest—reinforced that "protection and support of whistleblowers who disclose information to the press is therefore critical to the proper functioning of United States regulators, such as the [SEC]." Brief for The Signals Network et al., *supra* note 52, at 6.

163. See NWC Petition, *supra* note 22, at 1.

164. *Id.*; Letter from Meirion Jones, Ed., Bureau of Investigative Journalism, to Vanessa Countryman, Sec'y, SEC (Nov. 16, 2022), <https://www.sec.gov/comments/4-783/4783-20150877-319939.pdf> [<https://perma.cc/66JJ-AE2U>].

165. See *The Media's Role as Watchdogs*, FREEDOM F., <https://www.freedomforum.org/freedom-of-press/the-medias-role-as-watchdogs/> [<https://perma.cc/6BNQ-G84G>] (last visited Mar. 3, 2025) ("An independent news media uses its watchdog role to investigate and report on . . . wrongdoing and hold those in power accountable for their actions.").

166. See, e.g., 60 Minutes, Jeffrey Wigand: *The Big Tobacco Whistleblower*, YOUTUBE (Dec. 16, 2018), https://youtu.be/1_Vu8LrUDk?si=CjEz5GbqVUbrPn0 [<https://perma.cc/4CVS-7GSJ>] (airing a 1996 interview of a whistleblower who publicly outed the harmfulness of cigarettes to later face death threats against his and his kid's lives).

167. See generally *Journalists and Whistleblowers: A Dynamic Relationship to Fight Corruption*, UNITED NATIONS EDUC., SCI., & CULTURAL ORG. (Apr. 20, 2023), <https://www.unesco.org/en/articles/journalists-and-whistleblowers-dynamic-relationship-fight-corruption> [<https://perma.cc/5VWL-2BGY>] (arguing this relationship "deserves attention" when drafting laws that affect either group).

In addition, the SEC should be mindful of its encouragement of internal whistleblowing, which is often counterproductive and harmful to both the SEC's goals and the whistleblowers themselves.¹⁶⁸ To do so, the SEC must remove internal whistleblowing as a positive factor that can increase one's final award amount.¹⁶⁹ Otherwise, those familiar with the program rules and ready to contact the SEC may first try to get an award boost by notifying their own company about the bad behavior they have witnessed, opening themselves up to retaliation and corporate cover-up.¹⁷⁰ Though internal corporate compliance programs are in place to detect and report wrongdoing just as whistleblowers do, one must recognize that they live within the company itself and likely prioritize internal protection over a grander external mission of transparency and accountability.¹⁷¹ If a company is able to catch and correct wrongdoing from within, or internally punish or push out employees who challenge corporate operations, then they will not be inclined to expose that action to the public.¹⁷² If a strong deterrent effect against corruption is what the SEC is after, it should acknowledge that large awards for whistleblowers, which stem from large penalties against wrongdoers, are more effective than giving corporate wrongdoers the chance to further perpetuate and cover up the very behavior Dodd-Frank aims to punish.¹⁷³

168. See *supra* Part I.

169. 17 C.F.R. § 240.21F-6(a)(4) (2024).

170. See RULES FOR WHISTLEBLOWERS, *supra* note 4, at 65–67 (noting whistleblower retaliation following a seemingly protected internal report); see also Carozza, *Sherron Watkins*, *supra* note 71 (explaining Enron's cover-up following employee concerns). 17 C.F.R. § 240.21F-6(a)(4) (listing “[p]articipation in internal compliance systems” as a positive factor toward one's award amount) promotes a risky behavior and is counterintuitive to SEC goals of protecting both investors and whistleblowers alike. See *supra* Part I.A.

171. See RULES FOR WHISTLEBLOWERS, *supra* note 4, at 65 (“[A] compliance department supposedly independently investigates the concern. There's just one hitch. Is the hotline truly independent?”). Kohn warns that “[c]ompany lawyers work for the company and owe a duty to act in the company's best interest, not [the whistleblower's].” *Id.* at 68.

172. See, e.g., *Why an Ethics Hotline*, WHISTLE BLOWERS, <https://www.whistleblowing.co.za/why-an-ethics-hotline/#scrollcontact> [<https://perma.cc/R4T6-7V9R>] (last visited Feb. 23, 2025) (“[An ethics hotline is] an essential line of [defense], providing a flow of information that promotes business sustainability by helping you identify and rectify problems before they become larger, more costly or damage your hard-earned reputation.”).

173. See Dorothy S. Lund & Natasha Sarin, *The Cost of Doing Business: Corporate Crime and Punishment Post-Crisis*, CLS BLUE SKY BLOG (Mar. 18, 2020), <https://clsbluesky.law.columbia.edu/2020/03/18/the-cost-of-doing-business-corporate-crime-and-punishment-post-crisis/> [<https://perma.cc/45MY-SCE7>] (“[A] large fine will cause the people at the top to take steps to prevent future instances of harm across the entity.”).

Other federal agencies are revamping and reintroducing their whistleblower programs.¹⁷⁴ They look to the SEC program as a blueprint but should consider these recommendations before finalizing any rules of their own.¹⁷⁵ To save later rule-writers and whistleblowers from future headaches, these agencies should carve out more whistleblower incentives and protections from the start.¹⁷⁶

B. *The Limitations of Expanded Eligibility*

These recommendations are not meant to undermine the SEC's investigative capabilities. It is still ideal for the SEC to work under the radar with confidential sources whose employers are unaware of any sort of investigation.¹⁷⁷ The recommendation to reward media-first whistleblowers is simply intended to create a catch-all for those in the same situation as Claimant 1, who was denied an award despite aiding the SEC.¹⁷⁸ Media attention surrounding a government's investigation can be harmful, but once the story is out, a whistleblower willing to work with the SEC in developing a strong case should not be deprived of the same award that others receive.¹⁷⁹

If the SEC is not yet ready to fully embrace media-first whistleblowers, it can still meet them halfway. Currently, the SEC views multiple behaviors—unreasonable report delay, interference with internal compliance operations,

174. DOJ recently rolled out its new whistleblower program framework, and the Treasury Department's Financial Crimes Enforcement Network (FinCEN) is currently drafting its own. See *Criminal Division Corporate Whistleblower Awards Pilot Program*, DOJ (Aug. 1, 2024), <https://www.justice.gov/criminal/criminal-division-corporate-whistleblower-awards-pilot-program> [https://perma.cc/4K5L-79CR]; Andrea Gacki, Dir., FinCEN, Prepared Remarks at SIFMA AML Conference (May 6, 2024), <https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-andrea-gacki-during-sifma-aml-conference> [https://perma.cc/RKL6-9JJU].

175. Kimberly A. Parker, Boyd Johnson, Christopher Cestaro, Jay Holtmeier, Michael J. Leotta, Sandra Redivo, et al., *DOJ Rolls Out Corporate Whistleblower Pilot Program*, WILMERHALE (Aug. 6, 2024), <https://www.wilmerhale.com/insights/client-alerts/20240806-doj-rolls-out-corporate-whistleblower-pilot-program> [https://perma.cc/F9Q3-MNTQ] (“The DOJ’s August 1 Guidance lauds the success of existing federal whistleblower programs at the SEC . . .”).

176. See Stephen Kohn, *FinCEN Regs Must Recognize Int’l Whistleblower Realities*, LAW360 (Aug. 18, 2023, 5:20 PM), <https://www.law360.com/articles/1710635/fincen-regs-must-recognize-int-l-whistleblower-realities> [https://perma.cc/AFE8-JR37] (urging FinCEN to adopt these recommendations while finalizing its own award program).

177. See Shaver, *supra* note 48 (explaining how the SEC “prefers to keep things under wraps”).

178. See *supra* Part I.B.

179. See Kohn Interview, *supra* note 84, at 2; NWC Petition, *supra* note 22, at 1 (arguing media-first whistleblowers should be “judged by the merit of their contributions to SEC investigations rather than their mode of communication. . . .”).

or culpability in the misconduct—as a “negative factor[]” when calculating an award.¹⁸⁰ The SEC could instead add “reporting to the media in a way that prejudices an investigation” as one of these factors. While quite the subjective test, the SEC is used to these kinds of evaluations and has agents specifically assigned to walk through award factors and make determinations as to which were met.¹⁸¹ The SEC could then continue to promote discrete whistleblowing while still attracting knowledgeable whistleblowers who feel incentivized to cooperate after sharing their story with a journalist.¹⁸²

The SEC may hesitate to strip internal whistleblowers of their award boost. After all, if less misconduct is reported and squashed internally (either appropriately or via cover-up), then more claims make their way to the SEC’s desk. While the SEC takes pride in its growing number of whistleblower tips, resource limitations and the Trump Administration’s change in enforcement priorities—from corporate wrongdoing to organized crime and cartel-led corruption—may limit the SEC’s ability to investigate an abundance of whistleblower leads.¹⁸³

180. The SEC has justified its decision to still award culpable whistleblowers so long as they were not the originators of the fraud. *See* Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34,300, 34,350 (June 13, 2011) (“[C]ulpable whistleblowers can enhance the Commission’s ability to detect violations of the Federal securities laws, increase the effectiveness and efficiency of the Commission’s investigations, and provide important evidence for the Commission’s enforcement actions.”). This same argument should apply to media-first whistleblowers, who pose the same benefits. *See also* *Whistleblower Frequently Asked Questions*, *supra* note 8 (answering the prompt: “[w]hat factors does the SEC consider in determining the amount of the award?”). The presence of one or more of these factors does not mean a whistleblower is ineligible for a financial award; these circumstances simply decrease the award amount from the maximum 30% recovery. *Id.*

181. The SEC’s Final Orders for Whistleblower Award Determinations identify the “Claims Review Staff,” tasked with reviewing award applications and issuing Preliminary Determinations, which are subject to appeal. *See, e.g.*, Order Determining Whistleblower Award Claim, Exchange Act Release No. 102762, at 1 (SEC Apr. 3, 2025), <https://www.sec.gov/files/rules/other/2025/34-102762.pdf> [<https://perma.cc/9RRL-FTA3>]; *see also* SEC, OFF. OF THE WHISTLEBLOWER, APPROACH TO PROCESSING WHISTLEBLOWER AWARD CLAIMS (July 17, 2019), <https://www.sec.gov/files/OWB%20Approach%20to%20Processing%20Award%20Claims.pdf> [<https://perma.cc/3ZBS-LVSA>] (outlining the award application review process and personnel assigned to specific action items).

182. *See* NWC Petition, *supra* note 22, at 1.

183. In response to a record amount of annual whistleblower tips, former SEC Chairman Gary Gensler said that “[t]he public’s tips, complaints, and referrals (TCRs) are essential to [the SEC’s] work as a cop on the beat.” Gary Gensler, Chair, SEC, “Partners of Honest Business and Prosecutors of Dishonesty”: Remarks Before the 2023 Securities Enforcement

Internal controls, then, may be better suited to catch and correct more isolated or discrete wrongdoings, such as a singular employee's instance of expense reimbursement fraud, time theft, or non-disclosure of a conflict of interest. After all, the large, scandalous frauds prosecuted by the government likely started as one small infraction that an internal compliance officer could have fixed.¹⁸⁴ And the SEC's program only awards whistleblowers when the agency imposes a sanction over \$1 million, so whistleblowers may lack a financial incentive to file small, individual infractions with the government, even if they see other benefits in doing so.¹⁸⁵ But if a major fraud is uncovered, a whistleblower is likely better off bypassing internal compliance and going right to the government.¹⁸⁶ In some cases, the company's own compliance or human resources staff may be in on the fraud themselves, waiting for their own controls to expose who would dare to speak up.¹⁸⁷ While tough to square the usefulness of internal compliance programs with their own

Forum (Oct. 25, 2023), <https://www.sec.gov/newsroom/speeches-statements/gensler-remarks-securities-enforcement-forum-102523#> [<https://perma.cc/F3D5-BSZX>]. For a discussion on U.S. Attorney General Pam Bondi's plan to refocus FCPA priorities, see Cary Aronovitz, *A Game-Changer Relating to FCPA Enforcement*, HOLLAND & KNIGHT EYES ON WASH. BLOG (Feb. 7, 2025), <https://www.hklaw.com/en/insights/publications/2025/02/a-game-changer-relating-to-fcpa-enforcement> [<https://perma.cc/TN8B-AYY6>].

184. See Makan Delrahim, Assistant Att'y Gen., Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs at the New York University School of Law Program on Corporate Compliance and Enforcement (July 11, 2019), <https://www.justice.gov/archives/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-new-york-university-school-l-0> [<https://perma.cc/PC55-4C24>] (calling strong corporate compliance programs the "first line of defense" that "can prevent crime or detect it early").

185. See *Whistleblower Frequently Asked Questions*, *supra* note 8 (noting the financial threshold, though it is not always possible to price-out the fraud at this stage). Whistleblowers are, of course, also motivated by factors beyond financial rewards. See Ronickher, *supra* note 62 (citing one's own integrity and a "genuine desire to protect the public" as common motivators for speaking up).

186. See *Whistleblowers Should Avoid Internal Reporting Channels*, NWC, <https://www.whistleblowers.org/internal-reporting-channels/> [<https://perma.cc/KX9M-PGDX>] (last visited Feb. 28, 2025) ("Whistleblowers should remember that internal reporting channels exist to benefit the company, rather than the individual reporting misconduct.").

187. See RULES FOR WHISTLEBLOWERS, *supra* note 69 and accompanying text. If a company is known to retaliate against its own well-intentioned employees, it will soon drive people with information of misconduct outward, and to the government. Stephen Kohn, *Whistleblowers Should be Supported, Not Shunned. Here's How to Do It*, TRAINING MAG. (Jan. 11, 2024), <https://trainingmag.com/whistleblowers-should-be-supported-not-shunned-heres-how-to-do-it/> [<https://perma.cc/F2QJ-HYY8>] ("Companies that do not welcome internal whistleblowing ultimately deserve what they get: intrusive government investigations, high fines and penalties, and potential criminal charges.").

biases and motivations to contain large scandals, the SEC should acknowledge the risks presented by internal whistleblowing and consider whether its own goals are truly advanced by encouraging the use of internal programs that could stunt the government's access to information.

CONCLUSION

Whistleblowing is risky. Whistleblowers have lost their jobs, their homes, and even their lives in choosing to come forward and report wrongdoing.¹⁸⁸ Just as Dodd-Frank intended, whistleblowers have helped the SEC collect billions in financial remedies, return more than a billion dollars to harmed investors, deter white-collar crime, and prevent sophisticated criminals from targeting everyday Americans.¹⁸⁹ This impact is bigger than program technicalities. Just as victims of fraud deserve financial compensation and closure, the brave sources who enabled that relief should receive their own rewards and recognition too.

Previous presidential administrations and the OECD recognize the potential of equipping whistleblowers and whistleblower advocates with more resources, protections, and incentives.¹⁹⁰ Instead, some government whistleblower award programs shut out a critical class of these well-intentioned informants—those who first collaborate with journalists.¹⁹¹ By rewarding the courageous efforts of media-first whistleblowers and recognizing the historic relationship whistleblowers and journalists share in American society, the United States can further its role in the fight against corruption both domestically and abroad.

188. See, e.g., Michael Kaplan, *Boeing Whistleblower John Barnett Died by Suicide, Police Investigation Concludes*, CBS NEWS (May 19, 2024, 4:18 PM), <https://www.cbsnews.com/news/boeing-whistleblower-john-barnett-suicide-police-investigation/> [<https://perma.cc/LXN2-UXFF>].

189. SEC Announces Enforcement Results for Fiscal Year 2024, *supra* note 15 (reporting financial remedies of a record \$8.2 billion in Fiscal Year 2024 alone); see White, *supra* note 130 (describing the whistleblower's role in the SEC's robust prosecution of individuals as "the best form of deterrence against white collar wrongdoing").

190. See *supra* Part II.A.

191. See, e.g., Release No. 97450, *supra* note 23 (denying an award despite Claimant's "good faith").