

The SEC's Whistleblower Program: A \$2 Billion Success Story Under Threat

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Introduction

Since the start of the SEC Whistleblower Protection and Rewards Program in 2011, the Securities and Exchange Commission (SEC) has attracted more than 33,300 high-quality tips, market intelligence, and information from individuals in 123 countries. That has resulted in the SEC recovering nearly \$2 billion from fraudsters who violated securities laws and SEC rules, including more than \$1 billion in disgorgement of ill-gotten gains and interest. Of this \$2 billion, nearly \$500 million has been or is scheduled to be returned to investors. This is directly due to whistleblowers who have provided the SEC with critical information that enable it to identify and prosecute fraud and other violations.

While reporting on the Whistleblower Program often highlights the awards received by whistleblowers, it is less known that the SEC **only** rewards whistleblowers when:

- (1) their original information leads to a successful case,
- (2) that case results in a penalty or sanction of over \$1 million, and
- (3) the Commission actually collects those sanctions.

Equally important, whistleblower awards cost the taxpayer nothing because the award **only** comes from money recovered by the SEC from fraudsters. While some of the awards are significant—justified by the egregiousness of the illegality whistleblowers expose and the degree of their assistance—most awards are relatively modest. However, all of the awards are **only** granted based on the (1) quality of information; (2) degree of cooperation; and (3) harm they prevent (which is especially important when the alternative is the SEC not being aware of the fraud and, therefore, unable to detect the harm at all).

Catching and punishing fraudsters are just part of the benefits and overall success of the Whistleblower Program. During the past eight years, the SEC has received thousands of high-quality, hard-to-obtain information of possible securities law violations from whistleblowers, which it simply would not have otherwise obtained. This hard-to-get information expands the Commission's knowledge base and provides insight into fraudulent activities harmful to U.S. investors—even when these activities are taking place or being planned in countries where the SEC lacks jurisdictional authority. This information enables the SEC to optimally target its limited enforcement and examination resources.

That is why the SEC recognizes that whistleblower assistance and information is a “powerful weapon”: it allows the agency to “minimize the harm to investors, better preserve the integrity of the United States’ capital markets, and more swiftly hold accountable those responsible for unlawful conduct.” Using this intelligence enables the SEC to not only identify, stop and prosecute abuse, but it adds to its knowledge regarding trends and abuses in the marketplace.



The SEC is the federal government's independent regulator charged to oversee the \$97 trillion in securities trading annually, and the more than 27,000 registered market participants, which includes investment advisers, mutual funds, exchange-traded funds, broker-dealers, municipal advisors, and transfer agents. Given this enormous regulatory landscape and critical mission of investor protection, obtaining timely and high-quality information helps the Commission stop and deter fraudulent and predatory activities. The Whistleblower Program at the SEC has been a critical tool for the agency to fulfill this mission.

Nevertheless, despite the Whistleblower Program's demonstrable successes, the SEC has proposed dangerous and legally baseless changes that risk discouraging whistleblowers from going to the SEC to expose illegality. These changes, if finalized as proposed, would expose investors to needless harm and allow fraudsters to remain on the loose. These are exactly the policy failures that Congress intended to cure by creating the SEC Whistleblower Program. Given the SEC's unfortunate history of ignoring if not mistreating whistleblowers, including its dereliction of duty regarding the Madoff investment scandal—during which the SEC spectacularly failed¹ to heed the repeated calls of whistleblowers who presented the SEC with irrefutable evidence that Bernie Madoff was running the largest Ponzi Scheme and ripping off countless investors—it should act with maximum caution and humility in attempting to tamper with a wildly successful program that has helped millions of investors and punished lots of fraudsters.

No one should forget that the SEC could have stopped Madoff if it had acted on information provided to the agency by whistleblower Harry Markopolos (and others). And, no one—especially the SEC—should forget that the agency's enforcement and examination divisions were unable to detect or stop Madoff even though his illegal activities were conducted literally under their noses. Between May 2000 and December 2008—when Madoff confessed and surrendered to the FBI—Madoff's fraudulent fund grew from about \$3 billion to \$50 billion. During this same time, the SEC conducted at least five examination and enforcement investigations but did not detect, let alone stop, Madoff's massive fraud. It was partly this failure that motivated Congress to create the Whistleblower Protection and Rewards Program at the SEC, which was enacted in the Dodd-Frank Act over vigorous objections from large corporations and over some reservations of the SEC itself.

The Whistleblower Program is One of the Most Significant Innovations in Enforcement Since the Creation of the SEC

The Whistleblower Program at the SEC has been a wild success by any measure. Congress created the Program in 2010 in part because of the SEC's failure to detect and stop the massive Madoff fraud and partly to replicate a similar program at the Internal Revenue Service. The Whistleblower Program offers significant incentives and strong anti-retaliation protections to those considering blowing the whistle on conduct that violates securities laws and SEC rules. Proving the value

¹See SEC Inspector General's "Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme," David Kotz, Inspector General, SEC (Aug. 31, 2009), available at <https://www.sec.gov/news/studies/2009/oig-509.pdf>



Whistleblowers perform a vital public service by revealing fraudulent and illegal conduct. Much of this conduct is hard to detect by outsiders, including regulators who examine and inspect regulated entities. Whistleblowers provide ready-made, original information that helps regulators and law enforcement agencies to quickly initiate enforcement proceedings that stop the illegal conduct, prevent significant future harm that would have gone on undetected, and serve as a deterrent to those scheming. For example, whistleblowers could identify particular individuals engaged in illegal conduct, provide specific documents (or direct the regulator to where such documents may be found), or identify fraudulent transactions, and provide detailed explanations that 'connect the dots' for law enforcement.

of the rewards and protections offered by the Whistleblower Program, the SEC has attracted more than 33,300 high-quality tips, market intelligence, and information since it began.

While most of the information and data come from insiders, analysts, investors, and others based in the United States, the SEC has also received submissions from individuals living in 123 other countries. The international scope of the program has helped the SEC acquire information that it otherwise would not be able to obtain given its jurisdictional limitations. Overall, this information and insight has significantly improved the SEC's knowledge-base and helped its enforcement and examination staff to better focus its regulatory resources.

This trove of information has enabled and compelled the agency to initiate proceedings to enforce the rule of law, protect investors and instill market integrity. Of those whistleblowers who received awards, nearly 70 percent provided original information in sufficient quality that **caused the SEC to open a new investigation** and examination. Whistleblowers also provide missing pieces or crucial information that serve a decisive role in an already-open investigation. More than 32 percent of whistleblowers who received awards provided original information and analysis that significantly contributed to an existing case. These cases all resulted in fines, sanctions, penalties, or disgorgement decisions above the statutorily set threshold of \$1 million.

During the past 10 years, since the Program's inception, the SEC has imposed sanctions and penalties, and recouped more than \$2 billion—including more than \$1 billion in disgorgement of ill-gotten gains and interest—from fraudsters and others who violated the SEC's rules. Of this amount of recovered monies, the SEC has returned or is scheduled to return almost \$500 million to harmed investors. So, by amply rewarding whistleblowers—as mandated by Congress—victimized investors have or will receive \$500 million that they would have otherwise never gotten back. And perhaps even worse, the fraud would have likely been undetected much longer, causing irreparable harm.

In addition, the SEC has awarded more than \$500 million to 83 individual whistleblowers. These rewards are funded by a segregated fund created by Congress and administered by the SEC called the Investor Protection Fund. This fund is replenished with penalties, sanctions, or disgorgement money that the SEC generally collects from wrongdoers, which are not distributed to investors. Importantly, these rewards are neither funded by taxpayers nor do they come at the expense of harmed



investors. Finally, the Commission only rewards whistleblowers when their original information leads to a successful case of a penalty or sanction of more than \$1 million and when the Commission actually collects these sanctions. While some of the awards are significant—justified by the egregiousness of the illegality exposed and degree of whistleblower’s assistance—most awards are relatively modest. All of the awards are granted based on the quality of information, the degree of cooperation, and the harm that was prevented, especially if the alternative is the SEC not being able to detect the harm.

Simply put, the Whistleblower Program has been a game-changer in terms of investor protection, fraud detection, and prevention.

Data and Analysis of Recent Whistleblower Awards

The SEC has continued to appropriately reward and incentivize meritorious whistleblowers and protect them against retaliation. The Whistleblower Program is required to report its activities to Congress annually. The following narrative tracks and describes the activities of the Whistleblower Program. These are not captured by any reports from the Commission. These actions include some of the largest awards granted and anti-retaliation decisions the SEC has made since the creation of the Whistleblower Program. Remarkably, the Commission has awarded more to meritorious whistleblowers in the last six months (November-May) than it did in the entire 2019 fiscal year: more than \$64 million compared to \$60 million, which, again, reflects the quality and value of the information provided by the whistleblowers.

While the details of whistleblower awards are appropriately held in confidence to protect the identity of whistleblowers, the SEC has disclosed the following decisions regarding the Whistleblower Program since October 2019:

<i>Nov. 4, 2019</i>	The Commission announced charges against a CEO who attempted to silence investor complaints.
<i>Nov. 15, 2019</i>	The SEC announced its decision to reward three whistleblowers for a total of \$260,000 —who themselves were victimized investors—for shedding light on an ongoing fraudulent scheme that targeted retail investors.
<i>Jan. 22, 2020</i>	The SEC rewarded two whistleblowers— \$45,000 and \$277,000 —who helped the Commission shut down two separate fraudulent schemes that were preying on retail investors.
<i>March 23, 2020</i>	A whistleblower was rewarded with a \$1.6 million award for providing significant information early in an already open investigation and helping the Commission focus its investigations, which saved time and resources.
<i>March 24, 2020</i>	The SEC awarded two whistleblowers for their help in two different investigations. The awards totaled over \$570,000 .



March 30, 2020 The SEC announced a reward of **\$450,000** for a whistleblower who enabled the Commission to focus its investigation, leading to successful enforcement charges.

April 3, 2020 The SEC announced an award of approximately **\$2 million** to a whistleblower whose information would have been difficult to obtain without the actions of the whistleblower.

April 16, 2020 The SEC announced a **\$27 million** award to a whistleblower who provided significant information for misconduct—part of which occurred overseas. This was particularly helpful to the Commission since it often lacks jurisdictional authority to conduct inspections of overseas operations of entities. The whistleblower then met with SEC officials and helped them in building the case.

April 20, 2020 The SEC awarded **\$5 million** to a whistleblower who faced unique hardship when raising the concerns internally.

April 28, 2020 The Commission announced its decision to reward a whistleblower with an **\$18 million** award. The whistleblower reported the issue internally multiple times before finally contacting the SEC.

May 4, 2020 The Commission announced a **\$2 million** reward for a whistleblower whose information helped the Commission to stop an ongoing fraudulent activity, which then allowed the Commission to obtain an asset freeze and return a significant amount of money to investors.

June 4, 2020 The Commission announced a significant award of \$50 million to an individual who provided significant first-hand information that led the Commission to stop a massive violation and return possibly millions to harmed investors.

Unfortunately, despite the Whistleblower Program's demonstrable success in attracting hard-to-obtain information and helping the Commission to effectively protect investors and promote market integrity—as amply demonstrated by these cases over just the last six months—the SEC has proposed changes that risk decreasing the effectiveness of the Program.



CASE STUDY: A Whistleblower Exposed A Bank's Illegal Activities that Harmed Countless Retirees

On June 5, 2020, the SEC announced its largest award—\$50 million—to a single whistleblower, since the start of the Program. Press reports have connected the whistleblower to a 2016 SEC enforcement case—which also involved the Department of Justice and the New York state authorities—against one of the largest Wall Street firms, the BNY Mellon. BNY Mellon offers financial services to pension funds, retirement funds, foundations' and educational institutions' endowments, governmental funds and treasuries, etc. In their role as a custodian for these entities' assets, BNY Mellon handles over \$30 trillion of assets most of which ultimately belong to retired teachers, firefighters, veterans, ordinary Americans saving for their dignified retirement or to meet the educational needs of their kids. One of the more profitable services that BNY Mellon offered to its clients was meeting their foreign currency needs.

As funds and investment pools, these entities often invest in foreign securities. These funds need to exchange their U.S. dollars into foreign currencies to be able to transact in foreign securities or repatriate their foreign income (such as dividends paid by foreign issuers). BNY Mellon offered just such services to its clients. But between 2000-2012—as detailed in the 2016 SEC enforcement proceedings—BNY Mellon engaged in a massive and systemic illegal acts that bilked its clients and provided inferior service.

We now know that the SEC learned about this massive illegal act only because a whistleblower—a trader at the firm—approached the SEC in 2012 with detailed information and helped the Commission to investigate, and ultimately, hold BNY Mellon accountable. As shown in the 2016 proceedings—triggered by the whistleblower's efforts—in the decade-long period between 2000-2012, BNY Mellon priced its clients' transactions at or near the worst rates reported during that day, in a way that was most beneficial to the firm (which obtained more favorable rates on its own behalf when buying and selling foreign currency in the interbank market). While BNY Mellon engaged in these acts, it gave false assurances to its clients that led them to believe that the Wall Street firm was acting in the best interest of its clients and transacting their foreign currency transactions at rates that were supposedly most favorable for the clients. The firm went as far as providing incomplete and misleading statements to its clients that obscured the firm's practices. The Commission and other regulators, including the Department of Justice, were unaware of these activities, despite their examinations and inspections of the firm. It was only after the whistleblower's efforts that the SEC and other regulators began investigating, which ultimately led to a successful enforcement case.

According to the order determining the whistleblower award, the Commission received highly significant information from the whistleblower, who provided first-hand observations of the misconduct that, again, was unknown to the Commission. The whistleblower also “detailed substantial aspects of the scheme and provided a roadmap for the investigation.” This information led to a successful enforcement case and allowed Commission to impose a penalty of \$163 million on the firm that broke the laws. The same information also helped the Department of Justice and New York state regulators to impose an additional \$500 million of penalties. Finally, the whistleblower's information and the subsequent enforcement case helped the Commission to “return[] a significant amount of money to those harmed by the [firm's] misconduct.”²

²See the Commission's order determining the award (June 4, 2020), available at <https://www.sec.gov/rules/other/2020/34-89002.pdf>.



Better Markets is Fighting to Preserve the Successful Program Despite the SEC’s Ill-advised Proposal, Which Would Hurt Investors and Help Fraudsters

In June 2018, the SEC proposed several amendments (Proposal) to its rules that govern the Whistleblower Program. The Commission argued that these changes would make administering the Whistleblower Program more effective but, as Better Markets has detailed, the net result of these changes would be the creation of hurdles and disincentives, which would put investors at risk, allow fraudsters to avoid detection, and discourage whistleblowers. Better Markets released a [press release](#)³ at the time of the proposal, then [commented on the Proposal](#),⁴ and continued its public advocacy for the need to preserve the effectiveness of the Whistleblower Program (see the Further Reading section below for the list of activities that Better Markets has engaged in regarding the Program).

There are two important changes that are counterproductive and self-defeating that Better Markets highlighted in its advocacy (see the Further Reading section below for the link to [Better Markets’ comment letter](#)).

1. **10% Award Cap.** The changes would impose additional conditions on rewards, and arbitrarily—and contrary to Congress’s intent—send a chilling message to all whistleblowers: if you provide original information that leads to large sanctions, your award will be capped at 10 percent of the collected sanctions—the bare minimum required under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the act that created the SEC Whistleblower Program, and;
2. **No Public Sources.** The changes would discount or dismiss otherwise original information provided by whistleblowers, which in turn would disqualify them for an award. The Proposal includes an “interpretive guidance” by which the SEC staff would assess and weigh a whistleblower’s submission. According to this interpretive guidance, a whistleblower’s submission risks getting disqualified when that information contains information that the Commission could have inferred from public sources. In other words, when a whistleblower provides original information to the Commission that may contain a news article or other publicly available information, the Commission could argue that this whistleblower’s information is unoriginal since bits and pieces of it are based on publicly available information which the Commission—in due time—would have gleaned and acted upon.

In our view, these specific changes must be critically evaluated against two governing principles:

1. Will the changes make the Whistleblower Program even more user-friendly and attract an even greater number of whistleblowers with quality information to the Commission that would stop or deter serious investor harm?
2. And, are the proposed changes in line with Congress’s specific intentions with regards to the Whistleblower Program and the mandates and limitations Congress imposed on the SEC as it administers this program?

³See Better Markets’ press release in response to the SEC’s Proposal (June 28, 2018), available at <https://bettermarkets.com/newsroom/contrary-congressional-mandate-sec-votes-give-itself-inappropriate-control-over>.

⁴See Better Markets’ comment letter in response to the SEC Proposal to amend the rules of the Whistleblower Program (Sept. 18, 2018), available at <https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20to%20SEC%20on%20Whistleblower%20Program%209-18-18.pdf>.



Unfortunately, the Proposal taken as a whole fails these two fundamental tests. The Proposal would make the Whistleblower Program user-unfriendly and contrary to Congress's intent, vision and express direction. During the legislative process that resulted in the Dodd-Frank Act with the Whistleblower Program, the Chairman of the SEC at the time expressed reservations on multiple occasions about some of the key elements of the Program as it was being designed by Congress (including asking Congress to grant the Commission more discretion in determining the awards) but Congress overruled the SEC and decided to make the Program maximally investor- and whistleblower-friendly. And therefore, these proposed changes are inconsistent with the purposes of the Whistleblower Program, as designed and enacted by Congress. In short, these proposed changes put investors needlessly at risk, increases the likelihood of fraud going unreported and therefore undetected, and makes missing future Madoff Ponzi schemes much more likely. Fortunately, the Commission seems to have paused its ill-advised campaign—but it has not withdrawn the Proposal. Many pro-investor advocates, members of Congress, those who work with whistleblowers, and known whistleblowers have written to the Commission, arguing the many reasons it should not proceed forward with the Proposal. As previously mentioned, Better Markets also filed its own comment letter arguing that the Commission will be violating Congressional intent and direction if it amends the Whistleblower Program rules as described in the Proposal.

Conclusion

The SEC Whistleblower Program has revolutionized the SEC's ability to detect, punish, and deter fraudsters. These newly gained abilities have allowed the agency to fulfill its mission of investor protection and promotion of market integrity much more effectively. These two outcomes mean investors have more confidence to invest in the securities markets, which in turn provides companies access to capital necessary to grow their business and retain employees. The Commission should be doubly careful to not erect harmful barriers and hurdles that would discourage would-be whistleblowers. Any disincentives and unnecessary hurdles would mean fraud would go on undetected and harm investors.



Further Reading

1. Better Markets' press release in response to the SEC's Proposal (June 28, 2018), available at <https://bettermarkets.com/newsroom/contrary-congressional-mandate-sec-votes-give-itself-inappropriate-control-over>.
2. Better Markets' comment letter in response to the SEC Proposal to amend the rules of the Whistleblower Program (Sept. 18, 2018), available at <https://bettermarkets.com/sites/default/files/Better%20Markets%20CL%20to%20SEC%20on%20Whistleblower%20Program%209-18-18.pdf>.
3. Better Markets' newsletter calling on the SEC to not tamper with the successful Whistleblower Program (Dec. 18, 2018), available at <https://bettermarkets.com/newsroom/blowing-whistle-sec%E2%80%99s-proposed-changes>.
4. Better Markets' blog welcoming SEC's apparent pause in making changes to the Whistleblower Program (Oct. 23, 2019), available at <https://bettermarkets.com/blog/good-news-sec-does-not-weaken-protections-whistleblowers>.
5. Better Markets' blog highlighting SEC Whistleblower Program's FY2019 Report to Congress and the need to preserve the successful program (Nov. 20, 2019), available at <https://bettermarkets.com/blog/report-shows-sec%E2%80%99s-whistleblower-program-wildly-successful-should-not-be-weakened>.
6. SEC Office of Whistleblower 2019 Annual Report to Congress, available at <https://www.sec.gov/files/sec-2019-annual%20report-whistleblower%20program.pdf>.
7. Commission's Orders Determining Whistleblower Award Claims, available at <https://www.sec.gov/rules/other.shtml>.
8. "Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme," David Kotz, Inspector General, SEC (Aug. 31, 2009), available at <https://www.sec.gov/news/studies/2009/oig-509.pdf>.
9. Whistleblower Who Revealed Currency Abuses at BNY Mellon Gets \$50 Million," Dave Michaels, Wall Street Journal (June 4, 2020), available at <https://www.wsj.com/articles/whistleblower-who-revealed-currency-abuses-at-bny-mellon-gets-50-million-11591303871>.



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Better Markets is a public interest 501(c)(3) non-profit based in Washington, DC that advocates for greater transparency, accountability, and oversight in the domestic and global capital and commodity markets, to protect the American Dream of homes, jobs, savings, education, a secure retirement, and a rising standard of living.

Better Markets fights for the economic security, opportunity, and prosperity of the American people by working to enact financial reform to prevent another financial crash and the diversion of trillions of taxpayer dollars to bailing out the financial system.

By being a counterweight to Wall Street's biggest financial firms through the policymaking and rulemaking process, Better Markets is supporting pragmatic rules and a strong banking and financial system that enables stability, growth, and broad-based prosperity. Better Markets also fights to refocus finance on the real economy, empower the buy-side, and protect investors and consumers.

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