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Richard E. Moberly, *University of Nebraska*

Lindsey E. Wylie, *University of Nebraska at Omaha*

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An Empirical Study of Whistleblower Policies in United States Corporate Codes of Ethics

Richard Moberly & Lindsey E. Wylie

Companies have issued Codes of Ethics (also called Codes of Conduct) for decades, and these Codes increasingly have contained provisions related to whistleblowing. For example, Codes often encourage or even require corporate employees to report incidents of misconduct they witness. Code provisions describe the types of misconduct employees should report and provide numerous ways for employees to make reports. Moreover, companies use Codes to promise employees that they will not retaliate against whistleblowers. Indeed, because these whistleblowing provisions have become an important part of a corporation's internal control and risk management systems, they merit closer examination to determine exactly what they require and promise. Accordingly, this chapter describes the results of the first comprehensive empirical study of whistleblower provisions contained in United States corporate Codes of Ethics.

Section 1 of the chapter provides a brief history of whistleblower provisions and Codes of Ethics. Although companies once issued Codes voluntarily, beginning in the 1990s, companies received substantial legal incentives to issue Codes, resulting in an explosion in popularity. The Sarbanes-Oxley Act of 2002, however, for the first time required publicly-traded companies in the United States to issue Codes. Subsequent regulation mandated that these Codes contain, among other things, provisions related to encouraging and protecting whistleblowers.

Section 2 describes the methodology from a study of these whistleblower provisions. This study replicates and extends previous studies while also utilizing a methodology that distinguishes it from its predecessors. By focusing on companies listed on U.S. stock exchanges, this study provides an important extension of previous studies, which focused on whistleblower provisions in corporate Codes of European companies (Hassink et al. 2007) and of companies listed on the London Stock Exchange (D. Lewis & Kender 2007; D. Lewis & Kender 2010). However, in contrast to the methodology utilized by those prior studies, which relied on self-selected responses to surveys, this study used public documents to obtain Codes from a stratified sample of 90 publicly-traded companies. We examined over 100 variables related to the whistleblower policies we located.

We present the results of the study in Appendix A, and we discuss some of the more interesting findings in Section 3 of the chapter. First, the results indicate that a consensus

has emerged among U.S. corporations regarding the scope and content of the whistleblower provisions in their Codes. Second, these provisions may provide broader and better whistleblower protection than current U.S. statutory and tort law. This conclusion, however, is subject to the considerable qualification that whistleblowers may be unable to enforce many, if not most, of these provisions because of the prevalence of the at-will rule in U.S. employment law.

Finally, Section 4 of the chapter discusses some of the study's limitations and presents some suggestions for further research.

1. Whistleblower Provisions in Codes of Ethics⁵

In the 1970s, U.S. corporations voluntarily adopted broad corporate Codes of Ethics in response to various scandals of the time, including bribery of foreign government officials, fraud and overbilling in the defense industry, and insider-trading allegations. (Pitt & Groskaufmanis 1990, pp.1582-99; Krawiec 2003, p.497) These Codes proscribed a wide range of illegal conduct to send a message to outsiders (such as shareholders and government regulators) that companies were addressing potential problems, and also to clarify legal boundaries for their employees. (Berenbeim 1987, pp.13-14; Jackall 2007, p.1134; Pagnattaro & Peirce 2007, pp.383-84) However, these early Codes rarely included whistleblower provisions or identified how employees could report corporate misconduct. (Moberly 2008, p.990)

The federal Organizational Sentencing Guidelines (OSG), which the U.S. government released in 1991, changed the emphasis corporations placed on Codes of Ethics because the OSG provided reduced penalties for a corporate criminal defendant that could demonstrate it implemented an 'effective' compliance system prior to engaging in misconduct. (Krawiec 2003, pp.498-99; Pagnattaro & Peirce 2007, p.384) Issuing a corporate Code of Ethics became an important way for corporations to demonstrate the effectiveness of its compliance system, in large part because the OSG's commentary section specifically suggested that companies must communicate their ethical regulations to its employees. (U.S. Sentencing Guidelines Manual 1991, s. 8A1.2, Application Note 3(k)(5)) Moreover, in 2004, the OSG expanded the requirements for an 'effective' system to specifically mandate that organizations publicize a system for employees to 'report or seek guidance regarding potential or actual criminal conduct.' (U.S. Sentencing Guidelines Manual 2004, s. 8B2.1(b)(4)(A)) The OSG also required that companies offer a reporting system that employees can use 'without fear of retaliation.' (U.S. Sentencing Guidelines

⁵ Parts of this section summarize a history of Codes of Ethics presented more fully in Richard Moberly, *Protecting Whistleblowers By Contract*, 79 COLO. L. REV. 975, 988-95 (2008).

Manual 2004, s. 8B2.1(b)(5)(C)) These OSG requirements naturally led corporations to use Codes both to communicate the companies' expectations to their employees and to inform their employees that they would not be retaliated against if they reported wrongdoing to the company.

A series of court cases in the 1990s supplemented the OSG incentives to use Codes of Ethics as part of an overall legal compliance system. For example, the Delaware Chancery Court held that a corporate director could avoid a breach of fiduciary duty of care claim if the director implemented a sufficient 'corporate information and reporting system.' (In re Caremark Int'l Inc. 1996, p.970) Further, the U.S. Supreme Court determined that a company that implemented an internal grievance procedure would have an affirmative defense to sexual harassment claims. (Burlington Indus. Inc. v. Ellerth 1998, p.765, Faragher v. City of Boca Raton 1998, p.807) Later, the Equal Employment Opportunity Commission advised that grievance systems would not satisfy the Supreme Court's test unless the employer 'make[s] clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints.' (U.S. Equal Employment Opportunity Commission 1999) Ultimately by the year 2000, corporate 'best practices' for internal reporting systems included a 'comprehensive whistleblower policy that encouraged employees to report misconduct and that included a promise not to retaliate against them.' (Moberly 2008, p.993) Indeed, at least one survey of human resources professionals, conducted in 1993, found that about two-thirds of companies with internal disclosure policies promised protection from retaliation for employee whistleblowers. (Barnett et al. 1993, p.131)

The passage of the Sarbanes-Oxley Act of 2002 brought new attention to corporate Codes and to the importance of whistleblowing. Section 301 required every publicly-traded company to provide an anonymous route for employees to disclose questionable accounting or auditing matters to the company's audit committee. (15 U.S.C. s. 78f(m)(4)) Section 406 of the Act required publicly-traded companies to disclose whether the company had a Code of Ethics that applied to senior financial officers, and, if it did not have such a Code, to provide a public explanation of why it did not. (15 U.S.C. s. 7264(a)) Subsequently, the Securities and Exchange Commission (SEC) issued regulations under the Act that expanded upon these baseline statutory requirements in three significant ways. First, companies must disclose Codes applying to principal executive officers as well as to senior financial officers. Second, the regulations expanded Sarbanes-Oxley's definition of 'Code of Ethics' to include written standards that promote the 'prompt internal reporting of violations of the code to an appropriate person or persons identified in the code.' Third, companies must provide their Codes of Ethics to the public in one of three ways: as an exhibit to its publicly available

annual report, by posting it on its website, or by providing a copy without charge to any person requesting it. (17 C.F.R. s. 229.406)

The SEC also asked the U.S. stock exchanges to evaluate their listing standards related to corporate governance. In response, three of the largest stock exchanges issued new listing standards that, among other things, made new requirements of listed companies related to whistleblowing policies and Codes of Ethics. Interestingly, although the exchanges promulgated similar standards, they all vary in significant ways from each other, as well as from Sarbanes-Oxley's statutory requirement and the SEC's regulatory rules.

The New York Stock Exchange (NYSE) now requires its listed companies to issue a Code of Ethics that applies to all its directors, officers, and employees – a significant change from Sarbanes-Oxley's application of Codes to senior financial officers. The NYSE also states that corporate Codes should 'encourage' good faith reporting of 'violations of laws, rules, regulations or the code of business conduct' to 'supervisors, managers or other appropriate personnel.' (on 'good faith' see section IV below) Codes also should encourage reports when an employee is 'in doubt about the best course of action in a particular situation.' With regard to protections for whistleblowers, the NYSE requires that the 'company must ensure that employees know that the company will not allow retaliation.' NYSE companies must make the Code of Ethics available on the company's website or in print to any shareholder who requests it. (NYSE Listing Manual, s. 303A10)

The NASDAQ makes similar, but slightly different, requirements of its listed companies. Like the NYSE, NASDAQ company Codes must apply to all directors, officers, and employees and the Code must ensure 'prompt and consistent enforcement of the code' by encouraging the reporting of violations and protecting from retaliation persons who report 'questionable behavior.' However, the NASDAQ rules provide fewer specifics than the NYSE requirements. For example, the NASDAQ rules do not explicitly protect 'good faith' reports, nor do they provide a detailed definition of the type of misconduct that should be reported. Also, the NASDAQ rules do not mandate to whom whistleblower reports should go. Finally, NASDAQ companies only have to make the Code 'publicly available' – the NASDAQ rules do not require posting to the company website. (NASDAQ Interpretative Manual Online, s. IM-4350-7)

Finally, the American Stock Exchange (AmEx) took a different approach by not expanding significantly upon the SEC regulations. Other than requiring its listed corporations to apply their Codes of Ethics to all directors, officers, and employees (similarly to the NYSE and NASDAQ), the AmEx requirements simply mirrored the SEC regulations by mandating a

Code of Ethics that requires reporting violations of the Code to 'an appropriate person.'⁶ Although companies must make the Code 'publicly available,' the AmEx standards did not mention protection from retaliation. (AmEx Company Guide, s. 807)

By 2007, then, the combination of Sarbanes-Oxley, the SEC regulations, and the stock exchange listing standards effectively moved the corporate practice of producing a Code of Ethics from a voluntary or incentive-based system to a mandatory requirement for publicly-traded companies. (Moberly 2008, pp.988-95) Furthermore, the stock exchange listing standards required companies to encourage employees to report misconduct through whistleblower reporting channels described in corporate Codes of Ethics. In addition, new mandatory provisions of the NYSE and the NASDAQ went even further by requiring company Codes to include a promise to protect employees from retaliation for reporting corporate misconduct through those internal channels.

2. Methodology

This study used content analysis to examine the types of protections provided by U.S. corporate Codes of Ethics now that these substantial changes have had time to take effect. It differs from previous studies of Codes of Ethics in two important ways. First, most other studies of Codes catalog various provisions contained in Codes of Ethics generally. This study focuses discretely on a Code's whistleblower provisions. Only two other studies of corporate Codes have a similarly narrow focus. Hassink, et al. examined whistleblower provisions issued by European companies, and Lewis and Kender have on two separate occasions examined provisions issued by companies listed on the London Stock Exchange. (Hassink et al. 2007; D. Lewis & Kender 2007; D. Lewis & Kender 2010) This study provides an important extension of those studies by focusing on companies listed on U.S. stock exchanges.

Second, this study's methodology differs from Hassink and from Lewis & Kender. The Hassink study sent emails to the largest European listed companies asking whether they had a whistleblower protection program and, if so, whether the company would send the text of the program. The researchers accepted specific policy documents as well as Codes of Conduct with a whistleblower provision. After receiving a response rate of 25%, the authors added whistleblower policies from 26 other companies listed on the Dutch AEX index and the SWX Swiss exchange, bringing their total sample size to 56 companies. (Hassink et al. 2007, p.31) Lewis and Kender's studies sent questionnaires to companies on the FTSE 250, which contains the 101st to the 350th largest companies with their primary listing on the London

⁶ In 2008, after this study was completed, the NYSE purchased the AmEx.

Stock Exchange. In 2007, 32% of the companies responded with information about their whistleblowing procedures, (D. Lewis & Kender 2007, p.9), while the 2010 survey had a slightly lower response rate of 26% (D. Lewis & Kender 2010, pp.8-9).

The current study, by contrast, used public documents to obtain Codes from a randomly-selected sample of thirty publicly-traded companies from each of the three largest U.S. stock exchanges, the NYSE, the NASDAQ, and the AmEx, providing a sample of ninety companies. The random sample was obtained from a list generated by searches of annual SEC filings for the calendar year 2007. The searches were run on 10kwizard.com, a fee-based subscription service that collects corporate filings. We found the company Codes in each company's annual filing (called the Form 10-K or 10-KSB, collectively the 'Form 10s') or on the company's website.

The first author developed a Code Book containing numerous variables, many of which were based on variables used in Hassink's study of whistleblower provisions in European Codes. (Hassink et al. 2007) The Codes were examined with regard to their (1) general content, scope, and tone; (2) the nature of the corporate violations that whistleblowers were instructed to report; (3) the officials to whom the Codes indicate that wrongdoing should be reported; (4) any reporting guidelines or formalities; (5) any provisions related to confidentiality or anonymity; (6) the extent of the protection from retaliation provided by the Codes; and (7) details regarding the investigation of any whistleblower report.

After extensive training, two research assistants (RAs), both upper-class law students at a Midwestern law school, reviewed and coded each Form 10 and Code from all the companies contained in the sample. Their inter-coder reliability for all ninety cases across all the variables was 92.4%. After the coding, the two RAs met and resolved the differences for the remaining variables. When they were unable to reach an agreement, the first author determined the code that would be used in the study. Although Form 10s for all ninety companies were examined, one AmEx company refused to provide its Code of Ethics, so coders ultimately examined eighty-nine Codes of Ethics.

3. Discussion

Appendix A provides a table with the frequency distribution for the variables mentioned above. This section will highlight two of the more interesting findings from the study.

An Emerging Consensus

First, the results indicate that U.S. corporations have developed a consensus regarding the contents and scope of whistleblower provisions in corporate Codes. This consensus has emerged despite the facts that U.S. statutory and regulatory law provides little guidance

regarding the Codes' contents, and that the stock exchanges differ widely on the requirements they impose upon corporations.

Who Do the Codes Cover?

As noted above, Sarbanes-Oxley, the SEC regulations, and the stock exchange listing requirements all contain slightly different mandates on who should be covered by a company's Code of Ethics. Sarbanes-Oxley mentions only senior financial officers, the SEC regulations add principal executive officers, and all three stock exchanges require the Code to cover 'all directors, officers, and employees.' The majority of Codes comply with the stock exchanges' broad requirements: 98.9% cover all employees, 78.7% cover officers and senior management, and 82.0% cover directors. Interestingly, only 22.5% of the Codes specifically cover 'financial officers,' the one group mentioned by both Sarbanes-Oxley and the SEC regulations. About a quarter of the Codes (25.8%) permit contractors (i.e. people who are not 'employees' but provide work for the company, such as self-employed consultants) to report wrongdoing and over half (53.9%) explicitly mention that the Code covers subsidiary corporations or the entire corporate family of companies.

Is Reporting Required or Encouraged?

Although some exceptions exist, the law rarely requires employees (or any individual) to report illegal behavior. (Tippett 2007, pp.11-12; Feldman & Lobel 2010, pp.1163-67; Tsahuridu & Vandekerckhove 2008, p.108) The SEC follows this norm and only mandates that companies 'promote' internal reporting of misconduct. U.S. corporations, however, have responded to this regulatory mandate by going beyond merely 'promoting' whistleblowing. Instead, corporations require employees to report misconduct: 96.6% of these Codes make whistleblowing a duty of employment. Thirty-six percent also 'encourage' employees to report misconduct. In other words, U.S. companies recognize the importance of whistleblowing to their own internal control mechanisms by demanding that every employee become a whistleblower if the employee witnesses misconduct.

What Violations Matter to the Companies?

Whistleblowers must always determine whether the misconduct they witness is the type of wrongdoing the company wants reported and whether the company will protect them for disclosing. To resolve the question of what violations should be reported, the SEC and the listing standards provide a variety of suggestions. The SEC states that 'violations of the code' should be reported - no other types of misconduct, such as illegal or unethical behavior, are mentioned. As for the listing standards, the NYSE requires companies to encourage reports of 'violations of laws, rules, regulations or the Code of business conduct'

and the NASDAQ encourages reports of 'questionable behavior.' The AmEx simply adopts the SEC regulation approach by addressing only reports of Code violations.

A large percentage of companies (93.3%) follow the SEC regulations precisely and indicate that the misconduct to be reported are violations of the Code itself. However, many companies expand this basic requirement and require employees to report a broader range of wrongdoing. For example, 76.4% broaden the reporting requirement to include violations of the law or regulations and more than half (52.8%) mandate reporting 'unethical' or 'improper' conduct. Taken together, the Codes' requirement that employees report violations of the Code, illegal conduct, and unethical behavior indicate that companies want employees to report an extremely broad range of potential misconduct. Perhaps not coincidentally, these three areas mirror the seminal definition of 'whistleblowing' set forth by Janet Near and Marcia Miceli in 1985: whistleblowing involves the reporting of 'illegal, immoral, or illegitimate' behavior. (Near & Miceli 1985, p.4)

Interestingly, many corporations went beyond these general instructions to point out specific types of misconduct that should be reported. These categories may shed some light on the type of misconduct corporations truly think will be beneficial to have reported. Indeed, from one perspective, the Codes identify specific areas to be reported that align with the corporation's self-interest. For example, the most frequently identified misconduct to be reported was conflicts of interest – either one's own conflict or the conflict of others – by 79.8% of the Codes. This outcome was followed by requests that employees report 'financial reporting problems, including accounting, internal controls or auditing problems' – by 65.2% of the Codes – and fraud (36.0%). By contrast, Codes did not identify areas that might have broad societal benefits nearly as frequently. Health and safety issues were the highest (29.2%), but other areas were remarkably low, such as environmental issues (7.9%), criminal offenses (3.4%), insider trading, bribery, and money laundering (9.0%).

Only 21.3% of the Codes identified harassment and discrimination as problems that should be reported. This result seems low, because a pair of 1998 U.S. Supreme Court cases gave companies who implement internal reporting mechanisms for complaints about harassment an affirmative defense in cases in which harassment has been alleged. (*Burlington Indus.Inc. v. Ellerth* 1998, *Faragher v. City of Boca Raton* 1998) The conventional wisdom after those cases was that companies would implement complaint channels in order to utilize the affirmative defense. (Callahan et al. 2002, pp.192-93; Sturm 2001, p.557) According to the results of this study, although companies utilize complaint channels, only about 1 in 5 specifically identify harassment as one of the problems that should be reported. One explanation may be that procedures for harassment complaints are identified more thoroughly in other documents, such as an employee handbook.

Who Should Receive Reports of Misconduct?

The SEC regulations and the AmEx listing standards are vague on who should receive reports of misconduct. Both state that reports should be made to 'an appropriate person ... identified in the code.' The NASDAQ standard does not identify a person to receive reports, while the NYSE states that reporting should be to 'supervisors, managers, or other appropriate personnel.' Given this variety among different regulatory regimes, the study examined who Codes said should receive a whistleblower's disclosure of wrongdoing.

Contrary to the vagueness of the SEC Regulations, as well as the AmEx and NASDAQ listing standards, many Codes listed several possible recipients of whistleblower reports, either as a primary contact for whistleblowers or a secondary option. By far the most popular person identified as a potential recipient is the employee's supervisor, who was listed in 75.3% of the Codes. This result seems to indicate that corporations, by and large, would still prefer that employees make whistleblower reports through the chain of command. Perhaps not coincidentally, employees tend to prefer reporting to supervisors as well: one recent survey found that 46% of whistleblowing reports were given to supervisors, far more than any other source. (Ethics Resource Center 2010, p.5)

Two types of recipients were listed by almost half of the Codes: the corporate audit committee (55.1%) and an employee hotline (47.2%). The popularity of these options may be a reflection of Sarbanes-Oxley's requirement that publicly-traded companies provide a disclosure channel directly to the company's audit committee. (Sarbanes-Oxley Act of 2002, s. 301) On the other hand, a 1999 study of Fortune 1000 companies found that 51% of those companies had an ethics hotline for employees to report misconduct before Sarbanes-Oxley was passed in 2002. (Weaver et al. 1999, p.290)

Moberly has theorized that a disclosure channel like a hotline should increase the number and quality of whistleblower disclosures over time. (Moberly 2006, pp.1141-50) Whether this is true remains to be seen, as hotlines have received mixed reception from actual employee whistleblowers. For example, the same survey mentioned above found that only about 3% of internal reports of misconduct went to company hotlines. (Ethics Resource Center 2010, p.5) Regardless, clearly some corporations have adopted this approach and begun advertising their hotlines through their Codes of Ethics. Indeed, some scholars have indicated that companies have responded to Sarbanes-Oxley's requirement by contracting with an independent, third-party hotline to receive employee reports. (Miceli et al. 2008, p.158) This study confirms that view in part, as many (36.7%) of the companies that indicated a hotline should receive an employee report also indicated that the hotline was managed by a third-party. That said, more than half (57.1%) of the companies that mentioned a hotline did not

provide any contact details for the hotline, which seems to undermine the company's reliance on this channel to receive valuable information.

We also examined whether companies listed recipients of whistleblowing reports as 'primary' or 'secondary' options, because often companies mention that reports should first be made to a particular recipient, but then could also be made to others. In fact, 98.9% of the companies mention a secondary contact. However, about 2/3 of the companies did not provide any reason for reporting to a secondary contact.

Of the remaining companies, we examined when companies told their employees a secondary contact should be used. The most frequent response was if the whistleblower felt 'uncomfortable' or wanted 'anonymity' (58.6%). Other reasons, in descending order of frequency were:

- if the whistleblower thought that after reporting to the primary contact, the report was not handled 'properly' or if the whistleblower was not 'satisfied' with the response from the primary contact (48.3%);
- if the primary contact was not 'appropriate' or if there were difficulties with 'communication' (34.5%);
- the absence of a primary contact (for example, if the committee does not exist); (10.3%);
- if the report contains a serious violation of the law (3.4%).

Not surprisingly, all of the Codes focused almost exclusively on internal recipients. (Only two of the 89 Codes mentioned an external recipient, such as a regulatory authority or Congress.) Although scholars debate whether whistleblowers should report internally or externally, it clearly is in a corporation's best interest to encourage internal reports. (Callahan et al. 2002, p.195) Corporations can address wrongdoing at an earlier stage and perhaps avoid negative publicity that can surround disclosure of illegal behavior. (Dworkin & Callahan 1991, pp.300-01) Additionally, by providing employees with direction on how to report internally, companies may avoid employees going externally in the first place. As Janet Near and Marcia Miceli have noted, '[p]reliminary research evidence indicates that whistle-blowers use external channels when they don't know about the internal channels and when they think the external channels will afford them protection from retaliation.' (Near & Miceli 1996, p.515) Moreover, studies demonstrate that employees typically are better off reporting internally because internal whistleblowers experience less retaliation than external whistleblowers. (Dworkin & Callahan 1991, pp.301-02)

The results also indicate that perhaps employees receive confusing message on who should receive a whistleblowing report. Over two-thirds of the Codes provide different recipients for reports depending on a variety of factors. Over half (56.2%) vary the recipient by the type of misconduct being reported. For example, 49.4% of the companies identify a special contact for reporting financial problems specifically. Some vary by who is engaging in misconduct (14.6%), while others vary because of who is doing the reporting (18.0%). That said, some variability is beneficial. For example, as noted above, numerous companies provided a secondary contact to whom a whistleblower could report if the whistleblower was not comfortable with the primary person identified or the whistleblower was not satisfied with the response from the primary option. Having several options – such as a supervisor, HR manager, and hotline – is important so that employees can avoid what Moberly has called the ‘blocking and filtering of whistleblower reports’ that often describe the reaction of middle management to whistleblower reports. (Moberly 2006, p.1121)

Do Companies Promise Not to Retaliate Against Whistleblowers?

Almost all (91.0%) of the companies either promise that the company will not retaliate against an employee whistleblower or affirmatively prohibit retaliation against whistleblowers. Almost one-third (30.3%) also state that the company will punish anyone who retaliates against a whistleblower. These promises go well beyond anything required by Sarbanes-Oxley or the SEC, neither of which require any sort of corporate promise regarding retaliation.⁷ Of the stock exchanges examined by the study, the NYSE and the NASDAQ explicitly mention that Codes of Conduct should include protection from retaliation.

None of the legal sources, however, give much guidance on the type of reports that will receive protection. Only the NYSE states that reports should be made in ‘good faith’ – no other listing exchange makes any other requirement. In that vacuum, companies seem to be incorporating several consistent practices. Over three-fourths of the companies (76.4%) adopt the NYSE ‘good faith’ requirement, while only 11.2% use the more rigorous ‘reasonable belief’ standard found in many whistleblower statutes. Companies claim to protect reports of ‘suspected’ violations (68.5%) as well. In addition to these carrots, companies use the stick as well: 21.3% state that they will punish false or malicious reports.

Are Confidentiality or Anonymity Guaranteed?

Neither Sarbanes-Oxley, the SEC regulations, nor the stock exchange listing requirements address whether Codes need to ensure confidentiality or anonymity for whistleblower reports generally. Despite this lack of guidance, a majority of the company Codes claim that all

⁷ That said, Sarbanes-Oxley does prohibit retaliation against employees who report various types of financial fraud. (18 U.S.C. s. 1514A)

reports made by whistleblowers will be kept confidential (59.6%) and that all violations can be reported anonymously (56.2%). That said, a quarter of the companies do not address confidentiality (25.8%) or anonymity (27.0%). Another group of Codes only permit confidentiality and anonymity in some cases – 14.6% and 16.9%, respectively. Indeed, 76.4% of the Codes state affirmatively that the company will investigate whistleblower reports, and 27.0% state that they expect employees to cooperate with the investigation. Perhaps the desire to investigate explains why 13.5% of the companies actually discourage anonymity in reporting.

Whistleblower scholars take different views on the value of confidentiality and anonymity as part of the whistleblowing process. Citing a study reporting a 20% decline in whistleblowing after Sarbanes-Oxley's passage, Miceli, Near, & Dworkin assert that 'there is scant evidence that anonymity promotes whistle-blowing.' (Miceli et al. 2008, p.158) They also cite a report from a hotline provider that employee requests for anonymity have decreased from 78% to 48% in the past twenty years 'as employees become more comfortable about reporting.' (Miceli et al. 2008, p.158) Moreover, these same scholars note that anonymity and confidentiality can cause numerous problems, including difficulty in following-up on reports of wrongdoing and problems maintaining confidentiality under certain circumstances. (Miceli et al. 2008, pp.158-59; Miceli & Near 1992, pp.74-76)

On the other hand, studies typically find that individuals are more likely to voice dissenting views if they can do so anonymously. (Miethe 1991, pp.54-57; Sunstein 2003, p.20) This research would predict that Codes that refuse to guarantee anonymity or at least confidentiality may be less successful at encouraging whistleblowing.

The trend in the law seems to be to promote anonymity in order to encourage whistleblowers. The primary example of this trend is Sarbanes-Oxley's requirement that U.S. publicly-traded corporations must provide a channel for employees to report financial fraud to the board of directors anonymously. (15 U.S.C. s. 78f(m)(4)) Companies clearly have responded to this requirement by instituting ways in which employees can make anonymous and confidential reports.

In sum, despite little direction from U.S. statutory or regulatory law, companies in this study seem to have developed whistleblower provisions for their Codes of Ethics that have remarkable consistency. The provisions generally apply to all company employees, and seem to require employees to report a broad range of misconduct to the company. The Codes identify numerous potential recipients of a whistleblower's report, including primary and secondary contacts. In return, the Code provisions promise protection from retaliation for employees who report violations of the code itself, the law, or even ethical violations.

Additionally, companies consistently permit whistleblowers to remain anonymous or keep their disclosures confidential.

Better Protections Than Statutory and Tort Law?

In addition to demonstrating that U.S. companies seemed to have reached a consensus about the content and scope of their Code of Ethics' whistleblower provisions, the study also provides an opportunity to compare the retaliation protection provided by most companies with the protections to whistleblowers afforded by U.S. law generally. That said, we recognize that one of the study's limitations is that it does not present any evidence of how these whistleblower programs are implemented. This study examined what U.S. companies tell the world – it does not provide much information regarding how things actually operate inside the company. Finding a way to get at this 'operational' information would be an important next step to examine how these whistleblower provisions effect a whistleblower's or potential whistleblower's experience inside a U.S. corporation. However, even with this limitation, the study can give some insight into how the combination of these provisions and U.S. law might affect whistleblowers as a formal legal matter. In other words, knowing the scope and extent of these protections allows us to make an argument that these provisions should play some role in legally protecting whistleblowers. Assuming the law has some impact on the behavior of both whistleblowers and corporations, this legal analysis should have some practical impact on the whistleblower's experience.

In fact, given the breadth and consistency of these whistleblower provisions, one conclusion that could be drawn from these results is that U.S. corporate Codes of Ethics may *better* protect whistleblowers from retaliation than statutory or tort law, two areas of law to which we traditionally have looked to provide whistleblowers protection.⁸ Statutory and tort whistleblower protections in the United States contain numerous exceptions and loopholes. (Miethe 1999, pp.147-48; Moberly 2008, pp.980-87) As the Senate noted when it passed Sarbanes-Oxley's whistleblower provision, corporate whistleblowers were 'subject to the patchwork and vagaries' of current law. (S. Rep. No. 107-146 2002, p.19) The corporate Codes, however, across the board, fill these gaps in coverage. Indeed, the data from this study paint a picture of whistleblower protections very different than the protections provided by statute or tort. Companies appear to require more of themselves through their Codes than U.S. law requires for protecting whistleblowers. We set forth three examples below.

Broader Definition of 'Protected Conduct'

⁸ This section reviews and summarizes topics Moberly has addressed previously in *Protecting Whistleblowers by Contract*, 79 COLO. L. REV. 975 (2008). The data from this study support and enhance the arguments he made in that article.

First, the Codes protect a wider variety of whistleblower reports than under current U.S. law. Whistleblower protections in the private sector protect only a limited type of report about very specific illegalities. For example, Sarbanes-Oxley protects only reports about certain types of fraud (18 U.S.C. s. 1514A), while the Surface Transportation Assistance Act of 1982 protects only whistleblower reports related to the safety of commercial vehicles (49 U.S.C. s. 31105(a)). Statutes addressing a specific topic, like nuclear power or clean water or corporate fraud, often will attach a whistleblower provision protecting from retaliation employees who report violations of that particular act. Despite having over 35 of these individualized whistleblower and anti-retaliation statutes, in the U.S. there is no over-arching, generalized whistleblower statute for employees who report any type of illegality or wrongdoing. To be protected under a particular statute's antiretaliation provision, an employee must report the 'right' (i.e., protected) type of misconduct – a whistleblower who reports something different, even if it is illegal, might fall through the gaps in the various statutes' protections. (Moberly 2008, pp.981-83)

A similar problem arises with state tort law. This type of law often provides a remedy for whistleblowers who are fired – they can bring a tort claim for wrongful discharge in violation of public policy. This tort protects employees who act 'in the public interest' by reporting misconduct that the public would want reported. The gaps in this tort coverage, however, are significant. (Westman & Modesitt 2004, p.131) Each of the U.S.'s fifty states has a different definition of what an employee must report in order to be protected – in other words, state courts define the 'public policy' that matters very differently from one another, and not always in a way that is completely predictable. One judge's public policy might appear to another judge to be a private matter, such as petty internal corporate squabbling. (Estlund 1996, p.1657; Moberly 2008, pp.984-86) Furthermore, because tort law is judge-made common law, no official codification of the rules exist for employees to consult before blowing the whistle and the courts' holdings are subject to change on a case-by-case basis.

In short, in order to bring a claim for retaliation or wrongful discharge, an employee must blow the whistle on the 'right' (meaning protected) type of conduct. This leads to landmines for the unwary and a situation in which whistleblowers may have difficulty predicting ahead of time whether they will be protected.

U.S. corporate Codes, however, differ from the current law because they appear to encourage employees to report a much broader range of misconduct. Protecting reports of illegal behavior generally (76.4% of Codes provide this protection) goes well beyond any current statutory protections for reporting misconduct. Many companies go even further by instructing employees to report violations of the Code (93.3%) as well as 'unethical' or 'improper' conduct (52.8%). Codes that speak broadly of reporting 'illegal' or 'unethical'

conduct may better protect whistleblowers and encourage reporting because whistleblower will not have to worry about whether their report falls into the class of reports protected by a particular statute. In fact, these broad provisions could stop what has become a common occurrence in U.S. retaliation cases: the employer trying to demonstrate that what the employee reported was not protected and the employee trying to fit his report into pre-defined legal boxes. Unwary employees inevitably get caught in a game of 'gotcha' after the fact because too often the legal retaliation case focuses on whether the employee reported the right type of misconduct, rather than focusing on whether the employer retaliated in response to that report. (Moberly 2007, pp.113-20) The Codes' broad definitions of what should be reported would place the emphasis in retaliation cases where it should be: on whether the employer retaliated against an employee based upon the employee blowing the whistle.

More Consistent Protections

Second, the law differs from jurisdiction to jurisdiction and from statute to statute regarding other aspects of a whistleblower's protection, such as the person to whom the whistleblower reports. Some laws require a whistleblower to report internally first for certain types of misconduct, others require external reports. (Westman & Modesitt 2004, p.143) Many allow for either, but there is often uncertainty, particularly with some older federal statutes. For example, in the most recent term of the U.S. Supreme Court, the Court refused to decide whether the Fair Labor Standards Act's antiretaliation provision protected internal reports of wrongdoing, leaving employees uncertain regarding whether they will be protected from retaliation if they tell their manager or the company president about violations of the minimum wage or overtime provisions of U.S. law. (*Kasten v. Saint-Gobain Perf. Plastics Corp.* 2011, p.1336)

By requiring company-wide policies for whistleblowers, the listing standards could avoid an increasingly problematic situation: employees in the same company being provided with different instructions as to whom they should give reports depending upon the state or jurisdiction in which the employee is located. The company-wide policies would apply the same standards to all company employees regardless of their physical location, and make it clear that reporting internally is protected. Moreover, by identifying specific individuals, and several different individuals, these corporate Codes give much better instruction to employees than the more formal legal protections provided by statute and tort.

This information is even more valuable to the extent we believe employees do not know about or understand their more formal legal protections and the intricacies and gaps those involve. By contrast to the difficulty an employee may have traversing through the maze of

federal and state legal protections, it appears that employees could easily find the whistleblower provisions of a company's Code. Indeed, Sarbanes-Oxley's Section 406 clearly intended to make Codes of Ethics more publicly available by requiring their disclosure. Only one of the ninety companies in the sample did not make the Code publicly available, even in response to a specific request from the authors. Thus, it seems that Sarbanes-Oxley and the SEC regulations fulfilled their purpose of having companies disclose their Codes of Ethics publicly. An interested and diligent employee likely could find and read the whistleblower provisions of a corporate Code in order to figure out how to report misconduct.

Good Faith Belief

Third, most whistleblower protection statutes and tort claims require a whistleblower to have a 'reasonable good faith belief' that the misconduct the whistleblower reports actually violates the law. (Moberly 2008, pp.1002-03) This standard, of course, means that the whistleblower does not necessarily have to be right, but that the whistleblower's belief must be objectively reasonable and subjectively made in good faith. Problems can result from this standard, however, because U.S. courts sometimes interpret this requirement strictly by holding everyday lay employees to very high standards regarding their knowledge of the intricacies of the law. (Moberly 2010, pp.448-51) For example, Title VII of the Civil Rights Act of 1964 makes racial and sexual harassment illegal. (42 U.S.C. s. 2000e-2) However, one instance of harassment typically is not 'severe and pervasive' enough to be illegal. (Faragher v. City of Boca Raton 1998, pp.787-88) As a result, courts have not protected a whistleblower from retaliation when he reported a single instance of harassment because he could not have had a 'reasonable belief' that the conduct violated Title VII. (Jordan v. Alternative Resources Corp. 2006, pp.339-43) Even if the employee reported the harassment in good faith (meaning the employee truly believed the harassment violated the law) – unless an objectively reasonable person would conclude that the wrongdoing violated the law, the employee would not be protected.

Codes of Ethics seem to ignore this high legal standard of both subjective good faith and objective 'reasonable belief' that what an employee reports violates the law. Instead, corporations generally tell employees that they will be protected from retaliation as long as they report misconduct in 'good faith'; 76.4% of the companies use this language to describe the type of report that must be made. Compare that statistic to the companies that use language such as 'employees will be protected who report what they reasonably believe to be misconduct.' Only 11.2% use that language, even though it would seemingly require employees to be more certain about the misconduct they report. Instead, by using the broader 'good faith' language, companies seem to encourage employees to report even concerns about which they are less certain. However, companies rarely, if ever, explain what

they mean by 'good faith,' which could mean either that the whistleblower has an 'honest' belief that what they report is true or it could mean that the whistleblower have a pure motive in making the disclosure. Should it mean the later, whistleblowers might be deterred from reporting if they know their motive will be questioned.

However, to the extent Codes focus on the subjective intent of the employee – the more forgiving standard – Codes should better protect whistleblowers because courts should not engage in an ex post evaluation of whether the conduct an employee reports actually violated the law. That review can be tricky because events seem much clearer in hindsight than they might to an employee who is trying to make a judgment call about whether misconduct has occurred. Additionally, the line between illegal and legal might seem much clearer to a legally-trained court than to a lay person on an assembly line, for example. Corporations clearly have decided that they would rather have people report earlier and with less information. This gives corporations the chance to investigate and to let the experts in the corporation determine whether activities violate the law instead of relying on an individual employee to decide whether conduct is sufficiently egregious to report.

To summarize these points, in several important ways, the non-retaliation promises corporations make in their corporate Codes of Ethics offer employees broader and stronger protection from retaliation than US statutory and tort law. This might encourage more employees to report the misconduct they see, knowing that they will be protected by the corporation's promise. Indeed, other scholars have argued that internal whistleblowing should increase under these circumstances, i.e., when a company provides a specific channel for an employee disclosure, identifies a specific person to receive the disclosure, and promises not to retaliate against an employee for disclosing misconduct. (Near & Dworkin 1998, p.1557; Barnett et al. 1993, p.133; Miceli & Near 1992, p.290) This conclusion, however, is undermined if employees cannot actually enforce these corporate promises in court should the company breach their promise. In other words, can employees rely on these Codes of Ethics' promises? Will courts enforce them by giving damages to employees who are retaliated against in violation of the promises?

Disclaimers May Undermine a Code's Promise of Protection

The answer to those questions is 'probably not.' In a previous article, Moberly detailed several reasons why a Code's promise of protection from retaliation may be difficult to enforce. (Moberly 2008, pp.1012-21) Here, we will briefly discuss one reason given the results of this study.

Most U.S. workers are 'at will' employees. That is, employers can discharge employees at any time, for any reason. Some exceptions to this background rule exist, but courts generally

presume that employers have great discretion to fire employees. This presumption makes it difficult for employees to enforce any type of employer promise, and, accordingly, the at-will rule makes enforcing the types of antiretaliation promises found in Codes questionable.

One prominent exception to the at-will rule, however, is that many courts will enforce promises found in employee handbooks. This doctrine has been developed in the last several decades as a state law doctrine – usually under a theory of either breach of contract or promissory estoppel – and today a majority of U.S. jurisdictions accept that at-will employees may enforce some employee handbook provisions. (Dau-Schmidt & Haley 2007, p.344)

Whistleblowers have tried to enforce antiretaliation promises in Codes of Ethics by equating these Codes with employee handbooks. Courts have had little problem equating the two: both Codes of Ethics and more detailed employee handbooks serve the same purposes of informing employees about employer expectations and encouraging employee loyalty by outlining the benefits employees gain by working for that particular employer. As a result, some U.S. courts have upheld employee claims that they were fired in violation of the antiretaliation promise in a Code of Ethics. However, this result is far from the norm, and in fact it will very often be the case that courts refuse to enforce these promises, based on several different legal doctrines. (Moberly 2008, pp.1012-21) Here, we will focus on the primary reason: the existence of an at-will disclaimer.

Courts typically will not enforce handbook provisions if the handbook contains a ‘clear and conspicuous’ disclaimer that proclaims the employment relationship to be at-will. (Fischl 2007, p.195) For example, a New York court dismissed an employee’s breach of contract claim based upon a Code’s whistleblower provision because the company stated in the Code that ‘[t]his code of conduct is not a contract of employment and does not contain any contractual rights of any kind . . . [the company] can terminate employment at any time and for any reason.’ (Lobosco v. New York Telephone Co./NYNEX 2001, p.464) Thus, an employer’s ability to include a disclaimer reaffirming the employee’s at-will status could undermine enforcement of a Code’s anti-retaliation provision.

We examined the extent to which companies in our study incorporated an at-will disclaimer into the company Code of Ethics. Interestingly, at the same time that companies made promises of non-retaliation, almost half of the companies (44.9%) also claimed that employees are at-will. Companies do not publicize this at-will disclaimer anywhere but in the Code itself. None of the companies put the at-will language on their Form 10 public filing with the SEC or even on the website from which the Codes can be downloaded.

Additionally, for the Codes that do not have at-will disclaimers, we speculate that other employment materials likely have disclaimers somewhere – such as in an actual employment handbook or some other document handed out to employees. This study does not measure that, but it seems likely that the percentage of employees subject to an unenforceable non-retaliation promise is even higher than 44.9%. And, those employees' situation might be even worse: they have one document that clearly promises them protection from retaliation, yet another document informs them that they are at-will employees and therefore cannot rely on any promise made to them.

4. Limitations

This study's methodology has benefits and drawbacks compared to the survey method used by Hassink and Lewis & Kender. As a benefit, this study was not dependent upon respondents to receive information, which makes the results less skewed by a non-response bias. The listing requirements of the U.S. stock exchanges require public posting of corporate Codes of Ethics, which provides a unique opportunity to examine the details of corporate policy. A survey might produce results skewed in favor of strong whistleblowing policies as companies with strong policies might respond readily, while those with weak policies may not. Moreover, by reviewing the actual documents, as opposed to a corporation's description of the document, this study might present a less-biased view of the contents of corporate whistleblowing policies (although it should be noted that many respondents in the Lewis & Kender surveys sent the authors relevant documents or made them available on their website). Finally, drawing the sample randomly also provides the benefit of surveying a greater diversity of corporations than surveying only the largest companies on a particular stock exchange or those who self-select by returning survey materials.

On the other hand, by relying only on public documents and not a detailed questionnaire, this study did not evaluate the manner in which companies actually implemented their Codes. By using surveys of companies, Lewis & Kender were able to gather information about how Codes were utilized and how companies trained their employees and supervisors. (D. Lewis & Kender 2010, p.31) Additionally, companies may address whistleblowing issues in documents not made public – such as in employee handbooks. This study did not have access to those materials. Finally, several studies recently have tried to evaluate whether Codes of Conduct are effective at reducing corporate misconduct, and the results of those studies have been mixed. (Schwartz 2002, pp.27-28; Newberg 2005, pp.264-66) This study, however, does not attempt to answer whether whistleblowing policies found in corporate Codes are effective.

All of these limitations could be addressed by further research. For example, surveys could follow up on the information received as part of this study. Moreover, although it may be difficult to structure, a study could attempt to determine whether whistleblowing policies actually help reduce corporate wrongdoing.

5. Conclusion

In the book arising out of the previous International Whistleblower Research Network conference, held in 2009, David Lewis outlined an 'agenda for further research' in which he noted that 'much of the existing research on the use and contents of employers' confidential reporting/whistleblowing procedures has tended to focus on the public sector and there is a need to obtain more information about how whistleblowing is managed in the private sector.' (Lewis 2010, p.163) The research described in this chapter provides an initial view of the ways in which the private sector in the United States attempts to manage whistleblowing. We found that, on paper at least, U.S. corporations have similar ways in which to encourage employees to report misconduct. Companies make whistleblowing a duty of employment and provide detailed instructions on how to blow the whistle internally. Numerous people in the organization can receive employee reports. And, perhaps most importantly, companies promise to protect whistleblowers from retaliation.

However, because of the strength of the at-will rule in the United States, employees will have a difficult time enforcing these promises, particularly if companies continue to include disclaimers in their Code of Ethics. These disclaimers essentially negate the companies' promise to protect whistleblowers from retaliation. This result seems counter-productive and ultimately, simply unfair. As the study shows, corporate Codes of Ethics make reporting a duty - a requirement of employment. In fact, this requirement is one of the most consistent provisions of these codes across the board: 96.6% tell their employees that they must report misconduct. Protecting employees from retaliation – enforcing the promise made by almost all corporations – is a simple matter of fairness. Companies should not be able to make whistleblowing a job requirement, and then be permitted to retaliate when the employee does exactly what the employee is told to do.

Further research is needed to examine how companies actually implement these policies. Employees may have difficulty enforcing promises not to retaliate legally, but the practical effects of such promises are still understudied. Now that we know the content and scope of private sector whistleblower policies, attention needs to turn to how companies implement these policies and whether they effectively encourage whistleblowing and reduce misconduct.

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APPENDIX A

Table 1. Location of the Full Code

	% of Codes
Form 10K or 10KSB	2.2%
Company website	85.4%
Annual report	5.6%
Sent to a person who requests it	43.8%

Table 2. Code Applicable To:

	% of Codes
All employees	98.9%
Subsidiaries/ Entire group	53.9%
Officers/Senior/Exec. Management	78.7%
Directors	82.0%
Financial officers	22.5%
Contractors	25.8%
Former employees	0.0%
Local application by subsidiaries	0.0%

Table 3. Tone of Code

	% of Codes
Reporting is a requirement/duty (e.g., employees 'must' or 'should' report)	96.6%
Employees are explicitly encouraged to report	36.0%
Neutral tone about reporting (e.g., employees 'can' or 'may' report)	11.2%

Table 4. Nature of the Violations to be Reported

	% of Codes
Violations of code itself	93.3%
Violations of law/other regulations	76.4%
Unethical/improper conduct	52.8%
Financial reporting problems	65.2%
Failing to report violation	23.6%
Criminal offenses	3.4%
Health and safety threats	29.2%
Environmental issues	7.9%
Corruption/mismanagement/abuse of authority	1.1%
Misinformation (including on reports to the SEC or involving other government reporting requirements)	15.7%
Miscarriage of Justice	0.0%
Theft/misappropriation/misuse of company assets	22.5%
Insider trading/bribery/money Laundering	9.0%
Harassment or discrimination	21.3%
Other violations, not mentioned [†]	58.4%
<i>Conflicts of interest</i>	
Conflicts of interest of <i>others</i> should be reported	4.5%
Employees should report <i>their own</i> conflict of interest	38.2%
States that conflicts should be reported, but is vague on whose conflict	52.8%
Code does not mention conflicts of interest	20.2%

Note. † Some examples of other violations include: 'fraud' (36.0%), 'anti-trust violations'; 'dishonest conduct'; 'tax violations'; 'boycott requests'; or 'infringing on copyrights, patents, or trademarks'.

Table 5. Officials or Bodies To Whom Wrongdoing May Be Reported

	% of Codes
<i>As a Primary Contact</i>	
Direct or indirect supervisor	75.3%
Compliance or ethics officer	29.2%
Special hotline [†]	47.2%
Board of directors	16.9%
Audit committee	55.1%
Human resources department	33.7%
Legal department	36.0%
Corporate governance department	1.1%
Internal audit department	16.9%
Company secretary	2.2%
Risk management department	0.0%
Chief executive officer	19.1%
Chief financial officer	15.7%
Complaints committee	0.0%
Others to receive complaints	50.6%
<i>As a Secondary Contact</i>	
Direct or indirect supervisor	0.0%
Compliance or ethics officer	2.2%
Special hotline [†]	5.6%
Board of directors	2.2%
Audit committee	4.5%
Human resources department	3.4%
Legal department	4.5%
Corporate governance department	1.1%
Internal audit department	2.2%
Company secretary	1.1%
Risk management department	0.0%
Chief executive officer	4.5%
Chief financial officer	2.2%
Complaints committee	0.0%
Others to receive complaints	54.5%

Note. † We also coded for how the hotline was run. Of the 49 companies that mentioned hotlines, 36.7% used a 3rd party, 6.1% run it internally; and 57.1% did not provide this information.

Table 6. Reporting Guidelines and Formalities

	% of Codes
Code provided the contact details to report misconduct	66.3%
Code states that the contact details can be found elsewhere	5.6%
<i>Reporting channels vary by</i>	
Type of misconduct being reported	56.2%
Who is engaging in misconduct	14.6%
Who is reporting the misconduct	18.0%
The channels do not vary	32.6%
Code identifies a separate contact for reporting <i>financial</i> problems	49.4%
Why a secondary contact should be used [†]	32.6%
Report should be in sufficient detail to permit an investigation	18.0%
Specific details that should be reported	6.7%
Reporting system is multilingual	3.4%
A special reporting form should be used	1.1%
A whistleblower should adequately explain their suspicion	0.0%
Code provides a checklist for criteria of ethical behavior	0.0%
Code provides a graphical representation of the reporting system	1.1%
Code bans employee investigation	5.6%
Requires whistleblower to translate the complaint into a specific language	0.0%

Note. † The reasons for reporting to a secondary contact clustered around five themes for the 29 Codes that provided reasons: because the employee felt 'uncomfortable' or wanted 'anonymity' (58.6%); the complaint was not handled 'properly' or the employee was not 'satisfied' with the response from the primary contact (48.3%); the primary contact was not 'appropriate' or there were difficulties with 'communication' (34.5%); the primary contact was absent (10.3%); or the report involved a serious violation of the law (3.4%).

Table 7. Protection from Retaliation and Qualification for Protection

	% of Codes
'No retaliation' promise or Code prohibits retaliation	91.0%
Retaliation will be punished	30.3%
Reports must be made in 'good faith'	76.4%
Reports must be based on a 'reasonable belief'	11.2%
Report must be of a genuine concern	3.4%
Report can included 'suspected' violations	68.5%
No retaliation even if the report is unfounded or factually untrue	3.4%
Making a false or malicious report is punishable	21.3%
Whistleblowers will have liability toward subject of malicious complaint	0.0%
Involvement – immunity for reporting one's own involvement	0.0%
Involvement – protection only provided if employee did not receive any personal gain from reported misconduct	0.0%
Involvement – disclosure will be credited if whistleblower is involved in misconduct	3.4%
Involvement – no retaliation even if whistleblower is involved in misconduct but with good faith	1.1%
Right of protection may be lost if report is made externally	0.0%

Table 8. Confidentiality and Anonymity

	% of Codes
Some or all reports will be treated confidentiality [†]	74.2%
Report will be kept confidential, <i>except</i> as required for investigation	24.7%
Report will be kept confidential, <i>except</i> as required by law or regulation	19.1%
Company will make its 'best efforts' to keep confidentiality or 'to extent reasonably possible'	30.3%
Violations can be reported anonymously ^Δ	73.1%
Anonymity is discouraged	13.5%
Whistleblowers are not able to make their concern publicly unless certain conditions are met	0.0%
Publicity is not permitted	1.1%
No anonymity for third parties	0.0%

Note. † This number includes a combination of Codes in which *all* violations are guaranteed confidentiality (59.6%) and *some* violations are guaranteed confidentiality (14.6%); Δ This number includes a combination of Codes in which *all* violations are guaranteed anonymity (56.2%) and *some* violations are guaranteed anonymity (16.9%).

Table 9. Investigation Details

	% of Codes
Company will investigate or give serious treatment to whistleblower disclosure	76.4%
Cooperation expected of employees in investigation	27.0%
Company will keep an investigation log	20.2%
Company will provide feedback on investigation to employee	12.4%

Table 10. At-Will Disclaimers

	% of Codes
Form 10 contains an at-will disclaimer	0.0%
Code contains an at-will disclaimer	44.9%