

2011

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### Recommended Citation

Donald C. Dowling, *Global Whistleblower Hotline Toolkit: How to Launch and Operate a Legally-Complaint International Workplace Report Channel*, 45 INT'L L. 903 (2011)  
<https://scholar.smu.edu/til/vol45/iss4/2>

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# Global Whistleblower Hotline Toolkit

## How to Launch and Operate a Legally-Compliant International Workplace Report Channel

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As corporate social responsibility and business ethics continue to grab our attention, evermore-sophisticated “best practices” and compliance strategies emerge. A key practice that anchors many corporate social responsibility programs and compliance initiatives is launching and publicizing an internal whistleblower procedure, report channel, or “hotline”<sup>1</sup> that entices insiders to denounce colleagues’ misdeeds so management can root out corporate crimes, corruption, and cover-ups.

Within the United States, workplace whistleblower hotlines are a largely uncontroversial “best practice” to which few ever object. But tensions rise when a multinational organization extends report channels abroad. Overseas, whistleblower hotlines can spark blowback from staff, employee representatives, and government enforcers and can trigger confounding legal issues that do not appear in the United States. To a socially responsible American, the hurdles impeding foreign whistleblower hotlines look higher than they should have any right to get.

Workplace whistleblower hotlines take many forms. Some stand on their own while others comprise part of a broader corporate code of conduct, code of ethics, or compliance or social responsibility program. Some run in-house while others are outsourced. There are single global hotlines and there are aligned but separate report channels across local affiliates. Some hotlines are closed to staff in certain countries. Whatever the form or reach, the idea behind a workplace hotline is simple: empower insiders who hear about

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1. This article uses “hotline” to mean any report channel or other internal system or procedure designed to collect whistleblower complaints, regardless of the structure and the medium (media might include, for example, telephone, email, interactive website, postal mail, social networking, or a combination). *See infra* note 21.

white-collar crime, policy breaches, or other wrongdoing to come forward with allegations so management can investigate, right wrongs, and punish the guilty.

Prison, gangster, and schoolyard cultures revile “snitches,” “stool pigeons,” and “tattle-tales, and what Melville’s Billy Budd reviled as “the dirty work of a telltale.”<sup>2</sup> But corporate culture in America and many other modern societies reveres company and political whistleblowers as do-gooders who expose corruption for the benefit of all. Look at all the Hollywood movies championing real-life informants. What was a trickle of based-on-a-true-story whistleblower-themed film dramas—*Serpico*, *All the President’s Men*, *The Insider*, *Erin Brockovich*—is now, in our post-Enron/post-Madoff age of “Occupy Wall Street,” a steady stream—*The Whistleblower*, *The Informant!*, *Fair Game*, *Puncture*, *Enron: The Smartest Guys in the Room*, and *Chasing Madoff*. Americans who watch these movies root for whistleblowers standing up to white-collar criminals and fighting for corporate accountability. In the workplace, too, rank-and-file Americans tend to welcome whistleblowing (and hence company whistleblower hotlines) as a check against abuses of management. American executives, meanwhile, champion whistleblowing (and hotlines) to support compliance and avert scandals and bet-the-company litigation. Everybody wins—except criminals brought to justice.

But this accommodating view of corporate whistleblowing (and hotlines) is not universal. A cultural component divides some places from the rest. Whistleblowing-averse societies from Russia and Latin America to the Middle East and India to parts of Asia and much of Africa fear reprisals and retaliation so much that they suspect workplace whistleblower hotlines as tools for entrapment. In jurisdictions such as Korea, corporate whistleblowing is taboo,<sup>3</sup> and parts of Continental Europe resist anonymous whistleblowing (and hence anonymous hotlines) surprisingly vehemently.<sup>4</sup> European workers may see hotlines as a threat to privacy—their own and that of powerful wrongdoers. An article in the *New York Times* says that in “much of Continental Europe” a “less swashbuckling attitude toward matters of privacy offer[s] the powerful,” such as corporate officers, “a degree of protection that would be unthinkable in Britain or the United States.”<sup>5</sup> The *Times* article points out that “French politicians have been able to hide behind some of Europe’s tightest privacy laws, protected by what amounted to a code of silence about the transgressions of the mighty.”<sup>6</sup> An article in the *Yale Law Journal* explores why Continental Europeans approach workplace privacy (and, by extension, workplace whistleblowing) so very differently from our outlook stateside:

2. HERMAN MELVILLE, *BILLY BUDD, SAILOR: (AN INSIDE NARRATIVE)* ch. 15, ¶ 5 (1962).

3. See Choe Sang-Hun, *Help Wanted: Korean Busybodies With Cameras*, N.Y. TIMES, Sept. 29, 2011, at A6, A11 (Korea is “a country where corporate whistle-blowing is virtually unheard of—such actions are seen as betrayal of the company [and] carry a social stigma”).

4. To Americans, facilitating anonymous whistleblowing encourages candid reports from otherwise-reluctant sources. According to Stephen M. Kohn, Executive Director of the National Whistleblowers Center, “[a]nonymity gets people to file [denunciations] and gets people with a lot to lose to file. The ability to be anonymous is a real game changer in terms of [enhancing potential whistleblowers’] willingness to file.” Stephen Joyce, *SEC Officials: Dodd-Frank Whistleblower Program Has Resulted in Higher Quality Tips*, 215 DAILY REP. FOR EXECUTIVES (BNA), at EE-13 (Nov. 7, 2011). Europe stands in sharp contrast. See Donald C. Dowling, Jr., *Sarbanes-Oxley Whistleblower Hotlines Across Europe: Directions Through the Maze*, 42 INT’L LAW. 1, 11-16, 21-28 (2008) [hereinafter Dowling SOX]. As to this article’s operative definition of “workplace whistleblower hotline,” see *supra* note 1 and *infra* note 21.

5. Alan Cowell, *Scandals Redefine Rules for the Press in Europe*, N.Y. TIMES, July 10, 2011, at A13.

6. *Id.*

[W]e are in the midst of significant privacy conflicts between the United States and the countries of Western Europe—conflicts that reflect unmistakable differences in sensibilities about what ought to be kept “private.”

....

... To people accustomed to the continental way of doing things, American law seems to tolerate relentless and brutal violations of privacy in [many] areas of law ....

....

... American privacy law seems, from the European point of view, simply to have “failed.”

....

... Americans and Europeans are, as the Americans would put it, coming from different places. At least as far as the law goes, we do not seem to possess general “human” intuitions about the “horror” of privacy violations. We possess something more complicated than that: We possess American intuitions—or, as the case may be, Dutch, Italian, French, or German intuitions ....

....

... Maybe Europeans feel that their personhood is confirmed by the fact that their bosses are obliged to respect their privacy in the workplace ....

... Everybody [in Continental Europe] is protected against disrespect, through the continental law of “insult,” a very old body of law that protects the individual right to “personal honor.” Nor does it end there. Continental law protects the right of workers to respectful treatment by their bosses and coworkers, through what is called the law of “mobbing” or “moral harassment.” This is law that protects employees against being addressed disrespectfully, shunned, or even assigned humiliating tasks like xeroxing.<sup>7</sup>

In societies that value personal privacy above corporate compliance, rank-and-file employees tend to fear workplace whistleblowing, particularly anonymous whistleblowing, as ruthless worker-on-worker espionage.<sup>8</sup> A confidential hotline makes every colleague and co-worker a potential spy, and facilitates unscrupulous rivals lodging false accusations. European workforces get especially queasy when an employer accompanies an anonymous hotline with a mandatory reporting rule—a common provision in multinational codes of conduct that forces employee witnesses to denounce misconduct or else get fired.<sup>9</sup> Conti-

7. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1155-57, 1159-60, 1163-65 (2000) (emphasis added, footnotes omitted).

8. Some countries outside the common law tradition, such as European regimes that suffered under Nazis, fascists, and Communists, fear anonymous whistleblowing as potentially treacherous and see anonymous whistleblowers as untrustworthy and dangerous sneaks who escape accountability for their denunciations. These cultures fear anonymous hotlines as lures that might tempt a jealous or vindictive grudge holder to accuse rivals of exaggerated or fabricated misdeeds. These cultures even seem to distrust corporations’ skill in conducting unbiased internal investigations into whistleblower allegations. This is, however, a generalization. Not every Continental European fears whistleblowers and elevates personal privacy above corporate compliance. Indeed, corporate governance mavens in parts of Continental Europe may be coming over to the Anglo view that values even anonymous whistleblowing (and hence corporate whistleblower hotlines) as a powerful weapon in the fight against corporate wrongdoing. See Dowling SOX, *supra* note 4, at 11-16.

9. Americans see mandatory reporting rules as a clear best practice. See Holly J. Gregory, *Whistleblower Bounty Rules: Impact on Corporate Compliance Programs*, 2011 PRAC. L. J. 20, 20 (“Corporate codes of conduct typically provide that employees have an obligation to come forward with information about potential wrong-

nental Europeans are quick to draw analogies here to anonymous neighbor-on-neighbor betrayals under the Stasi and Nazis that sparked torture and murder<sup>10</sup>—a period when the “sea of denunciations and human meanness” swelled to overwhelm even Adolf Hitler.<sup>11</sup> Beyond Europe, many societies fear whistleblowing reprisals, loathe mandatory reporting rules, and see an employer non-retaliation guarantee as a trap.

Laws exist to resolve conflicts in society.<sup>12</sup> In American society, corporate fraud sparks passionate conflict, so Americans tend to embrace corporate whistleblowing and hotlines

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doing . . . Without [this] direct reporting from employees, the company is hindered in its ability to identify potential problems, investigate and take timely corrective action.”). Mandatory reporting rules support employers’ internal investigations, such the scenario where an internal investigation does not uncover quite enough evidence to prove all implicated parties actively committed wrongdoing, but where the investigation confirms that some peripheral conspirators helped cover up malfeasance they demonstrably knew about. Mandatory reporting rules in international codes of conduct raise delicate issues of international and foreign-local employment law, issues beyond the scope of this article (which addresses international whistleblower hotlines). For a discussion by this author of mandatory reporting rules, see Dowling SOX, *supra* note 4, at 6, 17, 44–45. For a discussion by this author of multinationals’ cross-border internal investigations, see Donald C. Dowling, Jr., *Conducting Internal Employee Investigations Outside the United States*, in 2010 EMPLOYMENT LAW UPDATE ch. 2 (Henry H. Perritt ed., 2010), reprinted in 35 N.Y. ST. B.A. LAB. & EMP. L.J. 4 (2010) [hereinafter Dowling Investigations].

10. For examples of Europeans drawing this analogy, see Dowling SOX, *supra* note 4, at 12. Compare, as one example of an anonymous denunciation under the Nazis leading to torture, the case of Joseph Schachno, a U.S.-citizen expatriate doctor practicing medicine in a Berlin suburb during Hitler’s rise to power:

On the night of June 21 [1933], Schachno [was] visited at his home by a squad of uniformed men responding to an anonymous denunciation of him as a potential enemy of the state. The men searched his place, and although they found nothing, they took him to their headquarters. Schachno was ordered to undress and immediately subjected to a severe and prolonged beating by two men with a whip. Afterward, he was released . . . He lay in bed for a week. As soon as he felt able, he went to the [U.S.] consulate [which] ordered him taken to a hospital . . .

ERIK LARSON, IN THE GARDEN OF BEASTS: LOVE, TERROR, AND AN AMERICAN FAMILY IN HITLER’S BERLIN 4 (2011). Describing the beating, Larson adds, “From the neck down to the heels he was a mass of raw flesh,” as “he had been beaten with whips and in every possible way until his flesh was literally raw and bleeding.” *Id.* at 3.

Larson adds:

[In 1930’s Germany,] petty jealousies flared into *denunciations* made to the . . . Storm Troopers—or to the . . . Gestapo . . . The Gestapo’s reputation for omniscience and malevolence arose from . . . the existence of a populace eager . . . to use Nazi sensitivities to satisfy individual needs and salve jealousies . . . [O]f a sample of 213 *denunciations*, 37 percent arose not from heartfelt political belief but from private conflicts, with the trigger often breathtakingly trivial. In October 1933, for example, the clerk at a grocery store turned in a cranky customer who had stubbornly insisted on receiving three pfennigs in change. The clerk accused her of failure to pay taxes. *Germans denounced one another with such gusto that senior Nazi officials urged the populace to be more discriminating as to what circumstances might justify a report to the police. Hitler himself acknowledged . . . “we are living at present in a sea of denunciations and human meanness.”*

*Id.* at 57 (emphasis added). But cf. Whitman, *supra* note 7, at 1165 (arguing that the “Nazism” explanation for the Continental Europeans conception of personal privacy generally—but *outside* the whistleblowing context—is too facile because it ignores pre-Nazi-era history).

11. See LARSON, *supra* note 10, at 57 (“Germans denounced one another with such gusto that . . . Hitler himself acknowledged . . . ‘we are living at present in a sea of denunciations and human meanness.’”).

12. Cf. JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 263 (William Rehg, trans., MIT Press 2d ed. 1996) (1992) (arguing that democratic laws are “procedures according to which citizens can, in the exercise of their right to self-determina-

that encourage it.<sup>13</sup> U.S. law tends to support, even mandate, workplace hotlines, and U.S. corporations embrace hotlines in their push for “full compliance.”<sup>14</sup> By contrast, an employer that promotes whistleblowing in whistleblowing-averse societies like Russia, Latin America, the Middle East, and parts of Asia and Africa, causes conflict. And, because invading personal privacy sparks conflict among Continental Europeans,<sup>15</sup> European legal systems actively block many types of personal data processing<sup>16</sup> and interpret data protection laws to rein in the launch and staffing of hotlines.<sup>17</sup> This frustrates U.S. multinationals that buy into the “best practice” of report channels supporting compliance—especially those multinationals that think U.S. law actively requires offering hotlines overseas.<sup>18</sup> Many see the United States and European positions here as “seemingly contradictory regulatory regimes.”<sup>19</sup> The *Wall Street Journal* once quoted someone saying

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tion, successfully pursue the cooperative project of establishing just (i.e., relatively more just) conditions of life.”).

13. Every modern society rejects corporate misconduct, but modern U.S. society seems to be particularly vigilant in this regard. As just one example, in August 2011 a U.C.L.A. law professor publicly called for the U.C.L.A. School of Law to reject a \$10 million gift donated by Lowell Milken because, over twenty-five years before, Milken’s brother had been convicted in junk-bond scandals. Julie Creswell & Peter Latman, *Milken Gift Stirs Dispute at U.C.L.A.*, N.Y. TIMES, Aug. 23, 2011, at B1. The donor himself, Lowell, had never been convicted and had never “admit[ted] to any wrongdoing.” *Id.* Protest notwithstanding, U.C.L.A. took the money. *Id.*

14. See *infra* Part II(A)(1). On why the U.S. social concept of privacy and U.S. privacy law are compatible with phenomena like corporate whistleblower hotlines, see generally Whitman, *supra* note 7. As to U.S. corporations’ push for compliance, see generally Donald C. Dowling, Jr., *U.S.-Based Multinational Employers and the “Social Contract” Outside the United States*, 43 INT’L LAW. 1237, as reprinted in 26 ABA J. LAB. & EMP. L. 77 (2010).

15. See generally Whitman, *supra* note 7. For a discussion on “proportionality,” see Dowling SOX, *supra* note 4.

16. See Council Directive 95/46, EU Data Privacy Directive, art. 12, 1995 O.J. (L 281) (EC). For analysis of this directive, see generally Donald C. Dowling & Jeremy M. Mittman, *International Privacy Law*, in PROSKAUER ON PRIVACY: A GUIDE TO PRIVACY AND DATA SECURITY LAW IN THE INFORMATION AGE 14-1 (Kristen Mathews ed., 2006); Whitman, *supra* note 7.

17. See *infra* Part II(C).

18. For discussion of whether U.S. law actually requires hotlines abroad, see *infra* Part II(A)(1). As to U.S. opinion that it does, see, for example, DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE 162 (2d ed. 2004) (“it would be prudent to assume [that SOX enforcers will treat SOX as extending abroad] because foreign issuers whose shares are traded on U.S. stock exchanges are not exempt from securities filing requirements”). According to a U.S. law firm newsletter of August 2011, “[r]egulatory decisions in [Europe] cast doubt on the legality of whistleblowing hotlines within the EU, and companies listed on U.S. stock exchanges appear to face a difficult choice between two seemingly contradictory regulatory regimes.” Heather Egan Sussman & Alison Wetherfield, *An Employer’s Guide to Implementing EU-Compliant Whistleblowing Hotlines*, McDermott Newsletter (McDermott Will & Emery) Aug. 23, 2011, available at <http://www.mwe.com/index.cfm/fuseaction/publications.nldetail>. These “two seemingly contradictory regulatory regimes” refer to a widespread interpretation that Sarbanes Oxley § 301 (cited and discussed *infra* at Part II(A)(1)) extends extraterritorially—an interpretation that might be inconsistent with the U.S. Supreme Court decision *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010).

19. Sussman & Wetherfield, *supra* note 18. As to the SEC position: in April 2003, the SEC issued an early release interpreting SOX and saying the SEC declines to take a “one-size-fits-all” approach to regulating whistleblower hotlines and will not “mandat[e] specific [hotline report] procedures” for a number of reasons including the fact that “large, multi-national [sic] corporations [employ] thousands of employees in many different jurisdictions,” presumably meaning different nations, as opposed to different U.S. jurisdictions. Standards Relating to Listed Company Audit Committees Release, Securities Act Release No. 33-8220, 79 SEC Docket (CCH) 2876 (Apr. 9, 2003) (emphasis added) (SEC release implementing Exchange Act § 10A(m)(1) as amended by Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, 116 Stat. 772, § 301).

the conflict here effectively orders multinationals either to “chop off [their] left hand or chop off [their] right hand.”<sup>20</sup> Beyond Europe, those jurisdictions where workers fear hotlines as entrapment also impose hotline restrictions.

This article is a toolkit for a compliance-focused multinational that wants to launch a workplace whistleblower hotline across worldwide operations and therefore needs to comply with hotline restrictions overseas.<sup>21</sup> The discussion splits into halves, one conceptual, and one practical. Part One, the conceptual part, explores why any legal system would restrict whistleblower hotlines when no jurisdiction restricts whistleblowing itself and when few whistleblowers even bother with hotlines. Part Two, the practical part, analyzes the six categories of laws that restrict global whistleblower hotlines, focusing on compliance strategy.<sup>22</sup>

### I. Part One: Why Restrict Whistleblower Hotlines Without Regulating Whistleblowing Itself, When so Few Whistleblowers even Bother with Hotlines?

A workplace whistleblower hotline comprises three basic components: (1) a *communication* that (a) encourages (or forces)<sup>23</sup> employees to denounce colleagues suspected of wrongdoing, (b) explains how to submit a denunciation, and (c) (often) guarantees confidentiality or anonymity and non-retaliation; (2) a *medium or media* (channel or channels) for accepting denunciations, such as an email address, web link, postal mail address, telephone number, or some combination; and (3) *protocols/procedures and scripts* by which a hotline responder, often a specialist outsourced company,<sup>24</sup> processes denunciations and passes them onto someone at the hotline-sponsor company to investigate. Internal investigations into whistleblower denunciations raise tough legal issues of their own, particularly in the cross-border context, but investigations into specific denunciations are

20. David Reilly and Sarah Nassauer, *Tip-line Bind: Follow the Law in U.S. or EU?*, WALL ST. J., Sept. 6, 2005, at C1. For similar analogies in this context, see Dowling SOX, *supra* note 4, at 3, n. 6.

21. This article addresses *workplace-context* whistleblower hotlines because most regulations specific to hotlines are specific to *employee* hotlines. Some corporate hotlines are open to stakeholders like customers, suppliers, contractors, and the general public, in addition to employees. Opening a hotline to informants other than staff raises few, if any, legal issues beyond the ones discuss here. Further, hotlines tend to attract most of their calls from current and former employees, not from outsiders.

22. In 2008 this author published a study of the legal issues the reach whistleblower hotlines launched in Europe. See generally Dowling SOX, *supra* note 4. The present article updates some of the points in the 2008 piece and takes a global focus—beyond Europe.

23. See Gregory, *supra* note 9, for a discussion of employer mandatory reporting rules.

24. Hotline-sponsoring multinationals often contract with specialist outsourcer companies to respond to hotline calls. Indeed, a mini-industry of niche “hotline outsourcers” has emerged, comprising companies that respond to hotline calls purportedly in any language. See, e.g., EthicsPoint.com, Beyond Compliance: Implementing Effective Whistleblower Hotline Reporting Systems, <http://www.ethicspoint.com/articles/whitepapers/beyond-compliance-implementing-effective-whistleblower-hotline-reporting-systems> (last visited Jan. 1, 2012). The ability to outsource a cross-border hotline offers a hotline sponsor some distinct advantages—impartiality, specialized expertise—but also triggers additional legal issues because giving an outsider access to highly-confidential denunciations necessarily discloses sensitive data outside the company (even though, in the hotline context, the sensitive transmissions come from individual whistleblowers, not the employer). Particularly in Europe, using an outsourcer implicates the data protection/privacy law concepts of “onward transfer” and, where the outsourcer is outside the European Economic Area, “data export.” See Dowling SOX, *supra* note 4, at 24-25, 48; cf. chart, *infra* Part II(C).

completely separate from this topic, the pre-investigatory launch, and the operation of a workplace whistleblower hotline.<sup>25</sup>

In many societies, distrust of or aversion to whistleblowing<sup>26</sup> combines with particularly protective local privacy and labor laws<sup>27</sup> to spawn six distinct legal doctrines<sup>28</sup> that restrict multinational employers' freedom to launch anonymous whistleblower hotlines across international operations.<sup>29</sup> But to Americans, the fact that any jurisdiction resists workplace hotlines seems counterintuitive. A government should encourage, not frustrate, businesses policing themselves to comply with the government's own laws. Yes, social forces and public policy in some places seem hostile to whistleblowing, and yes, some societies aggressively ban hotlines that "disproportionately" invade personal privacy. But legislatively restricting hotlines raises a paradox: even the most privacy-protective legal systems on Earth do not dare restrict whistleblowing itself.<sup>30</sup> Why restrict channels that merely facilitate otherwise legal whistleblowing?

As a practical matter, "free-form" whistleblowing—truthful solo denunciations outside formal report channels—is probably impossible to regulate without prior restraints. Whistleblowing intrinsically links to speech, secrecy, and human interaction. In its most basic form, whistleblowing is ubiquitous—quite literally child's play: every toddler tattling on a sibling's misbehavior to mother and every kindergartner bringing an unruly classmate to the attention of teacher is a whistleblower. No free society can prohibit or materially restrict whistleblowing without imposing intolerable prior restraints on speech. And dictatorial, repressive, and fascist governments do not want to restrict whistleblowing; they encourage denunciations to police lawbreakers. Even the legal systems that are most hostile to hotlines leave free-form whistleblowing—including *anonymous* whistleblowing—completely unrestricted.<sup>31</sup>

With whistleblowing unrestricted, why rein in channels that merely receive otherwise-legal whistleblower reports? The historical (and practical) way that governments, free and authoritarian alike, censor speech is to restrict the speaker, not the listener. No federal communications law would restrict radio receivers but leave radio broadcasts unregulated. Merely crippling hotlines leaves would-be whistleblowers free to denounce colleagues any other way they want, anonymously or not, by telephone, written note, postal mail, e-mail,

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25. Investigating a hotline-received whistleblower denunciation opens its own Pandora's Box of legal issues—issues that follow after the launch of a company whistleblower hotline. Not all whistleblower hotline complaints lead to internal investigations and not all internal investigations are sparked by denunciations received via hotline. For analysis and inventory of international internal investigation issues, see *generally* Dowling Investigations, *supra* note 9.

26. See *supra* notes 1-4, 7-11 and accompanying text.

27. See, e.g., *supra* notes 4, 7-11 and accompanying text.

28. This article addresses these six doctrines *infra* Part II.

29. On workplace hotlines versus hotlines open to non-employee stakeholders, see *supra* note 21.

30. No known jurisdiction imposes any law that acts as a prior restraint on speech to forbid private citizens from truthfully reporting others' misdeeds to private third parties (or to government/police authorities, for that matter). Yet legal doctrines could conceivably be triggered under certain narrow whistleblower scenarios. For example, a government employee whistleblower could illegally divulge state secrets; a corporate officer whistleblower could breach a fiduciary duty; a lawyer whistleblower could breach the attorney-client privilege; a whistleblower party to a confidentiality/non-disclosure agreement could breach the agreement.

31. This part of the article discusses restrictions *against* free-form whistleblowing, not laws that *promote* or *require* whistleblowing. Part II(B), *infra*, discusses laws that promote denunciations to government authorities.

text message, on-line chat room, tweet, social media, web post, letter to the editor, spreading rumors, contacting government authorities, tying a note to a rock thrown through a window—whatever. With a smorgasbord of non-hotline channels available, restricting only hotlines seems futile.

Indeed, it *is* futile. Whistleblowers overwhelmingly favor non-hotline channels. Only a tiny minority—three percent—of corporate whistleblowers bother with hotlines; a whopping *ninety-seven percent* of whistleblowing is free form.<sup>32</sup> The study that confirms this ninety-seven percent figure was confined to the United States—abroad, where hotlines are less common and less accepted, the percentage of non-hotline whistleblower reports is likely even greater. Information-age communications make non-hotline whistleblowing easier now than ever before. Put aside old, low-tech whistleblowing channels like mailing a letter, dialing a telephone, slipping a note on someone's chair or under the door, talking to a news reporter, talking to government authorities, and spreading a rumor. Today's whistleblower accesses many high-tech channels instantly to transmit denunciations to anyone—anonymous email accounts, interactive websites, social media, tweets, text messages, web chat rooms, disposable cell phones, and web-enabled communications. In today's technology-enabled world, who needs a hotline? Ninety-seven percent of whistleblowers cannot be wrong.

Historically, hotlines always seem to have been mostly irrelevant. Whistleblowing without a hotline is the time-honored way we denounce our fellows. America's legendary whistleblowers—the real-life informants immortalized by Hollywood—submitted their history-making denunciations without hotlines: take, for example, environmental whistleblower Erin Brockovich (played by Julia Roberts in *Erin Brockovich*); New York police whistleblower Frank Serpico (played by Al Pacino in *Serpico*); Watergate “Deep Throat” whistleblower Mark Felt (played by Hal Holbrook in *All the President's Men*); tobacco industry whistleblower Jeffrey Wigand (played by Russell Crow in *The Insider*); Archer-Daniels-Midland whistleblower Mark Whitacre (played by Matt Damon in *The Informant*); Dyncorp/U.N. sex trafficking whistleblower Kathryn Bolkovac (derivative character played by Rachel Weisz in *The Whistleblower*); Nigeria “Yellowcake” whistleblower Joseph Wilson, husband of Valerie Plame (played by Sean Penn in *Fair Game*); Enron whistleblower Sherron Watkins (star of the documentary *Enron: The Smartest Guys in the Room*); Bernie Madoff whistleblower Harry Markopolos (star of the documentary *Chasing Madoff*)—even Oval Office sex-scandal whistleblower Linda Tripp (parodied by John Goodman on *Saturday Night Live*).<sup>33</sup> Trailblazing whistleblowers do not bother with hotlines.

32. “[T]he Ethics Resource Center survey found that *only three percent of all reports of wrongdoing come through hotlines*—possibly indicating that *employees* don't trust them. They might be right: A study by the University of New Hampshire concluded that *corporate* officials take anonymous complaints less seriously and devote fewer resources to them.” Dori Meinert, *Whistle-Blower: Threat or Asset?*, 56 SOC'Y HUM. RESOURCE MGMT. 27, 27 (2011) (emphasis added). Of course, though, there is no firm correlation between anonymous whistleblowing and hotline whistleblowing: anonymous denunciations are submitted all the time through channels other than hotlines, and self-identifying whistleblowers often call hotlines.

33. Other famous whistleblowers not yet immortalized by Hollywood also made their well-known denunciations free form, without resort to formal corporate hotlines. Think of Japan nuclear power whistleblower Kei Sugaoka; Glaxo Smith Klein whistleblower Cheryl Eckard; “Weinergate” (Anthony Weiner “sexting” whistleblower scandal) whistleblower Andrew Breitbart; and tobacco industry whistleblower Jeffrey Wigand. Indeed, workplace whistleblowers denounce errant employees every day without resorting to formal company

To Americans, imposing laws to restrict hotlines seems downright quixotic for two reasons. First, hotlines exist to support compliance with the government's own laws. Second, restricting hotline listeners without bothering whistleblower speakers is both counterintuitive and futile when ninety-seven percent of whistleblowers avoid hotlines anyway. But this is just a U.S. perspective. For whatever reason, jurisdictions worldwide do regulate workplace whistleblower hotlines, using six separate categories of laws. Multinationals launching cross-border report channels need to comply.

## II. Part Two: Complying with the Six Categories of Laws that Restrict Whistleblower Hotlines Around the World

The *raison d'être* of any whistleblower hotline is compliance. Because hotlines coax witnesses to reveal otherwise-clandestine wrongdoing so an employer can investigate, right wrongs, and comply with law,<sup>34</sup> no hotline can afford to violate applicable law. *Reductio ad absurdum*: an informant could contact a non-compliant report channel, announce the hotline itself violates some law, and denounce the in-house project team that launched it. So every compliant multinational that launches international hotlines needs to start by checking, in each affected jurisdiction, whether the channel might break the law. Then the multinational must comply. Because U.S. domestic laws tend not to restrict whistleblower hotlines, the issues here seem obscure to U.S. multinationals. The rest of this article analyzes the six categories of laws that can restrict whistleblower hotlines abroad, focusing on compliance.<sup>35</sup>

### A. CATEGORY # 1: LAWS MANDATING WHISTLEBLOWER PROCEDURES

The first category of hotline-regulating laws comprises mandates that require setting up whistleblower hotlines in the first place.<sup>36</sup> These laws even reach an organization already

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hotlines. One random, recent example appears in a 2011 California court opinion, *San Diego Unified Sch. Dist. v. Comm'n on Prof'l Competence*, 194 Cal. App. 4th 1454 (2011). In that case an anonymous whistleblower denounced, to police—not using any in-house hotline—a middle-school public teacher who had posted pornographic photographs of himself, and had solicited sex, on Craigslist. *Id.* The California court upheld the firing of the teacher even though the public-sector employee's Craigslist advertisement had been posted off-hours and was unconnected to his classroom job, and even though the denunciation had been anonymous. *Id.*

34. A hotline is never *necessary* for whistleblowing: any whistleblower can submit even anonymous tips in plenty of ways without a hotline. Indeed, only three percent of whistleblowers bother with hotlines. See, e.g., Meinert, *supra* note 32.

35. These six categories are the categories of laws that regulate the *launch and operation* of a whistleblower hotline itself. As such, they do not reach—and this article does not address—legal issues ancillary to hotline launch and operation. For example, it does not address either laws regulating the launch of a global code of conduct or laws regulating a *mandatory reporting rule* that forces employee witnesses to report wrongdoing. This author has addressed both of those issues elsewhere. As to laws regulating the launch of a global code of conduct, see generally Donald C. Dowling, Jr., *Code of Conduct Toolkit: Drafting and Launching a Multinational Employer's Global Code of Conduct*, in *GLOBAL LABOR AND EMPLOYMENT LAW FOR THE PRACTICING LAWYER* 563-77 (Andrew P. Morriss & Samuel Estreicher eds., 2010). For discussion of laws regulating a mandatory reporting rule that forces employee witnesses to report wrongdoing, see Dowling SOX, *supra* note 4, at 6, 17, 44-45.

36. For this article's definition of "hotline," see *supra* notes 1, 21. Hotline-mandating laws promote workplace hotlines and so these laws exist only in whistleblowing-friendly jurisdictions.

committed to launch a hotline, because any report channel rolled out where the law requires hotlines must comply with the strictures in the hotline-mandating law. This section first addresses the U.S. hotline mandating law, the Sarbanes-Oxley Act of 2002 [SOX],<sup>37</sup> then looks at similar mandates overseas.

# 1. SOX § 301

For multinationals that raise funds on U.S. stock exchanges, the vital hotline-mandating law is SOX § 301(4), which forces company board audit committees to offer “employees” “procedures” for the “confidential, anonymous” submission of “complaints” and “concerns” of “accounting or auditing matters.”<sup>38</sup> The Dodd-Frank law of 2010, discussed in subsection B(2), amends many parts of SOX but does not tweak this particular mandate.<sup>39</sup> SOX § 301(4) requires audit committees of SOX-regulated corporations, including so-called “foreign private issuers” based outside the United States, to:

*establish procedures for:* (A) the receipt, retention, and treatment of *complaints* received by the issuer regarding accounting, internal accounting controls, or auditing matters; and (B) the *confidential, anonymous* submission by *employees* of the issuer of concerns regarding questionable *accounting or auditing matters*.<sup>40</sup>

Fortunately, any viable hotline likely complies if only because SOX § 301(4) offers significant leeway in structuring “complaints” “procedures.”<sup>41</sup> Congress wanted audit committees to tailor bespoke report “procedures” to fit each company’s own needs, and so the U.S. SEC refuses to “mandat[e] specific [hotline] procedures.”<sup>42</sup> Any robust whistleblower channel that a SOX-regulated employer communicates to its (at least U.S.) employees likely complies with SOX § 301(4)(B) as long as employees know about it and can access it “confidential[ly] and “anonymous[ly].”<sup>43</sup> Structuring a SOX-compliant hotline is so easy that no one ever seems to have gotten it wrong: as of mid-2011, no SOX § 301(4) prosecution had ever been reported. Compliance may be so simple that most “complaints” “procedures” comply with SOX § 301(4).

But the concern here is the global context: *how can a multinational launch a compliant hotline for whistleblowers overseas?* The international dimension slams the otherwise-

37. Sarbanes-Oxley Act of 2002, Pub.L. No. 107-204, 116 Stat. 745, § 301 (codified at 15 USC 78j-1) [hereinafter SOX]. SOX reaches all entities, be they U.S.-based or foreign private issuers, that raise funds on U.S. stock exchanges such as the NYSE and NASDAQ.

38. *Id.* § 301(4). This part of the article addresses the SOX hotline mandate that audit committees make “procedures” available to “employees.” Separate provisions in SOX impose additional rules as to “reasonably” “promoting” whistleblowing reports by “senior financial officers” and “attorneys.” *See id.* §§ 307, 406, 407; 17 C.F.R. § 205.3. This article does not address those mandates because here the focus is on broad-based whistleblower hotline procedures available to all employees (and even to non-employee stakeholders).

39. Dodd-Frank Wall Street Reform and Consumer Protection Act (whistleblower bounty provision), Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (2010) (codified at 15 U.S.C. § 78u-6 *et seq.*).

40. SOX, *supra* note 37, § 301(4) (emphasis added).

41. SOX § 301 does not use the word “hotline.” *See id.* § 301. This article’s definition of “hotline” includes any “complaints” “procedure” that complies with SOX § 301(4). *See supra* notes 1, 21.

42. Standards Relating to Listed Company Audit Committees, *supra* note 19. *See also* Dowling SOX, *supra* note 4, at 6, n. 17.

43. SOX, *supra* note 37, § 301(4). SOX § 301(4) offers almost no guidance as to what hotline “procedures” must be, except that the text of § 301(4) requires a report channel be “confidential” and “anonymous.” *Id.*

straightforward § 301(4) “procedures” mandate into hotline-restrictive barriers, erected overseas to hold hotlines back.<sup>44</sup> The question might therefore become: *to what extent can a SOX-regulated audit committee modify a § 301(4) hotline protocol to conform to overseas laws restricting hotlines?* But that question assumes SOX § 301(4) steps beyond U.S. soil and confronts hotline-restrictive laws abroad. Notwithstanding a widespread belief and a 2003 statement by the U.S. SEC to the contrary,<sup>45</sup> SOX § 301(4) might be a shut-in. If SOX § 301 does not travel overseas, then a hotline launched abroad is free to conform to any local hotline rules that foreign law might impose. And so our actual question is: *does the SOX § 301(4) “complaints” “procedures” mandate reach extraterritorially?*

Perhaps it does not. U.S. statutes apply only domestically unless they specify otherwise.<sup>46</sup> Nothing in SOX, nor in any SOX regulation or reported case,<sup>47</sup> addresses whether § 301(4)(B) reaches “employees” based outside the United States. This statutory silence may anchor § 301(4) to U.S. soil.<sup>48</sup> In *Carnero v. Boston Scientific*, the U.S. First Circuit Court of Appeals (later confirmed with a U.S. Supreme Court denial of certiorari) confined a different SOX whistleblowing provision—SOX § 806, which prohibits whistleblower retaliation—to the United States, reasoning that the text is silent as to overseas reach.<sup>49</sup> SOX § 301(4) is also silent on that issue, so the *Carnero* analysis might compel a similar result and confine § 301(4) to the United States. Fresh support lies in the 2010 U.S. Supreme Court decision *Morrison v. Nat’l Aust. Bank Ltd.*,<sup>50</sup> which is eight years newer than SOX. *Morrison* anchors § 10(b) of the U.S. Securities Exchange Act of 1934—like SOX, also a securities law—to the United States:

It is a “longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” . . . When a statute gives no clear indication of an extraterritorial application, it has none . . . . On its face, § 10(b) [U.S. securities law] contains noth-

44. See Chart, *infra* Part II(C) (summarizing European hotline laws).

45. See Standards Relating to Listed Company Audit Committees, *supra* note 19.

46. The general, long-standing canon of statutory construction, upheld by a number of U.S. Supreme Court decisions, is that U.S. statutes do not apply extraterritorially unless they expressly say they reach abroad.

47. As of mid-2011, a search revealed no case law or other authority on this point.

48. See Dowling SOX, *supra* note 4, at 7-11.

49. *Carnero v. Boston Sci. Corp.*, 433 F.3d 1, 10 (1st Cir. 2006). *Accord* Villanueva v. Core Labs., Docket No. 09-108 (Dep’t of Labor Dec. 22, 2011). *But cf.* O’Mahoney v. Accenture, 2008 U.S. Dist. LEXIS 10600 (S.D.N.Y. 2008) (distinguishing the facts of *Carnero*). As to the factual distinction between *Carnero* and *O’Mahoney*, see Dowling SOX, *supra* note 4, at 8-9, n.29. After *Carnero*, Dodd-Frank § 929A amended SOX § 806 to expand the definition of entity to include “any subsidiary or affiliate whose financial information is included in the consolidated financial statement.” Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929A, 124 Stat. 1841 (2010). This would seem to include foreign-incorporated affiliates. But the Dodd-Frank amendments to SOX § 806 do not say anything about overseas-based whistleblowers or whistleblowing incidents that occur abroad. And so the Dodd-Frank § 929A amendments probably do not affect the rule in *Carnero*. But if the Dodd-Frank § 929A amendment is somehow held to overrule *Carnero* and extend SOX § 806 abroad, the fact that Dodd-Frank did not similarly amend SOX § 301 buttresses the analysis that § 301 does not extend abroad: Congress could have made a Dodd-Frank § 929A-like amendment to SOX § 301, but chose not to. On the Dodd-Frank § 929A amendment, see generally OSHA Docket Number OSHA-2011-0126, RIN 1218-AC53, Procedures for the Handling of Retaliation Complaints under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, Interim Final Rule, Request for Comments, at 5-6.

50. See *generally* *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

ing to suggest it applies abroad . . . In short, there is no affirmative indication in the [Securities] Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not.<sup>51</sup>

But *Morrison* is merely the U.S. Supreme Court's view. Multinationals reflexively presume, following an aging 2003 SEC comment with a fleeting reference to § 301 hotlines in "different jurisdictions,"<sup>52</sup> that the SOX hotline "procedures" mandate extends worldwide. SOX-regulated multinationals may not even care whether SOX § 301 reaches abroad—even if it does not, they aspire to the "gold standard" of a SOX-compliant confidential, anonymous hotline across operations worldwide, regardless of whether it sparks a conflict with hotline-restricting laws abroad.

## 2. Beyond SOX § 301

Abroad, whistleblower hotlines must comply with strictures in foreign laws that, like SOX § 301, require employee report channels.<sup>53</sup> But these laws are rare. As of 2011, very few laws beyond SOX force employers to offer hotlines. "Whistleblower laws" have popped up worldwide, but they tend to be mere *retaliation* prohibitions, stopping employers from punishing whistleblowers whether they use hotlines or not.<sup>54</sup> For example, the UK Public Interest Disclosure Act 1998,<sup>55</sup> India's Limited Liability Partnership Act 2008,<sup>56</sup> Japan's Whistleblower Protection Act,<sup>57</sup> and South Africa's Protected Disclosures Act 2000 contain whistleblower retaliation prohibitions without affirmatively requiring report channels.<sup>58</sup> Anti-fraud securities laws tend not to require hotlines either. Japan's Financial Instruments and Exchange Law (J-SOX) does not require them,<sup>59</sup> nor do UK financial accountability laws or the UK Bribery Act.<sup>60</sup> Legislatures in a few jurisdictions *recommend* whistleblower hotlines—India's clause 49 of the Listing Agreement<sup>61</sup> and Spain's Recom-

51. *Id.* at 2877-78, 2881, 2883 (emphasis added). After *Morrison*, Dodd-Frank § 929P, amended part of the securities law at issue (§ 17 (a) of the U.S. Securities Act of 1933) so that that law now expressly reaches abroad. See Dodd-Frank Wall Street Reform and Consumer Protection Act § 929P. But nothing in Dodd-Frank or elsewhere extends SOX § 301(4) abroad, and the § 929P amendment does not affect the jurisprudence of *Morrison*.

52. Standards Relating to Listed Company Audit Committees, *supra* note 19.

53. Just as, for example, SOX § 301 imposes the stricture that report "procedures" be "confidential [and] anonymous." See SOX, *supra* note 37, § 301(4).

54. See *infra* Part II(E) for discussion of whistleblower retaliation laws.

55. See *generally* Public Interest Disclosure Act, 1998, c. 23 (Eng.).

56. Limited Liability Partner Act, 2008, No. 6, Acts of Parliament, 2009 (India), available at <http://www.llp.gov.in/>.

57. Act No. 122 of 2004 (Japan).

58. Protected Disclosures Act 26 of 2000 (Cape Town) (S. Afr.). Section 6(2) addresses, but does not mandate, voluntarily-adopted "procedure[s] authorised by [an] employer." *Id.* § 6(2).

59. Financial Instruments and Exchange Act, Acts No. 65, 66 of 2006 (Japan).

60. Bribery Act, 2010, c. 23 (Eng.).

61. Limited Liability Partner Act, 2008, No. 6, Acts of Parliament, 2009 (India); Press Release, Sec. & Exch. Bd. of India, Extension of Date of Ensuring Compliance with Revised Clause 49 of the Listing Agreement (Mar. 29, 2005) (establishing an effective date of Dec. 31, 2005 for compliance with clause 49 of the Limited Liability Partner Act).

mentation 50.1(d), part II of *Codigo Unificado de Buen Gobierno* 19 May 2006.<sup>62</sup> But companies can and do ignore these.<sup>63</sup>

A few isolated laws in a handful of places require or have required employers to sponsor report channels. Liberia Executive Order # 22 of 2009,<sup>64</sup> issued by Liberia's Nobel Peace Prize-winning president, required "private entities" to launch procedures for "receiving and processing" "public interest disclosures" about private company "malpractices."<sup>65</sup> But that order has now lapsed. Norway's Working Environment Act<sup>66</sup> grants Norwegians a right to report "censurable conditions" and urges employers to "establish" some "routin[e] . . . or . . . other measures" for employee whistleblower reports.<sup>67</sup> But this is qualified and little more than a strong recommendation. Multinationals launching cross-border whistleblower hotlines must adapt report channels to strictures in local hotline mandates like the now-lapsed Liberia order and Norway's Working Environment Act. But beyond U.S. SOX, few laws yet require hotlines, although this might be an emerging trend.

#### B. CATEGORY # 2: LAWS PROMOTING DENUNCIATIONS TO GOVERNMENT AUTHORITIES

Requirements of whistleblower procedures aside, our next category of hotline regulation is laws like U.S. Dodd-Frank<sup>68</sup> that promote employee/stakeholder denunciations to *government authorities*. These laws do not regulate company hotlines per se, but they steer employer hotline strategy for two reasons: first, encouraging whistleblowing to government competes with employer hotlines by enticing internal whistleblowers to divert denunciations from company compliance experts and over to outside law enforcers who indict white-collar criminals. Second, laws that require (as opposed merely to encourage) government denunciations rarely except corporate hotline sponsors. These laws therefore force hotline sponsors to divulge hotline allegations to law enforcement. For both reasons, hotline sponsors need strategies accounting for these laws. We address U.S. Dodd-Frank first, then similar laws elsewhere.

62. CODIGO UNIFICADO DE BUEN GOBIERNO [REPORT OF THE SPECIAL WORKING GROUP ON THE GOOD GOVERNANCE OF LISTED COMPANIES] recommendation 50.1(d), part II, CNMV (2006), available at [http://objetivo15.net/doc/CNMV\\_CodigoBuenGobiernoDeLasSociedadesCotizadas.pdf](http://objetivo15.net/doc/CNMV_CodigoBuenGobiernoDeLasSociedadesCotizadas.pdf) (Spanish version) (Spain); see also Dowling SOX, *supra* note 4, at 15, n.48.

63. This part addresses laws mandating *general* denunciations to government authorities. In the specific area of sexual harassment, there are some other laws in some jurisdictions like Costa Rica that require employers to offer a report channel specifically for *sex harassment* complaints. Other countries affirmatively require employers to investigate specific allegations of sex harassment; those countries include Chile, India, Japan, South Africa, and Venezuela. Colombia requires some report channel for "labor" harassment.

64. Exec. Order 22 of 2009 (signed by Liberia President (2011 Nobel Peace Prize winner) Ellen Johnson Sirleaf in Dec. 2009; order now lapsed) (Liber.).

65. *Id.*

66. Working Environment Act, No. 10 (2007) (Nor.), available at <http://www.arbeidstilsynet.no/binfil/download2.php?tid=92156>; see also Dowling SOX, *supra* note 4, at 15, n.48 (discussing the Working Environment Act).

67. Norwegian Act, *supra* note 66.

68. Dodd-Frank Wall Street Reform and Consumer Protection Act (whistleblower bounty provision), Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (2010) (codified at 15 U.S.C. § 78u-6 *et seq.*).

1. *U.S. Dodd-Frank*

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 amended Sarbanes-Oxley in many key respects, but did not touch SOX § 301(4)'s mandate for hotline/"complaints" "procedures."<sup>69</sup> Rather, Dodd-Frank took a radically different approach to whistleblowing that ultimately promotes robust internal company hotlines for a completely different reason. Under Dodd-Frank § 922<sup>70</sup> and U.S. Securities and Exchange Commission [SEC] implementing rules of May 2011,<sup>71</sup> a U.S. government "bounty" pays cash awards of ten percent to thirty percent of SEC-recovered sanctions over \$1 million to eligible whistleblowers—whether living stateside or abroad<sup>72</sup>—who told the SEC "original information" about securities violations leading to an actual money recovery.<sup>73</sup> Even whistleblowers that bypass internal SOX § 301 hotlines are eligible. Dodd-Frank's lure of a huge payday may tempt whistleblowers more than even the warm feeling of doing the right thing by calling an in-house SOX hotline.<sup>74</sup> The *Wall Street*

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69. *See id.*

70. *Id.*

71. Adopting Release, Implementation of Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Rel. No. 34-64545 (May 25, 2011) (codified as amended at 17 C.F.R. pt. 240).

72. Cf. Tammy Marzigliano & Jordan A. Thomas, *Advocacy & Counsel for the SEC Whistleblower: A Primer for Employment Lawyers*, 196 DLR I-1, 1-2 (2011):

Any violation of the federal securities laws qualifies for protection under Dodd-Frank. The reported violation may have occurred *anywhere in the world*, involving public or private organizations and domestic or international violators. In most cases, securities fraud occurs when manipulative and deceptive practices are employed in connection with the purchase and sale of a security. Beyond stocks and bonds, the federal securities laws have interpreted "security" broadly to include investment contracts, notes, and other nontraditional investments.

(emphasis added).

73. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, *supra* note 68, at § 922(a); *see also* Adopting Release, *supra* note 71. SEC Enforcement Division Associate Director Stephen L. Cohen, speaking at a conference in November 2011, said that critics of the bounty program "warned," "individuals [would] see[k] financial awards under the program, which by statute will be *no less than \$100,000 and could reach into the millions of dollars*." Joyce, *supra* note 4, at 1 (emphasis added). The Dodd-Frank bounty is payable only for disclosing a violation of U.S. securities laws—not, for example, for disclosing bribery that violates the U.S. Foreign Corrupt Practices Act. Dodd-Frank Wall Street Reform and Consumer Protection Act, *supra* note 68, at §§ 21F(a)(1), (b)(1). That said, though, "[s]ome whistleblowers may not distinguish between the securities laws and [other laws like] the FCPA . . . and once the SEC has received a tip, it can be expected to pass it on to other law enforcement authorities." Larry P. Ellsworth, *Blowing the Whistle on Private Cos.?*, Employment Law 360, LAW360.COM (Oct. 26, 2011). Whistleblowers resident outside the United States who suspect a violation of U.S. securities laws (such as related to accounting fraud occurring overseas) appear to be fully eligible for the bounty.

74. Cf. Marzigliano & Thomas, *supra* note 72:

Dodd-Frank not only provides robust whistleblower protection, but it has revived pre-existing whistleblower claims. The False Claims Act (FCA), once limited to individuals who were "original sources" with "direct and independent knowledge," has been expanded to cover individuals with either information or analysis . . . . Similarly, the Sarbanes-Oxley Act (SOX) now appears to have the teeth it was intended to have. Dodd-Frank expanded SOX by extending coverage beyond just public companies to employees of affiliates and subsidiaries of publicly traded companies "whose financial information is included in the consolidated financial statements of such publicly traded company."

*Journal* and many others lament the discordant policy message here to would-be whistleblowers.<sup>75</sup>

Former Deputy U.S. Attorney General George Terwilliger, now a partner practicing white-collar criminal law at White & Case LLP in Washington D.C., analyzes the conflict here in detail and offers strategic advice to corporations caught between SOX and Dodd-Frank. Terwilliger's analysis merits setting out in detail:

Notably *omitted* from the [SEC Dodd-Frank whistleblower bounty] Final Rules are requirements that were suggested and designed to preserve the effectiveness of [SOX § 301-style] corporate internal reporting systems. The Final Rules provide what the SEC posits are a number of incentives to encourage potential whistleblowers to utilize existing internal reporting systems. However, *an individual with access to a well-structured, staffed, and responsive internal reporting system can nonetheless forgo reporting internally, provide information directly to the SEC, and remain eligible for [a bounty] award.*

The SEC has downplayed the likelihood that individuals seeking awards will bypass internal systems, but *the program's first-to-report requirement, enormous potential financial awards, and lack of an internal reporting requirement represent a significant challenge to maintaining effective compliance programs [including an effective internal hotline].* Companies have implemented these very compliance programs, often at great expense, at the behest of federal authorities and the dictates of Sarbanes-Oxley requirements to effectively monitor corporate operations for compliance with law.

*Companies now need to assess the effect of the whistleblower reward provision of Dodd-Frank and the SEC's implementing rules on their compliance programs and consider such programmatic adjustments and changes as that assessment may suggest.*<sup>76</sup>

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75. According to a Wall St. Journal blog article:

Compliance lawyers and general counsel argue that they've spent much of the past decade putting compliance programs into place to deal with whistleblowing complaints; *letting every disgruntled employee run to the SEC would provide huge headaches and little benefit . . .* David Becker, the SEC's general counsel, recently told a group . . . that *whistleblowers should not have to approach their companies' management before they run to the SEC . . .* Becker said the reason is because some compliance programs "no matter how elaborately conceived and extensively documented, exist only on paper. Some small number are shams."

Ashby Jones, *Sympathy for the Whistleblower? SEC GC's Comments Pique Interest*, WALL ST. J.L. BLOG (Feb. 1, 2011), <http://blogs.wsj.com/law/2011/02/01/sympathy-for-the-whistleblower-sec-gcs-comments-pique-interest/>.

Many later commentators offered similar views during 2011. See, e.g., BNA Daily Labor Report, *Lawyers Stress Whistleblower Protections in Dodd-Frank Act and SOX Amendments*, 112 DLR C-1 (June 10, 2011); Corpedia Ask the Experts, *What Should a Company's Response Be to the Dodd-Frank Whistleblower Provisions Which Encourage Employees to Report Wrong-Doing to the SEC?*, CORNPEDIA ONLINE, Aug. 2, 2011; Ellsworth, *supra* note 73; Gregory, *supra* note 9; Meinert, *supra* note 32; David Schwartz & Kathiana Aurelien, *Whistleblowing: Dodd-Frank Whistleblower Bounties and Their Impact on Employers*, BLOOMBERG LAW REPORTS: LABOR & EMPLOYMENT, vol. 5 no. 42, at 14 (Oct. 24, 2011); Sutherland Whistleblower Response Team, <http://www.regulatoryreformtaskforce.com/whistleblowerresponseteam/> (last visited Dec. 30, 2011); George J. Terwilliger III, *SEC Adopts Final Rules to Implement New Whistleblower Program*, METROPOLITAN CORP. COUNS., July 1, 2011. For the opposite point of view—Dodd-Frank's whistleblowing scheme as it looks to counsel for *employee whistleblowers*—see Marzigliano & Thomas, *supra* note 72.

76. Terwilliger, *supra* note 75 (emphasis added, footnotes omitted). Terwilliger adds:

The final SEC rules implementing the bounty attempted, at least ostensibly, to accommodate the critics. According to Terwilliger:

The SEC's release accompanying its Final Rules identifies three incentives in the Final Rules to encourage individuals to report potential misconduct to internal [hotline] systems, or at least minimize the incentive for individuals to bypass internal reporting systems in the hope of qualifying for an award. First, a whistleblower's voluntary participation or interference with a corporate compliance program may increase or decrease the award for that whistleblower. Second, if an individual reports information internally that . . . leads to a successful enforcement action, the SEC will give the whistleblower "full credit" for information disclosed by the corporation for purposes of determining the individual's eligibility for and amount of an award. Third, if a whistleblower reports information internally and within 120 days, reports that same information to the SEC, the SEC will consider the initial date of internal disclosure as the effective date for purposes of determining the whistleblower's eligibility for an award.<sup>77</sup>

But to Terwilliger, these three would-be "incentives . . . fall short of the rule-making options available to the SEC that would ensure internal [hotlines] continue to help companies identify misconduct and provide opportunities to investigate and take appropriate remedial actions:"

It seems apparent that the SEC made a policy choice that places greater importance on its enforcement interests than on maximizing the continued effectiveness of internal reporting systems and the compliance programs they support. For its part, the SEC "expects that in appropriate cases . . . it will, upon receiving a [bounty-eligible] whistleblower complaint, contact a company . . . and give the company an opportunity to investigate the matter and report back." While one can hope this positive

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[SEC] Commissioner Paredes stated: "singular attention has centered on the extent to which the [Dodd-Frank] whistleblower [bounty] program, depending on how it is structured, could unduly erode the value of internal compliance programs in rooting out and preventing wrongdoing." Despite the advocacy for an internal reporting requirement as a condition of award eligibility, the SEC declined to incorporate such a requirement in the final rules.

77. *Id.* (footnotes omitted). According to David Schwartz and Kathiana Aurelien of the law firm Skadden, Arps, Slate, Meagher & Flom LLP:

Even though employers do not pay bounties directly to whistleblowers, many employers are rightly concerned that they will now be subject to unnecessary SEC investigations as employees start to view bounties as personal "*lottery tickets*." If a few employees "*hit it big*," more complaints to the SEC will follow, whether or not they are well-founded.

Schwartz & Aurelien, *supra* note 75, at 14 (emphasis added); see also Gregory, *supra* note 9, at 20-22:

The [Dodd-Frank] rules pose a potential risk to the effectiveness of corporate compliance programs, which by their nature depend on reports from employees about potential wrongdoing. The split 3-2 SEC vote adopting the rules underscores the controversy about the potential impact of the rules on [company compliance] programs . . . . A new Office of the Whistleblower has been established within the SEC's Division of Enforcement to administer the rules. . . . [The rules] address concerns that compliance programs will be undermined if employees go directly to the SEC with information about potential wrongdoing . . . . The new rules may have a detrimental effect on existing internal reporting systems.

policy statement will describe a normative practice excepted only in outlier cases where the business . . . in question bears hallmarks of a criminal enterprise, the SEC's actual practice under its whistleblower rules merits continued attention, including through congressional oversight.

The new whistleblower program provides good cause for corporations to *evaluate their compliance efforts* and *take steps to encourage employees* to use internal reporting systems and ensure that companies are made aware of compliance issues as soon as possible.

The objectives of such reevaluation should include (a) maximizing the effectiveness of internal reporting systems; (b) ensuring that internal reports are thoroughly evaluated by a person or group with sufficiently comprehensive knowledge to recognize potential compliance issues in reports that are misdirected or incomplete; and (c) re-examining policies and practices concerning the dissemination of information regarding potential compliance issues within a corporation . . . .

Corporations may also want to consider renewed efforts to inform or remind employees about the existence and use of internal [hotline] reporting systems and provide additional training concerning such use. Employees must believe that reporting internally *will not negatively impact their job status*. Where appropriate, examples of successful internal reporting offer the best evidence to employees that internal reporting is in the best interest of both the employees and the corporation.

*Corporations should also evaluate, assess, and update compliance programs* to ensure that internal complaints are handled swiftly and, where appropriate, lead to investigations, remediation and disciplinary measures. Such efforts are, of course, necessary to protect shareholder value and mitigate liability if misconduct does occur, as the SEC will continue to consider cooperation efforts by companies in accordance with . . . SEC policies that reward such efforts.<sup>78</sup>

Despite the stark policy clash between SOX § 301 and the Dodd-Frank bounty, at the end of the day both laws push company hotline strategy in the very same direction: SOX *requires* an employer to offer internal hotline "procedures" while Dodd-Frank *motivates*

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78. Terwilliger, *supra* note 75 (emphasis added, footnotes omitted). For other analyses broadly consistent with Terwilliger's, see citations *supra* note 75. According to *HR Magazine*:

To reduce the risk of an expensive and embarrassing government investigation [following up on a Dodd Frank whistleblower's call], company leaders must step up internal reporting procedures and management training to encourage employees to report their concerns to the company first, lawyers say. . . . Corporate lawyers argue that the proposed [Dodd-Frank] regulations would entice disgruntled employees to circumvent internal reporting methods with the goal of getting hefty rewards.

Meinert, *supra* note 32, at 28. According to Skadden, Arps commentators:

The final rules do not require employees to report suspected violations using internal compliance mechanism to qualify for a bounty. Although the lack of a requirement to report internally *creates a huge incentive* for employees to go directly to the government, the SEC attempted to encourage compliance with internal reporting systems by counting it as a factor when determining the amount of the bounty.

Schwartz & Aurelien, *supra* note 75, at 15 (emphasis added).

the very same thing—a conspicuous internal report channel robust enough to attract denunciations that informants might otherwise report to government enforcers.<sup>79</sup>

## 2. *Beyond Dodd-Frank*

Laws outside the United States also regulate whistleblower denunciations to local government enforcers. Any multinational launching a global hotline needs to account for these if only because they rarely exempt hotline sponsors themselves and require companies to disclose hotline denunciations over to local law enforcement. Yet these laws are rare in the free world. The Malaysian Whistleblower Protection Act of 2010, as one example, encourages whistleblowing with a vague Dodd-Frank-like bounty.<sup>80</sup> Now-lapsed Liberia Executive Order # 22 used to encourage whistleblowing to the government in a few ways.<sup>81</sup> But both these laws and even U.S. Dodd-Frank merely *promote* denouncing wrongdoers to government. They pose no compliance challenge to companies launching and staffing internal hotlines, although they motivate multinationals to promote report channels robust enough to attract denunciations that might otherwise go to law enforcers.

The tougher compliance and hotline administration issue here is laws that *require* divulging evidence of criminal behavior to government enforcers. Because few, if any, mandatory-reporting laws exempt hotline sponsors, these laws require divulging credible hotline reports to law enforcers *even before* a thorough internal investigation. Fortunately, very few free-world jurisdictions impose these laws. Slovakia's Criminal Code, as one example, forces Slovaks (including employers) who reliably learn of illegal behaviour to denounce wrongdoers to the police.<sup>82</sup> Liberia's now-lapsed Executive Order # 22 forced employers that received credible criminal allegations through mandatory hotlines to report them to Liberia's "attorney general."<sup>83</sup> These laws cripple hotline strategy both because they require organizations to use their hotlines to incriminate themselves and because they limit organizations' power to investigate denunciations.<sup>84</sup>

79. See citations *supra* note 75. While to a self-interested whistleblower an internal hotline may not ever look as attractive as the Dodd-Frank cash bounty, employers are in a special position for keeping their hotlines in front of employees worldwide. The U.S. SEC does not communicate directly with U.S. workforces, much less overseas workforces.

80. Act 711, *effective* Dec. 15, 2010, at art. 26 (Malay) (government can pay "rewards" to whistleblowers), available at <http://www.bheuu.gov.my/pdf/Akta/Act%20711.pdf>; cf. *id.* at art. 18(2)(f) (whistleblower can win "pain and suffering" award).

81. Exec. Order 22 of 2009 (signed by Liberia President (2011 Nobel Peace Prize winner) Ellen Johnson Sirleaf in Dec. 2009; order now lapsed) (Liber.).

82. See Dowling SOX, *supra* note 4, at 15 (discussing Law of the National Council of the Slovak Republic No. 300 (2005) Coll. Penal Code (section 340/failure to report a criminal offense)).

83. Liberia Executive Order # 22 of 2009, *supra* note 64.

84. See generally Dowling Investigations, *supra* note 9. Hotline communications are usually worded to invite reports of violations of both criminal law and of company policy; laws that require reporting to police obviously affect only whistleblower denunciations of criminals, not denunciations of mere policy violators.

### C. CATEGORY # 3: LAWS RESTRICTING HOTLINES SPECIFICALLY (EU DATA PROTECTION LAWS)

Having discussed laws that both require whistleblower hotlines and promote whistleblowing to government, our next category is hotline mandates that run completely in the opposite direction and *restrict* organizations' freedom to launch and operate report channels.<sup>85</sup> In theory, this category includes all laws that specifically ban or limit whistleblower hotlines, but no such laws are known to exist anywhere. Rather, the only known laws specifically restricting employer whistleblower report procedures are European Union member state guidelines interpreting EU data protection (privacy) laws in the hotline context.<sup>86</sup>

Some Continental Europeans distrust whistleblowers and hotlines.<sup>87</sup> Over a dozen European jurisdictions interpret their local domestic data protection laws (either by regulation or at least by data agency pronouncement) specifically to rein in employer hotlines. In addition, an EU advisory body called the Article 29 Working Party issued a persuasive but non-binding report that recommends all twenty-seven EU states embrace a particularly restrictive interpretation of EU data law to rein in hotlines.<sup>88</sup> Broadly speaking, Europeans see hotlines as threatening privacy rights of denounced targets and witnesses when hotlines are not "proportionate" to other report channels in European workplaces.<sup>89</sup>

85. We do not include here in "Category #3" whistleblower *retaliation* laws because those laws do not reach the *launch and operation* of whistleblower hotlines. Rather, whistleblower retaliation laws regulate retaliatory acts against whistleblowers who have already denounced suspected wrongdoers, whether or not they had used a hotline to do it. We address whistleblower retaliation laws separately, *infra* at Part Two, "Category #5."

86. See EU Data Privacy Directive, directive 95/46/EC (Oct. 1995) (discussing what EU data protection laws are); see e.g., Dowling & Mittman, *supra* note 16; and see generally Whitman, *supra* note 7.

87. *Supra* notes 5-11 and accompanying text.

88. See Dowling SOX, *supra* note 4, at 18-56 (summarizing (far more thoroughly than the discussion *infra*) these European hotline restrictions); see also Chart, *infra* Part III; Daniel Cooper & Helena Marttila, *Corporate Whistleblowing Hotlines and EU Data Protection Laws*, PLC ONLINE, <http://ipandit.practicalallaw.com/1-366-2987>.

89. See Dowling SOX, *supra* note 4, at 41-42 (on "proportionality" in the hotline context); Continental Europeans insist that a hotline is not "proportionate" (is redundant, unnecessary, or at least "overkill") if it threatens to compromise data rights of denounced targets and others but offers little benefit beyond simply duplicating alternate, more privacy-protective report channels already in the European workplace. These so-called "alternate report channels" are not hotlines, of course, but rather are local employee representatives (trade unions, works councils, health and safety committees, ombudsmen), local grievance procedures, and local line managers/chain of command/human resources. To an American, though, these are not adequate "alternates" at all. An American sees local representatives/processors/managers as insiders incompetent to substitute for a hotline for two reasons: (1) reporting to local representatives/processors/managers tends to be neither confidential nor anonymous (although it can be both); and (2) local representatives/processors/managers are rarely both neutral and able to field potentially-explosive denunciations about their own local team or their own local office/plant/operation. An informant making a scandalous accusation to a local representative/processor/manager could step into internal company politics or sensitive personal relationships and the denunciation might go nowhere. Even a local representative/processor/manager not intending to bury an allegation might be too distracted to appreciate its gravity or too busy or untrained to ask the right follow-up questions, or else communication lines might break down. For many reasons, headquarters might never hear about the denunciation or might not get an accurate version. These problems are not just theoretical or hypothetical; denunciations to local interested insiders are mishandled all the time. For example, in October 2011 a California jury awarded a Sears employee \$5.2 million in a race harassment case that emerged from this very scenario. Loretta Kalb, *Sears Employee Wins \$5.2 Million Jury Award for Racial Harassment*, SACRAMENTO (CA.) CITY NEWS, Oct. 26, 2011. The Sears employee had approached his "supervisors" denouncing

Among the specific hurdles that European jurisdictions erect to frustrate hotlines, perhaps the four biggest are: (1) restrictions against hotlines accepting anonymous denunciations; (2) limits on the universe of “proportionate” infractions on which a hotline accepts denunciations; (3) limits on who can use a hotline and be denounced by hotline; and (4) hotline registration requirements. This article discusses each in turn.

### 1. *Restrictions Against Hotlines Accepting Anonymous Denunciations*

European hostility toward whistleblowing runs fiercest against anonymous denunciations<sup>90</sup> and hotlines that accept them. Spain and Portugal ban anonymous hotline denunciations entirely and France may prohibit (or at least has prohibited) employers from disclosing that a hotline will accept anonymous calls, even if it does in fact take them.<sup>91</sup> Hotline communications across the rest of Continental Europe should affirmatively discourage anonymous calls and affirmatively encourage informants to self-identify. Multinationals that see SOX § 301(4)’s mandate for “anonymous procedures” as reaching overseas face an impossible conundrum, at least in Spain and Portugal, and possibly in France.<sup>92</sup>

Employers that think they must reconcile U.S.-style SOX hotlines with European anonymity restrictions have four possible choices, not all fully compliant: (1) violate Spanish, Portuguese, and maybe French law by offering and communicating a hotline that accepts anonymous calls; (2) keep hotline communications silent on anonymity but let hotline staff accept denunciations from informants who refuse to self-identify, even where that violates local law; (3) issue a hotline communication that discourages but implicitly accepts anonymous denunciations even where this violates local law; or (4) have hotline staff hang up on anonymous callers where required under local law, taking the position that the SOX § 301 “anonym[ity]” requirement does not reach abroad.

Deciding among these four options forces a multinational to ponder whether to locally tailor hotline communications abroad or to do what every American multinational would likely prefer—issue a single global hotline protocol for affiliate employees worldwide, or at least Europe-wide. This requires tough decisions. How can a global intranet send different messages to employees in different countries? If a hotline sponsor can post

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a racist colleague who happened to be “one of [Sears’s] top sales producers nationally.” *Id.* The “supervisors,” “not want[ing] to take action” against the racist sales star, covered up the denunciation and took “subsequent acts . . . to avoid being exposed for failing to follow the law.” *Id.* A jury awarded \$5.2 million to the victim. *Id.* The Sears case shows that what Europeans call “alternate” internal “report channels” do not really mimic whistleblower hotlines because they are not disinterested. To Americans, the European “proportionality” argument in the report channel context fundamentally misunderstands what workplace whistleblower hotlines are designed to do. A hotline, to an American, gives retaliation-fearing informants a *way around* interested local players who might be less concerned with “making it right” than with “making the numbers”—Americans see a hotline as a detour around, not a duplicate of, local internal “report channels.” See *infra* note 95.

90. See *supra* notes 4–10 and accompanying text. In the United States, by contrast, champions of corporate compliance and social responsibility tend to trust anonymous report channels, reasoning that anonymity encourages reluctant whistleblowers.

91. See Chart *infra* Part III (citing to these laws in Spain, Portugal, and France).

92. See *supra* notes 18, 50–54 (SOX-regulated multinationals widely believe that SOX § 301(4) extends “extraterritorially” to workforces outside the United States even if the 2010 *Morrison* U.S. Supreme Court decision does not support this belief).

country-tailored hotline protocols on its company intranet, what happens if an employee based in one-country accesses and follows a protocol for staff in a different country? What if an informant from a country where the employer purports not to accept anonymous calls offers up a huge denunciation but refuses to self-identify—must hotline staff cut off his report? At this level of granularity, these are strategy questions; answers depend on circumstances, risk analysis, and HR communication systems specific to each organization.<sup>93</sup>

## 2. *Limits on the Universe of “Proportionate” Infractions on Which a Hotline Accepts Denunciations*

Even the most hotline-skeptical jurisdictions in Europe recognize, grudgingly, that U.S. multinationals feel compelled to offer employee hotlines to collect reports of financial/audit/accounting fraud and bribery/improper payments, to comply at least with the spirit of U.S. SOX and the U.S. Foreign Corrupt Practices Act.<sup>94</sup> Hotline-skeptical jurisdictions in Europe interpret data protection laws to allow only “proportionate” workplace hotlines closed off to all but these few infractions.<sup>95</sup> But U.S. multinationals see no reason to restrict hotlines this way. They prefer to throw open hotlines to most any impropriety. After all, Americans reason, if we go through the trouble of launching and staffing a hotline, we might as well use it to find out about any problem out there, be it an environmental spill, workplace harassment and bullying, vandalism, corporate espionage, breach of HR policy, breach of expense reimbursement protocols—even theft of office supplies, and unsanitary use of toilets. But to list hotline-reportable infractions is illusory and deceptive if hotline operators will actually take all calls. Yet an employer faces logistical problems confining a hotline to only a few topics. How does hotline-answering staff field an off-point call? Can they even listen? How does hotline staff divert an off-point denunciation to another channel, without dropping it?

93. These issues lead to real-world litigation. See Benoist Girard (subsidiary of Stryker) v. CHSCT, *Cour d'Appel Caen* 3rd Chamber (23 Sept. 11, released 4 Oct. 11) (Fr.) (Holding illegal the France hotline of Michigan-based medical technology multinational Stryker, *even though the French Data Protection Authority had previously approved it*. A French whistleblower had gotten past the approved France-specific communications and accessed a different on-line hotline communication meant for Stryker U.S. employees.); see also Dowling SOX, *supra* note 4, at 51-56 (for a deeper discussion of the strategy issues in play here).

94. FCPA, 15 U.S.C. §§ 78dd-1 *et seq.* (The FCPA does not expressly mandate in-house hotlines, but FCPA compliance without a hotline presents tough challenges. Even EU jurisdictions seem open to hotlines that accept denunciations of bribery); see also Dowling SOX, *supra* note 4, at 30.

95. In short, European jurisdictions see workplace hotlines as a threat to data privacy tolerable only where absolutely necessary. By European standards a hotline is somehow less objectionable if it collects only allegations of audit/accounting fraud and bribery but not allegations of, say, theft, physical violence, and sexual harassment. Europeans speak here in terms of “proportionality;” to a European, a hotline that accepts denunciations of thievery, bullying, and sex harassment is not “proportionate” because harassers, bullies, and thieves, unlike fraudsters and bribers, somehow can be denounced more appropriately via other channels. To an American, this “proportionality” analysis in the hotline context seems circular, even bizarre. See *supra* note 89 (on “proportionality”).

### 3. *Limits on Who Can Use a Hotline and be Denounced by It*

Some jurisdictions such as Austria, Hungary, Netherlands, and Sweden<sup>96</sup> seem oddly classist and undemocratic because they force employers to reserve hotlines for executives denouncing misdeeds of upper-level colleagues. These jurisdictions steer low-level staff to report channels more “proportionate” for their low rank.<sup>97</sup> An employer communication closing off a hotline to low-ranking whistleblowers and targets must be explicit. Hotline staff must be ready to cut off any low-ranking would-be whistleblower who offers a compelling denunciation.

### 4. *Hotline Registration Requirements*

Many European jurisdictions require hotline sponsors to register hotlines with local government data-privacy bureaucracies (data protection authorities). These tend to be general mandates that in effect require data “processors” to declare to data authorities many various types of “data processing systems”—including Human Resources Information Systems from payroll and attendance to performance evaluation, pension/benefits, expense reimbursement, travel tracking, milestone anniversary gift programs, and hotlines, too. A few European jurisdictions, such as France,<sup>98</sup> go farther and require complex *hotline-specific* data agency registrations. France imposes both a hotline “declaration” procedure and an alternate hotline “authorization” mandate.<sup>99</sup>

Beyond these four main types of EU data-law hotline restrictions, Europe’s hotline-skeptical jurisdictions regulate other aspects of report channels. Other regulated issues include: (5) alignment with “proportionate” alternate report channels in the workplace;<sup>100</sup> (6) notices to employees, targets, and witnesses explaining their rights; (7) restrictions against outsourcing hotlines; (8) communications to targets/witnesses disclosing specific whistleblower denunciations; (9) complying with “sensitive” (EU Data Directive article 8) data restrictions as to criminal data received by hotline; (10) rights to access, rectify, block, or eliminate personal data processed via hotline; (11) restrictions against transferring hotline data outside of Europe; and (12) deleting/purging of data in hotline call files.<sup>101</sup> The chart below summarizes hotline laws in Europe on key topics.

## III. Whistleblower Hotlines and Data Protection Laws in Europe

This chart summarizes data-protection law pronouncements in those EU member states that issued data-law mandates or interpretations specific to employee whistleblower hotlines as of mid-2011. “Whistleblower hotline” means any channel/system for employees/stakeholders to submit complaints/concerns/allegations of wrongdoing to management.

96. See “Sweden” row on Chart and citations therein.

97. See *supra* notes 89 and 95 (on “proportionality”).

98. See Dowling SOX, *supra* note 4, at 18-56 (summarizing European hotline restriction laws); see also Chart, *infra* pp. 141-61; Cooper & Marttila, *supra* note 88.

99. See “France” row on Chart and citations therein.

100. See *supra* notes 89, 95 (on “proportionality”).

101. These twelve issues are discussed at Dowling SOX, *supra* note 4, at 41-51.

Jurisdiction	Is the authority binding law?	Must confine hotline to certain topics only?	Are anonymous whistleblower calls ever ok?	Is outsourced (vs. in-house) hotline favored?	Must disclose hotline to data agency?
EU Art. 29 Working Party	No: opinion of 1 Feb. 06 is persuasive, a collective view of local Data Protection Agency [DPA] representatives from the EU member states	Hotline OK if limited to accounting, internal accounting controls, audit, anti-bribery, banking and financial crimes; no opinion on hotlines that reach other topics	Yes, but do “not advertise” anonymity feature: “The Working Party considers that whistleblowing schemes should . . . not encourage anonymous reporting as the usual way to make a complaint . . . [c]ompanies should not advertise the fact that anonymous reports may be made through the scheme. If, despite this information [being assured of confidentiality], the person reporting . . . still wants to remain anonymous, the report will be accepted.”	In-house hotline is favored; trained in-house team should oversee	Art. 29 Working Party has no opinion; disclosure depends on local EU member state law
Austria	Largely yes: Four hotline-specific decisions are binding as to their specific facts and parties only but otherwise are persuasive: K178.274/0010-DSK/2008 of 5 Dec. 08 K178.301/0003-DSK/2009 of 25 Feb. 09 K178.305/0004-DSK/2009 of 24 July 09 K600.074/0002-DVR/2010 of 20 Jan. 10	Yes. A hotline must be for a legitimate purpose, therefore must be limited to complaints on topics of “substantial importance;” specifically, Austrian authority interprets this to reach: accounting/ internal accounting controls; audit; severe misconduct/ severe violations of internal code of conduct;	Yes, but employers are not supposed to encourage anonymous calls	Third-party hotline outsourcer is favored; in any event (whether hotline is answered internally or outsourced), an independent specially-trained team should handle reports	Yes, whistleblowing systems must be <i>notified</i> to the DPA; affirmative DPA <i>authorization</i> is required if the hotline will process sensitive data and/or other special categories of data such as criminal offences

Jurisdiction	Is the authority binding law?	Must confine hotline to certain topics only?	Are anonymous whistleblower calls ever ok?	Is outsourced (vs. in-house) hotline favored?	Must disclose hotline to data agency?
		money laundering and anti-terrorism might also be considered legitimate Only reports of misconduct regarding executive managers can be processed and transferred to the US			
<b>Belgium</b>	No, but persuasive: DPA recommendation of 29 Nov. 06	Yes, to: criminal offenses and violations of company written rules and legal regulations (particularly related to finance and accounting)	Yes, but discouraged; only for exceptional cases	Outsourcing is disfavored and maybe not allowed; need in-house independent point person	Yes
<b>Denmark</b>	Yes, binding as to notification process with the DPA: Local DPA Whistleblower Guidelines: Procedure for Notification of Whistleblower Systems (updated Apr. 10) There are also two DPA decisions: 2006-42-1061 (Vestas) 2010-42-1941 (Euprin) DPA decisions are not directly binding on non-parties, but have persuasive authority; DPA must treat similar cases similarly	Yes, to: criminal offenses; issues under US SOX; serious offenses important to group/company or relevant to life/wellbeing; economic crimes (e.g., bribery, fraud, forgery); accounting, auditing, bank/finance; corruption/crimes; environmental issues; serious work safety issues, serious employee issues (e.g., assault or sexual abuse) Hotline should not accept reports about "less serious offences," expressly including: harassment, "cooperative difficulties,"	Not addressed by guidelines; Danish lawyers understand anonymous calls are OK but should not be encouraged	Neither is favored; third-party hotline outsourcers must be listed in notification to the DPA as processors	Yes

Jurisdiction	Is the authority binding law?	Must confine hotline to certain topics only?	Are anonymous whistleblower calls ever ok?	Is outsourced (vs. in-house) hotline favored?	Must disclose hotline to data agency?
		incompetence, absence, violation of HR policies			
<b>Finland</b>	No (local DPA guidelines of 27 July 10)	Yes, to: accounting, financial matters, banking, and bribery Under the Finnish data protection law “necessity” requirement, only information directly necessary for an employee’s employment relationship should be collected through a hotline	Apparently yes, but discouraged; hotline sponsor should discourage anonymous calls; targets have a right to know the source of reports about them unless specifically restricted by law	Neither is favored; hotline needs to be notified to DPA if outsourced	No, <i>unless</i> data transferred outside EU/EEA (without using model contractual clauses, safe harbor or binding corporate rules) <i>or</i> hotline is outsourced to third party
<b>France</b>	Yes: local DPA (CNIL) guidelines of 10 Nov. 05 and 8 Dec. 05 (modified by Resolution no. 2010-369 of 14 Oct. 2010 as a result of <i>Dassault Systèmes</i> decision [ <i>Cour de Cassation</i> 8 Dec. 09]), and clarified by CNIL <i>Fiche pratique</i> of 14 Mar. 11; <i>see generally</i> Benoist Girard (subsidiary of Stryker) v. CHSCT, <i>Cour d’Appel Caen</i> 3rd Chamber (23 Sept. 11, released 4 Oct. 11)	Yes, to: financial, accounting, audit and banking issues; antitrust/competition practices; and bribery/corruption; per <i>Fiche pratique</i> of 3/11, if serious issues <i>outside the scope</i> (e.g., environmental violations; trade secret disclosure; data breach risks; discrimination, harassment and other “risks” to employee “integrity”) are reported via hotline, the report needs to be redirected to the responsible person (e.g., financial	Yes, but not encouraged; DPA orally said on 2 Mar. 07 that anonymity feature cannot be communicated to employees, but as of 2011 DPA’s position on this seems to have softened; per <i>Fiche pratique</i> of 3/11, “in principle, whistleblower systems are not anonymous” and whistleblower “must” be “invited” to self-identify; <i>Benoist Girard</i> decision ( <i>supra</i> ) says anonymous denunciations cannot be “accepted except by exception and surrounded	Neither is favored; if in-house, a trained team should oversee and retain confidentiality	Affirmative permission required under 10 Nov. 05 hotline guidelines; self-certify disclosure necessary under 8 Dec. 05 hotline guidelines

Jurisdiction	Is the authority binding law?	Must confine hotline to certain topics only?	Are anonymous whistleblower calls ever ok?	Is outsourced (vs. in-house) hotline favored?	Must disclose hotline to data agency?
		director, HR director)	by certain precautions"		
<b>Germany</b>	No (opinion of 20 Apr. 07 of <i>Düsseldorfer Kreis</i> , a national data agency collective/working group consisting of local German <i>Länder</i> [states] data agency representatives)	Hotline OK if limited to: criminal offenses (in particular, fraud, accounting and auditing matters, corruption, banking and financial crime, and insider trading), human rights (e.g., child labor), and environmental violations; other topics may be OK, but hotline may not focus on "conduct which adversely affects company ethics" (e.g., vague mandates such as "to be friendly when dealing with customers")	Yes, but discouraged; only for exceptional cases	Not clear; third-party hotline outsourcers appear favored	Yes, but disclosure mandate is general, applying to many data processing systems (no hotline-specific disclosure mandate), and subject to exceptions such as where there is a company data protection officer
<b>Hungary</b>	No Local DPA guidance to individual parties (like letter ruling): No. 652/K/2007 and No. 295/K/2007 Fair Process Act includes some limited references restrictively authorizing employer whistleblowing systems	Limit hotline to "matters that may cause harm to or jeopardize public interest" (e.g., abuse of public resources, corruption, bribery, health and safety, criminal conduct, environmental issues); if hotline covers other matters (not of public concern), employees' consent is needed Only senior employees can be targets	Yes; Hungary tracks the Art. 29 Working Party opinion	In-house is favored; if outsourced, employees' consent is needed and hotline must be registered with DPA; in both cases, access to data must be restricted to limited group authorized to handle reports	If hotline involves transferring data beyond the direct employer (e.g., intra-group transfers or transfer to third-party hotline provider), registration (and perhaps also consent) is required; if not, no explicit registration obligation, but registration is advisable; processing personal data from a whistleblowing call must be registered with the DPA

Jurisdiction	Is the authority binding law?	Must confine hotline to certain topics only?	Are anonymous whistleblower calls ever ok?	Is outsourced (vs. in-house) hotline favored?	Must disclose hotline to data agency?
Ireland	No (guidance posted on local DPA webpage, 6 Mar. 06)	No; hotline can cover whatever violations company specifically designated in advance	Yes, but "not encouraged"	Neither is favored	No, certain data controllers are required to register with DPA, but hotlines do not trigger the registration obligation
Italy	<i>Segnalazione al Parlamento e al Governo sull'individuazione, mediante sistemi di segnalazione, degli illeciti commessi da soggetti operanti a vario titolo nell'organizzazione aziendale</i> , 10 Dec. 09 (Italian DPA) issued per art. 154,1f of 30 June 03, no.196) (DPA referral of hotline questions to Parliament taking no substantive positions)	No position	No position	No position	No position
Luxembourg	No (guidance of 30 June 06, updated 10 Nov. 07 and 11 May 09, posted on DPA webpage and affirmed in 2009 Annual Report of Activities at § 2.2.1.2)	Yes, to: accounting, audit, banking and bribery issues	Yes, but anonymity must be discouraged; whistleblowers must identify where possible	Neither is favored; trained hotline-answering team with a confidentiality obligation to handle reports is recommended	Yes
Netherlands	No, but persuasive: local DPA recommendation to individual party of 16 Jan. 06	Yes, "limi[t]" scope to "substantial abuses;" any forwarding of reports to "parent company" can only involve "substantial abuses" above "subsidiary level" (mostly reports of serious abuses by upper management)	Yes, but organizations may not encourage anonymous reports and in theory must use a system by which identity of the informant is established	Third-party hotline outsourcer is favored	Yes

Jurisdiction	Is the authority binding law?	Must confine hotline to certain topics only?	Are anonymous whistleblower calls ever ok?	Is outsourced (vs. in-house) hotline favored?	Must disclose hotline to data agency?
Portugal	No, but persuasive ("The [whistleblowing hotline] authorizations granted shall make direct reference to the legal principles included herein"): DPA's deliberation n° 765/2009 of 21 Sept. 09	Yes, to: accounting, internal accounting controls, audit, fight against corruption, banking and financial crimes; targets must be individuals exercising management activities in these fields	Likely no; anonymous calls appear to be forbidden: DPA "deliberation" "repudiates" anonymous hotlines; Portuguese practitioners differ on whether this "repudiation" amounts to a complete ban on accepting anonymous calls	Third-party hotline outsourcers are preferred; if in-house, only a small trained team with a confidentiality obligation (contractual) should handle reports	Yes: hotline must be authorized by DPA
Slovenia	No, Slovenia Information Commissioner Opinion on Registration of Whistleblowing Systems, 26 June 07	No position	Yes. No restrictions	Neither is favored; no position	No; disclose and register investigation files only A hotline itself is not deemed to process "personal data;" uninvestigated third party allegations are too speculative to be deemed Slovenian "personal data;" investigation files are subject to Slovenian data law art. 27(3) registration as HR records
Spain	No, but very persuasive: report 0128/2007 of 28 May 07 issued by DPA legal department sets out DPA's opinion; later cited in: several DPA international data transfer authorizations (files n°: TI/ 00035/2007; TI/ 00022/2009; TI/ 00026/2009; TI/ 00088/2010; TI/ 00089/2010, etc.),	Yes, to: violations of internal or external regulations that could subject target to discipline; must specify: what offenses can be denounced; what internal or external regulations the offenses violate	No; "[m]echanisms guaranteeing only the acceptance of reports in which the whistleblower is clearly identified should be established to guarantee the information's accuracy; not being adequate to establish systems permitting anonymous	Neither is favored; whistleblowers and targets must be duly informed if data is sent to a third party to investigate the reports	Yes, "it will be necessary to notify" to get "inscription" in DPA "Register" and obtain authorization to send data outside of EU/ EEA: this is a general (not hotline-specific) mandate

Jurisdiction	Is the authority binding law?	Must confine hotline to certain topics only?	Are anonymous whistleblower calls ever ok?	Is outsourced (vs. in-house) hotline favored?	Must disclose hotline to data agency?
	2007 and 2008 DPA Annual Report, and DPA Guide to Data Protection in Labor Relations		reports" ; Spain's DPA says (orally) that anonymous calls are not acceptable( <i>hence head-on conflict with SOX § 301, if § 301 extend extraterritorially</i> )		
<b>Sweden</b>	Yes: Swedish Data Inspection Board general regulations DIFS 2010:1 decided 22 Sept. 10 and subsequent Guidelines for companies: <i>Responsibility for personal data processed in whistleblowing systems</i> of Oct. 2010 partially affirming previous holdings in cases: <i>Tycø</i> Decision of 6 Mar. 08; <i>AON</i> Decision of 26 Mar. 08; <i>Telef.</i> Decision of 6 Mar. 08	Yes, to serious irregularities concerning: accounting, internal accounting controls, audit, fight against bribery, banking and financial crimes, other serious irregularities concerning vital interests of the company or group or individuals' life and health (e.g., serious environmental crimes, major workplace safety issues, serious discrimination or harassment issues). Processing personal data concerning crimes may only involve those in leading positions in the co. or group	Yet, but cf. <i>Shell</i> case of 29 Mar. 2007: proportionality required	Neither is favored; Tycø hotline outsourced to US held OK; there must be a written contract with the outsourcer	No, if hotline complies with DIFS 2010:1; if not, an affirmative § 21 exemption is required (this article prohibits processing data about crimes)
<b>Switzerland</b>	No: 11th Annual Report of Activities 2003/2004 (of Swiss DPA), at § 7.1 (This report is very early, 2003/04, and may not reflect current Swiss DPA thinking)	No restriction	Unclear; hotline must collect at least whistleblower's untraceable contact information (such as anonymous email address or drop-box address) and, if necessary,	Neither is favored as neither is seen as a perfect solution; a proposed "compromise" would be to name a person responsible to answer the hotline in each subsidiary;	Yes, but notification mandate is general, applying to many data processing systems (no hotline-specific notification mandate), and there are exceptions such

Jurisdiction	Is the authority binding law?	Must confine hotline to certain topics only?	Are anonymous whistleblower calls ever ok?	Is outsourced (vs. in-house) hotline favored?	Must disclose hotline to data agency?
			complete identity; a complaint should not, in principle, be processed if the whistleblower does not provide this contact information	reports made by a given employee of one subsidiary would be answered by the person responsible in a different subsidiary, to assure impartiality	as where there is a company data protection officer; if data are sent abroad, the local DPA might also need to be notified.
UK	No (local DPA conference paper of 6 Apr. 06)	No, but there "should be" a "clear" list of topics covered	Yes, but "confidential reporting" is preferred	DPA position unclear: legal advice in UK recommends third-party hotline outsource to reduce likelihood of conflicts of interest	Likely yes, as part of general mandate to disclose data processing activities annually (no hotline-specific mandate)

In discussing laws that expressly restrict workplace whistleblower hotlines, this article discussed only the data protection laws of Europe because those are the only known laws anywhere that specifically speak to, and restrict, employer whistleblower hotlines. Those laws present the toughest single compliance challenge to a multinational launching a cross-border hotline. In particular, France continues to issue cases, regulations, pronouncements, and private letter rulings that regulate hotlines increasingly minutely. Spain aggressively prohibits anonymous hotlines, and Portugal seems to as well.<sup>102</sup> Germany imposes multi-faceted rules that can differ by *Länder* (state).<sup>103</sup> So many differing hotline-specific restrictions across Europe both impose compliance challenges and they create logistical problems of hotline alignment. Having to tailor disparate local hotlines frustrates multinationals that invariably would prefer just one single global (or at least one single European) hotline protocol.<sup>104</sup>

#### D. CATEGORY # 4: LAWS PROHIBITING WHISTLEBLOWER RETALIATION

Having addressed laws that mandate workplace whistleblower hotlines, which regulate denunciations to government authorities and restrict hotlines specifically, this article now turns to a fourth category of whistleblowing law: prohibitions against whistleblower retaliation. These are increasingly common. U.S. SOX<sup>105</sup> and Dodd-Frank<sup>106</sup> as well as U.S.

102. See "France," "Spain," and "Portugal" rows on Chart and citations therein.

103. See "Germany" row on Chart.

104. Cf. Dowling SOX, *supra* note 4, at 53-54 (exploring alternatives of eschewing hotlines altogether or implementing one global hotline).

105. SOX § 806 offers whistleblowers an administrative, and ultimately a court, claim for retaliation—*cf.* the § 806 claim in the *Carnero* case (cited and discussed *supra* note 49 and accompanying text). The U.S. Occupational Safety and Health Administration handles whistleblower claims in the first instance that allege SOX

state whistleblower retaliation laws<sup>107</sup> grant causes of action to stateside whistleblowers punished for whistleblowing. Now, more and more overseas jurisdictions, from the United Kingdom and South Africa to Malaysia, Japan, and beyond have climbed aboard this bandwagon and prohibited whistleblower retaliation.<sup>108</sup> Indeed, freedom from workplace whistleblower retaliation has actually been declared a human right, at least in Europe. In a decision of July 2011 involving Germany, the European Court of Human Rights allowed all employees to denounce wrongdoing free from the spectre of retaliation.<sup>109</sup>

Whistleblower retaliation laws are sometimes colloquially called “whistleblower laws,” and so they might seem to play a role in the launch of a legally-compliant hotline. But for the most part they do not. These laws are specific to workplace-context whistleblowing, but in practical effect they have almost nothing to say about hotlines because retaliation is impossible until after a whistleblower call ends and a follow-up investigatory stage begins.<sup>110</sup> Retaliation can become an issue only after an employer responds to a would-be whistleblower.<sup>111</sup>

That said there is a big hotline communication issue here. In whistleblowing-averse jurisdictions around the world, from Russia to Latin America and the Middle East to India and parts of Asia and Africa, an employer needs to overcome worker fear of reprisal for whistleblowing. This means guaranteeing that no one using the report channel in good

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§ 806 violations. OSHA whistleblower-retaliation-handling rules appear at 29 CFR Part 1980. These rules were being revised in 2011 to accommodate the changes of Dodd-Frank, and a draft revision issued November 3, 2011. OSHA “Procedures for the Handling of Retaliation Complaints under Section 806 of the Sarbanes-Oxley Act of 2002, as Amended, Interim Final Rule, Request for Comments,” *supra* note 49.

106. Dodd-Frank, *supra* note 37 (codified as 15 U.S.C. § 78u-6(h)(1)(A),(B)); *cf.* Final Rule § 240.21F-2(b)(2). Dodd-Frank whistleblower retaliation provisions appear at Dodd-Frank § 929, which amends SOX § 806 by expanding the statute of limitations significantly, exempting SOX whistleblower claims from mandatory arbitration, and allowing state court SOX whistleblower retaliation claims to be removed to federal court and tried before a jury. Dodd-Frank’s whistleblower retaliation protections are available to employees who provide information to the SEC in the manner described in the Final Rules and with a “reasonable belief that the information being provided relates to a possible securities law violation that has occurred, is ongoing, or is about to occur.” Dodd-Frank affords individuals a cause in federal district court to enforce the new provisions. *See also* Terwilliger, *supra* note 75; *see* SOX § 806, *supra* note 105.

107. National Conference of State Legislatures, <http://www.ncsl.org/?tabid=13390> (last visited Nov. 21, 2011) (summarizing U.S. state whistleblower retaliation laws).

108. *See, e.g.*, UK Public Interest Disclosure Act 1998; South Africa Protected Disclosures Act 2000, art. 6, no. 785; Malaysian Whistleblower Protection Act of 2010; Japan Whistleblower Protection Act (Act No. 122 of 2004); *see supra* notes 55-63 and accompanying text.

109. *Heinisch v. Germany*, Eur. Ct. Hum. Rts. (5th Sec.), app. no. 28274/08 (7/21/11) (citing, at ¶ 37, Assembly for the Council of Europe, Res. 1729 [2010] on “The Protection of Whistleblowers”), *available at* <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=888505&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

110. To the extent that some jurisdictions’ whistleblower retaliation laws separately contains a provision mandating the launch of a whistleblower hotline, for our purposes that would be a “category #1” law, discussed *supra* (Part Two, “Category #1”). Liberia’s now-lapsed whistleblower executive order (*supra* note 64) is an example—a hybrid retaliation/hotline mandate law. Laws of this type may be emerging, but as of 2011 were extremely rare.

111. An employer that merely structures, communicates, launches, and operates a whistleblower hotline has not yet arrived at a stage where whistleblower retaliation can possibly come into play. An act alleged to be retaliatory can happen only after a would-be whistleblower purports to have made (by hotline or otherwise) a specific denunciation, and after the employer responds in some way that the whistleblower deems victimization.

faith will suffer retaliation. But globally communicating a non-retaliation commitment almost surely extends, quasi-contractually, otherwise non-existent anti-retaliation rights to whistleblowers in jurisdictions without retaliation laws.<sup>112</sup> Consider carefully the strategic and legal implications before making an anti-retaliation commitment across borders.

#### E. CATEGORY # 5: LAWS REGULATING INTERNAL INVESTIGATIONS

Probably every jurisdiction imposes some legal doctrines that reach employer investigations into allegations of employee wrongdoing. Depending on the country and the allegation investigated, an internal investigation might trigger, for example, local laws on labor/employment, data privacy/protection, tort, crimes, criminal procedure, private-party due process, and prohibitions against exporting state secrets.<sup>113</sup> But these doctrines only kick in after an investigation starts. They have almost no bearing on the launch and staffing of a global whistleblower hotline because a hotline is a *pre-investigatory* tool.<sup>114</sup>

This said there is a hotline communication issue here. Heavy-handed communications about a hotline might later support claimants who allege the employer rigged its investigation process. For example, imagine a hotline communication that says something to the effect of "we investigate every report exhaustively, leaving no stone unturned to verify the truth of reports received." Few organizations are likely to convey so blunt a message, but if one did the statement might turn up later as evidence supporting a victimization claim. Ensure communications about report channels do not convey an overzealous approach to complaint-processing and investigations. Where necessary, such as in Europe, be sure hotline communications spell out the private due process rights of whistleblowers, witnesses, and targets.

#### F. CATEGORY # 6: LAWS SILENT ON, BUT POSSIBLY TRIGGERED BY, WHISTLEBLOWER HOTLINES

Having addressed five types of laws that in at least some contexts regulate hotline whistleblowing specifically, our sixth and final category is broader: legal doctrines that neither explicitly address hotline whistleblowing nor have yet been interpreted in the hotline whistleblowing context, but that a hotline might theoretically trigger. This category is necessarily vague, and determining which laws fall into it is difficult. Our two most likely candidates are data protection laws silent on hotlines and labor laws imposing negotiation duties and work rules obligations.

112. A common, perhaps "best," practice is for international hotline communications expressly to guarantee that the employer will not retaliate against those using the hotline in good faith. Making a no-retaliation commitment in a global hotline communication almost surely extends non-retaliation rights quasi-contractually into jurisdictions where local jurisprudence does not specifically protect whistleblowers. And so an employer voluntarily issuing a non-retaliation promise across all a company's global operations has about the same effect as if each jurisdiction passed a whistleblower retaliation law.

113. This author has analyzed and inventoried international investigation legal issues elsewhere. Dowling Investigations, *supra* note 9.

114. Further, to the extent that ninety-seven percent of whistleblower denunciations come to organizations outside whistleblowing channels (*see supra* note 32), most internal company investigations arise outside the hotline context entirely.

### 1. *Data Protection Laws Silent on Hotlines*

This article already discussed, as “category #3,” data protection law doctrines in Europe that explicitly address whistleblower hotlines. Beyond Europe, more and more jurisdictions around the world now impose European-style omnibus data privacy/protection laws. Argentina, Canada, Costa Rica, Hong Kong, India, Israel, Japan, Malaysia, Mexico, Peru, South Korea, Taiwan, Uruguay, and others as of 2011 had passed or were implementing comprehensive (as opposed to sectoral) data protection laws. Some of these are almost as tough as data laws in Europe. In the future these laws might be argued to reach whistleblower hotlines, paralleling the analysis in Continental Europe.<sup>115</sup> But as of 2011 none of these data laws was known ever to have been interpreted to reach hotlines.

The way Europeans stretch their data laws to reach hotlines may be exceptional.<sup>116</sup> Data privacy/protection laws regulate information about identifiable humans, but the launch and staffing of an employer whistleblower hotline—before it receives a whistleblower call that might or might not later morph into an internal investigation—does not implicate any personal data whatsoever, about anybody. A hotline standing alone does not contain or process personal data about any whistleblower, target, or witness. A hotline is a mere channel, not a database, and is more analogous to a telephone, computer, or communications device than to a human resources database warehousing information about, for example, payroll, attendance, performance management, expense reimbursements, business travel, or benefits/pension/insurance administration. For that matter, even when a real-life whistleblower contacts a company hotline to denounce an identified colleague, the personal data transmitted get sent *by the whistleblower*, not the company hotline sponsor. So even an actual hotline denunciation would not seem to implicate a hotline sponsor company in processing personal data until the moment the denunciation ends and hotline staff further processes data received by writing up a report and perhaps launching an investigation.<sup>117</sup> Of course, many but not all<sup>118</sup> *European* jurisdictions reject this analysis and regulate report channels as if they somehow were databases. We have no way yet to know whether *non-European* jurisdictions with comprehensive data laws will be so aggressive.

### 2. *Labor Laws Imposing Negotiation Duties and Work Rules Obligations*

Labor laws—specifically mandates imposing labor negotiation duties and obligations regarding work rules—are another type of law that, although silent on and not yet construed as to stand-alone whistleblower hotlines, could reach workplace report channels.<sup>119</sup>

115. See *supra* Part Two, “Category #3.” This interpretation is most likely to emerge in those European states (like, for example, Italy) that have not yet interpreted their data laws in the hotline context but that might accept the Article 29 Working Party analysis. See “Article 29 Working Party” row on Chart.

116. Of course, we are speaking here specifically about hotlines/report channels, not about whistleblowing generally, whistleblower retaliation, or internal investigations.

117. Of course, a hotline operator report and an investigation about a specific incident/allegation differ from a whistleblower hotline. Hotline operator reports and internal company investigations are subject to data laws.

118. Slovenia does not accept the otherwise-common European interpretation on this point. See “Slovenia” row on Chart.

119. We are speaking here of an employer’s launch and operation of a hotline/report channel, not about whistleblowing generally, whistleblower retaliation, or internal investigations.

Labor laws in most every jurisdiction require at least some employers to bargain with trade unions over certain changes in the workplace. Some jurisdictions also require informing and consulting about new workplace practices with other employee representatives such as works councils, health and safety committees, and ombudsmen.<sup>120</sup> But the texts of collective labor statutes never address hotlines specifically. As of 2011, few if any regulations, court decisions, or administrative rulings had construed bargaining obligations as to launching a stand-alone whistleblower hotline.<sup>121</sup>

An employer subject to labor consultation obligations might take the position that merely offering a new stand-alone hotline does not change anyone's work conditions and so is not subject to labor discussions. Employee representatives might counter that having to work under a hotline regime poisons the work environment because it turns every co-worker and colleague into a possible spy.<sup>122</sup> In the United States, unionized employers have to bargain with their unions before implementing new workplace surveillance technology like email and video monitoring.<sup>123</sup> A U.S. labor union inclined to resist a whistleblower hotline could characterize it as a sort of monitoring/surveillance tool that triggers this same bargaining obligation.<sup>124</sup> This same analysis could apply abroad, as well. Whether launching a stand-alone hotline falls under existing bargaining obligations is rarely settled law. The answer can depend on the comprehensiveness of the local bargaining obligation, the applicable collective agreement, the workplace bargaining history, and the local society's receptivity or aversion to whistleblowing. Consulting over a stand-alone hotline will much more likely be held mandatory in Continental Europe and Hong Kong than in the Middle East, the Americas, much of Asia, Latin America, or Africa.

In launching a stand-alone whistleblower channel outside the United States, check whether local worker representatives in each jurisdiction could plausibly argue that new report procedures trigger mandatory bargaining/consultation. Look into whether existing collective arrangements address reporting and grievance procedures, whether the society is whistleblowing-averse, and whether the company's own worker representatives tend to obstruct most changes to the workplace. Where the employer can convince its worker representatives why the proposed hotline benefits everyone and is not a material adverse change, bargaining/consultation should present no hurdle.

But resisting worker consultation over a stand-alone hotline is not always a sound strategy. In whistleblowing-averse societies that suspect hotlines as a form of entrapment, consultations may make sense to make the hotline effective. And in certain jurisdictions an affirmative agreement with worker representatives about a hotline can help surmount

120. A discussion of this topic in the whistleblower hotline context appears at Dowling SOX, *supra* note 4, at 16-18.

121. We are addressing stand-alone hotlines. Of course, plenty of labor cases around the world address the launch of work rules, codes of conduct, and mandatory reporting rules (*see supra* note 9), and plenty of cases adjudicate disputes arising out of specific whistleblower denunciations.

122. Dowling SOX, *supra* note 4, at 17.

123. *See, e.g.*, National Labor Relations Act, 29 U.S.C. § 158(d) (2006); Cal. Newspapers P'ship & N. Cal. Media Workers' Guild, 350 N.L.R.B. No. 89 (2007) (email monitoring mandatory subject of bargaining); *Brewers & Maltsters, Local Union No. 6*, 414 F.3d 36 (D.C. Cir. 2005), *aff'g* *Anheuser-Busch, Inc.* 342 N.L.R.B. No. 49 (2004) (surveillance cameras mandatory subject of bargaining). *See generally* Dowling SOX, *supra* note 4, at 16-18.

124. Fighting hotlines, though, seems to rank low on U.S. unions' agenda. Indeed, a U.S. union might be expected to welcome a hotline as a watchdog over abuses of management.

challenges on grounds beyond labor law. For example, a labor/management works agreement (*Betriebsvereinbarung*) in Germany and a “plant bargaining agreement” in Austria that accept a workplace hotline can rebut claims that report procedures violate data protection laws. Bargaining is also necessary where a hotline does not stand alone but comprises a piece of a more extensive compliance program inarguably subject to consultation, such as a new global code of conduct with a mandatory reporting rule that requires whistleblowing.<sup>125</sup>

A workplace hotline can also implicate a separate labor law issue: *mandatory work rules*. France, Japan, Korea, and other countries require that employers post written work rules that list prohibited workplace infractions. A stand-alone whistleblower hotline, as distinct from a mandatory reporting rule,<sup>126</sup> is not a work rule and so should not require changing already-posted lists of infractions. But a hotline launch that includes a new mandatory reporting rule likely requires tweaks to extant rules.

#### IV. Conclusion

Domestically within the United States, launching new work rules, employee handbooks, and codes of conduct can trigger legal issues, especially in unionized workplaces. And in the United States, a whistleblower’s call to a workplace hotline triggers a cluster of legal issues, such as internal investigations, employee discipline, and whistleblower retaliation. But U.S. employers, even unionized ones that make a stand-alone workplace whistleblower hotline available to U.S. staff, rarely get blowback.<sup>127</sup> Indeed, offering employee report “procedures” stateside affirmatively complies with a mandate in Sarbanes-Oxley and is a recommended “best practice” response to the Dodd-Frank whistleblower bounty.<sup>128</sup>

But the U.S. *laissez faire* approach here can lull multinationals into overlooking or minimizing the surprisingly steep compliance hurdles to launching whistleblower procedures across worldwide affiliates. Six distinct legal doctrines can restrict hotline whistleblowing abroad. Our U.S. point of view sees hotlines as a best practice for nurturing compliance by rooting out crimes and corruption. So to us these six restrictions look like technicalities grown bigger and more complex than they should have any right to get. For that matter, Americans have a hard time understanding why laws anywhere would restrict whistleblower hotlines when no jurisdiction bothers to restrict whistleblowing itself and when the vast majority of whistleblowers—ninety-seven percent—tend to avoid hotlines, anyway.<sup>129</sup>

But this policy analysis takes us only so far when legal restrictions already in place around the world actively restrict employers’ freedom to launch a workplace

125. See *supra* note 9 and accompanying text (on mandatory reporting rules). See, e.g., Wal-Mart, Wuppertal Labour Court, 5th Div., 5 BV 20/05, June 15, 2005 (Germany), discussed at Dowling SOX, *supra* note 4, at 17 (code of conduct with mandatory reporting rule held subject to mandatory information, consultation, and co-determination with works council in Germany).

126. *Supra* note 125.

127. But cf. *supra* note 121 and accompanying text (hotline launch as possible mandatory subject of U.S. labor union bargaining).

128. *Supra* Part II, “Category #1” and “Category #2.”

129. Ethics Resource Center, *supra* note 32.

whistleblower hotline. Employees in whistleblowing-averse societies like Russia, Latin America, the Middle East, India, much of Asia, and Africa can fear hotlines as entrapment. Meanwhile, data protection laws in Europe actively block hotlines, and violations can spark passionate resistance from European workforces and can trigger punitive sanctions. So launching an international report channel has become a global compliance project of its own. Before making a hotline available to employees worldwide, check which of the six legal topics arise in each relevant jurisdiction. Isolate, in each affected country, those issues the hotline will trigger under local law. Then take steps to make reporting protocols and employee communications packages comply.

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