Between a Rock and a Hard Place: The Conflict Between U.S. Corporate Codes of Conduct and European Privacy and Work Laws

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For several decades now, publicly-held corporations have been adopting codes of conduct to further both U.S. federal law and corporate goals. The implementation of such codes, however, is creating a legal conundrum for those firms seeking to operate transnationally and, in particular, in the European Union. At the heart of the problem is the incongruity between U.S. and European perspectives on human rights and worker privacy. Recently, in three cases heard in France and one in Germany, the codes of conduct of U.S. companies were held to be in violation of European human dignity laws and work and data protection laws. This Article examines in detail the conflict that arises as transnational corporations attempt to comply with both U.S. law and data protection and privacy laws in Europe. Part II reviews the history of U.S. corporate codes of conduct. Part III examines the legal derivation for certain provisions of these codes of ethics, with particular reference to the Federal Sentencing Guidelines and the Sarbanes-Oxley Act (SOX). Part IV reviews privacy law in the European Union and analyzes the four European cases that have been reported to date. Finally, Part V makes recommendations as to how companies may satisfy the duality of compliance with SOX and with European laws.

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I.
INTRODUCTION

The highly-publicized corporate governance failures in the early part of this decade\(^1\) have highlighted for U.S. organizations the need to heighten integrity and ethical behavior in corporate America. Although it has been the unspoken policy for several decades now for publicly-held corporations to adopt corporate codes of conduct or corporate codes of ethics,\(^2\) the recent scandals—as well as previous\(^3\) and subsequent\(^4\) legislation—have encouraged or even mandated that corporations adopt such policies.

Such codes further both federal and corporate goals and mandates by encouraging ethical conduct and statutory compliance and by improving self-governance.\(^5\) However, the implementation of such codes is creating a

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2. While some authors attribute separate meanings to “corporate codes of ethics” and “corporate codes of conduct,” in this article these terms will be used interchangeably to mean a set of guiding principles and mandates set forth in one or more documents addressing ethical behavior and legal compliance.

3. See U.S. SENTENCING GUIDELINES MANUAL, § 8A1.1 (2005). The Guidelines apply to “corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated associations, governments and political subdivisions thereof, and non-profit organizations.” Id. at cmt. n.1. The Guidelines are not mandatory. However, they set the benchmark for proper corporate conduct. The Guidelines, as amended in 2004, pursuant to a mandate in the Sarbanes-Oxley Act (“SOX”), tighten the criteria a corporation must follow in order to have an effective compliance program. More importantly, the Guidelines urge organizations to establish both a compliance and ethics program that “encourages ethical conduct and a commitment to compliance with the law.” Id. at § 8B2.1(a)(2). See also David Hess, Robert McWhorter & Timothy Fort, *The 2004 Amendments to the Federal Sentencing Guidelines and their Implicit Call for a Symbiotic Integration Of Business Ethics*, 11 FORDHAM J. CORP. & FIN. L. 725 (2006).

4. See, e.g., Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of titles 11, 15, 18, 28 and 29 of the U.S.C.). SOX mandates that organizations implement procedures for “the receipt, retention, and treatment of complaints...regarding accounting, internal accounting controls, or auditing matters; and the confidential, anonymous submission by employees...of concerns regarding questionable accounting or auditing matters.” Id. at § 301(m)(4)(A) and (B) (codified at 15 U.S.C. § 78f). See also infra Part III.B for a discussion of specific provisions of the Act addressing codes of conduct. The U.S. stock exchanges also have affirmative requirements concerning codes of ethics and further require codes have an enforcement mechanism. Codes subject to the jurisdiction of the SEC must be designed to promote ethical behavior, handling of conflicts of interest, timely and accurate public disclosures as well as compliance with laws. Further, codes must promote prompt internal reporting of code violations and contain enforcement mechanisms to this effect. Id. at § 406; 7 C.F.R. § 229.406 (2005); NYSE GROUP, LISTED COMPANY MANUAL, § 303A.10, http://www.nyse.com/lcm/1078416930909.html?enable=section&sn=section=3&ssnumber=303A.00. (2004) [hereinafter NYSE].

5. A recent survey by Deloitte and Corporate Board Member Magazine showed that 49.5% of the companies surveyed not only had codes of ethics, but also had appointed an ethics and compliance officer, implemented a compliance program, and conducted ethics and compliance training. Of those surveyed, 98% agreed that an ethics and compliance program, including a code, was an essential component of corporate governance. *See DELoitTE, BUSINESS ETHICS AND COMPLIANCE IN THE*
legal conundrum for those firms seeking to operate transnationally and, in particular, in the European Union (EU). At the heart of the problem is the incongruence between U.S. and European perspectives on human rights, which is apparent in European human dignity laws, as well as work and data protection laws created to protect the privacy of European workers. Three recent cases heard in France and one in Germany found U.S. companies' codes of conduct to be in violation of such laws. In each instance, the violation arose from wording in these codes that encouraged employees of the corporation to use anonymous hotlines to report a wide range of infractions. Although U.S. corporations see anonymous whistleblowing as a benign way to encourage employees to report improper activity, the French, for example, perceive the concept as an


9. Unlike the United States, European law is vehemently protective of any number of different types of privacy including consumer data, credit reporting and workplace privacy. For a comparison of U.S. and European privacy law see generally James Whitman, The Two Western Cultures of Privacy: Dignity Versus Liberty, 113 YALE L.J. 1151, 1155 (2004).


12. Whistleblowing is the act of sounding the alarm from within an organization in which the employee works for the purpose of disclosing legal or ethical violations committed by other members of the organization that threaten the public interest. See Sissela Bok, Whistleblowing and Professional Responsibility, N.Y.U. EDUC. Q., Summer 1980, at 2. See also, MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE: THE ORGANIZATIONAL & LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES (1992).

invitation to abuse; such anonymous whistleblower hotlines could be used to slander coworkers or to identify someone maliciously. The anonymity provision in particular has touched a national raw nerve in France, where it conjures World War II memories of citizens anonymously reporting on one another to the Nazi-backed Vichy regime. Such provisions are also clearly in violation of French data protection laws, which limit the collection and transfer of information about French citizens out of the country. The recent cases in France found the U.S. corporations' codes unenforceable both for the codes' anonymous whistleblowing provisions and for the codes' procedures for circulating such allegations overseas to the U.S. companies' home offices. In the German case, the court ruled Wal-Mart's hotline illegal because Wal-Mart had not discussed the provision with its workers pursuant to Germany's worker co-determination laws. In addition, EU data protection laws require employers to provide a higher level of confidentiality to their employees than that required by U.S. laws.

Although a large percentage of U.S. corporations have historically used ethics reporting policies or whistleblowing schemes voluntarily to effectively manage risk and establish good corporate governance, these policies have become mandatory since the passage of the Sarbanes-Oxley Act ("SOX"). This Act, which was passed in response to the serious unethical and illegal behavior of corporate executives at the turn of the century, is one of the few Federal laws to mandate a vehicle for confidential reporting. 

Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes-Oxley Act, 76 St. John's L. Rev. 875 (2002).

14. Sotto, Kuner & Simpson, supra note 13, at 48. See also McDonald's Decision, supra note 10.


17. McDonald's Decision, supra note 10; CEAC Decision, supra note 10.


19. Law No. 78-17 of Jan. 6, 1978, Journal Officiel de la République Française [J.O.] [Official Gazette of France] (Jan. 7, 1978), translated at http://www.cnil.fr/fileadmin/documents/uk/78-17VA.pdf. See infra Part IV.B.1. Although the European Union Data Protection Working Party issued a memorandum designed to decrease the mounting tension between EU data protection laws and Sarbanes Oxley by recognizing a narrow application of whistleblowing provisions, it is not likely to solve the problem. Although the opinion recognizes the legitimacy of whistleblower systems and provides guidance for their operation in the European Union, it limits the application of whistleblower systems in the European Union such that it confounds a U.S. company's universal application of provisions typically found in its code. It thus adds a greater degree of complexity to the international implementation of such systems. Bobbie Gregg, Privacy Laws Limit Whistleblowers, 5 Bus. Ins. 24 (2006). See infra notes 305-11 and accompanying text for a discussion of the Working Party opinion.

reporting of possible violations. Not only is the Act causing problems for U.S. companies with subsidiaries overseas to whom the companies want to apply a universal code of ethics, but effective July 2006, foreign companies listed on U.S. stock exchanges must also comply with Sarbanes-Oxley.

Companies such as Toyota, Sony, HSBC, and British Petroleum must now enact corporate codes with anonymous reporting systems or they will be in violation of U.S. law and thereby subject to potential de-regulation by the SEC. Thus, compliance with U.S. law potentially places firms in violation of EU privacy laws.

U.S. corporations must conceive of a way to both apply their codes of ethics to their overseas subsidiaries in compliance with SOX and simultaneously accommodate foreign laws and values that are in conflict with these codes. The four European cases referenced above suggest that U.S. corporations (and foreign corporations listed on U.S. stock exchanges) will face a growing challenge to the application of their codes as their operations spread increasingly across the globe.

This Article will examine in detail the conflict posited by compliance with both SOX in the United States and the data protection and privacy laws in Europe, and suggest how corporations might address this issue. Part II will review the history of corporate codes of conduct in the United States. Part III will examine the legal derivation of certain provisions common to many corporate codes of ethics, with particular reference to the Federal Sentencing Guidelines and to SOX. Part IV will review privacy law in the EU and analyze in depth the four European cases that have found provisions of U.S. corporate codes of conduct to be illegal. Finally, Part V will make recommendations as to how companies may satisfy compliance with both SOX and with European laws.

21. *Id.* at § 301. Section 301 provides that audit committees of public companies must establish procedures to provide employees with the opportunity to confidentially and anonymously submit any concerns they may have relative to questionable accounting or auditing procedures without fear of retaliation. Companies have typically responded to section 301 by implementing employee whistleblower hotlines, either telephone or web-based. Sotto, Kuner & Simpson, *supra* note 13.


23. See *infra* Part IV.B for a discussion of the problems faced by U.S. companies McDonald’s, CEAC, and Wal-Mart relative to European laws.

24. See *infra* Part II.

25. See *infra* Part III.

26. See *infra* Part IV.

27. See *infra* Part V.
II.
CORPORATE CODES OF CONDUCT/CODES OF ETHICS

A. U.S. Influences on Corporate Codes

In the United States, state statutes governing corporations are for the most part enabling statutes, which provide a framework for such corporations to exist. Regulation of corporations, which might include the creation of a code of ethics, is then left to the internal management of the corporation. There are, however, some Federal statutes that address the internal regulation of corporate affairs. Of importance to our analysis of corporate codes of conduct are: securities laws, the Federal Sentencing Guidelines, and the Sarbanes-Oxley Act. In contrast, corporations in the EU are more highly regulated and much more of the law is mandatory instead of enabling.

Corporate codes of conduct have been generally defined as “companies’ policy statements that define ethical standards for their conduct.” The U.S. Department of Labor has explained the use of these codes in the following manner:

Corporations voluntarily develop such codes to inform consumers about the principles that they follow in the production of the goods and services they manufacture or sell. Corporate codes of conduct usually addressed many workplace issues—including child labor—and, according to some observers, are part of a broader movement toward social responsibility.

Corporate codes may be created either by the founder of the company, the Board of Directors, the CEO, top management, legal departments, or

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29. NYSE, supra note 4. See also infra Part III.


even consultants. The codes of companies working at the national level generally cover ethical standards of behavior and compliance with federal and state laws. It is important to note that corporate codes are voluntary, self-imposed obligations which have no legal impact and are not enforceable.

As the International Labour Organization is quick to note, there is a distinction between corporate codes of conduct and codes of conduct for multinational corporations. The former are individual company policy statements that define a company’s own ethical standards, while the latter are statements generated by international bodies to address broader, global goals such as human rights, fair labor laws, prohibitions against child labor, and environmental protection. While codes of conduct for multinational corporations are intended to supplement regulation in a variety of nation-states, U.S. corporate codes of conduct typically address only U.S. ethical standards and legal requirements. The codes of McDonald’s, Compagnie européenne d’accumulateurs (Exide Technologies), and Wal-Mart were arguably too U.S.-centric and had not been reviewed sufficiently for external application.

In some instances, a code of conduct may be only a one-page mission statement that broadly addresses the company’s ethical standards and responsibilities without giving specific guidelines about unethical or illegal acts. The Johnson & Johnson corporate credo, published in 1943, is of such a nature. In contrast, other corporations adopt codes of extensive length. Lockheed Martin’s code, for example, contains twenty-three separate sections with such specific directives as “[p]romote a positive work environment” and “[k]now the rules about employing former government officials.” Most transnational corporate codes today attend to a variety of issues, including human rights, “the treatment of employees, relations with

37. INTERNATIONAL LABOUR ORGANIZATION, supra note 33.
38. JENKINS, supra note 33, at 5.
government officials, certain business practices, and the environment. Although there is no uniform framework for corporate codes of ethics, they are likely to include provisions addressing U.S. legal issues such as conflicts of interest, insider trading, harassment and discrimination in the workplace, and misrepresentations in financial reporting.

The monitoring and enforcement of these codes has been a major point of contention. Most transnational corporations advocate internal monitoring to enforce their codes, yet the codes rarely take the added step of providing sanctions for violations. Since these codes do not have the force of law behind them, it is unclear whether they actually affect the behavior of the organization’s employees. However, pursuant to the mandates of SOX, it is likely that the corporations that are now required to draft such codes are giving them more attention.

Corporate codes in the United States date back to the early 1900s, when the founder of Johnson & Johnson, General Robert Wood Johnson, adopted the code for his company pursuant to a sense of social responsibility. Johnson defined the corporation’s responsibilities to four stakeholders: customers, employees, stockholders, and the community. It was not until the 1980s that other companies adopted codes of conduct, largely in reaction to scandals in the defense industry and on Wall Street, as well as the public disclosure of bribery and questionable payments made by many major U.S. companies. At this point, corporations looked to codes of conduct as a way to institutionalize business ethics and to stave off government regulation.

Not only have companies adopted internal codes of conduct to prevent government regulation, but they have also adopted principles promulgated by private groups to address ethical issues with regard to their operations overseas — and to preempt public denunciation. For example, U.S.

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42. Baker, supra note 40, at 138.
43. Johnson & Johnson, supra note 39.

   to the extent business regulates itself, develops and implements best practices, and cooperates with the business community in other countries, the pressure for new rules may be tempered. Positive efforts on the part of business to confront legitimate concerns about social and environmental issues will also help blunt the efforts of trade unions and NGOs who seek to control corporate behavior in the pursuit of their objectives.

1. ZELDENRUST & N. ASCOLY, INT'L RESTRUCTURING EDUC. NETWORK EUROPE, CODES OF CONDUCT FOR TRANSNATIONAL CORPORATIONS: AN OVERVIEW 45 (1998). See also JENKINS, supra note 33, at 43.
companies adopted the Sullivan Principles\(^4\) for doing business in South Africa during the apartheid era in order to stave off the specter of consumer boycotts. U.S. corporations also adopted the McBride Principles for addressing labor standards issues in Northern Ireland,\(^4\) the Slepak Principles for addressing issues in the former Soviet Union,\(^4\) and the Maquiladora Standards of Conduct for addressing labor standards in Mexico and Central America.\(^4\)

Besides communicating a founder's beliefs or preempting federal regulation or public castigation, corporations also created codes to guide corporate culture and to communicate the corporation's identity to employees and stakeholders alike. Corporate codes of conduct also served to reassure analysts and potential investors that a company understood and abided by ethical standards.\(^5\) Some authors have suggested that corporations implement a code of ethics under the expectation that they will receive more favorable treatment by such rating agencies as Moody's, Standard & Poor's, and Fitch.\(^5\)

Congress' amendments to the Federal Sentencing Guidelines in 1991, which added corporations to the list of criminal defendants to whom the Guidelines applied, provided another impetus for corporations to create codes of conduct.\(^5\) These codes came to be seen as a means to comply with the Federal Sentencing Guidelines' recommendation that companies implement self-policing structures through effective compliance and ethics programs. Organizations that had a code of ethics would typically receive a decreased fine if they were tried and sentenced under the Guidelines.

Today, in the post-Enron and post-SOX world, "substantial efforts to establish and implement and enforce such codes are the norm among North American companies of all types."\(^5\) Because the U.S. Federal Sentencing Guidelines and SOX are of such importance to our analysis of the provisions in U.S. corporate codes of ethics that conflict with European

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46. See Cragg, supra note 41, at 6.
47. Id.
49. Id.
53. Duffy, supra note 50.
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privacy laws, an analysis of these acts will be undertaken separately in Part III.  

B. Global Influences on Corporate Codes of Conduct

A number of global changes contributed to an increased emphasis on corporate governance during the late 20th century and early 21st century, which included the proliferation of corporate codes of ethics. For instance, there was a period of economic development during the 1980s in which developed countries shifted away from social democratic influences and underdeveloped countries shifted away from importing and toward industrialization and statism. As one author has noted, the economic role of the state was also redefined through the increased attention to monetarist economic policies, integration of international markets for goods and finance, privatization of state assets and, in developing countries, trade liberalization and export promotion. This metamorphosis of the state’s role, along with an increased dependence on the market, encouraged corporations to self-regulate and to act ethically in their business transactions. As Corporate Watch reports, fifty-one of the one hundred largest economies in the world are global corporations, while only forty-nine are countries. Furthermore, the world’s 200 largest corporations create more than one quarter of the world’s economic activity. The obligation of these corporations to act ethically is critical considering their relative impact on both the economic and humanitarian structure of societies worldwide. The rapid development of corporate codes of ethics in the 1990s was an indication of this shift in the economic role of the state, as was the emphasis in such codes on three areas in particular: labor, environment, and social conditions.

The global economic changes over the last two decades have contributed significantly to the interest not only in corporate codes of ethics, but also in corporate social responsibility on the whole. With the transterritorialization of corporate activities, including the use of subsidiaries, partnerships with foreign entities or governments, and outsourcing, corporations’ activities have become much more decentralized. During the 1990s there was growth of global “commodity”

54. See infra Part III.
55. JENKINS, supra note 33, at 1.
56. Id.
57. Cragg, supra note 41, at 2.
58. Id.
59. JENKINS, supra note 33, at 5.
or "value" chains in many industries.61 Through these value chains, corporations came to control production of goods from a great distance without exercising ownership. Brand-name producers like Nike, Levi Strauss, and well known retailers such as Wal-Mart, controlled the chain of manufacture of goods such as footwear, apparel, and food. With this new structure, it became possible for U.S. companies to manufacture goods in foreign countries for a fraction of the price it would cost to manufacture the same goods in the U.S. However these savings brought issues of fair trade, working conditions, and the desecration of the environment. Due to the tremendous increase in global communications during the same period,62 it became easier for the public to identify such abuses and report them widely. Through "active engagement," watchdog groups, consumers,63 shareholders, and other interested stakeholders all seized the opportunity to report on the often unethical and sometimes illegal behavior of U.S. corporations in these foreign ports so that corporations would feel pressure to adopt ethical practices.64 Public attitudes were changing as the U.S. population became more aware of environmental and human rights issues.65 Consumers demonstrated their power over corporate codes of ethics by, for example, demanding fair trade coffee,66 or by boycotting products made by companies that promoted child labor (such as Nike and Kathy Lee Gifford) or other deplorable working conditions (such as the Gap in its supplier factories in El Salvador).67 Pursuant to public outcry, these companies changed their policies and their codes. One might argue that such measures were taken to protect the companies' brand names and reputations,68 which

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62. JENKINS, supra note 33, at iii.

63. While it is true that consumers attempt to put pressure on corporations to adopt more ethical behavior, researchers have questioned the extent to which consumers have a true impact on corporate behavior. See, e.g., Baker, supra note 40, at 136; JENKINS, supra note 33, at 15. However, in contrast to these doubts, a UK Secretary for Estate for International Development felt that they did, stating: "Codes have come into existence because consumers do not want to purchase goods produced by exploiting workers here or overseas." CLARE FERGUSON, DEPT. FOR INT'L DEV., A REVIEW OF UK COMPANY CODES OF CONDUCT (1998); JENKINS, supra note 33, at 14.


65. JENKINS, supra note 33, at 7.

66. For example, pursuant to hundreds of letters received by Starbucks Coffee Co. from consumers demanding that the working conditions on Guatemalan coffee plantations be improved, it decided to introduce a code of ethics for all coffee bean suppliers. A Starbucks executive admitted that the protesters had "prodded' the company into developing a code." U.S. Dept. of Labor, supra note 34.


68. An OECD survey in 2000 found that the most important reason for companies to adopt a code of ethics was to protect or enhance its reputation. ORG. FOR ECON. CO-OPERATION AND DEV., CODES OF
have admittedly factored into the development of corporate ethical standards.\textsuperscript{69} Associating brand names, consumer goodwill, and positive ethical changes in corporate governance may even have a positive effect on a corporations’ return on investment, employee loyalty, consumer preferences, and stock prices. As the CEO of Levi Strauss & Company has said:

I believe – and our company’s experience demonstrates – that a company cannot sustain success unless it develops ways to anticipate and address ethical issues as they arise. Doing the right thing from day one helps avoid future setbacks and regrets. Addressing ethical dilemmas when they arise may save your business from serious financial or reputational harm.\textsuperscript{70}

Finally, for some corporations, it took a major global disaster or scandal for them to adopt or to enhance their corporate codes of ethics. An early example of this was the Lockheed bribery scandal of the late 1970s.\textsuperscript{71} The fact that American companies were willing to condone bribery in foreign business transactions in order to successfully compete was one of the earlier warning signs that corporate policies on international standards of conduct needed to be addressed.\textsuperscript{72} Then, following the pricing scandals of the defense industry in the 1980s, General Electric felt compelled to revamp its own image. It created the office of corporate ombudsman and drew up an eighty-page statement on ethical concerns entitled “Integrity: The Spirit & the Letter of Our Commitment,”\textsuperscript{73} which is available in virtually every language spoken in countries where General Electric operates. General Electric also created the first anonymous hotline through which employees could ask questions about the aforementioned guidelines or report suspected violations.\textsuperscript{74} Shell Oil Company is a final example of a corporation that altered its codes of ethics after a widely-publicized disaster. Shell Oil revamped its code in the face of the criticism that followed Ken Saro-Wiwa’s conviction and execution in an unfair trial for his protests against Shell’s operations in Nigeria.\textsuperscript{75} The company introduced sections

\begin{itemize}
  \item \textsuperscript{69} Companies whose budget includes millions of dollars spent on advertising and whose sales depend heavily on brand image and consumer goodwill are particularly responsive to allegations that their operations exploit children or demonstrate poor human rights practices and will respond by changing their code of ethics to prohibit such practices. \textit{Id.}
  \item \textsuperscript{70} \textit{Id.}
  \item \textsuperscript{71} Cragg, \textit{supra} note 41, at 10.
  \item \textsuperscript{72} \textit{Id.}
  \item \textsuperscript{74} See KPMG, \textit{supra} note 45.
\end{itemize}
on human rights in its code of ethics to respond to public outcry and to save its brand name.  

The U.S. and foreign governments have also tried to influence the content of transnational corporate ethics codes. In May of 1995, President Clinton promulgated the Model Business Principles, which were to be administered by the Department of Commerce. These principles addressed the global behavior of multinational corporations and encouraged these corporations to establish codes of conduct that included workplace health and safety provisions and policies against child and forced labor; however, the Model Business Principles provided neither incentives to include such provisions in codes of conduct, nor sanctions for failing to do so.

Representative Cynthia McKinney introduced the Corporate Code of Conduct Act (2000) in response to the protests against the World Trade Organization in Seattle and in Washington, D.C., concerning globalization and the treatment of workers. The Act’s primary goal was to identify strict guidelines for corporations operating in the global arena with regard to labor rights, human rights, and the protection of the environment. The guidelines were derived from both internationally-recognized and U.S.-developed standards. Various international organizations made a number of attempts to influence transnational corporations’ ethical principles. These efforts


77. Baker, supra note 40, at 115.


79. Clyde Summers, The Battle in Seattle: Free Trade, Labor Rights, and Societal Values, 22 U. PA. J. INT'L ECON. L. 61 (2001). This article addresses the huge protest made at the November 30, 1999, meeting of the World Trade Organization in Seattle. Professor Summers, in defining the issues surrounding the protest, stated "The root of their protest was that the WTO, in developing its rules and procedures for promoting free trade, had not given adequate, if any consideration to labor rights, environmental problems, or human rights." Id.; see also Baker, supra note 40, at 11.


82. Id.
emerged early in the 1970s, during a major campaign to develop international standards for corporations. Part of this effort came from the corporate sector itself when the International Chamber of Commerce issued the Guidelines for International Investment of 1972.\textsuperscript{83} Subsequent efforts emanated from international organizations, and in particular from the agencies of the United Nations. The Center on Transnational Corporations, created in 1974 by the United Nations,\textsuperscript{84} fostered the development of a Draft Code of Conduct for transnational corporations. Several United Nations agencies subsequently developed codes covering various aspects of transnational corporate behavior. Among these was the International Labour Organization’s (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy in 1977.\textsuperscript{85} This declaration created voluntary guidelines for corporations in the area of “employment, training, worker conditions, and industrial relations.”\textsuperscript{86} Although the Tripartite Declaration was intended to impact corporations, the ILO’s conventions did not operate on multinational corporations directly. Instead, the Declaration relied on governments to ratify and implement its provisions.\textsuperscript{87} Countries were charged with implementing their own legislation to legally bind corporations.\textsuperscript{88}

The Organization for Economic Cooperation and Development (OECD) is another organization which successfully influenced corporate governance and the drafting of corporate codes of ethics.\textsuperscript{89} The OECD adopted the Declaration on International Investment and Multinational Enterprises in 1976, which included the OECD Guidelines against bribery. The important aspect of these Guidelines was their strong language that corporations “not render—and they should not be solicited or expected to render—a bribe for other improper benefit, direct or indirect, to any servant or holder of public office.”\textsuperscript{90} Unfortunately, no country criminalized

\begin{itemize}
\item \textsuperscript{83} JENKINS, supra note 33, at 2.
\item \textsuperscript{84} Id.
\item \textsuperscript{85} Id.
\item \textsuperscript{86} HAUFLER, supra note 78, at 17; Cragg, supra note 41, at 7. See also Abdallah Simaika, The Value of Information: Alternatives to Liability in Influencing Corporate Behavior Overseas, 38 COLUM. J.L. & SOC. PROBS. 321, 325 (2005).
\item \textsuperscript{87} HAUFLER, supra note 78, at 17.
\item \textsuperscript{88} Id.; see also Simaika, supra note 86, at 325. The fact that international law applies to governments rather than directly to specific corporations is a challenge representative throughout the scope of international law. See Robert McCorquodale, Human Rights and Global Business, in COMMERCIAL LAW & HUMAN RIGHTS, 89, 92 (Stephen Bottomley & David Kindley eds., 2002).
\item \textsuperscript{89} See generally Organisation for Economic Co-operation and Development [OECD] Home Page, http://www.oecd.org (last visited August 1, 2006) (existing member states include Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungry, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United States, and the United Kingdom).
\item \textsuperscript{90} Padideh Ala’i, The Legacy of Geographical Morality and Colonialism: An Historical Assessment of the Current Crusade Against Corruption, 33 VAND. J. TRANSNAT’L L. 877, 922 (2000).
\end{itemize}
bribery under the Guidelines and thus their impact remains questionable. However, in 1994 the OECD revisited the issue and adopted a Recommendation on Bribery in International Business Transactions which urged member nations to take "effective measures to deter, prevent, and combat bribery of foreign public officials in connection with international business transactions."

Further, the OECD Guidelines recognize that corporations have an obligation not only to the economic progress of communities in which they do business, but also to the social progress of these communities and to the protection of their environments. The member nations were to adopt anti-bribery laws modeled after the U.S. Foreign Corrupt Practices Act; eventually all twenty-nine member states signed onto this convention in 1997. Once again, the Guidelines are voluntary and there is no mechanism currently in place to mandate compliance.

In 1998, the Business Sector Advisory Group on Corporate Governance Issues recommended that the OECD:

- Encourage member countries to adapt their corporate governance regulatory frameworks to change competitive and market forces;
- Formulate minimum international standards of corporate governance designed to promote fairness, transparency, accountability and responsibility;
- Issue suggested guidelines for voluntary "best practices" for boards to improve accountability, ensuring that the guidelines encompass board independence;
- Encourage common principles for addressing the comparability, reliability, and enforcement of corporate disclosure; and
- Emphasize the impact which changes in corporate governance practices would have on society at large, and on the need to clarify responsibilities between the public and private sector.

Finally, in 2000 the OECD issued a far more detailed set of guidelines addressing the concerns of non-governmental organizations (NGOs)

91. Id.
92. Cragg, supra note 41, at 8.
94. See Ala'i, supra note 90, at 923. See also Baker, supra note 40, at 120. Once again, however, the OECD guidelines are not self executing and member nations must themselves enact the anti-bribery type legislation.
95. McCorquodale, supra note 88, at 59.
regarding the increasing power of transnational corporations.97 Once again, these guidelines focused primarily on labor issues, environmental issues, and bribery; however, the OECD guidelines also addressed human rights issues. Corporations have had difficulty understanding how broadly the guidelines should be embraced in any corporate code of ethics.98 Further, the Guidelines only vaguely addressed corporate duties and stakeholder accountability.99 As with the guidelines mentioned earlier, the OECD’s guidelines are voluntary and lack any enforcement mechanism.

In 1999, the UN again attempted to promote ethical corporate behavior by implementing the Global Compact.100 The Compact identifies ten principles of human rights, labor rights, and environmental protection derived from the Universal Declaration of Human Rights, the ILO Tripartite Declaration of Fundamental Principles and Rights at Work, and the Rio Declaration on the Environment and Development. Kofi Annan, the head of the United Nations at the time, stated that the purpose of the Global Compact was to align corporations and UN agencies, labor, and civil society in support of these ten principles.101 The Global Compact also urged transnational corporations to follow the OECD Guidelines for Multinational Enterprises. Most, if not all, member states of the OECD have complied, setting forth the OECD Guidelines as recommendations for “standards for responsible business conduct consistent with applicable laws.”102 Corporate compliance, however, is voluntary.

All of these efforts by global organizations to influence the behavior of transnational corporations, whether through Compacts, Guidelines, or other recommendations, fall short in the same dimension: they are only voluntary. However, insofar as such compacts and guidelines express public opinion, they may indirectly influence the content of transnational corporate ethics codes. Yet even when corporations do adopt the principles advanced in these guidelines, there is no assurance that these codes will be enforced.

99. Sumaika, supra note 86, at 328.
The corporate codes provide neither *ex ante* nor *ex post* sanctions. Thus, it becomes necessary for corporations to adopt anonymous reporting mechanisms to encourage workers to alert management to illegal or unethical practices. And when the enforcement of corporate codes depends on whistleblowers, it furthermore becomes necessary for governments that want to encourage compliance to draft legislation (such as SOX) to protect whistleblowers against retaliation. Further, corporations themselves have gone so far as to adopt principles in their codes of conduct which prohibit whistleblowers from being retaliated against.

Other organizations have influenced the development of corporate codes of ethics, including the Caux Round Table, and NGOs such as Greenpeace and Amnesty International. The Round Table was founded in 1986 by Frederick Phillips, the former president of Philips Electronics, and Olivier Giscard d’Estaing, the Vice-Chairman of INSEAD. The Round Table focuses in part on reducing social and economic threats to world peace and stability. It emphasizes cooperation and mutual understanding between countries and corporations, and encourages these relationships through the highest moral values and responsible actions by individuals in their interactions in the world business community.

III.

The numerous efforts by a variety of institutions, organizations, private watch groups, and governments underscore the public concern over the power transnational corporations have come to exert on the global economy and on humanity itself. This concern is reflected in the types of humanitarian issues the codes, compacts, and guidelines outlined in the previous Part all embrace, which include workplace standards, workers’


106. CAUX ROUND TABLE PRINCIPLES FOR BUSINESS, http://www.itcilo.it/english/actrav/telelearn/global/ilo/code/caux.htm (last visited Aug. 8, 2006). In brief, its general principles embrace the responsibility of businesses beyond shareholders toward stakeholders, the economic and social impact of business toward innovation, justice and world community, business behavior beyond the letter of law toward a spirit of trust respect for rules, support for multilateral trade, respect for the environment, and avoidance of illicit operations. It further identifies business stakeholders as the following: customers, employees, owners/investors, suppliers, competitors, and communities. Id.
rights, bribery, and the protection of the environment. Although none of these guidelines or compacts are mandatory, it is clear that corporations respect the ideology promoted by these groups, whether they do so for humanitarian reasons or for purely promotional ones. In summary, the initial wave of corporate codes of conduct originating in the late 1970s, focused on issues such as bribery and questionable payments, which emanated from the public outrage over unethical payments made by many multinational corporations to foreign governments.107 The more recent wave of corporate codes was prompted by concerns for child labor and working conditions as well as environmental issues, which have become global issues over the last two decades.

While the impact of the above guidelines can be seen in the corporate codes of ethics for Exide Technologies (the parent company of Compagnie européenne d’accumulateurs), McDonald’s, and Wal-Mart,108 one issue remains open. Corporations have just begun to heed the concern that they neither monitor nor ensure compliance with their codes of ethics. A number of NGOs have complained that the codes are nothing but window dressing, and are not actually followed. The issue, then, is how to ensure that the directives in U.S. corporate codes of ethics are followed universally. Monitoring requires the cooperation of employees in subsidiaries all over the world, which raises the issue of whistleblowing. Although provisions for “blowing the whistle” on a workplace practice or on a fellow employee have been used for the past thirty years, two recent laws have generated increased concern over the concept, as they have driven the recent implementation of whistleblowing provisions in codes of ethics: the Federal Sentencing Guidelines, adopted in 1977 and made applicable to corporations in 1991, and the Sarbanes-Oxley Act, adopted in 2002 as a response to the corporate scandals at the turn of the century, including Enron, WorldCom, Healthcare and Tyco, among several others. The use of whistleblowing provisions and other U.S.-centric provisions is causing concern in European countries like France and Germany, where U.S. companies such as Wal-Mart, McDonald’s, Owens-Illinois, and Exide Technologies are spreading their bases. In fact, as of this writing, Wal-Mart has sold all its German stores partly because Wal-Mart’s code of ethics and concepts of corporate governance were found to be in violation of

107. JENKINS, supra note 33, at 5.
fundamental German principles and laws.\textsuperscript{109} It is important therefore to analyze the mandates behind both of these federal laws to fully understand the dilemma they pose for U.S. companies today, as exemplified in the four cases discussed in Part IV. In each of these cases, the corporation implemented a whistle-blowing clause to encourage employee compliance with the corporation's code of ethics (as required by SOX and urged by the Federal Sentencing Guidelines), and yet each time the policy was found unacceptable to the mores and legal requirements of European countries.

\textbf{A. The U. S. Federal Sentencing Guidelines}

The Federal Sentencing Guidelines were originally developed by the United States Sentencing Commission, a governmental body created in 1984.\textsuperscript{110} The goal of the Commission at that time was to create consistency in the sentencing of violators of federal laws.\textsuperscript{111} After these Guidelines were promulgated for individuals in 1987, the Commission then turned to create guidelines for organizations, which went into effect in 1991.\textsuperscript{112} The Guidelines take the form of a manual, which judges use to determine the appropriate sentences for corporations that are convicted of a federal crime. Before the commission generated this manual, the U.S. government lacked clear corporate sentencing policies for federal crimes. The Sentencing Commission conducted empirical research before it created the Guidelines and concluded that "corporate sentencing was in disarray... nearly identical cases were treated differently."\textsuperscript{113} In addition, it found that average fines were "less than the cost corporations had to pay to abide by the law."\textsuperscript{114} As a result, judges were having difficulty determining meaningful ways to punish corporations for their crimes.

The Commission used a "carrot and stick" approach to make the new Guidelines effective against corporate crimes. The carrot allowed criminally liable corporations that had developed the suggested ethics standards and procedures outlined in the Guidelines a reduced fine, which could be mitigated (up to 95\%) relative to the extent of their effort to curtail


\textsuperscript{110} See U.S. SENTENCING GUIDELINES MANUAL, supra note 3.


\textsuperscript{112} See U.S. SENTENCING GUIDELINES MANUAL, supra note 3.


\textsuperscript{114} CORPORATE CRIME IN AMERICA, supra note 113, at 30.
criminal acts within the corporation. Specifically, the Guidelines provided that a corporation could reduce its “culpability” by establishing an “effective compliance and ethics program” before it was charged with any offense, and by engaging in self-reporting, both to prevent and to detect violations of the law. The Guidelines set forth seven criteria to help corporations understand what constituted an effective compliance and ethics program: (1) the establishment of ethics and compliance standards and procedures; (2) the assignment of specific high-level employees to oversee ethics and compliance; (3) the taking of due care in delegating substantial discretionary authority; (4) the effective communication of standards and procedures to all employees and agents through training and through printed and electronic materials; (5) the monitoring and auditing of the ethics and compliance program and the establishment of a retribution-free means for employees to obtain information about standards and procedures and to report possible wrongdoing (e.g., a helpline); (6) consistent enforcement of discipline for employee violations; and (7) prompt response to any wrongdoing and the remedying of any program deficiencies. As a stick, the Guidelines could impose sentences on individuals and significant fines on corporations. Pursuant to the Guidelines, organizations that are found guilty of Federal offenses such as antitrust or securities violations, fraud, money-laundering, criminal business activities, bribery may be liable for fines. Company officers may also be sentenced or may serve periods of probation.

The specific goals of the Sentencing Guidelines were trifold: “(1) to define a model for good corporate citizenship; (2) to use the model to make corporate sentencing fair by providing objective, defined criteria; and (3) to use the model to create incentives for companies to take crime-controlling actions.” Evidence suggests that the Guidelines have successfully increased compliance and encouraged ethics programs across the country and even outside the United States. The Commission itself noted that the Bank of Tokyo (among others) used the Guidelines as a “focal point” for its overall compliance effort and that the Guidelines gave the bank “a clear picture of what a compliance program should look like and a set of

115. U.S. SENTENCING GUIDELINES MANUAL, supra note 3, at § 8A1.1 (“These guidelines offer incentives to organizations to reduce and ultimately eliminate criminal conduct by providing a structural foundation from which an organization may self-police its own conduct through an effective compliance and ethics program. The prevention and detection of criminal conduct, is facilitated by an effective compliance and ethics program, will assist an organization in encouraging ethical conduct and in complying fully with all applicable laws”).
116. Schwartz, supra note 111, at 296.
117. U.S. SENTENCING GUIDELINES MANUAL, supra note 3, at § 8B2.1; see also Edward L. Pittman & Frank L. Navran, Corporate Ethics and Sarbanes-Oxley, WALL ST. LAWYER (July 2003).
118. Izraeli & Schwartz, supra note 113.
120. Schwartz, supra note 111, at 299.
instructions on how to construct a program." \(^{121}\)

In a national study of compliance practices involving 333 corporations of various sizes and industries, forty-four percent of the respondents stated that the Guidelines caused them to add rigor to their compliance programs and twenty percent created compliance programs because of their awareness of the Guidelines. \(^{122}\) The author of the study found that "certainly, the guidelines are having a significant impact on what organizations are doing to prevent and detect violations of law." \(^{122}\) A separate study conducted by the Council of Ethical Organizations, whose respondents were 750,000 employees from 203 large U.S. companies, also found the Guidelines to have a significant influence on corporate ethics programs. Thirty percent of the companies in that study had significantly improved their ethics compliance programs subsequent to passage of the Guidelines. \(^{123}\)

The 1991 Sentencing Guidelines for corporations were responsible for the creation of compliance programs by corporations seeking to reduce their criminal culpability through prevention. However, organizations were initially unclear as to who was responsible for overseeing and implementing an effective program. A 1996 decision by the Delaware Chancery Court, \textit{In re Caremark}, \(^{124}\) clarified that responsibility for compliance programs rested with the board of directors. The court held that it was the board's responsibility to implement an adequate reporting system that would provide senior management and the board with timely and accurate information relating to legal compliance. \(^{125}\) The court further noted that that the failure to ensure the existence of an adequate reporting system might constitute a violation of a director's duty of due care. \(^{126}\) This Delaware decision elevated the responsibility for compliance programs to the level of a fiduciary obligation for individual board members. After this

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122. \textit{Id.} See also Schwartz, \textit{supra} note 111, at 299.
123. \textit{Corporate Crime in America}, supra note 113, at 67. It is interesting to note that although the Guidelines have been very successful in encouraging the self-regulation of corporations and the development of compliance programs, a statute with similar self-regulation goals, the Foreign Corrupt Practices Act, enacted in 1977, has not been seemingly as successful. The objective of the FCPA was to prohibit the bribing of foreign government officials by U.S. corporations. A recent article has suggested that the FCPA has been ineffective in achieving these goals: "the FCPA was not effective at raising the general standards of American business conduct either at home or abroad with respect to the bribery of foreign government officials or in encouraging the voluntary establishment of . . . internal control standards." William Woof & Wesley Cragg, \textit{The U S Foreign Corrupt Practices Act: The Role of Ethics, Law and Self-Regulation in Global Markets, in Ethics Codes, Corporations, and the Challenge of Globalization} 128 (Wesley Cragg ed., 2005). Relative to the FCPA's impact on compliance programs, they point to a 1995 study which showed that of those companies listed on the New York Stock Exchange who had codes of ethics (90% of companies listed had codes), only 36% had anti-bribery provisions in their codes, and less than 9% had specific control or monitoring procedures designed to ensure that the code was complied with. \textit{Id.}
126. \textit{In re Caremark Int'l Derivative Litig.}, 698 A.2d at 959.
decision it became generally understood that the implementation and oversight of compliance programs was the responsibility of the board and high-level management.

The Sarbanes-Oxley Act of 2002 mandated that the United States Sentencing Commission review and amend the Federal Sentencing Guidelines, which the Commission did in 2004. The Commission’s goal was to strengthen the Guidelines by enhancing the need for effective compliance while at the same time ensuring the effectiveness of the Guidelines’ deterrence and punishment provisions. Through this review, the Sentencing Commission amended the Guidelines to emphasize the importance of internal structural safeguards designed to prevent and detect criminal conduct. The Commission recommended that corporations implement internal crime prevention policies and self-policing. The amended Guidelines also urged business organizations to align themselves with the federal government to further self-policing, self-reporting, and cooperation in investigations into their own malfeasance.

The amended Guidelines are important not for introducing new concepts into the area of corporate compliance, but rather for clarifying the seven elements deemed necessary to an effective compliance program as defined by the original Guidelines. The revised Guidelines state that, in order to be effective, a compliance and ethics program must outline the “prevention and detection of criminal conduct” along with the “promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law.” The revised Guidelines place particular emphasis on three aspects of a compliance program: ethical behavior, organizational responsibility, and risk assessment. This new emphasis suggests that legal compliance is necessary but not sufficient; the corporation must also exhibit a strong commitment to ethical conduct by implementing a proactive management agenda that identifies key concerns for the constituents of a given corporation and also identifies the foreseeable ethical and legal risks. If a corporation that has committed a federal crime is deemed to have fully met the Sentencing Guidelines Amendments for compliance, its culpability score, in terms of dollars, may be lowered from huge sums to virtually nil.

129. Id.
130. Imperato, supra note 125, at 13.
131. Id.
132. Id.
134. Id.
135. Imperato, supra note 125, at 15.
Corporations began creating anonymous hotlines to address one particular provision of the 1991 Guidelines, which mandated "a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation" (e.g., a helpline) such that employees may obtain responses to concerns about variances in standards and procedures and report possible wrongdoing. These hotlines became even more prominent after the Sarbanes-Oxley Act, which directed the United States Sentencing Commission to amend the Federal Sentencing Guidelines.

The amendments to the Sentencing Guidelines enacted in 2004 enhanced the existing criteria for using auditing and monitoring systems by specifically providing that such systems be designed to detect legal violations. As mentioned above, corporations would have had difficulty effecting compliance were they not able to call upon employees to anonymously report wrongdoers and unethical or illegal practices. Further, because the U.S. is an employment-at-will country, meaning that the termination of the employment relation in this country is permissible at any time and for any reason, anonymity would be necessary for an employee to disclose illicit or unethical practices without fear of retribution. Otherwise, whistleblowing employees could very well fear being fired if their identities were to be discovered. Fired whistleblowers are not necessarily entitled to severance payments under U.S. law, and must therefore seek their remedies in court. The revised Guidelines acknowledged this imperative for anonymous hotlines by replacing the existing reference to "reporting systems without fear of retribution" with the more specific requirement of "anonymity or confidentiality... without fear of retaliation." These amendments to the Guidelines broaden the requirement from reporting the "criminal conduct of others" to "seeking guidance and reporting potential or actual violations of law." Whistleblowing thus became a staple provision in corporate codes of conduct after these changes. Ninety percent of those organizations

137. Id.
139. A discussion of the origins of the "at will employment" doctrine can be found in H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877).
140. Ralph Nader was credited with the concept of whistleblowing as a means to control corporate wrongdoing. See RALPH NADER ET AL., WHISTLEBLOWING (1972); Ralph Nader, A Code for Professional Integrity, N.Y. TIMES, Jan. 15, 1971, at 43. See also Callahan, Dworkin & Lewis, supra note 13.
143. Id.
surveyed by Deloitte and Corporate Board Magazine had implemented reporting mechanisms for anonymous and confidential reporting of code or legal infractions.144

Although whistleblowing145 has received almost universal acceptance as an organizational control strategy in the United States,146 as well as in other common-law countries such as the United Kingdom147 and the Australian states and territories,148 it remains an anathema in most European countries and flies in the face of European privacy laws and moral principles.149 Thus, the specific mandate in the amended U.S. Sentencing Guidelines that corporations use mechanisms to allow for anonymous reporting150 sets the stage for conflict with European law, as demonstrated by the cases discussed in Part IV.151

B. The Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley Act was signed into law in the summer of 2002152 to protect shareholder investment and to shore up shareholder confidence, which seriously faltered after the numerous and financially-devastating ethical lapses by publicly-traded corporations in the early years of the 21st century. The Act proposed to curb corporate malfeasance by revising the way corporations conduct business and by imposing a higher standard of accountability on executives.153 The Act enumerated five specific objectives: increasing accountability of corporate executives and board

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144. DELoitTE, supra note 5, at 3.
145. Whistleblowing has been most commonly defined as "the disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to affect action." MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 15 (1992).
146. Callahan, Dworkin & Lewis, supra note 13, at 880-81. Although the concept of whistleblowing was in fact highly controversial when first discussed by Ralph Nader, it has gained substantial public support subsequent to the corporate scandals of the early 21st century and the events of September 11, 2001. See, e.g., DOJ Set to Launch Nationwide System For Workers to Report to Suspicious Activities, Modified Whistleblower Rights to be Granted to Airport Screeners, DOT Official Announces, 18 INDIV. EMPL. RTS. REP. (BNA) 53 (June 11, 2002).
147. Callahan, Dworkin & Lewis, supra note 13, at 880.
148. Id. at 881.
149. See infra Part IV for a discussion of European privacy laws and European morals. See also Whitman, supra note 9, for a full discussion of the differences in perceptions of privacy between European cultures and American cultures.
151. See infra Part IV.
153. Id. It is interesting to note the marked departure that this Act brings to the regulation of federal securities laws. Federal securities laws had until the passage of this Act been concerned primarily with disclosure requirements rather than substantive corporate governance mandates, which traditionally had been left to state corporate law. SOX then significantly changes the former division of authority between federal securities law and state law by drafting explicit legislative directives on corporate governance. See Roberta Romano, The Sarbanes-Oxley Act and the Making of Quack Corporate Governance, 114 YALE L.J. 1521, 1523 (2005).
members; increasing the accuracy of financial information and encouraging complete disclosure; improving disclosure of information by eliminating conflicts of interest both internally and externally; fostering an ethical climate in which employees at all levels are encouraged to report unethical behavior to management; and ensuring that those who reported would be protected from retaliation. These principles were intended to create corporate environments that would discourage fraud and accounting improprieties and would encourage whistleblowers to come forward.

The Act also requires corporations to make a commitment to both ethical conduct and to effective self-governance practices. The Act's provisions concerning self-governance direct corporations to comply with the letter and the spirit of the law. If a corporation, subsequent to the enactment of the Sarbanes-Oxley Act and the revised Sentencing Guidelines, sets its goal as merely "one of compliance," the corporation is likely to fall short of these laws' requirements. At a minimum, SOX demands a commitment to self-governance with its itinerant adherence to all applicable laws and regulations, as well as a commitment to a strict ethical culture within the organization. SOX and its requirements of self-governance and the implementation of a code of ethics apply to public companies, the subsidiaries of public companies, and private companies that have registered for a public offering under the Securities Act of 1933. The application of SOX to companies registered under the Securities Act necessarily includes foreign subsidiaries of American companies as well as any foreign companies whose stock is traded in U.S. stock exchanges.

Corporations such as McDonald's, Exide Technologies, and Wal-Mart have generated additional provisions in their corporate codes of conduct to accommodate SOX. It is important to examine particular sections of SOX to understand why these companies' accommodation of the SOX mandates caused them such conflict with their EU host countries. The pertinent

154 Imperato, supra note 125, at 12.
157 Id.
158 Id.
159 Id.
sections of Sarbanes-Oxley to be examined are sections 406, 404, 301, and 806.

SOX section 406 requires that companies listed on U.S. stock exchanges disclose in their filings to the SEC whether or not they have adopted a code of ethics for senior financial officers. The SEC also requires that public companies disclose in their proxy statements whether they have adopted codes of ethics for their senior executives. The U.S. stock exchanges require companies to maintain a code of ethics that is reasonably designed to handle conflicts of interest, timely and accurate public disclosures, and compliance with all laws and regulations. Furthermore the code must promote the prompt internal reporting of, and contain an enforcement mechanism against, code violations. Companies that do not have an ethics code must explain why. Similarly, SOX section 404 requires companies to have a control system in place that ensures that their public disclosures are timely and truthful, as mandated by U.S. securities laws. Corporations have interpreted this adequate reporting requirement to mean the implementation of whistleblowing procedures to encourage employees to disclose fraud and other issues that could impact the integrity of the financial statements. Corporations typically draft broad codes of conduct that encourage employees to file complaints with management about topics such as fraud, financial inconsistencies, conflicts of interest, employment, environmental issues, sexual harassment, and other issues by using the same hotline or other reporting mechanism that is used for accounting-related complaints. As the legal challenges to the codes of U.S. corporations conducting business in France and Germany demonstrate, the use of a single reporting mechanism for both financial fraud issues and other employment issues may be impermissible in some European countries. However, it is clear that many U.S. companies in fact advise this practice.

The SOX mandate in section 301 is also critical to our analysis of sections 404 and 406, as it requires the audit committees in companies listed on stock exchanges to establish procedures for employees to anonymously submit concerns about questionable accounting or auditing.

161. Sarbanes-Oxley Act, Pub. L. No. 107-204 at §406, 116 Stat. 745. Senior financial officers may include CFOs, controllers, the principal accounting officer, and others performing similar functions.
162. Id.
163. Id.
164. Id.
166. See infra Part IV for a thorough discussion of the issues that compounding financial statements and employment issues in the same hotline incurs. In the two decisions that it rendered, the CNIL has stated that the data privacy protection laws in France do not disallow hotlines concerning financial infractions, but would disallow hotlines used for any other purpose. Id.
167. See Schreiber & Held, supra note 155, at 3.
Section 301 also regulates the receipt, retention, and treatment of the accounting-related complaints a company receives, as well as the companies’ internal accounting controls and auditing matters. Although neither SOX nor the SEC regulations prescribe a method for receiving such complaints, they do mandate that corporations provide employees at least one confidential, anonymous method. It is evident that many companies outsource this reporting function to a third-party service provider who typically creates a confidential hotline, web service, or other such vehicle where employees may register complaints.

The clear intent of SOX and related SEC regulations is to provide a confidential and anonymous vehicle that would encourage employees to come forward without fear of retaliation. An anonymous hotline is therefore meant to help bring the information to the attention of appropriate parties within the company. As mentioned earlier, SOX is one of the few pieces of federal legislation that provides whistleblowers protection from retaliation. Not only does section 806 of SOX mandate protection from retaliation, but it also gives employees who are retaliated against a right to later file suit through the U.S. Department of Labor. This provision, however, gives no comfort to foreign workers of U.S. companies operating overseas; the First Circuit recently ruled in Carnero v. Boston Scientific Corp. that the whistleblowing protections of SOX do not extend to foreign citizens working in foreign subsidiaries of companies covered by SOX.

Carnero involved an Argentinean citizen who worked for Boston Scientific Argentina in Brazil until he was terminated in August of 2002. Carnero brought a whistleblowing retaliation claim under SOX, alleging that he was fired in retaliation for disclosing to the parent company that its subsidiaries had created false invoices and inflated sales figures. At the appellate level, Carnero argued that the objectives of SOX would be thwarted if the whistleblower protections were not extended outside the U.S. However, the First Circuit ruled against Carnero. The court relied upon the well-established presumption against the extraterritorial application of congressional legislation, supplementing this with evidence that Congress did not intend to apply the SOX whistleblowing provisions (particularly

171. Imperato, supra note 125, at 12.
173. Id. See also Schreiber & Held, supra note 155, at 3. Prior to the enactment of SOX, protection for private corporate whistleblowers existed only to the extent that was provided in state law. Forty-two states and the District of Columbia now recognize a cause of action for retaliatory discharge. Tom Divine, Government Accountability Project, The Whistleblower’s Survival Guide: Scourge Without Martyrdom, 133-134 (1997); see also Baynes, supra note 13, at 888.
174. 433 F.3d 1 (1st Cir. 2006).
those of section 806) extraterritorially. Thus, foreign employees of U.S. corporations working overseas would not be granted the protection of section 806 of SOX even if whistleblowing provisions were well accepted in the countries in which the employees worked.

Companies have made good faith efforts to comply with the recommendations of the Federal Sentencing Guidelines, the mandates of SOX, and the regulations of the SEC. Given the convenience of hotlines, it is not surprising that most U.S. firms appear to have used this tool to comply with each of these pressures. Only in the last year have companies that universally apply their codes of conduct unwittingly found this practice to be in conflict with the laws and mores of other countries.\textsuperscript{175} The next Part identifies and describes the clash between U.S. corporate codes of conduct and the mandates of privacy in the EU. The Article concludes with recommendations as to how U.S. corporations can safely walk the fine line between the mandates of both U.S. and European law.

IV.
PRIVACY IN THE EUROPEAN UNION: THE CLASH WITH U.S. CORPORATE CODES OF CONDUCT

A. Background

The laudable attempt by companies to adopt codes of conduct in compliance with the U.S. laws described in Part III have met with challenges in the global marketplace.\textsuperscript{176} A code of conduct that is consistent with U.S. law and privacy protections\textsuperscript{177} may still run afoul of privacy laws in foreign jurisdictions. This is especially the case in the EU, where privacy is an important value with extensive legal protection. The valorization of privacy protection has deep historical roots. EU citizens still remember the fear generated when records of personal information were used to single out and persecute individuals in Nazi Germany.\textsuperscript{178} The

\textsuperscript{175} See infra Part IV.


\textsuperscript{178} Ryan Moshell, ...And Then There Was One: The Outlook for a Self-Regulatory United States Amidst a Global Trend Toward Comprehensive Data Protection, 37 TEX. TECH L. REV. 357, 358-59 (2005) (describing the actions of Nazi secret police and Hitler youth swarming "Jewish businesses and
memory of anonymous informants reporting individuals to German authorities for offenses—both real and fictitious—during World War II also makes Europeans particularly wary of whistleblower systems. The result is that well-intentioned policies and procedures of U.S. companies may be repudiated in the EU. This is precisely what happened to a subsidiary of U.S. company Exide Technologies, Compagnie Européene d’Accumulateurs, along with McDonald’s France, and Wal-Mart. In the wake of these three cases, U.S. companies doing business in the EU have been forced to rethink their codes of conduct.

The general framework for EU privacy protection was set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1953. Article 8 of the Convention explicitly states that “[e]veryone has the right to respect for his private and family life, his home and his correspondence.” The Convention further mandates that

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

In 1981, this Convention was further codified by the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, also known as Convention 108. The purpose of Convention 108 was to secure respect for each individual’s “right to privacy, with regard to automatic processing of personal data.” A Consultative Committee was set up in 1986 in accordance with Article 18 of Convention 108.

The EU took an important step toward the complete protection of personal data on October 24, 1995 when it adopted Directive 95/46/EC of
the European Parliament and of the Council (EU Directive). Explicitly recognizing that data processing systems must respect "fundamental rights and freedoms, notably the right to privacy," the EU Directive established limits on the processing of personal data and required each EU member state to adopt national law consistent with the EU Directive. Member states are required to ensure that personal data is "processed fairly and lawfully," that it is "collected for specified, explicit and legitimate purposes," and that it is "adequate, relevant and not excessive in relation to the purposes for which [it is] collected." Moreover, all personal information is to be kept accurate and up-to-date. In addition, member states are mandated to require that personal data may only be processed under limited circumstances, including:

- for compliance with a legal obligation to which the controller is subject;
- for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental frights and freedoms of the data subject which require protection under Article 1(1).

Article 1(1) of the EU Directive states further that "Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data." As is discussed below, these provisions are particularly relevant to whistleblower systems.

Further underscoring the European esteem for privacy protection is the Charter of Fundamental Rights of the EU, which was signed and proclaimed by the Presidents of the European Parliament, the Council, and the Commission in Nice in 2000. The Charter is divided into six chapters: dignity, freedoms, equality, solidarity, citizens' rights, and justice. With regard to privacy, two articles are of particular importance. First, pursuant to article 7, "[e]veryone has the right to respect for his or her privacy in the exercise of his or her private life, family, home and correspondence."
private and family life, home and communications.” 200 This is a very broad provision, and it creates an expectation of privacy that is arguably much more expansive than the right to privacy as defined by U.S. jurisprudence.

Second, consistent with the EU Directive, personal data is also explicitly protected:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which as been collected concerning him or her, and the right to have it rectified.201

Under the Charter, compliance with the data protection rules is controlled by an independent authority.202 Because this Charter and other EU documents potentially afford very extensive protections, some U.S. corporate codes of conduct may run headlong into conflict with EU expectations of privacy.

Notwithstanding this conflict and despite the restrictions on personal data, which could be viewed as merely hampering the ability of firms to do business in the EU, the privacy initiatives are actually part of a larger scheme to promote corporate responsibility. For instance, in 2001, the European Commission released Promoting A European Framework for Corporate Social Responsibility, also known as the Green Paper.203 The Green Paper aimed to launch a debate on corporate social responsibility (CSR) both in the EU and internationally.204 The Green Paper itself defines CSR as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”205 An important aspect of the Green Paper is its emphasis on employees as “major stakeholders of companies.” As such, the Green Paper mandates that management must engage in “closer involvement” with employees in a “two-way dialogue that can structure permanent feedback and adjustment.”206 The dialogue between management and workers’ representatives is viewed as crucial to a company’s adoption of socially responsible practices.

200. Id. at art. 7.
201. Id. at art. 8(1)-(2).
202. Id. at art. 8(3).
204. Id. at 4, 7.
205. Id. at 8.
206. Id. at 19.
The Commission of the European Communities (CEC) received more than 250 responses to its publication of the Green Paper, a substantial number of which were from trade unions and other civil society organizations.\textsuperscript{207} The responses illustrate the variation that exists between perspectives on CSR. For example, the EU trade union CEC advocated that companies develop CSR initiatives “with their partners”—trade unions and NGO’s—and that the EU Commission support “all joint steps taken by stakeholders to analyze best practices.”\textsuperscript{208} Eurocadres, the Council of European Professional and Managerial Staff, similarly expressed the need “to involve all stakeholders in a variety of ways so that everyone involved can contribute.”\textsuperscript{209} The company sought CSR codes that promoted “fundamental human rights” by involving all interested parties, including “employees, shareholders, suppliers and sub-contractors, customers, residents, public authorities at local, national and European levels and international bodies.”\textsuperscript{210}

Interestingly, another representative perspective can be found in policy pronouncements from some U.S. firms. Levi Strauss, for example, details its longstanding commitment to CSR, and expresses its disagreement with the views of the organizations that are supposed to represent employers in the dialogue.\textsuperscript{211} The company specifically states that the Union of Industrial and Employers’ Confederations in Europe is “not always able to represent the views of businesses willing to focus on this element of employee relations” and advocates that “alternative and complementary voices” outside the traditional business groupings be heard.\textsuperscript{212} Although Levi Strauss agrees that voluntary CSR should be encouraged, it goes a step further by suggesting that a “legal framework may help create a more level playing field.”\textsuperscript{213} In contrast, Agilent Technologies states that it believes

\begin{itemize}
\item \textsuperscript{208} CEC'S ANSWER TO THE GREEN PAPER PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL RESPONSIBILITY (Nov. 30, 2001), http://ec.europa.eu/employment_social/soc-dial/csr/pdf/081-SPTUEU_CEC_EU_020110_en.pdf, at 3.
\item \textsuperscript{210} Id. at 2-3.
\item \textsuperscript{212} Id. at 7-8. The Union of Industrial and Employers Confederations is the mandatory social partner who is supposed to negotiate on behalf of employers in the official EU Social Dialogue. Id.
\item \textsuperscript{213} Id. at 8.
\end{itemize}
that CSR practices should remain “primarily voluntary,” utilizing a
“systems approach, rather than compliance.” Like the U.S. firms, 
McDonald’s Europe submitted a position paper that emphasized its
commitment to CSR; however, the company also recognized the tension
between competing interests in the development of CSR systems, noting
that “[c]orporations, issues, localities, EU member state policies, and
stakeholders are far too varied to admit of a [sic] single model for CSR.” Accordingly, McDonald’s Europe called on the EU to act “as a facilitator
of CSR” by bringing stakeholders together for discussions, aiding in
exchanges on issues and practices (including stakeholder management
and reporting), and identifying and sharing best practices among the various
firms and institutions across Europe. In all, these responses are
indicative of the larger debate in the EU about the most effective way to
implement CSR.

In response to this debate, the Commission of the European Communities
sought greater transparency in codes of conduct, specifically referencing
workers’ rights and human rights. While acknowledging the ongoing
challenge of ensuring that voluntary codes are effectively implemented
and monitored, the Commission advocated that corporations adhere to
codes of conduct developed by international organizations. Presumably taking
into consideration the many competing perspectives, the Commission stated
that an appropriate code of conduct should:

- Build on the ILO fundamental Conventions and the OECD
guidelines for multinational enterprises as a common
minimum standard of reference;
- Include appropriate mechanisms to evaluate and verify the
implementation of this code and to create a system of
compliance;
- Involve the social partners and other relevant stakeholders
who are affected by the corporate code of conduct, including

214. GREEN PAPER ON PROMOTING A EUROPEAN FRAMEWORK FOR CORPORATE SOCIAL

215. MCDONALD'S EUROPE POSITION PAPER ON THE GREEN PAPER PROMOTING A EUROPEAN

216. Id. (emphasis added).

217. COMMISSION COMMUNICATION, supra note 207.

218. Id. at § 5.

219. Id.; see also INTERNATIONAL LABOUR ORGANIZATION, supra note 33; JENKINS, supra note 33
(providing an overview of codes of conduct in the global context, including their limitations).
those in developing countries, in the elaboration, implementation, and monitoring of these codes;

- Disseminate experience with good practices by European enterprises.\footnote{220}

Finally, the report and activity of the Commission in promoting CSR should also be placed in the context of the goal of protecting personal data. In 2003, the Commission published a report on public perceptions of data protection in the EU,\footnote{221} which found that thirty-nine percent of the French and thirty percent of the Germans did not trust their employers to keep personal information in an acceptable manner.\footnote{222} This distrust undoubtedly underscores the need for employees to participate actively in CSR and the pressure to develop enforceable codes of conduct. Moreover, another Commission study concluded that there are differences in the implementation and the application of data protection laws among the EU member states, and "the way the different national laws are appreciated and respected vary significantly between countries."\footnote{223} The overall perception of the level of current legislation is seen as "medium" among member states.\footnote{224} Regardless of the perception, U.S. companies face objections to the implementation of certain aspects of their codes of conduct in the EU.

**B. Implementation and Application**

In accordance with EU mandates, both France and Germany duly implemented elaborate national data protection schemes. These supplemented the expansive privacy and labor laws that had already been in effect in both countries, which limit an employer’s intrusion into the personal lives of employees. When applied to U.S. companies operating in the EU, however, these rules can be in direct conflict with SOX requirements, such as whistleblower hotlines, and other aspects of codes of conduct that govern employee behavior. Recent cases in France and Germany illustrate the difficult position in which U.S. companies have been placed.

\footnote{220} COMMISSION COMMUNICATION, \textit{supra} note 207, § 5.1. \\
\footnote{222} \textit{Id.} at 19. Note that in 2003, 52% of French and 53% of Germans reported that they trust their employers to use their personal information in an acceptable way. \textit{Id.} \\
1. Data Protection in France

Data protection in France predates the EU Directive; the country introduced law No. 78-17 protecting personal data as early as 1978.225 This law established the French Data Protection Authority, the Commission Nationale De L’informatique et des Libertés (CNIL) and charged it with the oversight and application of French data protection law.226 The mission of the CNIL is to provide information and assistance to individuals and organizations regarding the application of the law.227 Before the aforementioned passage of the EU Directive on personal data, France had adopted privacy laws in a piecemeal fashion.228 After a lengthy legislative process to implement the EU Directive, the French legislature passed an amendment (No. 2004-801) to the 1978 French Data Protection law in 2004. The role of the CNIL became particularly important after the passage of this law.229 At the heart of this recent, comprehensive law is the general principle that information technology “shall not violate human identity, human rights, privacy, or individual or public liberties.”230 It provides detailed protection of personal data, as well as criminal penalties for the fraudulent, unfair, or illegal collection of data.231 The CNIL currently receives approximately eight thousand telephone calls per month and four thousand complaints or requests for opinions per year as a result of this law.232

Two such opinion requests came from companies seeking to implement the type of hotlines or whistleblower systems discussed in Part III.233 On July 29, 2004, Compagnie européenne d’accumulateurs (CEAC) requested permission from the CNIL to implement an ethics hotline for its employees. CEAC’s parent company, Exide Technologies, sought to establish the system to comply with SOX.234 The hotline was designed to permit employees a mechanism to communicate accounting inaccuracies or irregularities with the Surveillance Accounting Committee of Exide’s board of directors.235 Additionally, the hotline would allow employees to report

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227. Id.
228. PRIVIREAL, DATA PROTECTION—FRANCE, supra note 225.
230. Id. at art. 1.
231. Id. At arts. 6-10, 50-52.
232. CNIL, supra note 226.
233. CEAC Decision, supra note 10; McDonald’s Decision, supra note 10.
234. CEAC Decision, supra note 10.
235. Id.
to management any possible violations of the law or of company principles, such as ethics rules or codes of conduct. CEAC proposed a system in which employees could make reports via a toll-free number or via e-mail. The caller’s anonymity would be guaranteed upon request. The system was to be operated by subcontractors who would classify each call under one of four categories: (1) human resources or work issues; (2) fraud or theft; (3) accounting error; or (4) problems tied to behavior and ethics. The information would then be confidentially sent via encrypted e-mail to the person designated by the company to handle such issues. Thereafter, the company would launch an internal investigation, which would include CEAC’s French General Counsel and specific management personnel. Significantly, any employee who was the subject of a call would be informed “as soon as possible of the allegations made against him/her so that he/she may explain himself/herself.” The personal data inevitably generated by this proposed system was to be kept for a maximum of one year.

McDonald’s France made a similar request for an opinion to the CNIL on January 7, 2005, to get authorization for a system of “professional integrity.” The international McDonald’s Group, which has a corporate code of ethics, wanted the staff of its French subsidiaries to report behavior “deemed contrary to the French legal rules as well as the Code of Ethics.” Reporting, which was not obligatory, could be done by mail or fax to the parent company, McDonald’s Corporation. The contents of any such reports would be sent to the Ethics Department of McDonald’s Corporation, which would ensure confidentiality and, depending on the nature of the report, possibly communicate the information to the person responsible for investigating such complaints. Like the proposed CEAC system, McDonald’s planned to divide responsibility for the reports into four categories, and designate a particular officer to handle the complaint: (1) the Human Resources Director would receive reports relating to labor and employment law, such as harassment, consumption of alcohol in the workplace, discrimination, incoherent timesheet breakdowns, and other issues relating to workplace behaviour; (2) the Security Director would receive reports of embezzlement, theft of company property, espionage or sabotage, corruption, or diffusing or divulging confidential information; (3) the Financial and Accounting Director would receive reports regarding

236. Id.
237. Id.
238. Id.
239. Id.
240. Id.
241. McDonald’s Decision, supra note 10.
242. Id.
243. Id.
audits of internal controls, financial irregularities, questionable methods concerning bookkeeping and accounting; and (4) other persons would receive the other remaining reports, depending on the nature of the alleged violation. Following this report, staff members “presumed guilty” would be informed that they have the “right to access, rectify or contest within two business days.” Pursuant to the proposed system, if an investigation revealed misconduct, the reports would be retained for between one and five years, depending on the nature of the fault committed; however, if there were no investigation or the report produced a negative result, it would be destroyed within two business days of the final decision.

The CNIL issued opinions rejecting the proposed systems of both CEAC and McDonald’s on May 26, 2005. The CNIL began both opinions by referencing the relevant EU and French data protection laws: EU Convention 108, EU Directive 95/46/EC, and the French Data Protection law. Interpreting these laws, the CNIL began its analysis in both opinions by referencing Article 3 of the French Data Protection law, which provides that “data controller means, unless expressly designated by legislative or regulatory provisions relating to this processing, a person, public authority, department or any other organisation who determines the purposes and means of the data processing.” Upon finding the proposed systems of both CEAC and McDonald’s to be involved in the collection of personal data, the CNIL asserted its jurisdiction to determine whether each system was compliant with the law. Next, the CNIL determined that both the CEAC hotline and the McDonald’s system could, in certain cases, lead either company “to decide, as ‘corrective measures,’ to preclude employees from the protections of their employment agreements by virtue of what it considers as misconduct and in the absence of any legal or regulatory provision.” This finding, in turn, triggered the application of French Data Protection law Article 25 I(4), because the “automatic processing” may, “due to its nature, importance or purposes, exclude persons from the benefit of a right, a service or a contract in the absence of any legislative or regulatory provision.” Based on these observations, the CNIL made identical findings in both the CEAC and McDonald’s cases:

The Commission finds that the implementation by an employer of a system designed to gather personal data from employees, in any form whatsoever, concerning behaviour contrary to company rules or contrary to the laws

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244. Id.
245. Id.
246. Id.
247. McDonald’s Decision, supra note 10; CEAC Decision, supra note 10.
248. Id.
249. Id.
250. Id.
251. Id.
252. Id. See also French Data Protection law, supra note 229, art. 25 I(4).
attributable to their colleagues, which could lead to an organized system of professional denunciation, can only give rise to reservations in regard to the Law dated January 6, 1978 as amended, and notably Article 1 of such law.

In this sense, the Commission observes that the possibility to establish an "ethics alert" in an anonymous manner could only re-enforce the risk of slanderous denunciations.

Moreover, the Commission considers that this system is disproportionate to the objectives sought and the risks of slanderous denunciations and the stigmatization of employees who were the subjects of an "ethics alert." The Commission notes that henceforth other legal means exist to guaranty compliance with legal provisions and company rules (programs of consciousness raising through information and training, audits and alerts by the statutory auditors for financial and accounting matters, bringing the matters before the Labour Inspector or the competent Courts).

The Commission considers, finally, that the employees subject to an alert would not be, by definition, informed as soon as the data questioning their professional or personal integrity is recorded, and as such they would not have the means to contest the processing of such data. The terms and details of collection and processing of this data, which could involve actions likely to constitute criminal infractions, can no longer be considered as loyal as defined by Article 6 of the Law dated January 6, 1978 as amended.253

Accordingly, both systems were found not to comply with the French Data Protection law.254

The CNIL appears to object to several aspects of the hotlines. First, the commission expresses concern that the proposals could establish an "organized system of professional denunciation." The CNIL found that the CEAC and McDonald's systems imperiled the fundamental basis of the French Data Protection to uphold human rights, identity, privacy, or liberties,255 particularly because the reports were to be anonymous. While the companies may have had the good intention to increase legal compliance, such a system lacks transparency from the perspective of an accused employee. Second, in light of this potential harm to employees' fundamental privacy rights, the CNIL expressed concern that the use of the hotlines would be "disproportionate" to their objectives. In other words, the harm that could be caused by a slanderous accusation—to which the employee may not be able to adequately respond—was too great a burden and outweighed the justifications for the hotlines. Lastly, the delay in

253. CEAC Decision, supra note 10; McDonald's Decision, supra note 10.
254. Id. Note that Article 6 of the French Data Protection law provides that processing of personal data may only be performed under specified limited conditions. French Data Protection law, supra note 229, art. 6.
255. Id. at art. 1.
notifying an employee of a report would place the employee at an unlawful and unfair disadvantage, especially if a criminal prosecution could result. To be fully understood, these decisions must be viewed in their historical context. The anonymous nature of the reporting systems did not allay French fears about baseless denunciations and the damage that they can cause to individuals. In short, the kind of denunciation that the EU Directive and French Data Protection laws were designed to prevent could occur under the proposed whistle blowing systems.

Following the CEAC and McDonald’s cases, the Tribunal de Grande Instance de Libourne reached a similar decision on September 15, 2005, in a case involving a hotline implemented by BSN GlassPack, a French affiliate of U.S. company Owens-Illinois. BSN-GlassPack instituted a SOX-mandated hotline for employees to anonymously report fraud, theft, or non-compliance with accounting regulations. An employee works council and labor union challenged the hotline as violating workplace privacy rights and the right to defend against wrongdoing. The court held that the hotline was “disproportionate” to its purpose and unfit to prevent potential wrongdoing. As such, the “individual liberties” of potential targets were at risk. Interestingly, the legal basis for this case was found in French employment law and due process principles, rather than in the French Data Protection law. The court awarded the plaintiffs approximately $1500 in damages and ordered the removal of the hotline.

All three of these cases question the legality of the use of SOX whistleblower hotlines in France.

French labor courts have also invalidated unilaterally-implemented codes of conduct when the company fails to follow works council laws. For example, a trade union and company works council commenced a legal action challenging Novartis’s code of conduct. Specifically, they alleged that the code constituted an illicit intrusion into the private life of employees, and that the code was implemented in violation of internal regulations. The Civil Court of Nanterre ruled in summary proceedings that the company must withdraw its code of conduct or face a €10,000 per day
BETWEEN A ROCK AND A HARD PLACE

2. Labor Law and the Protection of Privacy in Germany

As in France, companies doing business in Germany must be sensitive to potential conflicts with national privacy and labor laws. The Bundesdatenschutzgesetz, or Federal Data Protection Act of 2003 (German Data Protection Act) served to implement EU Directive 95/46/EC. In addition to the protection offered to employees through the German Data Protection Act, the Works Council Constitution Act sets forth detailed rules that employers must respect in the workplace. Not unlike what happened to McDonald’s and CEAC in France, Wal-Mart’s global code of conduct became hopelessly entangled in German law. While Wal-Mart is no stranger to criticism of its global practices, the German court decisions discussed in this Section place the company in the position of reworking fundamental aspects of its code of ethics if it plans to continue to operate in Germany. This is no small matter given Wal-Mart’s substantial presence in Germany, with eighty-eight Supercenter stores and over 11,500 employees or “associates.”

The first German decision to challenge Wal-Mart’s practices was issued on June 15, 2005, when the German Local Labour Court of Wuppertal invalidated the application of parts of Wal-Mart’s global code of conduct to its employees in Germany. The particular provisions of Wal-Mart’s code at issue were its guidelines on the prevention and handling of conflicts of interest, confidentiality, fair conduct of daily business, and the protection of company assets. Wal-Mart had circulated a “quick guide,” encouraging employees to report any violations via an anonymous


270. Wuppertal Decision, supra note 11.

271. Id.
telephone hotline. The works council of Wal-Mart’s German subsidiary argued that the implementation of the code of conduct should be subject to a codetermination right as guaranteed by the Works Council Constitution Act. Pursuant to this Act, the works council has “a right of codetermination” in a range of matters, including in the case of “the introduction and use of technical devices designed to monitor the behavior or performance of employees.” This process of codetermination gives labor a voice in certain matters affecting workers. The works council “sued Wal-Mart Germany, asking the court to establish that 1) the implementation of the code as a whole, 2) alternatively the individual guidelines of the code of conduct and 3) the operation of the telephone hotline would be subject to codetermination.” As such, the code would require the consent of the Wal-Mart works council in Germany prior to its implementation. In response, Wal-Mart contended that its “code of business conduct and ethics,” which included the telephone hotline, had been implemented as “part of the company’s legal obligation under section 303A of the New York Stock Exchange (“NYSE”) Listed Company Manual.” Under the NYSE rules, listed companies must adopt and disclose a code of business conduct and ethics for directors, officers and employees, including “encouraging the reporting of any illegal or unethical behavior.”

The Wuppertal court held that “encouraging employees to report ethical misconduct or any violation of an internal code of conduct through an anonymous hotline” without the agreement of the works council violates section 87 of the Works Council Constitution Act. The court noted that although the reporting clause in Wal-Mart’s internal code of conduct did not itself establish a legal obligation to report misconduct, the fact that the code specified disciplinary measures for its violation created such an obligation in practice. In other words, an “employee is effectively obliged to adhere to a certain conduct within the company” or face disciplinary measures, including termination. The court also cited to an earlier decision in which the German Federal Labour Court

272. Id.
273. Id.
274. Id.
276. Wuppertal Decision, supra note 11.
277. Id.
278. NYSE, supra note 4.
279. Wuppertal Decision, supra note 11.
280. Id.
281. Id.
(Bundesarbeitsgericht) held that the "mere introduction of a template for documenting the conduct of employees is subject to a right of codetermination" under the Works Council Constitution Act. Accordingly, because the Wal-Mart code of conduct "involve[d] a higher degree of interference than the introduction of a template," the court held that Wal-Mart's obligation to report misconduct was a fortiori subject to a right of codetermination.

Implicit in the Wuppertal court's decision was that the implementation of a code of conduct does not require the consent of a works council per se. The aspects of the code of conduct that triggered the right of codetermination were its provisions for reporting concerns, presents and gifts, harassment, privacy, private relationships, and alcohol and drug abuse—all of which relate to the "behavior or performance of employees" within the scope of the Works Council Constitution Act. Notably, the Wuppertal decision rests on German labor law rather than on data protection laws (which were at stake in the McDonald's and CEAC cases). Data protection law in Germany does not require companies to apply for permission to implement an anonymous hotline or to register the hotline with the data protection authority.

Wal-Mart appealed to the Düsseldorf Regional Labour Court, which affirmed the Wuppertal Decision on November 14, 2005. The court reviewed a number of provisions of Wal-Mart's Statement of Ethics, including:

- "Associate Responsibilities"—regarding the ways to raise ethics concerns, including use of an anonymous hotline;
- "When You Have an Ethics Concern" and "How to Raise and Ethics Concern"—regarding the obligation to raise a concern about a possible violation of Wal-Mart policy or the law and how to raise the concern;
- "Gifts and Gratuities"—regarding the policy about accepting a gift or gratuity from a supplier, potential supplier or any person who may influence a business decision or transaction involving Wal-Mart, etc.;
- "Media Statements"—regarding making written or verbal statements on behalf of Wal-Mart to the media;
- "Harassment and Inappropriate Conduct"—regarding a broad definition of harassment, including conduct which negatively interferes with work performance, diminishes the dignity of any person or which creates an intimidating, hostile or otherwise offensive work environment;

282. Id.
283. Id.
284. See generally Mark E. Schreiber et al., supra note 15.
285. Düsseldorf Decision, supra note 11.
• "Privacy"—regarding the maintaining of privacy of associates and customers;
• "Fraternization"—regarding dating or becoming romantically involved with coworkers; and
• "Alcohol and Drug Abuse"—regarding drug screening as part of the post-offer hiring process and other drug testing.\(^{286}\)

The Düsseldorf court held that the works council had a right of codetermination under German Industrial Constitutional Law with regard to the following sections of Wal-Mart's Statement of Ethics: "Associate Responsibilities," "How to Raise an Ethics Concern," "Forbidden to Accept Gifts and Gratuities," and "Harassment and Inappropriate Conduct."\(^{287}\) The court made an exception, however, for a sentence in the "Harassment" section, which had stated, "[a]dditionally, Wal-Mart will not tolerate violent acts or threats of violence on Wal-Mart property or while engaged in Wal-Mart business."\(^{288}\) The court held that the works council did not have a right of codetermination on this provision because an employer can "exercise its domiciliary rights and . . . maintain corporate peace [and] direct, without exception, that neither on its premises nor during work may any violent acts be committed or threatened."\(^{289}\) Inasmuch as the Human Resources poster at issue contained information that had not been arrived at through codetermination by the works council, Human Resources could no longer use the poster. Additionally, the court prohibited Wal-Mart from continuing to use the hotline to report the same issues until it reached agreement with the works council.\(^{290}\)

In contrast to the Wuppertal court, the Düsseldorf court held that there was no right of codetermination regarding "Media Statements," "Privacy," and "Fraternization."\(^{291}\) With regard to the media statements provision, the court found that Wal-Mart has the right to instruct its staff not to make statements on behalf of the company.\(^{292}\) The court similarly found no codetermination issue in the privacy provisions because there is precedent "as to when an associate may inspect what [is] in his/her personnel and medical records."\(^{293}\) Pursuant to section 83 of the Works Council

\(^{286}\) Id. For the full text of these provisions, see WAL-MART, STATEMENT OF ETHICS, supra note 108, at 3-17.
\(^{287}\) Düsseldorf Decision, supra note 11, pt. II.
\(^{288}\) Id.
\(^{289}\) Id.
\(^{290}\) Id. at pt. III.
\(^{291}\) Id. at pt. V.
\(^{292}\) Id.
\(^{293}\) Id. (emphasis added).
Constitutional Law, employees have the general right of access to their personal file.294

Arguably the most startling aspect of the Düsseldorf decision, however, was its holding that the "Fraternization" provision in Wal-Mart's code of conduct was not subject to the right of codetermination because it was null and void as a violation of Articles 1 and 2 of the Basic Law.295

Although it is not unusual for U.S. companies to have policies relating to an employee's off-duty conduct, such policies may not be legal in other jurisdictions. Wal-Mart's Fraternization provision states:

Wal-Mart Associates are expected to conduct themselves in a manner that promotes respect, trust, safety, and efficiency in the workplace. You may not date or become romantically involved with any other Associate if you can influence that Associate's terms and conditions of employment or if that Associate can influence the terms and conditions of your employment.296

As the court acknowledged, Basic Law puts "the dignity of man and the free development of personality as central values in our Constitution."297 Articles 1 and 2 of the Basic Law for the Federal Republic of Germany provide:

Article 1: Human dignity
(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
(3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

Article 2: Personal freedoms
(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.298

The term "general personality" was developed by the German Constitutional Court to protect a core area of human personality traits. 299

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295. Düsseldorf Decision, supra note 11, pt. V. Because the provision is invalid, there is nothing to "codetermine."
297. Düsseldorf Decision, supra note 11, at pt. V.
299. See generally Gerlind Wisskirchen, Christopher Jordan & Alexander Bissels, Cross-Border Ethics Codes: The Case of Wal-Mart in Germany, 34 LAB. & EMP. LAW 7 (2005) (discussing the
This right, which may apply to the relationship between employers and employees, is not subject to state interference. According to the court, these rights include an individual’s right to determine “whether and with whom [he or she] wishes to enter into relationships with others—be it either one of friendship or of fraternization.”300 The court then elaborates on the importance of the employment relationship in the life of an employee, including how one’s self-esteem is related to one’s work and that relationships with work colleagues are “a great opportunity to develop one’s intellectual and physical capabilities.”301 From this, the court concludes that depriving an employee the “possibility to freely develop” relationships “within the scope of an employment relationship shall affect his/her dignity” and “have a profound affect on an associate’s rights of personality.”302 The Düsseldorf court directed Wal-Mart to comply with its decision or face a fine of up to €250,000 for every case of contravention.303

These decisions required Wal-Mart to seek codetermination with the works council on several provisions of its German code of ethics, and to remove its fraternization provision entirely. Wal-Mart has appealed the Düsseldorf court’s opinion to the German Federal Labor Court. Its leave to appeal was granted and is currently pending. Because of these labor issues and for other business-related reasons, Wal-Mart opted to sell its German stores in late July 2006.304 At the most fundamental level, these German cases illustrate the problems that a company may encounter as it attempts to establish a global code of conduct.

C. The Challenge for U.S. Companies

These decisions by French and German courts have created uncertainty for U.S. companies doing business and seeking to do business in the EU. What whistleblowing requirements would be acceptable under European data protection laws? How can SOX obligations be reconciled with EU Data Protection rules? What other provisions of corporate codes of conduct violate EU privacy law? The EU and the CNIL have recently issued guidelines and recommendations to help clarify these questions.

After the McDonald’s and CEAC decisions, companies struggled to harmonize their U.S. legal obligations with data protection laws in France and in other EU countries. In response, CNIL issued its French Guidelines for the Implementation of Whistleblowing Systems (November Guidelines)

problems experienced by European subsidiaries of U.S. companies who attempt to implement internal codes of conduct required by their parent companies).

300. Düsseldorf Decision, supra note 11, pt. V.
301. Id.
302. Id.
303. Düsseldorf Decision, supra note 11.
304. See Olson, supra note 109.
in November 2005.²⁰⁵ Not surprisingly, the November Guidelines reiterated the court’s position in the McDonald’s and CEAC cases, and thus left unresolved the dilemma these companies faced; while it was theoretically possible to use an anonymous and confidential hotline in France, it would be practically impossible to do so in a way that would maintain compliance with SOX. As companies were considering the best way to navigate this dilemma, the CNIL issued another decision on December 8, 2005, which authorized the processing of personal data information through a whistleblowing system (December Guidelines).²⁰⁶ This unexpected but welcome move added one important feature to the November Guidelines: it allowed employers to implement a SOX hotline in France without waiting for CNIL authorization.²⁰⁷ An employer may now simply report to the CNIL via an on-line declaration that it plans to establish a hotline consistent with the December Guidelines.

To comply with the December Guidelines, the whistleblowing system must be aimed at managing internal controls in financial, accounting, banking, and anti-bribery areas, even if the system is implemented under SOX section 301.²⁰⁸ The December Guidelines also contain provisions pertaining to the processing of the whistleblower’s identity. As a general rule, a whistleblower must identify himself or herself, and this information must remain confidential. However, a whistleblower may also remain anonymous under two limited conditions. First, “particular precautions” must be taken in the processing of the information; and second, the organization must not encourage employees to report anonymously.²⁰⁹

Another important aspect of the December guidelines is its provision that all incriminated persons must be informed about the allegations that have been brought against them “as soon as [their] personal data [are] recorded” to allow incriminated persons to object to the processing of the data.²¹⁰ Moreover, all incriminated individuals have the right to access the

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²⁰⁷. Id.

²⁰⁸. Id. The December Guidelines also note that the reporting of concerns relating to other activities would also be in compliance if they have “an impact on such areas of internal controls.” Id. at art. 1. To the extent that a whistleblowing system does not fulfill the December Guidelines, it must be submitted to the CNIL for authorization. Id. at art. 11.

²⁰⁹. Id. at art. 2.

²¹⁰. Id. at art. 9.
data that has been gathered about them, or to correct or suppress any
information that is "inaccurate, incomplete, ambiguous or out-of-date." These binding guidelines protect both the letter and spirit of EU and French data protection law by protecting the rights of incriminated persons.

The EU also weighed in on whistleblowing systems to help firms determine how to comply with EU law. On February 1, 2006, the Working Party (set up under Article 29 of EU Directive 95/46/EC) issued an advisory opinion (Article 29 Working Party 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 federal crimes. The Article 29 Working Party states in its opinion that it intends to contribute to the "legal certainty" of companies subject to EU data protection rules and SOX. The essential features of the Article 29 Working Party Opinion are the same as the CNIL Guidelines; it advocates ameliorative rights for incriminated persons through a whistleblowing scheme, and it balances the importance of the data collected with the objective of privacy protection. With regard to the practical aspects of implementation, the Article 29 Working Party Opinion emphasizes:

- Providing clear and complete information about the scheme, including informing data subjects about the existence, purpose and functioning of the scheme and rights of access;
- Protecting the rights of the incriminated person, including information rights and rights of access, rectification and erasure;
- Managing the collection and handling of whistleblower reports;
- Transferring personal data to third countries; and
- Complying with notification requirements.

The Chairman of the Working Party sent a copy of the opinion to the U.S. SEC, stating that the opinion "makes it clear that EU data protection rules neither prevent companies from setting up such whistleblowing schemes nor from processing personal data reported by whistleblowers

311. Id. at art. 10.
313. Id.
314. Id. at 6.
315. Id. at 13-17.
between these schemes." In his letter, the Chairman emphasized that the conditions that the Working Party placed on the schemes enabled it to "strike a very difficult balance between the legitimate purposes of whistleblowing requirements," the risks at stake for the individuals who may be incriminated, and the social responsibility of operating such systems in the EU. The letter also invited a response from the SEC to help "reach a common understanding of the challenges" of compliance on both continents. At this point, it appears that the EU is making a good faith attempt to assist U.S. firms in this balance.

In a final effort to clarify its decision, the CNIL promulgated its FAQs on Whistleblowing Systems, which sets forth twenty key questions and answers for companies wishing to establish whistleblowing systems consistent with the French Data Protection law. The CNIL issued this document to supplement its November and December Guidelines and to respond to the Article 29 Working Party’s advisory opinion. In the FAQs, the CNIL defines a “professional whistleblowing system” as “a system implemented by a private or public organization, encouraging its employees to report issues that can affect its business or involve its responsibility in a serious manner.” While the CNIL rules may allow employers to encourage the use of these systems, the FAQs state that the use of the whistleblowing system cannot be made mandatory or compulsory. The FAQs reiterate some of the points made in the CNIL’s earlier Guidelines and include some examples to illustrate these points. With regard to the scope of the topics that can be reported via hotlines, for example, the CNIL lists the following as appropriate subject matter: accounting and account auditing disorders; false entries; tax evasion; fictitious personnel employment; bribery of public agents; terrorism funding; and money laundering. The FAQs also elucidate Article 3 of the December Guidelines, which states that other topics may “be communicated to the competent persons within the organization concerned when its vital interest or the physical or moral integrity of its employees are at stake.”

According to the FAQs, some examples of situations falling into this category would be threats to the safety of another employee; moral harassment; sexual harassment; discrimination; insider trading; conflicts of

317. Id.
318. Id. Note that as of the publication of this Article, there has been no response from the SEC.
320. Id.
321. Id.
322. Id.
323. December Guidelines, supra note 308, at 3.
interest; serious environmental breaches or threats to public health; disclosure of a manufacturing secret; and serious risks to the company’s information security system.\textsuperscript{324}

The CNIL made an a final important clarification in its 2006 FAQ sheet regarding the accused’s right of rectification and right to oppose the processing of his or her data. Specifically, the CNIL explained that neither of these rights are absolute.\textsuperscript{325} Rectification is subject to the condition that the data is “inaccurate, incomplete, ambiguous, outdated.”\textsuperscript{326} Similarly, if lawful, “compelling legitimate grounds” exist for processing the data, an individual may not oppose the action.\textsuperscript{327} Although the McDonald’s and CEAC cases caused much reverberation as U.S. firms tried to come to terms with the decisions, the CNIL’s subsequent publications have helped to clarify the requirements.

\section*{V. RECOMMENDATIONS}

\subsection*{A. General Considerations}

Against the backdrop of the McDonald’s, CEAC, GlassPack, and Wal-Mart cases, as well as the clarifying CNIL and EU publications, U.S. global companies must consider the best way to fully comply with U.S. law and also to avoid conflict with EU members’ national laws. Specifically, these companies might ask how to best fulfill their SOX section 301 obligations in the EU—and indeed, whether it is even possible for these companies to enforce a code of conduct globally. Because these are evolving areas of the law, and because they involve both EU and national law, there is not likely to be a simple solution. There are, however, a number of strategy recommendations that U.S. companies should consider when operating within the EU and attempting to comply with SOX.\textsuperscript{328} In the first instance, although not all EU countries take the same view as France about SOX compliance and whistleblower hotlines,\textsuperscript{329} companies should consider

\begin{itemize}
  \item \textsuperscript{324} CNIL FAQs, supra note 319.
  \item \textsuperscript{325} Id.
  \item \textsuperscript{326} Id.
  \item \textsuperscript{327} Id. See EU Directive (EC) 95/46/EC, supra note 190, art. 14(a).
  \item \textsuperscript{328} See generally DONALD C. DOWLING, JR., PROSKAUER ROSE, LLP, WHISTLEBLOWING HOTLINES IN EUROPE UNDER SARBANES-OXLEY: DIRECTIONS THROUGH THE MAZE (2006), http://www.proskauer.com/news_publications/published_articles/content/2006_06_02/_res/id=sa_File/12335-Whistleblowing%20hotlines-REPRINT-v7.pdf. In this client newsletter, the Proskauer Rose firm notes that one possible alternative could be to invoke the Carnero case and “shut off the hotline in Europe/France . . . on the theory that SOX does not mandate hotlines abroad, especially where local laws discourage them.” Id. at 12. This is not likely to be a strategy undertaken by many U.S. multinational companies.
  \item \textsuperscript{329} Early indications are that the U.K. Information Commissioners Office will not be following the French or German approach. See generally Paul Callaghan, Corporate Codes of Conduct in the UK and Conflicts with UK Employment and Labor Law, presented at the American Bar Association
complying with the very restrictive French requirements for all of their EU hotlines as a cautionary measure. In addition, the following ten specific recommendations take into consideration both French and EU law.

B. Specific Recommendations

1. Be Aware of Works Council Rights and the Right of Codetermination

Before implementing any codes of conduct or whistleblowing system in the EU, determine if the law requires consultation with the works council. If the code of conduct monitors the behavior or performance of employees, this should be a red flag that the works council may have a right of codetermination. Conferring with a works council and reaching a mutually-acceptable agreement is likely to avoid a court challenge or problems with the local data protection authority.

2. Determine if Authorization of Hotlines is Required by the National Data Protection Authority

Because the implementation of EU Directive 95/46/EC varies in each EU member nation, the rules must be checked in each jurisdiction. For example, note that the CNIL now has a streamlined procedure whereby hotlines in compliance with French guidelines can be established without pre-authorization.330

3. Circumscribe the Scope of the Whistleblowing Hotline

The hotline should be limited in scope to issues involving accounting, financial audit, bribery and banking, and should not be used for general employee workplace concerns. The CNIL has made it clear that professional whistleblowing systems should not turn into “organized schemes of denouncement.”331 In short, the system must not extend beyond what is necessary to achieve its lawful goals.

4. Promote Non-Anonymous, Confidential Reporting

The system may offer anonymity, but it should not encourage it. If a report is made that is not anonymous, the whistleblower’s identity should not be disclosed to the reported person. If an anonymous report is submitted, precautions should be taken to limit the circulation of the report

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330. See December Guidelines, supra note 306, and accompanying text; CNIL FAQs, supra note 319.

331. See ARTICLE 29 DATA PROTECTION WORKING PARTY, supra note 312, § I; CNIL FAQs, supra note 319.
and to clearly state that the report is anonymous. In all cases, precautions must be taken to ensure confidentiality.\footnote{332. See \textit{Article 29 Data Protection Working Party}, supra note 312; \textit{CNIL FAQs}, supra note 319.} The Article 29 Working Party and the CNIL are emphatic that systems should \textit{not} be designed to encourage anonymity.

5. \textit{Institute a Voluntary Reporting Scheme}

The required route in France, and the safest procedure in the EU, is for the whistleblowing system to be a voluntary, not compulsory, scheme.\footnote{333. See \textit{CNIL FAQs}, supra note 319 (noting that the French Ministry of Labour and Social Affairs states that it could be argued that a “compulsory reporting requirement would breach article L120-2 of the Labor Code as a requirement out of proportion with its objective”). \textit{See also Article 29 Data Protection Working Party}, supra note 312, at § IV(2)(iii).}

6. \textit{Promptly Inform the Accused Individual About the Report}

Individuals who are the subject of a whistleblower report should be notified promptly. If a report falls outside of the scope of the whistleblower system, it can be deleted rapidly, obviating the need to inform the person who is the subject of the report. However, if such a report is archived, the reported person should be notified promptly and should have the right to access and rectify its information.\footnote{334. See \textit{EU Directive}, supra note 190, at arts. 11, 14(a); \textit{Article 29 Data Protection Working Party}, supra note 312, at § IV(4); \textit{CNIL FAQs}, supra note 319; \textit{see infra Part V..9}.}

7. \textit{Comply with EU Cross-Border Data Transfer Rules or Keep the Investigation Local if Possible}

More than likely, whistleblower reports pertaining to SOX compliance issues will need to be transmitted to the company’s headquarters in the U.S. In these circumstances, EU cross-border data transfer rules must be followed. If possible, keep all reports within their country of origin to avoid this extra burden of compliance. In any event, handle all reports that are unrelated to SOX compliance in the country in which they originated.

8. \textit{Develop an Archiving System of Document Retention and Destruction}

Under the French guidelines, a report falling within the system should result in a prompt investigation within two months after the close of the investigation.\footnote{335. See \textit{CNIL FAQs}, supra note 319.} If a judicial or disciplinary procedure will be initiated, the data can be kept until the close of the procedure, for a maximum of thirty years. Any reports that the employer does not pursue after the close of the
investigation, as well as any reports that fall outside of the whistleblowing system, must be deleted immediately or archived rapidly.336

9. *Grant the Accused Rights of Access, Rectification and Opposition*

The accused should have access to the report, but not to the identity of the whistleblower. Additionally, the accused has the right to correct any “inaccurate, incomplete, ambiguous or outdated” data and to object to the processing of the data. These rights, however, are not absolute. They are intended to prevent mistakes from being made, not to block a lawful investigation.337

10. *Provide Effective Oversight of External Service Providers, Including “Reinforced Confidentiality”*

Ensure that any external service provider that is used to collect and process whistleblower reports is in full compliance with both U.S. and EU law. Additionally, there should be a duty of confidentiality defined by contract with the external service provider to build trust in the system. The CNIL refers to this contractual duty as “reinforced confidentiality.”338

Although there is not likely to be a simple solution to this challenge that will work for all companies doing business in the EU, attention to all of these factors will go a long way toward fulfilling data protection and privacy expectations in the EU. Lastly, as with any system of compliance, codes of conduct and whistleblower schemes should be evaluated on an ongoing basis to make sure that they are consistent with any changes in the law.

VI.
CONCLUSION

Although the application of U.S. laws such as the Sarbanes-Oxley Act to U.S. corporate operations abroad can create a true conflict of law situation for those companies, the situation is not irremediable. As has been discussed, corporations can take a number of strategic steps to preempt such conflict. As more and more corporations transact business globally, these conflicts of laws are likely to become increasingly common. It is therefore critical that corporations be sensitive to foreign countries’ statutes and mores in extending the reach of their corporate governance and codes of conduct—and that they modify their codes accordingly before stepping into these countries to do business. It is no longer possible for U.S. corporations

336. *ARTICLE 29 DATA PROTECTION WORKING PARTY, supra* note 312, at § IV(2)(v).
337. *See EU Directive, supra* note 190, at art. 14(a); *CNIL FAQs, supra* note 319.
338. *See ARTICLE 29 DATA PROTECTION WORKING PARTY, supra* note 312, at § IV(6); *CNIL FAQs, supra* note 319.
to single-mindedly follow business demands without sensitivity to the social and legal environments to which those demands lead them. It is therefore necessary for corporations to tailor their approaches to corporate governance sensitively in various parts of the world in order to achieve their corporate goals, comply with home country laws, and at the same time, respect host country laws.