

## **Why Whistleblowers Wait:**

*Recommendations to Improve the Dodd-Frank Law's SEC Whistleblower Awards Program*

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**Why Whistleblowers Wait:**  
*Recommendations for Improving the Issuance of SEC Whistleblower Awards  
to Enhance Dodd-Frank Enforcement*

**I. Introductory Summary**

The Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”) was passed in 2010 to protect consumers and investors from the consequences of financial industry fraud and related misconduct that led to the Great Recession of 2008. Recognizing that whistleblowers—employees or other individuals who witness and disclose possible legal violations—are one of the best enforcement resources, Dodd-Frank established a two-part scheme to encourage reports of financial misconduct to the Securities and Exchange Commission (“SEC” or “Commission”), adding Section 21F, “Securities Whistleblower Incentives and Protection,” to the Securities Exchange Act of 1934.<sup>1</sup>

The first part of the Act that encourages whistleblowing creates an incentive program that awards whistleblowers between 10-30% of the total amount of monetary sanctions imposed in a successful enforcement action that was the result of original information the whistleblower provided to the SEC.<sup>2</sup> The second part of the Act prohibits employers from retaliating against whistleblowers, giving employees who suffer discharge, demotion, suspension, threats, harassment or other forms of discrimination the right to bring a cause of action in federal court. However, unlike almost all of the other whistleblower protection provisions consistently included in over 30 other federal whistleblower laws, the Dodd-Frank Act SEC anti-retaliation provisions do not offer compensatory relief to employees who suffer damages other than discharge.<sup>3</sup> Nor does it include the modern burdens of proof that govern all other federal whistleblower laws since 1989, rules of the game that give employees a far more realistic chance of successfully defending their rights.

The SEC’s Office of the Whistleblower (OWB) since its inception has embraced its mission to implement the Whistleblower Incentive and Protection provisions of the Dodd-Frank Act. Many of the SEC’s efforts to promote, protect and maximize whistleblowers’ impact on enforcement have been impressive: over 14,000 tips have been received since the OWB opened in 2011 through FY 2015: More than \$55 million in total award payments have been issued. It independently enforced the anti-retaliation provisions of the Act, sending a message to companies that reprisal against employee whistleblowers is unacceptable. It condemned the use of restrictive language in corporate

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<sup>1</sup> 15 U.S.C. § 78u-6; Pub . L . No . 111-203, § 922(a) (adding Section 21F, “Securities Whistleblower Incentives and Protection,” to the Securities Exchange Act of 1934).

<sup>2</sup> 15 U.S.C. § 78u-6.

<sup>3</sup> 15 U.S.C. § 78u-6(h)(1). While most whistleblower protection provisions offer “make whole” damages, such as compensation for emotional distress, lost bonuses or raises, etc. the Dodd-Frank anti-reprisal provisions provide relief to successful claimants that includes “reinstatement with the same seniority status that the individual would have had, but for the discrimination, 2 times the amount of back pay otherwise owed to the individual, with interest; and compensation for litigation costs, expert witness fees, and reasonable attorneys’ fees.” Sec. 922(h)(1)(C). While significantly greater than “make whole” remedies are provided to whistleblowers who suffer discharge, no compensatory relief is offered to whistleblowers who suffer forms of reprisal other than termination.

confidentiality and severance agreements that would interfere with an employee's ability to report wrongdoing to the SEC by bringing an enforcement action against an employer using such agreements. It advocated at the federal appellate level that the Act should be interpreted to protect both internal and external disclosures of misconduct, recognizing that

...if individuals are not assured that they will be protected from retaliation if they report internally, they will be less likely to do so, which could undermine the important role that public companies' internal compliance programs play in helping the Commission prevent, detect, and stop securities law violations.<sup>4</sup>

The Commission and the OWB have set an example for the enforcement community as well as the financial industry about the important role whistleblowers play in defending consumers, investors and the general public from fraud, and how necessary it is to protect them.

However, after five years implementing the Act's whistleblower incentive and protection provisions, we have identified some examples of conflicts between the Act's intent—a safe channel for disclosures to make an enforcement difference -- and its actual implementation. For example, GAP co-authored a petition warning that current SEC “anti-gag” rules have not kept pace with more aggressive, creative corporate tactics to silence whistleblowers.<sup>5</sup>

Most recently, deep concerns have been raised about the Commission's Orders that reduced three whistleblowers' award percentages based on determinations that the whistleblowers unreasonably delayed reporting the violations to the Commission.<sup>6</sup> While the initial impact may be minimal, affecting only a small percentage of any award, the precedent as currently explained sends a potential message to would-be whistleblowers that the Commission's award system neither offers proportional incentives that overcome the risks of disclosure, nor is grounded in the reality whistleblowers face when deciding whether to report significant legal violations, as sought by the Commission.

Most fundamentally, we are concerned that the Commission inadvertently is pressuring for “quick and dirty” disclosures that will undermine the credibility of whistleblowers more broadly, waste or exacerbate necessary Commission resources, and be unfair to employers. An effective whistleblower program needs a safe channel for timely, responsible disclosures. Blowing the whistle responsibly is an in-depth, time-consuming research process. It is unfair to all concerned if whistleblowers shoot from the hip. More basic, the decision to bear witness involves life's crossroads decisions and prior funding for the expensive campaign that likely will be needed to survive professionally. While expensive, legal counsel also is necessary to screen out disclosures with

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<sup>4</sup> 2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program, U.S. Securities and Exchange Commission, (Nov. 16, 2015), <http://www.sec.gov/about/offices/owb/annual-report-2015.pdf>. *Also see* SEC Awards Whistleblower More Than \$700,000 for Detailed Analysis, U.S. Securities and Exchange Commission, (Jan. 15, 2016), <https://www.sec.gov/news/pressrelease/2016-10.html>.

<sup>5</sup> Petition for Rulemaking and Issuance of a Policy Statement on Certain Aspects of the Dodd-Frank Whistleblower Program (July 18, 2014); <http://www.whistleblower.org/sites/default/files/SECPetition.pdf>.

<sup>6</sup> *See* Orders Determining Whistleblower Award Claims of Sept. 22, 2014 (<https://www.sec.gov/rules/other/2014/34-73174.pdf>); July 17, 2015 (<https://www.sec.gov/rules/other/2015/34-75477.pdf>); and November 14, 2015 (<https://www.sec.gov/rules/other/2015/34-76338.pdf>). *Also see* 17 C.F.R. §21F-(b) (unreasonable reporting delay as a factor that may decrease the amount of a whistleblower's award; other factors include the whistleblower's culpability in the violations reported and whether the whistleblower interfered with internal compliance and reporting systems.)

insufficient support. From every perspective, pressuring whistleblowers to act before they are responsibly prepared will backfire.

More specifically, it takes time for individuals who discover possible violations to ensure that their concerns are reasonable, and whether they have or can safely obtain the evidence to prove them. In addition, because independent research indicates more than 97% of employee-whistleblowers choose to report internally first,<sup>7</sup> the process of weighing risks and effectiveness, obtaining evidence, navigating the internal reporting process, and then giving internal compliance efforts a chance to prove good faith all drain time, effort and emotions. And the latter process of waiting for the internal processes to work—or fail to work—is largely outside of the whistleblower’s control. Requiring them to break ranks after 120 days may prematurely expose them to retaliation. Even the act of finding an attorney, either for counsel on whether to report wrongdoing or for representation to report anonymously, takes time, partially again outside of the whistleblower’s control.

Further, the precedents appear to conflict with other, well-taken Commission rules:

- A mandate that to qualify for an award, the original information provided to the Commission that led to successful enforcement was not only “sufficiently timely” but also “specific” and “credible.”<sup>8</sup>
- Instructions that while the Commission may increase the amount of a whistleblower’s award if he or she used internal compliance systems before reporting possible violations to the Commission,<sup>9</sup> the whistleblower must also report the same information to the Commission within 120 days in order to be eligible to be considered for an award.<sup>10</sup>
- Mandating that anonymous tips be filed with the Commission by an attorney.<sup>11</sup>

Each of these regulations create mandatory prerequisites for whether the Commission will even consider disclosures for an award. Implicit in each, however, are requirements that do not occur quickly for typical whistleblowers. Recent SEC decisions that have found reporting delays “unreasonable” telegraph a failure to appreciate the process most whistleblowers experience between discovering a violation and the decision to report.

The Commission’s opaque Orders that reduce a whistleblower’s award for “unreasonable delay”—all heavily redacted and with limited details in order to protect a whistleblower’s confidentiality—offer almost no guidance. There is little to no information about the amount of time that elapsed between a whistleblower’s discovery of violations and the act of reporting, or any of the reasons why the delay was deemed “unreasonable.” The takeaway is that a premium seems to be put on rapidly reporting violations to the Commission despite very legitimate reasons that may make rapid reporting difficult, unwise, and even inconsistent with the SEC’s own mandates regarding disclosures. Clear guidance on this issue is necessary so whistleblowers know what is

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<sup>7</sup> Inside the Mind of a Whistleblower: A Supplemental Report of the 2011 National Business Ethics Survey, Ethics Resource Center, (2012), [http://www.kkc.com/wp-content/uploads/2014/08/ERC\\_Inside-The-Mind-Of-A-Whistleblower.pdf](http://www.kkc.com/wp-content/uploads/2014/08/ERC_Inside-The-Mind-Of-A-Whistleblower.pdf), 12-13.

<sup>8</sup> 17 C.F.R. § 21F-4(c)(1).

<sup>9</sup> 17 C.F.R. § 21F-6(a)(4).

<sup>10</sup> 17 C.F.R. § 21F-4(b)(7) and 21F-4(c).

<sup>11</sup> 17 C.F.R. § 21F-9(c).

expected, and to ensure application of consistent Commission standards.

Finally, while more than \$55 million in awards have been issued since 2011, that amount was distributed to only 23 whistleblowers out of more than 390 award claims submitted and more than 14,000 whistleblower tips received since the program's inception.<sup>12</sup> In part this reflects SEC failure to complete ongoing investigations, a lesson learned that it should apply to rules on timely disclosures.

For whistleblowers, however this track record also draws a pessimistic bottom line: winning an award is not much better odds than winning a small town lottery. The ratio of tips to enforcement actions is low, and the ratio of tips to awards is even lower, with only a 35% chance of whistleblowers even receiving an award determination and a .16% chance of receiving any award. When the Commission is this painstaking and selective, it is unfair to hold whistleblowers to a double standard that may force them to act before they are ready.

Absent and/or conflicting guidelines can weaken the willingness of whistleblowers to come forward, elevate the well-documented risk of reprisal for reporting misconduct internally, put a burden on employee-whistleblowers to assess the procedural integrity and/or efficacy of either their employer's compliance and ethics program or the SEC's own reporting, investigation and enforcement process, or otherwise make the already difficult decision to report misconduct in any way harder. We believe the Commission and its OWB should look carefully at how it can ensure that its implementation of the whistleblower incentive provisions—awards issued at the *end* of a successful enforcement action—align more with the reality that whistleblowers face.

The goal of this report is two-fold to help achieve the SEC whistleblower's program's goals. First, we seek to make a record of what whistleblowers experience -- the choices they must make and the consequences -- from discovery through resolution, and its impact on delays. The bases for our concerns are academic scholarship, empirical studies and GAP's own 39 year experience representing or assisting over 8,000 whistleblowers. Our concerns have been confirmed by an on-line survey of 1,366 whistleblowers, whistleblower rights lawyers and whistleblower organizations throughout the world. We hope to ensure that the Commission fully appreciates how an opaque determination that a whistleblower's delay in reporting is "unreasonable" may undermine its goal to encourage safe and responsible reporting.

Second, we seek consideration of recommendations to ensure that SEC authorities establish standards that – 1) do not penalize delays necessary for responsible, safe disclosures; and 2) provide adequate notice to whistleblowers regarding what is expected. We believe that penalties should be limited to intentional delay or lack of diligence, rather than the facts of life that whistleblowers face. We believe that these recommendations will maximize achieving Dodd-Frank's Whistleblower Incentives and Protection primary objective: a safe channel that encourages whistleblower disclosures that are invaluable to protect consumers, investors, workers and overall economic stability from illegality in the financial industry.

## **II. The Commission's Emphasis on "Reasonably" Timely Reports**

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<sup>12</sup> SEC Awards Whistleblower More Than \$700,000 for Detailed Analysis, U.S. Securities and Exchange Commission (Jan. 15, 2016), <https://www.sec.gov/news/pressrelease/2016-10.html>; U.S. SEC 2015 Annual Report, 10, 21.

The Commission established the Office of the Whistleblower to manage and implement the whistleblower program. One of its primary activities is making recommendations to the Claims Review Staff both on a whistleblower-applicant's award eligibility and, if eligible, what percentage between 10% and 30% of the total monetary sanctions secured in a successful Commission enforcement action the whistleblower should receive.<sup>13</sup> Some of the key factors explicitly identified that may *increase* the amount of the award include (emphasis added below):

- assistance provided by the whistleblower, measured by factors such as
  - whether the whistleblower provided ongoing and timely cooperation;
  - the *timeliness* of whistleblower's initial report to the Commission or to an internal compliance or reporting system;
- law enforcement interest in information that deters violations of the securities laws (including, among other factors, whether the reward encourages the submission of *high quality* information); and
- participation in internal compliance systems (including whether the whistleblower reported the problems through internal procedures before or simultaneous with reporting to the Commission).<sup>14</sup>

Notably, timeliness of reporting violations is considered a factor that may increase an award, as is the submission of high-quality information and participation in internal compliance systems. However, one of the factors that may *decrease* the amount of the award is whether the whistleblower unreasonably delayed reporting the violation, weighing such things as:

- Whether the whistleblower was aware of the relevant facts but failed to take reasonable steps to report or prevent the violations;
- Whether the whistleblower was aware of the relevant facts but only reported them after learning about a related inquiry or enforcement action; and
- Whether there was a legitimate reason for the whistleblower to delay reporting the violations.<sup>15</sup>

While delay negatively impacts the whistleblower's reward, the standard is inconsistent with the other two factors—culpability in the violation or deliberate interference with an internal reporting system. They both require and describe the whistleblower's malfeasance. However, the Commission asserts absolute discretion for what is "legitimate ... delay." In light of the myriad uncertainties whistleblowers face, that question mark combined with recent unexplained decisions unfairly creates a chilling effect.

Even the initial criterion, failure to take reasonable steps that prevent or report fraud, is so vague that it will leave whistleblowers guessing. For example, are well-grounded fears of retaliation a reasonable basis for delay? Particularly if redacted from award rulings, the principle needs to be defined so that whistleblowers have clear notice of realistic duties.

There is no definition in the rules about how the Claims Staff might determine what is reasonable, except an implied expectation that a whistleblower should act upon discovering "relevant facts." There is no indication of what amount of time the Commission would consider

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<sup>13</sup> 17 C.F.R. § 240.21F-5.

<sup>14</sup> 17 C.F.R. § 21F-6(a).

<sup>15</sup> 17 C.F.R. § 21F-6(b).

“reasonable,” except a mandate in other sections requiring whistleblowers, first reporting violations internally, to disclose those same facts to the Commission with 120 days in order to preserve award eligibility.<sup>16</sup> In addition, the OWB has complete discretion in determining an award amount.<sup>17</sup> While Preliminary Determinations by the OWB Claims Review Staff on the proposed award amount may be contested,<sup>18</sup> Final Decisions regarding award amounts issued by the Commission are not appealable.<sup>19</sup>

Approximately 20% of the awards made to date were reduced reasons related to delay.<sup>20</sup> The Commission reduced two awards less severely, because the delay in reporting occurred before the Implementing Rules of the Dodd-Frank whistleblower program were finalized.<sup>21</sup> But the most recent award decision noted that “the duration of the delay was relatively limited” and still found the delay “unreasonable.”<sup>22</sup> The Commission determined that despite the “relatively limited” duration of the delay—offering no time specifics that might guide whistleblowers or their counsel in the future—it believes that the “incentives and protections now afforded to whistleblowers” by the whistleblower program make even this “limited” delay “unreasonable.”

That rationalization is unrealistic. In terms of incentives a whistleblower’s chance of receiving an award range from .16% to 35%. In terms of protection, Dodd Frank’s SEC provisions only offer weak remedies to whistleblowers *after* they suffer reprisal. These factors are inadequate for the Commission’s stated purpose of “motiv[at]ing those with insider knowledge [of securities violations] to come forward’ and ‘take the enormous risk of blowing the whistle in calling attention to fraud.’”<sup>23</sup>

The risk of blowing the whistle is in fact “enormous,” as we will describe in detail below, and the decision to report is difficult and complex. In this very case, the employee 1) chose not to report internally, 2) chose to report anonymously, thus also requiring time to retain an attorney, and 3) reported to the SEC only after leaving his or her employer.<sup>24</sup> Rather than recognizing these factors as classic efforts to minimize the “enormous risk” of reprisal and protect one’s self professionally, the Commission views each of these decisions as evidence supporting its conclusion that the whistleblower’s “relatively limited” delay in reporting was nonetheless unreasonable.

The Commission notes that “it would undermine our objective of leveraging whistleblower tips to help detect fraud early and thereby prevent investor harm if whistleblowers could unreasonably delay reporting and receive greater awards due to the continued accrual of wrongful profits.”<sup>25</sup> The Order, however, does not appear to argue that in this case it believed the whistleblower’s delayed report evidenced any *deliberate* intent to increase the amount of the fraud and thus receive a potentially larger award. In the absence of evidence that self-enrichment was at play, the Commission’s implication is that whistleblowers are motivated by self-interest rather than ethics,

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<sup>16</sup> 17 C.F.R. § 240.21F-4(b)(7).

<sup>17</sup> 17 C.F.R. § 240.21F-5(a)

<sup>18</sup> 17 C.F.R. § 240.21F-11(e)

<sup>19</sup> 17 C.F.R. § 240.21F-13(a)

<sup>20</sup> U.S. SEC 2015 Annual Report, 18.

<sup>21</sup> *Ibid*; *also see* SEC Award Order July 17, 2015, SEC Award Order Sept. 22, 2014.

<sup>22</sup> *Ibid*; *also see* SEC Award Nov. 4, 2015, 2.

<sup>23</sup> Order, Nov. 4, 2015, 2, quoting S. Rep. 111-176 at 110-11 (Apr. 30, 2010).

<sup>24</sup> *Ibid*, 3.

<sup>25</sup> *Ibid*.



one of the most common and pernicious misperceptions held about whistleblowers. The Commission conflates its interest in rapid reporting with the motives of whistleblowers, and on the record arbitrarily appears to regard delays as unwarranted on a blank basis, without checking they are unavoidable or explicable. Instead of providing fair guidance, the Commission’s decisions about “reasonableness” on a rapid enough reporting could perpetuate the very biases and misunderstandings about whistleblowers that drive workplace hostility and reprisal, rather than encouragement.

Outlined below is a broad-based record for a foundation to address concerns raised above. It is based on academic research, empirical studies and new survey data compiled by GAP. The research tracks whistleblowers’ typical experience, from discovering a problem to disclosing it and the aftermath, that explain why reporting is rarely immediate—nor should it be given the burden of risk that a whistleblower carries on his or her own shoulders in protecting to protect consumers, investors and the public from fraud.

### **III. Why Whistleblowers Wait: Living the Experience**

#### **A. Substantial Risk of Reprisal**

Studies have shown that the primary reasons people do not report misconduct internally are because they fear retaliation or believe that nothing will be done to address the problem.<sup>26</sup> According to a 2005 National Business Ethics Survey, for example, the most frequent reason that people failed to report misconduct was because they believed that the organization would fail to take corrective action (59% of respondents) and the second most common reason was that they feared retaliation (46% of respondents).<sup>27</sup>

This fear of retaliation is substantiated by GAP’s own independent research. In January 2016, GAP conducted an online survey regarding the “Factors that Influence Whistleblowers’ Decisions to Report Violations” (attached as Appendix 1).<sup>28</sup> When GAP asked survey respondents

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<sup>26</sup> Pacella, Jennifer. “Inside or Out? The Dodd-Frank Whistleblower Program’s Anti-Retaliation Protections for Internal Reporting.” *Temple Law Review* 86. 4 (2014): 721-761, 755, citing Mayer, David et. al. “Encouraging Employees to Report Unethical Conduct Internally: It Takes a Village.” 121 *Organizational Behavior and Human Decision Processes* (2013): 91,100-01.

<sup>27</sup> ERC, “Inside the Mind,” 4, 6.

<sup>28</sup> The survey was sent to GAP’s substantial electronic mailing list (65,345 people), publicized on Twitter, and circulated to members of the Whistleblowing International Network, which includes civil society organizations throughout the world that defend and support whistleblowers. We received responses from 1,366 people, with an average response rate per question of 295 (suggesting that not all of the participants completed the survey). The survey included 31 questions, the majority of which were multiple choice. Respondents were also encouraged to leave comments in response to several questions. GAP selected a small portion of the overall comments we received to include in this report, based on relevancy and whether we had been granted permission by the respondent to include his or her comments. Some of the comments included in this report have been slightly edited to correct spelling and grammatical problems and to remove information that was not relevant.

The majority of respondents, 73%, were whistleblowers who worked either as an employee or contractor for the company they blew the whistle on; 14% were whistleblowers who were not employees of the company they blew the whistle on; 9% were representatives of nonprofit organizations that work with whistleblowers (primarily in countries other than the U.S.); and 4% were attorneys. The survey was designed for any type of whistleblower (or their representative) and not just those who blew the whistle to the SEC. However, 10% of the whistleblowers who participated in the survey did blow the whistle on a publicly-traded company; 7% blew the whistle through a

why they waited to report wrongdoing internally, the main reason given was “I feared reprisal” (35%). The second most common reason was because they “wanted to confirm the suspected wrongdoing, gather additional evidence to substantiate my concerns, and/or better understand the scope of the misconduct” (32%). The third most common reason was because they “feared nothing would be done if I came forward,” (19%). Of the 13 potential reasons listed for delay, the lowest ranked option was, “I wanted to wait until the fraud or misconduct increased so that I could obtain a higher award for coming forward” (selected by less than 1% of respondents).

Increasing fear of retaliation is justified. According to a 2011 National Business Ethics Survey, more than one in five whistleblowers who reported misconduct experienced some kind of retaliation.<sup>29</sup> Based on prior survey data, the Ethics Resource Center (ERC) found that “in the last five years, there has been an 83 percent increase in the rate of retaliation, but reporting has only increased by 12 percent.” According to the survey, the number of employees that experienced retaliation increased by 2.3 million people from 2009 to 2011.<sup>30</sup>

It can take employees a significant amount of time to determine whether the risk of blowing the whistle is worth the likely risk of reprisal. As Jennifer Pacella, an assistant professor of law at Baruch College, noted, “The threat of reprisal itself is a major deterrent to blowing the whistle, causing potential whistleblowers to carefully weigh the possible costs and benefits of reporting wrongful acts.”<sup>31</sup> According to former financial professional Jos Leys and University of Greenwich Business School Professor Wim Vandekerckhove, “frequent consequences of blowing the whistle are ... loss of job, loss of health, loss of financial assets – hence, one has to think twice before blowing the whistle even if it’s one duty.”<sup>32</sup> Reprisal may also involve tactics such as negative performance reviews, denials of promotions or bonuses, demotion, assault, harassment, increased scrutiny, investigations into the whistleblower’s background, transfers, threats, termination and blacklisting.

### **Reprisal in the financial sector**

The types of whistleblowers who approach the SEC may be especially vulnerable to retaliation. According to a 2012 ERC report, whistleblowers in high-pressure work environments – such as *Fortune* 500 companies – are four more times more likely to be retaliated against than those who aren’t operating under such stressful conditions. ERC also found that retaliation rates were higher at *Fortune* 500 companies than at U.S. companies overall; 24% of respondents reported retaliation at *Fortune* 500 companies versus 22% at other companies.<sup>33</sup> Similarly, a Labaton Sucharow US & UK Financial Services Industry Survey conducted in July 2012 found that while 14% of respondents believed their employers were likely to retaliate in response to a report of wrongdoing,

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bounty/whistleblower reward program; and 26% blew the whistle on issues connected to financial accountability and fraud, thus some of the respondents were the target audience for SEC’s whistleblower award program.

<sup>29</sup> Retaliation: When Whistleblowers Become Victims: A Supplemental Report of the 2011 National Business Ethics Survey, Ethics Resource Center, (2012), [http://jpp.whs.mil/Public/docs/03\\_Topic-Areas/06-Retaliation/20150410/06\\_ERC\\_RetaliationWhenWhistleblowersBecomeVictims.pdf](http://jpp.whs.mil/Public/docs/03_Topic-Areas/06-Retaliation/20150410/06_ERC_RetaliationWhenWhistleblowersBecomeVictims.pdf), 2.

<sup>30</sup> Ibid, 5, 2-3.

<sup>31</sup> Pacella, 755.

<sup>32</sup> Leys, Jos, and Wim Vandekerckhove. “Whistleblowing Duties.” *International Handbook on Whistleblowing Research*. Ed. Brown, A.J., et al. Northampton: Edward Elgar Publishing Limited (2014). 115-132. 119.

<sup>33</sup> National Business Ethics Survey of *Fortune* 500: An Investigation into the State of Ethics at America’s Most Powerful Companies, Ethics Resource Center, (2012), <http://pdfserver.amlaw.com/cc/SURVEY.pdf>, 10-11.

only 35% of respondents were certain that their employer would “definitely not” retaliate against them for blowing the whistle. The authors concluded that “fear of retaliation may play a major role in the reluctance to speak out against misconduct.”<sup>34</sup> Subsequently, in a follow-up 2015 survey conducted by University of Notre Dame and Labaton Sucharow of more than 1,200 financial services industry professionals in the U.S. and U.K., the number of respondents who thought their employer would retaliate *increased* to 19% overall (and to 24% for respondents from the U.K.).<sup>35</sup>

Dr. Kate Kenny, a professor at Queen’s University Belfast Management School, reviewed fifteen whistleblower cases at banks in the UK, Ireland, Switzerland and the U.S. and interviewed the relevant whistleblowers between April 2011 and December 2012. She concluded that, based on her interviews, blowing the whistle at a bank tended to be associated with increased “separation and isolation from one’s colleagues.”<sup>36</sup> She observed that the banks often investigated the whistleblower and, in a number of cases, attacked the whistleblower’s personality. She also found that most of the interviewees had struggled with mental health issues after blowing the whistle “given the significant mental and emotional stress” involved. She noted, “[S]uch difficulties were frequently used against people, as a means to discredit their stories.” This occurred most commonly in court cases or media coverage. She said “this was so common that it occurred in almost every case to some extent.”<sup>37</sup>

For a 2015 study, Kenny interviewed more than 20 whistleblowers from financial services firms. She found that long-term unemployment “greatly affected” the whistleblowers she interviewed. For example, Eileen Foster, a prominent Countrywide/Bank of America whistleblower, could not find work after being terminated. She applied for 145 jobs before finally finding one that paid half her former salary. Based on her interviews, Kenny concluded, “[t]he long-term unemployment faced by many whistleblowers is of course related to the informal blacklisting that persists in many industries, and notably in banking and finance.”<sup>38</sup>

Similarly, a study conducted by David Welch, one of the first whistleblowers in the landmark Sarbanes-Oxley Act, analyzed the outcomes of over 27,000 OSHA whistleblower complaints. He found that the “vast majority of whistleblowers struggle to find new employment and have considerable financial difficulties.” Approximately “83% found it was extremely difficult to impossible to find a new job in the same field,” and approximately “78% endured moderate to severe financial difficulties in the first 60 months after blowing the whistle.”<sup>39</sup>

Those who report wrongdoing to the government may be particularly vulnerable to retaliation. A 2012 ERC study found that the likelihood of retaliation increased with each additional

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<sup>34</sup> Wall Street, Fleet Street, Main Street: Corporate Integrity at a Crossroads: United States & United Kingdom Financial Services Industry Survey, Labaton Sucharow (July 2012), <http://www.labaton.com/en/about/press/upload/US-UK-Financial-Services-Industry-Survey.pdf>, 6.

<sup>35</sup> The Street, The Bull and the Crisis: A Survey of the US & UK Financial Services Industry, The University of Notre Dame and Labaton Sucharow (May 2015) [www.secwhistlebloweradvocate.com/LiteratureRetrieve.aspx?ID=224757](http://www.secwhistlebloweradvocate.com/LiteratureRetrieve.aspx?ID=224757), 8.

<sup>36</sup> Kenny, Kate. “Banking Compliance and Dependence Corruption: Towards an Attachment Perspective.” *Law and Financial Markets Review*, 8:2 (2014): 165-177, 172.

<sup>37</sup> *Ibid*, 173.

<sup>38</sup> Kenny, Kate. “Constructing Selves: Whistleblowing and the Role of Time.” *Developments in Whistleblowing Research*. Ed. Lewis, David and Wim Vandekerckhove. London: International Whistleblowing Research Network, 2015. 70-84, 72-73.

<sup>39</sup> Welch, David. “Letter to Assistant Secretary of Labor David Michaels.” *Voices for Corporate Responsibility* (May 7, 2010), [https://dl.dropboxusercontent.com/u/7253576/mehriskalet/62311/Welch\\_letter\\_May\\_10.pdf](https://dl.dropboxusercontent.com/u/7253576/mehriskalet/62311/Welch_letter_May_10.pdf).

audience to which the whistleblower reported.<sup>40</sup> Their data also showed that “one in three reporters willing to blow the whistle to the government experiences retaliation, far higher than the national retaliation rate of 22 percent.”<sup>41</sup> In another study, professors Joyce Rothschild and Terance Miethe found that for each form of harassment they identified (i.e. loss of job, negative performance evaluation, etc.) “the rate of retaliation was generally 10 to 15% points higher among external whistleblowers.”<sup>42</sup>

Indeed, GAP survey respondents noted that Dodd-Frank’s anti-retaliation protections may not be sufficient to overcome whistleblowers’ fear of reprisal. As one survey respondent commented, “Fear of reprisal is a very realistic and very dangerous source of complaint inhibition that cannot be eliminated totally by the Dodd-Frank provisions.”

### **Association between the degree of wrongdoing and reprisal**

A basic lesson from GAP’s experience is that the more severe the scope and consequences of misconduct, the greater the odds of uglier retaliation. The motive is understandable, because corresponding whistleblowing disclosures are more threatening. This experience is consistent with academic and empirical research. According to Rodney Smith, an associate professor at the University of Sydney, “more serious wrongdoing appears to be more likely to end in reprisals for whistleblowers than less serious wrongdoing... Studies since the 1980s have mostly found positive correlations between wrongdoing seriousness and retaliation...”<sup>43</sup> For example, a 2005 study by Mesmer-Magnus and Viswesvaran, which looked at the impact of seriousness and frequency of wrongdoing on reprisal, found that both elements had an effect.<sup>44</sup> Similarly, Rothschild and Miethe found that whistleblowers “who report on systemic organizational corruption or major activity (i.e., misconduct involving over \$100,000 in losses and that frequently occurs) are most likely to experience organizational reprisals.” They concluded, “organizations are more likely to self-correct (and not to retaliate against the whistle-blower) when the misconduct that the whistle-blower has disclosed involves an isolated bad apple. However, when the misconduct in question is systemic—part of the regular way that this organization does business—management denial and retaliation are quick and, as we have found, virtually certain.”<sup>45</sup>

Significantly, given that awards are only issued by the OWB in enforcement actions with a minimum of \$1,000,000 in monetary sanctions, the whistleblower disclosures necessarily rise to a level of significant wrongdoing, thus increasing the risk of reprisal for reporting, as well as the potential intensity of that retaliation.

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<sup>40</sup> ERC “Retaliation” 7.

<sup>41</sup> Ibid 12

<sup>42</sup> Rothschild, Joyce and Terance Miethe. “Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption.” *Work and Occupations*. 26(1) (1999): 107-128. (1999),120.

<sup>43</sup> Smith, Rodney. “Whistleblowers and Suffering.” *International Handbook on Whistleblowing Research*. (2014). 230-249, 241. The studies he refers to include: Near, Janet and Marcia Miceli. “Retaliation Against Whistle-Blowers: Predictors and Effects.” *Journal of Applied Psychology*. 71(1) (1986): 137-45, 141-2; Miceli, Marcia and Janet Near. “Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees.” New York: Lexington (1992), 104; Rothschild and Miethe 122-3; Miceli, Marcia, Janet Near and Terry Morehead Dworkin. “Whistle-Blowing in Organizations.” New York: Routledge (2008), 122-3; and Brown, A.J. and Jane Olsen. “Whistleblower Mistreatment: Identifying the Risks.” *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*. Ed. Brown, A.J. Canberra: ANU E Press, 137-61, 147, 150.

<sup>44</sup> Ibid.

<sup>45</sup> Rothschild and Miethe 122-123, 125.

## **Counter suits and confidentiality agreements**

Whistleblowers may also face reprisal in the form of countersuits by companies, sometimes resulting from overly broad confidentiality agreements. The SEC has, indeed, tried to limit such confidentiality agreements, which are prohibited by Rule 21F-17(a), and has brought enforcement action against a company that used restrictive confidentiality language in an agreement.<sup>46</sup> However, as we noted in our July 18, 2014 submission to the SEC entitled “Petition for Rulemaking and the Issuance of a Policy Statement Regarding Certain Aspects of the Dodd-Frank Whistleblower Program,” in spite of this rule GAP and Labaton Sucharow, “along with numerous other lawyers in the employment and whistleblower bars, have seen repeated examples of employment, severance and confidentiality agreements that purport to limit the extent to which employees or former employees can participate in the SEC Whistleblower Program, and/or receive congressionally-mandated incentives for doing so.”<sup>47</sup> As we reported then, employers are also increasingly seeking civil or criminal liability for theft of company property,<sup>48</sup> and even defying “anti-gag” statutory provisions through frivolous lawsuits that whistleblowers cannot afford to defend against.

After our 2014 submission to the SEC, the 2015 University of Notre Dame and Labaton Sucharow survey of financial services industry professionals found “new evidence of employers actively seeking to suppress employee truth-telling through the widespread use of restrictive, and often illegal, confidentiality agreements.”<sup>49</sup> According to the survey results, “28% of respondents earning \$500,000 or more per year (16% for all employees) say their company’s confidentiality policies and procedures bar the reporting of potential illegal or unethical activities directly to law enforcement or regulatory authorities.” Indeed, 10% of overall respondents and 25% of those earning \$500,000 or more annually had actually “signed or been asked to sign a confidentiality agreement that would prohibit reporting illegal or unethical activities to the authorities.”<sup>50</sup> They also add an extra element of potential delay to those employees still committed to reporting violations by necessitating more complicated legal assistance to determine what their actual rights are and to weigh the risks of coming forward.

The chilling effect of these types of aggressive efforts to silence whistleblowers cannot be overstated. Even if confidentiality provisions prove to be unenforceable, potential whistleblowers may decide to remain silent rather than risk a legal battle with an organization that has far greater

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<sup>46</sup> U.S. SEC 2015 Annual Report 7.

<sup>47</sup> Devine, Tom and Jordan Thomas. “Petition for Rulemaking and the Issuance of a Policy Statement Regarding Certain Aspects of the Dodd-Frank Whistleblower Program.” (July 18, 2014) <https://www.sec.gov/rules/petitions/2014/petn4-677.pdf>, 6.

<sup>48</sup> Ibid, 8, 14-15.(citing as examples *State v. Saavedra*, 2013 WL 6763248 (N.J. App. Dec. 24, 2013) (upholding criminal indictment for the theft of confidential records for employment discrimination claim); Natalie Singer, “Was Inspector Source of Leak at Boeing,” *The Seattle Times* (Mar. 26, 2008) ( <http://www.seattletimes.com/business/boeing-aerospace/was-inspector-source-of-leak-at-boeing/> ) (felony trial for disclosure of records to prove quality control violations); Kevin Sack, “Nurse to Stand Trial for Reporting Doctor,” *New York Times* (Feb. 6, 2010) ([http://www.nytimes.com/2010/02/07/us/07nurses.html?\\_r=0](http://www.nytimes.com/2010/02/07/us/07nurses.html?_r=0)) (felony trial for anonymous disclosure to state medical board a doctor was selling sham herbal medicines to hospital patients).

<sup>49</sup> The University of Notre Dame and Labaton Sucharow 9.

<sup>50</sup> Ibid 3, 7.

financial resources and access to top legal counsel. As Kenny noted in her 2015 study, whistleblowers who have been terminated may lack “the resources for expensive lawyers. This is a problem when the financial services firm that you are fighting typically has significant means and can thus afford the best representation.” According to one bank whistleblower she interviewed, being involved in a court case against a bank is “David against Goliath. And Goliath has \$800-dollar-an-hour lawyers coming out their ears.”<sup>51</sup> Similarly, one GAP survey respondent said, “What significance is the law if in order for the whistleblower to obtain its protection the whistleblower must sacrifice their entire financial future through attorney fees in an attempt to receive the protection of the law... Companies will always have more financial resources than whistleblowers.”

In other contexts, the Commission recognizes the very real risk of reprisal faced by whistleblowers who internally report financial fraud, and how this culture of reprisal has the real effect of chills disclosures. Indeed, it has actively worked to advance whistleblowers’ rights and prevent reprisal. It challenged the used of restrictive confidentiality agreements by bringing an enforcement action against KBR Inc. for requiring witnesses in internal investigations to seek prior approval for discussing matters with outside parties or face discipline or possible termination.<sup>52</sup> It has filed numerous *amicus curiae* briefs in private retaliation claims urging courts to interpret the Dodd-Frank anti-reprisal provisions to hold that individuals who disclose violations internally to their employers, not simply to the SEC, qualify for legal protection against retaliation.<sup>53</sup>

Finally, the Commission filed its own retaliation enforcement action against Paradigm Capital and its CEO, which had “engaged in a series of retaliatory actions against the whistleblower [after the he had reported possible violations to the SEC] including removing the whistleblower from the whistleblower’s then-current position, tasking the whistleblower with investigating the very conduct the whistleblower reported to the SEC, changing the whistleblower’s job function, stripping the whistleblower of supervisory responsibilities, and otherwise marginalizing the whistleblower.”<sup>54</sup> The Commission’s decision to award the whistleblower the highest award level—30%—in connection with the related enforcement action reflected its intent to send a message that “[re]taliation against whistleblowers is entirely unacceptable” and to encourage “potential whistleblowers to come forward in light of our demonstrated commitment to protect them against retaliatory conduct and make significant financial awards to whistleblowers who suffer employment hardships as a result of reporting possible securities law violations.”<sup>55</sup>

The Commission’s actions to support whistleblowers who report misconduct and to punish companies that engage in reprisal are not only laudable but critical to fighting the culture found in almost all workplaces, particularly so in the financial sector, that vilifies rather than values whistleblowers. However, because the fear—and likelihood—of reprisal is so strong, the Commission must continue to take actions that encourage disclosures and demonstrate understanding of the significant professional and personal risk involved with reporting potential misconduct.

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<sup>51</sup> Kenny, “Constructing Selves” 75.

<sup>52</sup> U.S. SEC 2015 Annual Report, 19.

<sup>53</sup> *Ibid.*, 20 (noting efforts to counter the decision in *Asadi v. G.E. Energy (USA, LLC)*, 720 F. 3d 620 (5th Cir. 2013) narrowly interpreting the Dodd-Frank Act to limit protection only to whistleblowers who report violations directly to the SEC).

<sup>54</sup> SEC Announces Award to Whistleblower in First Retaliation Case, U.S. Securities and Exchange Commission (April 28, 2015), <https://www.sec.gov/news/pressrelease/2015-75.html>.

<sup>55</sup> *Ibid.*

## B. Desire for Anonymity

While the SEC has stated that it is committed to working “closely with whistleblowers or their attorney in an effort to take appropriate steps to maintain their confidentiality,” the fact remains that Congress has authorized the Commission to disclose whistleblower-identifying information in certain circumstances, as outlined in Section 21F(h)(2).<sup>56</sup> This provision could be especially problematic for the approximately 20% of individuals who chose to submit their information anonymously to the Commission through counsel, some of whom were thereafter required to identify themselves to enforcement staff under 15 USC 78u-6(d)(2)(b), which requires a whistleblower to disclose his or her identity prior to the payment of an award.<sup>57</sup>

Some whistleblowers therefore may be hesitant to come forward to the SEC, because they fear that their identity may become public. Indeed, when GAP asked survey respondents who disclosed the problem they discovered to a government oversight and/or enforcement body that expressly promises to maintain the confidentiality of whistleblowers whether they had concerns about the commitment or ability of that organization to protecting their confidentiality, 64% said they had concerns about the organization’s *commitment* to doing so and 66% said they had concerns about the organization’s *ability* to do so. Moreover, when GAP asked people if “you requested confidentiality from a government audience, such as a legislative office, an inspector general, or an oversight and/or enforcement body, were you satisfied that your identity was adequately protected,” 76% of respondents replied “No.”

According to ERC survey data, the third most frequent reason that whistleblowers don’t report is because they fear there will be no anonymity, a reason that was given by 39% of respondents.<sup>58</sup> This sense that anonymity will not be protected by either internal channels or external parties is made graphic by this advice on “Successful Defense in the Age of Whistleblowers” offered to business trial lawyers:

Assume...that a company learns of a whistleblower claim only when it is contacted by a government agency, and the agency refuses to suspend its investigation while the company conducts its own inquiry...Mounting an aggressive defense requires counsel to learn as much as possible about the identity of the whistleblower and the nature of her complaint, and to plan avenues of response and attack at the earliest stages...False Claims Act cases are kept under seal for months or years, and whistleblower statutes typically require the government to maintain the confidentiality of the informant’s identity....It will certainly be helpful to the company to know the whistleblower’s identity as soon as it can—not solely for the purpose of impeaching her credibility, but also for the purpose of assessing the seriousness of her allegations of misconduct, and the identities and credibility of potential fact witnesses. If the whistleblower is a discharged employee or one with a history

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<sup>56</sup>15 U.S.C. § 78u-6(h)(2); 17 C.F.R. § 240.21F-7(a). These circumstances include when the Commission or another authority files an action and disclosure is required to the defendant entity charged with fraud, or if in its discretion the Commission determines it is necessary to accomplish the purposes of the Exchange Act. While domestic entities are subject to the same confidentiality rules, foreign authorities must offer assurances of confidentiality deemed adequate by the Commission.

<sup>57</sup> U.S. SEC 2015 Annual Report, 17.

<sup>58</sup> ERC, “Inside the Mind,” 5.

of performance or disciplinary problems, those facts will be important to know. Counsel may decide to bring these facts to the attention of the investigating authority at the earliest possible time.<sup>59</sup>

### C. Whistleblowers Report Internally First

Employees who do report misconduct overwhelmingly do so first through internal channels. According to the SEC, of “the award recipients who were current or former employees, approximately 80% raised their concerns internally to their supervisors or compliance personnel, or understood that their supervisor or relevant compliance personnel knew of the violations, before reporting their information of wrongdoing to the Commission.”<sup>60</sup>

Studies have found that the main reason employees report wrongdoing is because they believed corrective action would take place.<sup>61</sup> As GAP noted in the book *“The Corporate Whistleblower’s Survival Guide,”* the overwhelming majority of whistleblowers “are motivated by loyalty to the company and professional pride in its positive role in society.”<sup>62</sup> This is one of the reasons that most whistleblowers try to first work within the corporate system before going externally.

According to the 2011 National Business Ethics Survey, only 3% of initial reports were made outside the company and only 11% of secondary reports were made outside the company.<sup>63</sup> A 2012 National Business Ethics Survey of *Fortune* 500 Employees found that the initial percentage of external reports was even lower in *Fortune* 500 companies: only 1% of employees surveyed made their initial report through external channels.<sup>64</sup> Similarly, a 2010 New England Journal of Medicine article that reviewed pharmaceutical industry *qui tam* cases in which the whistleblower received a substantial award found that 82% (18 of 22) of the whistleblowers had filed their concerns internally with the company first.<sup>65</sup>

### Internal processes affect timing and willingness to report externally

Whistleblowers may also delay reporting outside the organization because their company has misled them or been unresponsive. As one financial whistleblower told Kenny, organizations may delay responding to a whistleblower on purpose, as “[there] appears to be a universal assumption that if they stonewall you long enough you will eventually go away; they are nearly always right in this.”<sup>66</sup> Indeed, according to the National Business Ethics Survey of *Fortune* 500 employees, “26

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<sup>59</sup> Freeman, William S. “Successful Defense in the Age of the Whistleblower.” *ABTL Report*, Association of Business Trial Lawyers, 20.3 (2011), <http://tinyurl.com/j7lqg8k>, 2.

<sup>60</sup> U.S. SEC 2015 Annual Report, 17.

<sup>61</sup> ERC, “Inside the Mind,” 5.

<sup>62</sup> Devine, Thomas and Tarek Maassarani. *The Corporate Whistleblower’s Survival Guide*. San Francisco: Berrett-Koehler Publishers (2011), 6-7.

<sup>63</sup> ERC, “Inside the Mind,” 12-13.

<sup>64</sup> According to the survey, 75 percent of *Fortune* 500 companies are public.

<sup>65</sup> Kesselheim, Aaron, David Studdert, and Michelle Mello. “Whistle-blower’s Experiences in Fraud Litigation Against Pharmaceutical Companies.” *N Engl J Med*. 362 (2010):1832-1839.

<sup>66</sup>Kenny, “Constructing Selves,” 76.



percent of survey respondents said that, as far as they know, the company didn't investigate what they reported."<sup>67</sup>

GAP's survey data supported this finding. When we asked people who blew the whistle through internal channels how long it took the organization to provide an initial response acknowledging and committing to act on their disclosure, 23% of survey respondents said the organization "never told me." Moreover, the number of people who never received a response was probably significantly higher than this figure reflects. This is because 27% of respondents did not select a multiple-choice answer/time range for this question, opting instead to leave detailed comments, many of which described how the organization failed to respond in a timely manner or downplayed the problem: "they did nothing and did not give me any answers," "I was told I must have misunderstood," and "they never acknowledged wrongdoing, instead they did an investigation on me and eventually fired me." According to the results of GAP's survey, 95% of whistleblowers who used internal channels said they were not satisfied that the organization implemented in good faith any corrective action commitments when the investigation was completed. Similarly, 94% of whistleblowers who used internal channels said they were not satisfied on balance that the organization responded in good faith to their disclosures.

Even when organizations do respond, it may take some time for them to do so. Studies have found that it usually takes more than 30 days for an organization to close a whistleblower's case. According to a 2015 NAVEX Global report, in which they reviewed data from more than 4,600 of their hotline and case management clients, the median number of days it took for a company to complete an investigation and close a whistleblowers' case was 39 days. The median rate to close accounting, auditing and financial reporting cases was significantly higher at 57 days.<sup>68</sup> At organizations not represented by NAVEX, the response time may be substantially longer. This was evident from the numerous public comments the SEC received, many of which suggested that "90 days was not sufficient time for an internal compliance or review program to conduct a sufficiently thorough investigation and suggested extending the period to 120 days, 180 days, or a reasonable period of time. (*See, e.g.*, letters from Association of Criminal Defense Lawyers, AT&T, Business Roundtable Institute for Corporate Ethics ("Business Roundtable"), NSCP.)"<sup>69</sup>

When GAP asked survey respondents how long it took their organization to provide an initial response, 15% said it took the organization 120 days or more to respond, whereas 34% said it took the organization less than 120 days. When we asked whistleblowers how long it took the organization—after acknowledging their disclosure—to actually complete its investigation and share the results, the most common response was "they never told me the investigation was completed," which was cited by 34% of respondents. 17% said it took 120 days or less, 7% said it took between 120 days and a year, and 10% said it took "more than a year."<sup>70</sup> As one GAP survey respondent commented, "delays by management shouldn't be able to derail whistleblower complaints." Another respondent said, "Each case is unique—a balance should be struck between incentives for prompt

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<sup>67</sup> ERC, "Fortune 500" 14.

<sup>68</sup> Penman, Carrie and Edwin O'Mara. "2015 Ethics & Compliance Hotline Benchmark Report." *NAVEX Global* (2015) 6, 19.

<sup>69</sup> Implementation of the Whistleblower Provisions of Section 21F of the Securities and Exchange Act of 1934. Securities and Exchange Commission, Release No. 34-64545; File No. S7-33-10. (25 May 2011), <http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/secfinalrules.pdf> 89.

<sup>70</sup> 23% of respondents chose to select "other" for this question and left detailed comments and 7% selected "they told me the investigation was completed but didn't share the results."

reporting and allowances for the organization to respond and self-correct. Also, reporting is often discouraged by managers under promise that the issue will be addressed...” A third respondent noted, “It can take considerable time for a trusting, sincere, dedicated person to conclude that the agency/official internal response is either deceptive, fraudulent, or disingenuous. So that can lead to delays of many months or even a year or more before you can solidly conclude you've been misled, deceived or deluded about the agency's will to take corrective action.”

#### **D. Lack of Awareness or Confusion About the SEC Program**

Whistleblowers also may fail to report to the SEC in a timely manner, because they are unaware of that option or confused about next steps. Based on her interview with bank whistleblowers, Kenny found that after whistleblowers reported through the internal complaint procedure, they “often did not know what to do next.” She found that “there was little clear guidance on how to escalate complaints, and compliance personnel in this position often spent months, and sometimes years, trying to figure out what the appropriate actions were... Confusion and ambiguity continue to characterise procedures for reporting wrongdoing in financial services organisations in 2013, even after the introduction of new legislation governing this area.”<sup>71</sup>

The 2015 University of Notre Dame and Labaton Sucharow survey of financial services industry professionals found that 89% of respondents would report misconduct in their workplace “if they could do so anonymously, with protection from retaliation, and if they had the potential to receive a monetary award,” the main elements of the SEC whistleblower program. However, the survey also found that “astonishingly, while the lion’s share of industry professionals would report misconduct given the incentives and protections such as those offered by the SEC whistleblower program, 37% of respondents are still unaware of the agency’s program.” Moreover, the results show that even those who are aware of the program may doubt its effectiveness, as 39% of respondents overall – and 46% of those earning \$500,000 or more annually – thought that “law enforcement and regulatory authorities in their country are ineffective in detecting, investigating and prosecuting securities violations.”<sup>72</sup>

When GAP asked whistleblowers if they were aware of any time limit or statute of limitations for filing a disclosure about the wrongdoing they discovered with an oversight/regulatory agency, 73.2% said “No.” When we asked specifically those who reported as a part of a bounty program if they were aware that their potential award could be reduced as a result of delayed reporting, 85% said “No.” As one GAP survey respondent said, the “majority of employees are not aware of time limits for reporting, till it is too late and then can become disenchanted with such laws when illegally terminated for doing the right thing...”

#### **E. Bystander Apathy**

Psychological factors may also result in a potential whistleblower hesitating to come forward. In her book, *Whistleblowing: When it Works and Why*,<sup>73</sup> Roberta Ann Johnson concludes that “decisionmaking in the whistleblowing arena seems to involve a most interesting individualized mix

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<sup>71</sup> Kenny, “Banking Compliance” 170.

<sup>72</sup> The University of Notre Dame and Labaton Sucharow 8.

of rational and emotional factors,” and that “deciding to blow the whistle on wrongdoing is a complex and risky business.” She explains that there are psychological reasons why people may hesitate to come forward when faced with wrongdoing, including “bystander apathy.” She notes that if other people appear unconcerned about a problem, “it will likely make you hesitate about reacting – you don’t want to embarrass yourself or appear foolish and wrong.” An ERC study supports this bystander apathy phenomenon, as it found that the fourth most common reason that whistleblower failed to come forward is because they thought, “someone else would,” (24% of respondents said this).<sup>73</sup>

Notably, the bystander apathy phenomenon may explain why it may be difficult for whistleblowers to meet the Commission’s criteria that reports be “specific” and “credible” in addition to timely. Johnson notes that people may also hesitate to come forward because the situation appears “ambiguous” and in need of interpretation.<sup>74</sup> In the context of complex financial fraud, the effort involved with substantiating an initial discovery of possible wrongdoing to a level that meets the standard of “credible and specific” involves both psychological and then practical hurdles that would explain delayed reporting.

## **F. Due Diligence and Professional Protection**

As GAP pointed out in “*The Corporate Whistleblower’s Survival Guide*,” there are many steps that a whistleblower should go through to protect themselves professionally and ensure their disclosure results in successful efforts to address the misconduct. These include:

- 1) **Contemplating their objectives and considering the results of their actions on their career path**<sup>75</sup>
- 2) **Considering whether to blow the whistle anonymously or publicly**
- 3) **Consulting with loved ones, including their family and close friends**
- 4) **Testing “the waters for support among workplace peers.”**<sup>76</sup> This may also include developing an understanding of organizational dynamics. As Professor Brian Martin of the University of Wollongong wrote, it is “valuable to learn how the organization works; who had connections; what networks exist; what practices are standards; how people get things done; what sort of measures are taken against those who challenge the status quo...It is helpful to find experienced workers who can provide stories of what has happened in the past.”<sup>77</sup>
- 5) **Considering whether or not to work within the system**
- 6) **Creating “a well-thought-out plan”**
- 7) **Networking with potential allies**, such as “elected officials, journalists or activists,”<sup>78</sup>
- 8) **Keeping “an ongoing, detailed, contemporaneous record.”** This step includes, for example, writing “memos of important events or conversations about which you want to make a permanent record.”<sup>79</sup>

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<sup>73</sup> ERC, “Inside the Mind,” 5.

<sup>74</sup> Johnson, Roberta. *Whistle-Blowing: When it Works – And Why*. London: Lynne Rienner Publishers, 2003. 48-50.

<sup>75</sup> Devine and Maassarani, 42.

<sup>76</sup> Ibid, 47.

<sup>77</sup> Martin, Brian. “Research That Whistleblowers Want – and What They Need.” *International Handbook on Whistleblowing Research*. (2014). 497-521, 504.

<sup>78</sup> Devine and Maassarani, 51.

<sup>79</sup> Ibid, 53-54.

- 9) **Securing all relevant records:** As *“The Corporate Whistleblower’s Survival Guide”* authors note, “because corporate records may be destroyed or hidden, it is important to have a copy of all relevant documents before you expose the problem, even if you plan to remain anonymous.”<sup>80</sup> Similarly, Martin wrote that a “standard piece of advice for whistleblowers is to collect lots of information about the problem...for instance saving documents and e-mails. It might also involve soliciting signed statements, [and] sending messages that confirm interpretations...”<sup>81</sup> The organization Workplace Fairness recommends that potential whistleblowers collect and put “in chronological order all of the documents that you can find concerning your employment—every pay stub, every memo, and every handwritten note.”<sup>82</sup>

Kenny noted that a lot of the bank whistleblowers she interviewed spent a significant amount of time on the “technical and specific points of their cases, trying to obtain meeting minutes for example, or in-house documents, which took very long to arrive.” One whistleblower she interviewed said it took him years to get a copy of minutes he was trying to obtain. Kenny noted that “this was a common feature among people’s experiences. Often the delay in gaining access to documents and key evidence meant that as time passed, the danger of the person running out of money, patience, or indeed time to legally file a claim, increased.”<sup>83</sup>

- 10) **Seeking legal advice:** As *“The Corporate Whistleblower’s Survival Guide”* notes, whistleblowers “need a strong support network that includes legal expertise because... whistleblowing can take on complex legal dimensions.” Indeed, those who submit anonymously to the Commission are required by Section 21F(d)(2) to have counsel. But is also important to pick the right lawyer. To do this, *“the Survival Guide”* authors recommend that whistleblowers “create a list of lawyers with whom you might want to work. Ask your friends, family, colleagues, and anyone else whose opinion and judgment you trust. ... Once you have a list of attorney prospects, you should set up meetings to get a feel for how it would be to work with them... Do not make a decision until you meet and have confidence in the specific attorney who will be responsible for defending your rights and interests.”<sup>84</sup>

When GAP asked whistleblowers who sought legal representation how long it took them to find and retain an attorney, 28% of survey respondents said it took less than 30 days, 17% said took between 30 days and 60 days, another 17% said it took between 60 and 120 days, 10% said it took between 120 days and 6 months, and 29% said it took more than a year. GAP also asked how long it took for the lawyer to decide whether or not to take the case. While the majority (59%) said it took less than 15 days, in some cases it took significantly longer. 13% said it took between 30 and 60 days, 5% said it took between 60 days and 90 days, 2% said it took between 90 days and 120 days, 1% said it took between 6 months and a year and 4% said it took more than a year.

As one GAP survey respondent commented, “Whistleblowers need to have adequate

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<sup>80</sup> Ibid, 55.

<sup>81</sup> Martin, 503.

<sup>82</sup> Blowing the Whistle: Practical Tips, Workplace Fairness, (Accessed Jan. 25, 2016), <http://www.workplacefairness.org/blowing-the-whistle#7>.

<sup>83</sup> Kenny, “Banking Compliance,”17.

<sup>84</sup> Devine and Maassarani, 137-138.

time to consult with a lawyer and whistleblower advocates. Being a whistleblower has a life changing effect and once a person travels down that road they have risked their livelihood, reputation, and sometimes their life.”

- 10) **Building a case:** This may involve reviewing corporate filings, searching the public record or filing a Freedom of Information Act request.<sup>85</sup> As one whistleblower commented in GAP’s survey, “My delay in reporting [to the government] was ... because I was waiting for a report of internal review on my complaints, that I requested under FOIA, and management action on my audit findings; both of which took years.”

This step may also include summarizing the issues. According to Martin, “having lots of information is a good start, but to make an effective case, it is nearly always valuable to be able to develop a succinct summary of the issues. When approaching potential supporters or outlets, whether co-workers, outside agencies, journalists or social media, it is vital to be able to describe the issues in a persuasive way... The skills involved here are ones of extracting central issues, namely ones that inform and resonate with others, and mustering evidence and arguments in a way that is understandable to the audience.”<sup>86</sup>

This all takes considerable time. As one GAP survey respondent commented, “It takes time to build up the courage to act.” Another noted, “Whistleblowers often confront moral dilemmas that require time to reconcile.” A third said, “It takes months to realize that you are not mistaken about discovering wrongdoing, verifying the evidence, ruling out other benign explanations for your findings, getting ‘reality checks’ from trusted colleagues, getting the OK from loved ones, figuring out how and to whom to report the misconduct, considering how the reporting may backfire and cost you your job and wreck your family etc.” As Kenny found, based on her interviews with whistleblowers from financial services firms, “it was common for years to have passed between the initial recognition and reporting of wrongdoing, and a final resolution of the case, if the latter ever was achieved. Reporting wrongdoing, waiting for a response, trying to arrange meetings, waiting for court dates, waiting for settlement agreements, all of these things take significant time.”<sup>87</sup>

## **G. The Importance of Reporting “Specific” and “Credible” Information**

Securing relevant records, one of the important “survival strategies” identified above, is particularly salient in the context of reporting violations under the Dodd-Frank Act because to qualify for an award, the information provided must be “sufficiently specific, credible, and timely to cause the staff to commence an examination, open an investigation, reopen an investigation that the Commission had closed...”<sup>88</sup> According to a 2010 SEC Office of Inspector General report on the SEC’s bounty program, the Commission “typically” dismissed “general or vague bounty applications.”<sup>89</sup>

When GAP asked respondents, “How long do you think whistleblowers should have to

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<sup>85</sup> Ibid, 73.

<sup>86</sup> Martin, 503.

<sup>87</sup> Kenny, “Constructing Selves,” 72.

<sup>88</sup> 17 C.F.R. § 240.21F-4(c)(1).

<sup>89</sup> Assessment of the SEC’s Bounty Program, U.S. Securities and Exchange Commission, Office of Inspector General, Office of Audits (March 29, 2010), <https://www.sec.gov/about/offices/oig/reports/audits/2010/474.pdf>, 17.

make a decision to report and to adequately prepare disclosures that are both credible and specific to the government,” the most frequent answer was “there should be no time limits” (40%). Only 27% of respondents thought they should have 120 days or less to report to the government after seeing an indication of wrongdoing. 7% of respondents said they should report within 6 months; 8% said within one year; an additional 8% said within three years; 3% said within ten years and 8% had no opinion or did not know. Some of the comments that respondents made related to this topic included:

- “Why would a time limit be needed? If the government saves money then the government saves money... and isn't saving money the whole and only purpose of the Act?”
- “In my experience, the sooner you report, the less evidence you have. The longer you wait, the more likely it is that evidence will be altered or lost.”
- “I think two or three years will balance the need to lessen the pressure on whistleblowers who already experience stress due to the risks involved in whistleblowing and the need for timely reporting so that the issues may be addressed in time.”
- “Yes, the reporting should be done within a reasonable period of time, but not one artificially constructed due to some idea that a month to report wrong-doing is somehow intrinsically better than, for example, three months.”
- “The biggest issue in my mind is the need for whistleblowers to prepare a case that convinces the authorities to investigate.”
- “There are many reasons, including not wanting to believe what you are seeing, or the evidence showing wrong doing, as well as concerns about loss of employment, housing ability to provide for your family, as well as personal safety of yourself and your family all of which can lead to delays in reporting. If there is a statute of limitations on reporting, it needs to be long enough to give people the time to evaluate whatever information they have found that may indicate wrong doing, overcome initial legitimate concerns about serious potential consequences, and seek outside help in the form of legal assistance or others who have a background in dealing with either or both of the legal issues and the type of organization or industry in which the whistleblower is employed.”
- “I think the totality of circumstances needs to be taken into account. For instance, a whistleblower may have a family member who needs serious medical care, so the whistleblower must delay reporting in order not to jeopardize his or her job and the family member's healthcare insurance...”

84% of respondents said that their answer regarding this timeframe would not change if the disclosure were submitted as part of a bounty program. Some of the reasons given for the change in response were:

- Respondents “need time to prepare claim;”
- “If the disclosures were submitted as part of a Bounty Program the time-limits should be the same as RICO time-limits (which I believe are 12 years);” and
- “Financial fraud may take longer to prove. If it takes a whistleblower more time to gather all the evidence necessary there should be allowances. A whistleblower can lose their employment by rushing to gather information ...so allowances must be made to insure that justice is served.”

The Commission should avoid imposing double standard against whistleblowers for reasonable or unavoidable delays. Whistleblowers often are acting as an outside volunteer project, preparing their SEC disclosures on their own time and nickels. By contrast, it is worth noting how long it takes both internal compliance processes and government agencies to conduct investigations into the merit of reported violations, despite having resources and processes for this very purpose. While we have not found publicly available data regarding how long the Commission itself takes to investigate claims that meet the “sufficiently credible and specific” threshold,<sup>90</sup> the slow pace of awarding bounties reflects the time it takes to investigate cases. Further, the Department of Justice, for instance, routinely takes years to make a decision to intervene in False Claims Act cases filed by whistleblowers.<sup>91</sup>

A whistleblower who discovers potential violations, in contrast, has to independently and carefully verify his or her concerns to ensure that they are sufficiently credible and specific to warrant disclosure, often with limited access to full information and at great professional risk. In light of the Commission’s requirements for specificity and credibility, it is unrealistic to hold whistleblowers to a standard of rapid investigation that neither internal compliance programs nor government agencies can satisfy. The SEC should not hold whistleblowers acting on personal initiative to higher standards of timeliness than it applies to itself.

## **H. Money Does Not Motivate Employee Whistleblowers To Report**

We noted with some concern that in one recent award judgment (File no. 2016-1), the SEC decreased an award to a whistleblower and commented, that “it would undermine our objective of leveraging whistleblower tips to help detect fraud early and thereby prevent investor harm if whistleblowers could unreasonably delay reporting and receive greater awards due to the continued accrual of wrongful profits.”<sup>92</sup> It is of course important for the SEC to prevent investor harm. As one GAP survey respondent noted, “The sooner fraud is uncovered the less taxpayer money wasted.” However, the reality is that the reasons most whistleblowers delay reporting have nothing to do with a desire to “receive greater awards.”

For example, a study by Dr. Aaron Kesselheim and his colleagues, in which they interviewed 26 whistleblowers in the pharmaceutical sector, found that the “compulsion to do the right thing and not money is the primary motivation when drug company employees report fraudulent activity to the government.” He said that none of the whistleblowers said money was their primary motive for coming forward. Rather “they seemed to want to right a wrong, or bring to light something that was ethically compromised.”<sup>93</sup>

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<sup>90</sup> Evaluation of the SEC’s Whistleblower Program, U.S. Securities and Exchange Commission Office of Inspector General (January 18, 2013)( <https://www.sec.gov/about/offices/oig/reports/audits/2013/511.pdf>), 16 (noting that the most “No Further Action” determinations were made within 30 days, though others that warrant further investigation continue in the SEC system).

<sup>91</sup> Taxpayers Against Fraud Education Fund, False Claims Act Overview: Process, <http://www.taf.org/resource/fca/process> (last visited January 29, 2016) (noting that evidence of the fraud alleged by the whistleblower needs to be specific and documented to avoid declination, and that a “qui tam suit initially remains under seal for at least 60 days during which time the Department of Justice can investigate and decide whether to join the action. Most seals are extended at least once, and it is not uncommon for a case to remain under seal for several years.”)

<sup>92</sup> U.S. SEC Award Order, Nov. 4, 2015, 3.

<sup>93</sup>Emery, Gene. “Money Not Major Incentive for Whistle-blowers.” *Reuters* (May 12, 2010), <http://www.reuters.com/article/fraud-whistleblowers-idUSN1221530120100512>.

Similarly, the ERC found that the two main reasons why *Fortune* 500 employees said they would make an external disclosure were “frustration over inaction” (74%) and “ongoing problems” (80%). The Center also found that people were more likely to go to the federal government if they had experienced retaliation: 46% of respondents who did not experience retaliation said they would consider reporting to the government if it meant losing their job versus 62% of those who had been retaliated against. Based on its research, the ERC concluded, “Retaliation and corporate inaction can increase the likelihood that employees will take their reports outside the company.”<sup>94</sup> The Center found that another factor that impacts whether or not an employee reports to the government is his or her personal and/or professional security. Those with better compensation than two years ago and those with a more secure financial situation overall were more likely to report to the government. They also found that managers, as well as “more engaged employees” were more likely to report to the government than lower-level employees or less engaged employees. The Center concluded, “in essence, bounties do not really matter to the people who are most likely to report” and that only about 5% of individuals would be motivated to report because of a monetary award.<sup>95</sup>

When GAP asked survey respondents to rank the reasons why they blew the whistle on their employer, the majority (58%) chose “I felt like it was the right thing to do” as their first reason. The lowest ranked reason (which was only given as a primary reason by two people) was: “I was motivated by the possibility of receiving a substantial monetary award for being the first to report misconduct.” Moreover, in the comments section of the survey, many respondents explained that money was not a motivating factor for their whistleblowing, even though we didn’t specifically ask for their thoughts on this topic. Some of the comments included:

- “I did not report it for the reward. I filed because it was the right thing to do. I discovered the bounty provisions after I reported the wrongdoing.”
- “Approach it with an understanding that the whistleblower is most often not motivated by a financial reward and that in fact the reason for a delay in timing is nothing more than a fear of reprisal, which in my experience is a truly rightfully placed fear.”
- “I truly do not believe the financial reward is at the front of the whistleblowers mind. The financial reward would pay the attorney fees that the whistleblower needs to defend themselves.”
- “I did not do it for money.”
- “I personally also believe that it's not the monetary award that matters much, mainly (sic) is for the whistleblowers to feel safe and be able to continue to develop our career possibilities...”
- “Personal gain is not important to me, but professional survival was. So better to go slow and get the facts right and avoid termination.”
- “...External reporting ends many careers, isolates the whistleblower from many friends and family, and is often ruinous. I reported to protect co-workers' safety and corporate interests. A financial gain would have to be quite large to make up for the damage to one's life, in most externally reported cases.”
- “My character is such that I would report because it is wrong.”
- “I went to the SEC after warning internally for 18 months, but did not do so for reward, but

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<sup>94</sup> ERC, “*Fortune* 500,” 14-16.

<sup>95</sup> ERC, “*Inside the Mind*,” 15-16.



for accountability.”

This is substantiated in detailed research by Yuval Feldman and Orly Lobel that compares the effectiveness of different incentives in encouraging whistleblowing.<sup>96</sup> Feldman and Lobel’s work conducted independent empirical analysis applying behavioral economics, psychology and governance research to evaluate how the effectiveness of how the different regulatory schemes promote enforcement through whistleblowing—e.g., anti-reprisal statutes which reward intrinsically-motivated reporting (reporting out of a sense of moral or civic duty), affirmative duties and fines for failure to report, and low and high monetary incentives—might align with what actually motivates people to report wrongdoing. Some of their key findings reveal:

- when illegal actions are perceived as morally offensive, reward levels have minimal effects on actions;
- when there is low ethical significance attached to the reporting act, low monetary awards may actually *decrease* the rate at which the wrongdoing is reported/suppress internally motivated action, because the wrongdoing is framed as a commodity with a price tag;<sup>97</sup>
- “when illegalities witnessed by potential enforcers were perceived as less severe, the use of high rewards and fines” produced higher levels of reporting than the use of low rewards;<sup>98</sup>
- individuals perceive their own actions as primarily motivated by intrinsic ethical concerns, but perceive others to be motivated by high bounties, thus evidencing a “holier-than-thou” effect.<sup>99</sup>

When GAP asked whistleblowers who reported externally how long it took them to do so, 61% said it took them less than 120 days, 20% said it took between 120 days and a year, and 19% said it took more than a year. When asked why they decided to wait to report *externally*, the number one reason survey respondents gave was because they “feared reprisal” (35%). The second most common reason was because they wanted to “confirm the wrongdoing, gather additional evidence to substantiate my disclosure and/or to better understand the scope of the misconduct (31%). Of the 13 potential reasons for delay that we listed, the option that was ranked the lowest was “I wanted to wait until the fraud or misconduct increased so that I could obtain a higher award for coming forward,” which was selected by less than 1% of respondents.

When we asked survey respondents, “Do you believe that the whistleblower incentives and protection in the Dodd-Frank law—including the provisions that give whistleblowers the ability to report anonymously, obtain employment protection, and potentially receive a monetary award—eliminate the reasons whistleblowers may have for delayed reporting to the SEC,” 9% agreed, 37% disagreed and 55% partly agreed, meaning that they believed the whistleblower provisions in the Dodd-Frank law eliminated/addressed some but not all of the reasons a whistleblower would have for delayed reporting to the SEC. Some of the reasons people gave for their responses included:

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<sup>96</sup> Feldman, Yuval and Orly Lobel, “The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties & Protections for Reporting Illegality,” *Texas Law Review* 87 (May 2010) ([http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1415663](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1415663)).

<sup>97</sup> *Ibid*, 40.

<sup>98</sup> *Ibid*, 41

<sup>99</sup> *Ibid*.

- “The level of reprisal common to whistleblowers is enough to give many people pause. To think a reward is enough to compel someone to report an issue if it leads to years of mistreatment is ridiculous.”
- “There are not enough provisions to allow whistleblowers to deal with the risk that they take. The entities (government) get a great deal with no risk from a whistleblower. All the risk is taken by the whistleblower. The risk is extremely HIGH, and sometimes so high that it is not worth reporting...”
- “...I would not think it would be wise to put a time limit on someone who is trying to get enough evidence to prove his claim and maybe change policy and maybe keep his job.”
- “The whistleblower needs time (and support) to come to grips with what he/she is about to do, and to prepare for it...”
- “When the laws protect the whistleblower from career suicide and retaliation and when the whistleblower has little to risk career wise, that is when it would be reasonable to limit the timing of reporting and disclosing. In the face of the weak protections that exist for any individual willing to disclose, the timing should not be a consideration in refusing to consider their claims and grant them an award, if their claims are supported by facts and properly substantiated.”

#### **IV. Statutes of Limitations and Timeliness: Comparisons to Best Practices in Place Internationally and at Other Agencies**

Although the Dodd-Frank Act does not have a statute of limitations for reporting misconduct and has a lengthy statute of limitations for reporting retaliation (3, 6 or 10 years, depending on the circumstance),<sup>100</sup> the Commission has created a rule requiring a whistleblower, if reporting violations internally first, to disclose those same facts to the Commission with 120 days in order to be eligible for an award.<sup>101</sup> The 120-day reporting rule creates the functional equivalent of a statute of limitations for SEC reporting to qualify for an award for those whistleblowers—the vast majority—who first report internally. This mandate has the admirable goal of encouraging corporate compliance systems to operate more efficiently upon learning of potential violations from a whistleblower. But it also forces the whistleblower face the increased likelihood of retaliation by breaking ranks. This burden is unjustified, if the organization’s delays reflect good faith, hard work to address concerns.

This *de facto* statute of limitations is also inconsistent with international best practices. GAP has reviewed whistleblower laws in the U.S. and throughout the world and found that “six months is the minimum functional statute of limitations and that one-year statutes of limitations are consistent with common law rights and are preferable.”<sup>102</sup>

This 120-day deadline even is at odds with other reward or bounty programs. Under the False Claims Act, for example, an action must be filed within six years from the date of the violation or within three years after the relevant government officially knew or reasonably should have known

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<sup>100</sup> 15. U.S.C. § 78u-6 (h)(B)(iii).

<sup>101</sup> 17 C.F.R. § 240.21F-4(b)(7) and(c)(3)

<sup>102</sup> For a full list of relevant laws, see

[https://www.whistleblower.org/sites/default/files/Best\\_Practices\\_Document\\_for\\_website\\_revised\\_April\\_12\\_2013.pdf](https://www.whistleblower.org/sites/default/files/Best_Practices_Document_for_website_revised_April_12_2013.pdf), 8.

about the violation.<sup>103</sup> Although timeliness is one of the factors the DOJ may consider according to its relator’s share guidelines, these guidelines are not binding and are non-exhaustive. As a representative from the Taxpayers Against Fraud Education Fund (TAFEF), which closely monitors the False Claims Act, wrote, “the value of the guidelines is limited, at best. Since only a few relators’ challenges to the percentages offered by DOJ have ever been litigated, there’s almost no evidence of how the government arrives at the awards they propose. So we cannot be certain that timeliness actually factors in at all – particularly since the guidelines suggest that a timely filing should result in a higher award, but rewards in non-intervened cases seemingly remain static, at about 16%-17%.”<sup>104</sup> Another TAFEF representative noted, “off the top of my head, I know of no case where that [timeliness] has been a factor in reducing an FCA award below the statutory ‘normal minimum’ of 15%. The FCA has a ‘first to file’ clause [like the Dodd-Frank Act] which tends to bar subsequent FCA actions, so there is a genuine ‘race to the courthouse’ with the very best case that can pass 9b.”<sup>105</sup>

There are two additional points of comparison between the SEC whistleblower bounty program and other federal bounty programs that are worth noting. The first is that, unlike IRS awards judgments – which a whistleblower can appeal in Tax Court<sup>106</sup> – or False Claims Act award judgments, which can also be appealed in court, SEC judgments cannot be appealed outside the agency.<sup>107</sup>

The second point is that the SEC’s lowest award percentage (10%) is already on the low side of what agencies can award, as summarized in a SEC Office of Inspector General (OIG) chart below.<sup>108</sup> This is especially the case when one considers that, in several instances, the SEC has awarded less than 10% to individual whistleblowers.<sup>109</sup>

### Comparison of Award Levels for Federal Whistleblower Programs

Government Agency	Minimum Award Collected	Maximum Award Collected
SEC	10%	30%
CFTC	10%	30%
IRS	15%	30%
DOJ (Government)*	15%	30%
DOJ (Non-government)*	25%	30%

<sup>103</sup> 31 U.S.C. § 3731(b).

<sup>104</sup> Lawrence, Cleveland. “Re: Request for information about “timeliness” in relation to the False Claims Act.” Message to the co-author. Jan. 28, 2016. Email.

<sup>105</sup> Burns, Patrick. “Re: Request for information about “timeliness” in relation to the False Claims Act.” Message to the co-author. Jan. 28, 2016. Email

<sup>106</sup> Tax Relief and Health Care Act of 2006 § 406 (b)(4).

<sup>107</sup> “False Claims Act Relator Awards,” Tony Munter, (2016) <http://whistleblower-quitam-attorney.net/false-claims-act-lawyer/fca-relators-awards/>.

<sup>108</sup> Evaluation of the SEC’s Whistleblower Program, U.S. SEC, Office of Inspector General, 23.

<sup>109</sup> See, for examples, case number 2013-1, (5% per claimant), 2013-3 (5% per claimant), 2014-6 (in which one of the three claimants received 5%) and 2015-7 (in which one of the two claimants received 9%).

It is important to consider that a 2010 SEC Office of Inspector General (OIG) report recommended that the SEC Bounty Program “incorporate best practices obtained from DOJ and the IRS into the SEC bounty program with respect to bounty applications, analysis of whistleblower information, tracking of whistleblower complaints, recordkeeping practices, and continual assessment of the whistleblower program.”<sup>110</sup> But SEC awards are not fully consistent with those best practices: the awards start lower than those two agencies; they cannot be appealed outside the agency; appear to give greater weight to timeliness, and may, at least in theory, be dismissed entirely if the whistleblower failed to report to the SEC within 120 days. Further, whistleblowers are wholly dependent on the SEC to pursue an enforcement action to secure any ultimate financial award for making their disclosure, in contrast to whistleblowers who submit claims to the DOJ under the False Claims Act and can choose to prosecute the fraud they discovered independently if the DOJ declines to intervene.

Although some of these factors are mandated by statute, the SEC should keep these differences in mind when considering discretionary awards, given the numerous limitations that make it difficult for a whistleblower to obtain as substantial an award as through the DOJ and IRS incentive schemes. Exercises of discretion by the Commission should not discourage reporting.

## **V. Recommendations to Improve the Whistleblower Incentives Program**

To strike a proper balance between the goals of timeliness compared to safe, responsible disclosures, we request consideration of the following recommendations.

- 1) Reconcile the possible contradiction in the mandate that information reported must be “specific, credible, and timely” by presuming that reports are timely absent a finding of deliberate delay, because of either culpability, interference with internal investigative processes, or attempts at self-enrichment.
- 2) Articulate and apply specific criteria to assess whether delays are unreasonable, including factors such as:
  - Guidance for how much evidence a whistleblower needs to provide for a legitimate disclosure, referencing standards applied in similar incentive schemes familiar to legal counsel;
  - The complexity of the misconduct disclosed, the scope of necessary evidence to prove the allegation, and its availability;
  - Availability of counsel;
  - Reasonable fears of retaliation, including the company’s motive, personal threats received, and the company’s past track record of responding to employee concerns;
  - The pace of the employer’s response for investigation and corrective action, including evidence of good faith, internal delays, communication efforts, and thoroughness of investigation;
  - The impact of corporate tactics to obstruct timely reporting, such as existence of “indirect gags” of the sorts the SEC has previously challenged, threats of liability, obstruction of efforts to get counsel, etc.

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<sup>110</sup> SEC OIG (2010), v.

- 3) Extend the reporting deadline to the Commission from 120 days to one year to bolster the goal of encouraging internal disclosures to help companies improve their compliance systems to prevent fraud in the first place.<sup>111</sup> This is more in keeping with international best practices. The Dodd-Frank Act itself contains no statute of limitations on reporting violations of securities laws to the commission.<sup>112</sup>
- 4) Improve transparency by issuing generic public decisions, in addition to specific Award Orders, that provide generic notice of the rationale and criteria used to assess awards, both positive and negative. Redaction can be used in specific individual Award Orders to preserve confidentiality, but not at the expense of offering meaningful guidance to future whistleblowers about the Commission's reasoning in determining awards.
- 5) Offer guidance in the form of dedicated SEC staff to provide non-authoritative, helpful instruction on filing timely disclosures, similar to like the IRS offers for support with filing tax returns. While the guidance would not be binding, it could be a factor in assessing the reasonableness of delayed reporting if the whistleblower sought advice and acted on it in good faith.
- 6) Establish a multi-stakeholder advisory council, similar to the Blue Ribbon Whistleblower Panel established by OSHA, to assess the strengths and weaknesses of the Whistleblower Incentives and Protection Program and to make recommendations for improvement. Include in the scope of work the Government Accountability Office's recommendation to "conduct a long-term, government-wide study on how whistleblower motivations are affected by award levels."<sup>113</sup>

## VI. CONCLUSION

The importance of timely whistleblowing disclosures is beyond dispute. But equally important are safe, responsible disclosures for the most effective government action. The Commission has sent a clear message and taken strong actions for the former objective. Those actions need to be balanced with action to reinforce the oft-conflicting latter goals. Unless the Commission acts, it will create a counterproductive chilling effect and dilute the quality of reports it still receives. Policies that increase reprisal risks while encouraging "quick and dirty" disclosures will be a "lose-lose-lose" result for whistleblowers, the SEC whistleblower program, and corporate employers. The Commission can and should prevent that outcome through clear guidance that balances its recent actions on delay.

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<sup>111</sup> The Commission should, however, still keep the 120 period after which officers, director, auditors or other designated persons (under Rule 21F-4(b)(4)(iii)) can become a whistleblower, as according to our data, companies that do investigate the wrongdoing and share the results with the whistleblower will often do so within 120 days.

<sup>112</sup> It should be noted that the Commission does not have the authority to violate Congressional intent. The current 120 deadline significantly reduces the scope of the Act and therefore may be in violation of Congressional intent.

<sup>113</sup> SEC OIG Report (2013), 23.

## **ABOUT GAP**

**The Government Accountability Project (GAP)** is the nation's leading whistleblower protection and advocacy organization. A non-partisan public-interest group, GAP litigates whistleblower cases, helps expose wrongdoing to the public, and actively promotes government and corporate accountability. Since 1977, GAP has helped over 6,000 whistleblowers and has been instrumental in drafting more than 30 domestic and international whistleblower protection laws.

## **ABOUT THE AUTHORS**

**Dana Gold** is a Senior Fellow at the Government Accountability Project, having served as GAP's Director of Operations and as a staff attorney from 1995-2002, representing whistleblowers on the Alaskan pipeline and at Department of Energy nuclear facilities. Ms. Gold subsequently co-founded and directed the Center on Corporations, Law & Society at Seattle University School of Law, where she also taught whistleblower law and corporate governance and developed an annual Directors Training Academy, which became the leading corporate governance executive education program in the Pacific Northwest. Ms. Gold is an employee advocate member of the Hanford Concerns Council, an alternative resolution dispute forum that resolves whistleblower concerns at the Hanford nuclear site. An author of several articles about whistleblowing and corporate accountability, Ms. Gold most recently served as a 2014-2015 Network Fellow at Harvard University's Edmond J. Safra Center for Ethics.

**Shelley Walden** worked for the Government Accountability Project for eight years, most recently as the international program officer. An author of numerous whistleblower studies, including PEN America's "Secret Sources: Whistleblowers, National Security and Free Expression" and GAP's "Tipping the Scales: Is the United Nations Justice System Promoting Accountability in the Peacekeeping Missions or Undermining It?" she is published in the *International Handbook on Whistleblowing Research, A Global Agenda; Issues Before the United Nations 2009-2010*, and *Foreign Policy in Focus*.

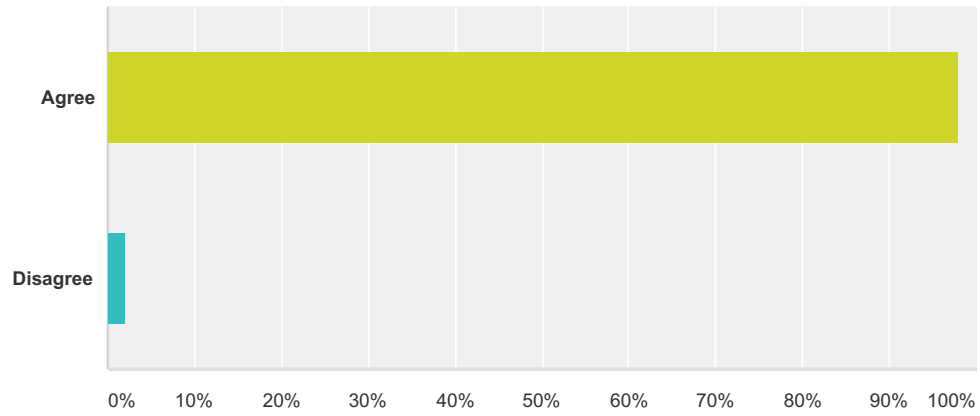
**Tom Devine** is legal director of the Government Accountability Project, where he has worked since January 1979. During his career at GAP he has helped over 7,000 whistleblowers defend themselves against retaliation or make a difference, such as stopping nuclear power plants that were accidents waiting to happen, defeating five attempts to deregulate government-approved meat inspection, or removing the killer pain killer Vioxx from the market. He has been a leader in campaigns to pass or defend 32 domestic or international whistleblower laws -- from the Whistleblower Protection Act of 1989 to the Whistleblower Protection Enhancement Act of 2012 for federal employees; to twelve laws since 2002 creating the right to jury trials for corporate whistleblowers; to new U.N. and World Bank policies legalizing public freedom of expression for their own whistleblowers. Mr. Devine has spoken in over a dozen nations as an "Ambassador of Whistleblowing" for the State Department, and has authored or co-authored numerous books, including *Courage Without Martyrdom: The Whistleblower's Survival Guide*, *The Art of Anonymous Activism* and *The Corporate Whistleblower Survival Guide: A Handbook for Committing the Truth*, which won "International Business Book of the Year" at the 2011 Frankfurt Book Fair. He has received numerous awards, including the Hugh Hefner First Amendment Award and the Fund for Constitutional Government's Defender of the Constitution Award, and has been selected by Washingtonian magazine as one of DC's top employment lawyers for the last six years.

# APPENDIX 1

Survey: Factors that Influence  
Whistleblowers' Decisions to  
Report Violations

**Q1 Please indicate if you agree to the structure described above. Your agreement is a prerequisite for participation in this survey.**

Answered: 1,394 Skipped: 0



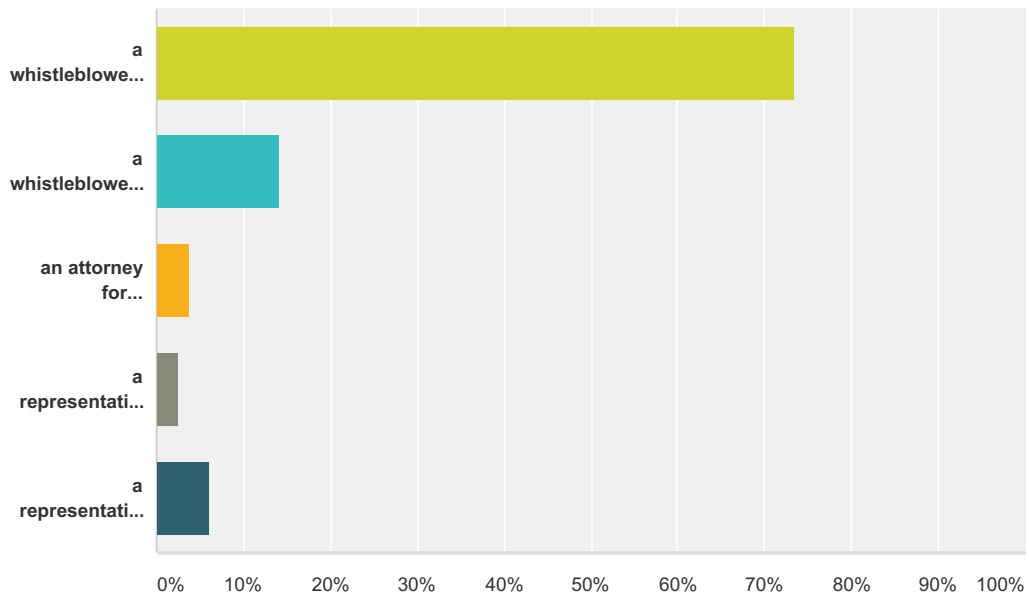
Answer Choices	Responses
Agree	97.99% 1,366
Disagree	2.01% 28
<b>Total</b>	<b>1,394</b>



# Factors that Influence Whistleblowers' Decisions to Report Violations

## Q2 Please indicate whether you are –

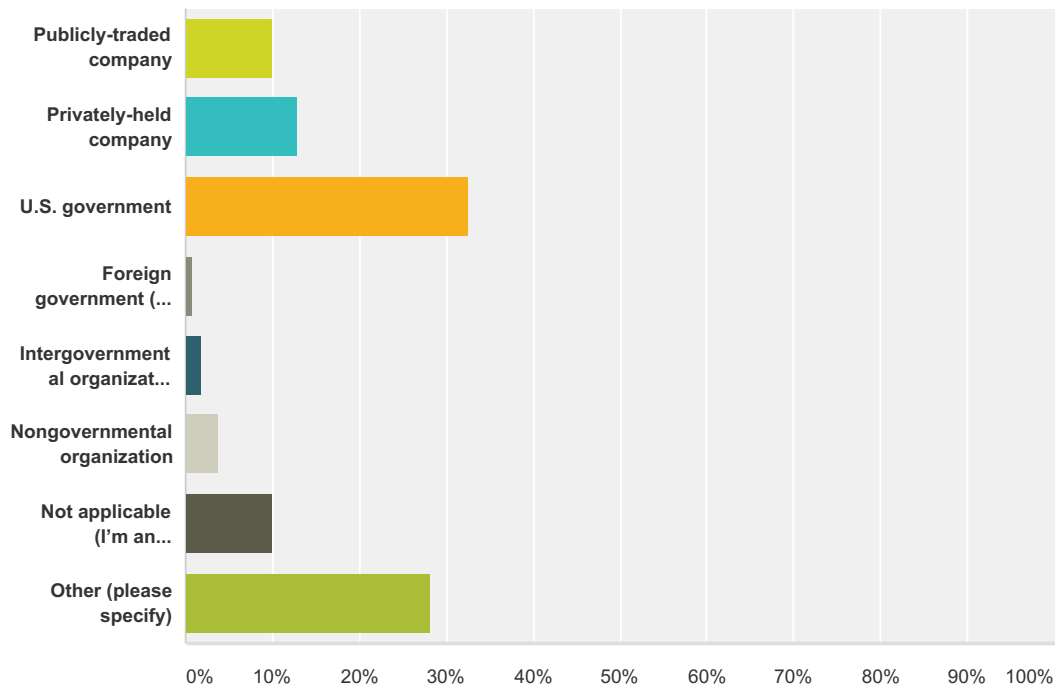
Answered: 245 Skipped: 1,149



Answer Choices	Responses
a whistleblower who is or was an employee or contractor of the organization engaged in the misconduct I reported	73.47% 180
a whistleblower who was not an employee or contractor of the organization engaged in the misconduct I reported	14.29% 35
an attorney for whistleblowers	3.67% 9
a representative of a nonprofit organization based in the U.S. that assists with individual whistleblower cases	2.45% 6
a representative of a nonprofit organization that assists with individual whistleblower cases and is based in a country other than the U.S.	6.12% 15
<b>Total</b>	<b>245</b>

### Q3 If you are a whistleblower, on which sector did you blow the whistle?

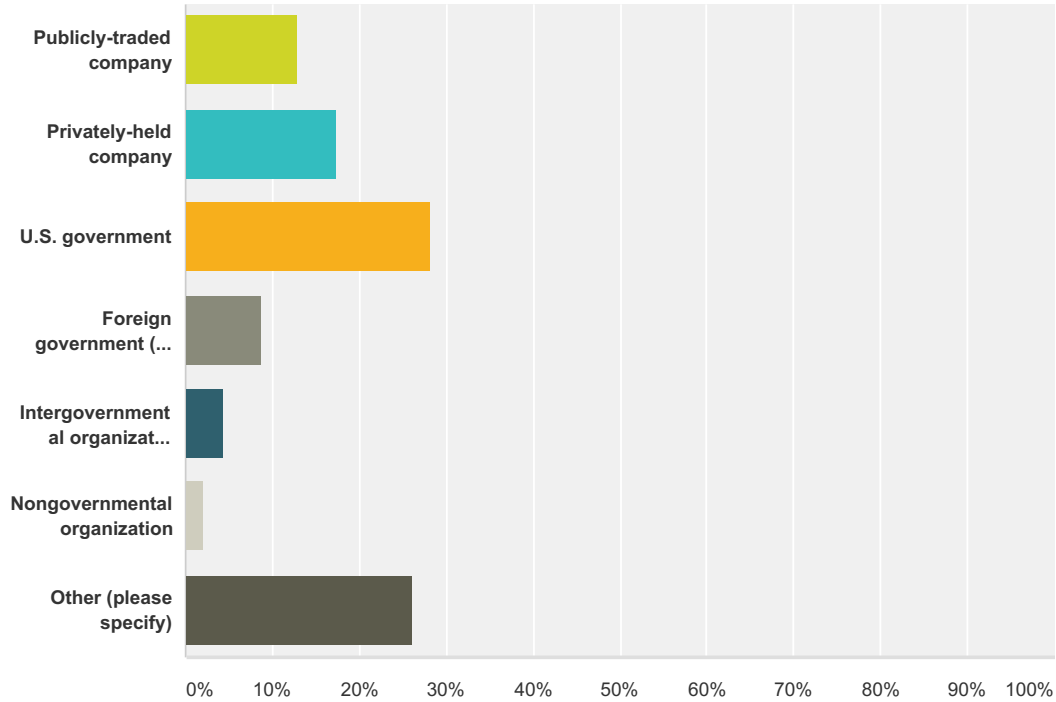
Answered: 270 Skipped: 1,124



Answer Choices	Responses
Publicly-traded company	10.00% 27
Privately-held company	12.96% 35
U.S. government	32.59% 88
Foreign government (any country other than the U.S.)	0.74% 2
Intergovernmental organization (i.e. World Bank, United Nations)	1.85% 5
Nongovernmental organization	3.70% 10
Not applicable (I'm an attorney or nongovernmental organization representative)	10.00% 27
Other (please specify)	28.15% 76
<b>Total</b>	<b>270</b>

**Q4 If you are an attorney who has represented whistleblowers or work for an NGO that assists whistleblowers, on which sector have the majority of your clients blown the whistle?**

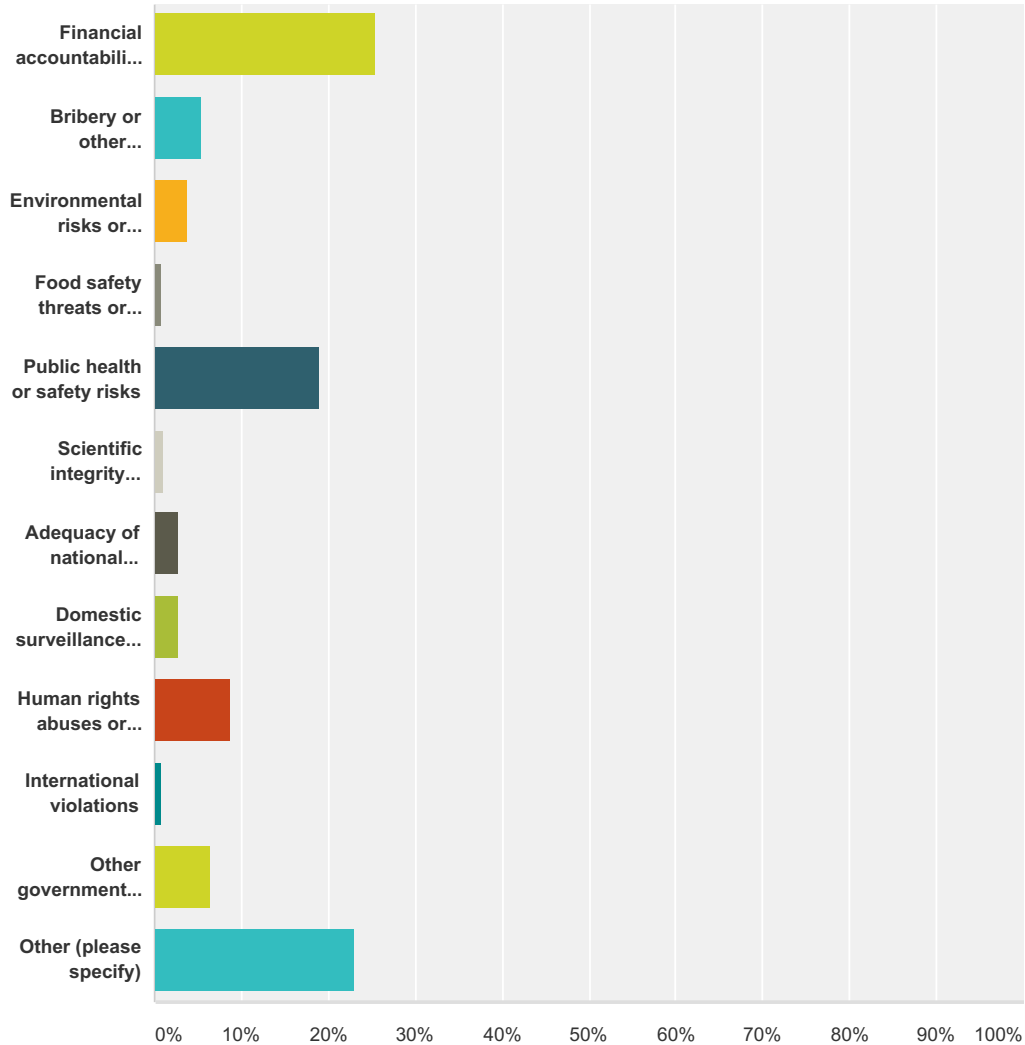
Answered: 206 Skipped: 1,188



Answer Choices	Responses
Publicly-traded company	13.04% 6
Privately-held company	17.39% 8
U.S. government	28.26% 13
Foreign government (any country other than the U.S.)	8.70% 4
Intergovernmental organization (i.e. World Bank, United Nations)	4.35% 2
Nongovernmental organization	2.17% 1
Other (please specify)	26.09% 12
<b>Total</b>	<b>46</b>

### Q5 Which option(s) best describe the nature of the issue upon which you or your clients blew the whistle?

Answered: 262 Skipped: 1,132



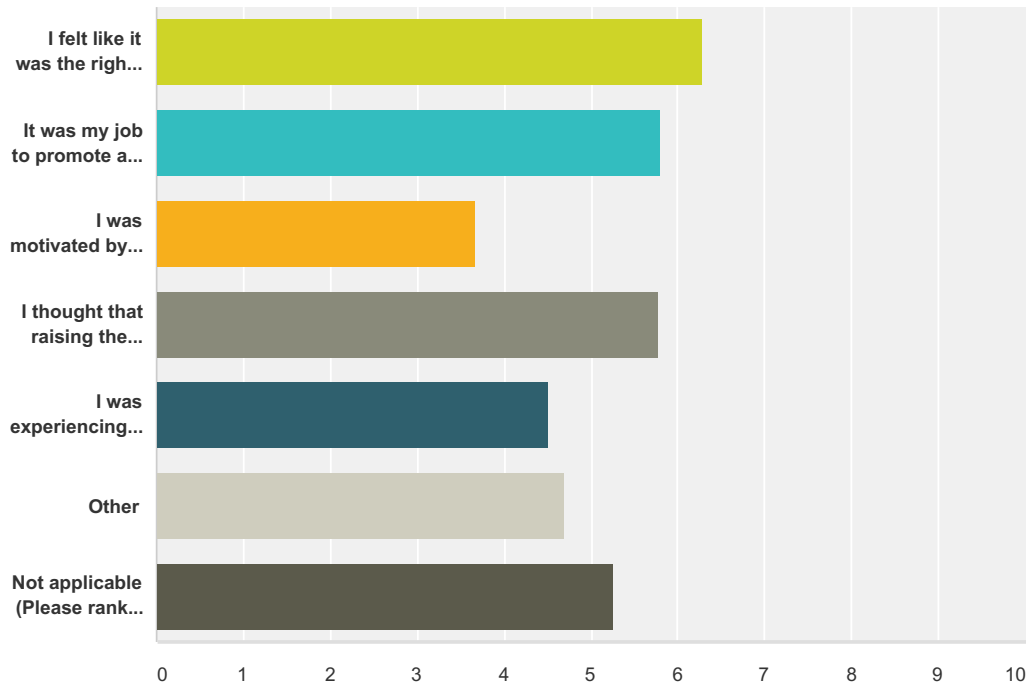
Answer Choices	Responses
Financial accountability/Fraud	25.57% 67
Bribery or other corruption	5.34% 14
Environmental risks or violations	3.82% 10
Food safety threats or violations	0.76% 2
Public health or safety risks	19.08% 50
Scientific integrity concerns	1.15% 3
Adequacy of national security or defense	2.67% 7
Domestic surveillance or other civil liberties violations or abuses of power	2.67% 7

## Factors that Influence Whistleblowers' Decisions to Report Violations

Human rights abuses or concerns	8.78%	23
International violations	0.76%	2
Other government related concerns	6.49%	17
Other (please specify)	22.90%	60
<b>Total</b>		<b>262</b>

**Q6 If you blew the whistle on misconduct you discovered while working as an employee, please rank in order of importance the top three reasons why you decided to blow the whistle on the misconduct you discovered, 1 being the most significant reason to 3 being the least significant reason:**

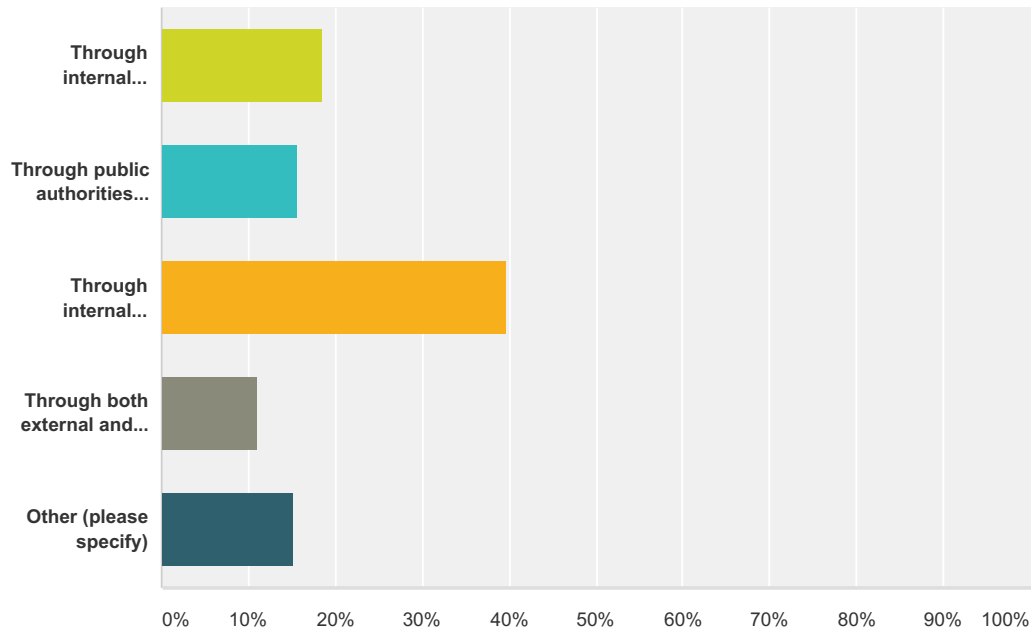
Answered: 252 Skipped: 1,142



	1	2	3	4	5	6	7	Total	Score
I felt like it was the right thing to do.	58.47% 107	23.50% 43	14.75% 27	0.00% 0	0.55% 1	0.55% 1	2.19% 4	183	6.29
It was my job to promote and ensure legal compliance.	27.03% 30	39.64% 44	26.13% 29	1.80% 2	5.41% 6	0.00% 0	0.00% 0	111	5.81
I was motivated by the possibility of receiving a substantial monetary award for being the first to report misconduct.	4.76% 2	4.76% 2	35.71% 15	14.29% 6	9.52% 4	9.52% 4	21.43% 9	42	3.67
I thought that raising the issue would fix the problem and improve my organization in the future.	26.34% 49	41.40% 77	24.73% 46	4.30% 8	0.00% 0	1.08% 2	2.15% 4	186	5.78
I was experiencing difficulties in the workplace and wanted to protect myself from being disciplined.	9.86% 7	19.72% 14	28.17% 20	15.49% 11	14.08% 10	5.63% 4	7.04% 5	71	4.51
Other	18.18% 14	7.79% 6	48.05% 37	1.30% 1	6.49% 5	12.99% 10	5.19% 4	77	4.70
Not applicable (Please rank this as "1" if you are not a whistleblower and leave the other options blank.)	66.00% 33	2.00% 1	2.00% 1	2.00% 1	2.00% 1	2.00% 1	24.00% 12	50	5.26

### Q7 If you are a whistleblower, which option best describes the way you blew the whistle?

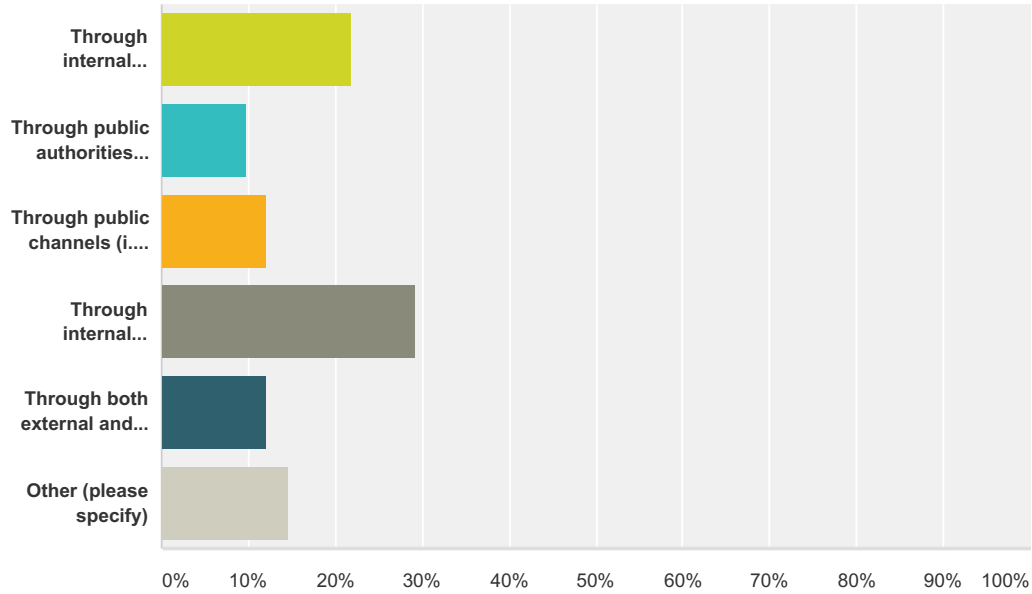
Answered: 269 Skipped: 1,125



Answer Choices	Responses
Through internal channels within your organization (i.e. to a supervisor, higher management, etc.) only	18.57% 44
Through public authorities (i.e., an elected office or an external regulator) only	15.61% 37
Through internal channels within your organization first and then through external channels	39.66% 94
Through both external and internal channels at the same time	10.97% 26
Other (please specify)	15.19% 36
<b>Total</b>	<b>237</b>

**Q8 If you are an attorney who has represented whistleblowers or a NGO representative, which option best describes the way the majority of your clients blew the whistle?**

Answered: 203 Skipped: 1,191

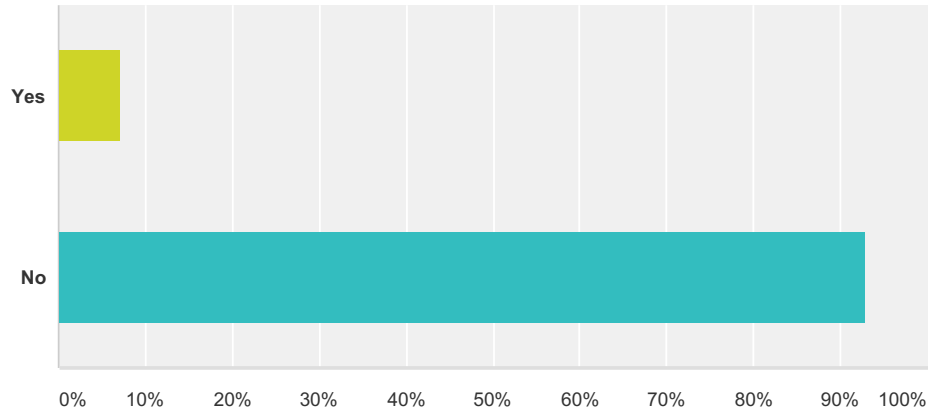


Answer Choices	Responses
Through internal channels within their organization (i.e. to a supervisor, higher management, etc.) only	21.95% 9
Through public authorities (i.e., an elected office or an external regulator) only	9.76% 4
Through public channels (i.e., the media or a nongovernmental organization) only	12.20% 5
Through internal channels within their organization first and then through external channels	29.27% 12
Through both external and internal channels at the same time	12.20% 5
Other (please specify)	14.63% 6
<b>Total</b>	<b>41</b>



**Q9 Did you or your clients blow the whistle through a bounty/whistleblower reward program (for example, did you file a False Claims Act case, or submit a tip to the Securities and Exchange Commission's Office of the Whistleblower or to the Internal Revenue Service)?**

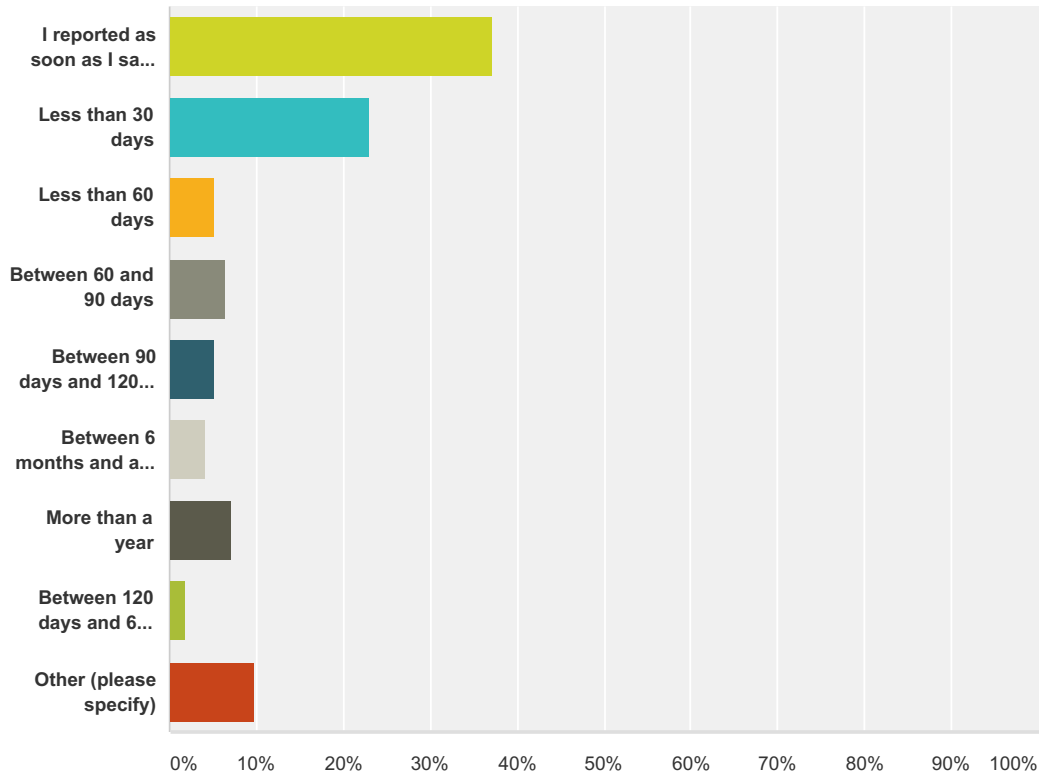
Answered: 260 Skipped: 1,134



Answer Choices	Responses
Yes	7.11% 17
No	92.89% 222
<b>Total</b>	<b>239</b>

**Q10 If you reported wrongdoing INTERNALLY, how long, if at all, after you became aware of wrongdoing did you wait before first reporting the problem?**

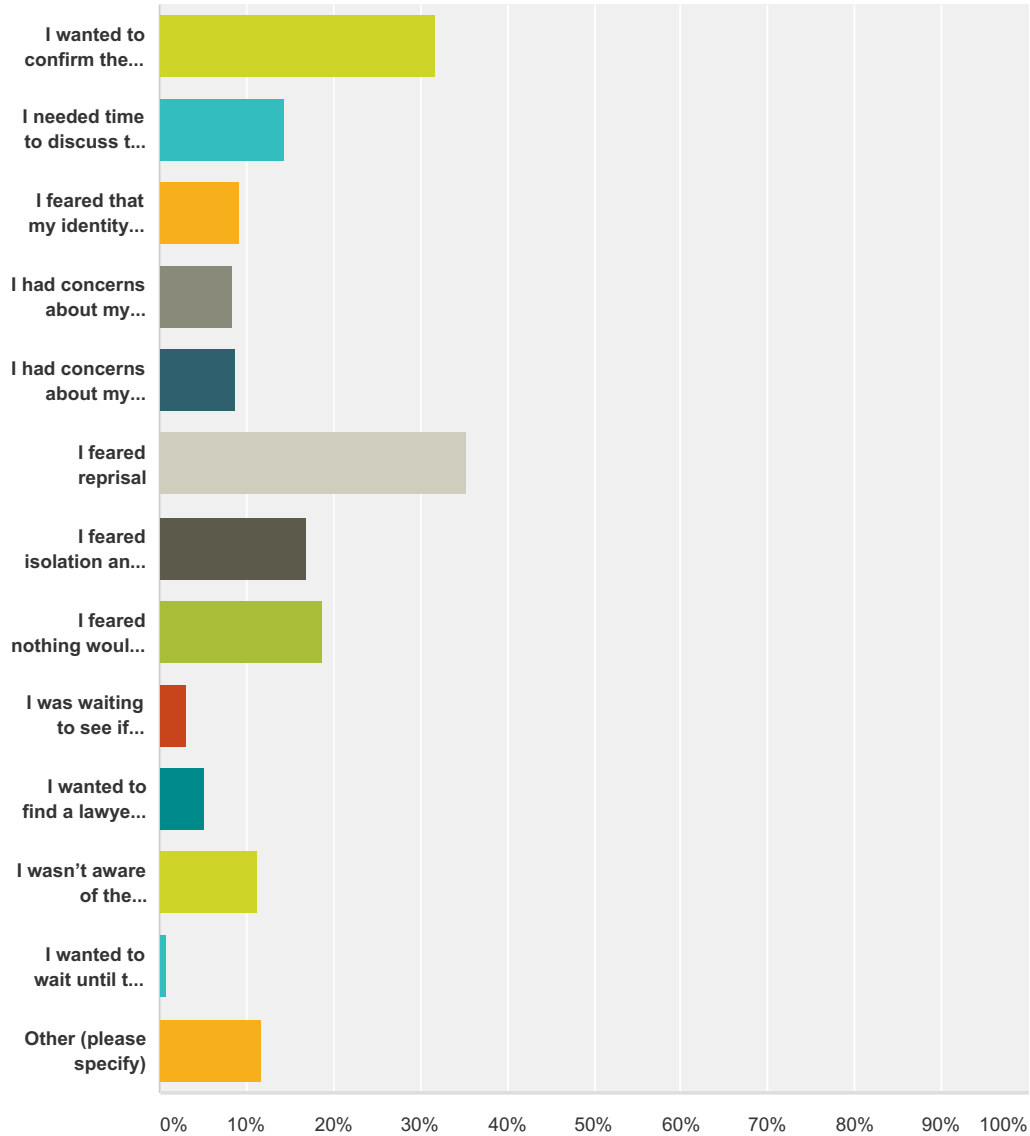
Answered: 274 Skipped: 1,120



Answer Choices	Responses
I reported as soon as I saw an indication of wrongdoing	37.09% 79
Less than 30 days	23.00% 49
Less than 60 days	5.16% 11
Between 60 and 90 days	6.57% 14
Between 90 days and 120 days	5.16% 11
Between 6 months and a year	4.23% 9
More than a year	7.04% 15
Between 120 days and 6 months	1.88% 4
Other (please specify)	9.86% 21
<b>Total</b>	<b>213</b>

**Q11 If you waited to report the problem you discovered INTERNALLY, why did you wait? (Please check all that apply)**

Answered: 249 Skipped: 1,145



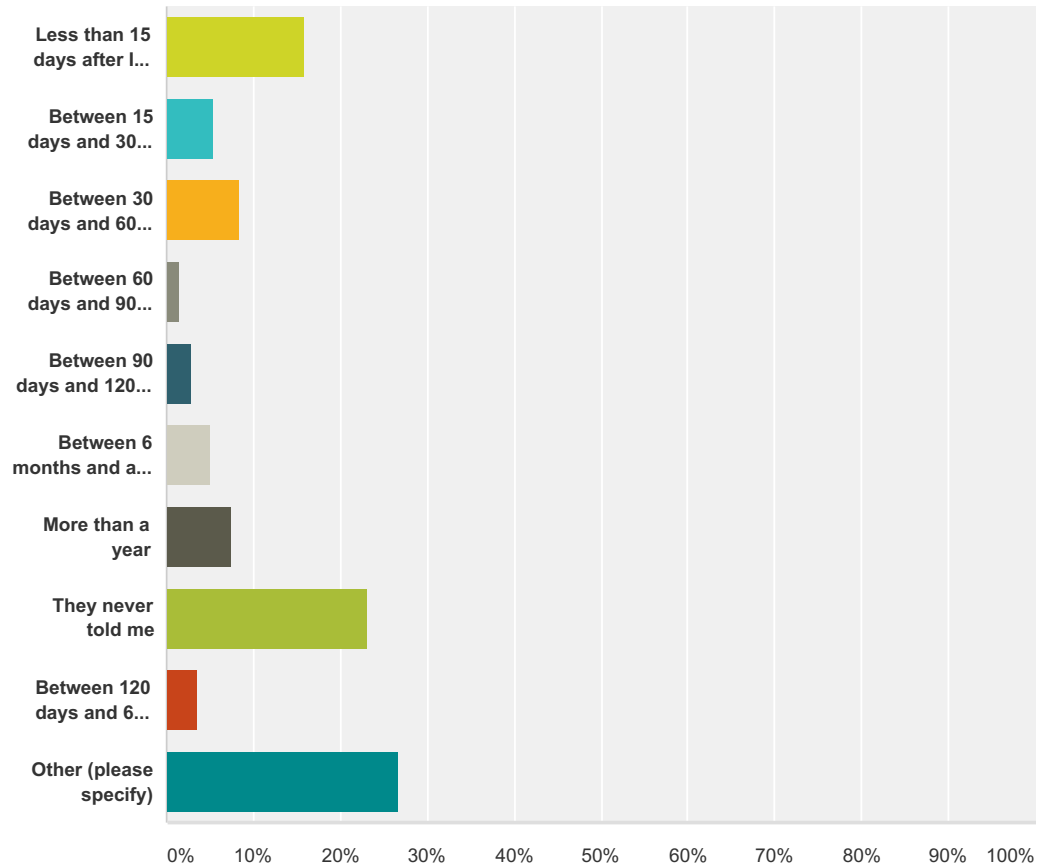
Answer Choices	Responses
I wanted to confirm the suspected wrongdoing, gather additional evidence to substantiate my concerns, and/or better understand the scope of the misconduct	31.73% 79
I needed time to discuss the decision with my family, friends and/or trusted colleagues	14.46% 36
I feared that my identity would become known if I came forward, and did not want the notoriety	9.24% 23
I had concerns about my organization's commitment to keeping my identity confidential despite promises it would do so	8.43% 21
I had concerns about my organization's ability to keep my identity confidential despite promises it would do so	8.84% 22

## Factors that Influence Whistleblowers' Decisions to Report Violations

I feared reprisal	<b>35.34%</b> 88
I feared isolation and rejection by my colleagues	<b>16.87%</b> 42
I feared nothing would be done if I came forward	<b>18.88%</b> 47
I was waiting to see if someone else would come forward first	<b>3.21%</b> 8
I wanted to find a lawyer first, and that took time	<b>5.22%</b> 13
I wasn't aware of the potential avenues and related processes for making a disclosure	<b>11.24%</b> 28
I wanted to wait until the fraud or misconduct increased so that I could obtain a higher award for coming forward	<b>0.80%</b> 2
Other (please specify)	<b>11.65%</b> 29
<b>Total Respondents: 249</b>	

**Q12 If you blew the whistle through internal channels, how long did it take the organization to provide an initial response acknowledging and committing to act on your initial disclosure?**

Answered: 267 Skipped: 1,127



Answer Choices	Responses
Less than 15 days after I reported the misconduct	15.84% 32
Between 15 days and 30 days	5.45% 11
Between 30 days and 60 days	8.42% 17
Between 60 days and 90 days	1.49% 3
Between 90 days and 120 days	2.97% 6
Between 6 months and a year	4.95% 10
More than a year	7.43% 15
They never told me	23.27% 47
Between 120 days and 6 months	3.47% 7
Other (please specify)	26.73% 54

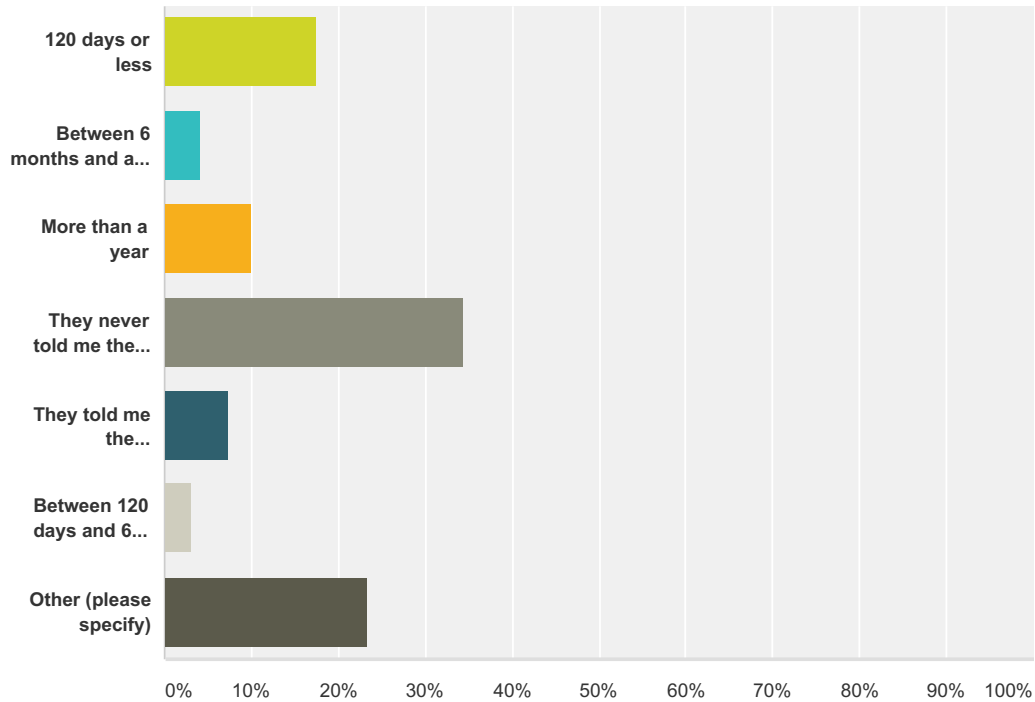
# Factors that Influence Whistleblowers' Decisions to Report Violations

Total

202

**Q13 If you blew the whistle through internal channels and the organization subsequently investigated, how long did it take the organization to complete the investigation and share the results with you after acknowledging the disclosure?**

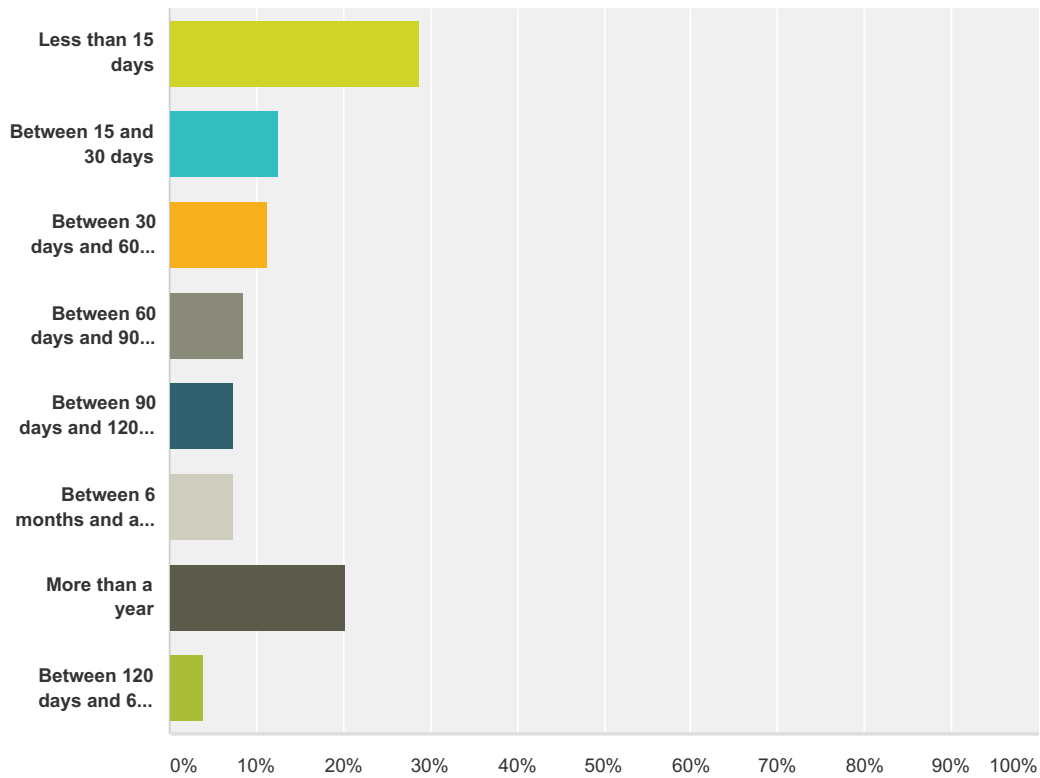
Answered: 267 Skipped: 1,127



Answer Choices	Responses
120 days or less	17.46% 33
Between 6 months and a year	4.23% 8
More than a year	10.05% 19
They never told me the investigation was completed	34.39% 65
They told me the investigation was completed but didn't share the results	7.41% 14
Between 120 days and 6 months	3.17% 6
Other (please specify)	23.28% 44
<b>Total</b>	<b>189</b>

**Q14 If you blew the whistle through internal channels, how long did it take for you to determine that the organization was or was not responding to your disclosure in good faith (this may be the same or different than your answer to the previous question)?**

Answered: 264 Skipped: 1,130

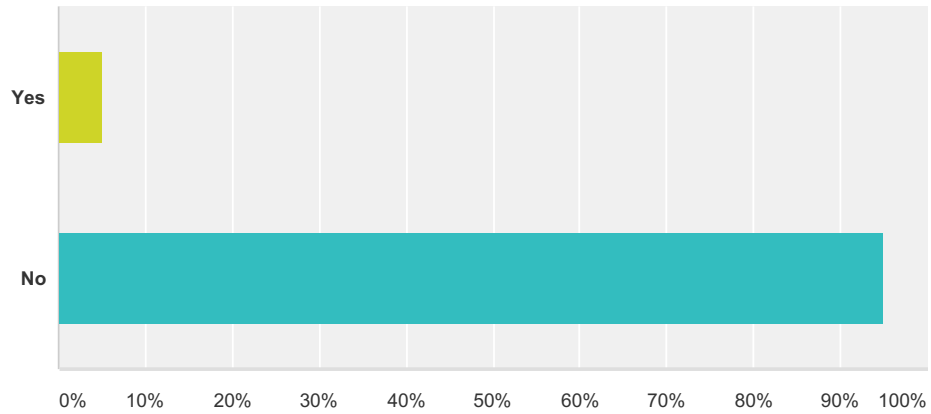


Answer Choices	Responses
Less than 15 days	28.81% 51
Between 15 and 30 days	12.43% 22
Between 30 days and 60 days	11.30% 20
Between 60 days and 90 days	8.47% 15
Between 90 days and 120 days	7.34% 13
Between 6 months and a year	7.34% 13
More than a year	20.34% 36
Between 120 days and 6 months	3.95% 7
<b>Total</b>	<b>177</b>



**Q15 If you blew the whistle through internal channels, are you satisfied that the organization implemented in good faith any corrective action commitments when the investigation was completed?**

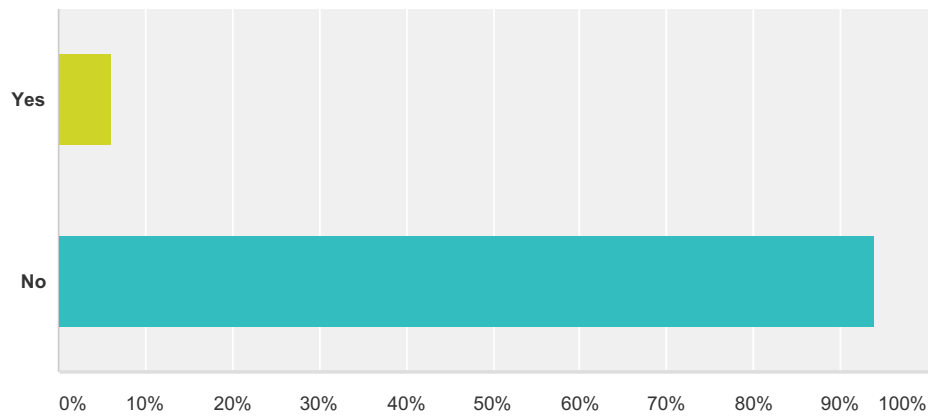
Answered: 266 Skipped: 1,128



Answer Choices	Responses
Yes	5.10% 10
No	94.90% 186
<b>Total</b>	<b>196</b>

**Q16 If you blew the whistle through internal channels, were you satisfied on balance that the organization responded in good faith to your disclosure? Please share any explanatory comments regarding how the organization's response affected your decision whether to report your concerns externally.**

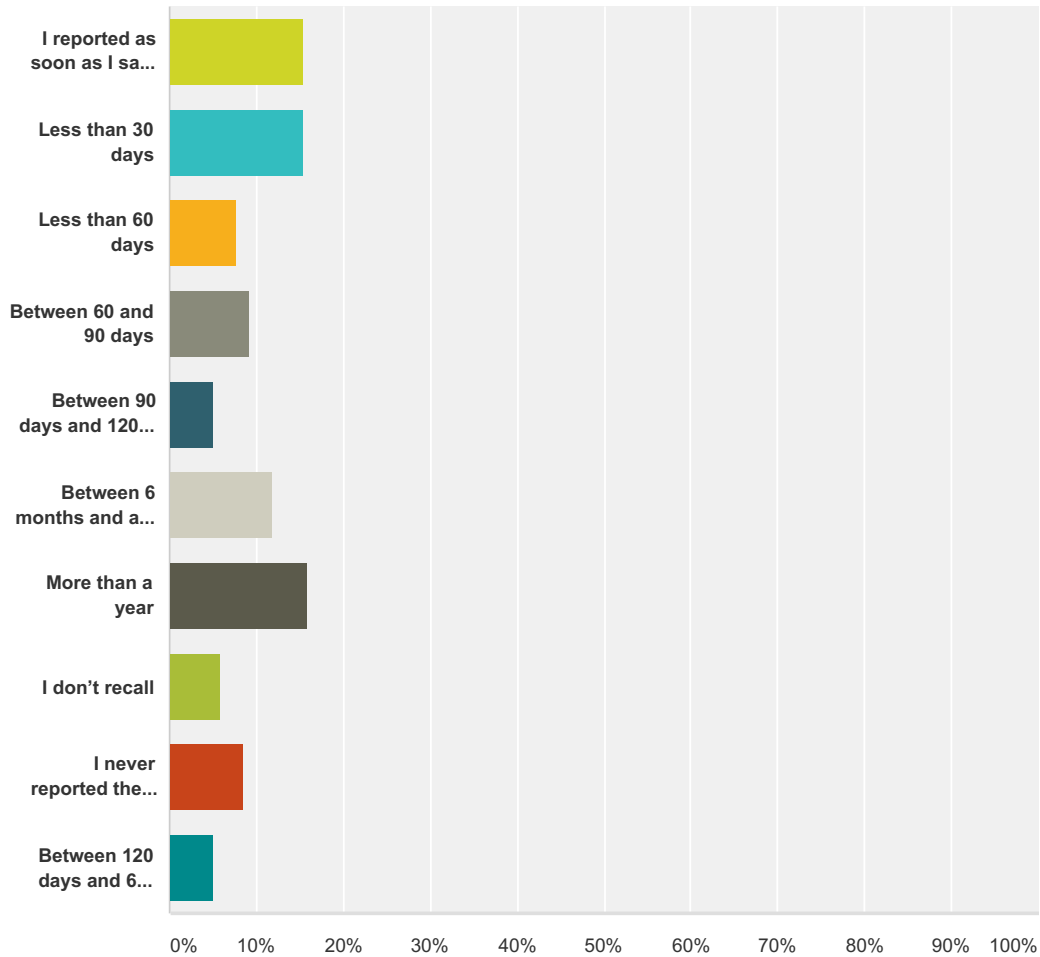
Answered: 264 Skipped: 1,130



Answer Choices	Responses
Yes	6.03% 12
No	93.97% 187
<b>Total</b>	<b>199</b>

**Q17 If you reported wrongdoing EXTERNALLY, how long, if at all, after you became aware of wrongdoing did you wait before first reporting the problem?**

Answered: 267 Skipped: 1,127



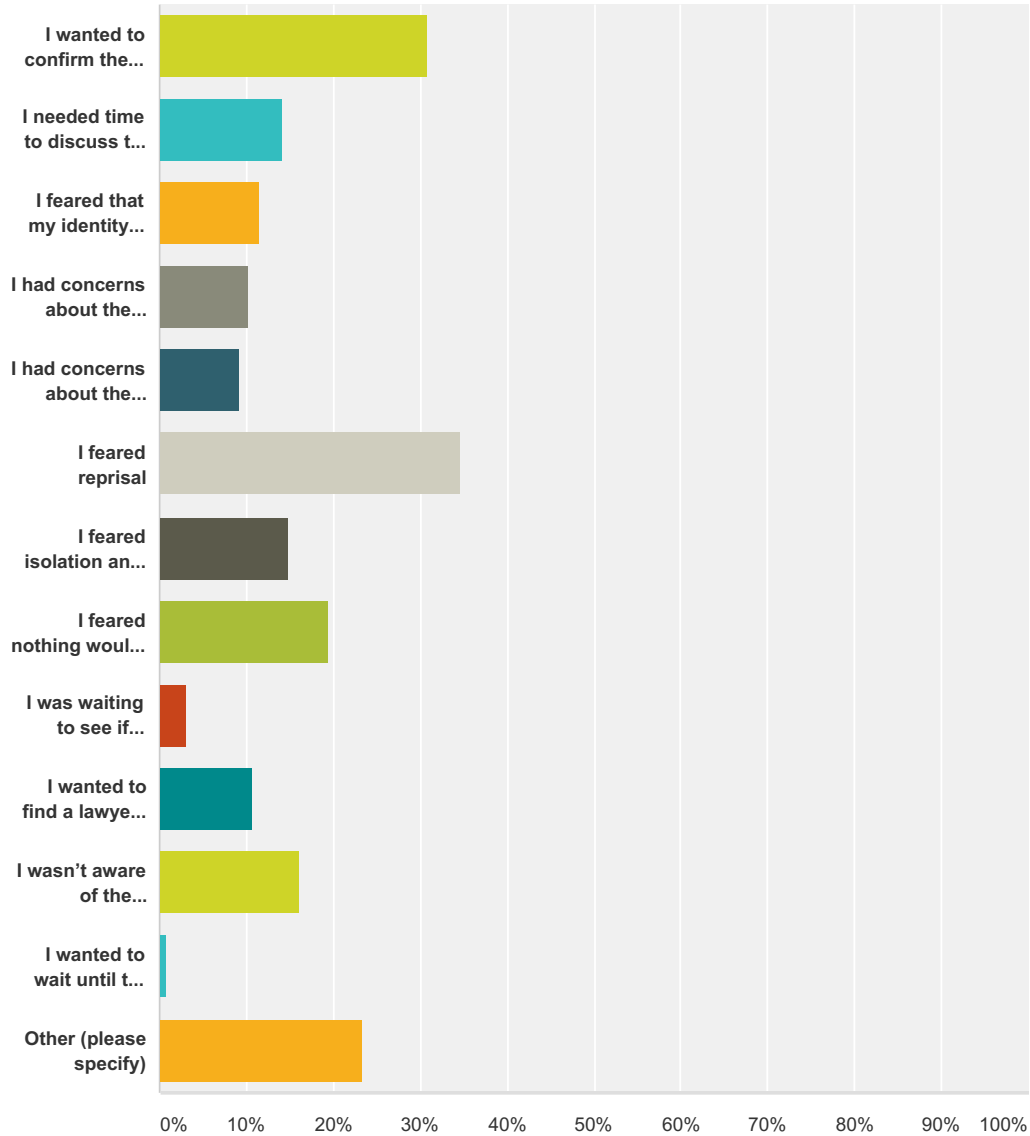
Answer Choices	Responses	Count
I reported as soon as I saw an indication of wrongdoing	15.45%	34
Less than 30 days	15.45%	34
Less than 60 days	7.73%	17
Between 60 and 90 days	9.09%	20
Between 90 days and 120 days	5.00%	11
Between 6 months and a year	11.82%	26
More than a year	15.91%	35
I don't recall	5.91%	13
I never reported the problem externally	8.64%	19

## Factors that Influence Whistleblowers' Decisions to Report Violations

Between 120 days and 6 months	5.00%	11
<b>Total</b>		<b>220</b>

**Q18 If you waited to report the problem you discovered EXTERNALLY, why did you wait? (Please check all that apply)**

Answered: 262 Skipped: 1,132



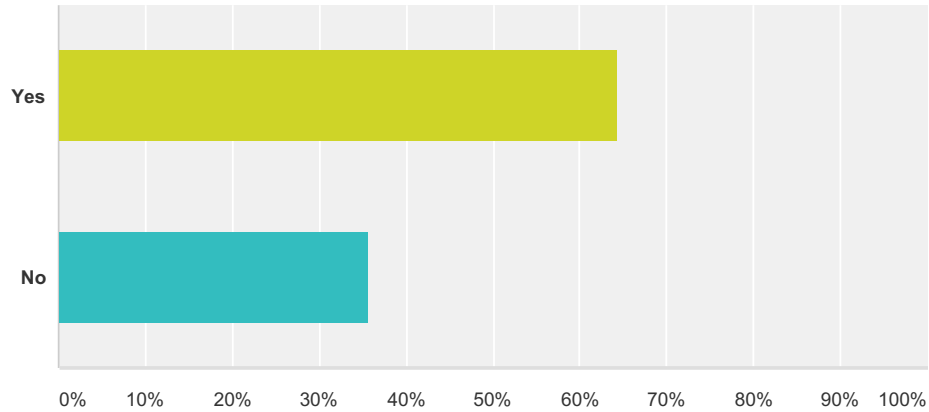
Answer Choices	Responses
I wanted to confirm the wrongdoing, gather additional evidence to substantiate my disclosure and/or to better understand the scope of the misconduct	30.92% 81
I needed time to discuss the decision with my family, friends and/or trusted colleagues	14.12% 37
I feared that my identity would become known if I came forward, and did not want the notoriety	11.45% 30
I had concerns about the external source's commitment to keeping my identity confidential despite promises it would do so	10.31% 27
I had concerns about the external source's ability to keep my identity confidential despite promises it would do so	9.16% 24
I feared reprisal	34.73% 91

## Factors that Influence Whistleblowers' Decisions to Report Violations

I feared isolation and rejection by my colleagues	<b>14.89%</b> 39
I feared nothing would be done if I came forward	<b>19.47%</b> 51
I was waiting to see if someone else would come forward first	<b>3.05%</b> 8
I wanted to find a lawyer first, and that took time	<b>10.69%</b> 28
I wasn't aware of the potential avenues and related processes for making a disclosure	<b>16.03%</b> 42
I wanted to wait until the fraud or misconduct increased so that I could obtain a higher award for coming forward	<b>0.76%</b> 2
Other (please specify)	<b>23.28%</b> 61
<b>Total Respondents: 262</b>	

**Q19 If you disclosed the problem you discovered to a government oversight and/or enforcement body that expressly promises to maintain the confidentiality of whistleblowers, did you have concerns about the commitment of that organization to protect your confidentiality?**

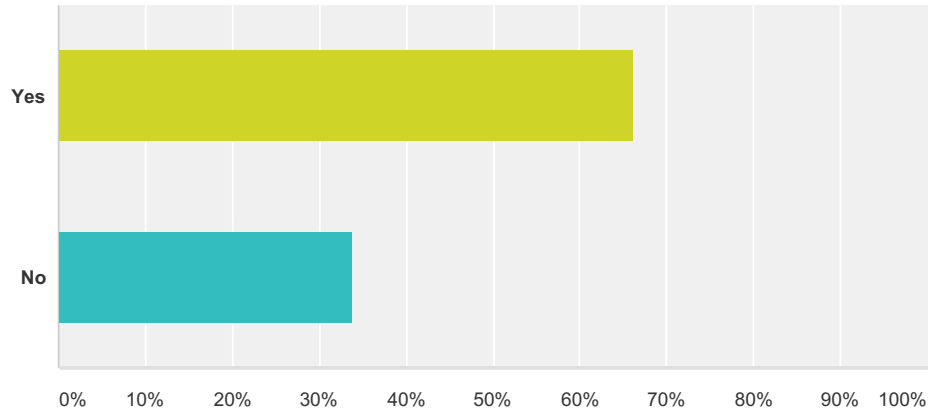
Answered: 271 Skipped: 1,123



Answer Choices	Responses
Yes	64.25% 115
No	35.75% 64
<b>Total</b>	<b>179</b>

**Q20 If you disclosed the problem you discovered to a government oversight and/or enforcement body that expressly promises to maintain the confidentiality of whistleblowers, did you have concerns about the ability of that organization to protect your confidentiality?**

Answered: 271 Skipped: 1,123

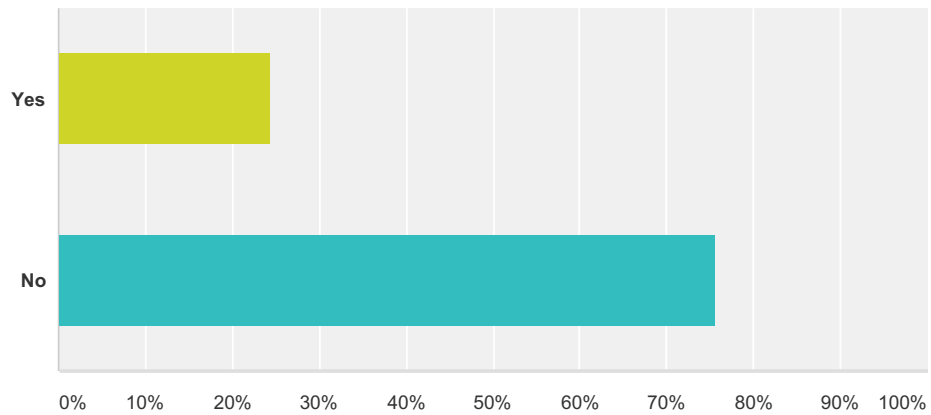


Answer Choices	Responses
Yes	66.10% 117
No	33.90% 60
<b>Total</b>	<b>177</b>



**Q21 If you requested confidentiality from a government audience, such as a legislative office, an inspector general, or an oversight and/or enforcement body, were you satisfied that your identity was adequately protected?**

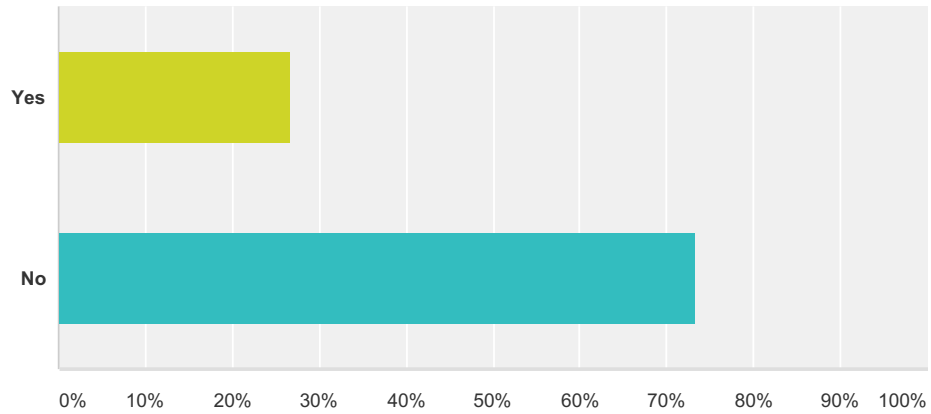
Answered: 269 Skipped: 1,125



Answer Choices	Responses
Yes	24.41% 31
No	75.59% 96
<b>Total</b>	<b>127</b>

**Q22 Were you aware of any time limit/statute of limitations for filing a disclosure about the wrongdoing you discovered with an oversight/regulatory agency?**

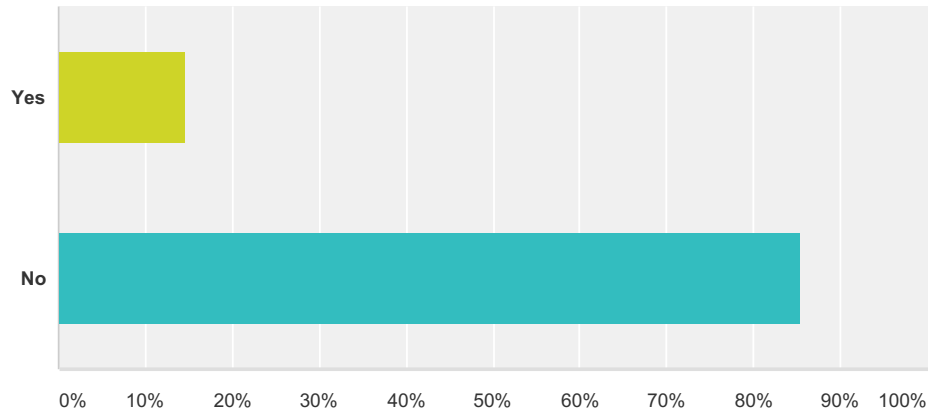
Answered: 272 Skipped: 1,122



Answer Choices	Responses
Yes	26.79% 56
No	73.21% 153
<b>Total</b>	<b>209</b>

**Q23 If you reported as part of a bounty program, were you aware that your potential award could be reduced as a result of delayed reporting?**

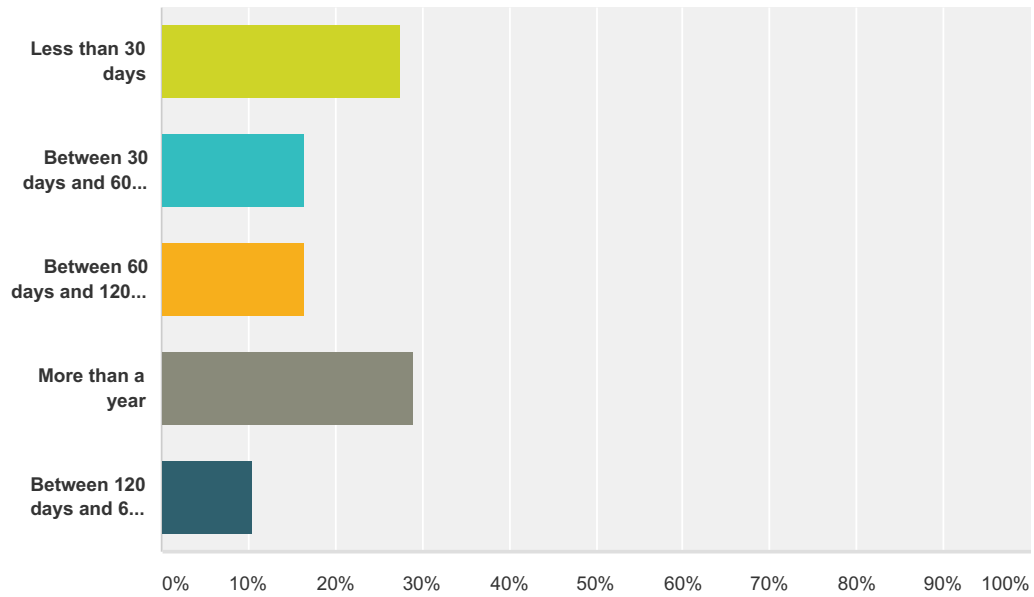
Answered: 268 Skipped: 1,126



Answer Choices	Responses
Yes	14.63% 6
No	85.37% 35
<b>Total</b>	<b>41</b>

**Q24 If you sought legal representation, how long did it take for you to find and retain a lawyer or organization to represent you?**

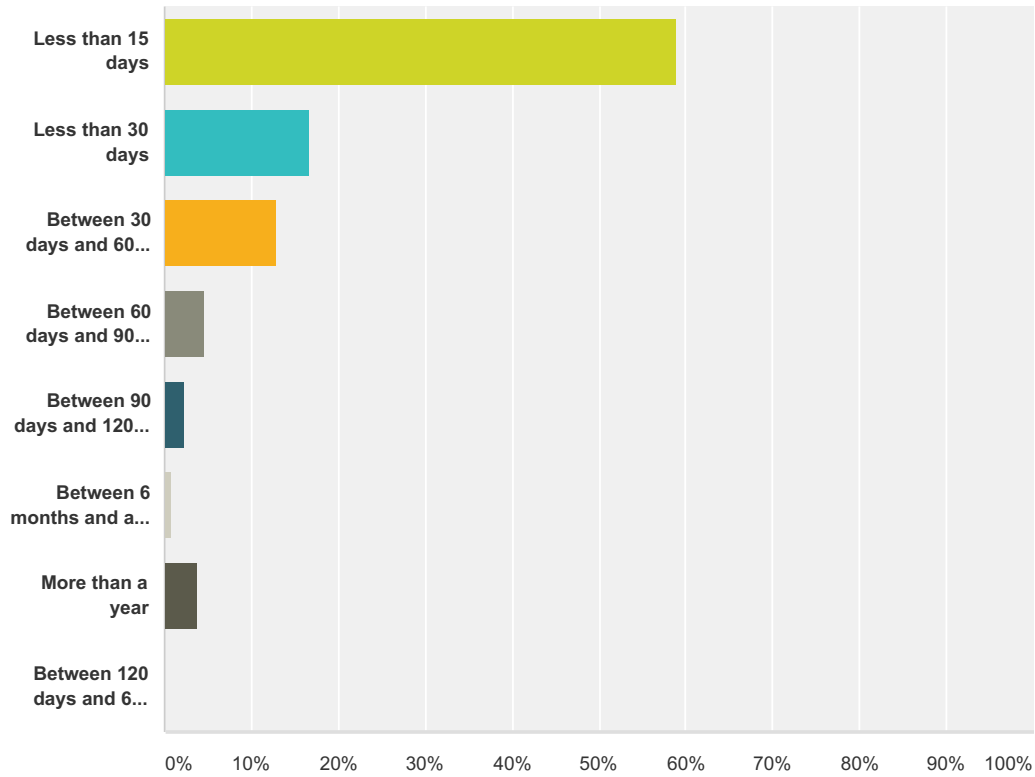
Answered: 272 Skipped: 1,122



Answer Choices	Responses
Less than 30 days	27.59% 40
Between 30 days and 60 days	16.55% 24
Between 60 days and 120 days	16.55% 24
More than a year	28.97% 42
Between 120 days and 6 months	10.34% 15
<b>Total</b>	<b>145</b>

### Q25 If you had legal representation, how long did it take for the lawyer or organization to decide whether or not to take your case?

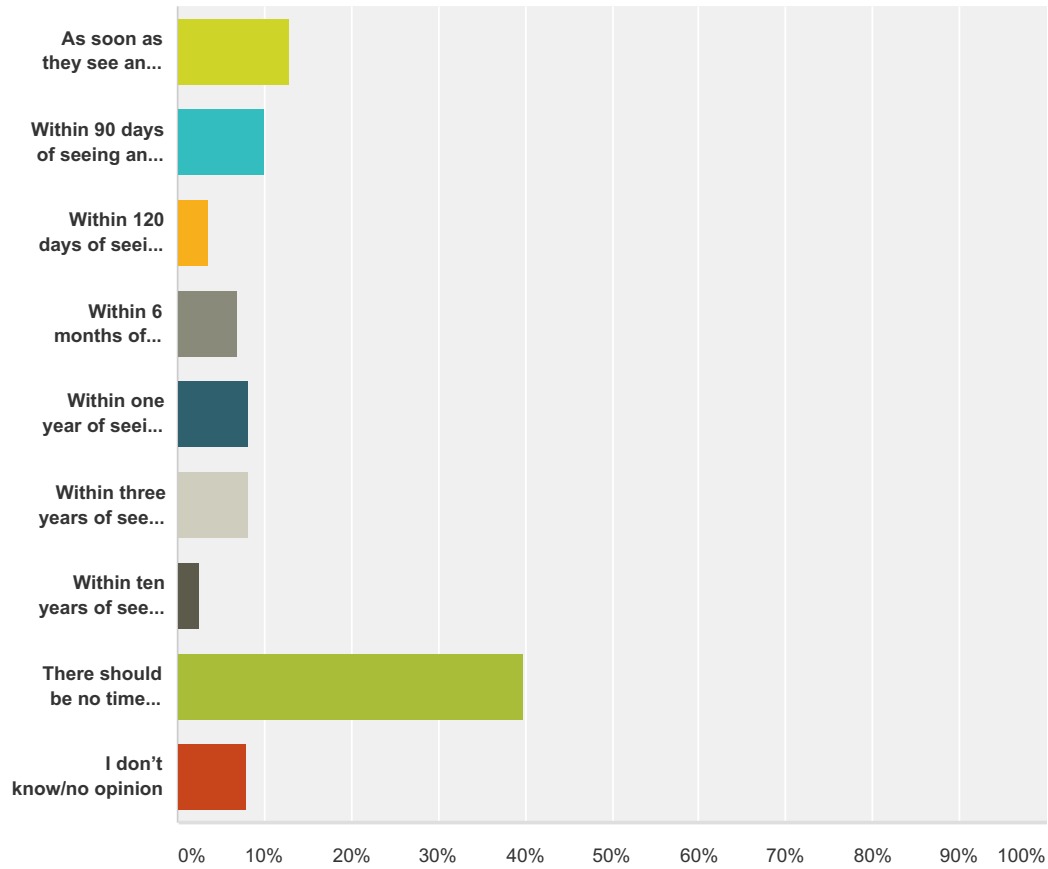
Answered: 271 Skipped: 1,123



Answer Choices	Responses
Less than 15 days	58.78% 77
Less than 30 days	16.79% 22
Between 30 days and 60 days	12.98% 17
Between 60 days and 90 days	4.58% 6
Between 90 days and 120 days	2.29% 3
Between 6 months and a year	0.76% 1
More than a year	3.82% 5
Between 120 days and 6 months	0.00% 0
<b>Total</b>	<b>131</b>

**Q26 How long do you think whistleblowers should have to make a decision to report and to adequately prepare disclosures that are both credible and specific to the government?**

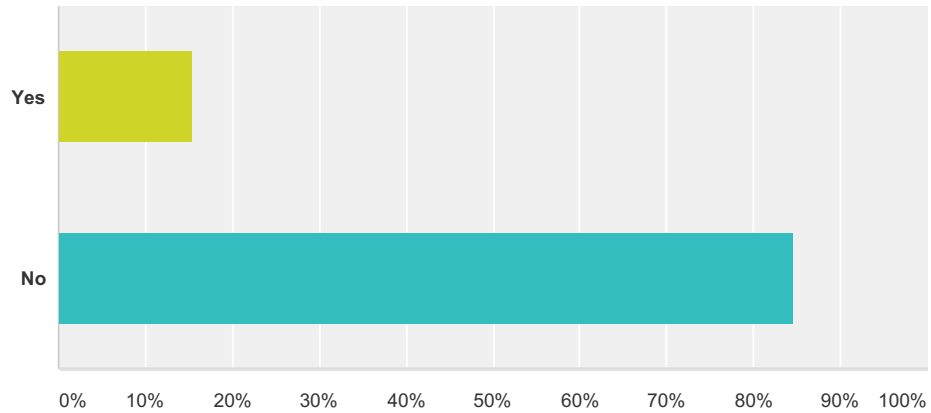
Answered: 279 Skipped: 1,115



Answer Choices	Responses
As soon as they see an indication of wrongdoing	12.90% 36
Within 90 days of seeing an indication of wrongdoing	10.04% 28
Within 120 days of seeing an indication of wrongdoing	3.58% 10
Within 6 months of seeing an indication of wrongdoing	6.81% 19
Within one year of seeing an indication of wrongdoing	8.24% 23
Within three years of seeing an indication of wrongdoing	8.24% 23
Within ten years of seeing an indication of wrongdoing	2.51% 7
There should be no time limits	39.78% 111
I don't know/no opinion	7.89% 22
<b>Total</b>	<b>279</b>

**Q27 Would your answer change if the disclosure were submitted as part of a bounty program (in which they will receive a financial reward if the financial wrongdoing is substantiated, such as in False Claims and Dodd-Frank claims)?**

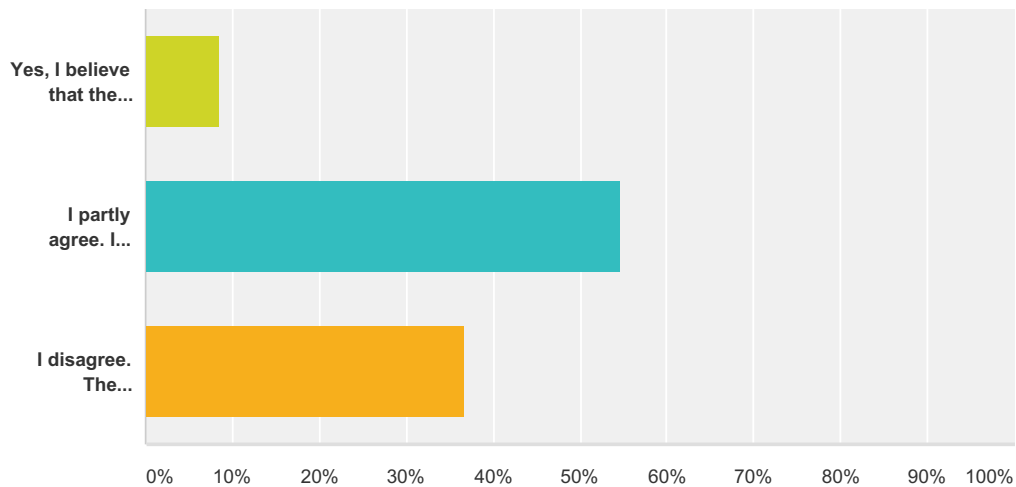
Answered: 264 Skipped: 1,130



Answer Choices	Responses
Yes	15.53% 41
No	84.47% 223
<b>Total</b>	<b>264</b>

**Q28 Do you believe that the whistleblower incentives and protection in the Dodd-Frank law – including the provisions that give whistleblowers the ability to report anonymously, obtain employment protection, and potentially receive a monetary award – eliminate the reasons whistleblowers may have for delayed reporting to the SEC?**

Answered: 279 Skipped: 1,115

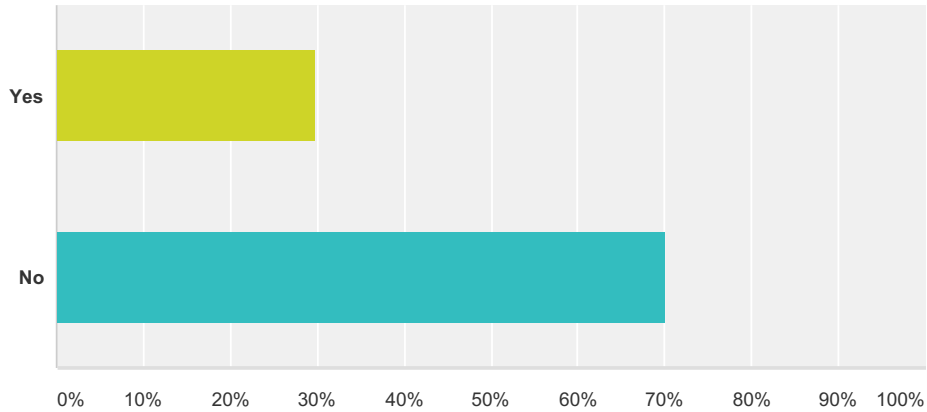


Answer Choices	Responses
Yes, I believe that the whistleblower provisions in the Dodd-Frank law fully eliminated/addressed any reason a whistleblower may have for delayed reporting.	8.63% 12
I partly agree. I believe that the whistleblower provisions in the Dodd-Frank law eliminated/addressed some, but not all, of the reasons a whistleblower would have for delayed reporting to the SEC.	54.68% 76
I disagree. The whistleblower provisions are not relevant for and/or did not eliminate the reasons a whistleblower may delay reporting to the SEC.	36.69% 51
<b>Total</b>	<b>139</b>



**Q29 If you were filing a disclosure about financial fraud under a whistleblower award scheme such as the False Claims Act or the Dodd Frank law, would knowing that a higher value is put on disclosures that are reported quickly have changed the course of action you took?**

Answered: 275 Skipped: 1,119



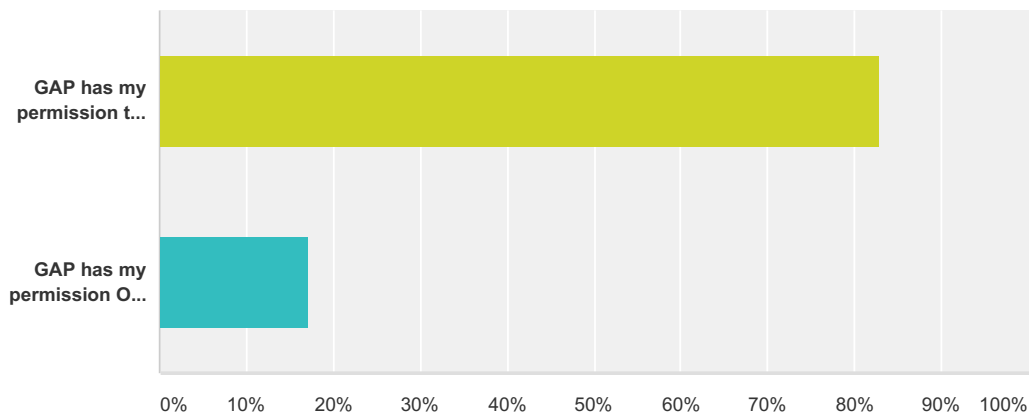
Answer Choices	Responses
Yes	29.81% 31
No	70.19% 73
<b>Total</b>	<b>104</b>

**Q30 Is there anything else that you would like to say about the kind of guidance that would be most helpful to agency officials in assessing whether the timing of a whistleblower's disclosure was reasonable? Please feel free to share any additional comments here:**

Answered: 143 Skipped: 1,251

**Q31 All communications are strictly confidential and we will not reveal your identity. We will not reveal your comments without your express permission. Please indicate that you grant permission for GAP to use your comments anonymously in a report or for related advocacy by selecting the first option below, understanding that the comments you have provided during the course of this survey may include identifying information incidentally. If you grant permission to GAP to use your comments solely for our internal analysis, and NOT for our report or any other related advocacy, please indicate this by selecting the second option below.**

Answered: 276 Skipped: 1,118



Answer Choices	Responses
GAP has my permission to use my comments and multiple choice data anonymously in its report and in any related advocacy	82.97% 229
GAP has my permission ONLY to use the multiple-choice data I have submitted anonymously in its report and related advocacy and may use information contained in my comments ONLY for internal analysis	17.03% 47
<b>Total</b>	<b>276</b>