

Harmonizing the Shield to Corporate Liability: A Comparative Approach to the Legal Foundations of Corporate Compliance Programs from Criminal Law, Employment Law, and Competition Law Perspectives*

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Abstract

A range of legal regimes from employment law to corporate and securities law foresees a reduction or elimination of “enterprise liability” for organizations that can demonstrate the existence of “effective” internal compliance structures. The pervasiveness of corporate conduct codes and internal compliance programs, while reflecting the importance ascribed to these codes and programs by different jurisdictions, also raises questions regarding the extent to which companies are willing to take measures to encourage compliance with the law and nip corporate

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misconduct in the bud before courts and agencies detect such errant behavior. With a compliance industry that has developed over the past decade at an insurmountable pace, the previously defined borders of criminal law, employment law, and antitrust law are hazier and their relationship more intertwined. This article aims to lay out the interaction between these fields of law by particularly examining whistleblowing and elements of setting up effective compliance programs.

A range of legal regimes, from environmental law to tort law, from employment law to corporate and securities law, foresees a reduction or elimination of “enterprise liability” for organizations that can demonstrate the existence of “effective” internal compliance structures. With competent and committed management teams, internal compliance structures “may play a central role in the organization’s preventive approach to organizational misconduct, depending on the size and structure of the specific organization.”¹ The pervasiveness of corporate conduct codes and internal compliance programs (collectively, internal compliance structures) reflect the importance ascribed to these codes and programs by different jurisdictions, while raising questions regarding the extent companies are willing to take measures to encourage compliance with the law before courts and agencies detect such errant behavior.

1. Kimberly D. Krawiec, Organizational Misconduct: Beyond the Principal-Agent Model, 32 **Fla. St. U. L. Rev.** 571, 614 (2005) [hereinafter Krawiec, Organizational Misconduct].

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With a compliance industry that has developed over the past decade at an insurmountable pace, the previously defined borders of criminal law, employment law, and antitrust law are hazier and the relationships more intertwined. Internal corporate compliance structures are dispersed across a multitude of jurisdictions and regulated under various laws, either in the local criminal legislation, local labor laws, antitrust/competition laws, or even separate bodies of corporate governance laws. Corporate compliance questions raised across three fields of law—criminal law, employment law, and antitrust law—may challenge parties from both sides of the dais; enterprises may be placed in the good or bad category depending on whether they have an effective compliance program, designed to ostensibly detect violations. Courts and agencies, on the other hand, must embrace the task of interpreting whether criminal liability hinges on the effectiveness of a compliance program or whether companies will be required to meet prescriptive standards rather than specific industry needs. The latter need arises from courts and agencies having limited expertise, time, budget, and imperfect guidance on what will serve as compliance with law.²

Bearing in mind existing incentives to implement internal compliance structures, this article examines compliance programs and the interaction between criminal law, employment law, and antitrust law in resolving corporate compliance questions by examining whistleblowing and

2. Mark C. Suchman & Lauren B. Edelman, Legal Rational Myths: The New Institutionalism and the Law and Society Tradition, 21 *Law & Soc. Inquiry* 903, 934 (1996).

elements of setting up effective compliance programs. Section I follows a segmented approach to whistleblowing, which forms a central topic of this article for its vital role in detecting and preventing corporate misconduct. Canvassing international law and domestic law perspectives, this section discusses implications of divergence between the United States and European Union for assessing whistleblowing practices. Section II concludes by outlining the elements of an effective compliance program and the different standards established by the Organization for Economic Cooperation and Development (OECD) and the U.S. Federal Sentencing Guidelines (USSG)³ for interpreting the effectiveness attribute.

I. WHISTLEBLOWING⁴

The existence of a whistleblowing policy within an organization can influence an employee's legal status in several ways. First, the inevitable question concerning the extent employees have a duty to follow the compliance program arises: do they have an actual legal duty to blow the whistle in the prescribed cases? Furthermore, questions arise regarding the legality of data storage during investigation. As external companies are often involved in compliance (especially whistleblowing) policies, issues may emerge following the transfer of data relating to misconduct (and personal data of whistleblowers). Protecting an employee's rights is a relevant

3. U.S. Organizational Sentencing Guidelines, 18 U.S.C.A § 3E1.1 (2001)

4. **Black's Law Dictionary** 1734 (9th ed. 2009) (defining whistleblower as "[a]n employee who reports employer wrongdoing to a governmental or law-enforcement agency.").

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concern after an employee has blown the whistle. As whistleblowers experience retaliation, more often than not, the protection of employees against such negative consequences is considered crucial for effective compliance programs.

This section mainly addresses the legal consequences of whistleblowing policies, starting with a brief introduction to this topic. The facilitation of internal whistleblowing is increasingly recognized as a valuable policy in both the public and private sector, and several guidelines created by international and national organizations serve as models for the construction of whistleblowing policy.⁵

Whistleblowing is generally regarded as a form of corporate dissent.⁶ An area of controversy amongst scholars over the definition of this concept is whether the definition of whistleblowing should be limited to external (i.e. public) whistleblowing (i.e. directly alarming the media without flagging the matter internally within the company).⁷ For the purpose of this article, in indicating reasons for employees (not) to act further to observed misconducts, the definition will not be limited to external (i.e. public) whistleblowing.

5. See, e.g., **ICC Commission on Anti-Corruption, Int'l Chamber of Commerce, ICC Guidelines on Whistleblowing** (2008), available at <http://www.iccwbo.org/advocacy-codes-and-rules/document-centre/2008/icc-guidelines-on-whistleblowing/> (last visited July 10, 2013) [hereinafter **ICC Guidelines on Whistleblowing**]; see also **British Standards Institute, Whistleblowing arrangements Code of Practice** (2008).

6. Frederick A. Elliston, Civil Disobedience and Whistleblowing: A Comparative Appraisal of Two Forms of Dissent, 1 **J. Bus. Ethics** 23, 23-28 (1982).

7. **Joseph J. Martocchio, Research in Personnel and Human Resources Management** 100 (Emerald Group Pub., 2005).

To create an internal framework, an organization's management decides on significant areas of consideration including the following: who can blow the whistle (can ex-employees benefit from this policy?); issues and misconducts covered by whistleblowing; who would be the addressee to receive such concerns; how these concerns would be raised (by using "hotlines"?⁸); whether to facilitate confidential and anonymous reporting; whether to address the means of protection of whistleblowers; what system to use for recording and tracking complaints; whether whistleblowing is an employee right or a duty; dealing with malicious reporting; how whistleblowers are rewarded; what would the method of providing advice to whistleblowers be; determining and outlining the roles and responsibilities of individuals during investigation; and operating, monitoring, and reviewing the whistleblowing policy, as well as training employees to effectively handle complaints.⁹

A. WHISTLEBLOWING COMPONENT TO CORPORATE COMPLIANCE

One of the most important elements of a corporate compliance program is a policy encouraging transparency and honesty through the disclosure of anticompetitive activities. The whistleblowing component of a corporate compliance program is essential to promote

8. Mollie Painter-Morland & René ten Bos, *Business Ethics and Continental Philosophy* 204 (Cambridge Univ. Press Pub., 2011).

9. Dave Lewis & Wim Vandekerckhove, *The Content of Whistleblowing Procedures: A Critical Review of Recent Official Guidelines*, 108 *J. Bus. Ethics* 253, 253-56 (2012) [hereinafter Lewis & Vandekerckhove].

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appropriate corporate actions at different levels in the corporate structure. Establishing effective whistleblowing programs is subject to varying definitions, requirements, protections, and enforcement.

Whistleblowing, as a means of reporting, inter alia, corruption, fraudulent behavior, and/or misconduct, is challenging to define and, therefore, there is “no generally accepted definition.”¹⁰ It is difficult to provide a broad and accurate definition of corruption because it cuts across moral values and social or cultural norms; therefore, international conventions tend to provide specific actions that are deemed as constituting corruption by signatories.¹¹ This, in turn, affects the contours within which whistleblowing is understood and contextualized.

Whistleblowing intends to promote transparency in corporations through advancing the truth and encouraging individuals to report violations. Regardless of the noble intention behind whistleblowing, there remain barriers to effective whistleblowing.¹² Some of these barriers include employees lacking awareness of whistleblowing mechanisms, lacking trust in the

10. What is WB?, **Whistleblower Protection in the Central and Eastern Europe Region**, http://www.whistleblowing-cee.org/about_whistleblowing/ (last visited July 10, 2013).

11. Indira Carr & David Lewis, Combating Corruption Through Employment Law and Whistleblower Protection, 39 **Indus. L. J.** 52, 56 (2010) [hereinafter Carr & Lewis 2010].

12. Barriers to effective whistleblowing include fear of retaliation, legal liability, and cultural barriers. See generally David Banisar, Whistleblowing: International Standards and Developments, in Corruption and Transparency: Debating the Frontiers Between State, Market and Society 5 (Irma Sandoval ed., 2011), available at SSRN <http://ssrn.com/abstract=1753180> (last visited July 10, 2013).

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company to combat corruption, feeling guilty for the effect of disclosures on employees and shareholders, fearing retaliatory effects from disclosure, and cultural constraints that indicate a negative perception of whistleblowers.¹³

An effective whistleblowing mechanism provides legal remedies for retaliatory actions, rewards whistleblowers, and provides processes that encourage disclosure of suspected illegal actions.¹⁴ These protective mechanisms could include protection from job termination or transfer, preference to requests for work transfer, confidentiality, legal immunity (including protection from defamation lawsuits), penalties to those who retaliate against the whistleblower (such as imprisonment or disciplinary action), and police protection for a whistleblower and his/her family.¹⁵

B. INTERNATIONAL LAW PERSPECTIVES

This section addresses the rise of international and regional agreements on corporate governance; it specifically addresses compliance programs and whistleblowing practices, which

13. Annie Enriquez-Geron, Public Services Independent Confederation (PSLINK) General Secretary, Vice President-Public Services International, *Blowing the Whistle: A Window for Civil Society Engagement and Holding the Government Accountable in Fighting Corruption*, available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan027828.pdf> (last visited July 10, 2013).

14. *Id.*

15. *Id.*

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are simultaneously based on and influencing domestic whistleblowing laws. It provides a summary of relevant agreements and their impact on domestic criminal and employment law.

The increase of international business transactions and corporate interactions recognize the necessity of global compliance programs. Most national laws on corruption, however, are inadequate to deal with cross-border corruption issues.¹⁶

Whistleblowing is an important component of successful corporate compliance programs recognized by international efforts to promote global support. Increasing international business transactions and corporate interactions necessitate a rise in global compliance initiatives, which have an effect on national criminal laws, employment laws, and antitrust laws.¹⁷ International standards established to promote competition require integration with international standards for compliance, indicating an overlap between compliance and antitrust law.¹⁸ Additionally, most national laws on corruption are inadequate to deal with cross-border corruption issues.¹⁹ International anti-corruption agreements also attempt to address these cross-border corruption issues by providing an adequate standard that all nations can support. International efforts to produce corporate compliance frameworks include whistleblowing as an important component of successful programs.

16. Carr & Lewis, *supra* note 11, at 53.

17. *Id.* at 53, 79.

18. Ted Banks & Joe Murphy, *The International Law of Antitrust Compliance*, 40 *Denv. J. Int'l. L. & Pol'y.* 368, 368 (2012).

19. Carr & Lewis, *supra* note 11, at 53.

International agreements bridge gaps between divergent national laws to create a synthesized approach to handling corruption across multiple jurisdictions. International agreements that address whistleblowing at a global level include the United Nations Convention on Corruption,²⁰ the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,²¹ and the International Chamber of Commerce Guidelines on Whistleblowing.²² There are also regional agreements that include provisions on whistleblowers within a specific geographic area. The European Council has produced both the Civil Law Convention on Corruption²³ and the Criminal Law Convention on Corruption.²⁴

International and regional anti-corruption conventions interact with national criminal laws, employment laws, and antitrust laws. In Europe, national laws and regional rules provide two levels for managing whistleblowing programs.

The international agreements on whistleblowing, however, create only a broad framework to ensure that signatory states agree to the general principles of whistleblowing while allowing

20. United Nations Convention Against Corruption, Oct. 31, 2003, 43 I.L.M. 37 (entered into force Dec. 14, 2005).

21. Organization for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted Nov. 21, 1997, 37 I.L.M. 1 [hereinafter OECD].

22. **ICC Guidelines on Whistleblowing**, supra note 5.

23. Civil Law Convention on Corruption, Council of Europe, opened for signature Nov. 4, 1999, C.E.T.S. No. 174 (entered into force Nov. 1, 2003).

24. Criminal Law Convention on Corruption, Council of Europe, opened for signature Jan. 27, 1999, C.E.T.S. No. 173 (entered into force July 1, 2002).

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flexibility in the implementation. An international perspective on whistleblowing poses certain challenges to implementation and investigation. Individual nations, while agreeing with the overall scheme of international agreements, continue to implement whistleblowing laws through national, social, and cultural-based legal frameworks.

The United States does not have significant data protection legislation in place. There are several specific laws covering particular business sectors and self-regulations in other sectors. European data protection law is significantly more comprehensive. As the E.U. Member State countries began adopting varying data protection regulations, the cross-border information flow was restricted.²⁵ This encouraged the European Union to adopt a Directive for Member States to incorporate into their national laws.²⁶ Directive 95/46 EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data establishes when the processing of personal data is lawful and acceptable.²⁷ The main requirements for such processing are (i) transparency, (ii) serving a legitimate purpose, and (iii) proportionality.²⁸

In response to developments in France, where the French data protection agency published guidelines on the lawfulness of anonymous whistleblowing policies (CNIL Guidelines), the

25. Anonymous Whistleblowing Systems and CNIL and European Union Data Protection Measures, **MySafeWorkPlace**, 2 (2006), <http://www.mysafeworkplace.com/pdf/cnil.pdf> [hereinafter **MySafeWorkPlace** 2006].

26. Id.

27. Id.

28. Id.

European Article 29 Working Party (Working Party) issued an opinion on “the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime.”²⁹ Following this opinion, the main points of considerations for whistleblowing mechanisms are: “fair and lawful processing,” “legitimate purpose,” “relevance,” “accuracy,” “retention,” “security,” and “data transfer.”³⁰ While this opinion is not legally binding and is limited in scope, it is, however, the main document expressing collective European policy.

As indicated above,³¹ the American and European standards on whistleblowing policies and data protection standards are not coherent. These differences have significant consequences for companies involved in international business. Additionally, American companies operating in

29. Opinion 1/2006 on the Application of the EU Data Protection Rules to Internal Whistleblowing Schemes in the Fields of Accounting, Internal Accounting Controls, Auditing Matters, Fight Against Bribery, Banking and Financial Crime, Art. 29 Working Party Opinion 1/2006, 00195/06 WP 117 (Feb. 1, 2006), available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2006/wp117_en.pdf (last visited July 10, 2013).

30. Daniel P. Cooper, *Corporate Investigations & EU Data Privacy Laws—What Every In-House Counsel Should Know*, **Covington Report**, **Covington & Burling** 6-8 (2008), available at <http://www.cov.com/files/Publication/642283cc-5498-47ac-ad87-163246b3a569/Presentation/PublicationAttachment/1a4d7e6c-c11e-41a1-ba25-02fe0ff77196/Corporate%20Investigations%20and%20EU%20Data%20Privacy%20Laws%20Amended%2020%209%2008.pdf> (last visited July 10, 2013).

31. See *supra* Section I.B.

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Europe face difficulties in their effort to comply with both the Sarbanes-Oxley Act (SOX)³² and the European data protection laws.³³

1. General Whistleblowing Policies

International and regional anti-corruption conventions heavily influence national criminal laws, which in turn influence the development of national antitrust law and employment law.³⁴ International whistleblowing creates a broad framework for domestic laws to work within, which shapes the domestic approach to corporate compliance laws, through employment and criminal law. In Europe, there remain two levels for managing whistleblowing programs—national laws and regional rules that derive from the European Council and European Union.³⁵

In providing an international perspective on whistleblowing policies, certain issues can be challenging—particularly, data protection and whistleblower protection under nationally

32. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in 15 U.S.C. §§ 7201-7266 and scattered sections of 11, 18, 28, and 29 U.S.C.).

33. For more on this, see generally Pulina Whitaker, *Multinationals Dance to Two Whistleblowing Tunes*, **European Lawyer** (2007); Paul Lanois, *Sarbanes-Oxley, Whistleblowing, and European Union Data Protection Laws*, **The Practical Lawyer** 59 (Aug. 2007); see also **MySafeWorkPlace** 2006, *supra* note 25, at 1.

34. Carr & Lewis 2010, *supra* note 11, at 78.

35. See, e.g., **Eur. Parl. Ass. Resolution, Protection of “Whistle-Blowers.”** Resolution 1729 (Apr. 29, 2010), available at <http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta10/eres1729.htm> (on the overlap with criminal law and employment law); see also **Eur. Parl. Ass. Rep., The Protection of “Whistle-Blowers.”** Doc. No. 12006 (2009), available at <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=12302&Language=EN>.

enforced practices. Furthermore, individual nations, while agreeing with the overall scheme of international agreements, continue to implement whistleblowing laws through national, social, and cultural-based legal frameworks.

2. Company Implementation of Whistleblowing and Data Protection and Privacy Matters

Data protection includes important components of employment law and criminal law; international conventions have, therefore, applied a very broad framework that allows nations to determine data protection requirements independently.³⁶

An example of an American law that requires publicly traded companies to incorporate a whistleblowing mechanism is SOX, which demonstrates what international covenants do for data protection components of whistleblower laws.³⁷ Section 301(4) of this Act can be explored in detail. Notwithstanding these provisions, fears that subsequent government or third-party access to information produced by internal compliance structures may inadvertently deter the implementation of such structures, which are better addressed through privilege rules.³⁸

Attorney-client privilege can be invoked to shield corporate audits from discovery and disclosure; these are “rules mandating that any information produced through internal policing

36. See Lewis & Vandekerckhove, *supra* note 9, at 253; United Nations Development Programme, *International Conference on Freedom of Access to Information and the Position of Whistleblowers in Serbia*, [undp.org.rs](http://www.undp.org.rs) (June 29, 2010), <http://www.undp.org.rs/index.cfm?event=public.newsDetails&revid=B6CBCC28-DCB1-77FC-9888FEA024D2A762>.

37. 116 Stat. 745, § 1514A.

38. Krawiec, *Organizational Misconduct*, *supra* note 1, at 577-78.

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measures will not be used against the organization, provided that the organization cooperates with any government investigation.”³⁹

Internal investigations, with the principal objective of “find[ing] the facts and remedy[ing] the problems, including blunting public speculation of the degree and extent of wrongdoing,”⁴⁰ can be intrusive. Data protection law has a significant influence on the action undertaken by the investigating party, which directly affects the legal position of employees involved in internal investigations.

European data protection law requires companies to comply with several principles while collecting, retaining, and processing information. These principles are “fair and lawful processing,” “legitimate purpose,” “relevance,” “accuracy,” “security,” and principles relating to data transfers.⁴¹

The law serves to strike a balance between the effective investigation and the right of the employee while promoting transparency. Ideally, employees should be notified before the investigation enters the actual data collection phase.⁴²

During data collection, the investigator must ensure that the data processing is “legitimate” under local laws.⁴³ A distinction is made regarding whether the data is merely personal data or

39. *Id.* at 578.

40. **Benjamin R. Civiletti, Internal Corporate Investigations** xix (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2003).

41. For a brief indication of these principles see Cooper, *supra* note 30.

42. *Id.* at 34.

whether it is “sensitive” personal data.⁴⁴ “Sensitive” data provides strong evidence and relates to the commission of an offense.⁴⁵ This difference enhances the legitimacy of processing such information. For example, personal data can be legitimized by indicating the required compliance with money-laundering regulations, while “sensitive” data can be legitimate for funding a legal claim.⁴⁶ If data qualifies as “sensitive,” the rules are stricter for legitimate processing.⁴⁷

Employees are also protected by the requirement of collecting personal data up to a proportionate extent.⁴⁸ The proportionality is tested by the aim of the investigation (is it an alleged criminal offense, or does it concern an internal policy?), compared to the intrusiveness of such action (is the information highly personal, or is it publicly available?).⁴⁹ Following the conclusion of an investigation, personal data may only be retained as necessary.⁵⁰ This necessity depends on the nature of the information found and the extent it is useful for legitimate

43. *Id.* at 36.

44. *Id.*

45. *Id.*

46. *Id.* at 38.

47. *Id.* at 45.

48. *Id.* at 15.

49. *Id.*

50. *Id.* at 55.

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purposes.⁵¹ If the material is used for a legal process, the personal data may be retained during the process and for some time after completion.⁵²

European data protection rules that can influence an employee's rights include the requirement to ensure security of the retained data,⁵³ the considerations relating to data transfers to another country,⁵⁴ and the principle of "finality."⁵⁵ This latter principle requires that the collected data is only used for the intended purposes of the collection.⁵⁶ A company cannot change this purpose and use the personal data beyond the investigation.⁵⁷ Additionally, employees can request to access their data that was gathered during the investigation.⁵⁸

51. Id.

52. Id.

53. Id. at 40.

54. Id. at 43.

55. Id. at 56.

56. Id.

57. Id.

58. Id.

3. Whistleblower Protections

Protecting the whistleblower involves specific components of employment law and criminal law under antitrust law. International agreements, again, provide a broad framework for individual states to adapt.⁵⁹

Another specific area of law that has significant consequences for the legal position of employees is that of whistleblower protection against retaliation. Defining retaliation has been considered impossible because “retaliation—as with wrongdoing—resides in the eye of the beholder.”⁶⁰

To indicate the importance of protection, the threat of negative consequences following reported misconduct is the primary reason employees do not disclose alleged misconduct.⁶¹ Consequently, when the threat of retaliation is low, employees are more likely to blow the whistle.⁶² Besides being made redundant in an organization, common consequences following

59. The Institute of Public Administration of Canada, Whistle-Blowing, ipac.ca, <http://www.ipac.ca/documents/WBI-WhistleBlowing.pdf> (last visited May 22, 2013).

60. Marcia P. Miceli & Janet P. Near, **Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees** 202 (1992).

61. Ernst & Young, **A Survey into Fraud Risk Mitigation in 13 European Countries** 9 (June 2007) available at http://www2.eycom.ch/publications/items/2007_fids/ey_2007_FIDS_europe_survey.pdf.

62. Barbara Masser & Rupert Brown, “When Would You Do It?” An Investigation into the Effects of Retaliation, Seriousness of Malpractice and Occupation on Willingness to Blow the Whistle, 6 **J. of Community & Applied Soc. Psychol.** 127, 129 (1996).

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the reporting of misconduct include being blacklisted, being treated as mentally instable or even insane, losing life savings following lawsuits, and even losing a marriage.⁶³

a. United States

SOX intended to promote strong corporate accountability.⁶⁴ Following this Act, employees of publicly traded companies, including their contractors, subcontractors, and agents, are protected when blowing the whistle on conduct that they “reasonably believe” involves several securities regulations and other fraud against shareholders.⁶⁵ Consequently, the protection extends to mistaken allegations. Both current and former employees are protected by SOX against discharge, demotion, suspension, threats, harassment, and other discrimination with respect to employment terms, conditions, and privileges.⁶⁶ The protection extends to employees providing information and assisting in investigations and to employees filing, testifying in, participating in or otherwise assisting in a proceeding.⁶⁷

63. Annette D. Greene & Jean K. Latting, Whistle-Blowing as a Form of Advocacy: Guidelines for the Practitioner and Organization, 49 **Social Work** 219, 221(2004).

64. Susan L. Maupin, Retaliation Against Whistle-Blowing Under the Sarbanes-Oxley Act: Understanding the Law, 35 **The Brief** 13, 13 (2006).

65. Id.

66. Id.

67. Id.

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b. European Union

There is no European-wide legislative protection for whistleblowers against retaliation. The necessity of legal protection of whistleblowers against retaliation is, however, stressed by the Parliamentary Assembly of the Council of Europe (PACE). On September 14, 2009, PACE published a report from the Committee on Legal Affairs and Human Rights entitled “The Protection of Whistleblowers,” which urges the Committee of Ministers to take action in drawing up guidelines while taking the Resolution principles into account.⁶⁸ It also calls upon Member States to review legislation on compliance parallel to the guiding principles.⁶⁹ The report notes that “[m]ost member states of the Council of Europe have no comprehensive laws for the protection of ‘whistle-blowers.’”⁷⁰

In the United Kingdom, employees are protected against any detriment on grounds that they made a “protected disclosure” about their employer or co-worker by the Public Interest

68. David Lewis, The Council of Europe Resolution and Recommendation on the Protection of Whistleblowers, 39 *Indus. L. J.* 432, 432 (2010).

69. See *Eur. Parl. Ass. Resolution*, *supra* note 34, § 6.2.2. (“this legislation should protect anyone who, in good faith, makes use of existing internal whistle-blowing channels from any form of retaliation (unfair dismissal, harassment, or any other punitive or discriminatory treatment)”) (for all guiding principles see *id.* § 6). See also *Eur. Parl. Ass. Rep.*, *supra* note 34; *Eur. Parl. Ass. Rep.*, Protection of “Whistle-Blowers”, Recommendation 1916, § 2 (2010), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/EREC1916.htm>.

70. *Eur. Parl. Ass. Rep.*, *supra* note 34.

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Disclosure Act of 1998 (PIDA).⁷¹ Such disclosures may be related to a wide range of acts, including criminal offenses, legal obligations, miscarriages of justice, danger to health and safety, and damage to the environment.⁷² In a recent case, the Employment Appeal Tribunal held that when a claimant's act falls within the scope of protected disclosures and suffered detriment, the burden of proof is on the respondent that the treatment did not relate to the protected disclosure.⁷³

C. DOMESTIC LAW PERSPECTIVES

International efforts to harmonize corporate governance and antitrust practices across borders remain subject to domestic implementation. A comparative analysis of whistleblowing laws in the United States and Europe demonstrates the interrelation of criminal laws, employment laws, and antitrust laws with the social and cultural norms that influence compliance programs. Corporations in both areas are subject to compliance programs that use whistleblowing mechanisms, but whose application differs under domestic laws.

71. Public Interest Disclosure Act, 1998, c. 23, §47B(1) (U.K), available at <http://www.legislation.gov.uk/ukpga/1998/23/contents?view=plain>.

72. Id. § 43B(1).

73. *Fecitt & Others v. NHS Manchester*, [2010] UKEAT 0150_10_2311 [48]; for more detail on this case, see generally Rad Kohanzad, The Burden of Proof in Whistleblowing: Fecitt and Others v NHS Manchester, 40 *Indus. L. J.* 214 (2011).

SOX and the Dodd-Frank Act⁷⁴ provide the foundation for whistleblowing policies within corporate compliance programs in the United States. SOX requires public companies to maintain a forum for addressing issues related to “questionable accounting or auditing matters.”⁷⁵ It also provides reasonable protections against retaliation to individuals that disclose information regarding these questionable practices.⁷⁶ The Dodd-Frank Act was developed in the aftermath of the 2006-2007 financial crisis as an effort to overhaul the financial regulatory system. Dodd-Frank incorporates new regulations regarding whistleblowers to improve regulations in the financial sector through internal disclosure mechanisms. It introduces financial incentives and strengthens anti-retaliatory protections to encourage individuals to address potentially illegal corporate activity.⁷⁷ The Dodd-Frank Act has significantly changed the landscape for whistleblowing in the United States. While it caused serious concern amongst many companies based on its reward-based incentives for using external whistleblowing mechanisms, it also increased recognition of the necessity for transparency within businesses.⁷⁸

74. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 2, 5, 7, 11, 12, 15, 18, 20, 22, 26, 28, 31, 42, and 44 U.S.C.).

75. 15 U.S.C. § 78j-1.

76. *See id.* § 806.

77. 7 U.S.C. § 26.

78. Michael D. Greenberg & Donna C. Boehme, [How Whistleblower Rule Enables Corporate Compliance](http://www.rand.org/blog/2011/06/how-whistleblower-rule-enables-corporate-compliance.html), **Rand Corporation** (June 14, 2011), <http://www.rand.org/blog/2011/06/how-whistleblower-rule-enables-corporate-compliance.html>.

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Within Europe, states enforce domestic practices that are compatible with European Union and European Council policies while abiding by social and cultural interpretations of effective corporate governance policies. This adds an additional layer to the structure of whistleblowing programs in Europe, holding states accountable to strong international and regional ideas of effective whistleblowing mechanisms.

It is essential to recognize the challenges corporations face with whistleblowing policies in implementing and investigating compliance programs in both the United States and Europe. Although international agreements provide an adequate framework for whistleblowing, the actual application through domestic laws produces recognizable divergence.

1. General Whistleblowing Policies

In the United States, SOX and the Dodd-Frank Act provide the foundation for corporate compliance programs. SOX significantly expands the importance of internal compliance structure in securities law.⁷⁹ Together with the Securities and Exchange Commission (SEC) rules implementing it, SOX requires the disclosure of information relating to internal controls over financial reporting, the company's conduct and ethics codes, and whether the company has an audit committee meeting certain criteria.⁸⁰

79. Kimberly D. Krawiec, Cosmetic Compliance and the Failure of Negotiated Governance, 81 **Wash. U. L. Q.** 487, 502 (2003).

80. 15 U.S.C. §§ 7262, 7264, 7265 (2012); see also 17 C.F.R. §§ 229.308, 229.406, 220.401; see generally Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in 15 U.S.C. §§ 7201-7266 and scattered sections of 11, 18, 28,

E.U. Member States continue to enforce domestic practices that are compatible with E.U. policies while abiding by social and cultural interpretations of effective corporate governance policies.⁸¹

In determining the effectiveness of whistleblowing provisions for criminal law, antitrust law, and employment law in an international context, it is essential to recognize the challenges corporations face in implementing and investigating compliance programs.

2. Company Implementation

This section addresses the manner in which companies implement whistleblower policies in the United States and in Europe. It focuses on data protection and employee obligations to highlight the differences in the systems and their interaction with existing criminal and employment laws.

Implementation of whistleblowing policies involves two important considerations for corporations—employee's reporting obligations and data protection laws. Divergences

and 29 U.S.C.); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 2, 5, 7, 11, 12, 15, 18, 20, 22, 26, 28, 31, 42, and 44 U.S.C.); A Guide To The Sarbanes-Oxley Act, **The Sarbanes-Oxley Act 2002**, <http://www.soxlaw.com/> (last visited June 19, 2013); see generally Making Sense of Dodd-Frank, **Leonard Street and Deinard**, <http://dodd-frank.com/> (last visited June 19, 2013).

81. Hunton & Williams LLP, French Appeals Court Suspends U.S. Company's Whistleblower Program, **Privacy and Information Security Law Blog** (October 13, 2011), <http://www.huntonprivacyblog.com/2011/10/articles/french-appeals-court-suspends-u-s-companys-whistleblower-program/>.

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between the preferred models in the United States and within European countries, however, remain important considerations for implementation. The differences not only challenge the implementation and investigation of whistleblowing policies, but also impact the different roles of criminal law, employment law, and antitrust law in corporate compliance programs.⁸²

a. Employee Obligations

Imposing a duty on employees to disclose antitrust violations straddles criminal law, employment law, and competition law. Voluntary disclosure, however, remains an option under some structures.

Within whistleblowing programs there are different approaches for encouraging employee disclosure. Some programs obligate employees to report or face penalties while other programs prefer policies that encourage voluntary disclosure. A required disclosure can subject an individual to sanctions or even criminal penalties for failing to notify the appropriate contact of

82. Top Ten Considerations for Whistleblowing Schemes in Europe, **Association of Corporate Counsel** (Sept. 1, 2010), <http://www.acc.com/legalresources/publications/topten/whistleblowing-scheme-in-europe.cfm?makepdf=1>; Steven A. Lauer, EU Data Privacy for Whistleblower Hotlines: Variation Among EU Countries' Laws Requires Flexibility in Hotline Scope and Operations, **Global Compliance Services, Inc.** (2008), <http://www.globalcompliance.com/pdf/eu-data-privacy-for-whistleblower-hotlines-variation-among.pdf> (last visited July 10, 2013) (quoting at n. 20: "The number of issues raised by the implementation of whistleblowing schemes in Europe in 2005, including data protection issues, has shown that the development of this practice in all EU countries can face substantial difficulties. These difficulties are largely owed to cultural differences, which themselves stem from social and/or historical reasons that can neither be denied nor ignored").

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suspected or known violations.⁸³ In addition to obligations imposed on employees through whistleblowing laws, employment laws can also provide the basis for a duty to disclose.

Under SOX, certain employees are obligated to divulge information on anticompetitive behavior.⁸⁴ Although obligatory disclosures are subject to criticism, there are certain benefits associated with compelled whistleblowing programs—including risk allocation, social penalty reductions, improved efficacy of voluntary programs, and speedier disclosures.⁸⁵ Additionally, employees in non-managerial positions may not be required to disclose suspected illegal behavior, but incentives can encourage disclosure through reward-based systems.⁸⁶

The United Kingdom recognizes similar obligations for employees in certain sectors or positions based on employment laws.⁸⁷ The duty to report through “express terms,” “implied terms,” or “equity” is not typically imposed on ‘ordinary’ employees; this duty is usually reserved for managerial positions.⁸⁸ The British Standards Institute, however, recognizes challenges to obligatory reporting—including negative ramifications on an open and accountable

83. Banisar, *supra* note 12.

84. 15 U.S.C. § 7245.

85. Elizabeth Tippett, The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes-Oxley Mean for Employment Law, 11 **Employee Rts. & Emp. Pol'y J.** 1, 2-3 (2007), available at <http://ssrn.com/abstract=930226>.

86. For instance, an individual that acts as a whistleblower for unpaid or improperly paid taxes may receive a monetary portion of the total tax owed for their assistance in the collection.

87. See Carr & Lewis, *supra* note 11, at 11, 16.

88. *Id.* at 12.

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work culture, issues of fairness in the dispensation of sanctions, and potential over-reporting to avoid sanctions.⁸⁹ The Council of Europe places greater emphasis on voluntary disclosure, encouraging whistleblowing schemes that indicate that disclosure is non-obligatory and voluntary at the discretion of the whistleblower.⁹⁰

Employee obligations influence data protection and whistleblower protection protocols, particularly with regards to voluntary notifications. An employee is more likely to voluntarily provide information on illegal corporate activity if they feel secure in both the disclosure methods and the post-disclosure protections.⁹¹

Under SOX, certain employees are obligated to divulge information that suggests fraud within a corporation or collusion within a market. This requirement is occasionally supplemented with rewards for the whistleblower.⁹² In Europe, however, there is greater emphasis on voluntary disclosures and ensuring that employees are not required to divulge suspected illegal activity.⁹³

89. **British Standards Institute**, *supra* note 5.

90. Top Ten Considerations for Whistleblowing Schemes in Europe, *supra* note 82.

91. Banisar, *supra* note 12.

92. Tippet, *supra* note 85, at 2-3; Geoffrey Christopher Rapp, Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers, 87 **B.U. L. Rev.** 91, 92 (2007).

93. Mathieu Bouville, Whistle-Blowing and Morality, 81 **J. Bus. Ethics** 579, 579 (2007); Top Ten Considerations for Whistleblowing Schemes in Europe, *supra* note 82.

Employee obligations are an important component of whistleblower laws because of the influence on data protection and whistleblower protection protocols. In Europe, the laws are inclined to promote voluntary action rather than obligatory reaction because of the stigma against anonymous reporting and data protection laws.

b. Data Protection Issues

The establishment of a whistleblower policy requires mechanisms that facilitate rather than impede effective reporting. International agreements related to whistleblowers provide vague frameworks; effective mechanisms are, therefore, subject to national laws. Divergence in data protection requirements in the United States and Europe pose the most significant challenge to uniformity of whistleblowing policies.

In the United States, SOX section 301(4) dictates the importance of anonymous complaints. SOX requires audit committees to establish procedures for the “confidential, anonymous submission by employees regarding questionable accounting or auditing matters.”⁹⁴

Within Europe, data protection laws tend to oppose the use of anonymous complaint systems. Traditionally, the European Union has placed significant emphasis on the respect for individual rights, which led to E.U. Directive 95/46/EC.⁹⁵ Corporations that operate within specific data protection laws are required to balance whistleblowing programs with applicable data protection

94. 15 U.S.C. § 78j-1(m)(4).

95. Council Directive 95/46/EC, 1995 O.J. (L 281/31) 3 (EU).

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laws.⁹⁶ The Working Party published Opinion 1/2006, addressing the application of E.U. data protection rules to internal whistleblowing programs, finding that it was possible to construe foreign statutes and regulations as non-legal obligations under E.U. Directive 95/46/EC.⁹⁷ The “proportionality principle” brings the Directive and Opinion together to protect data while enabling effective whistleblowing mechanisms by limiting the type of data collected and the type of employee with access to the reporting scheme.⁹⁸ In January 2012, however, the European Union unveiled a draft General Data Protection Regulation.⁹⁹

To facilitate the development of effective whistleblowing mechanisms in conjunction with existing data protection laws, European nations have adopted strategies to protect individuals and comply with international and national ideas on corporate governance.¹⁰⁰ Some of these strategies include limiting the individuals that may file whistleblowing complaints, limiting the issues that can be addressed in whistleblowing complaints, and limiting the mechanisms or

96. Banks & Murphy, *supra* note 18, at 368-369.

97. Lauer, *supra* note 82.

98. Top Ten Considerations for Whistleblowing Schemes in Europe, *supra* note 82.

99. See generally Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation), COM (2012) 11 final (Jan. 25, 2012).

100. Harold Hassink, Meinderd de Vries & Laury Bollen, A Content Analysis of Whistleblowing Policies of Leading European Countries, 75 *J. Bus. Ethics* 25, 25 (2007).

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regulatory bodies that can receive complaints from whistleblowers.¹⁰¹ Individual states enacted national laws designed to protect individual data, which were upheld over implementation of certain whistleblowing mechanisms. A 2011 French court decision suspended a whistleblower program implemented by the French affiliate of an American company because the program was not limited in terms of employees that could report and the scope of activity that could be reported.¹⁰² Additionally, the website and the hotline were not consistent in the implementation of personal disclosure—the website encouraged anonymous reporting while the hotline encouraged identified reporting.¹⁰³ Germany's modification to its whistleblowing laws received significant attention for attempting to make whistleblowing laws compatible with data protection laws.¹⁰⁴

Implementation of SOX provisions for corporations established in both the United States and Europe are the cause of significant tensions between U.S. whistleblowing requirements and European data protection requirements.¹⁰⁵ Conflict between these two dominant perspectives

101. Lewis & Vandekerckhove, *supra* note 9, at 254-55.

102. Hunton & Williams LLP, *supra* note 81.

103. *Id.*

104. Hogan Lovells, Germany: Parliament Appoints Hogan Lovells Lawyer as Expert for Public Hearing Regarding Whistleblower Jurisdiction and Data Protection, **Chronicle of Data Protection** (March 7, 2012), <http://www.hldataprotection.com/2012/03/articles/international-eu-privacy/germany-parliament-appoints-hogan-lovell-lawyer-as-expert-for-public-hearing-regarding-whistleblower-jurisdiction-and-data-protection/>.

105. Lanois, *supra* note 32.

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indicates the challenges facing international corporations implementing effective whistleblowing mechanisms.

As explained previously,¹⁰⁶ in the United States, SOX section 301(4) dictates the importance of anonymous complaints.¹⁰⁷ Within Europe, however, data protection laws view anonymous hotlines differently.¹⁰⁸ Individual states have also enacted national laws designed to protect an individual's data; these laws were subsequently upheld over implementation of certain whistleblowing mechanisms.¹⁰⁹ The conflict between these dominant perspectives on data protection laws indicates the challenges facing international corporations attempting to implement effective whistleblowing mechanisms.¹¹⁰

The positions of the United States and European Union with regard to the interface of employer and employee protection in compliance matters are significantly different. European

106. See *supra* § I.C.2.b.

107. 15 U.S.C. § 78j-1.

108. Opinion 1/2006, *supra* note 29; Council Directive 95/46/EC, *supra* note 95, at 31-50. The “proportionality principle” brings these two documents together to protect data while enabling effective whistleblowing mechanisms by limiting the type of data collected and the type of employee that has access to the reporting scheme. See also Top Ten Considerations for Whistleblowing Schemes in Europe, *supra* note 82.

109. **Cours d’appel** [CA] [regional court of appeal] Caen, 3e ch., Sept. 23, 2011 (Fr.), available at http://www.huntonprivacyblog.com/wp-content/uploads/2011/10/article_3236.pdf; Cf. Arbeitsgericht Wuppertal, [Wuppertal Labour Court] June 15, 2005, BV 20/05, NZA-RR 2005, at 476 (Ger.).

110. Lanois, *supra* note 32.

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countries take a strong pro-employee approach by focusing on the rights of the accused, while the United States offers greater employer protection in the compliance process. Ideas on the value of anonymity in reporting lead to a different valuation of the rights of the reporting party and the accused.¹¹¹

3. Company Investigations

This section addresses the next phase in whistleblower policies—after the whistleblower has alerted the company to potentially fraudulent practices there must be an effort to protect the whistleblower from retaliation. At this phase, the United States and Europe provide more consistent practices. A company is required to conduct an investigation following a fraud allegation, which requires provisions protecting whistleblowing individuals involved in the disclosure (under criminal law and employment law).

International agreements indicate the need for companies to conduct an internal investigation following allegations of anticompetitive or fraudulent activity. Companies have frequently engaged in anti-retaliation remedies and reward-based approaches to encourage disclosure.¹¹² Reward-based approaches alone are insufficient; to promote disclosure it is imperative that provisions exist to protect whistleblowers during and after the investigation.

111. **MySafeWorkPlace** 2006, *supra* note 25, at 1.

112. Tippet, *supra* note 85.

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Whistleblower laws include specific provisions to protect whistleblowers from retaliation. In the United States, for example, the Occupational Safety & Health Administration (OSHA) operates a Whistleblower Protection Program to ensure that employees in certain sectors are protected when reporting alleged violations.¹¹³ Resolution 1729 of 2010 by the Council of Europe emphasized specific protections necessary for whistleblowers.¹¹⁴ The resolution stressed the necessity for comprehensive whistleblowing legislation focusing on providing a safe alternative to non-disclosure, monitoring by independent external bodies to ensure compliance with whistleblower protection initiatives, and improving the general corporate cultural attitude toward whistleblowing.¹¹⁵

Regardless of these provisions, there remain problems with protecting whistleblowers.¹¹⁶ Disclosure provisions can still foster disincentives to disclose; employees may be afraid of retaliation, social ostracism, and psychological strain related to their role in whistleblowing.¹¹⁷

Corporate governance programs recognize the importance of protecting whistleblowers, whether they are acting voluntarily or under an obligation and whether they are anonymous or

113. The Whistleblower Protection Program, **United States Department of Labor**, <http://www.whistleblowers.gov/> (last visited June 19, 2013).

114. **Eur. Parl. Ass. Resolution**, supra note 34.

115. Id.

116. Brian Martin, Illusions of Whistleblower Protection, 5 **UTS L. Rev.** 119 (2003).

117. Geoffrey Christopher Rapp, supra note 92.

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identified. Protecting whistleblowers promotes honesty and transparency by encouraging individuals to recognize and report anticompetitive behavior.¹¹⁸ Protecting whistleblowers is one of the crucial elements of an effective corporate governance policy because it promotes honesty and transparency in corporate practices to avoid anticompetitive behavior.

D. IMPLICATIONS OF DIVERGENCE

The different perspectives on anonymous disclosures and the additional obstacles the new E.U. data protection regulation might provide¹¹⁹ challenges to identifying a duty to disclose and to converging these differing ideas on the scope of disclosure. In this respect, an examination into the US and European models may illustrate the potential implications for divergence.

1. United States

In its corporate governance provisions, SOX imposes duties on several professionals. First, attorneys have a duty to report evidence of securities fraud to the chief legal officer of the

118. Cf. Hassink et. al., supra note 100; The Whistleblower Protection Program, supra note 113 (OSHA, in the United States, offers resources to enforce statutory protections of whistleblowers); Mary Kreiner Ramirez, Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power, 76 Univ. Cinc. L. Rev. 183 (2007), available at http://washburnlaw.edu/profiles/faculty/activity/_fulltext/ramirez-mary-2007-76universitycincinnatiawreview183.pdf; Martin, supra note 116.

119. Cynthia O'Donoghue & Nick Tyler, US wades into debate on revision to EU Data Protection Directive, **Global Regulatory Enforcement Law Blog** (Jan. 17, 2012), <http://www.globalregulatoryenforcementlawblog.com/2012/01/articles/data-security/us-wades-into-debate-on-revision-to-eu-data-protection-directive/>.

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company.¹²⁰ Second, executives must certify that the financial statements comply with securities law.¹²¹ Third, the audit committee members of the board of directors are required to take an active role in investigating and receiving whistleblowing complaints.¹²² Interestingly, employees have a general duty to cooperate with internal investigations, even if this leads to disclosing personally incriminating material. The Fifth Amendment right¹²³ against self-incrimination does not apply in this situation.¹²⁴ Additionally, corporate evidence may not be withheld by employees reasoning that this falls within their right to remain silent.¹²⁵

2. European Union

As previously explained,¹²⁶ in the United Kingdom, the obligations of employees follow from the “express terms” in the employment contract, the “implied terms” (including the duty of good

120. 15 U.S.C. § 7245.

121. *Id.* §§ 302, 906.

122. *Id.* §§ 301, 207, 407.

123. **U.S. Const.** amend. V (“[n]o person shall . . . be compelled in any criminal case to be a witness against himself”).

124. See Lindsay K Eastman, Note Revising the Organizational Sentencing Guidelines to Eliminate the Focus on Compliance Programs and Cooperation in Determining Corporate Sentence Mitigation, 94 **Minn. L. Rev.** 1620, 1642 (2010); Richard V. Wiebusch & Conor A. Gearty, Internal Investigations Conducted in the United Kingdom: A Human Rights Law Perspective, **Eur. Human Rights Law Review**, 20, 28 (2001).

125. *Bellis v. United States*, 417 U.S. 85, 88 (1974).

126. See *supra* § I.C.2.a.

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faith and fidelity), and “equity,” imposing fiduciary obligations.¹²⁷ There is no general duty to report or investigate imposed on “ordinary” employees. But a manager can have such a duty. In the case of Swain v. West Ltd, the general manager was obligated to report his managing director’s wrongdoing, following the duty to “provide, extend and develop the interest of the company.”¹²⁸ A consequence of not abiding by the duty to report colleagues was dismissal on the grounds of misconduct. Even if there is no express duty established in a code of conduct or contract, the employer could base its decision on “some other substantial reason” as a fair reason for dismissal since it suffices for employers to genuinely believe a reason to be fair.¹²⁹

In another UK case,¹³⁰ a company allegedly collapsed because of the misappropriation of \$400 million. The judge determined that whether the executive was under a duty to report the wrongdoing by its colleagues depended on several factors, including the terms of his employment contract, his duties and his seniority in the company, the nature of the wrongdoing, and the potentially adverse effect on the company.¹³¹

II. INTROSPECTING ON SETTING UP EFFECTIVE COMPLIANCE PROGRAMS:

127. Carr & Lewis, supra note 11, at 52.

128. Swain v. West (Butchers) Ltd., [1936] 3 All E.R. 261 (C.A.) (Eng.).

129. Carr & Lewis, supra note 11, at 71 (citing Ely v. YKK Ltd, [1993] Ir. L. R. 500 (C.A.) (N. Ir.)).

130. RBG Resources Plc v. Rastogi, [2002] EWHC (Ch) 2782 (Eng.).

131. David Lewis, When Do Employees have a Contractual Duty to Report Wrongdoing?, 33 **Ind. Law J.** 279 (2004).

ALIGNING THE INTEGRATED COMPONENTS OF CORPORATE COMPLIANCE

There is a lack of judicial guidance for corporations and the compliance industry to evaluate the effectiveness of a compliance program. Nonetheless, there are certain accepted standards and elements to understand how an “effective” compliance program can be set up, with the approach of several commentators favoring that a less detailed compliance program model set in law would be better; otherwise companies face the risk of being constrained to adapt to a stricture which they do not essentially need. Tailored compliance programs provide the ideal method for addressing these issues.

A. SETTING OUT THE STANDARDS FOR “EFFECTIVE” COMPLIANCE PROGRAMS: WHAT IS AN “EFFECTIVE” COMPLIANCE PROGRAM?

U.S. law reduces or eliminates organizational liability for enterprises that demonstrate the existence of “effective” internal compliance structures.¹³² The Organizational Sentencing Manual lists the minimum steps that an organization must take to qualify for consideration of a reduced sentence, “effective” compliance structures result in a reduction of the organization’s fine;¹³³ this fine can be reduced by up to 60 percent.¹³⁴

132. 18 U.S.C.A. § 8B2.1(a)(2) (2001) (stating that effective internal compliance structures are those that are “reasonably designed, implemented, and enforced so that [they] generally will be effective in preventing and detecting criminal conduct. Failure to detect the instant offense, by itself, does not mean that the program was not effective”).

133. *Id.* § 8C2.5(f)(1) (expressing that effective internal compliance structures are those that follow § 8B2.1(a)(2)); *id.* § 8B2.1(a)(2).

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First, an effective internal compliance structure contains a written ethics code or similar code of conduct that sets the ostensible limits of acceptable behavior within the firm.¹³⁵ Mechanisms of code enforcement—such as internal reporting and information gathering, policies regarding the investigation of reported violations, procedures and policies for protecting whistleblowers against retaliation, and internal procedures and sanctions for conduct or ethics code violations—exist in many corporate codes.¹³⁶

“Second, the organization must take steps to ensure that the code of conduct is communicated to employees and other agents . . . through training programs designed to familiarize personnel with the code and/or through dissemination and publication of the code.”¹³⁷ Company newsletters, employee manuals, and organization websites are some of the common mechanisms for dissemination.¹³⁸

134. The U.S. Sentencing Guidelines provide an example for § 8C3.4 where the organization’s fine was offset by 60%. 18 U.S.C.A. § 8C3.4, Commentary.

135. *Id.* § 8B2.1(b).

136. Andrew Brien, *Regulating Virtue: Formulating, Engendering and Enforcing Corporate Ethical Codes*, 15(1) **Bus. & Professional Ethics J.** 21 (1996); Richard S. Gruner, *Developing Judicial Standards for Evaluating Compliance Programs: Insights from EEO Litigations*, 1317 **PLI/Corp.** 162, 169 (2002).

137. Krawiec, *Cosmetic Compliance*, *supra* note 79, at 496; 18 U.S.C.A. § 8B2.1(b)(4)(A).

138. Krawiec, *Cosmetic Compliance*, *supra* note 79, at 496.

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“Third, an effective internal compliance structure will contain monitoring and auditing systems reasonably designed to detect prohibited conduct by employees and other agents.”¹³⁹

Fourth, “a reporting system that enables employees to report violations of the conduct code or of laws and regulations by others within the organization without fear of reprisal” is necessary for an internal compliance structure to be effective.¹⁴⁰

Fifth, high-level personnel within the organization must have oversight responsibility for compliance with the code of conduct.¹⁴¹

The U.S. Sentencing Guidelines Manual lists other necessary minimum steps including requiring the organization to use due care not to delegate authority to employees with a propensity to engage in illegal activities.¹⁴² Once a violation has been detected, the organization must take all reasonable steps to respond appropriately to the offense and to prevent similar offenses.¹⁴³ Additionally, the code of conduct must have been consistently enforced.¹⁴⁴

139. *Id.* at 496; 18 U.S.C.A. § 8B2.1(b)(5)(A).

140. Krawiec, *Cosmetic Compliance*, *supra* note 79, at 496; 18 U.S.C.A. § 8B2.1(b)(5)(C).

141. Krawiec, *Cosmetic Compliance*, *supra* note 79, at 496; 18 U.S.C.A. § 8B2.1(b)(2)(B).

142. 18 U.S.C.A. § 8B2.1(b)(3).

143. *Id.* §8B2.1(b)(7).

144. *Id.* §8B2.1(b)(6).

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B. THE INCENTIVES AND THE DISINCENTIVES BEHIND THE NEED TO SET-UP AN “EFFECTIVE COMPLIANCE PROGRAM”

Companies may have various incentives and disincentives to implement compliance programs into their organizational structure. Some of the incentives and disincentives that companies face include the following:

Incentives:

- Incentives for corporations to shield themselves against criminal liability.
- Incentives to deter criminal activity within a corporation.
- Incentives to potentially save millions of dollars.
- Incentives to adopt sub-optimal programs.
- Incentives to invest in “low-cost, potentially ineffective internal policing measures that fail to reduce organizational misconduct, yet nonetheless reduce organizational liability”¹⁴⁵ (what one commentator suggests is a cosmetic¹⁴⁶ approach to organizational compliance).
- Incentives for the company to self-report.

145. Krawiec, Organizational Misconduct, *supra* note 1, at 577.

146. See Krawiec, Cosmetic Compliance, *supra* note 79, at 487 (“Cosmetic” compliance structures should be understood as those structures designed to create the illusion of compliance for purposes of avoiding legal liability, rather than for the purpose of deterring misconduct).

Disincentives:

- Expenses to create a compliance program make it difficult for small-sized corporations.¹⁴⁷
- Weakness of the sentence downgrade, which “forces companies to choose between complying either with the spirit of the law or letter of the law.”¹⁴⁸ The more detailed the design, the less effective a compliance program is to the differing industry-specific needs each company adheres to. This could lead to under-deterrence by the corporation to implement compliance structures, which in turn may enhance liability, a disincentive to self-police ex post and a difficult to credibly enforce internal compliance measures ex ante.¹⁴⁹
- Information generated by compliance programs may be used against the corporation—by the government or in civil suits.¹⁵⁰ As such, the more effective the compliance program, the more likely the violations will become public.

Whether or not an organization implements a compliance program depends on how individual organizations see the effectiveness of their own compliance mechanisms and whether they

147. Krawiec, Organizational Misconduct, *supra* note 1, at n. 149.

148. Philip A. Wellner, Effective Compliance Programs and Corporate Criminal Prosecutions, 27 *Cardozo L. Rev.* 497, 510 (2005).

149. *Id.* n. 53; *see also* Richard A. Bierschbach & Alex Stein, Overenforcement, 93 *Geo. L.J.* 1743, 1774 (2005).

150. Wellner, *supra* note 148, at 510-511; *see discussion supra* Section II.C.2.ii on data privacy and protection.

ultimately want to invest in such programs at the risk of not being caught in an organizational misconduct.

C. CHARACTERISTICS OF AN “EFFECTIVE COMPLIANCE PROGRAM”

The central feature of an effective compliance program is that it must be adapted to fit legal standards and persuade the public of the program’s effectiveness. Some companies may continue their operations without a formal compliance structure,¹⁵¹ while others adopt four potential orientations for effective compliance programs.¹⁵²

- “Compliance-based” approach
- “Values-based” approach
- “External stakeholder” approach
- “Top management protection” approach¹⁵³

As previously mentioned, empirical studies do not demonstrate the effectiveness of compliance programs, so “courts and agencies lack sufficient information regarding the effectiveness of

151. Wellner, *supra* note 148, at 507-08 (quoting Frank O. Bowman, III, *Drifting Down the Dnieper with Prince Potemkin: Some Skeptical Reflections About the Place of Compliance Programs in Federal Criminal Sentencing*, 29 *Wake Forest L. Rev.* 671, 686 (2004)).

152. *Id.* at 513.

153. *Id.*; Linda K. Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 *Cal. Mgmt. Rev.* 131, 138 (1999).

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internal compliance structures” designed primarily to avoid liability rather than to deter misconduct.¹⁵⁴ But a compliance program will generally be considered effective if it “promotes an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”¹⁵⁵

Organizational culture, incentive and reward systems, and management commitment to ethical conduct all shape the organizational environment, which determines whether an internal compliance structure is effective or not.¹⁵⁶

Two cursory standards for understanding what constitutes an “effective” compliance program are the OECD standard and the U.S. Sentencing Guidelines Standard.

154. Krawiec, Organizational Misconduct, *supra* note 1, at 582.

155. 18 U.S.C.A. § 8B2.1(a), Application Note 3.

156. Jeff Allen & Duane Davis, Assessing Some Determinant Effects of Ethical Consulting Behavior: The Case of Personal and Professional Values, 12 **J. Bus. Ethics** 449, 456 (1993) (finding that corporate culture and reward systems—rather than mere ethics codes—impact employee behavior); Anita Jose & Mary S. Thibodeaux, Institutionalization of Ethics: The Perspective of Managers, 22 **J. Bus. Ethics** 133, 138 (1999) (finding that 98.8% of managers surveyed ranked top management support and that 93% ranked corporate culture as more important than other factors such as conduct codes and training programs in encouraging ethical corporate conduct).

1. The OECD Standard

The OECD issued the “Good Practice Guidance on Internal Controls, Ethics and Compliance” in 2010, which provides guidance on combating bribery and setting standards for effective compliance programs.¹⁵⁷

The document notes that effective compliance programs require the following: (i) senior management personnel installed to support the compliance programs, (ii) a clear and publicly known corporate policy prohibiting bribery, (iii) the fact that all employees understand and abide by internal controls and compliance programs, (iv) effective supervision of the program, (v) adoption of provisions on any kind of payments, (vi) accounting to ensure accurate books and records, (vii) training for all employees and subsidiaries, (viii) measures for observation of conformity with the provisions of the compliance program, (ix) reporting and disciplinary proceedings if compliance fails, (x) an advice mechanism for employees facing potential violations, and (xi) periodic reviews for evaluation purposes.¹⁵⁸

2. The U.S. Sentencing Guidelines Standard

Regarded as the “gold standard” of compliance programs, the U.S. Sentencing Guidelines do not provide much detail on the standards of an effective compliance program, although they

157. See generally OECD, *supra* note 21.

158. *Id.*

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prescribe a multi-part test.¹⁵⁹ Instead, they provide general guidance, noting that an organization shall exercise due diligence to prevent and detect criminal conduct, promote an organizational culture that encourages ethical conduct, and commit to compliance with the law.¹⁶⁰ “Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct.”¹⁶¹

“The failure to prevent or detect an offense does not necessarily indicate that the program is ineffective at preventing and detecting criminal conduct.”¹⁶² The guidelines furthermore note that (i) standards and procedures must be established to prevent and detect criminal conducts; (ii) employees in highly-ranked functions should ensure the effectiveness of the program and have responsibility for this purpose; (iii) daily operation should be executed by specifically selected individuals, which should be periodically informed about the standards and procedures; (iv) compliance with the program should be ensured, including monitoring and auditing to detect criminal conduct; (v) to have and publicize an advice and whistleblowing system for employees and agents, which may include mechanisms that allow for anonymity or confidentiality without fear of retaliation; (vi) compliance shall be promoted and enforced through incentives and

159. See generally 18 U.S.C.A. § 8B2.1(a).

160. *Id.* § 8B2.1(a)(1-2).

161. *Id.* § 8B2.1(a)(2).

162. *Id.*

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disciplinary measures; and (vii) reasonable steps shall be taken to respond to criminal conduct.¹⁶³

The commentary notes that effectiveness may also depend on the relevant industry practice, the standard required by government regulation, the size of the company, and similar misconducts by the company in the past.¹⁶⁴ Furthermore, sector-specific standards and U.S. Department of Justice (DOJ) Guidance (memorandum for prosecutors and agreements of non-prosecution) provide additional indications of standards.¹⁶⁵

3. Standards across Europe for an Effective Compliance Programs

Recently, the French Competition Authority (French Authority) provided rather extensive guidance on indications of an effective compliance program indicating two main objectives of compliance programs: “firstly, [to] prevent the risk of committing infringements and, secondly, [to] provide the means of detecting and handling misconducts that have not been avoided in the first place.”¹⁶⁶ In addition to training the company’s supervising personnel, a culture of compliance must be created and maintained. The value of the compliance program depends on the combination of the preventive and corrective components. The French Authority notes that there is no “one-size-fits-all” program and that programs should be tailored to the characteristics

163. See generally 18 U.S.C.A. § 8B2.1(a).

164. *Id.* §8B2.1, Application Note 2(A).

165. See John S. Moot, Compliance Programs, Penalty Mitigation and The FERC, 29 **Energy L.J.** 547, 561-67 (2008).

166. **Autorité de la Concurrence**, Framework-Documents of 10 February 2012 on Antitrust Compliance Programmes, ¶ 11, available at http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf.

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of the company such as size, activity and markets, organization, governance, and culture.¹⁶⁷ The French guidelines mirror the requirements of the OECD and U.S. Sentencing Guidelines.

The British Office of Fair Trading (OFT) has also published guidance on competition law compliance. The OFT emphasizes that no specific compliance measures are obligatory; it suggests a “risk-based, four-step approach” that assists in tailoring the program to the risk faced by the company and is not mandatory.¹⁶⁸ “The key point is that businesses should find an effective means of identifying, assessing, mitigating and reviewing their competition law risks in order to create and maintain a culture of compliance with competition law that works for their organizations.”¹⁶⁹ The OFT approach is made up of the following ideas: (i) a commitment to compliance by management is considered the core of the program; (ii) aimed at identifying risks for the company; (iii) assessing the risk by indicating whether it is high, medium, or low risk; (iv) facilitating risk mitigation where policies, procedures, and training can be set up; and (v) reviewing the first three steps and the company’s commitment to compliance regularly.¹⁷⁰

167. *Id.* ¶ 19.

168. **Office of Fair Trading Guidance, *How Your Business Can Achieve Compliance with Competition Law*** ¶ 1.13 (June 2011), [available at](http://www.offt.gov.uk/shared_offt/ca-and-cartels/competition-awareness-compliance/oft1341.pdf) http://www.offt.gov.uk/shared_offt/ca-and-cartels/competition-awareness-compliance/oft1341.pdf.

169. *Id.* ¶ 1.14.

170. *Id.* ¶ 1.15.

III. CONCLUSION

The multitudinous corporate compliance questions that companies face every day, including how to deter organizational misconduct and how to not fall under the radar of courts and agencies, may increasingly lend support to cross-over considerations among employment law, criminal law, and antitrust law matters. There are strong incentives for establishing internal compliance structures implemented at a sub-optimal level when corporations choose to adopt compliance programs to shield themselves from corporate liability. But this is not to say that a discouraging picture of the effectiveness of compliance programs is painted by such an approach.

Ultimately, internal company investigations into corporate misconduct can be effectively carried out by setting up an effective compliance program that neither fits into any prescribed stricture, nor follows a “one-size-fits-all” approach. The underlying rationale behind setting up effective compliance programs rests in fostering a culture of ethics and legal compliance within corporations.

Compliance programs should be encouraged and not prescribed in a manner that compromises their effectiveness. Corporations should be allowed the freedom to tailor their programs more effectively to their industries and business models and not be constricted to any legal or judicial mechanical approaches.¹⁷¹ As one commentator effectively describes, “law should not ask whether the corporation adopted a relatively rigid framework prescribed by the [agency]. It

171. Wellner, *supra* note 148, at 524.

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should ask whether the corporation's actions were, in general, reasonable efforts to ensure compliance with the law."¹⁷²

172. Id.