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# THE LAW OF CORPORATE INVESTIGATIONS AND THE GLOBAL EXPANSION OF CORPORATE CRIMINAL ENFORCEMENT

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*The United States model of corporate crime control, developed over the last two decades, couples a broad rule of corporate criminal liability with a practice of reducing sanctions, and often withholding conviction, for firms that assist enforcement authorities by detecting, reporting, and helping prove criminal violations. This model, while subject to skepticism and critiques, has attracted interest among reformers in overseas nations that have sought to increase the frequency and size of their enforcement actions. In both the United States and abroad, insufficient attention has been paid to how laws controlling the conduct of corporate investigations are critical to regimes of corporate criminal liability and public enforcement. Doctrines*

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*governing self-incrimination, employee rights, data privacy, and legal privilege, among other areas, largely determine the relative powers of governments and corporations to collect and use evidence of business crime, and thus the incentives for enforcers to offer settlements that reward firms for private efforts to both prevent and disclose employee misconduct. This Article demonstrates the central role that the law controlling corporate investigations plays in determining the effects of corporate criminal liability and enforcement policies. It argues that discussions underway in Europe and elsewhere about expanding both corporate criminal liability and settlement policies—as well as conversations about changes to the U.S. system—must account for the effects of differences in investigative law if effective incentives for reducing corporate crime are, as they should be, a principal goal.*

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## INTRODUCTION

American criminal and civil enforcement officials have, to date, been international leaders in their ability to obtain a large and steady volume of high-profile settlements from the world's largest corporations.<sup>1</sup> The United States has pursued many more corporate criminal enforcement actions than any other nation, collected vastly more sanctions than any other country, and occupied center stage in the global enforcement arena.<sup>2</sup> This dominance is

1. See, e.g., *Corporate Prosecution Registry*, LEGAL DATA LAB, <http://lib.law.virginia.edu/Garrett/corporate-prosecution-registry/index.html> [https://perma.cc/HHZ5-837A]; *Foreign Corrupt Practices Act Clearinghouse*, STAN. L. SCH., [fcpa.stanford.edu](http://fcpa.stanford.edu) [https://perma.cc/GTR7-VXE7]; *Violation Tracker*, GOOD JOBS FIRST, <https://www.goodjobsfirst.org/violation-tracker> [https://perma.cc/SZ7Y-FCDM].

2. For example, in 2011, the United States imposed criminal sanctions on seventy-six organizations; this constituted 84 percent of the total number of sanctions imposed against legal persons around the world. No other country sanctioned more than four companies. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, WORKING GROUP ON BRIBERY, 2011 DATA ON ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION 3 (2012), <http://www.oecd.org/daf/anti-bribery/AntiBriberyConventionEnforcement2011.pdf> [https://perma.cc/7CMK-HZCC]. In 2018, the U.S. accounted for 136 of the 203 (67 percent) criminal sanctions imposed throughout the world on legal persons. The next most active jurisdictions, Germany and the United Kingdom, sanctioned only eleven and ten companies, respectively, for foreign bribery. ORGANISATION FOR ECONOMIC CO-OPERATION AND

largely due to the broad scope of its corporate criminal liability rule, combined with a policy governing enforcement and sanctions designed to encourage corporate self-reporting, cooperation, and settlement.<sup>3</sup>

Unlike in most other countries, in the United States companies can be held criminally liable for almost any crime committed by any employee in the scope of employment, through the doctrine of *respondeat superior* liability.<sup>4</sup> The United States also has a stated policy of offering to resolve cases through deferred and non-prosecution agreements (“DPAs” and “NPAs”)<sup>5</sup> if firms self-report criminal conduct or fully cooperate with government efforts to investigate and prosecute.<sup>6</sup> DPAs and NPAs not only impose lower sanctions, but also do not trigger the collateral consequences that can follow a formal conviction, such as debarment or delicensing.<sup>7</sup> The longstanding practice of settling most cases against publicly-held and other large corporations in this way, in lieu of indictment and conviction, has enabled enforcement authorities to leverage corporate compliance programs and internal investigations to detect and obtain actionable evidence of misconduct, thereby allowing simultaneous pursuit of numerous complex enforcement actions.<sup>8</sup>

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DEVELOPMENT, WORKING GROUP ON BRIBERY, 2018 ENFORCEMENT OF THE ANTI-BRIBERY CONVENTION: INVESTIGATIONS, PROCEEDINGS, AND SANCTIONS 2–4 (2019), <http://www.oecd.org/corruption/anti-bribery/OECD-Anti-Bribery-Convention-Enforcement-Data-2019.pdf> [https://perma.cc/JY86-YQ7R].

3. In addition, the United States has adopted powerful statutes, with transnational reach, that subject both domestic and foreign corporations to sanction by American prosecutors for acts overseas. *See, e.g.*, 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, 78dd-3, 78ff (2018) (foreign bribery); 18 U.S.C. § 1030 (2018) (computer fraud and abuse); *id.* § 1952 (travel in aid of racketeering); *id.* § 1956(a)(2) (prohibited currency transportation); 31 U.S.C. § 5322 (2018) (bank secrecy); 50 U.S.C. § 1705 (2018) (export controls).

4. *Respondeat superior* also requires that the employee had some intent to benefit the company. *See, e.g.*, *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 493–94 (1909); *United States v. Dye Constr. Co.*, 510 F.2d 78, 82 (10th Cir. 1975).

5. Under a DPA, the prosecutor files charges but agrees to dismiss the charges, without conviction, if the corporation complies with the terms of the agreement. Under an NPA, the prosecutor agrees not to file charges against the firm if the corporation fulfills the bargain. *See* David M. Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1303–15, 1326 (2013).

6. U.S. DEP’T OF JUSTICE, JUSTICE MANUAL § 9-28.000 (2018) [hereinafter JUSTICE MANUAL], <https://www.justice.gov/jm/justice-manual> [https://perma.cc/ZW5D-WZE8]; *see also* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (U.S. SENTENCING COMM’N 2018); Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, in RESEARCH HANDBOOK ON THE ECONOMICS OF CRIMINAL LAW 144, 152 (Alon Harel & Keith N. Hylton eds., 2012).

7. *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 882, 886 (2007).

8. We focus on publicly-held firms and large privately-held firms because these are the firms that usually enter into DPAs and NPAs. Small owner-managed firms typically do not cooperate to get such agreements because (1) owner-managers often are implicated in the wrongdoing, (2) such firms have little to gain from settlement because they often cannot survive the fine (even if imposed through a DPA), or (3) prosecutors do not need cooperation because they can obtain evidence within such firms relatively easily. *See* Arlen, *supra* note 6, at 148, 152–53. Our analysis is limited to crimes that could produce a

As other countries observed the progress of American enforcers, especially in imposing sanctions on other nations' companies doing business globally, some acquired a taste for a greater presence in corporate enforcement. Meanwhile, the expanding role of the Organisation for Economic Cooperation and Development ("OECD") in the global effort to control corporate bribery increased pressure on other countries to strengthen corporate enforcement efforts.<sup>9</sup> U.S. law and practices, whatever their faults, offer the most salient model for nations motivated to expand the laws and institutions of corporate enforcement.<sup>10</sup>

The arguments in favor of an approach like the one pursued in the United States are familiar. Both broad organizational liability and enforcement policies that enable companies to enter into corporate criminal settlements short of conviction, if they self-report or cooperate, are effective tools for reducing corporate crime.<sup>11</sup> In theory, corporate liability deters by

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corporate conviction, such as corrupting a foreign official, fraud, and money laundering, as distinct from purely personal crimes by employees, such as receiving a bribe, or most insider trading.

9. See Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, Dec. 17, 1997, 37 I.L.M. 1; Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW & CONTEMP. PROBS. 193, 197–200 (2017); *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, ORG. FOR ECON. CO-OPERATION & DEV., <https://www.oecd.org/investment/countryreports/implementationoftheoecdanti-briberyconvention.htm> [<https://perma.cc/DH3S-ZAVH>].

10. At the time of the OECD convention on foreign bribery, the U.S. had the broadest regime governing corporate liability for corruption. Following the convention, forty of the forty-one countries who are parties reformed their laws governing corporate liability to create or expand corporate its scope. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY: A STOCKTAKING REPORT 8* (2016) [hereinafter *THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY*], <https://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf> [<https://perma.cc/QC5Y-VJZT>]. See generally Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89 (2004) (comparing corporate criminal liability in Western Europe and the United States); Markus Rübenthal & Christian Brauns, *Trial and Error—A Critique of the New German Draft Code for a Genuine Corporate Criminal Liability*, 16 GERMAN L.J. 871 (2015) (discussing a German bill that creates corporate criminal liability); Frederick Davis, *Limited Corporate Criminal Liability Impedes French Enforcement of Foreign Bribery Laws*, GLOBAL ANTICORRUPTION BLOG (Sept. 1, 2016), <https://globalanticorruptionblog.com/2016/09/01/guest-post-unduly-limited-corporate-criminal-liability-impedes-french-enforcement-of-foreign-bribery-laws> [<https://perma.cc/PUB4-V7J5>] (discussing France's attempts to expand corporate criminal liability under the U.S. model). Following adoption by the United States of deferred and non-prosecution agreements, other countries also have moved to implement negotiated non-trial corporate criminal resolutions. See Jennifer Arlen, *The Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S.*, in RESEARCH HANDBOOK ON NEGOTIATED SETTLEMENTS (Abiola Makinwa & Tina Söreide eds., forthcoming 2020) (discussing U.K. and French law on corporate criminal liability); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS: SETTLEMENTS AND NON-TRIAL AGREEMENTS BY PARTIES TO THE ANTI-BRIBERY CONVENTION 28–37* (2019) [hereinafter *RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS*], <https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf> [<https://perma.cc/6VPQ-9EQH>] (describing other countries' growing use of non-trial corporate criminal resolutions).

11. E.g., Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of*

increasing the probability that corporations will expect crime to be costly instead of profitable. This can induce corporate managers to pursue prevention efforts. In addition, corporate liability can deter by increasing the expected cost to employees of corporate misconduct. Employees face a substantially higher threat of punishment when corporations have strong incentives to detect misconduct, report it, investigate it, and provide actionable evidence to government officials about individual wrongdoers—that is, a motive to engage in corporate policing.

Corporate policing has particular public value in the United States because under American law large, complex firms are better able to obtain evidence about individual misconduct within the corporation than are government officials situated outside the corporation.<sup>12</sup> U.S. enforcement policy strives to induce corporate policing by offering settlements without criminal convictions (such as DPAs and NPAs) and with reduced fines to companies that self-report or fully cooperate and remediate;<sup>13</sup> the United States even offers declinations to many companies that self-report, fully cooperate, *and* remediate.<sup>14</sup>

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*Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 688–95 (1997); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 866–67 (1994); A. Mitchell Polinsky & Steven Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability?*, 13 INT'L REV. L. & ECON. 239, 239–42 (1993); see also Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345, 1380 (1982); Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 857–58 (1984); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1231–33 (1984).

12. Our methodological approach in this Article is to assume an established theoretical model for corporate criminal liability, for which we have argued elsewhere. See, e.g., SAMUEL W. BUELL, *CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE* 109–75 (2016); Arlen & Kraakman, *supra* note 11, at 688–95; Arlen, *supra* note 6, at 154–62; Arlen, *supra* note 10; Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 474–78 (2006). We recognize that the model and its implementation have skeptics. For some of the more thorough critiques, see generally JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* (2017); BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* (2014); Uhlmann, *supra* note 5, at 1295–302; Jed S. Rakoff, *The Financial Crisis: Why Have No High Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <https://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions> [https://perma.cc/ZH25-MCMP].

13. JUSTICE MANUAL, *supra* note 6. This approach has spread beyond criminal enforcement to civil regulatory agencies, such as the Securities and Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC). E.g., Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, 76 SEC Docket 220 (Oct. 23, 2001) (“Seaboard Report”); U.S. COMMODITY FUTURES TRADING COMM’N, ENFORCEMENT ADVISORY: COOPERATION FACTORS IN ENFORCEMENT DIVISION SANCTION RECOMMENDATIONS FOR COMPANIES (Jan. 19, 2017), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrenforcementactions/documents/legalpleading/enf advisorycompanies011917.pdf> [https://perma.cc/7WMT-X2YC].

14. JUSTICE MANUAL, *supra* note 6, § 9-47.120 (FCPA Corporate Enforcement Policy).

Other countries are seeking to enhance corporate enforcement with reforms adapted from the U.S. approach. Such reforms have included expanding the scope of corporate criminal liability and adopting laws and policies that allow negotiated criminal settlements, including DPAs and NPAs, typically targeted at firms that self-report or cooperate.<sup>15</sup> The international debate surrounding such reforms has focused on the general desirability of taking an instrumental, deterrence-focused approach to rules and policies concerning corporate criminal liability and enforcement settlements. In the United States as well, critiques of the system of corporate criminal enforcement have been directed mostly at how enforcers have settled large corporate actions, including the type and size of sanctions imposed on firms (as well as individuals) and the form of criminal resolutions.<sup>16</sup>

These debates have focused on the comparative analysis of corporate liability regimes without attending sufficiently to a host of other laws—which we refer to collectively as the law of corporate investigations—that determine the extent to which enforcement authorities benefit from inducing corporations to conduct and share with them the fruits of both their monitoring and detection efforts when conducting corporate compliance, and their internal investigations when responding to misconduct.<sup>17</sup> The law governing corporate investigations includes four important fields: (1) doctrines determining employees’ rights during government interrogation, including laws on self-incrimination and rights to counsel; (2) employment laws governing employers’ ability to discipline and terminate employees for failure to cooperate in investigations, including both substantive and procedural rights of employees; (3) laws determining employers’ access to employees’ workplace communications and activities, including data privacy and surveillance rules; and (4) the law governing the activities of counsel for corporations and their employees, including

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15. See, e.g., Loi 2016-1691 du 9 Décembre 2016 Relative à la Transparence à la Lutte Contre la Corruption et à la Modernisation de la Vie Économique [Law 2016-1691 of December 9, 2016 on Transparency in the Fight Against Corruption and the Modernization of Economic Life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF THE FRANCE], Dec. 10, 2016 (“Sapin II”); U.K. SERIOUS FRAUD OFFICE ET AL., GUIDANCE ON CORPORATE PROSECUTIONS, <https://www.sfo.gov.uk/?wpdmdl=1457> [<https://perma.cc/P9RL-B9S4>]; *Deferred Prosecution Agreements*, U.K. SERIOUS FRAUD OFFICE, <https://www.sfo.gov.uk/publications/guidance-policy-and-procedures/deferred-prosecution-agreements> [<https://perma.cc/JQD9-A8BH>]. For a discussion of these reforms, see Arlen, *supra* note 10.

16. See, e.g., Uhlmann, *supra* note 5, at 1344; see also Miriam H. Baer, *When the Corporation Investigates Itself*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 308, 308–310 (Jennifer Arlen ed., 2018).

17. Kevin Davis similarly emphasizes the application of a central point from comparative law studies that the effects of adopting a given doctrine depend heavily on the surrounding legal environment, including institutional arrangements. KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 154–55 (2019).

attorney-client privilege and work product doctrines.<sup>18</sup>

This Article makes three principal contributions to the study of corporate crime. First, it shows that the value to U.S. prosecutors of inducing corporations to investigate and provide prosecutors with information about misconduct rests, to a considerable degree, on a range of U.S. laws that give firms a comparative advantage over enforcers in gathering evidence of corporate misconduct, particularly in the early stages of inquiries. Second, it demonstrates that most other countries pursuing reforms in the area of corporate crime have materially different laws controlling public and private access to evidence of white-collar offenses. These differences can alter both the expected value of corporate investigations and the relative positions of corporations and enforcement authorities in investigating corporate misconduct, such that some public officials overseas may be in an equivalent, or even superior, position to private corporations to investigate and gather evidence. Finally, it examines how differences in law governing corporate investigations can alter the manner in which effective enforcement policy can and should reward firms for private efforts to reduce crime.

There are, of course, extensive additional differences across legal systems, too numerous and complex to treat in a single article, that influence the progress of efforts to expand corporate criminal liability and public enforcement.<sup>19</sup> These include, most prominently, laws and institutions

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18. See Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1614–17 (2007); Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 312–13 (2007). In defining the law governing corporate investigations, we focus on laws governing corporate investigations that would persist after introduction of DPAs—and thus alteration of existing law governing prosecutorial discretion. For a discussion of differences in the law controlling prosecutorial discretion in the United States and Germany, see Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, 118 YALE L.J. 126, 159–65 (2008).

Our analysis of laws governing investigations also does not cover laws that protect corporate employees who blow the whistle on wrongdoing, either internally or externally, from retaliation. These laws are an important feature of any jurisdiction's overall legal framework for addressing corporate crime. Indeed, reform discussions on this subject are growing more lively and interesting. See TRANSPARENCY INT'L, WHISTLEBLOWING IN EUROPE: LEGAL PROTECTIONS FOR WHISTLEBLOWERS IN THE EU 6–7 (2013), [https://images.transparencycdn.org/images/2013\\_WhistleblowingInEurope\\_EN.pdf](https://images.transparencycdn.org/images/2013_WhistleblowingInEurope_EN.pdf) [<https://perma.cc/FHU8-59AC>]; *Whistleblower Protection: Commission Sets New, EU-Wide Rules*, EUROPEAN COMMISSION (Apr. 23, 2018), [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_18\\_3441](https://ec.europa.eu/commission/presscorner/detail/en/IP_18_3441) [<https://perma.cc/CU6U-XJHT>]. We leave this important field of law for later work because legal protections for employee whistleblowers (or the lack thereof) are a factor endogenous to the relative legal powers of public enforcers and firms to gather evidence of corporate crime. In addition, one cannot easily assess the relative protections for internal and external whistleblowers in the United States (which has a variety of anti-retaliation provisions) and abroad (which tends not to) in light of employees' greater protection against termination and other sanctions in many other countries. The relevance of bounty systems for rewarding whistleblowers is addressed briefly later in this Article. See *infra* notes 52, 105, 132 and accompanying text.

19. See Karen J. Alter et al., *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*, 60 AM. J. COMP. L. 629, 629–33 (2012); Frank Dobbin et al., *The Global*



controlling prosecutorial discretion, the extent to which civil regulatory and liability regimes are available alongside corporate criminal liability, the scope of liability for white-collar offenses, laws governing whistleblowers, and norms that influence management and employee behavior. This Article's comparative focus is solely on the laws governing investigative powers. Because a primary goal and effect of introducing DPAs and their equivalents is to enhance the scope and role of corporate investigations, the doctrines governing these investigations are the logical place to begin expanding analysis of how enforcement of corporate criminal liability will differ across legal systems. In addition, investigative law is, at present, an area in which foreign jurisdictions active in corporate enforcement vary not only from U.S. law but also among themselves.

Part I of this Article explains the U.S. model of corporate criminal liability and describes how that model is influencing the development of law and its enforcement in other nations. Part II explains the doctrines in American law that constitute the law of corporate investigations and shows how those laws allocate powers between the government and firms. Part III explains how the investigative laws of other nations greatly differ, and thus place governments and corporations in different positions relative to investigating corporate misconduct. Part IV examines how differences in relative access to and control over evidence between corporations and enforcers affects analysis of how to shape law and settlement policies to deal effectively with corporate crime.

#### I. CORPORATE CRIMINAL LIABILITY IN THE UNITED STATES AND OVERSEAS

This Part details the U.S. approach to corporate crime control and the steps other countries are taking to follow the U.S. model. It discusses how the U.S. Department of Justice ("DOJ") has pursued a policy that seeks to target liability at individual wrongdoers by structuring corporate liability in a manner designed to induce corporations to both detect and self-report misconduct, and to aid government investigations by conducting, and sharing the fruits of, private investigations. It then describes how other countries have begun reforming their systems in the direction of the U.S. approach, by both expanding the scope of corporate criminal liability and introducing negotiated corporate settlements.

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*Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 ANN. REV. SOC. 449, 449 (2007); Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 442 (Mathias Reimann & Reinhard Zimmermann eds., 2006); Katerina Linos, Note, *When Do Policy Innovations Spread? Lessons for Advocates of Lesson-Drawing*, 119 HARV. L. REV. 1467, 1467–71 (2006); Mathias Siems, *Malicious Legal Transplants*, 38 LEGAL STUD. 103–04 (2018).

## A. SETTLEMENT AND U.S. DE FACTO CORPORATE CRIMINAL LIABILITY

The American approach to corporate criminal liability and its enforcement begins with the nature of crime within organizations. Misconduct by large economic enterprises can impose greater social harms than individual crime due to the leveraging effects of team production and firms' assets. The size and complexity of such organizations also makes crime hard to detect and punish. In addition, wrongful business behaviors are often embedded within ordinary and lawful economic activities and frequently implicate statutes, like fraud laws, that have contestable boundaries.<sup>20</sup> Low risk of detection impedes governments' efforts to use criminal sanctions to deter misconduct because people tend not to fear sanctions that they believe are rarely imposed.<sup>21</sup> Moreover, misconduct by large firms, particularly publicly held firms, can be difficult to deter because employees regularly benefit personally from such actions and thus are not adequately deterred by the mere threat that the firm may be sanctioned.<sup>22</sup>

In the U.S. system, corporations are able to detect and investigate individual misconduct at far less public cost than if the government attempted to police corporate crime in a manner comparable to policing of street crime. Firms can deploy compliance programs to deter and detect misconduct, pursue internal investigations to develop proof of misconduct, report detected wrongdoing to the government, and assist the government in gathering probative evidence of crime.<sup>23</sup> Moreover, with firms that fail to prevent serious crime, the common criminal enforcement goals of specific deterrence and rehabilitation can be promoted by imposing on firms the costs and other burdens of corporate overhaul through forfeiture of the benefits of misconduct, adoption of internal reforms (for example, to a firm's compliance program or its practices in the offending line of business), acceptance of an external monitor, or discipline of implicated employees and responsible managers.<sup>24</sup> Firms can be threatened with heightened sanctions

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20. See Samuel W. Buell, *Culpability and Modern Crime*, 103 GEO. L.J. 547, 554–59 (2015); Samuel W. Buell, "White Collar" Crimes, in THE OXFORD HANDBOOK OF CRIMINAL LAW 837 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

21. E.g., Arlen & Kraakman, *supra* note 11, at 706; Arlen, *supra* note 11, at 833–37.

22. Corporate crime, in other words, is an agency cost. See Jennifer H. Arlen & William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 701; Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315, 315–20 (1991).

23. Arlen & Kraakman, *supra* note 11, at 688–95. Firms also can deter through internal systems that make it more difficult to commit misconduct and through employee compensation and retention policies that encourage compliance and sanction agents who violate the law. *Id.*

24. JUSTICE MANUAL, *supra* note 6, § 9-47.120; see Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 353–365 (2017) (discussing when mandated compliance programs and monitors promote deterrence); Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713,

if they do not follow through on such requirements.

In light of structural and political realities that prevent prosecutors and law enforcement agents from having the resources and public support to comprehensively and intrusively surveil activities inside large corporations, business firms thus can be viewed not only as a source of crime but also as a resource in crime prevention.<sup>25</sup> Policing activities by firms make employees less likely to violate the law, both because a firm's systems may prevent them from doing so in the first instance and because employees are less likely to engage in misconduct when faced with the higher probability of detection and sanctioning that results from the coordinated efforts of their employers and government enforcers. Public enforcement policies can not only promote private policing but, depending on the government's particular policy goals, can also differentially reward preventive compliance efforts, self-reporting of detected crime, cooperation in the gathering and furnishing of evidence, and reforms to prevent future violations.

The doctrine of corporate criminal liability is the starting point for this model of enforcement. In the United States, criminal *respondeat superior* doctrine permits holding corporations criminally liable for all crimes committed by all employees in the scope of employment with some intent to benefit the company.<sup>26</sup> As corporate enforcement grew in the 1980s and 1990s, it became apparent that *respondeat superior* liability—which holds a firm liable for any crime by any employee at any level, regardless of whether the firm had an effective compliance program or engaged in self-reporting and cooperation—is not the best way to deter crime by individual actors within large firms. Firms held liable for all employee misconduct will be discouraged from seeking to discover, disclose, and investigate if such efforts will only assist enforcement authorities in imposing higher corporate sanctions. As a result, individual wrongdoers are likely to evade sanction.<sup>27</sup>

The Criminal Division of the DOJ and influential United States Attorneys' Offices, through a series of policy memoranda and practices developed across many corporate criminal settlements,<sup>28</sup> replaced the *de jure*

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1714–15 (2007) (discussing when monitors promote deterrence); see also Jonathan J. Rusch, *Memorandum to the Compliance Counsel, United States Department of Justice*, 6 HARV. BUS. L. REV. ONLINE 69, 86 (2016).

25. BUELL, *supra* note 12, at 109–175; Arlen & Kraakman, *supra* note 11, at 688–95; Arlen, *supra* note 11, 833–37.

26. N.Y. Central & Hudson River R.R. v. United States, 212 U.S. 481, 494–95 (1909); Thomas J. Bernard, *The Historical Development of Corporate Criminal Liability*, 22 CRIMINOLOGY 3, 8–11 (1984); *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247–51 (1979).

27. See Arlen, *supra* note 11, at 836–37; see also Arlen & Kraakman, *supra* note 11, at 692–94.

28. JUSTICE MANUAL, *supra* note 6, § 9-28.000; Arlen, *supra* note 6, at 151–53; Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C. L. REV. 823, 832–36 (2018);

rule of *respondeat superior* with a *de facto* regime for sanctioning and controlling corporate crime. This regime provides incentives for companies to self-report and cooperate, by offering more favorable forms of resolution and lower sanctions.<sup>29</sup> Companies that self-report misconduct and fully cooperate generally can expect to (1) resolve criminal matters without a formal conviction through the use of DPAs or NPAs, (2) be subject to reduced criminal fines, and (3) be less likely to be subject to mandatory oversight in the form of a monitor or other intrusive internal reforms.<sup>30</sup> Indeed, under current policy, in some circumstances companies that self-report, fully cooperate, and remediate are presumed to be entitled to a declination of prosecution.<sup>31</sup> These guidelines embrace a model in which the government uses the stick of severe corporate criminal sanctions, together with the carrot of their partial or complete elimination, to extract information from firms about either the existence of misconduct or the identity of perpetrators and the nature of the evidence of their guilt.

U.S. prosecutors could maximize the incentive to self-report by reserving avoidance of criminal conviction, through a DPA or NPA, for companies that self-report as well as cooperate. Instead, they enable companies to obtain a DPA or NPA in return for full cooperation alone because enforcement officials derive substantial benefit from corporate cooperation in investigating crime even in the absence of self-reporting. Full credit for cooperation requires a firm to conduct a thorough and proactive internal investigation, collect and preserve all documentary records (especially overseas documents), disclose all relevant facts about individual wrongdoing (including attribution of facts to identified sources), and “de-conflict” and “make available” relevant witnesses over whom the corporation may exercise control.

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*see also* GARRETT, *supra* note 12, at 45–80 (discussing the history of the DOJ’s embrace of corporate DPAs).

29. A large and maturing corporate criminal defense bar—comprised of many lawyers with federal prosecution experience—has worked in coordination with enforcers to develop the *de facto* practice of corporate enforcement. *See* BUELL, *supra* note 12, at 142–203; Brewster & Buell, *supra* note 9, at 210–12; Charles D. Weisselberg & Su Li, *Big Law’s Sixth Amendment: The Rise of Corporate White-Collar Practice in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1239–43 (2011).

30. *See* BUELL, *supra* note 12, at 116–19, 145–53; Arlen & Kahan, *supra* note 24, at 324–30.

31. Under the current policy, self-reporting, together with cooperation and remediation, can earn corporations a declination (that is, exemption from prosecution)—provided that the firm does not have a history of prior violations, otherwise demonstrates no “aggravating circumstances” relating to the offense or the offender, and agrees to disgorgement of unlawful gains. If the firm does not obtain a declination, a firm that undertakes these activities can qualify for a 50 percent reduction in the fine. JUSTICE MANUAL, *supra* note 6, § 9-47.120. Although the DOJ originally adopted this policy for Foreign Corrupt Practices Act (“FCPA”) enforcement actions, *id.*, it later extended it to all actions by the Criminal Division. Rod J. Rosenstein, Deputy Attorney General, Remarks at the 32nd Annual ABA National Institute on White Collar Crime (Mar. 2, 2018).

The benefits of corporate cooperation are likely to be particularly large under one or more of three conditions: (1) when prosecutors are in the early stages of an investigation, before they have sufficient evidence of individuals' culpability to threaten individual liability as a means of producing cooperating witnesses; (2) when employees and documents relevant to the misconduct can be identified only after digesting large masses of potentially relevant materials; and (3) when information is located overseas and beyond the easy reach of U.S. legal procedures. The benefits of using DPAs and NPAs—which, unlike formal conviction, typically do not trigger potentially ruinous collateral consequences to corporations such as debarment from an industry or line of business<sup>32</sup>—to encourage cooperation are seen as outweighing the reduction in incentives to self-report that results from offering access to DPA and NPAs to firms that merely cooperate after government detection.

To be sure, there is skepticism about whether U.S. enforcement policy is effectively calibrated to achieve its goals, and whether prosecutors have pursued this model of corporate crime control with sufficient zeal.<sup>33</sup> Many have accused the DOJ of failing to follow through on the principal deterrence benefits of this policy: the ability to use corporate cooperation to facilitate prosecution of individual violators.<sup>34</sup> Still, as measured by expansion of corporate compliance programs,<sup>35</sup> increase in corporate cooperation and self-reporting, and the numbers and size of U.S. enforcement matters resolved in recent years, U.S. prosecutors appear, at least, to have benefitted from the enhanced access to information about corporate misconduct that this system has produced.

#### B. THE U.S. MODEL OF CORPORATE CRIMINAL ENFORCEMENT OVERSEAS

European and other nations have been adopting or expanding their corporate criminal regimes and introducing DPA-like corporate resolutions. This movement has been driven in part by growing concern over corruption

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32. See Cindy R. Alexander & Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 87, 128–29, 134–38 (Jennifer Arlen ed., 2018).

33. See, e.g., GARRETT, *supra* note 12.

34. See sources cited *supra* note 12. Others have questioned the competence of prosecutors to design and manage programs of corporate reform. See Arlen & Kahan, *supra* note 24, at 375–85. See generally PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (collecting the perspectives of 11 legal scholars on issues relating to prosecutorial regulation of corporate conduct through criminal enforcement).

35. See Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 990–91 (2009); Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1003–04 (2017).

of public officials in international business affairs and shifting norms about bribery.<sup>36</sup> It also is a response to the substantial sanctions imposed by U.S. authorities on European and other global companies, as well as to efforts of the OECD to combat under-enforcement against corrupt companies by European and other nations.<sup>37</sup> Especially since the global financial crisis, European regulators have developed an increasing appreciation for the costs of all corporate crime and the need to think about the problem of its control.<sup>38</sup>

Many countries are adopting corporate criminal liability or expanding its scope. For example, in 2010, the United Kingdom enacted comprehensive new anti-bribery legislation with both domestic and international applications.<sup>39</sup> This statutory scheme may prove broader than even the Foreign Corrupt Practices Act (“FCPA”), turning on arguably less demanding mens rea requirements and extending its jurisdiction more broadly. The U.K. Bribery Act of 2010 imposes *respondeat superior*-style corporate criminal liability for all employee bribery (with the possibility of an affirmative defense for compliance efforts), and even attaches individual criminal liability to senior managers of firms who do not themselves commit bribery but allow it to be committed with their “consent or connivance.”<sup>40</sup>

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36. For comprehensive treatment of these developments, see DAVIS, *supra* note 17. According to a recent OECD report, countries that bring corporate enforcement actions for foreign corruption tend to use non-trial corporate criminal resolutions. RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS, *supra* note 10, at 13–17.

37. Brewster & Buell, *supra* note 9, at 193–95; Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUD. 409, 409–11 (2014); Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1776–84 (2011).

38. The United Kingdom has become a leader and partner with the United States in focusing on financial sector crime, as shown in the multiple and coordinated prosecutions on both sides of the Atlantic relating to the London Interbank Offered Rate (“LIBOR”) scandal. See *Libor Cases*, SERIOUS FRAUD OFFICE, <https://www.sfo.gov.uk/cases/libor-landing/> [<https://perma.cc/H8CM-6MZS>]; James McBride, *Understanding the Libor Scandal*, COUNCIL ON FOREIGN REL. (Oct. 12, 2016), <https://www.cfr.org/background/understanding-libor-scandal> [<https://perma.cc/35XB-6E5T>]; Liam Vaughan & Gavin Finch, *Libor Scandal: The Bankers Who Fixed the World's Most Important Number*, GUARDIAN (Jan. 18, 2017), <https://www.theguardian.com/business/2017/jan/18/libor-scandal-the-bankers-who-fixed-the-worlds-most-important-number> [<https://perma.cc/892K-M2L5>]. Even Switzerland, with its participation in the FIFA prosecutions and somewhat greater willingness to cooperate with efforts to overcome banking secrecy, appears to be moving in a similar direction. See Luke Brown et al., *Sepp Blatter Under Criminal Investigation by Swiss Authorities Over 'Disloyal Payment' to Michel Platini — as It Happened*, TELEGRAPH (Sept. 26, 2015), <https://www.telegraph.co.uk/sport/football/sepp-blatter/11891462/Sepp-Blatter-under-criminal-investigation-at-Fifa-live.html> [<https://perma.cc/3FDW-4DFQ>]; *Swiss Prosecutor Appeals for Cooperation on FIFA Case File*, ASSOCIATED PRESS (Apr. 20, 2018), <https://apnews.com/86eae88af7e54205ade703bd4dbf9efa/Swiss-prosecutor-appeals-for-cooperation-on-FIFA-case-file> [<https://perma.cc/R9CT-KE73>].

39. Bribery Act 2010, c. 23 (UK).

40. *Id.* §§ 7, 14; see also Liz Campbell, *Corporate Liability and the Criminalisation of Failure*, 12 LAW & FIN. MARKETS REV. 57, 60–61 (2018); Jonathan J. Rusch, *Section 7 of the United Kingdom Bribery Act 2010: A “Fair Warning” Perilustration*, 43 YALE J. INT’L L. ONLINE 1, 25 (2017). In Ireland, the Law Reform Commission has delivered a comprehensive report recommending a host of changes in Irish law relating to corporate criminal liability and white-collar offenses. The report recommends expansion of corporate criminal liability to hold firms responsible for most offenses that would be covered

In 2016, the French parliament enacted Sapin II, an extensive new legal regime governing bribery and anti-bribery enforcement.<sup>41</sup> Sapin II imposes administrative liability on companies that do not have a sufficient anticorruption compliance program and criminal liability for influence peddling (with extraterritorial application). It also creates a new anti-bribery enforcement agency.

In addition, countries in Europe and elsewhere have adopted, or are considering the introduction of, DPA-style corporate criminal settlements, often with the explicit goals of encouraging corporate self-reporting and cooperation, as well as settlement.<sup>42</sup> For example, the U.K. Serious Fraud Office (“SFO”) is now empowered to propose to courts negotiated DPAs targeted at firms that self-report wrongdoing, fulfill obligations to assist prosecutors, and improve compliance efforts. The SFO has issued written guidance for corporations on how to obtain credit for assisting in investigations.<sup>43</sup> The French Sapin II legislation introduced a form of non-

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by U.S.-style *respondeat superior* liability if there were also a potential defense to liability for effective corporate compliance. LAW REFORM COMM’N OF IR., REPORT: REGULATORY POWERS AND CORPORATE OFFENCES 417–28 (2018), [https://www.lawreform.ie/\\_fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%201.pdf](https://www.lawreform.ie/_fileupload/Completed%20Projects/LRC%20119-2018%20Regulatory%20Powers%20and%20Corporate%20Offences%20Volume%201.pdf) [https://perma.cc/74LW-AXG8]. The Commission also recommended the creation of a new “Corporate Crime Agency.” *Id.* at 17–40.

41. Loi 2016-1691 du 9 Décembre 2016 Relative à la Transparence à la Lutte Contre la Corruption et à la Modernisation de la Vie Économique [Law 2016-1691 of December 9, 2016 on Transparency in the Fight Against Corruption and the Modernization of Economic Life], Journal Officiel de la République Française [J.O.] [Official Gazette of the France], Dec. 10, 2016 (“Sapin II”). For a discussion of Sapin II, see Arlen, *supra* note 10. In addition, Germany has gone from permitting corporations to treat overseas bribes as a tax-deductible business expense to becoming a willing partner in the OECD effort to expand anti-bribery enforcement. See OECD WORKING GROUP ON BRIBERY, PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN GERMANY 58–60 (2011), <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Germanyphase3reportEN.pdf> [https://perma.cc/3TQJ-9463]; Carter Dougherty, *Prosecutions of Business Corruption Soar in Germany – Business – International Herald Tribune*, N.Y. TIMES (Feb. 15, 2007), <https://www.nytimes.com/2007/02/15/business/worldbusiness/15iht-deutsch.4605942.html> [https://perma.cc/8E83-YNLU]. Germany is entertaining the adoption of corporate criminal liability, an idea once unthinkable in a system of criminal law predicated on moral theory. See Rübenthal & Brauns, *supra* note 10, at 871.

42. RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS, *supra* note 10.

43. See, e.g., Serious Fraud Office v. Rolls-Royce PLC, Approved Judgment (Southwark Criminal Court) (Jan. 17, 2017), <https://www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf> [https://perma.cc/R7YH-K54E] (judgment of Sir Brian Leveson in the Southwark Crown Court approving deferred prosecution agreement); U.K. SERIOUS FRAUD OFFICE ET AL., *supra* note 15; SFO OPERATIONAL HANDBOOK: CORPORATE CO-OPERATION GUIDANCE, SERIOUS FRAUD OFFICE (2019), <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/sfo-operational-handbook/corporate-co-operation-guidance/?wpdmdl=24184&refresh=5ecae597ed26b1590355351> [https://perma.cc/4F63-4FT9]; *Deferred Prosecution Agreements*, *supra* note 15. In the United Kingdom, resolution through a DPA is subject to a form of judicial review that courts are not able to undertake in the United States. See Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 192 (2016); Brandon L. Garrett, *The Public Interest in Corporate Settlements*, 58 B.C. L. REV. 1483, 1484–92 (2017).

trial corporate criminal resolution akin to DPAs.<sup>44</sup> Canada has introduced DPAs for some offenses,<sup>45</sup> as has Singapore.<sup>46</sup> Efforts are underway in other countries, including Australia, Switzerland, and Ireland, to permit the use of DPA-style criminal settlements.<sup>47</sup> In addition, the OECD is formulating principles for corporate settlements in anti-bribery enforcement. These developments are particularly striking in light of very different attitudes, traditions, and institutional arrangements in Europe versus the United States with respect to prosecutorial discretion and plea bargaining.<sup>48</sup>

The exciting conversation about corporate crime control in Europe, Asia, and elsewhere is extending into other important areas, such as legal regimes affecting whistleblowers, regulatory systems governing corporate disclosure, and individual liability for failures by corporate managers.

Given that these accelerating international developments originated in the area of corporate liability and settlements, a pressing question for jurisdictions pursuing enhanced deterrence of corporate crime is whether they can increase the ability of prosecutors to detect and sanction corporate misconduct by following U.S.-style approaches to liability and settlements. As the remainder of this Article will explain, there is cause for skepticism. The benefits to U.S. enforcement authorities of the U.S. system's mix of rewards for corporate self-reporting, cooperation, and remediation depends greatly on doctrines and features of U.S. law unrelated to the law of corporate criminal liability: the laws governing public and private investigations of corporate misconduct. Thus, before one can further consider the impact of adopting enforcement and settlement regimes that follow in the path of the United States, one must understand the contrast between U.S. law governing

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44. Law 2016-1691 of December 9, 2016 (Fr.); *First French DPAs for Corruption Offences Concluded*, DEBEVOISE & PLIMPTON (Mar. 12, 2018), <https://www.debevoise.com/insights/publications/2018/03/first-french-dpas-for-corruption> [<https://perma.cc/XM8X-2G87>]; see Arlen, *supra* note 10.

45. Milos Barutciski et al., *Canada Now Has Deferred Prosecution Agreements*, FCPA PROFESSOR (Sept. 24, 2018), <http://fcpaprofessor.com/canada-now-deferred-prosecution-agreements/> [<https://perma.cc/X8NY-4SML>]; see also Department of Justice Canada, *Remediation Agreements and Orders to Address Corporate Crime*, GOV'T OF CAN., <https://www.canada.ca/en/department-justice/news/2018/03/remediation-agreements-to-address-corporate-crime.html> [<https://perma.cc/YW89-KPZW>].

46. See Criminal Justice Reform Bill (Bill No. 14/2018) (Sing.). Chile and the Netherlands also allow prosecutors to enter into DPA-like resolutions with corporations. See RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS, *supra* note 10, at 21, 49–50. Other countries permit prosecutors to use some form of non-trial resolutions to pursue criminal or administrative cases against corporations for corruption, including Brazil, Germany, Italy, Norway, and Switzerland. *Id.* at 21, 23, 27, 60; DAVIS, *supra* note 17, at 173.

47. Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth) (Austl.); LAW REFORM COMM'N OF IR., *supra* note 40, at 266–79; see also RESOLVING FOREIGN BRIBERY CASES WITH NON-TRIAL RESOLUTIONS, *supra* note 10, at 34–35, 50.

48. See Yue Ma, *Prosecutorial Discretion and Plea Bargaining in the United States, France, Germany, and Italy: A Comparative Perspective*, 12 INT'L CRIM. JUST. REV. 22, 22–24 (2002).



corporate investigations (explained in Part II) and the investigative laws of other countries (explained in Part III).

## II. THE LAW OF CORPORATE INVESTIGATIONS IN THE UNITED STATES

While policies regarding corporate criminal liability and settlements determine the basic structure of corporate enforcement in the United States, the value to prosecutors of the U.S. approach of rewarding corporate self-reporting and cooperation, described in Part I, depends on laws external to enforcement policy. That value derives from how U.S. laws governing evidence collection in the business context determine the relative abilities of the government and private corporations to detect and investigate corporate crime. In the United States, doctrines relating to self-incrimination, employee rights during questioning, data privacy, and legal privileges—that is the laws governing corporate investigations—combine to place firms in a superior position to the government when seeking to acquire evidence of misconduct, particularly at the early stages of an investigation.

This Part advances the literature on corporate crime by demonstrating the essential role of evidentiary and procedural laws in the process of threatening corporations with criminal liability in order to uncover and prove misconduct within firms. This Part also sets the stage for this Article's discussion, in Parts III and IV, of how differences in investigative law in other countries mean that, when evaluating whether to follow the U.S. approach to both the scope of liability and negotiated settlements, other jurisdictions cannot expect to obtain equivalent benefits from corporate policing without substantial changes to enforcement policies and institutions.

### A. INVESTIGATIONS OF CORPORATE CRIME

A brief description of the current shape of corporate investigations in the United States will set the stage for the doctrinal discussion that follows. When the Justice Department sanctions large multinational firms, the resulting settlement or conviction most often relates to an investigation in one of a few areas: foreign commercial bribery, large-scale fraud such as accounting or consumer fraud, fraud on the government (especially with regard to health care programs or defense contracts), and harm to consumers and the environment through corporations' products and industrial activities.<sup>49</sup>

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49. The statutes and regulations available to U.S. prosecutors to sanction these activities are, for practical purposes, countless and thus far less influential in determining the course of investigation of corporate crime than many public or foreign observers might think.

A first, and critical, investigative step is how a firm or a prosecutor learns about a potential criminal matter. The most common methods of initial detection are through a firm's compliance systems (for example, internal reporting by employees, data analytics, or other monitoring systems), or, in the case of government detection, a whistleblower report, investigative journalism, disclosure by a cooperating defendant implicated in other misconduct, or, less commonly, detection by regulators.<sup>50</sup>

Following detection, preliminary investigation is pursued by the firm, public enforcers, or both. At this initial stage, the first objective is to determine whether misconduct occurred and, if so, to assess the scope of the wrongdoing and associated legal risks, especially the identities of implicated managers and employees. The company will do this by examining internal documents (including employees' electronic communications) and interviewing employees. If the government is not yet aware of the wrongdoing, an urgent question for the firm is whether to report its findings to enforcers or attempt to remediate and then remain silent.

For prosecutors, the initial task is to determine whether there is sufficient evidence of misconduct to investigate at all, and, if so, what should be the scope of, and resources devoted to, the investigation. They then need to determine whom to interview. This requires identifying non-implicated employees with relevant information because prosecutors often do not have sufficient evidence of misconduct at the early stage to pressure implicated witnesses to cooperate. Initial interviews also enable enforcement authorities to determine what documentary and electronic evidence to seek.

By the time the nature of the wrongdoing and the rough scope of personnel involved have become clear, the corporation will almost always have retained outside counsel. These private lawyers will conduct witness interviews and data recovery and review on behalf of the company, often with the assistance of other professionals such as forensic accountants. The corporation will also have hired separate counsel to represent many of its employees, especially those who might be implicated in the wrongdoing. At this stage in a government investigation, prosecutors may seek to enter into cooperation deals with ancillary implicated employees.

The firm and the government will then move to a phase in which the company's primary objective is to obtain a favorable resolution, and the

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50. An analysis of corporate fraud indicates that government investigators tend to learn about misconduct from people within the firm, as opposed to through their own monitoring. Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2214 (2010). Public enforcement detects only a small amount of the corporate misconduct that occurs, however. Companies' internal systems detect, and are able to substantiate, more crime. See Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923, 923-25 (2019).

government's primary objective is to gather complete and legally admissible evidence of the wrongdoing, both documentary and testimonial. This stage, which often continues past the point of settlement between the corporation and prosecutors, commonly involves private and public lawyers and their agents conducting interviews, data analysis, document review, and sometimes grand jury testimony, all while regularly communicating with each other about the course and findings of the investigation. Settlement negotiations commonly occur during this period. The company will understand that prosecutors will consider the quality of the firm's cooperation when determining the recommended form of settlement (that is DPA, NPA, or plea) and magnitude of sanction.

Before and after any settlement, the firm also will implement internal reforms either voluntarily or as mandated by settlement agreement. Reforms typically will include changes to personnel and sometimes governance systems, improvements to the corporation's compliance programs, and submission to oversight by an independent monitor.<sup>51</sup> These activities can lead to the detection, and potentially the disclosure of, evidence of further detected wrongdoing.

#### B. ACCESS TO EMPLOYEES' STATEMENTS AND TESTIMONY

At each stage of a corporate investigation, witnesses can be essential to identifying and proving a criminal violation. Documents and other forensic materials can be decisive. But their probative power, especially for complex business crimes, often depends on the explanatory testimony of persons who can identify the material documents and explain their meaning. As this Section shows, U.S. criminal procedure and employment law combine to give private corporations distinct advantages relative to public prosecutors in obtaining testimonial evidence from employees, especially at the early stage of an investigation.<sup>52</sup>

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51. Arlen & Kahan, *supra* note 24, at 335–36.

52. As stated previously, this Article sets aside for later work comparative analysis of legal doctrines protecting employees against termination if they blow the whistle on misconduct internally or externally, as well as of legal regimes that provide bounties to external whistleblowers. *See supra* note 18. Protections for internal whistleblowers in both federal and state law, *see, e.g.*, CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 75–88, 132–35, 142–45 (2010), can enhance firms' ability to detect and investigate by generating more information about misconduct from employees. While overseas there are less-developed laws protecting whistleblowers from retaliation, in many countries employees are protected by stronger employment laws preventing termination without cause. *See infra* Part III. The United States is one of the few countries that offers bounties for some crimes. Such bounties potentially enhance both the government's ability to detect misconduct and corporations' incentives to self-report it. Arlen, *supra* note 10. Bounties do not obviate, or even significantly reduce the benefit to the government of inducing corporate self-reporting or cooperation. Bounties are not available for most crimes. Moreover, for misconduct for which they are available, the government appears not to obtain actionable whistleblowing reports relating to most of the

### 1. Prosecutors' Ability to Obtain Information from Employees: Fifth Amendment, Immunity, and Right to Counsel

Corporate personnel with knowledge of wrongdoing within a firm were often involved in the misconduct and thus have potential exposure to prosecution.<sup>53</sup> Given the factual and doctrinal complexity of most white-collar crimes, and the extremely broad scope of American prosecutorial discretion, employees close to the misconduct will, at the beginning of a criminal inquiry, have at least reasonable apprehension of potential charges.

The U.S. Constitution's Fifth Amendment guarantees all such employees a right against self-incrimination, erecting a barrier to prosecutors' acquiring their evidence.<sup>54</sup> The core guarantee is that the government may not prove a person's guilt in a criminal trial by offering in evidence verbal or written statements of that person that were compelled by government action.<sup>55</sup> A subpoena, of course, is deemed compulsory because the law of civil and criminal contempt provides for sanctions, including imprisonment, against a witness who refuses to obey a subpoena's commands.<sup>56</sup> Therefore, an individual who reasonably fears self-incrimination, even indirectly, has a right to invoke the Fifth Amendment as grounds for refusing to testify in a grand jury, courtroom, or other proceeding that is subject to contempt sanctions.<sup>57</sup> And, of course, any person may decline a request to appear voluntarily for an interview with government investigators without needing to expressly invoke constitutional privilege.

One might think that prosecutors could rely on compelling the testimony of witnesses who have no reasonable fear of self-incrimination, and thus no right to assert, because they have no potential criminal liability. This route is not promising in the context of corporate crimes for two reasons. First, such crimes are rarely provable without the testimony of those who were themselves involved in illegal activity, because violators tend to

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misconduct that occurs, or even that it enforces. Thus, even with some available bounties, corporations in the United States have a comparative advantage in detecting and investigating misconduct.

53. See Miriam H. Baer, *Reconceptualizing the Whistleblower's Dilemma*, 50 U.C. DAVIS L. REV. 2215, 2234–67 (2017).

54. U.S. CONST. amend. V; see also *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972); Lisa Kern Griffin, *Silence, Confessions, and the New Accuracy Imperative*, 65 DUKE L.J. 697, 705 (2016).

55. See *Chavez v. Martinez*, 538 U.S. 760, 766–67 (2003); *Ullman v. United States*, 350 U.S. 422, 430 (1956).

56. 18 U.S.C. § 402 (2018); *Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 838–39 (1994). *Miranda* doctrine is rarely at issue in the investigation of corporate crime in the United States because questioning in police custody of corporate suspects is so uncommon. *Miranda v. Arizona*, 384 U.S. 436 (1966). Unlike some nations, the United States does not permit even temporary arrest solely for investigative purposes. See *id.* at 482. The Supreme Court, in spite of the opportunity to do so, has declined to rule that questioning before a grand jury constitutes custodial interrogation. *United States v. Washington*, 431 U.S. 181, 186 (1977).

57. *Brown v. Walker*, 161 U.S. 591, 597–601 (1896).

keep wrongdoing secret from those who are not members of criminal conspiracies.<sup>58</sup> Second, law and courts take a deferential posture towards an individual's assertion that she reasonably fears, *ex ante*, that answering an investigative question might further her later prosecution.<sup>59</sup> Even peripheral witnesses, when well advised by counsel, are apt to resist government questioning on Fifth Amendment grounds, especially early in an investigation when neither prosecutors nor defense counsel can confidently predict who, if anyone, will be implicated in wrongdoing.

Another option for prosecutors is to attempt to build a case on the testimony of occasional uncounseled individuals who voluntarily waive their Fifth Amendment right and submit to investigative questioning. Less well advised or informed employees, those keen on currying favor with employers, and those with strong appetite for legal risks might choose to answer questions freely. However, the opportunity to surprise and deal directly with an unrepresented person, prized by any government investigator, is rare in major corporate criminal investigations. Firms typically already know about the potential wrongdoing and, as discussed below, have either had the firm's counsel contact employees before the government commences investigative activities, or have hired individual counsel for employees.

State rules of attorney conduct, which bind federal prosecutors,<sup>60</sup> prohibit prosecutors and their agents from contacting individuals who are known to be represented by counsel without counsel present, even during the earliest stages of a criminal investigation before any person has been charged.<sup>61</sup> These rules can particularly inhibit corporate investigations because most states interpret them as applying, when a company is represented by counsel, to contacts with senior personnel of the company; some states find them to apply to contacts with lower-level employees and even, if privileged information is sought, to contacts with former employees.<sup>62</sup>

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58. *See, e.g.*, *United States v. Provenzano*, 615 F.2d 37, 44–45 (2d Cir. 1980).

59. *See Hoffman v. United States*, 341 U.S. 479, 485–87 (1951); *Davis v. Straub*, 430 F.3d 281, 287–90 (6th Cir. 2005). Prosecutors generally eschew the onerous and often fruitless task of litigating whether a particular witness may assert the right to silence, especially during the investigative stage of a matter.

60. 28 U.S.C. § 530B (2018).

61. *See United States v. Hammad*, 858 F.2d 834, 834–35 (2d Cir. 1988); MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N 2018); *see also Massiah v. United States*, 377 U.S. 201, 205–06 (1964) (explaining the Sixth Amendment dimension to government contacts with charged defendants represented by counsel).

62. *See, e.g.*, *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 628–29 (S.D.N.Y. 1990); *Meachum v. Outdoor World Corp.*, 654 N.Y.S.2d 240, 254–55 (Sup. Ct. 1996); *see also* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 296 (2005) [hereinafter CRIMINAL RESOURCE MANUAL]

A prosecutor seeking evidence from an informed individual represented by counsel must thus obtain a waiver of the Fifth Amendment right, which will come at a price. This price will vary, of course, according to the parties' bargaining strength. At the early stages of a corporate investigation, when the government has not yet gathered enough evidence to determine whether a crime has been committed, much less which employees might have been involved, an implicated individual has little to fear from the government if she does not cooperate and thus little reason to waive her right to silence.

To obtain information from informed, savvy witnesses who assert their rights, prosecutors must often deploy a costly measure: the statutory procedure for immunizing witnesses in order to obtain evidence in the face of the Fifth Amendment right. For statutory immunity to comply with constitutional requirements, it must fully "supplant" the Fifth Amendment right, that is, place the immunized witness in no worse position than if she had remained silent.<sup>63</sup> Therefore, testimony compelled under such immunity—known as "derivative use" or "*Kastigar*" immunity—may not be used against a witness in any manner, even indirectly as a lead to acquiring evidence. Functionally, this means that later prosecution of an immunized witness will be extremely difficult or even impossible.<sup>64</sup>

At later stages of a corporate investigation, the government may be able to extract a waiver of the right to self-incrimination as part of a guilty plea that exchanges testimony for a reduced sentence or more limited form of immunity protection, but only if the government has solved the problem of how to assemble sufficient proof of wrongdoing in the early stages, when witnesses lacked strong incentives to cooperate. Thus, if the government were to act alone, the Fifth Amendment—together with the pervasive and early presence of private counsel—would impose costly impediments to the investigation of corporate crime that could disable an investigation at the

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(summarizing uneven state of the law and advising federal prosecutors to study local law before acting).

63. See 18 U.S.C. §§ 6002–6005 (2018); *Kastigar v. United States*, 406 U.S. 441, 448–49 (1972); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964).

64. See, e.g., *United States v. Poindexter*, 951 F.2d 369, 390 (D.C. Cir. 1991); *United States v. North*, 920 F.2d 940, 943 (D.C. Cir. 1990); *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973); see also Stephen D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1321–27 (2001). For this reason, Justice Department guidelines disfavor grants of statutory immunity. JUSTICE MANUAL, *supra* note 6, § 9-23.000. It is rare that a prosecutor will be willing to apply to a court for immunity without first having obtained a "proffer" from the witness. The proffer process requires the witness to be willing to effectively give up any prospect of testifying in her own defense, or otherwise putting on a defense case, by previewing her testimony for the government in exchange for a limited form of "use immunity" that guarantees only that the government will not use her proffer statements as evidence in its case-in-chief. See SAMPLE PROFFER AGREEMENT, UNITED STATES ATTORNEY, SOUTHERN DISTRICT OF NEW YORK (May 17, 2005), <http://inns.innsocourt.org/media/66719/2%20-%20SDNY%20Proffer.pdf> [<https://perma.cc/4B7D-GQ5R>]; see also *United States v. Velez*, 354 F.3d 190, 191–92 (2d Cir. 2004).

threshold.

## 2. Corporations' Ability to Obtain Information from Employees: State Action and Employment Law

The U.S. Constitution does not constrain non-governmental actors. As a result, corporations do not face similar restrictions when obtaining testimonial evidence from potentially implicated employees. Private corporations interacting with their own employees generally are not official actors under U.S. constitutional law, even when investigating in anticipation of cooperating with the government in the future.<sup>65</sup> Thus, private corporations can compel their employees to speak to representatives of the firm tasked with determining whether and where misconduct has occurred.<sup>66</sup> If an employee refuses to answer, the firm may lawfully terminate, demote, or reduce the compensation of the employee—and thus may obtain employee cooperation by credibly threatening to take such measures.<sup>67</sup>

In addition, employees do not have a constitutional right to counsel during such interviews.<sup>68</sup> Employees of private corporations in the United States, the vast majority of whom do not have union representation, generally work under the terms of at-will employment, meaning the employer can summarily fire the employee, without notice or an opportunity to be heard, as long as the firm does not act in violation of other laws, such as statutory prohibitions on discrimination.<sup>69</sup> Even senior managers working under protective employment contracts, or union members working under collective bargaining agreements, usually may be terminated “for cause,” a condition that, in the United States, is likely met by a manager’s refusal to obey a directive to cooperate with a firm’s investigation.<sup>70</sup>

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65. See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350–58 (1974); *Jensen v. Farrell Lines, Inc.*, 625 F.2d 379, 384–85 (2d Cir. 1980); cf. *United States v. Slough*, 641 F.3d 544 (D.C. Cir. 2011) (relating to government military contractor operating overseas).

66. See *Gilman v. Marsh & McLennan Cos.*, 826 F.3d 69, 77 (2d Cir. 2016).

67. *Id.* at 69.

68. See *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161–63 (2d Cir. 2002); *United States v. Solomon*, 509 F.2d 863, 871–72 (2d Cir. 1975); *United States v. Antonelli*, 434 F.2d 335, 337–38 (2d Cir. 1970). The small percentage of private-sector workers who are represented by unions do have a statutory right to the presence of a union representative if the employee might be subject to discipline as a result of the interview. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256–57 (1975); see also ROBERT A. GORMAN & MATTHEW W. FINKIN, *LABOR LAW: ANALYSIS AND ADVOCACY* § 16.4 (2013).

69. See RESTATEMENT (THIRD) OF EMP’T LAW § 2.01 (AM. LAW INST. 2014); see Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343, 347 (2014).

70. See RESTATEMENT (THIRD) OF EMP’T LAW §§ 2.02, 2.04 (AM. LAW INST. 2014); see also Rachel Arnow-Richman, *Just Notice: Re-Forming Employment at Will*, 58 UCLA L. REV. 1, 24–25 (2010); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405–06 (1967).

Prosecutors who obtain the fruits of such questioning from a cooperating corporation are free to use them as they please, including as evidence in court, even though, as matter of colloquial understanding, such statements have been coerced by the firm's threat of action against employees who remain silent.<sup>71</sup> As long as the corporation directs its own investigation, without being directed by prosecutors, the investigation will not be deemed to constitute state action, even if the government benefits in the end, thus leaving affected individuals without viable Fifth Amendment objections.<sup>72</sup>

To summarize, U.S. prosecutors face substantial practical and legal hurdles to obtaining individual testimony in the investigation of corporate crime, particularly at the initial stages of determining whether a crime has been committed and who may be implicated. Firms encounter much lower hurdles to obtaining the statements of their own employees. Thus, prosecutors have powerful legal and practical incentives to induce firms to acquire witness testimony in exchange for leniency in corporate sanctioning.

### C. THE LAW OF LAWYERS: ATTORNEY-CLIENT PRIVILEGE AND JOINT DEFENSE

Firms' comparative advantage in obtaining evidence during corporate investigations in the United States depends on another area outside corporate criminal law: rules governing attorney-client privilege and the freedom of corporations to hire counsel for their employees and share investigative information with such lawyers.

Firms are reluctant to work proactively to detect and fully investigate misconduct unless they can control access to the fruits of such efforts. Firms have an incentive to expend resources on investigating when they can benefit from sharing products with enforcers and among defense counsel, while both retaining control over how much is shared and shielding those products from adversarial third parties who would seek to exploit them in costly private

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71. See *United States v. Garlock*, 19 F.3d 441, 443–44 (8th Cir. 1994); see also *Colorado v. Connelly*, 479 U.S. 157, 166, 169–71 (1986); Griffin, *supra* note 18.

72. Judges have concluded that a specific private investigation constituted state action when prosecutors exerted undue influence over the firm's investigation. *E.g.*, *United States v. Stein*, 541 F.3d 130, 136 (2d Cir. 2008), *aff'g* 435 F. Supp. 2d 330, 381 (S.D.N.Y. 2006); *United States v. Connolly*, 2019 U.S. Dist. LEXIS 76233, at \*33–34 (S.D.N.Y. 2019). In *Stein*, the court found that prosecutors had fully entwined themselves in the conduct of the firm by explicitly threatening the firm (KPMG, which was a partnership in the reputationally sensitive auditing business) with a disabling criminal conviction if it did not follow prosecutors' directives, including instructions about precisely what the firm should say to its employees to induce them to talk to the government, including without counsel. See generally *Stein*, 435 F. Supp. 2d 330. The court in *Connolly* likewise found that the government directed specific investigative measures, including individual interviews, while failing to conduct meaningful investigation of its own. *Connolly*, 2019 U.S. Dist. LEXIS, at \*31–46.



litigation. U.S. law on legal privileges and related matters gives firms substantial and early control over information gathered in corporate investigations, thereby enhancing private firms' investigative powers.

#### 1. Counsel for the Firm: Attorney-Client Privilege and Work Product Protection

The American attorney-client privilege protects from disclosure all confidential communications between client and lawyer made for the purpose of obtaining legal advice of any sort: transactional (such as for mergers and acquisitions), litigation-related (whether during or in anticipation of legal action), and even general advice unrelated to a specific deal or dispute, such as ongoing compliance advice.<sup>73</sup> Corporate clients enjoy the privilege just as individuals do.<sup>74</sup> Moreover, the U.S. corporate privilege applies both to in-house lawyers and outside counsel when acting as legal representatives for the firm.<sup>75</sup> Corporations and their counsel also enjoy the protection of the work product doctrine, a qualified protection shielding materials, such as notes of interviews, prepared in anticipation of litigation and reflecting the mental processes of counsel.<sup>76</sup>

Under the Supreme Court's foundational decision in *Upjohn v. United States*, when lawyers acting on behalf of a firm interview employees about actions undertaken in the scope of employment, the attorney-client privilege and the work product doctrine protect the resulting information regardless of whether a lawyer speaks with the most senior manager or the lowest-level employee.<sup>77</sup> Thus, corporate counsel can conduct internal investigations of wrongdoing knowing, and assuring employees, that the privilege will shelter interviews as long as one of the significant purposes of the investigation is to provide legal advice to the firm.<sup>78</sup>

This doctrine assists corporate investigations in two ways. First, corporations can more freely investigate and respond to misconduct of which the government is unaware because they can control whether and what information is disclosed. Second, it may lead employees to speak more frankly. The privilege belongs to the corporation, not the employee, and is the corporation's to assert or waive, at the discretion of corporate

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73. See INTERNAL CORPORATE INVESTIGATIONS 25–91 (Brad D. Brian et al. eds., 4th ed. 2017).

74. See *id.*

75. *Upjohn Co. v. United States*, 449 U.S. 383, 394–95 (1981).

76. *Id.* at 397–402.

77. *Id.* at 392–96.

78. See, e.g., *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 140–41 (D.C. Cir. 2015); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758–60 (D.C. Cir. 2014); see also *In re GM LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 529–30 (S.D.N.Y. 2015).

management. However, a corporate lawyer's standard "*Upjohn* warning"<sup>79</sup> informs an interviewed employee that the conversation is privileged. (A complete *Upjohn* warning should also explain to the employee that the corporation, not the employee, has the power to choose to waive that protection.<sup>80</sup>) Having been told that a conversation with counsel is confidential, some employees may believe it will remain so, and thus may be more willing to disclose wrongdoing in the hope of retaining employment or at least being allowed to exit on favorable terms.

Companies seeking to cooperate can do so either by waiving the privilege and providing the government with raw investigative materials gathered by corporate counsel, or by giving the government summaries of the facts of the misconduct.<sup>81</sup> U.S. companies tend not to supply such raw material because, in the United States, disclosure to one party causes general waiver of the attorney-client privilege, leaving investigative products exposed to private plaintiffs, regulators, and others.<sup>82</sup> However, even factual summaries are required to be quite detailed and include facts identifying relevant witnesses and culpable actions by specific individuals. Firms are also asked to provide the government with a roadmap showing where it can

79. United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997).

80. *Id.*; see also Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73, 100 (2013). Practitioners differ about whether corporate counsel also should caution an employee to obtain her own attorney and advise her that the corporation may agree to cooperate with the government and share the fruits of its investigation, to the legal detriment of the employee. See INTERNAL CORPORATE INVESTIGATIONS, *supra* note 73, at 43–45. Employees must pass a high hurdle to establish a personal privilege with respect to conversations with counsel for the employer. See *In re* Beville, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir. 1986). Bar rules have been interpreted to permit corporate counsel to simultaneously provide legal advice to both the firm and its employees, at least at the early stages of an investigation when counsel is seeking to determine whether wrongdoing has likely occurred and a full internal investigation is warranted. See N.Y. City Lawyers' Ass'n. Prof'l Ethics Comm., Formal Op. 747 (2014).

81. Companies' leverage has been enhanced since the DOJ changed its policy—largely due to lobbying by the bar and business sector—to discourage prosecutors from insisting on a waiver of legal privilege in return for giving cooperation credit, but to allow companies to offer to waive. Memorandum from Mark Filip, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Dep't Components & U.S. Attorneys (Aug. 28, 2008) [hereinafter Filip Memo], <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>; see Jonathan D. Glater & Michael M. Grynbaum, *U.S. Lifts a Policy in Corporate Crime Cases*, N.Y. TIMES (Aug. 28, 2008), <https://www.nytimes.com/2008/08/29/business/29kpmg.html> [<https://perma.cc/3DFB-5797>]. For full treatment of these developments and their importance to firms' bargaining position, see Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No,"* 45 AM. CRIM. L. REV. 1237 (2008).

82. See, e.g., *In re* Pac. Pictures Corp., 679 F.3d 1121, 1124 (9th Cir. 2012); *In re* Qwest Commc'ns Int'l Inc., 450 F.3d 1179, 1185 (10th Cir. 2006); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1417 (3d Cir. 1991). *But see* *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 598 (8th Cir. 1977) (en banc) (stating that voluntary disclosure of privileged materials to the Securities and Exchange Commission ("SEC") does not waive the attorney-client privilege as to civil plaintiffs). Rule-makers have adopted limited waiver protections, such as for accidental disclosure. See FED. R. EVID. 502.

obtain the evidence needed to prove a case.<sup>83</sup> To date, this approach to cooperation has been reasonably successful in maintaining confidentiality vis-à-vis third parties.<sup>84</sup>

## 2. Counsel for the Employees: Funding and Conflicts of Interest

The relative advantage of firms in the United States gathering information during investigations is enhanced by principles that allow corporations to retain lawyers for individual employees and share information among corporate and individual counsel. Firms' control of counsel makes it more likely that employees will cooperate with firms' efforts to gather facts because refusal to cooperate generally results in not only termination but also loss of firm-funded representation. Further, employees provided with counsel may be more likely to assert their rights if prosecutors attempt to compel their statements.

U.S. firms have wide latitude to hire counsel for employees for two reasons. First, attorney ethics regimes allow the conflict of interest inherent in such arrangements to be waived by the individuals, who often are motivated to do so to avoid legal expenses.<sup>85</sup> Second, corporate law facilitates the funding by firms of attorneys for officers, managers, and employees in investigative and enforcement matters.<sup>86</sup> Almost all large U.S. corporations have a settled practice of paying employees' legal fees in work-related investigative and regulatory matters.<sup>87</sup>

In addition, rules allowing coordination among corporate and individual counsel give corporations greater access to information about the progress

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83. JUSTICE MANUAL, *supra* note 6, § 9-28.720. It remains unclear whether corporations can share even summaries of information gathered by lawyers through interviews of corporate personnel—including identification, as the government expects, of relevant witnesses—without waiving the privilege.

84. *Cf.* U.S. Sec. & Exch. Comm'n v. Herrera, 324 F.R.D. 258, 258 (S.D. Fla. 2017) (reporting the ruling of a single magistrate judge that protection was waived as to some internal investigation fruits due to “oral downloads” of the content of employee interviews to SEC personnel).

85. MODEL RULES OF PROF'L CONDUCT r. 1.7(b) (AM. BAR ASS'N 2018).

86. *See* DEL. CODE ANN. tit. 8, § 145(e) (2019). *See generally* TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION (2010) (exploring how corporate insurance and indemnification practices and arguing that such practices weaken deterrence of wrongdoing in the corporate setting).

87. One court concluded that employees of the KPMG auditing firm had a reasonable expectation that the firm would cover their fees based on the firm's past practices (and its own statements), even though they were not contractually entitled to fee advancement. *United States v. Stein*, 541 F.3d 130, 155–58 (2d Cir. 2008); *see also* Andrew Ross Sorkin, *Wall St. Debates Who Should Pay Legal Bills*, N.Y. TIMES: DEALBOOK (Aug. 12, 2013, 8:50 PM), <https://dealbook.nytimes.com/2013/08/12/wall-st-debates-who-should-pay-legal-bills/> [<https://perma.cc/CT9C-8AP4>]. “Clawback” actions to recoup fees from employees later convicted of crimes are burdensome and relatively rare. *See* Peter J. Henning, *When Legal Bills Become a Cause for Dispute*, N.Y. TIMES: DEALBOOK (Feb. 1, 2010, 9:11 AM), <https://dealbook.nytimes.com/2010/02/01/when-legal-bills-become-an-item-of-dispute/> [<https://perma.cc/ZZL6-GLCM>].

and direction of the government's investigation. This stems from U.S. law on the joint defense privilege, which underlies the common practice of joint defense agreements.<sup>88</sup> This doctrine operates as an exception to the ordinary rules governing waiver of the attorney-client privilege. If multiple parties to an actual or potential legal proceeding share a common legal interest and clearly invoke the joint defense privilege, sharing of privileged materials among such persons and their counsel will not waive the attorney-client privilege.<sup>89</sup>

The practice of information sharing under joint defense agreements can greatly enhance corporate counsel's (and thus management's) ability to know what the evidence is in a complex matter, what parts of that evidence are known to the government, and even what the government's actions suggest about which persons and crimes it may be targeting. If a firm both is paying the fees of individual counsel and is party to joint defense agreements with those counsel, even the most careful counsel inevitably will have incentives, including potential benefits to their own clients, to exchange information about the progress and direction of the government's investigation with the firm and among individual counsel.

The more a corporation's employees submit to questioning, and the more the corporation knows about both its own employees' and the government's knowledge of the facts, the better positioned the corporation will be to craft a cooperation strategy that will satisfy prosecutors and earn the firm the sanction reductions it seeks.

#### D. CORPORATE DOCUMENTS AND RECORDS

Corporate crime is also investigated and proved through very large quantities of documents. With digitization, it is now routine for major corporate investigations to involve millions of documentary records, within which items of critical proof can be scattered or buried. Although U.S. authorities can obtain documents by subpoena, firms retain a comparative advantage in the very costly enterprise of collecting and assessing documentary evidence in major cases of corporate crime.<sup>90</sup> Whereas

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88. See INTERNAL CORPORATE INVESTIGATIONS, *supra* note 73, at 179–84.

89. See *id.*

90. See Arlen, *supra* note 6, at 165–67 (discussing companies' comparative advantage at obtaining and analyzing information about conduct by their employees in the scope of employment); see also JAY E. GRENIG & WILLIAM C. GLEISNER, III, EDISCOVERY & DIGITAL EVIDENCE (1st ed. 2005) (discussing how lawyers can handle electronically stored information); INTERNAL CORPORATE INVESTIGATIONS, *supra* note 73, at 134; MICHELE C.S. LANGE & KRISTIN M. NIMSGER, ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW (1st ed., 2004); Roger Parloff, *How VW Paid \$25 Billion for 'Dieselgate' — And Got Off Easy*, FORTUNE (Feb. 6, 2018, 2:01 AM), <https://fortune.com/2018/02/06/volkswagen-vw-emissions-scandal-penalties/> [<https://perma.cc/4YBL-AE9T>].

prosecutors cannot expend the resources that would be required to blindly subpoena records whenever a hunch about misconduct has arisen, companies in the United States can monitor electronic communications and documents to detect misconduct.

Moreover, when investigating crime, companies are better able to identify, collect, and assess vast amounts of potentially relevant information. Corporate records are routinely spread across many locations and housed in multiple jurisdictions. The collection and review of documentary evidence presents government enforcers with severe practical problems. The ability of firms to assist the government in reducing those problems, and thus to speed corporate investigations, and lower their costs, enhances prosecutors' ability to learn of and prove misconduct.

### 1. Government Access to Documentary Evidence

The legal mechanism for compelling production of documents in a U.S. criminal investigation is the grand jury subpoena or, in regulatory matters such as Securities and Exchange Commission ("SEC") or Internal Revenue Service ("IRS") investigations, an administrative subpoena authorized by statute.<sup>91</sup> A grand jury subpoena satisfies the Constitution as long as it is not overly burdensome or broad, and there is a reasonable possibility that the materials obtained will be relevant, even if only indirectly.<sup>92</sup> Corporations have no right against self-incrimination under the Fifth Amendment. As a result, an employee subpoenaed to provide corporate documents in her official capacity cannot resist, even if the material could be personally incriminating.<sup>93</sup>

However, in order to determine which documents to seek and to understand them, investigators need to undertake preliminary work, generally by interviewing witnesses. Corporations have a large advantage in this endeavor, as discussed above. Moreover, even when prosecutors know the broad category of records they need, they often cannot effectively obtain the information without the corporation's help. A subpoena at the outset of an investigation for all records relating to a line of business will elicit a far greater volume of evidence than the government can manage with its own resources.<sup>94</sup> Uncooperative corporations have room to drag their heels in

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91. See, e.g., 15 U.S.C. § 78u(b) (2018); 26 U.S.C. § 7602 (2018).

92. As a matter of doctrine, a grand jury may issue a subpoena "just because it wants assurance" that no crime has been committed. *United States v. R. Enters., Inc.*, 498 U.S. 292, 297 (1991); *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950).

93. See *Hale v. Henkel*, 201 U.S. 43, 73–75 (1906); see also *Fisher v. United States*, 425 U.S. 391, 405–14 (1976); Sara Sun Beale & James E. Felman, *The Fifth Amendment and the Grand Jury*, 22 CRIM. JUST. 4, 6–7 (2007).

94. A subpoena that sweeping could prompt litigation on the ground that it exceeds even the wide

complying, leading to delay in addition to the government being buried in documents.<sup>95</sup>

In corporate investigations that cross international borders, the government faces legal obstacles in addition to these practical problems. A grand jury subpoena is not self-executing outside United States territory. An American court may not issue a warrant to search premises abroad, although electronic evidence stored abroad by United States entities may be searchable.<sup>96</sup> Production of foreign documents can be ordered only with cumbersome procedures provided through mutual legal assistance treaties.<sup>97</sup> Given the volume, complexity, and dispersion of data in any investigation of crime within a large global corporation, prosecutors acting alone could not get to the bottom of a matter in reasonable time, at least not with current resources.

## 2. Corporate Access to and Capacity to Evaluate Documentary Evidence

A cooperative corporation can reduce these problems for government investigators. Corporations in the United States generally have the right to access work-related electronic evidence, including employees' emails, on servers or company-owned computers, even when this information contains employees' personal data.<sup>98</sup> As a result, corporations can better detect

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latitude given to investigative subpoenas because the directive is overbroad, would be excessively burdensome to comply with, and likely covers material subject to attorney-client privilege. *See* FED. R. CRIM. P. 17; *Swidler & Berlin v. United States*, 524 U.S. 399, 401 (1998).

95. Criminal investigators of course have the alternative of proceeding by search warrant. But this requires having evidence in hand sufficient to establish probable cause and, because most documentary evidence is digital, will result in the same problem of overbreadth: the government will end up with reams of data. *See generally* U.S. DEP'T OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS (2009), <https://www.justice.gov/sites/default/files/criminal-ccips/legacy/2015/01/14/ssmanual2009.pdf> [<https://perma.cc/J6BL-AV9H>] (explaining the difficulty in obtaining and navigating computer evidence).

96. *See* 18 U.S.C. § 2701 (2018); Clarifying Lawful Overseas Use of Data Act, Pub. L. No. 115-141, §103, 132 Stat. 348 (2018); *see also* *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (declining to rule on the issue of access to communications stored abroad following Congress's enactment of new legislation granting access).

97. *E.g.*, Treaty Between the United States of America and the Federal Republic of Germany on Mutual Legal Assistance in Criminal Matters, Ger.-U.S., art. 11, Oct. 14, 2003, S. TREATY DOC. NO. 108-27; Treaty on Mutual Legal Assistance in Criminal Matters, U.K.-U.S., art. 14, Jan. 6, 1994, S. TREATY DOC. NO. 104-2; *see also* JUSTICE MANUAL, *supra* note 6, § 9-13.512; CRIMINAL RESOURCE MANUAL, *supra* note 62, §§ 266-283; SUSAN W. BRENNER & LORI E. SHAW, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE § 14:4 (2d ed. 2019).

98. *See generally* MATTHEW W. FINKIN, PRIVACY IN EMPLOYMENT LAW 5-4-5-255 (5th ed. 2018). For example, under federal law, companies may seize and access the contents of company laptops provided to employees and can monitor employees' work-related communications in the ordinary course of business by notifying employees that their electronic communications are being monitored. *Id.* at 5-86. Employers also can access electronic information, including emails, stored on their own systems. Courts have concluded employees do not have privacy rights over work-related materials when the employer clearly reserved the right of access. Employees also cannot claim privacy interests in work-related emails. *Id.* at 5-110; *see also* RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND

misconduct in the first instance by routine monitoring of employees' emails, data storage facilities, and other electronic evidence. A company with an effective compliance program is likely to have signposts to guide it—transactions flagged by compliance mechanisms or internal whistleblowing reports.<sup>99</sup>

In addition, companies are better able to exploit documents in investigating suspected misconduct because they can use their knowledgeable employees, and the ability to compel their assistance, to identify problematic conduct and relevant documentary records. A large corporation also can use its systems of data management, which may be more powerful and sophisticated than those available to prosecutors and government investigators. Moreover, large corporations have assets to retain outside vendors, such as data management and law firms, to assist in electronic discovery through technical expertise and supplying of personnel for manual document review.

Finally, some documents useful to investigators may be shielded by the firm's attorney-client privilege. Corporations routinely need the penmanship and opinions of counsel to conduct deals and, given the prevalence of litigation, have a strong incentive to include lawyers in internal discussions in order to invoke the shield of the privilege.<sup>100</sup> Firms can freely access these materials in the course of determining whether misconduct occurred. In situations where prosecutors need access to such records to make their case, firms are free to waive privilege and provide the documents.<sup>101</sup>

In short, U.S. firms own their own records and can choose to access, organize and share them as they please. Given the volume and complexity of documentary records in large modern corporations, this power and control is of tremendous value to the government in detecting and proving corporate crime.

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MATERIALS ON TORTS 1048 (12th ed. 2020). California's new privacy law could alter this for residents of California, but at present it appears not applicable to an employer's employees. AB-25, California Consumer Privacy Act of 2018, Assembly Bill No. 25 (providing a temporary exemption from the CCPA for information collected about employees by employers, with the exception of the private civil action provision and the obligation to provide notice about the categories of personal information to be collected), [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200AB25](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB25).

99. Arlen & Kraakman, *supra* note 11, at 752–54.

100. Moreover, firms negotiating with the government over corporate criminal liability sometimes rely on arguments that the advice of counsel contemporaneous with transactions negates liability by providing defenses of “good faith reliance” and the like. See Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 639–41 (2011).

101. JUSTICE MANUAL, *supra* note 6, § 9-28.710.

### III. THE LAW OF CORPORATE INVESTIGATIONS OVERSEAS

In the United States, structuring corporate enforcement policy to substantially reward self-reporting and cooperation can enhance enforcement because corporations in the United States enjoy superior and less costly access to information than do enforcement authorities, not only due to superior resources, but also because of U.S. law governing corporate investigations.<sup>102</sup> Seeking similar benefits, other countries are adopting, or considering, laws that expand corporate criminal liability and allow negotiated corporate criminal resolutions, such as DPAs, in part to promote corporate cooperation and self-reporting.<sup>103</sup> Debates over such laws have tended to overlook that such reforms, including the conditions for sanction mitigation, cannot be fully evaluated without accounting for how local laws governing the conduct of corporate investigations determine corporations' and government authorities' relative abilities to detect and investigate misconduct.

This Part shows that, in many other countries, differences in laws governing self-incrimination, employment, legal privileges, and data privacy restrict corporate investigations or strengthen government investigations relative to U.S. law of corporate investigations, thereby impacting the likely effect and optimal structure of reforms. To demonstrate this, this Article focuses on material differences in investigative laws across jurisdictions that could lead to different enforcement outcomes even if countries' adopted *respondeat superior* liability for firms and negotiated settlements short of conviction (such as DPAs).<sup>104</sup> The objective is to illustrate the importance and prevalence of such differences in many jurisdictions, rather than to provide complete comparative analysis of the laws and institutions of any single country.<sup>105</sup>

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102. Corporate cooperation would help prosecutors detect and sanction misconduct even if companies do not enjoy a comparative advantage in detecting misconduct, provided that corporations are able to devote more resources to investigations. In these conditions, a preferable response would be to increase funding for government authorities. But in this Article we are largely taking existing political economy arrangements as given, at least within reasonable bounds.

103. For a discussion of how the United States' success in corporate criminal enforcement has influenced reforms in other countries, both directly and through the OECD, see DAVIS, *supra* note 17; Arlen, *supra* note 10; Brewster & Buell, *supra* note 9, at 198.

104. Given our focus on laws that would impact corporate investigations were a country to adopt *respondeat superior* and DPA-like negotiated settlements, we do not consider legal differences that arise when a country does not permit negotiated corporate criminal settlements. For a discussion of these differences see, for example, Arlen, *supra* note 10 (discussing France and the United Kingdom); Diskant, *supra* note 18 (discussing the United States and Germany).

105. A full comparison of the laws of the U.S. and another country would necessarily incorporate a host of other laws and institutions, including those affecting prosecutorial discretion, the public evidence gathering process, collateral consequences, the availability of private class actions, effectiveness of sanctions imposed by civil and administrative enforcement, the range of white collar offenses and the degree of extraterritorial enforcement, the magnitude of corporate criminal fines, the funding of



To be sure, it is exceptionally difficult to predict the effects of deploying in one jurisdiction legal doctrines and policies that have been pursued in another.<sup>106</sup> Institutional arrangements, legal and cultural norms, and differing political economies can have equal or greater effects than laws and government policies. The interaction effects of the plethora of relevant laws and institutions can be too complicated for any theoretical or empirical model to fully accommodate. Nonetheless, policymakers throughout Europe, in areas of the Pacific Rim, and elsewhere have taken a keen interest in the model of corporate criminal enforcement that has developed in the United States over the last two decades. That interest starts with the intuition that broadening corporate criminal liability and adopting laws and policies that reward corporations for assisting in public enforcement will yield social welfare benefits. This Part shows that further pursuit of this intuition will require confronting the serious potential effects of fundamental differences in legal doctrine governing public and private efforts to investigate corporate crime.

#### A. PROSECUTORS' INVESTIGATIVE POWERS

Prosecutors in many other countries have more latitude than their U.S. counterparts to compel or pressure potentially implicated people to answer questions. They also often can use evidence derived from interrogations that violated a suspect's rights.

Some legal systems, particularly those in Asia, do not grant implicated persons a right to silence at all.<sup>107</sup> In other countries, the right to silence is weaker than in the United States. For example, French investigators can make it costly for implicated employees to remain silent by threatening to introduce their silence as circumstantial evidence of guilt at trial.<sup>108</sup> In

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enforcement authorities, political influence over and potential corruption of legal authorities, the effectiveness of laws governing whistleblowing, willingness to use accomplice testimony, and laws mandating self-reporting of misconduct.

106. See, e.g., Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 15 (1998).

107. See generally LAW LIBRARY OF CONG., MIRANDA WARNING EQUIVALENTS ABROAD 15 (2016), <https://www.loc.gov/law/help/miranda-warning-equivalents-abroad/miranda-warning-equivalent-s-abroad.pdf> [<https://perma.cc/C292-3CST>] (concluding that Cambodia does not recognize a right to silence). For example, in China, people do not have a right to refuse to answer questions asked by regulators, such as the China Securities Regulatory Commission or the Public Securities Bureau, on the grounds that the answers would involve self-incrimination. Michael Han & Jonathan Wong, *Investigations in China*, in CORPORATE INTERNAL INVESTIGATIONS: AN INTERNATIONAL GUIDE 483, 491 (Paul Lomas & Daniel J. Kramer eds., 2d ed. 2013). In Hong Kong, individuals may not refuse to answer questions on grounds of self-incrimination. In addition, no privilege against self-incrimination bars the compelled production of documents, although such evidence may be used only derivatively against the person, not directly. Georgia Dawson et al., *Investigations in Hong Kong*, in CORPORATE INTERNAL INVESTIGATIONS: AN INTERNATIONAL GUIDE, *supra*, at 419, 425–26.

108. France permits a strong inference that people who refuse to explain their circumstances are

England and Wales, suspects are cautioned that invocation of the right to silence can harm their defense, because the fact-finder may draw an inference against facts that the suspect seeks to rely on at trial that were not disclosed during the government's interview.<sup>109</sup>

Moreover, prosecutors in several countries can compel an implicated witness to speak, notwithstanding a right to silence, without granting derivative use immunity.<sup>110</sup> In England and Wales, both the SFO and the Financial Conduct Authority ("FCA") have statutory authority to compel people to answer questions.<sup>111</sup> Although compelled statements may not be used *directly* against the speaker in a criminal prosecution, prosecutors may be able to make derivative use of such statements, thus avoiding the

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guilty. See Antoine Kirry et al., *France*, in *THE INTERNATIONAL INVESTIGATIONS REVIEW* 114, 118 (Nicolas Bourtin ed., 8th ed. 2018). The risk of negative inference is enhanced in countries with strong cultural norms against invoking the right to silence.

109. See, e.g., Jason Mazzone, *Silence, Self-Incrimination, and Hazards of Globalization*, in *COMPARATIVE CRIMINAL PROCEDURE* 308, 320–21 (Jacqueline E. Ross & Stephen C. Thaman eds., 2016); Jessica Parker & Andrew Smith, *Representing Individuals in Interviews: The UK Perspective*, in *THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS* 234, 241 (Judith Seddon et al. eds., 2d ed. 2017); Peter B. Pope et al., *The Clash of Legal Cultures in the Brave New World of International Law Enforcement*, N.Y.U.: COMPLIANCE & ENFORCEMENT (Mar. 27, 2018), [https://wp.nyu.edu/compliance\\_enforcement/2018/03/27/the-clash-of-legal-cultures-in-the-brave-new-world-of-international-law-enforcement](https://wp.nyu.edu/compliance_enforcement/2018/03/27/the-clash-of-legal-cultures-in-the-brave-new-world-of-international-law-enforcement) [<https://perma.cc/TR4A-45ND>].

110. According to a recent petition filed by the DOJ for rehearing in the Second Circuit Court of Appeals, the following foreign authorities can obtain evidence, including testimony, on pain of sanction: Australia, Austria, Brazil, Canada, the Cayman Islands, Croatia, Cyprus, the Czech Republic, El Salvador, Estonia, the European Union, France, Finland, Greece, Hong Kong, Hungary, Israel, Italy, Japan, Korea, Luxembourg, Malaysia, Poland, Russia, Singapore, Slovakia, Spain, South Africa, Sweden, Switzerland, Taiwan, Turkey, the United Arab Emirates, and the United Kingdom. See *Petition of the United States for Rehearing or Rehearing En Banc* at 13–14, *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017) (No. 16-898). Similarly, in Ireland, regulatory authorities can compel cooperation, subject to a form of use immunity. Carina Lawlor, *Ireland*, in *THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS* 614, 619 (Judith Seddon et al. eds., 2016). In Brazil, enforcement authorities' ability to pressure implicated people to answer questions is undermined by subjects' ability to lie with impunity. Camila V. Ancken et al., *Brazil*, in *CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS* 51, 69–71 (Stephen Spehl & Thomas Gruetzner eds., 2013). Prosecutors in other countries may be less impeded by rights that do exist if they face a narrower exclusionary rule. See *infra* note 170.

111. The Director of the SFO has authority to investigate suspected offenses involving serious or complex fraud. The SFO Director can compel witnesses to answer relevant questions and provide any relevant documents. See *Criminal Justice Act 1987*, c. 38 § 2 (U.K.). The Financial Conduct Authority regulates financial services firms and markets in the United Kingdom through monitoring, investigations, sanctions, and civil and criminal proceedings. See *Enforcement*, FIN. CONDUCT AUTHORITY, <https://www.fca.org.uk/about/enforcement> [<https://perma.cc/N3QA-HG2X>]. The FCA also has the power to compel, and impose sanctions for refusal. See *Financial Services and Markets Act 2000*, c.8, §§ 171, 174, 177 (U.K.). The FCA also has the power to compel witnesses to speak, but usually does not do so with targets. It favors "interviews under caution" with suspects in a criminal proceeding. U.K. FIN. CONDUCT AUTH., *FCA HANDBOOK* § 2.14(4) (2020), <https://www.handbook.fca.org.uk/handbook> [<https://perma.cc/J4HJ-9924>]. Other U.K. enforcement authorities, such as the Competition and Markets Authority, the National Crime Agency, and the Health and Safety Executive have similar powers to compel witnesses to answer questions and produce documents. Hector Gonzalez et al., *Production of Information to the Authorities*, in *THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS*, *supra* note 109, at 173, 175.

burdensome or disabling task of disproving taint that U.S. prosecutors face when deploying immunity powers.<sup>112</sup> While English prosecutors tend not to compel statements from people they expect to charge,<sup>113</sup> they do compel statements by implicated employees for use against others—an important tool if prosecutors lack sufficient evidence to induce a witness to cooperate voluntarily. U.K. prosecutors can also compel cooperation by an employee they assume is not a suspect, without losing the ability to use evidence derived from that testimony against the employee if they later learn that the employee should be charged.<sup>114</sup> Finally, the SFO can compel testimony for use against a subject in a civil matter, such as an action to confiscate illegal gains.<sup>115</sup>

Similarly, some enforcement authorities in Australia, including the Securities and Investment Commission and the Crime Commission, can compel implicated witnesses to cooperate.<sup>116</sup> Indeed, Australian authorities

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112. In England and Wales, prosecutors are constrained by the Police and Criminal Evidence Act. See Police and Criminal Evidence Act 1984, c. 60 (Eng. & Wales). Section 76 of the Act permits a judge to exclude confessions for unreliability, such as confessions obtained through oppression, and Section 78 allows exclusion of material that would affect the fairness of the trial. *Id.* §§ 76, 78. Furthermore, Section 78 gives judges' discretion to exclude evidence that would affect the fairness of the trial in light of all the circumstances, provides judges with discretion to exclude a confession obtained in violation of a defendant's right to silence, but does not require it, and can, but often does not, extend to evidentiary fruits of the excluded statement. Mazzone, *supra* note 109, at 321–22; see also Police and Criminal Evidence Act 1984, c. 60, § 76(4)(a) (Eng.) (“The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence of any facts discovered as a result of the confession . . .”). Cautious prosecutors prefer not to compel statements by targets to avoid exclusion.

113. The SFO has avoided using its powers under Section 2 of the Criminal Justice Act against someone it expects to charge in recognition of both the uncertain admissibility of evidence derived from such testimony, see *supra* note 111, and a 1996 ruling by the European Court of Human Rights that found compelling testimony by an accused violates Article 6 of the European Convention on Human Rights. See *Saunders v. United Kingdom*, 23 Eur. Ct. H.R. 313 (1996). Compulsory production of documents is permitted, however. *Id.*

114. English enforcement officials, upon learning that an employee is implicated, tend to caution the employee and stop the interview until a lawyer is present, in order to provide the expected procedural protections needed to ensure that any evidence obtained could be used against the witness at trial, should charges be brought. Police and Criminal Evidence Act of 1984, Code C, Paragraph 10.1 (Eng. & Wales) (when questioning someone whom there are grounds to suspect of an offense, the person must be cautioned if either the suspect's answers or silence, may be given in evidence to a court in a prosecution, unless a narrow exception applies). If enforcement officials do compel testimony, these procedural protections also are respected, although lawyers play a more passive role in interrogations in the England than in the United States. See *infra* note 121 (discussing the role of defense counsel in interrogations).

115. The SFO also pursues civil actions to confiscate benefits of crime. The SFO can obtain and directly use compelled statements to confiscate benefits civilly, including statements identifying the location of assets. Proceeds of Crime Act of 2002, c. 29, § 357 (U.K.) (authorizing investigators seeking a civil recovery to obtain a disclosure order from a judge compelling a person to answer questions or produce documents or face criminal sanctions).

116. Statutory commissions in Australia have the power to require a person to attend an examination to answer under oath. It is an offense to fail to answer at an examination, even if the answer could be incriminating. Honorable T.F. Bathurst, AC, Chief Justice of N.S.W., Address at Univ. of N.S.W.: Statutory Commissions, Compulsory Examinations and Common Law Rights (Mar. 21, 2016),

have compelled statements from defendants subject to pending charges.<sup>117</sup> Although prosecutors may not make direct use of compelled statements,<sup>118</sup> they can make derivative use of such statements to either obtain other evidence or prepare for trial.<sup>119</sup>

Government investigators in many countries also benefit from the freedom to interview implicated suspects away from the protective interventions of defense counsel. Suspects do not have a right to have counsel present during all interrogations in countries including Germany, England and Wales, the Netherlands, Singapore, and Canada.<sup>120</sup> Other countries allow counsel to attend but limit their ability to intervene during interrogation.<sup>121</sup> In France, witnesses who are not suspects do not have a right to have counsel present during questioning by police or investigating

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[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst\\_20160321.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst_20160321.pdf) [<https://perma.cc/AT78-7F9F>]; see also *R v OC* (2015) 90 NSWLR 134, 161–63 (Austl.); *Australian Securities and Investments Commission Act 2001* (Cth) ss 19, 63.

117. Compare *Lee v NSWCC* (2013) 251 CLR 196 (Austl.), with *X7 v Australian Crime Comm'n* (2013) 248 CLR 92 (Austl.).

118. For a discussion of the prohibition on direct use, see, for example, Bathurst, *supra* note 116, at 3, and see also *Australian Securities and Investments Commission Act 2001* (Cth) s 68(3) (stating that a transcript cannot be used in any criminal or penalty proceedings against an individual).

119. For example, enforcement officials can review statements made by an accused under compulsion, following invocation of the privilege, in order to prepare for trial. *R v OC* (2015) 90 NSWLR 134, 120–22 (Austl.); see also Transcript of Proceedings, *OC v The Queen* [2016] HCATrans 026 (12 February 2016) (Austl.). Moreover, the Competition and Consumer Act only prevents use in criminal proceedings (essentially cartel proceedings); the transcript can be used in civil penalty proceedings. See *Competition and Consumer Act 2010* (Cth) s 159 (Austl.).

120. See, e.g., Jacqueline S. Hodgson, *From the Domestic to the European: An Empirical Approach to Comparative Custodial Legal Advice*, in *COMPARATIVE CRIMINAL PROCEDURE*, *supra* note 109, at 258, 270–71 (stating that in the Netherlands, counsel is not permitted in the interrogation room). In Germany, suspects do not have a right to have counsel present at an initial interrogation done by the police. Diskant, *supra* note 18, at 156. However, suspects do have a statutory right to have counsel present if the interrogation is done by a prosecutor or judge, and witnesses always have a right to have counsel present during interrogations. STRAFPROZESSORDNUNG[TPO] [STPO] [CODE OF CRIMINAL PROCEDURE], §§ 68b, 136, translation at [https://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html](https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html) [<https://perma.cc/9UBT-JBRU>] (Ger.). In England and Wales, counsel do not have an absolute right to attend a compelled interrogation. Parker & Smith, *supra* note 109, at 239. In Singapore, police can question an arrested suspect without counsel present, as long as the suspect is afforded counsel within a “reasonable time” after arrest. See Hock Lai Ho, *The Privilege Against Self-Incrimination and Right of Access to a Lawyer: A Comparative Assessment*, 25 SING. ACAD. L.J. 826, 833, 838–39 (2013). Canada allows government authorities to continue questioning subjects after invocation of the right, although continued questioning in the face of repeated invocations of the right to silence could lead a court to conclude that statements made were involuntary, and are therefore excludable. See Lisa Dufraimont, *The Interrogation Trilogy and the Protections for Interrogated Suspects in Canadian Law*, 54 SUP. CT. L. REV. 309, 314 (2011). Investigators in France, Russia, Brazil, Peru, China, Hong Kong, Serbia, and Scotland are not required to caution suspects about the right to counsel. See generally LAW LIBRARY OF CONG., *supra* note 107.

121. In France, lawyers can attend police interrogations but must remain passive. Hodgson, *supra* note 120, at 271. In England and Wales, a lawyer permitted to attend an interview can provide legal advice and essential assistance but must not interrupt the flow of information provided by the subject. Parker & Smith, *supra* note 109, at 239. Counsel in England may stop the interview, however. See Hodgson, *supra* note 120, at 271.

judges.<sup>122</sup> Finally, in many countries, including England and Germany, prosecutors who violate a subject's right to silence or counsel nevertheless likely can introduce at trial evidence derived from those illegally obtained statements, and, in some countries, the statements themselves.<sup>123</sup>

Therefore, prosecutors in other jurisdictions active in the investigation of corporate crime do not face the same steep costs, and difficult choices, that, as explored in Part II above, would confront U.S. prosecutors if they were to attempt to detect and investigate corporate crime without the assistance of firms.

### B. CORPORATIONS' INVESTIGATIVE POWERS

Overseas companies may be less able, and less willing, to conduct robust internal investigations due to differences in interrogation law, employment law, legal privileges, and data privacy regimes. These doctrines in other nations can both impede corporations' ability to obtain information from employees and increase the costs of investigations, with the greatest likely effect falling on investigation of misconduct that government officials have not yet detected. Thus, foreign enforcement officials may gain less than U.S. prosecutors from providing incentives for corporations to detect and self-report misconduct, and to cooperate by sharing the results of internal investigations.

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122. DEBEVOISE & PLIMPTON, 10 THINGS U.S. CRIMINAL DEFENSE LAWYERS SHOULD KNOW ABOUT DEFENDING A CASE IN FRANCE 34 (2019), [https://www.debevoise.com/-/media/files/pdf/20190521\\_10\\_things\\_us\\_criminal\\_defense\\_10.pdf](https://www.debevoise.com/-/media/files/pdf/20190521_10_things_us_criminal_defense_10.pdf) [<https://perma.cc/B34H-UMKN>]. Suspects in France only obtained the right to have counsel present during police interrogations in the last ten years, and even then lawyer-client consultations are limited to 30 minutes. Jacqueline Hodgson & Laurène Soubise, *Prosecution in France*, in OXFORD HANDBOOKS ONLINE, at § 2.2 (2016) <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-124> [<https://perma.cc/F736-ZWZC>].

123. In England and Wales, confessions obtained in violation of a suspect's right to silence are not automatically excluded. Instead, courts determine admissibility by balancing the severity of the breach with the severity of the offense, and regularly give considerable weight to the public's interests in prosecuting crimes and seeking the truth. *See* Mazzone, *supra* note 109, at 322–23, 333–34. In Germany, as in most inquisitorial systems, evidence is presumptively admissible. Diskant, *supra* note 18, at 157. Courts employ a balancing test to determine exclusion of confessions obtained in violation of a suspect's rights and permit admission of evidence derived from such statements in some circumstances. *See* STRAFPROZESSORDNUNG [STPO] [CODE OF CRIMINAL PROCEDURE], § 136a, para. 3, sentence 2, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html](https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html) [<https://perma.cc/9UBT-JBRU>] (Ger.); *see also* Bundesgerichtshof [BGH ] [Federal Court of Justice] Apr. 18, 1980, 2 StR 731/79, para. 9; Federal Court of Justice, judgement of 24 August, 1983 - 3 StR 136/83, BGHSt 32, 68; Federal Court of Justice, Sept. 14, 2010 StR 573/09, para. 13; BECK'SCHER ONLINE-KOMMENTAR: STRAFPROZESSORDNUNG [IOK STPO MIT RISTBV UND MISTRA] [BECK'S ONLINE COMMENTARY: CODE OF CRIMINAL PROCEDURE], § 136a, para. 33 (Jürgen-Peter Graf ed., 31st ed. 2018); *see generally* Mazzone, *supra* note 109, at 333–34.

## 1. Corporations' Ability to Obtain Statements from Employees

### a. Restrictions on Interviews During Government Investigations

In several countries, companies' ability to cooperate is undermined by laws or practices that preclude them from interviewing potential witnesses once a civil or criminal investigation has commenced.<sup>124</sup> For example, in France, corporations subject to a preliminary investigation are expected not to contact investigating authorities or witnesses prior to a determination of whether there is sufficient evidence that the company is a suspect,<sup>125</sup> because doing so could be deemed an improper attempt to exert.<sup>126</sup> In Switzerland, lawyers investigating for companies cannot take actions that could influence possible witnesses, a prohibition understood to preclude firms from conducting formal interviews after a government investigation has commenced (although firms may engage in softer fact-finding discussions with employees).<sup>127</sup>

In England and Wales, enforcement officials regularly request that companies refrain from interviewing implicated or material witnesses once their own investigations have commenced to avoid negative impact on

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124. Christopher J. Clark, *The Complexities to International White Collar Enforcement*, in INTERNATIONAL WHITE COLLAR ENFORCEMENT: LEADING LAWYERS ON UNDERSTANDING CROSS-BORDER REGULATIONS, DEVELOPING CLIENT COMPLIANCE PROGRAMS, AND RESPONDING TO GOVERNMENT INVESTIGATIONS 7, 57 (Michaela Falls ed., 2010) [hereinafter INT'L WHITE COLLAR ENFORCEMENT]; D. Michael Crites, *Recent Trends in White Collar Crime*, in INT'L WHITE COLLAR ENFORCEMENT (rev. ed. 2011); Lucian E. Dervan, *International White Collar Crime and the Globalization of Internal Investigations*, 39 FORDHAM URB. L.J. 361, 380 (2011).

125. DEBEVOISE AND PLIMPTON, *supra* note 122, at 39; see Hodgson & Soubise, *supra* note 122, at Section 2.2 (discussing the generally "limited and passive" role of defense counsel during the preliminary investigation). In France, criminal investigations often are conducted by a magistrate who determines whether there is sufficient evidence that an individual or corporation has committed a crime (*mise en examen*). Kirry et al., *supra* note 108, at 115. Once an investigation has been placed under the supervision of an investigating magistrate, the target (the person given *mise en examen* status) has the right to appear before the magistrate to present evidence, although the magistrate retains full discretion as to what weight to give this evidence. The matter can then be referred for trial. Thus, in France much of the investigation takes place before the target has a right to introduce evidence. This can reduce the value to government investigators of evidence provided by the firm as they must first obtain sufficient evidence to determine that a firm is a suspect on their own. DEBEVOISE AND PLIMPTON, *supra* note 122, at 35–39.

126. See Stephane de Navacelle, et al., *France*, in THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS, *supra* note 109, at 697, 706; DEBEVOISE & PLIMPTON, *supra* note 122, at 39; Kirry et al., *supra* note 108, at 116–17; see also Dervan, *supra* note 124, at 380. In the U.S., some prosecutors may ask a company not to interview certain important witnesses until after the prosecutors have spoken with them first but will allow firms to do so after those interviews have occurred. JUSTICE MANUAL, *supra* note 6, § 9-47.120 (FCPA Corporate Enforcement Policy) (providing that prosecutors may request a cooperating company "to defer investigative steps, such as the interview of company employees or third parties... for a limited period of time... Once the justification dissipates, the Department will notify the company that the Department is lifting its request").

127. Benjamin Borsodi & Louis Burrus, *Switzerland*, in THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS, *supra* note 110, at 665, 672.

government interviews.<sup>128</sup> In addition, authorities prefer to be the first to interview important witnesses in order to ensure that requisite procedures are followed for obtaining evidence that may be used at trial. For example, if a firm's investigators threatened an implicated employee with disciplinary action if she refused to admit wrongdoing, or offered protection from dismissal for confessing, a judge might exclude resulting statements on the grounds that they were unfairly obtained or unreliable. Reliability also may be questioned if the corporation did not record the interview and the employer and employee later disagree about what was said.<sup>129</sup> Evidence obtained by a firm investigating misconduct as part of a criminal matter also may not be admissible if investigators did not caution the employee about the right to counsel.<sup>130</sup>

b. Limitations on Pressuring Employees to Speak

In many other countries, employers cannot use the threat of termination to pressure employees to cooperate because employment laws either preclude such threats or impose procedural impediments to employee discipline.<sup>131</sup> In addition, non-implicated employees often do not voluntarily provide evidence about others, either because they fear retaliation or because they reside in a country with a strong cultural norm against informing on colleagues, such as in France.<sup>132</sup>

In the U.S., employer-employee relationships, including employees' rights, are largely defined by contract. By contrast, many countries view employment as a status automatically conferring substantive and procedural

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128. See Caroline Day & Louise Hodges, *Witness Interviews in Internal Investigations: The UK Perspective*, in THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS, *supra* note 110, at 91, 100, 103.

129. See Police and Criminal Evidence Act 1984, c. 60, §§ 76, 78 (Eng. & Wales). A court is required by section 76 to exclude a confession that it concludes is unreliable. The court has discretion under section 78 to exclude a confession that is unfairly obtained.

130. While internal investigators can interview employees without counsel if investigating for purposes of an internal disciplinary proceeding, corporate investigators interviewing employees with a view to providing evidence for a criminal investigation may be required to caution implicated employees about their right to counsel. See Day & Hodges, *supra* note 128, at 103. Compare *R v. Twaites* (1991) 92 Cr. App. R. 106 (Eng.), with *R v. Welcher* [2007] EWCA (Crim) 480 (Eng.).

131. For a discussion of sanctions and efficacy of enforcement in many countries, see generally Estreicher & Hirsch, *supra* note 69.

132. Jérémy Bernard et al., *Investigations in France*, in CORPORATE INTERNAL INVESTIGATIONS: AN INTERNATIONAL GUIDE, *supra* note 107, at 277, 309. Employees in other countries also may fear negative repercussions by superiors (outside the formal disciplinary process) for providing information about detected misconduct. This can deter them from coming forward either internally or externally. As of 2013, only four European Union countries had strong protections for whistleblowers; others had only partial or no protections. Cf. *Whistleblower Protection: Commission Sets New, EU-Wide Rules*, EUR. COMMISSION (Apr. 23, 2018), [http://europa.eu/rapid/press-release\\_IP-18-3441\\_en.htm](http://europa.eu/rapid/press-release_IP-18-3441_en.htm) [<https://perma.cc/235A-HLXY>]. See generally WHISTLEBLOWING IN EUROPE, *supra* note 18.

rights that dictate both the employee's treatment during the relationship and situations under which the relationship can be terminated.

Indeed, in some countries, including Australia, Austria, Brazil, Italy, and Switzerland, employees effectively have a right against self-incrimination in workplace investigations because employment law bars employers from pressuring implicated employees to cooperate.<sup>133</sup> In other countries, such as Germany, the right to silence does not strictly apply in private interviews,<sup>134</sup> but statements obtained by an employer from an implicated employee may be inadmissible against the employee in a criminal action.<sup>135</sup>

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133. Countries that in effect grant a right to silence to employees with a genuine and reasonable apprehension of being implicated include Australia, Austria, Italy, and Switzerland. *See, e.g., Grant v BHP Coal Pty Ltd* [2017] 247 FCR 295 (Austl.) (discussing Australia and citing *Police Service Board v Morris* (1985) 156 CLR 397, 403, 408, 411); Codice di procedura penale [C.p.p.] art. 391 bis no. 9 (Italy); Bettina Knoetzel, *Austria*, in *GLOBAL INVESTIGATIONS REVIEW: THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS* 647, 654 (Judith Seddon et al. eds., 2d ed. 2018) (right against self-incrimination applies if the internal investigation can be expected to provide information to a criminal investigation); Mark Livschitz, *Switzerland*, in *CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS*, *supra* note 110, at 347, 380 (employee's duty to cooperate does not apply if the employee would risk incrimination). In Brazil, interpretations of the constitution and case law suggest that employers may not sanction implicated employees who invoke their right to silence. Ancken et al., *supra* note 110, at 69–71; Juliana Sá de Miranda, *Brazil: Handling Internal Investigations*, in *THE INVESTIGATIONS REVIEW OF THE AMERICAS* 2018 51, 53 (2018) (discussing Brazil). Indeed, Brazilian courts have concluded that an employee may exercise his right to silence by lying, even under oath. Brazil does not have a crime of perjury applicable to criminal defendants. Ancken et al., *supra* note 110, at 59, 69–71, 76. In Germany, the duty of loyalty set forth in section 242 of the German Civil Code (BGB) obliges employees generally to answer the questions in a truthful and complete manner if they relate to the employment relationship. *Cf. HANS-GEORG KAMANN ET. AL, KARTELLVERFAHREN UND KARTELLPROZESS [CARTEL PROCEEDINGS AND TRIAL] § 40* (2017); THOMAS ROTSCH, *CRIMINAL COMPLIANCE § 7* (2015); Peter Schrader et al., *Auskunft durch den Arbeitnehmer: Was darf er? Was muss er? [Information from the Employee: What Can He Do? What Does He Have to Do?]*, *NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA]* 965, 968 (2018).

134. *See, e.g., Bundesgerichtshof [BGH ] [Federal Court of Justice]*, Nov. 30, 1989, III ZR 112/88 (Ger.); *Bundesgerichtshof [BGH ] [Federal Court of Justice]*, Apr. 30, 1964, VII ZR 156/62 (Ger.); *Bundesarbeitsgericht [BAG] [Federal Labor Court]* Sept. 7, 1995, 8 AZR 828/93 (Ger.); *LandesarbeitsgerichtArbeitsgericht [LAG] Hamm [The Higher Labor Court of Hamm]* Mar. 3, 2010, 14 Sa 1689/08 (Ger.) (an employee's constitutional right to silence does not apply to private parties); *cf. Björn Krug & Christoph Skoupil, Befragungen im Rahmen von internen Untersuchungen [Surveys in the Context of Internal Investigations]*, *NEUE JURISTISCHE WOCHENSCHRIFT [NJW]* 2374, 2375 (2017).

135. The highest German court has not yet ruled on whether an employee's statements provided to her employer under the obligation to provide information can be used in the later criminal proceedings. Lower courts are split on the issue. CHRISTOPH E. HAUSCHKA, KLAUS MOOSMAYER & THOMAS LÖSLER, *CORPORATE COMPLIANCE § 46* (3d ed., 2016). Some German courts have ruled that incriminating compelled statements by an employee to an employer may not be introduced as evidence against that employee in criminal proceedings in some circumstances. *See BVerfG*, Jan. 13, 1981, 1 BvR 116/77, Jan. 13, 1981; *AB Mar. 3, 2010, 14 Sa 1689/08*; Folker Bittmann, *Internal Investigations Under German Law*, 1 *COMPLIANCE ELLIANCE J.* 74, 92 (2015). *But see* LG Oct. 15, 2010, 608 Qs 18/10 (Ger.) (concluding that the self-incriminating statements should not be excluded).

In England and Wales, employers seeking to obtain credit for providing interview evidence must take care not to make threats or promises that might lead a court to conclude that the interview was unreliable or obtained through unfair process. *Compare R v. Twaites* (1991) 92 Cr. App. R 106 (Eng.), *with R v. Welcher* [2007] EWCA Crim. 480 (Eng.). *See also* Police and Criminal Evidence Act 1984, c.



In addition, employers often cannot use the threat of termination to compel cooperation by either implicated or non-implicated employees because in many countries employees can be terminated only for cause; failure to cooperate often does not provide adequate cause for immediate termination.<sup>136</sup> To justify termination under such a regime, the employee must have a duty to answer the questions asked and termination must be a proportionate response to the employee's breach. Employers who rush to terminate without adequate grounds risk suit for wrongful dismissal.<sup>137</sup> Employees do not always have a duty to answer their employer's questions even about workplace conduct. For example, Brazilian employees have a right to either refuse to attend the interview, or attend and then refuse to answer or lie with impunity.<sup>138</sup> In Belgium, employees also have the right not to cooperate; employers who threaten discipline violate their duty to ensure that the employee's statements are voluntary.<sup>139</sup>

In other countries, employees are required to cooperate, at least if the employer had a formal policy requiring them to do so, but only in limited circumstances.<sup>140</sup> For example, in France and Germany, employees have a duty to answer only questions directly related to matters within the scope of their jobs. They may refuse to answer other questions, including questions about observations of others' behavior falling outside that employee's scope

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60, §§ 76, 78 (Eng.); Day & Hodges, *supra* note 128, at 103, 112–13, 123.

136. See, e.g., DONALD C. DOWLING, JR., HOW TO CONDUCT AN INTERNATIONAL INTERNAL INVESTIGATION 6 (2019), [https://www.littler.com/files/international\\_investigations.pdf](https://www.littler.com/files/international_investigations.pdf) [<https://perma.c/c/G6PA-R4ZN>].

137. For example, in England, employees have prevailed against employers on the grounds that the employer's failure to consider alternatives to suspension was a breach of the employer's duty of trust and confidence, thus triggering a claim for constructive dismissal—a claim not easily won but that, if successful, provides the employee with both damages and release from post-termination restrictions on conduct. James Carlton et al., *Employee Rights: The UK Perspective*, in THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS, *supra* note 110, at 175, 179. In addition, in some countries in Latin America, a company that either threatens an employee for refusing to cooperate or accuses an employee of misconduct during an interview risks a lawsuit for moral damages for infringing on the employee's dignitary rights. Ancken et al., *supra* note 110, at 61. Employers must tread carefully with employees' dignitary interests in other countries as well, such as France. Cour de cassation [Cass.] [supreme court for judicial matters] soc., Feb. 25, 2003, Bull. civ. V., No. 66 (Fr.) (sanctioning an employer for infringing on an employee's dignity by disclosing his actions to co-workers with no specific reason).

138. Sá de Miranda, *supra* note 133, at 53.

139. Hans Van Bavel & Frank Staelens, *Belgium*, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CORPORATE INVESTIGATIONS 2018 25, 29 (2d ed. 2018).

140. CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L.1232-1 (Fr.). In Germany, employees may have a right to resist if the employment agreement does not specify a right to cooperate or if the employee's personality rights preempt the employer's right to information. See Bundesarbeitsgericht [BAG] [Federal Labor Court] Sept. 7, 1995, 8 AZR 828/93 (Ger.). See also Michael Kempter & Björn Steinat, *Compliance – arbeitsrechtliche Gestaltungsinstrumente und Auswirkungen in der Praxis* [*Compliance—Employment-Related Design Instruments and Effects in Practice*], NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 1505, 1511 (2017).

of activity.<sup>141</sup>

Even when employees are obligated to cooperate, labor laws often preclude employers from immediately threatening to fire employees who refuse to cooperate. In countries that require for-cause termination, disciplinary sanctions must be proportionate to the severity of the employee's breach. In many countries, including France, Belgium, Brazil, England and Wales, Switzerland, and Japan, an employee's failure to cooperate is not likely to be considered adequate cause for termination.<sup>142</sup>

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141. For example, in France and Germany, employees' duty to answer questions only applies to conduct in the core areas assigned to the employee. Thus, employees most likely need not answer questions about breaches by other employees. French courts do not always take an employer-friendly interpretation of whether questions relate to the employee's ability to perform, particularly when the questions involve the employees' observations of the conduct of others. Courts regularly conclude that the employee's right of personality prevails over the employer's right of information. CODE DU TRAVAIL [C. TRAV.] [LABOR CODE] art. L.1222-2 (Fr.) (providing that information requested by an employer from an employee must be only for the purpose of appreciating his/her professional abilities; the information requested must be directly and necessarily in connection with the employee's abilities); Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 23, 1989, IX ZR 236/86, para. 95 (Ger.); ArbG Arbeitsgericht [AB] Mecklenburg-Vorpommern [Labor Court of Mecklenburg-West Pomerania] July 8, 2016, 2 Sa 190/15, para. 95 (Ger.); Bundesarbeitsgericht [BAG] [Federal Labor Court] Sept. 7, 1995, 8 AZR 828/93 (Ger.). See also David Charlot et al., *France*, in CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS, *supra* note 110, at 141, 153 (discussing France); Peter Kasiske, *Mitarbeiterbefragungen im Rahmen interner Ermittlungen—Auskunftspflichten und Verwertbarkeit im Strafverfahren* [Employee Surveys Within the Scope of Internal Investigations—Information Obligations and Usability in Criminal Proceedings], NEUE ZEITSCHRIFT FÜR WIRTSCHAFT-, STEUER- UND UNTERNEHMENSSTRAFRECHT [NZWIST] 262, 264 (2014) (discussing Germany). In Germany, employees do have a limited obligation to answer questions about matters outside the workplace, such as incidents on a business trip. Volker Stück, *Unternehmensinterne Untersuchungen im Spannungsfeld von Arbeitsrecht, Compliance, Datenschutz, Haftungsrecht und Strafrecht* [Internal Investigations in the Area of Tension Between Labor Law, Compliance, Data Protection, Liability Law and Criminal Law], in GMBH-RUNDSCHAU [GmbHR] 156, 161 (2019). This may include an obligation to provide information about criminal offenses committed by a colleague that could be detrimental to the employer. MARCUS BÖTTGER, WIRTSCHAFTSSTRAFRECHT IN DER PRAXIS [COMMERCIAL CRIMINAL LAW IN PRACTICE] 2. AUFLAGE ch. 18 (2015); HAUSCHKA, MOOSMAYER & LÖSLER, *supra* note 135, § 46; Schrader et al., *supra* note 133, at 965, 971.

142. In France, there are no legal provisions permitting employers to sanction employees for refusing to cooperate. An employer can only suspend an employee if the employee has either committed misconduct or is under investigation for such. Bernard et al., *supra* note 132, at 313 (citing Art. 143-3 of the General Regulation of the AMF). Indeed, an employer who threatens an employee for failing to cooperate may be deemed to have committed an unlawful act that renders any information the employer obtains inadmissible in a judicial proceeding. Charlot et al., *supra* note 141, at 153, 156–57. Exclusion is particularly likely in a disciplinary action by the employer against the employee. Bernard et al., *supra* note 132, at 308 (evidence may be inadmissible in a disciplinary action against the employee). In England and Wales, an employer must establish that it has reasonable grounds for the suspension or termination, such as evidence that the employee engaged in serious misconduct. Carlton et al., *supra* note 137, at 175. In the United Kingdom, suspension is less of a threat than in the United States because unpaid suspension is rare, and indeed is not an option unless the employer explicitly contracted for the right to do so. *Id.* at 177.

In Switzerland, terminating an innocent employee whose only breach was a violation of the duty to cooperate with the investigation will likely be deemed excessive and thus invalid. Livschitz, *supra* note 133, at 372, 386. In Japan, courts are unlikely to conclude that a refusal to cooperate is “reasonable grounds” for dismissal, since that standard is interpreted in light of Japan's historical culture favoring lifetime employment. See Labor Contract Act, Law No. 128 of 2007, art. 3, para 4 (Japan). In Brazil,

Even when termination for non-cooperation is possible, employers often cannot threaten termination until less extreme forms of discipline, such as a formal warning letter or suspension, have failed,<sup>143</sup> and, even then, only in some circumstances. In countries such as Germany and Austria, even repeated refusals to cooperate may not justify dismissal. To justify termination, the employee's repeated refusal must provide the employer reasonable grounds for concluding that the employee cannot be trusted in the future. The employer may be unable to establish this if the employee is otherwise trustworthy and is not implicated in the offense, or if the employer did not terminate other non-cooperative employees.<sup>144</sup> Indeed, an employer may be unable to fire an employee who engaged in misconduct if the misconduct was not severe, the employee was low-level and acting under

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termination for cause is viewed as the harshest disciplinary measure only for extreme situations, such as if there is evidence that the employee engaged in corruption, theft of corporate information, or fraud. Companies have the burden of proof in cases of termination for cause. Sá de Miranda, *supra* note 133, at 53.

143. For example, in Australia an employer must warn an employee prior to commencing procedures to fire him. See Estreicher & Hirsch, *supra* note 69, at 359–60. Even then, termination will not be permitted if it is deemed harsh, unjust, or unreasonable under the circumstances. See *Mocanu v Kone Elevators Pty Ltd.*, [2018] FWC 1335 (Austl.). In England, Wales, Germany, and Italy, companies are expected to proceed through stages, beginning with a warning, and moving to more serious sanctions short of dismissal, before seeking dismissal. Employers may need to delay sanction until obtaining the employee's justification. See BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], §§ 622, 626 (Ger.) (employers should warn first, unless a compelling reason justifies termination without notice); Bundesarbeitsgericht [BAG] [Federal Labor Court], June 10, 2010, 2 AZR 541/09; ERFURTER KOMMENTAR ZUM ARBEITSRECHT [COMMENT ON LABOR LAW] ¶ 198 (19th ed. 2019) (Ger.); Carlton et al., *supra* note 137, at 179; Gianfranco Di Garbo et al., *Italy*, in CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS, *supra* note 110, at 245, 270–71; Sebastian Lach et al., *Germany*, in THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS, *supra* note 110, at 569; Joanna Ludlam & Henry Garfield, *England and Wales*, in CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS, *supra* note 110, at 105, 126–27; Carlton et al., *supra* note 137, at 179; Burkard Göpfert et al., "Mitarbeiter als Wissensträger"—Ein Beitrag zur aktuellen Compliance-Diskussion [Employees as Knowledge Carriers—A Contribution to the Current Compliance Discussion], NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1703, 1707 (2008) (Ger.); Volker Rieble, *Schuldrechtliche Zeugenpflicht von Mitarbeitern [Obligatory Witnessing of Employees]*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 1273 (2003) (Ger.).

144. In Germany and Austria, employers cannot reliably fire an employee for refusing to cooperate even when the employee had a duty to do so. Employers must establish that termination is needed to protect the employer, and not as a punishment. Failure to cooperate may not constitute adequate cause for dismissal if the employee is not implicated and has otherwise proved trustworthy. See Bundesarbeitsgericht [BAG] [Federal Labor Court] Oct. 23, 2008, 2 AZR 483/07, para. 32 (Ger.); see also Philipp Becker et al., *Investigations in Germany*, in CORPORATE INTERNAL INVESTIGATIONS: AN INTERNATIONAL GUIDE, *supra* note 107, at 225, 263 (discussing Germany). Repeated failure to cooperate may provide cause for termination in Germany if the employer sends the employee a formal warning letter and the employee commits a subsequent violation. Lach et al., *supra* note 143, at 717. These substantive and procedural limitations on dismissal apply even if the employer has concluded that the employee committed misconduct. Bundesarbeitsgericht [BAG] [Federal Labor Court] Oct. 23, 2008, 2 AZR 483/07, para. 32 (Ger.). Repeated failure can justify termination in Austria if it provides evidence of untrustworthiness, yet threat of termination is a last resort, and the employer's right to take such action must be found in a law, a collective agreement, or a works agreement. Georg Krakow & Alexander Petsche, *Austria*, in CORPORATE INTERNAL INVESTIGATIONS: OVERVIEW OF 13 JURISDICTIONS, *supra* note 110, at 1, 24–25, 33–34.

orders, or the misconduct was severe but was committed with the company's knowledge or tacit consent.<sup>145</sup>

Labor laws can also impose procedural burdens likely to dissuade companies from disciplining non-cooperative employees, particularly when investigating misconduct of which the government is unaware. For example, in many countries, employees targeted for discipline are entitled to be apprised of the evidence against them, including witness statements or portions of an investigatory report relevant to their conduct<sup>146</sup>—information that companies may be particularly reluctant to share when the government is unaware of the misconduct. Moreover, companies cannot necessarily

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145. See Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan: Part One: How Strict Is Japanese Law on Employers?*, 11 JAPAN LAB. REV. 83 (2014), reprinted in THE JAPAN INST. FOR LAB. POLICY & TRAINING, DISMISSALS IN JAPAN 1 (2015), [https://www.jil.go.jp/english/archives/documents/201501\\_dismissals\\_in\\_japan.pdf](https://www.jil.go.jp/english/archives/documents/201501_dismissals_in_japan.pdf) [<https://perma.cc/UEJ3-AQVM>] (discussing Japan); Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan: Part Two: How Frequently Do Employers Dismiss Employees?*, 11 JAPAN LAB. REV. 118 (2014), reprinted in THE JAPAN INST. FOR LAB. POLICY & TRAINING, DISMISSALS IN JAPAN 11, [http://www.jil.go.jp/english/archives/documents/201501\\_dismissals\\_in\\_japan.pdf](http://www.jil.go.jp/english/archives/documents/201501_dismissals_in_japan.pdf) [<https://perma.cc/UEJ3-AQVM>] (discussing Japan). In Germany, a dismissal of an employee for suspected misconduct will withstand judicial review only if the employee's misconduct appears based on substantiated incriminating facts, exonerating circumstances have been reasonably assessed, and the employer has exhausted all available sources to clarify the matter. Mario Eylert, *Die Verdachtskündigung [The Suspicion Termination]*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT RECHTSPRECHUNGS-REPORT ARBEITSRECHT [NZA-RR] 393, 404 (2014) (Ger.). In France, a labor court required Société Générale to pay \$510,000 for terminating an employee convicted of fraud relating to rogue trading. The court concluded that the bank fired the employee to punish him for the sanction imposed on the bank, instead of for the misconduct itself, because the bank learned of his rogue trading in 2007 but did nothing until 2008. Michael Stothard, *Kerviel Wins €400,000 from SocGen for Unfair Dismissal*, FIN. TIMES (June 7, 2016), <https://www.ft.com/content/82e3c230-2ca6-11e6-bf8d-26294ad519fc> [<https://perma.cc/A5WX-6LPD>]. The employee also was ordered to pay Société Générale damages for the losses he caused. Janina Conboye & David Keohane, *French Court Rejects Jérôme Kerviel Request for Retrial*, FIN. TIMES (Sept. 20, 2018), <https://www.ft.com/content/b63b7606-bce0-11e8-8274-55b72926558f> [<https://perma.cc/Q8ZV-K8DL>].

146. For example, in England, an employer seeking to terminate an employee for cause must undertake a three-step process of notice and meetings prior to disciplinary action. The employee must be given a hearing, including the right to respond to allegations, and an opportunity to appeal. Employment Code of Practice (Disciplinary and Grievance Procedures) 2004, SI 2004/2356 (Eng.). Furthermore, employees suspected of misconduct are often placed on garden leave (leave with pay) pending the resolution of any criminal proceedings against them. In Ireland, employees have a constitutional right to fair procedures in any investigatory or disciplinary process, which obligates the employer to keep the employee apprised of the investigation and give the employee a right to participate in the investigation. Lawlor, *supra* note 110, at 620–21. Switzerland and Australia afford employees subject to discipline various rights, generally including notice, the right to confront witnesses, discovery rights (such as the right to access to internal investigation files), and protection against any threats by the employer. Bundesgericht [BGR] [Federal Supreme Court] May 4, 2016, 4A\_694/2015 (Switz.). See *Fair Work Act 2009* (Cth) ch. 3 pt. 3-2 div 3 sub-div 387(c) (Austl.); *Farmer v KDR Victoria Pty Ltd T/A Yarra Trams* [2014] FWC 6539 (Austl.); *Cannan v Nyrstar Hobart Pty Ltd* [2014] FWC 5072 (Austl.). See generally Andrew Tobin & Adele Garnett, *Misconduct Investigations: Our Top Tips*, HOPGOOD GANIM (Mar. 20, 2015), <https://www.hopgoodganim.com.au/page/knowledge-centre/blog/misconduct-investigations-our-top-tips> [<https://perma.cc/289C-7UGQ>] (discussing Australia). In France, an employer seeking to dismiss an employee must provide notice, meet with the employee to explain its rationale, and provide the employee with opportunity and time to respond. See Estreicher & Hirsch, *supra* note 69, at 389.

avoid premature revelation of investigations by waiting to discipline employees until after the government learns of misconduct. Labor laws in many countries, such as France, require companies to initiate all intended disciplinary proceedings relatively quickly after discovering facts justifying discipline.<sup>147</sup> In addition, in countries that predicate termination on the employer's inability to trust the employee, such as Germany, France, and Australia, a company that delays disciplining a non-cooperative employee may undermine a claim of just cause for firing.<sup>148</sup> Thus, companies conducting internal investigations overseas may not be able to both threaten to fire employees in order to induce them to talk and maintain confidentiality of investigative findings.

### c. Employees' Access to Counsel During Employer Interviews

In the United States, companies often benefit from the ability to interview employees about sensitive matters without the employee having counsel present. By contrast, in many other countries, companies cannot interview employees in isolation because labor laws, contracts, union agreements, or bar rules give employees a right to consult a representative, such as a lawyer or union official, prior to an interview, and may give them a right to representation during the interview.<sup>149</sup>

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147. Indeed, some countries apply the principle of *ne bis in idem* (double jeopardy) to disciplinary procedures. In such countries, a company's decision to sanction the employee for failing to cooperate may prevent the company from later terminating the employee for the misconduct should the evidence reveal the employee was involved. In France, it appears that an employer discovering misconduct or gross misconduct cannot sanction an employee unless the employer begins the dismissal process within two months of becoming aware of the misconduct. Matthew Cowie & Karen Coppens, *Multi-Jurisdictional Criminal Investigations—Emerging Good Practice in Anglo-French Investigations*, in THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: CORPORATE INVESTIGATIONS 2018, *supra* note 139, at 4, 6. In Belgium, an employer who has received a credible allegation of misconduct against an employee whom he would like to discipline has only three working days to inform the employee of the factual basis for dismissal and then to discuss it with the employee. The clock begins running before the firm completes its investigation. Carl Bevernage, *Belgium*, in INTERNATIONAL LABOR AND EMPLOYMENT LAWS 3-1, 3-28 (William L. Keller et al. eds., 2009). In Italy, an employer seeking to terminate an employee is required to provide written notice to the employee of his misconduct as soon as the employer detects a violation. The employee has five days to reply. Only then may the employer decide whether to terminate, if warranted. Bruno Cova & Francesca Petronio, *Italy*, in THE EUROPEAN, MIDDLE EASTERN AND AFRICAN INVESTIGATIONS REVIEW 2017 34, 37 (2017).

148. In Germany, where discipline is intended to protect the employer from future harm, delay can undermine the employer's claim that dismissal is needed. Moreover, for an extraordinary dismissal, the employer has to act within two weeks after receiving knowledge of the grounds for dismissal. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 626 (Ger.). In Austria, employees are entitled to expeditious and thorough investigation of any matter that might lead to their discipline. Australian courts disfavor terminations following lengthy investigations. *See, e.g., Camilleri v IBM Austl Ltd* [2014] FWC 5894 (Austl.).

149. Dervan, *supra* note 124, at 380–81. For example, in Italy, employees are entitled to have a union representative present at any meeting to discuss dismissal or are entitled to have the works counsel informed. Di Garbo et al., *supra* note 143, at 270–71. In Germany, the company may be required to inform any existing works counsel about an employee interview both before and after the interview and consider input of the works counsel when making any disciplinary decision. Betriebsverfassungsgesetz [BetrVG]

For example, Swiss courts have held that firms interviewing employees accused of misconduct must afford them rights equivalent to those in criminal investigations, including the right to counsel, the right to remain silent, a confrontation right, access to internal investigation files, and a right against employer threats.<sup>150</sup> Under Austrian labor laws, employers owe employees a duty of care that may require them to inform employees about their right to counsel when the employer and employee have divergent interests.<sup>151</sup> In several countries, such as England, Germany, and France, bar rules provide that lawyers conducting interviews on behalf of employers should inform employees about their right to counsel and ensure that employees understand that their statements may be given to authorities and used against them.<sup>152</sup>

## 2. Legal Privileges and Role of Counsel

As discussed in Part II, the breadth and reliability of U.S. legal privilege protections encourage companies to detect and robustly investigate misconduct by shielding evidence gathered by lawyers from compelled disclosure to others.<sup>153</sup> Of course, such laws also can reduce the value of

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[Works Constitution Act], Jan. 19, 1972, last amended by Gesetz [G], Dec. 18, 2019, BGBl I at 2651, § 80(2) (Ger.); Peter Schrader et al., *Auskunft durch den Arbeitnehmer: Was darf er? Was muss er? [Information by the Employee: What Is He Allowed to Do? What Does He Have to Do?]*, in NEUE ZEITSCHRIFT FÜR ARBEITSRECHT [NZA] 965, 970 (2018). See also Estreicher & Hirsch, *supra* note 69, at 404. While the employee is not entitled to have the works counsel present, the works counsel can advise the employee before the interview.

150. Bundesgericht [BGer] [Federal Supreme Court] May 4, 2016, 4A\_694/2015 (Switz.).

151. Knoetzl, *supra* note 133, at 647. In Germany, by contrast, the employee is not entitled to have a lawyer present unless the company calls in an external attorney. Arbeitsgericht [ArbG] Hamm [Labor Court of Hamm] May 23, 2001, 14 Sa 497/01 (Ger.). Nevertheless, in practice employers allow employees to have lawyers of their choice present, particularly if employment may be at stake. See STELLUNGNAHME DER BUNDESRECHTSANWALTSKAMMER: THESEN DER BUNDESRECHTSANWALTSKAMMER ZUM UNTERNEHMENSANWALT IM STRAFRECHT [OPINION OF THE FEDERAL LAW OFFICIAL CHAMBER: THESES OF THE FEDERAL LAW COUNCIL TO THE CORPORATE LAWYER IN CRIMINAL LAW] 10 (2010) (Ger.) [hereinafter THESES OF THE FEDERAL LAW COUNCIL]. In extraordinary circumstances, courts have precluded an employer from disciplining an employee for misconduct when the employee was denied a confidant during initial interviews. See Arbeitsgericht [AB] Berlin [Berlin Labor Court] July 28, 2005, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1703, 2008 (Ger.).

152. See, e.g., THESES OF THE FEDERAL LAW COUNCIL, *supra* note 151 (discussing Germany); Thomas Baudesson & Charles-Henri Boeringer, *Internal Investigations in France—New Practices, New Challenges*, in REVUE INTERNATIONALE DE LA COMPLIANCE ET DE L'ÉTHIQUE DES AFFAIRES 1, 3 (2017) (discussing Paris bar rules); Charlot et al., *supra* note 141, at 146 (same). In England, Outcome 11.1 of the SRA Code of Conduct 2011 provides that a solicitor must not take unfair advantage of third parties in either a professional or personal capacity. Particular care is required when the person is implicated in misconduct and does not have legal representation. Solicitors are expected to caution the employee about the potentially incriminatory nature of the interview and, if the interview reveals that the employee is implicated, should suspend the interview in order for the employee to obtain counsel. See Charlot et al., *supra* note 141, at 163; Day & Hodges, *supra* note 128, at 103, 112–13, 123. Compare *R v. Twaites* (1991) 92 Cr. App. R 106 (Eng.), with *R v. Welcher* [2007] EWCA Crim. 480 (Eng.).

153. The lack of privilege may deter investigations less in countries with little risk of private

cooperation to the government. Because companies cannot selectively waive privilege only with public enforcers, cooperating firms generally provide investigative summaries but not the raw products of interviews.

The balance can be very different overseas, where corporations may have less incentive to conduct broad investigations, particularly of undisclosed misconduct, because privilege protections tend to be much narrower. On the other hand, prosecutors may derive greater benefit from interviews that are conducted by firms because prosecutors may be able to obtain full access to recordings or transcripts as a result of narrower privileges or policies granting or requiring selective waiver as a prerequisite to credit for cooperation.<sup>154</sup>

Internal investigations are especially risky in countries such as China that do not recognize legal privilege.<sup>155</sup> Many other countries recognize privilege in some circumstances but do not apply it to the lawyers best positioned to initially investigate and interpret preliminary evidence of potential misconduct at the lowest cost: in-house counsel.<sup>156</sup>

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litigation or with other barriers to private litigants acquiring information, such as restrictive discovery rules or state-secrets privileges affecting state-owned enterprises.

154. The Serious Fraud Office in the United Kingdom, for example, is granted significant power under Section 2 of the Criminal Justice Act. *See* Criminal Justice Act 1987, c. 38, § 2 (U.K.).

155. *See, e.g.,* *Wultz v. Bank of China Ltd.*, 979 F. Supp. 2d 479, 492–93 (S.D.N.Y. 2013); SUSAN E. BRUNE & ERIN C. DOUGHERTY, REPRESENTING INDIVIDUALS IN INTERNATIONAL INVESTIGATIONS 38, 43 (2016), [https://www.brunelaw.com/publications/2016-10-20-representing-individuals-in-international-investigations/res/id=Attachments/index=0/Brune\\_Representing\\_Individuals\\_Sept-Oct\\_2016.pdf](https://www.brunelaw.com/publications/2016-10-20-representing-individuals-in-international-investigations/res/id=Attachments/index=0/Brune_Representing_Individuals_Sept-Oct_2016.pdf) [https://perma.cc/Q78D-4N8W]. Although China does not recognize legal privilege Chinese law governing lawyers does impose on lawyers a duty of confidentiality in many situations. Nevertheless, this duty does not apply to information about a past or contemplated crime that severely impacts national or public security or causes serious personal injury. In addition, in China, parties and their lawyers may be compelled to testify in administrative investigations and proceedings. Moreover, the right of lawyers representing clients in criminal proceedings to keep matters confidential does not apply to in-house counsel or unregistered foreign lawyers. Yingxi Fu-Tomlinson, *Safeguarding Confidential Communication in China*, LAW 360 (Mar. 25, 2016, 10:45 AM), <https://www.law360.com/articles/773074/safeguarding-confidential-communication-in-china> [https://perma.cc/SHZ6-UAVJ].

In some countries, legal privilege does not attach if a firm hires a lawyer to determine whether the firm has adhered to compliance duties imposed on it by law, on the grounds that compliance duties are not typical activities of a lawyer. Thus, a financial institution hiring counsel to determine whether the anti-money laundering laws have been violated may be unable to shield the investigation under legal privilege. *See* Bundesgericht [BGer] [Federal Supreme Court] Mar. 21, 2018, 1B\_433/2017, § 4.5 (Switz.); Bundesgericht [BGer] [Federal Supreme Court] Sept. 16, 2016, 1B\_85/2016, § 6.1 (Switz.).

156. In many European countries, privilege applies only to communications with an independent lawyer. In-house counsel are not seen as independent. *E.g.,* BRUNE & DOUGHERTY, *supra* note 155, at 43–44; Dervan, *supra* note 124, at 370–71. These jurisdictions include Austria, Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Luxembourg, Romania, Russia, Sweden, and Switzerland. Julia Holtz, *Legal Profession Privilege in Europe: A Missed Policy Opportunity*, 4 J. EUR. COMPETITION L. & PRAC. 402, 405 (2013). *See also* Case C-550/07, *Akzo Nobel Chem. Ltd. v. Comm'n*, 2010 E.C.R. I-08301, I-08368 (ruling of the Court of Justice of the European Union that applicable legal privilege does not extend to legal advice given by in-house counsel or non-EU qualified lawyers); Borsodi & Burrus, *supra* note 127, at 665, 671; Charlot et al., *supra* note 141, at 161; Alexei Dudko, *Russia*, in THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS, *supra* note 110, at 633, 641; Krakow & Petsche,

Moreover, in many countries, legal advice privilege protects only communications with a small subset of employees: those who have authority to represent, and make legal decisions for, the company for purposes of the attorney-client relationship.<sup>157</sup> External counsel's communications with other employees, including those with direct evidence about the wrongdoing, are not protected. For example, in England, the Court of Appeals, in *Director of the Serious Fraud Office v. Eurasian Natural Resources Ltd.*, held that legal advice privilege applies only to company lawyers' communications with company employees "specifically tasked with seeking and receiving legal advice" on behalf of the company.<sup>158</sup> Similarly, in Italy, legal advice privilege applies only to employees who have the power to represent the company.<sup>159</sup>

In addition, work product privileges can be narrower than in the United States, leaving some internal investigations unprotected. England's version of the doctrine is called the litigation privilege. A company claiming this privilege must show that it was "aware of circumstances which rendered litigation between [itself] and a particular person or class of persons a *real likelihood* rather than a mere possibility."<sup>160</sup> In *Eurasian Natural Resources Ltd.*, the Court of Appeals held that documents, including interview notes, created in the course of an internal investigation, are protected by the litigation privilege only if the firm's dominant purpose is to obtain evidence in relation to, or to advise on, actual or contemplated litigation, including efforts to avoid or settle such litigation.<sup>161</sup> Importantly, the decision suggests that litigation privilege would not apply to internal investigations into

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*supra* note 144, at 46; Lach et al., *supra* note 143, at 575. In addition, many countries restrict legal privilege to communications with external lawyers registered with the bar in that country. See BRUNE & DOUGHERTY, *supra* note 155, at 43–44.

157. This is akin to the "control group" test that the U.S. Supreme Court rejected in the *Upjohn* decision as insufficiently protective to allow corporate lawyers to gather necessary facts. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

158. *Dir. of the Serious Fraud Office v. Eurasian Nat. Res. Ltd.*, [2018] EWCA (Civ) 2006 (Eng.) [hereinafter ENRC]. The Court of Appeals in ENRC recognized the rationales against narrow privileges but stated that it was constrained to follow a prior ruling of the House of Lords. Notably, the SFO and FCA often insist that firms waive the privilege and provide full transcripts of employee interviews. England does recognize selective waiver, however. Amanda Raad et al., *Self-Reporting to the Authorities and Other Disclosure Obligations: The UK Perspective*, in THE PRACTITIONER'S GUIDE TO GLOBAL INVESTIGATIONS, *supra* note 110, at 42.

159. See Cova & Petronio, *supra* note 147, at 36.

160. *United States v. Philip Morris Inc.* [2004] EWCA (Civ) 330 (Eng.) (emphasis added).

161. The firm had conducted an internal investigation following a whistleblower report, expecting to self-report to the SFO with hope of obtaining a DPA. The lower court concluded that the company could not claim litigation privilege because an internal inquiry conducted without a pending government investigation, with the intent to avoid litigation under the SFO's policy favoring leniency for self-reporting, was not prepared in anticipation of likely litigation, and thus was not covered by the litigation privilege. *Dir. of the Serious Fraud Office v. Eurasian Nat. Res. Corp.* [2017] EWHC 1017 (QB) (Eng.); see also *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) (Eng.).



misconduct the government has not detected if the firm investigating neither planned to self-report nor expected enforcement authorities to detect the misconduct.

Germany does not recognize traditional attorney-client and work product privileges. Instead, prosecutors' ability to obtain information from lawyers about their clients is governed by criminal procedure statutes.<sup>162</sup> Under these laws, external lawyers are entitled to maintain the confidentiality of client information and thus cannot be called to testify against a client.<sup>163</sup> However, German prosecutors may seize materials from lawyers' offices, including evidence generated during an internal investigation, in certain circumstances.<sup>164</sup> Authorities are prohibited from seizing either notes of conversations or written correspondence between a lawyer and a client, as well as defense materials, *if* the materials relate to the defense of a person whom the attorney represents in a criminal matter, or, in the case of a corporation, an administrative action threatening financial sanctions.<sup>165</sup> Yet prosecutors may be free to seize the results of a lawyer's internal investigation conducted on behalf of the corporation if the materials were not prepared to defend the corporation from charges, for example because the prosecutors' investigation is targeted at someone other than the corporate client, such as an employee or subsidiary.<sup>166</sup>

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162. There is less risk of disclosure in civil proceedings in Germany. In civil proceedings, courts usually dismiss motions for production of documentary evidence by opposing parties because German civil procedure follows the principle of production of evidence by the party who bears the burden of proof, that is, it is within every party's responsibility to obtain the evidence necessary to substantiate its claims, and, in principle, to bear the risk for failing to do so. HANS-JOACHIM MUSIELAK & WOLFGANG VOIT, ZIVILPROZESSORDNUNG (ZPO) [CODE OF CIVIL PROCEDURE] § 142, para. 8 (15th ed. 2018).

163. STRAFPROZESSORIG (STPO) [CODE OF CRIMINAL PROCEDURE], § 53, para. 1, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html](https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html) [<https://perma.cc/9UBT-JBRU>] (Ger.).

164. The Federal Constitutional Court recently concluded that the more general protections against prosecutors seeking evidence from lawyers do not extend to the seizure of objects such as documents. Lawyers' protection against document seizure is covered by German Code of Criminal Procedure. *Id.* § 97, para. 1; *see also* Bundesverfassungsgericht [BVerfG,] [Federal Constitutional Court] June 27, 2018, 2 BvR 1287/17, 2 BvR 1583/17, para. 78–79 (Ger.).

165. *Id.*; *see* STRAFPROZESSORDNUNG (STPO) [CODE OF CRIMINAL PROCEDURE], § 97, para. 1, *translation at* [https://www.gesetze-im-internet.de/englisch\\_stpo/englisch\\_stpo.html](https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html) [<https://perma.cc/9UBT-JBRU>] (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], Judgment of 25 February, 1998 - 3 StR 490/97, BGHSt 44, 46 (Ger.). For a comprehensive discussion of the decision's implications, *see* Michael Hippeli, *Hoheitliche Eingriffsmaßnahmen gegen deutsche Büros internationaler Kanzleien: Bedarf für ein Legal Privilege? [Sovereign Intervention Measures Against German Offices of International Law Firms: Need for a Legal Privilege?]*, 2018 GWR 383 (Ger.). Section 97 has been interpreted to apply only to materials prepared to defend a client subject to criminal charges. In Germany, corporations cannot be held criminally liable, but they are subject to administrative sanctions that resemble criminal liability in other countries; many provisions of the German Code of Criminal Procedure apply to these proceedings. *See* Gesetz über Ordnungswidrigkeiten [OWiG] [Law on Misdemeanors], re promulgated Feb. 19, 1987, BGBL I § 46(1) (Ger.).

166. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 27, 2018, 2 BvR 1287/17, 2 BvR 1583/17, para. 79 (Ger.); Regional Court of Hamburg, judgment of 15 October, 2010,

German courts tend to use a balancing test to assess the validity of such searches. The public interest in effective prosecution normally tips the scale in favor of allowing a search.<sup>167</sup> Applying these principles, the Federal Constitutional Court of Germany recently rejected challenges to prosecutors' seizure of materials from the Jones Day law firm, which was representing Volkswagen ("VW"), for use against VW executives. The court concluded that the seizure was permissible because VW was not formally accused of an offense, the government had probable cause to search for evidence against the targets of its investigation based on evidence contained in guilty pleas in the United States, and the case involved widespread material misconduct.<sup>168</sup>

Overseas regimes governing the conduct of lawyers may also inhibit, more than in the United States, the ability of corporations to select, fund, and communicate with counsel for individual employees. For example, according to English practitioners, lawyers involved in business crime cases do not reach the question of whether joint defense agreements are advisable (even if they would be of value under narrower privilege laws) because corporate counsel will be inhibited from discussing the facts with counsel for individuals for fear that it might be treated as "interference with the due administration of justice" or "contempt of court."<sup>169</sup>

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608 Qs 18/10; Regional Court of Bonn ("LG Bonn"), 21 June, 2012 - 27 Qs 2/12 NZWiSt 2013, 21 (Section 97 only applies if the client was already accused of a crime when the potentially incriminating material is obtained, and finding that a subsidiary is not necessarily represented by the attorney that represents the parent company). This situation can easily occur in Germany because corporations can be sanctioned under Section 30 OWiG for criminal or administrative misconduct by an employee only if the employee was (1) chairman of the executive committee of an association without legal capacity or a member of such committee; (2) an authorized representative with full power of attorney or in a managerial position as procura-holder or an authorized representative with a commercial power of attorney of a legal person; or (3) another person responsible on behalf of management for the operation or enterprise forming part of a legal person, which also covers supervision of the conduct of business, or other exercise of controlling powers in a managerial position. "Misconduct" of such a person can consist in the lack of proper supervision of any other employee who then committed a crime or administrative infraction. *See* Gesetz über Ordnungswidrigkeiten [OWiG] [Law on Misdemeanors], repromulgated Feb. 19, 1987, BGBL I § 130 (Ger.).

167. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 27, 2018, 2 BvR 1287/17, 2 BvR 1583/17, para. 61, 66, 67 (Ger.).

168. The Federal Constitutional Court also rejected claims by the law firm Jones Day that the search violated its constitutional rights because, as a U.S. firm, Jones Day is not entitled to the asserted German constitutional rights. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 27, 2018, 2 BvR 1287/17, 2 BvR 1583/17, para. 78–79 (Ger.). Similarly, in 2010, the District Court of Hamburg held that the public authorities pursuing a criminal investigation of a firm's employees could seize internal investigation material from a law firm because the company itself was not accused or suspected. Landgericht [LG] Hamburg [District Court of Hamburg] Oct. 15, 2010, 608 Qs 18/10 (Ger.). In 2012, the Bonn District Court held that prosecutors could seize material from a lawyer for a parent corporation for use against its subsidiary because the parent was not a potential party. *See* Philipp von Holst, *Germany*, in THE EUROPEAN, MIDDLE EASTERN AND AFRICAN INVESTIGATIONS REVIEW 29, 31 (2017).

169. For discussion of the scope of these offenses, see ARCHBOLD, CRIMINAL PLEADING, EVIDENCE & PRACTICE §§ 28-30–28-50 (P.J. Richardson ed., 2009).

### 3. Monitoring and Processing of Data and Documents

Compared with the United States, companies overseas often do not enjoy the same comparative advantage over enforcement officials in obtaining and analyzing corporate emails and other documents. Like their U.S. counterparts, government authorities overseas often can obtain documents and emails from firms.<sup>170</sup> Indeed, as a result of more restrictive approaches to legal privilege, enforcement authorities in many countries can obtain documents that their U.S. counterparts cannot, such as those prepared by in-house counsel.

However, as a result of privacy laws governing data and correspondence, companies overseas often are less able than U.S. firms to monitor employees' communications or freely access and process emails, digital evidence, and documents, even when stored on the company's servers or devices. These laws also often cause companies to incur greater cost and

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170. For example, both the SFO and the FACT have the power to compel the production of any kind of evidence by those within their jurisdiction, including documents. Criminal Justice Act 1987, c. 38, § 2(3) (U.K.). In addition, the SFO can obtain evidence by turning to the police to use extensive search and seizure powers, albeit with a warrant. *See generally* Christine Braamskamp & Kelly Hagedorn, *KBR Inc.: Foreign Companies Can Now Be Compelled to Produce Documents to the UK Serious Fraud Office*, N.Y.U.: COMPLIANCE & ENFORCEMENT (Sept. 12, 2018), [https://wp.nyu.edu/compliance\\_enforcement/2018/09/12/kbr-inc-foreign-companies-can-now-be-compelled-to-produce-documents-to-the-uk-serious-fraud-office](https://wp.nyu.edu/compliance_enforcement/2018/09/12/kbr-inc-foreign-companies-can-now-be-compelled-to-produce-documents-to-the-uk-serious-fraud-office) [<https://perma.cc/D8Y4-QTKM>].

In Germany, the Federal Financial Supervisory Authority ("BaFin") can demand documents and emails from companies for the purpose of exercising its supervisory duties. *See Wertpapierhandelsgesetz [WpHG] [Securities Trading Act] Sept. 9, 1998, Federal Law Gazette I at 2708, last amended by Article 2 of the Law Implementing the EC Deposit Guarantee Directive and Investor Compensation Directive of 16 July 1998, Federal Law Gazette I at 1842, § 6 (Ger.); Kreditwesengesetz [KWG] [German Banking Act] Sept. 9, 1998, Federal Law Gazette I at 2776, last amended by Article 3 of the Act amending insolvency and banking law provisions (Gesetz zur Änderung insolvenzrechtlicher und kreditwesensrechtlicher Vorschriften\*) of December 8, 1999, Federal Law Gazette I No. 54 at 2384, § 6 (Ger.).* BaFin also can compel employees of regulated entities to produce documents even if it would expose them to criminal or administrative liability. An implicated employee's compelled production may not be introduced as evidence against him in criminal proceedings, but derivative use is permitted. *See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 13, 1981 Neue Juristische Wochenschrift [NJW] 1431, 1981 (Ger.); Uwe H. Schneider, Investigative Maßnahmen und Informationsweitergabe im konzernfreien Unternehmen und im Konzern, [Investigative Measures and Information Dissemination in the Group-free Company and in the Group], in NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1201, 1203 (2010); see also Becker et al., supra note 144, at 248.*

Overseas prosecutors often have more leeway to conduct a search because they face a less robust exclusionary rule if the search is defective. Many countries employ a balancing test—balancing the individual's rights against the state's interest in sanctioning the crime—to determine whether to exclude illegally obtained evidence. In addition, a number of jurisdictions do not extend exclusion to evidence derived from an illegal search ("fruit of the poisonous tree") or exclude derivative evidence only in limited circumstances. *See* STEPHEN C. THAMAN, *COMPARATIVE CRIMINAL PROCEDURE: A CASEBOOK APPROACH* 118–124 (2d ed. 2008); Christopher Slobogin, *A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases*, in *COMPARATIVE CRIMINAL PROCEDURE*, supra note 109, at 280, 286–88. *See generally* Jenia Iontcheva Turner & Thomas Weigend, *The Purpose and Functions of Exclusionary Rules: A Comparative Overview*, in *DO EXCLUSIONARY RULES ENSURE A FAIR TRIAL?: A CONTEMPORARY PERSPECTIVE ON EVIDENTIARY RULES* 255 (2019) (discussing Spain, Germany, and Switzerland).

face more restrictions when accessing and processing records during an investigation.<sup>171</sup> In addition, financial institutions in some countries may be impeded from conducting adequate internal investigations by bank secrecy or state secrets laws.

a. Data Privacy Laws

Overseas companies often cannot freely monitor employees' communications or assess and evaluate documents and digital evidence, even when stored on the company's servers or computers, if employees' communications include personal communications, or if, as is inevitable, their work-related communications include personal data.

A company cannot freely process emails and electronic documents in countries with strong privacy protections, such as France, if employees use company-provided computers and email accounts for personal purposes.<sup>172</sup> Instead, companies often must incur the added cost of hiring a third-party to sort through emails and other documents to remove materials the firm is not authorized to access—an added cost that may be material to a smaller or medium-size firm deciding whether to investigate potential misconduct that it is not confident occurred.

Beyond this, companies face limitations on their ability to process work-related emails and documents because these inevitably contain personal data, often of both an employee and a third party. In this situation, the company needs a legitimate basis for processing that data and faces potential notice requirements.

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171. In addition to data privacy laws, many countries have laws protecting the secrecy of correspondence, such as letters, phone calls, and electronic communications. These provisions guarantee the secrecy of closed correspondence. They can impede a company's access to evidence in its employees' offices or work computers if the employee is allowed to make incidental personal use of company facilities. In this case, the company must get the employee's informed consent which can be withdrawn at any time. John P. Carlin, et al., *Data Privacy and Transfers in Cross-Border Investigations*, in AM. INVESTIGATIONS REV. 2020 1, 9 (2020).

172. In France, an employer seeking to collect all employee emails during an investigation needs to satisfy several requirements. First, the company must verify that the company's internal policies clearly state and notify employees that the employers' email accounts are corporate property. If employees are allowed to use their company accounts for personal emails, then the company must separate personal from company emails. Employees have a strong right of privacy in emails marked personal. Cour de cassation [Cass.] [supreme court for judicial matters] soc., May 30, 2007, 05/43102 (Fr.). Second, the firm would need to get prior approval from the French data collection authority, the Commission Nationale de L'Informatique et des Libertés ("CNIL"). Third, the firm would have to inform the work council and other labor committees. See Charlot et al., *supra* note 141, at 146–47. Similarly, in Austria a company that permits employees to use computers or email for private purposes must exclude resulting personal data from its processing, aside from spot checks. Knoetzl, *supra* note 133, at 647, 661. Employees in Canada also may have an expectation of privacy in personal information stored on workplace computers or devices. R. v. Cole, [2012] S.C.R. 34 (Can.).

Under the General Data Protection Regulation (“GDPR”),<sup>173</sup> which establishes minimum standards for European Union (“EU”) countries, “personal data” is defined as “any information relating to an identified or identifiable natural person.”<sup>174</sup> Email accounts are personalized if the email address includes an employee’s name. Data on a company laptop or desktop may be personal if company devices are assigned to individual employees.<sup>175</sup> Even personal identifying information in travel vouchers, requests for reimbursement, corporate contracts, and the like may be considered personal data. Personal data also includes names, email addresses, and other information of individuals outside the firm who are named in company documents.<sup>176</sup>

Under the GDPR, a company engages in “processing” of data if it performs “any operation or set of operations . . . on personal data or on sets of personal data.”<sup>177</sup> As a result, a company analyzing corporate emails and other electronic records during an investigation invariably will be processing “personal information” of employees and third-parties, as that term is defined by both the GDPR and country-specific data privacy laws.<sup>178</sup>

Companies can process personal data if they obtain either subjects’ voluntary affirmative consent to process data for the specific purpose intended or have a legitimate justification.<sup>179</sup> Companies generally cannot rely on blanket consent inserted in an employee contract or handbook to

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173. Commission Regulation 2016/679 of Apr. 27, 2016, On the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 2016 O.J. (L 119) [hereinafter GDPR]. The GDPR directly affects law in each member state but only sets a floor. In the European Union, individuals’ right to protection of personal data is deemed to be a fundamental right. Treaty of Lisbon Amending the Charter of Fundamental Rights of the European Union art. 8(1), Dec 13, 2007, 2007 O.J.

174. GDPR, *supra* note 173, at art. 4, para. 1.

175. For a discussion of Switzerland, see Livschitz, *supra* note 133. French law also prohibits a firm from accessing employees’ email and information on computers in employees’ possession, even when the firm owns both, if email accounts are personalized and electronic devices are individually assigned, unless the firm has a legitimate basis and proper procedures are employed. Cour de cassation [Cass.] [supreme court for judicial matters] soc., May 17, 2005, Bull. civ. V, No. 165 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] soc., Oct. 2, 2001, Bull. civ. V, No. 291. (Fr.).

176. Michelle Bramley et al., *Investigations in the United Kingdom*, in CORPORATE INTERNAL INVESTIGATIONS: AN INTERNATIONAL GUIDE, *supra* note 107, at 110, 143.

177. GDPR, *supra* note 173, at art. 4, para. 2.

178. The EU and member countries are not the only ones that restrict the processing of personal data. In Switzerland, efforts to screen email accounts for relevant information involve the processing of employees’ personal information and fall under Swiss data protection rules, assuming that the email accounts are personalized (as is the case if the email address involves the employees’ name). Some jurisdictions outside the EU, such as South Korea, Malaysia, Hong Kong, and Columbia, also require affirmative opt-in consent. Carlin et al., *supra* note 171.

179. Failure to comply with GDPR leads to administrative fines up to 10,000,00 EUR (approx. 11,400,00 U.S. Dollars), or in the case of an undertaking, up to 2 percent of the total worldwide annual turnover of the preceding financial year, whichever is higher. See GDPR, *supra* note 173, at art. 83, sec. 4.

justify either widespread monitoring or access to employee emails for an investigation. Broad consent arguably does not satisfy the GDPR's requirement that the subject affirmatively consent to the specific purpose for which the data will be processed. Consent also must be truly voluntary.<sup>180</sup> As a result, corporations in countries such as Germany and France tend not to rely on consent because employees must be expressly asked for it, must be able to refuse without risk of sanction, and can withdraw it at any time.<sup>181</sup> Moreover, in the corporate investigation context, courts tend to assume that such consent is involuntary because of the imbalance of power between the employer and employee, unless the employee derived legal or economic benefit from the consent.<sup>182</sup>

Absent consent, companies may process personal data if they have a statutorily-defined legitimate purpose. Processing is justified if necessary to comply with a legal obligation imposed by the EU or a member state, or if "necessary for the purposes of the legitimate interests" pursued by the company, as long as those interests are not "overridden by the interests or fundamental rights and freedoms of the data subject."<sup>183</sup>

These justifications often are interpreted narrowly. In particular, in many countries neither justification provides companies carte blanche to engage in ongoing monitoring of employees absent a reasonable suspicion

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180. Jim Halpert et al., *The GDPR's Impact on Internal Investigations*, DLA PIPER (July 10, 2018), <https://www.dlapiper.com/en/us/insights/publications/2018/07/global-anticorruption-newsletter/the-gdpr-impact-investigations> [<https://perma.cc/L9X4-KGVJ>] (explaining that under the GDPR, the risk of criminal law violations does not justify relying on consent, absent a related national law requiring consent); see also Carlin et al., *supra* note 171.

181. von Holst, *supra* note 168, at 29; Myria Saarinen et al., *Data Protection in France: Overview*, THOMSON REUTERS: PRACTICAL LAW (Dec. 1, 2018), <https://www.lw.com/thoughtLeadership/data-protection-in-france-overview> [<https://perma.cc/8NMP-DAW5>] (French data protection laws assumes employees cannot freely consent).

182. Section 26(2) of Germany's Federal Data Protection Act provides:

If personal data of employees are processed on the basis of consent, then the employee's level of dependence in the employment relationship and the circumstances under which consent was given shall be taken into account in assessing whether such consent was freely given. Consent may be freely given in particular if it is associated with a legal or economic advantage for the employee, or if the employer and employee are pursuing the same interests. Consent shall be given in written form, unless a different form is appropriate because of special circumstances. The employer shall inform the employee in text form of the purpose of data processing and of the employee's right to withdraw consent pursuant to Article 7 (3) of Regulation (EU) 2016/679.

Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], Jan. 14, 2003 BGBL I at § 26(2) (Ger.).

In the United Kingdom, guidance from the Information Commissioner's Office indicates that consent is less likely to be deemed to have been given freely when there is a significant imbalance of power, such as between employer and employees. See *Guide to the General Data Protection Regulation (GDPR)*, INFO. COMMISSIONER'S OFFICE, <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr> [<https://perma.cc/8WLV-KJXS>].

183. *Supra* note 179; see also Halpert et al., *supra* note 180.

that misconduct occurred or a need to monitor for safety reasons.<sup>184</sup> Monitoring is one tool that gives companies an advantage relative to outsiders in detecting misconduct. Data privacy laws also can impede companies from conducting prophylactic investigations based on misconduct detected by other firms in the same industry or an internal report from an employee that does not suffice to create reasonable suspicion.

The GDPR could negatively impact an investigation even when the company has evidence of misconduct. In the early stages of an investigation, companies often need to sort through massive amounts of emails and documents involving employees whom the company will later conclude were not implicated. Companies cannot be confident that their legitimate interests in legal compliance justify the processing of personal data of many uninvolved employees. Given the liability risks for failure to comply with the GDPR, companies in Europe can be expected to be less proactive than in the United States in examining employee communications, which may reduce their ability to detect and prove misconduct.<sup>185</sup>

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184. For example, in Germany the Bundesdatenschutzgesetz (“BDSG” or “Federal Data Protection Act”) permits companies to monitor employees’ emails under some circumstances, but does not favor broad ongoing monitoring. *See* Bundesdatenschutzgesetz [BDSG] [Federal Data Protection Act], Jan. 14, 2003 BGBl at 66 (Ger.). The law governs data processing for the purpose of both detecting, *id.* § 26(1) sent. 2, and preventing criminal misconduct. *Id.* § 26(1) sent. 1. In order to justify data processing to detect misconduct, the company must both suspect that the employee engaged in misconduct and have tangible facts that support a “concrete suspicion of crime.” This provision does not allow for secret monitoring “into the blue.” *Id.* § 26(1) sent. 2. In addition to needing a concrete suspicion, a court will apply an overarching reasonableness test to determine whether (1) the data is suitable for the employer’s purpose, (2) the data is necessary, in the sense that there is no less restrictive means to serve the same purpose, and (3) the monitoring is reasonable after balancing the employer’s interest in receiving the information with employees’ right to privacy. *See id.* § 26(1) sent. 1; ERFURTER KOMMENTAR ZUM ARBEISTRECHT [ERFK] [COMMENT ON LABOR LAW] § 26, para. 9, 10 and 11 (20th ed. 2020). France is also hostile to ongoing surveillance by companies of employees, consistent with the country’s historical preference for granting the government a monopoly on surveillance. *See* Jacqueline Ross, *The Surveillance State, the Private Surveillance Sector, and the Monopoly of Legitimate Stealth: Nineteenth Century Pathways to Undercover Policing in the United States and France* (2018) (unpublished manuscript) (on file with authors). In Greece, employee monitoring is illegal and can be prosecuted. Christine Pirovolakis, *Greece Puts Stop to E-mail Snooping in Decision by Data Protection Authority*, PRIVACY LAW WATCH (Feb. 7, 2005). In England a legitimate interest in processing data may require that a company reasonably suspects misconduct occurred based on documented facts, that the processing is necessary to achieve that interest, and that it is reasonably based on a balancing of the interests of the individual and the firm. *Guide to the General Data Protection Regulation (GDPR)*, *supra* note 182.

Companies outside of Europe also face restrictions on their ability to monitor their employees’ emails and other activities. For example, in Argentina, the National Court on Criminal and Correctional Matters ruled that even if an employer has a disclosed policy of monitoring emails, it cannot do so without violating its employees’ privacy rights unless the monitoring is under control of the courts. *See* Mariela Inés Melhem et al., *Argentina: Current Anti-Corruption Landscape*, in *THE INVESTIGATIONS REVIEW OF THE AMERICAS* 2018, *supra* note 133, at 45, 48 (Glob. Investigations Review ed., 2017).

185. Halpert et al., *supra* note 180. By contrast, the United Kingdom adopted the Data Protection Act of 2018, which regulates processing falling within U.K. national law instead of EU law. This Act clarifies that certain categories of data (including criminal convictions) may be processed to prevent or detect unlawful acts, protect the public against dishonesty, and prevent fraud, among other reasons. Data Protection Act 2018, c. 12 (Eng.).

Even with adequate justification, companies in Europe must comply with the requirement that the individual whose data is processed be informed about, and generally be allowed to object to, the processing. Companies seeking to process such information may need to provide notice to third parties whose personal data—such as in contracts, invoices, and the like—are in the company’s hands.<sup>186</sup> This requirement may reduce companies’ incentives and ability to investigate potential misconduct not yet detected by authorities.<sup>187</sup>

#### b. Financial Secrecy Laws

Some countries, such as Switzerland, Luxembourg, and Singapore, provide heightened protection for personal data of customers of financial institutions. Such rules may preclude transferring customer information outside the country, even to another office of the firm or to the firm’s internal investigators. To comply with such laws, external investigators often must set up operations contained within the firm, increasing costs of investigation. Investigations also may be hampered by the inability to share customer-specific information with employees or agents of the company in other countries, absent permission from the relevant authorities.<sup>188</sup>

In sum, in light of much greater legal restrictions overseas,<sup>189</sup>

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186. See GDPR, *supra* note 173, art. 12–23; see also Halpert et al., *supra* note 180; Caroline Krass et al., *The General Data Protection Regulation: A Primer for U.S.-Based Organizations that Handle EU Personal Data*, N.Y.U.: COMPLIANCE & ENFORCEMENT (Dec. 11, 2017), [https://wp.nyu.edu/compliance\\_enforcement/2017/12/11/the-general-data-protection-regulation-a-primer-for-u-s-based-organization-s-that-handle-eu-personal-data](https://wp.nyu.edu/compliance_enforcement/2017/12/11/the-general-data-protection-regulation-a-primer-for-u-s-based-organization-s-that-handle-eu-personal-data) [<https://perma.cc/5ALY-NDQP>].

187. Prior to the GDPR, companies also wanting to investigate misconduct about which enforcement authorities were unaware often had to contend with a requirement that they notify data protection authorities before processing personal data. This notification requirement has been replaced by the requirement to designate a “data protection officer,” pursuant to Article. 37 of the GDPR, who must be consulted prior to the processing of personal data. See GDPR, *supra* note 173, art. 36. The notification obligation under Directive 95/46/EC has been replaced by a recordkeeping obligation. See *id.* art. 30; see also Alex von Walter, *Germany*, in INT’L COMPARATIVE LEGAL GUIDES: DATA PROTECTION 2019 136 (6th ed., 2019), [https://iapp.org/media/pdf/resource\\_center/comparative\\_legal\\_guide\\_2019.pdf](https://iapp.org/media/pdf/resource_center/comparative_legal_guide_2019.pdf) [<https://perma.cc/K8PX-PFJN>].

188. E.g., Catherine Di Lorenzo & Thomas Berger, *Luxembourg*, in DATA PRIVACY AND TRANSFER IN INVESTIGATIONS (discussing the Luxembourg Act of April 5, 1993), <https://globalinvestigationsreview.com/jurisdiction/1006205/luxembourg> [<https://perma.cc/68NA-BEA9>]; Flavio Romero et. al., *Switzerland*, in 2 THE PRACTITIONER’S GUIDE TO GLOBAL INVESTIGATIONS 488, 492 (Judith Seddon et. al ed., 4th ed. 2020) (under Swiss banking law, banks may not disclose personal data relating to current or former clients and presumptively may not send it to be processed overseas to entities in countries lacking adequate data privacy regulation). See generally DELOITTE, THE GLOBAL FRAMEWORK FOR FIGHTING FINANCIAL CRIME: ENHANCING EFFECTIVENESS AND IMPROVING OUTCOMES 22, n. 35 (2019), <https://www2.deloitte.com/content/dam/Deloitte/tw/Documents/financial-services/tw-the-global-framework-for-fighting-financial-crime-en.pdf> [<https://perma.cc/5B9U-JJ8K>] (noting that certain jurisdictions, like Singapore, limit information-sharing by financial institutions even within a corporate group, although Singapore is relaxing the constraints on sharing information to enforce anti-money laundering laws).

189. In addition, some countries have state secrecy laws that can impinge on internal investigations,



corporations do not have nearly the same power as firms in the United States to assist enforcers with data collection and processing, as described in Part II. Thus, there is less for enforcers to gain in offering reduced sanctions for corporate cooperation—particularly if it arrives late in the investigation.

#### IV. IMPACT OF TRANSNATIONAL DIFFERENCES ON EFFECTIVE CORPORATE CRIMINAL ENFORCEMENT

The model of corporate criminal enforcement that U.S. prosecutors have sought to exploit has the potential to produce public benefits under certain conditions. The model, if properly implemented, potentially benefits society by shifting the primary task of detecting and investigating misconduct to the party that can most effectively undertake these activities at the lowest cost: the corporation. Society gains to the extent that enforcement policy induces corporations to detect and self-report misconduct, thereby enabling public authorities to detect and sanction more corporate misconduct, and do so more rapidly, than they otherwise could.

If enforcement policy induces companies to cooperate by obtaining and sharing evidence that prosecutors likely would not have obtained on their own, social benefits further increase. Corporate cooperation thus can allow prosecution of more individual violators, and sanctioning and remediation of more corporations, than if only prosecutorial resources were available to address the problem of business crime.<sup>190</sup> Deterrence of business crime should rise, as long as prosecutors, in implementing such an enforcement program, are effective in ensuring that firms, and especially senior managers, follow through honestly and fully on their obligations to self-report, cooperate (including in assisting in prosecution of individual violators), and remediate.

However, the use of such an enforcement policy to induce corporate detection and investigation, while reducing corporate sanctions, generally enhances welfare only if companies are better able to detect or investigate than the government. After all, the U.S. approach to corporate enforcement is not costless. Corporate primacy in investigations creates the risk of excessive corporate influence over government investigations and resulting enforcement actions, particularly if enforcement authorities lack the resources and will to conduct robust independent investigations. Moreover, corporations are induced to investigate and cooperate by lower sanctions—lower sanctions that risk undermining corporate deterrence if they do not

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particularly by companies, such as banks, that are repositories of private information of many state-owned enterprises.

190. See Arlen, *supra* note 6; Arlen & Kraakman, *supra* note 11, at 688–95; see also Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265 (2014).

sufficiently enhance detection of misconduct and enforcement. Therefore, it would be difficult to justify an approach like that of U.S. prosecutors if it did not induce detection and investigation by a more effective investigative entity, rather than simply enabling private funding of investigations that might be less effective than ones prosecutors would conduct.

This Article's principal contribution is to show that other countries' decisions about how to structure enforcement policy should account for legal rules governing investigations that materially impact the expected public benefits from U.S.-style models of corporate enforcement. This Part discusses conditions in which differences in the law governing corporate investigations are most likely to matter and the policy implications that follow from such differences—both for other nations and for continued domestic debate about how to improve upon the U.S. approach.

#### A. POLICY IMPLICATIONS FOR OTHER COUNTRIES

Criminal resolutions that offer a more favorable form of settlement and lower sanctions to both companies that self-report and those that cooperate represent a calculated trade-off: they accept some reduction in companies' incentives to prevent misconduct as the cost of enhancing companies' incentives to help enforcement authorities sanction misconduct. This policy promotes deterrence—both by speeding detection and remediation and enhancing the deterrent impact of individual sanctions—as long as enforcement policy is properly structured and the law governing corporate investigations leaves corporations better able to detect or investigate misconduct than government officials, independent of resource concerns.

The analysis in Part III reveals that this condition is not necessarily met around the world. Legal doctrines in many countries grant prosecutors greater power to compel witness cooperation, and greater access to corporate documents and electronic evidence than in the United States. Moreover, firms operating overseas regularly have less ability to detect misconduct by monitoring employees *ex ante*, investigating in response to misconduct detected in other companies, or using in-house counsel to investigate than firms in the United States. Foreign firms also often face more impediments and greater cost in investigating identified misconduct as a result of employment laws, data privacy laws, and laws governing legal privilege. These differences have implications for other countries considering policies that offer non-conviction resolutions and lower sanctions for corporate investigative efforts.

### 1. Non-Trial Resolutions as a Substitute for Public Expenditures on Enforcement

In theory, the law governing corporate investigations in some countries could give prosecutors an unambiguous advantage over corporations in detecting and investigating misconduct. This would be particularly likely in a jurisdiction with legally powerful, well-resourced prosecutors, laws impeding investigative actions by private firms, and robust laws both protecting whistleblowers who report misconduct to authorities and rewarding them financially for their disclosure of crime. (No jurisdiction yet fully meets these conditions.)

In such conditions, a country might choose to allow negotiated guilty pleas or DPAs to permit expedient resolutions, while eschewing more lenient forms of settlement such as NPAs or declinations, or substantial sanction mitigation designed to induce firms to detect wrongdoing, self-report, and cooperate. Resolutions short of conviction would be justified only to overcome barriers to settlement resulting from potential collateral consequences to firms, and substantial sanction mitigation would be unnecessary in agreements designed to avoid or dampen collateral consequences.

Policies that induce corporate investigations could nevertheless enhance enforcement efforts to the extent that legislatures restrict funding for corporate enforcement. However, should government authorities be better able than firms to detect and investigate, then policymakers can better enhance social welfare by increasing resources devoted to public enforcement, rather than using negotiated settlements to encourage self-reporting and cooperation. While the point is speculative, it could turn out that the U.S. government has been able to hold down enforcement expenditures largely because of corporate legal powers under U.S. law and that fundamental differences in those powers abroad will prevent similar budgetary approaches for other nations determined to achieve substantial growth in corporate enforcement.

### 2. Structuring Enforcement Policy: Relative Credit for Self-Reporting and Cooperation

In most countries, government authorities do not enjoy an advantage relative to companies over all aspects of detecting and investigating misconduct. Notwithstanding various private-law impediments to corporate monitoring and investigations, corporations generally appear to be better able to detect misconduct than the government due to their superior access to information about their own activities and their ability to create effective

internal reporting systems. Firms' comparative detection advantage is likely to persist as long as other countries resist adoption of effective bounty regimes and strong whistleblower protections.<sup>191</sup> In addition, corporations are likely better able to investigate misconduct within their own operations overseas than are domestic prosecutors.

Nonetheless, in some jurisdictions, properly resourced enforcement officials could be in a better position to investigate domestic misconduct that has been brought to their attention. Adequately funded investigators are particularly likely to have a comparative investigative advantage in countries that grant prosecutors the ability to compel testimony while restricting firms from compelling testimony or broadly searching internally stored data.

Thus, some countries likely have more to gain from inducing corporations to report undetected misconduct than from inducing corporate investigation and cooperation with respect to previously detected misconduct. This has implications for enforcement policy. Countries that use negotiated settlements to induce self-reporting and cooperation face a tradeoff between encouraging self-reporting versus cooperation following a failure to self-report.<sup>192</sup> Both self-reporting and cooperation enable the government to sanction a company for misconduct that otherwise would not have been sanctioned. Self-reporting has the greatest impact on a company's likelihood of being held liable.<sup>193</sup> Thus, it imposes the greatest potential cost on the company. Where well-funded prosecutors have robust enforcement powers, and companies are impeded from investigating by employment and data privacy laws, governments may benefit greatly from corporate self-reporting but gain little from inducing corporate investigations. Such countries should ensure that the primary benefit of entering into a non-trial resolution is reserved for companies that self-report undetected misconduct.

Given the enormous potential cost of collateral consequences of conviction, the strongest incentive available to government authorities is the offer of a DPA, NPA, or declination, instead of a guilty plea or trial conviction. The benefit to a firm of avoiding debarment or exclusion often

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191. Companies' comparative advantage at detection arises in part from their ability to induce employees to report potential misconduct internally. See Arlen & Kraakman, *supra* note 11, at 693; Arlen, *supra* note 10, at 265–66; see also *supra* note 50 (discussing evidence that companies detect much more misconduct than do government authorities). Governments that do not offer compensation to persons who report misconduct cannot expect to realize high levels of reporting.

192. In theory, sanctions can be structured to ensure that companies have incentives to self-report (and then cooperate), and also have an incentive to cooperate even if they did not self-report. Arlen & Kraakman, *supra* note 11, at 703–04; Arlen, *supra* note 6, at 145. This approach requires imposing truly enormous sanctions on companies that detect misconduct and fail to self-report, while offering such firms some fine reduction if they nevertheless cooperate.

193. Arlen & Kraakman, *supra* note 11, at 699.

will far outweigh the impact of any fines the company might pay in a settlement.<sup>194</sup> The insight that the benefit of obtaining a favorable form of settlement dwarfs the benefit of fine mitigation applies with particular force in the many countries that impose relatively low maximum sanctions on corporations convicted of misconduct.<sup>195</sup>

Because insulation from conviction can be the government's strongest source of leverage, countries that gain relatively little from corporate cooperation should allow firms to obtain the most favorable forms of settlement only if firms take actions that enable enforcement officials to discover undetected misconduct, or provide material evidence the government otherwise would not have obtained. This means they should deviate from the U.S. approach.

U.S. policy in effect offers companies that committed widespread misconduct or misconduct involving senior management the same form of resolution whether they self-report *and* cooperate or only cooperate. Both are likely to receive a DPA (or in some cases an NPA). Thus, the offer of a DPA does not provide a strong incentive to self-report. Firms that self-report are presumptively eligible for a 50 percent reduction in the fine instead of the 25 percent reduction available to those that only cooperate. Yet this fine mitigation is not sufficient to encourage reporting of misconduct that is likely to remain undetected if the firm stays silent. Thus, companies detecting serious misconduct are unlikely to self-report because they know that if the government eventually detects the wrongdoing the company can use cooperation to obtain a DPA or NPA as well as fine mitigation.<sup>196</sup>

By contrast, in some countries, corporate cooperation is less likely to yield valuable evidence that prosecutors could not obtain themselves as a result of laws that constrain corporate investigations. Such countries may best enhance enforcement and deter misconduct by restricting access to the most favorable forms of settlement (DPAs, NPAs, and declinations) to companies that either self-report misconduct or report additional instances of misconduct of which enforcers are unaware. This would both encourage companies to share information about misconduct that they detect and give them additional reason to implement measures to encourage employees to

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194. See Arlen, *supra* note 6. Further research should explore the complex question of debarment and delicensing consequences for firms convicted of crime in jurisdictions outside the United States, as well as the effects within each active enforcement jurisdiction of criminal convictions imposed on firms under the laws of other nations.

195. See THE LIABILITY OF LEGAL PERSONS FOR FOREIGN BRIBERY, *supra* note 10 (discussing corporate criminal liability).

196. This is so even if the firm obtains a 50 percent fine reduction for self-reporting, but only a 25 percent reduction for cooperation, as long as the risk of detection if the firm does not self-report is less than 50 percent (less than half the risk if it reports).

report misconduct internally.

These goals could be achieved by offering declinations (with full disgorgement of all profits from the misconduct) to companies that self-report, cooperate, or remediate, while allowing those that cooperate only to obtain a DPA with little fine mitigation where conviction would trigger mandatory but socially undesirable debarment or delicensing. When conviction would not trigger mandatory collateral sanctions, enforcement policy could restrict DPAs to companies that self-report previously undetected misconduct, fully cooperate, and remediate, while requiring firms that only cooperate to plead guilty in return for a reduced fine. Corporate cooperation that produces evidence the government could have obtained on its own likely would not suffice to justify use of a DPA. In the extreme situation of a company unable to produce evidence that the government cannot readily obtain, enforcement policy could offer little mitigation for cooperation.<sup>197</sup> Policy could reserve the main benefit—avoidance of conviction—for firms that self-report, providing information prosecutors could not obtain on their own.

### 3. Reforming Laws Governing Corporate Investigations

Finally, some countries might benefit from reconsidering some laws governing corporate investigations. Some of these laws, such as those protecting employees' rights, arise out of deep social commitments and are not likely candidates for change. Others, however, such as the scope of legal privileges governing corporate investigations and rules governing corporations' ability to process their own documents and emails, could warrant modification in countries where the present scope of such laws could discourage corporate detection and investigation of harmful misconduct.

#### B. POLICY IMPLICATIONS FOR THE UNITED STATES

This Article's analysis also has implications for U.S. enforcement policy. U.S. policy does not guarantee that companies that self-report, cooperate, and remediate serious misconduct will fare better than those that simply cooperate. Under current policy, companies that self-report large or

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197. See Arlen & Kraakman, *supra* note 11, at 767 (optimal mitigation for policing, either self-reporting or cooperation, depends on its impact on the firm's probability of sanction); Arlen, *supra* note 6, at 181 (same). To illustrate, a policy that reduces the sanction imposed on companies that self-report and cooperate from \$100 million to \$50 million will not reduce the expected cost of misconduct to companies that expect to self-report and cooperate if the decision to invest in detection, self-reporting, and cooperation increases the expected likelihood of detection and sanction from 25 percent to 50 percent. Absent such a policy, companies face an expected sanction of \$25 million (a 25 percent chance of a \$100 million fine). With the policy, companies that expect to self-report and cooperate also face an expected sanction of \$25 million (a 50 percent chance of a \$50 million fine).

wide-spread misconduct can be subject to a DPA, rather than a declination, just like companies that cooperate. The additional fine mitigation for self-reporting is unlikely to be large enough to outweigh the cost to the company of reporting misconduct the government is unlikely to detect on its own. The DOJ's decision to mute incentives to self-report in order to grant larger incentives to cooperate likely reflects the perceived substantial benefit to U.S. prosecutors of corporate cooperation, particularly with respect to overseas misconduct. Nevertheless, the approach dampens companies' incentives to self-report misconduct in cases that are likely to end in a DPA or similar resolution.

In addition, U.S. enforcement practice does not ensure that firms cooperate when it is most valuable to prosecutors: at the early stages of the investigation. Instead, U.S. prosecutors have granted companies credit for cooperation even when corporate cooperation arrives quite late in the government's investigation, thereby reducing the penalty to companies of delay. This approach likely reflects the perceived benefit to prosecutors of corporate cooperation even later in investigations. Yet each prosecutor's decision to award credit to benefit a single investigation undermines the overall incentive for firms to cooperate early, when it matters most. U.S. enforcement likely would be more effective if officials (1) reduced the amount of cooperation credit for companies investigating overseas in countries whose laws undermine the effectiveness, or value to U.S. prosecutors of, corporate cooperation and (2) ensured that credit cannot be obtained for cooperation that does not arrive until the government has sufficient evidence to prove the crime.

In the future, U.S. authorities may find that they obtain less benefit from corporate cooperation, particularly late-stage cooperation, than in the past. Courts may be restricting companies' ability to fully share the benefits of investigations without waiving privileges.<sup>198</sup> Reforms to data privacy laws in the United States could impact corporate investigations. In addition, U.S. prosecutors may gain less from inducing corporate investigations overseas because of both the rise of parallel investigations by overseas authorities and the negative impact on overseas investigations of data privacy and secrecy laws, as well as blocking statutes that can preclude companies from sharing the results of investigations with overseas authorities without domestic permission. To the extent that U.S. prosecutors both benefit from information obtained by foreign prosecutors<sup>199</sup> and obtain less benefit from

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198. See U.S. Sec. & Exch. Comm'n v. Herrera, 324 F.R.D. 258, 258 (S.D. Fla. 2017)

199. See *United States v. Allen*, 864 F.3d 63 (2d Cir. 2017) (reversing criminal convictions in the Libor scandal on the ground that testimony in federal court in the United States had been tainted, in violation of the defendants' Fifth Amendment rights, by witness's exposure to defendants' compelled

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inducing cooperation by companies operating overseas, they may wish to restrict companies' ability to benefit from pure cooperation that does not provide information the government could not have readily obtained. This would have the effect of enhancing the relative benefit of self-reporting prior to cooperating.

Finally, analysis of laws overseas reveals that the United States could potentially benefit from reforming laws governing legal privileges to allow for selective waiver permitting companies to disclose to government authorities while otherwise retaining privileges. This would enable U.S. prosecutors to obtain the full informational benefit of corporate investigations and cooperation.

### CONCLUSION

This Article has offered three principal contributions to the literature and policy debate on corporate crime. The first is to demonstrate the pivotal function of laws affecting the collection and use of evidence of wrongdoing—testimonial rights and duties, legal privileges, data and document collection and protection regimes, and other doctrines—in allocating powers between corporations and governments in corporate criminal enforcement. This largely unexamined phenomenon comes into sharp relief as soon as one begins to think about the implications of adopting a U.S.-style model of corporate criminal law and enforcement in other jurisdictions.

The second contribution has been to show how differences in the law governing corporate investigations in overseas nations are likely to arrange the relative powers of prosecutors and firms quite differently. Overseas, enforcers may have more freedom to compel witness statements without creating complications for later litigation, may have the ability to extract and analyze firms' electronic evidence without restriction, and may face far fewer barriers to uncovering evidence of wrongdoing that involves communications between lawyers and clients. Companies may be much more restricted in their ability to compel employee cooperation in internal investigations, may face obstacles to fast collection and review of employees' electronic communications, and may be unable to shield and control the fruits of their investigative efforts behind legal privileges. The implication is that officials overseas should consider different sanctioning and settlement policies in their efforts to reduce corporate crime. The tradeoffs among forms and types of prosecutions and settlements, as well as the forms and degree of sanctions in such proceedings, are dependent upon



the relative roles and powers of public prosecutors and private firms in the investigation of corporate crime.

The third contribution has been to identify the policy choices in designing effective systems using corporate criminal liability as a mechanism for reducing corporate crime, given differences in nations' investigative laws. As European and other nations continue down the path of modernizing their approaches to combatting corporate crime, a fruitful research agenda—teaching much more about corporate enforcement both abroad and within the United States—is sure to follow.