

Whistleblowers and corporate misconduct: the US vs the UK



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On July 21, 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, one of the most significant financial reform efforts in America since the Great Depression. This landmark legislation set out to reshape the US regulatory landscape, reduce systemic risk, and help restore confidence in the financial system. One of the most important investor protection provisions in Dodd-Frank directed the Securities and Exchange Commission (SEC) to establish a whistleblower programme that requires the agency to pay monetary awards to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the federal securities laws that leads to a successful enforcement action or a related action. Dodd-Frank also prohibits retaliation by employers against individuals who provide the SEC with information about possible securities violations.

In November 2011, the SEC announced record enforcement results and impressive early numbers for the agency’s whistleblower programme. The annual report for the whistleblower programme revealed that the SEC had received numerous high-quality whistleblower submissions, originating from virtually every state in the union and numerous countries around the world. Over 25 % of the submissions, based on the recent SEC report, came from the UK primarily dealing with US companies under the SEC’s jurisdiction but with UK operations.

While both Britons and Americans are all too familiar with daily news stories reporting corporate wrongdoing, many of those schemes seem to occur in the abstract – designed in the highest, closed-door echelons of financial institutions or

mega-conglomerates. Recently, we undertook a survey* of Americans to try to probe their knowledge and emotional responses as to such conduct. The results were somewhat disheartening. More than one third of Americans have witnessed or had firsthand knowledge of workplace misconduct. Tempering the blow, however, was the discovery that the lion’s share of respondents would report – and would encourage a loved one to report – wrongdoing if the report could be made anonymously, with protections and incentives. That willingness was exactly what Congress sought to channel in establishing the SEC whistleblower programme. But do Americans know that such vehicles exist? Our findings point to a resounding “no”, with 68% of Americans surveyed reporting that they are unaware of the new whistleblower programme. Although we have not done the same thing in Britain, we suspect the results would be similar. The key results follow:

KEY FINDINGS

A significant number of Americans have observed or had firsthand knowledge of wrongdoing in the workplace.

- More than one-third of Americans surveyed (34%) reported that they have observed or had firsthand knowledge of misconduct in the workplace.
- Where respondents reside had a notable impact on their observation of wrongdoing at work. For instance, 29% of Americans living in the Northeast corridor between New York and Boston have observed or have direct knowledge of misconduct in their workplace, whereas that number increases to 37% for those living in the Western US. Along similar lines, 41% of



respondents living in non-metro country areas, compared to 32% in metro areas, had knowledge of misconduct at work.

- Concerning income, 49% of respondents with annual household income¹ between \$75,000-\$100,000 (about £48,000-£65,000) reported that they had observed, or had knowledge of, misconduct at work. Interestingly, this percentage dropped to 29% for those respondents with a household income above \$100,000 (about £65,000).
- 37% of White/Caucasian respondents said they have observed or had knowledge of wrongdoing in the workplace, while that figure dropped to 33% for Black/African-American respondents and 22% of Hispanic respondents.
- Respondents' level of education also factored into their knowledge of workplace wrongdoing. While 29% of high school graduates up through the ages of about 17 had knowledge of wrongdoing, that figure jumped to 42% for those Americans who had some level of college education.

The vast majority of Americans would report wrongdoing in the workplace if it could be done anonymously, without retaliation, and result in a monetary award.

- 78% of respondents would report wrongdoing in the workplace if it could be done anonymously, without retaliation, and result in a monetary award. There was not a significant difference in willingness to report based purely on respondents' gender.
- Interestingly, age was a factor for respondents. 83% of those surveyed between the ages of 45-54 would

report misconduct given the three protections set forth above. However, only 74% of respondents at an earlier point in their career, aged 18-34, would report even with the anonymity and anti-retaliation protections and financial incentives.

- With regard to income, 88% of respondents with an annual household income over \$75,000 (about £48,000) would report wrongdoing, compared to 78% of those with a household income between \$50,000-\$75,000 (about £32,000-£48,000).
- The willingness to report misconduct with the protections outlined above increased steadily based on level of education. For instance, respondents who have not completed American high school, graduating at about 17 years of age, were 12% less likely to report misconduct than those who had graduated college.

Survey respondents are inclined to encourage a spouse or a loved one to report wrongdoing in the workplace if the report can be done anonymously and if the spouse or loved one would be protected from retaliation and receive a monetary award.

- 79% of respondents would encourage a loved one to report misconduct with the protections set forth above – a slight increase in percentage from a willingness to report themselves.
- Women were more inclined to encourage a loved one to be a whistleblower (82%), compared to 75% of men.
- There was little disparity between age and residential region indicated in respondents' willingness to

encourage a loved one to blow the whistle.

- The inclination to encourage a spouse or loved one to be a whistleblower is not consistent across racial groups. 82% of white respondents would encourage such behaviour, as compared to 76% of Hispanic respondents and 72% of Black respondents.

A significant percentage of Americans are unaware that the SEC has introduced a new Whistleblower programme designed to protect and reward individuals who report violations of the federal securities laws.

- 68% of Americans surveyed are unaware of the new SEC Whistleblower Programme. There was an eight point spread between men and women with respect to knowledge of the SEC's whistleblower program, 64% and 72% respectively.
- There is a strong correlation between age and awareness of the SEC programme. 81% of respondents between the ages of 18-34 were unfamiliar with the programme, a percentage that fell to 60% for individuals between the ages of 55-64.

Recent high-profile developments in the UK confirm the whistleblower trend is crossing the pond. In October, the Serious Fraud Office (SFO) launched *SFO Confidential*, a hotline for insiders to report fraud and corruption. This represents a marked shift in position because the FSA has historically discouraged external reporting and does not guarantee confidentiality. Furthermore, in late October in connection with a landmark case brought by three nurses against an NHS trust in Manchester,

UK authorities are now reviewing a loophole, identified by the Court, in the UK's Public Interest Disclosure Act which protects whistleblowers from retaliation by their employer but not their work colleagues.

However, two issues remain with the UK approach, notwithstanding the progress that has been made. First, it is unclear that, even with the SFO, the confidentiality and retaliation safeguards are sufficient or are as strong as Dodd-Frank. Secondly, there is no monetary incentive for whistleblowers to report wrongdoing. Although such "bounties" are controversial, it is human nature to react to monetary incentives.

As Russell Crowe said in his role as Captain Jack Aubrey in the film "Master and Commander: The Far Side of the World", as the crew was being rallied to engage in hand-to-hand combat to capture an enemy ship: "For England, for home, and *for the prize!*"

The prize can be a keen motivator.

1. Figures derived from 2010 Gross Income

*ORC international conducted the Labaton Sucharow Ethics & Action Survey. The random digit dialling telephone survey of 1,007 adults consisted of 503 men and 504 women, 18 years of age and older, living in private households in the continental United States. The sample was fully replicated and stratified by region. Only one interview was conducted per household. All sample numbers selected were subject to up to four attempts to complete an interview.