Purpose-Driven Compliance

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Veronica Root Martinez

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Many thanks to the participants of the 2018 National Business Law Scholars Conference, the 2019 Culp Colloquium, the University of Wisconsin Law School Rethinking the Shareholder Franchise Conference, the 2023 Fuqua Management and Organizations Area Workshop, the 2023 UVA Compliance Roundtable, the 2023 Duke Law Summer Workshop Series, the 2023 ComplianceNet Conference, the 2024 Georgetown Corporate Governance & ESG Workshop, the 2025 USC Corporate and Commercial Law Seminar, and the 2025 BC Law Regulation & Markets Workshop for excellent comments. Special thanks to Miriam Baer, Stuart Benjamin, Joseph Blocher, Samuel W. Buell, James D. Cox, Noah H. Marks, Deborah A. DeMott, Elysa Dishman, Yan Fang, Gina-Gail S. Fletcher, Todd Haugh, Renee Jones, Margaret H. Lemos, Geovanny Martinez, Elise Maizel, Patricia McCoy, Geeyoung Min, Joseph Murphy, Alicia Plerhoples, Arti Rai, Barak Richman, Steven L. Schwarcz, Natalya Shnitser, Michael Simkovic, D. Danile Sokol, and Karen Woody for feedback and conversations. Gratitude for research assistance from Amir Ali, Garret Hoff, Ken Krmoyan, Jesse Levinson, and Julie You. Finally, I am grateful for the support of the WRAP writing group at Duke University

Abstract

Whether it is a small brokerage firm in Ann Arbor, Michigan, a private university in Cambridge, Massachusetts, or a multinational conglomerate headquartered in New York City, organizations understand that they are required to fulfill a range of compliance obligations. Compliance programs today tend to have two important characteristics in common. First, the notion that perfect compliance is an impossible goal is a key component of the understandings and expectations of many firms' compliance programs. Second, organizations have almost uniformly adopted compliance programs in areas where enforcement activity has been significant—like in the areas of antibribery and anticorruption, anti-money laundering, antitrust, privacy, and cybersecurity. In short, today's compliance programs, particularly at many large, complex organizations, are enforcement-driven programs that expressly tolerate certain levels of misconduct. The reality, however, is that the priorities of enforcement authorities often do not align with the key risks a firm will face. Additionally, behavioral ethics research suggests that tolerating small amounts of misconduct within an organization can lead to more significant future violations. In short, the primary drivers of today's compliance programs may be inherently flawed. Yet, the time may be ripe to rethink, reframe, and refocus the motivations for compliance programs at organizations today. The past twenty-five years of investment in compliance activities by the public and private sectors have resulted in the widespread adoption of increasingly complex and sophisticated compliance programs by large, complex organizations. This Article argues that organizations should build upon these foundations and move toward purpose-driven compliance programs, which are compliance programs that are directed by the firm's (i) purpose, (ii) inherent risks based on the activities necessary to achieve that purpose, and (iii) ethical standards and goals. The priorities of enforcement authorities, which necessarily accept imperfect compliance, do not require firms to adopt a lower standard of conduct for themselves. Rather, organizations should adopt initiatives that are more proactive and focused on meeting a firm's own purpose, goals, and expectations.

Keywords: compliance, purpose, enforcement, governance, ethics, risk, misconduct

JEL Classifications: K20, K22, K42, K23, K49

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Purpose-Driven Compliance

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PURPOSE-DRIVEN COMPLIANCE

by: Veronica Root Martinez[*]

ABSTRACT

Whether it is a small brokerage firm in Ann Arbor, Michigan, a private university in Cambridge, Massachusetts, or a multinational conglomerate headquartered in New York City, organizations understand that they are required to fulfill a range of compliance obligations. Compliance programs today tend to have two important characteristics in common. First, the notion that perfect compliance is an impossible goal is a key component of the understandings and expectations of many firms' compliance programs. Second, organizations have almost uniformly adopted compliance programs in areas where enforcement activity has been significant—like in the areas of antibribery and anticorruption, anti-money laundering, antitrust, privacy, and cybersecurity. In short, today's compliance programs, particularly at many large, complex organizations, are enforcement-driven programs that expressly tolerate certain levels of misconduct. The reality, however, is that the priorities of enforcement authorities often do not align with the key risks a firm will face. Additionally, behavioral ethics research suggests that tolerating small amounts of misconduct within an organization can lead to more significant future violations. In short, the primary drivers of today's compliance programs may be inherently flawed.

Yet, the time may be ripe to rethink, reframe, and refocus the motivations for compliance programs at organizations today. The past twenty-five years of investment in compliance activities by the public and private sectors have resulted in the widespread adoption of increasingly complex and sophisticated compliance programs by large, complex organizations. This Article argues that organizations should build upon these foundations and move toward purpose-driven compliance programs, which are compliance programs that are directed by the firm's (i) purpose, (ii) inherent risks based on the activities necessary to achieve that purpose, and (iii) ethical standards and goals. The priorities of enforcement authorities, which necessarily accept imperfect compliance, do not require firms to adopt a lower standard of conduct for themselves. Rather, organizations should adopt initiatives that are more proactive and focused on meeting a firm's own purpose, goals, and expectations.

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I. INTRODUCTION

One of the most important corporate criminal resolutions in recent history resolved allegations of anti-money laundering offenses at one of the world's largest cryptocurrency exchanges.[1] Binance Holdings Limited entered into two settlement agreements during 2023, resolving allegations of significant misconduct and violations of the Bank Secrecy Act and other regulatory requirements.[2] In response to enforcement activity from the Department of Justice ("DOJ"), Binance entered a guilty plea, agreeing to pay over $4.3 billion in penalties, take steps to enhance its compliance program, and retain an independent monitor.[3] Additionally, Binance entered into a settlement with the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") for $968,618,825 to resolve "potential civil liability for 1,667,153 apparent violations of multiple sanctions programs."[4] The OFAC settlement required Binance to "retain an independent

[1] Press Release, U.S. Dep't of Just., Binance and CEO Plead Guilty to Federal Charges in $4B Resolution (Nov. 21, 2023), https://www.justice.gov/archives/opa/pr/binance-and-ceo-plead-guilty-federal-charges-4b-resolution [https://perma.cc/2UR7-FQWD].
[2] *Id.*
[3] *Id.*
[4] Press Release, Off. of Foreign Assets Control, Settlement Agreement Between the U.S. Department of the Treasury's Office of Foreign Assets Control and Binance Holdings, Ltd. (Nov. 21, 2023), https://ofac.treasury.gov/recent-actions/20231121 [https://perma.cc/7FNJ-BTYF]. In situations where two U.S. governmental authorities require a monitor, the same monitor is often appointed. In the case of Binance, however, different individuals were appointed, so two separate monitorships were being overseen by two different individuals at the same time. *See* Mengqi Sun, *Binance Gets Two Compliance Monitors in Settlements with U.S. Authorities*, WALL ST. J. (May 17, 2024, at 13:13 ET), https://www.wsj.com/articles/binance-gets-two-compliance-monitors-in-settlements-with-u-s-authorities-5ec6c22a [https://perma.cc/BP4K-L6GE].

compliance monitor for five years, whose mandate . . . include[s the] review and assessment of Binance's sanctions compliance program."[5]

Settlements of this nature are quite common as a result of corporate misconduct, and they often lead to what this Article will refer to as "enforcement-driven" compliance interventions, which are compliance programs, policies, procedures, and initiatives that are reactive to the enforcement priorities of the government or quasi-regulator.[6] Many scholars and government officials tout the importance of governmental enforcement activities in creating incentives for corporations to adopt and implement compliance programs.[7] Yet many parent companies are repeat offenders, with some having as many as 225 compliance cases involving penalties of at least $1 million.[8] In 2012, financial services group HSBC entered into an agreement with the OFAC in which HSBC paid $1.256 billion to avoid prosecution for its involvement in money laundering.[9] A year after that agreement expired,[10] HSBC entered into another deferred prosecution agreement and agreed to pay over $100 million to resolve fraud charges.[11] In turn, the DOJ is pursuing alternative penalties such as external oversight in the form of corporate monitors and audits of compliance programs, as seen with Binance.[12]

Indeed, for the last three decades, governments, courts, and other interested actors have implemented a range of external incentives targeted at corporate firms and other large

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[5] Press Release, Off. of Foreign Assets Control, *supra* note 4.

[6] For example, the World Bank is not a formal regulator, but it does require affiliated banks to comply with certain rules, issues guidance on compliance expectations, and sanctions those who fail to comply. *See, e.g.*, *Summary of World Bank Group Integrity Compliance Guidelines*, WORLD BANK (July 8, 2021), https://thedocs.worldbank.org/en/doc/06476894a15cd4d6115605e0a8903f4c-0090012011/original/Summary-of-WBG-Integrity-Compliance-Guidelines.pdf [https://perma.cc/3BZY-8LWB]. Similarly, the NCAA is not a governmental actor, but it does require certain compliance obligations from member universities and issue sanctions when violations are uncovered. *See, e.g.*, *Infractions Process*, NCAA, https://www.ncaa.org/sports/2021/6/28/infractions-process.aspx [https://perma.cc/94S3-5P2T] (last visited Oct. 4, 2025).

[7] *See, e.g.*, Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2078 (2016); Lisa O. Monaco, Deputy Att'y Gen., U.S. Dep't of Just., Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement (Sep. 15, 2022) (transcript available online with the Department of Justice), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement [https://perma.cc/ZA2H-AE8L]; Kenneth A. Polite, Jr., Assistant Att'y Gen., U.S. Dep't of Just., Assistant Attorney General Kenneth A. Polite, Jr. Delivers Remarks on Revisions to the Criminal Division's Corporate Enforcement Policy (Jan. 17, 2023) (transcript available online with the Department of Justice), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-georgetown-university-law [https://perma.cc/3X5F-C3J6].

[8] PHILIP MATTERA & SIOBHAN STANDAERT, THE HIGH COST OF MISCONDUCT: CORPORATE PENALTIES REACH THE TRILLION-DOLLAR MARK 4 (2024), https://goodjobsfirst.org/wp-content/uploads/2024/04/The-High-Cost-of-Misconduct-Corporate-Penalties-Reach-the-Trillion-Dollar-Mark.pdf [https://perma.cc/ZE8D-SFVT].

[9] Press Release, U.S. Dep't of Just., HSBC Holdings Plc. and HSBC Bank USA N.A. Admit to Anti-Money Laundering and Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), https://www.justice.gov/archives/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations [https://perma.cc/3PWL-PW86].

[10] Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEX. L. REV. 285, 330 (2021).

[11] Press Release, U.S. Dep't of Just., HSBC Holdings Plc Agrees to Pay More Than $100 Million to Resolve Fraud Charges (Jan. 18, 2018), https://www.justice.gov/archives/opa/pr/hsbc-holdings-plc-agrees-pay-more-100-million-resolve-fraud-charges [https://perma.cc/4Z98-9C65].

[12] *See* Press Release, U.S. Dep't of Just., *supra* note 1.

organizations[13] in an effort to ensure that they invest in effective ethics and compliance programs. As a result, the modern compliance function—the birth of which is often traced to various interventions enacted during the 1990s[14]—is not new. It is an established industry.[15] Regulatory and enforcement interventions have catapulted the importance of compliance over the last two decades. During that time, law firm corporate white-collar practices have been created, expanded, and diversified by subject matter and expertise.[16] Trade and research associations have exploded in membership and course offerings.[17] And legal scholars have created what is considered by many to be a new field of inquiry, bolstered by scholarship and programs of study.[18]

In short, those in leadership at corporations are well-aware that they must create and implement effective ethics and compliance programs or risk significant sanctions—from the government or perhaps even shareholders—when a compliance failure occurs.

As a result, corporations' expenditures in the compliance area have increased over time. For example, one industry study suggests that large companies are spending an average cost of $10,000 per employee to maintain compliance expectations.[19] Additionally, "Deloitte estimates banks' [compliance] costs have increased by more than 60%" since the 2008 financial crisis.[20] And if a compliance failure occurs within a corporate firm, it often results in new, significant compliance expenditures.[21] For example, JP Morgan's handling of the London Whale debacle resulted in the addition of over 3,000 new compliance personnel at the bank.[22] Similarly, Binance's monitor, the cost of which is Binance's direct responsibility, indicated a need to "build an army for [the] unique compliance role,"[23] and reporting suggests that "Binance has reportedly spent over $200 million to shore up compliance in 2024 alone."[24]

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[13] Public firms and large, complex organizations, even when private or non-profits, face similar compliance obligations. This Article uses the terms firm, organization, and company interchangeably, because the concerns and arguments apply to different types of organizations equally.

[14] *See infra* Part II.

[15] *See infra* notes 43–50. *See also generally* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487 (2003) (discussing corporate compliance efforts as they existed close in time to the passage of the organizational sentencing guidelines and release of the Holder memorandum).

[16] *See infra* notes 45–46.

[17] *See, e.g.*, *About Us*, SOC'Y OF CORP. COMPLIANCE & ETHICS, https://www.corporatecompliance.org/about-scce [https://perma.cc/CR4T-KQ8B]; *About the Ethics & Compliance Initiative*, ECI, https://www.ethics.org/about [https://perma.cc/J7XB-JBGF].

[18] *See infra* note 50.

[19] CLYDE WAYNE CREWS JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS 2018: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 17 (2018), https://cei.org/sites/default/files/Ten_Thousand_Commandments_2018.pdf [https://perma.cc/RKD5-98HC].

[20] Shakeel Lone, *The Creeping Cost of Compliance*, FORBES (Apr. 21, 2022), https://www.forbes.com/sites/servicenow/2021/10/21/the-creeping-cost-of-compliance/?sh=6fbd6f6056cc [https://perma.cc/7W8Q-GQC6].

[21] *See, e.g.*, Dylan Tokar, *Danske Bank Rebuilds Compliance Program After Money-Laundering Scandal*, WALL ST. J. (Jan. 3, 2022, at 05:30 ET), https://www.wsj.com/articles/danske-bank-rebuilds-compliance-program-after-money-laundering-scandal-11641205802 [https://perma.cc/4H7P-8R9V].

[22] Jill Treanor, *JP Morgan Chase Hires 3,000 New Staff in Its Compliance Department*, GUARDIAN (Sep. 17, 2013, at 16:36 EDT), https://www.theguardian.com/business/2013/sep/17/jpmorgan-banking [https://perma.cc/37SQ-XFQ8].

[23] Ben Penn, *Binance Monitor Must Build an 'Army' for Unique Compliance Role*, BLOOMBERG L. (Dec. 11, 2023, at 10:09 CST), https://www.bloomberglaw.com/bloomberglawnews/us-law-week/X6ASRQ6G000000?bna_news_filter=us-law-week#jcite [https://perma.cc/LJ8G-ZGFX].

[24] *Binance Nearing Deal to End DOJ Compliance Monitorship Early: Bloomberg*, BANKLESS (Sep. 16, 2025), https://www.bankless.com/read/binance-nearing-deal-to-end-doj-compliance-monitorship-early-bloomberg [https://perma.cc/5LPX-Y95K].

Every single year for the past decade, almost half of all compliance leaders surveyed by Reuters have anticipated an increase in their budgets.[25] The cost of complying with U.S regulations is so large ($1.9 trillion in 2019) that, according to the Competitive Enterprise Institute, it would be the eighth-largest economy in the world if it were a country's GDP.[26] Napier, a compliance platform, estimates that the cost of financial crime compliance rose by 18% worldwide and by 33% in North America in 2020.[27]

The increasing costs of compliance are the result of several interconnected events. First, before the 2008 financial crisis, firms knew they had certain compliance obligations.[28] After the financial crisis, however, firms had to shore up their compliance programs to better meet the demands that were in place prior to 2008, while simultaneously responding to new legal and regulatory requirements that were prompted by the 2008 financial crisis.[29] Additionally, firms increasingly need to comply with legal and regulatory requirements across the globe that are often slightly different in what they dictate to and expect from the firm.[30] Finally, since the early 1990s, public firms, which have decreased in number, have become much larger and more complex.[31] These bigger and more complicated firms have sometimes required a major retooling of their compliance programs.[32] And yet, corporate misconduct continues to occur—even when sanctions have been levied against a firm for past misconduct.

Whether it is a cryptocurrency company like Binance[33] or banks like Credit Suisse,[34] large, sophisticated organizations continue to commit significant compliance failures even when they have invested considerable time and resources toward compliance efforts. The combination of an increasingly sophisticated compliance effort with persisting corporate misconduct may lead some to wonder whether firms' compliance efforts are in fact working.[35] At a minimum, the continued

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[25] *See* THOMSON REUTERS, 2023 COST OF COMPLIANCE: REGULATORY BURDEN POSES OPERATIONAL CHALLENGES FOR COMPLIANCE 17 (2023), https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/reports/cost-of-compliance-report-final-web.pdf [https://perma.cc/85Y8-934A].

[26] CLYDE WAYNE CREWS, JR., COMPETITIVE ENTER. INST., TEN THOUSAND COMMANDMENTS 2021: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 5, 49 fig.5 (2021), https://cei.org/wp-content/uploads/2021/06/Ten_Thousand_Commandments_2021.pdf [https://perma.cc/XR6G-L9UL].

[27] *The Cost of Compliance: Future Trends in AML*, NAPIER AI (Aug. 12, 2021), https://www.napier.ai/post/cost-of-aml-compliance [https://perma.cc/3YJJ-234H].

[28] MONICA O'REILLY & DILIP KRISHNA, DELOITTE, REGULATORY PRODUCTIVITY: IS THERE AN ANSWER? 2 (2017), https://www2.deloitte.com/us/en/pages/regulatory/articles/cost-of-compliance-regulatory-productivity.html [https://perma.cc/M5RP-X484].

[29] *Id.*

[30] *The Cost of Compliance*, *supra* note 27. In October 2023, the DOJ further clarified several features of an effective compliance program. *See* Kathryn Cameron Atkinson et al., *Guidance from Attachment C: Recent Resolutions Include DOJ Updates to the Requirements for an Effective Compliance Program*, N.Y.U. PROGRAM ON CORP. COMPLIANCE & ENF'T (Oct. 27, 2023), https://wp.nyu.edu/compliance_enforcement/2023/10/27/guidance-from-attachment-c-recent-resolutions-include-doj-updates-to-the-requirements-for-an-effective-compliance-program [https://perma.cc/3DDG-SPLA]. Costs may continue to increase as new compliance expectations come.

[31] René M. Stulz, *The Shrinking Universe of Public Firms: Facts, Causes, and Consequences*, NAT'L BUREAU ECON. RESH. REP., June 2018, at 12, 12–13.

[32] *See, e.g.*, Jay T. Jorgensen, *The Foreign Corrupt Practices Act Turns 40: "Reflections on Walmart's Enhanced Ethics & Compliance Program*,*"* 5 TEX. A&M L. REV. 237, 241–44 (2017) (noting the changes to Walmart's compliance program).

[33] *See* Press Release, U.S. Dep't of Just., *supra* note 1.

[34] *See* Simon Brady, *Credit Suisse: A Failure of Regulatory Culture*, OFF. MONETARY & FIN. INSTS. F. (Mar. 22, 2023), https://www.omfif.org/2023/03/credit-suisse-a-failure-of-regulatory-culture [https://perma.cc/RX6N-6WDY].

[35] There is an empirical component to these concerns that would be extraordinarily difficult to practically assess. There are dozens, if not hundreds, of legal and regulatory areas that firms must comply with, in addition to industry standards

instances of misconduct suggest that it is time for those who study the role of corporate compliance to question whether certain assumptions rooted within today's compliance frameworks continue to make sense.

This Article confronts two related assumptions that many scholars, policymakers, and industry members have made regarding today's corporate compliance programs. First, enforcement activity and other external incentives are the primary drivers of creating effective corporate compliance programs.[36] Second, the effect of a presumption present in virtually all compliance work—whether practical or theoretical—that perfect compliance is largely unattainable.[37] To better understand the effect of these two assumptions, this Article presents a theoretical question. Whether a firm's decision to (i) center its compliance efforts on enforcement-driven priorities and (ii) tolerate imperfect compliance may inhibit the firm's efforts to tamp down corporate misconduct and unethical behavior by its agents. To assess this question, this Article draws on literature from organizational behavior, behavioral ethics, and law and economics. The Article proceeds as follows.

Part II begins by focusing on the foundations of today's compliance efforts. One finds compliance requirements in statutes from over fifty years ago,[38] but modern compliance efforts find their origins in actions taken in the mid to late 90s.[39] In particular, the Part details the (i) impact of the *Caremark*[40] decision, (ii) contribution of law and economics literature to understandings of what is necessary to deter corporate crime,[41] and (iii) pivotal policies adopted by enforcement authorities.[42] The Part then presents two case studies, one of a regulatory area that demonstrates the inherent limitations of enforcement-driven compliance programs and one of a corporate firm with significant investments in compliance and repeated compliance failures.

Part III focuses upon the limitations of an enforcement-driven compliance program. In particular, it discusses the ways in which the size and compliance sophistication of firms have limited the effectiveness of enforcement-driven programs. The Part then looks at the costs of pursuing a compliance program that accepts imperfection or attempts to achieve perfect compliance. The Part concludes by drawing on literature that highlights the limitations of enforcement-driven compliance programs. The upshot is that programs centered on these

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and their own internal norms and processes. There are, however, a range of discrete, practical, and important theoretical questions open for scholars interested in compliance to consider, particularly as much more is known about compliance due to the increased research in the topic over the past twenty or so years by legal scholars. Veronica Root, *The Compliance Process*, 94 Ind. L.J. 203, 205 (2019).

[36] *See, e.g.*, Griffith, *supra* note 7, at 2078.

[37] I say largely unattainable because there are regulatory areas where regulators define what an acceptable outcome is, and they expect perfect compliance with that outcome. Take, for example, worker safety outcomes as required by OSHA, or environmental standards as required by the EPA. This Article does not address these sorts of compliance mandates. Instead, it focuses on areas where (i) we do not formally tolerate any but (ii) we practically understand that not all misconduct can be stopped (e.g., money-laundering).

[38] *See, e.g.*, Bank Secrecy Act § 128, 12 U.S.C. § 1958 (1970).

[39] *See infra* Part II.

[40] *See generally In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996) (suit seeking to impose personal liability on board of directors members).

[41] *See generally* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997) (compares vicarious liability with duty-based liability regimes).

[42] Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., on Bringing Crim. Charges Against Corps. to All Component Heads & U.S. Att'ys (June 16, 1999) [hereinafter Holder Memorandum on Prosecuting Corporations], https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF [https://perma.cc/W9TD-7JRJ].

foundations may actually serve to make a firm's efforts to tamp down corporate misconduct and unethical behavior by its agents more challenging.

Part IV puts forth the thesis of this Article. Specifically, this Article argues that organizations should move toward purpose-driven compliance programs, which are compliance programs that are directed by the firm's (i) purpose, (ii) inherent risks based on the activities necessary to achieve that purpose, and (iii) ethical standards and goals. The Part begins by focusing on how firms can reorient their programs to prioritize the business purpose and business risks of the firm, while moving towards high ethical and aspirational standards. The Part then applies the framework of purpose-driven compliance to two companies that have overcome a variety of compliance failures to adopt more positive compliance systems and cultures. The Part concludes by outlining some of the benefits of this purpose-driven approach to compliance.

Part V discusses some additional topics that are related to the arguments set forth in the paper, including corrupt organizations, emerging industries, and concerns related to the reality that some types of misconduct may actually maximize shareholder wealth (at least in the short term).

The Article then concludes.

II. COMPLIANCE YESTERDAY AND TODAY

Compliance is everywhere you look within firms today. All but the smallest of firms have designated ethics and compliance officers,[43] with the largest firms having entire teams and significant organizational components dedicated to the work of compliance.[44] Large law firms have built out practice groups that assist corporate firms with creating and improving their compliance efforts, sometimes at a general level,[45] but often in a subject-matter specific manner.[46] Government enforcement authorities constantly promote the importance of firms creating and maintaining effective compliance programs,[47] and in some cases, sanction firms explicitly for

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[43] *See* Mengqi Sun, *Competition for Compliance Officers Intensifies Amid Regulatory Pressures*, WALL ST. J. (Jan. 19, 2022, at 15:11 ET), https://www.wsj.com/articles/competition-for-compliance-officers-intensifies-amid-regulatory-pressures-11642623091 [https://perma.cc/4X7R-MRQ4] (noting the increase in demand for compliance officers in recent years).

[44] *See, e.g.*, Jorgensen, *supra* note 32, 241–44 (detailing the "transformation of Walmart's ethics and compliance program" after its compliance scandals).

[45] *See, e.g.*, *Public Company Advisory Practice*, SIMPSON THACHER & BARTLETT LLP, https://www.stblaw.com/client-services/practices/corporate/public-company-advisory-practice [https://perma.cc/43K2-6V5Z] (last visited Nov. 8, 2025); *US Public Company Advisory*, WHITE & CASE LLP, https://www.whitecase.com/law/practices/public-company-advisory-pca [https://perma.cc/T2XC-YE9Y] (last visited Oct. 5, 2025).

[46] *See, e.g.*, *Healthcare*, HOLLAND & KNIGHT LLP, https://www.hklaw.com/en/services/practices/healthcare/healthcare-life-sciences [https://perma.cc/FD3H-ZL7K] (last visited Oct. 6, 2025) (advising on healthcare compliance matters); *Securities Enforcement*, GIBSON, DUNN & CRUTCHER LLP, https://www.gibsondunn.com/practice/securities-enforcement [https://perma.cc/W92K-7DL6] (last visited Oct. 6, 2025) (advising on securities compliance matters); *FDA: Compliance & Enforcement*, ALSTON & BIRD LLP, https://www.alston.com/en/services/industries/health-care-life-sciences/health-care/food-drug--devicefda/fda-compliance-enforcement [https://perma.cc/W9RE-KRF9] (last visited Oct. 6, 2025) (advising on FDA compliance matters).

[47] *See* Kenneth A. Polite Jr., Assistant Att'y Gen., U.S. Dep't of Just., Assistant Attorney General Kenneth A. Polite Jr. Delivers Remarks at NYU Law's Program on Corporate Compliance and Enforcement (PCCE) (Mar. 25, 2022) (transcript available online with the Department of Justice), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-remarks-nyu-law-s-program-corporate [https://perma.cc/6GZ3-BD8X] (discussing the importance of strong compliance programs).

failing to build up the compliance apparatus.[48] Even Congress is active in this area, with particular legislative enactments that require firms to enact certain compliance protocols.[49] And, finally, over the last decade, law schools have begun to see the connections between the legal function and compliance functions, as recognized by new centers and conferences dedicated to the exploration of compliance.[50] But even as one might survey the landscape of compliance activity today and look in wonder at all that has been created in a relatively short amount of time, it is instructive to think back to when compliance was more nascent. This Part begins by focusing on the origins of today's compliance efforts. The Part then turns to assessing—via case studies—whether current compliance efforts are in fact working.

A. The Origins of Today's Compliance Efforts

This Section details three separate interventions that occurred in the 1990s that serve as foundations of compliance as we know it today. Each of these interventions created external incentives for corporations to oversee the creation and implementation of an ethics and compliance program or risk significant enforcement or litigation activity. While these events appear to have occurred organically, there are consistent themes one can identify when examining the events in tandem, which are that compliance programs should be tailored to the enforcement priorities of the government and that imperfect compliance is tolerated when paired with what look to be adequate internal controls and processes.

1. Caremark[51]

In 1996, the Delaware Chancery Court issued *In re Caremark International Inc. Derivative Litigation*,[52] a decision that has had profound implications for corporate law and is seen by many as part of the origins of modern-day compliance efforts within corporate firms today.[53] In *Caremark*, the court outlined a test for determining whether a director's lack of oversight might breach her fiduciary duty of loyalty to the firm. The *Caremark* test has two factual prongs: "(a)

[48] *See, e.g.*, Press Release, U.S. Dep't of Just., Globe Metallurgical to Pay $2.6 Million Fine, Implement Extensive Emissions Controls and Limit Sulfur Inputs to Reduce Pollution from Industrial Furnaces in Ohio (July 25, 2023), https://www.justice.gov/opa/pr/globe-metallurgical-pay-26-million-fine-implement-extensive-emissions-controls-and-limit [https://perma.cc/B32L-4WH6] (noting the government's imposition of a fine on a company for, among other things, "failure to demonstrate compliance with regulations applicable to ferroalloy production plants").

[49] *See, e.g.*, Bank Secrecy Act § 128, 12 U.S.C. § 1958 (detailing compliance obligations); 17 C.F.R. § 275.206(4)-7 (2023) (detailing compliance obligations for entities covered by the Investment Advisers Act of 1940).

[50] *See, e.g.*, *Program on Corporate Compliance and Enforcement*, N.Y.U. SCH. OF L., https://www.law.nyu.edu/centers/corporatecompliance [https://perma.cc/647A-46U8] (last visited Oct. 6, 2025); *Center for Compliance and Ethics*, TEMP. UNIV. BEASLEY SCH. OF L., https://law.temple.edu/compliancecenter [https://perma.cc/U48V-LCHS] (last visited Oct. 6, 2025); *Corporate Compliance Institute*, FORDHAM UNIV., https://www.fordham.edu/gabelli-school-of-business/academic-programs-and-admissions/executive-education/open-enrollment/finance-and-accounting-programs/corporate-compliance-institute [https://perma.cc/JM46-5AKM] (last visited Nov. 8, 2025).

[51] It is not quite right to characterize *Caremark* as an "enforcement" event, as typically one would reserve that term to government action, although technically *Caremark* provides an opportunity for private actors to enforce compliance expectations against the firm.*See generally In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996) (five stockholder claims consolidated into this action and even with "the weakness of the plaintiff's claims the proposed settlement appears to be an adequate, reasonable, and beneficial outcome").

[52] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 972 (Del. Ch. 1996).

[53] Donald C. Langevoort, Caremark *and Compliance: A Twenty-Year Lookback*, 90 TEMP. L. REV. 727, 729 (2018).

directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations, thus disabling themselves from being informed of risks or problems requiring their attention."[54] These factual prongs, and the discussion in *Caremark*, dictate that a director's fiduciary duty requires implementing and overseeing compliance programs within corporate firms.[55]

Scholars have recognized the connection between the *Caremark* case and compliance today. Professor Donald Langevoort credits *Caremark* as a key initiator of the directors taking compliance seriously. However, he also outlines how the case has played a role in common issues corporations and their boards of directors face in ensuring effective compliance regimes.[56] Professor Todd Haugh contends that *Caremark* triggered powerful cognitive reactions in corporate directors over concerns that lack of oversight would generate substantial losses while simultaneously creating confusion that persists to this day about the role directors have in ensuring corporate compliance.[57] Professor Elizabeth Pollman describes how *Caremark* notably set forth a minimum threshold for establishing and maintaining a compliance system at the board level, after which the possibility of liability arises once conduct enters a zone of disobedience, allowing for the utilization of directors' fiduciary duty to help ensure compliance.[58]

Today, a board's audit committee typically oversees the management of the firm's ethics and compliance program.[59] But traditionally, plaintiffs have been unable to bring successful *Caremark* claims, in large part due to what is known as the business judgment rule. The business judgment rule, a common law rule that has been in place for two centuries,[60] is:

> a rule of law that insulates an officer or director of a corporation from liability for a business decision made in good faith if he is not interested in the subject of the business judgment, is informed with respect to the subject of the business judgment to the extent he reasonably believes to be appropriate under the circumstances, and rationally believes that the business judgment is in the best interests of the corporation.[61]

From a practical perspective, plaintiffs have had difficulty overcoming the relatively relaxed business judgment rule when attempting to bring *Caremark* claims in Delaware courts, which has resulted in most claims fizzling out at the motion to dismiss stage.[62]

Despite the reality that *Caremark* claims have traditionally been unsuccessful for plaintiffs, the case is still one of the initial origins of modern-day compliance programs, as a failure to implement a compliance program would not pass muster under either the rules articulated in *Caremark* or the common understandings of the business judgment rule in most places. As such, *Caremark* created a strong incentive for directors to ensure that a firm did, in fact, employ a compliance program,

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[54] Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).
[55] *Id.*
[56] Langevoort, *supra* note 53, at 729–30.
[57] Todd Haugh, Caremark*'s Behavioral Legacy*, 90 TEMP. L. REV. 611, 614 (2018).
[58] Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2016–17 (2019).
[59] MAUREEN BUJNO ET AL., DELOITTE, THE ROLE OF THE AUDIT COMMITTEE 22 (2018) (on file with Texas A&M Law Review).
[60] *See* S. Samuel Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 93 (1979) (describing, as of 1979, the 150-year history of the business judgment rule).
[61] Am. Soc'y for Testing & Materials v. Corrpro Cos., 478 F.3d 557, 572 (3d Cir. 2007) (quotation marks omitted).
[62] Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1859 (2021).

but the factors in *Caremark* have practically made it quite difficult for someone to claim that the compliance program implemented was insufficient.[63]

2. The Law & Economics of Self-Policing

Around the same time as *Caremark* was being litigated in Delaware, law and economics scholars began to focus on the problem of corporate misconduct. In 1997, Professors Jennifer Arlen and Reinier Kraakman published an article outlining a theoretical framework for determining how the law should "allocate liability for corporate misconduct between the firm and its agents; and, . . . how should the law structure the liability of the firm."[64] Misconduct that occurs within a firm is tricky to deter by the government directly because the firm is in a better position to monitor the conduct of its employees than the government. Because of this reality, controlling misconduct within corporate firms depends quite a deal on the firm's ability to self-police, i.e., police the conduct of its members to prevent, detect, and respond to incidents of misconduct within the organization.

A question that Arlen and Kraakman take up in their article is how to best incentivize corporate firms to engage in effective self-policing.[65] They note that under the traditional concept of *respondeat superior*, the employer would be held responsible for the conduct of its agents and employees.[66] If strict liability were levied against firms for the conduct of their agents, Arlen and Kraakman argue, firms would have a strong disincentive to engage in robust self-policing.[67] For instance, if Employee A is bribing foreign officials in violation of the Foreign Corrupt Practices Act ("FCPA"), the entity best able to identify this briber is his Employer. If a violation of the FCPA for this type of violation results in a fine of $1,000,000, and if the company detects the violation and is required to disclose it (which is often a requirement for public companies under the securities laws), the firm's detection, or self-policing efforts, would cause the firm to pay a $1,000,000 fine in a world of strict liability. Arlen and Kraakman argue that a firm would be disincentivized to detect misconduct of its employees if the result would be punishment levied on the firm.[68] Thus, a strict liability regime would seem to deter firms from engaging in a robust self-policing effort.

That said, if one believes that corporate misconduct is something that should be prevented, it is important to find ways to encourage corporate firms to engage in a self-policing effort. If no sanction is levied against corporate firms for failing to engage in self-policing, then Arlen and Kraakman argue, there will not be sufficient incentives for firms to stop misconduct within their ranks.[69] In short, Arlen and Kraakman present a conundrum: if sanctions are too high, firms will

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[63] *E.g.*, *id.* at 1863. *See* Krawiec, *supra* note 15, at 491–92. Indeed, Professor Kim Krawiec argues that reducing liability for organizations that can show the existence of internal compliance structures—with less emphasis on actual efficacy of said structures—may increase the danger of illegal and opportunistic behavior. Because *Caremark* sets the bar at having a compliance program it makes the central question one of whether the compliance program exists as opposed to whether it is actually sufficient to prevent violations of the law. *See also* Deborah A. DeMott, *Organizational Incentives to Care About the Law*, 60 L. & CONTEMP. PROBS., Autumn 1997, at 39, 64 (discussing the effectiveness of the Federal Sentencing Guidelines).
[64] Arlen & Kraakman, *supra* note 41, at 689.
[65] *Id.* at 691.
[66] *Id.* at 688.
[67] *See id.* at 690–91.
[68] *See id.* at 691.
[69] *See id.* at 691–92.

not self-police, but if sanctions are too low, firms still won't self-police.[70] As such, Arlen and Kraakman argue in favor of a system that makes clear what the strict liability sanction would be for a firm that does not engage in self-policing efforts, but allows mitigation credit to be awarded to firms that did attempt to put in place effective ethics and compliance programs.[71] In this goldilocks world, an Employer who detects that Employee A has engaged in bribery, but who has an effective mitigation program, would not be fined the full $1,000,000. Instead, that fine amount would be lowered based on a range of mitigation factors related to the strength of the firm's compliance program.

Arlen and Kraakman's argument—that enforcement activity meant to sanction corporate misconduct must balance the need to incentivize self-policing at firms while not deterring it—has proven to be incredibly prescient. Government enforcement authorities have long relied on firms' own self-policing to identify misconduct, and the self-policing function is often undertaken through a firm's compliance program.[72] While the law and economics models that scholars present in academic scholarship cannot, on their own, directly dictate activity at firms, they can influence the behavior and policy decisions of governmental actors, as well as those internal to firms. The rationale set out by Arlen and Kraakman has essentially been embraced by numerous governmental policies aimed at combating corporate misconduct over the past 25 years.

3. Enforcement Guidelines & Policies

The 1990s held two significant governmental interventions that contributed to the foundations of today's corporate compliance programs. Each intervention tracks many of the rationales set out in Arlen and Kraakman's seminal article on how to deter corporate misconduct. One intervention came before, and one after, their article was published.

The first governmental intervention was the enactment in 1991 of Chapter Eight of the United States Sentencing Guidelines, which are colloquially referred to as the Organizational Sentencing Guidelines.[73] The 1991 Organizational Guidelines explicitly refer to concepts like self-policing and the need for firms to adopt compliance programs. For example, the guidelines state that "[a]n 'effective program to prevent and detect violations of law' means a program that has been reasonably designed, implemented, and enforced so that it *generally* will be effective in preventing and detecting criminal conduct."[74] Additionally, the 1991 guidelines explain that an "organization must have established compliance standards and procedures to be followed by its employees and other agents that are reasonably capable of reducing the prosect of criminal conduct."[75] The 1991 guidelines also state that "[s]pecific individual(s) within high-level personnel of the organization must have been assigned overall responsibility to oversee compliance with such standards and procedures."[76] The original 1991 language predated today's emphasis by the government firms' ethics and compliance programs, but the basic framework for incentivizing firms to create and implement compliance programs is there.

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[70] See *id.*
[71] *See id.* at 692, 753.
[72] *See infra* Part II.C.
[73] U.S. SENT'G GUIDELINES MANUAL app. C, amend. 422 (U.S. SENT'G COMM'N 2003) (amendment effective Nov. 1, 1991).
[74] U.S. SENT'G GUIDELINES MANUAL § 8A1.2 cmt. n.3(k) (U.S. SENT'G COMM'N 1991) (emphasis added).
[75] *Id.* cmt. n.3(k)(1).
[76] *Id.* cmt. n.3(k)(2).

Over time, the Organizational Sentencing Guidelines have been revised and amended on a number of occasions,[77] which have allowed them to evolve as firms, scholars, and policymakers have adjusted their views on compliance. Importantly, the current guidelines expressly permit mitigation credit to be awarded to firms thathave effective compliance programs.[78] In other words, the current guidelines track the recommendations for combating corporate misconduct introduced by law and economics scholarship.[79]

Finally, the 1991 Organizational Guidelines also laid the foundation for the DOJ to prioritize corporate misconduct. In 1999, building upon this foundation, then-Deputy Attorney General Eric Holder issued what became known as the Holder Memo.[80] The Holder Memo laid out what DOJ prosecutors should consider when "Bringing Criminal Charges Against Corporations."[81] The memo explains that:

> Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.[82]

The Holder Memo expressly contemplates using the prosecutorial functions of the executive to change corporate culture and to create strong incentives for corporations to behave in a manner that addresses misconduct within firms' ranks.

The Holder Memo then outlines factors that prosecutors should consider when charging a corporation.[83] Like the Organizational Sentencing Guidelines and the recommendations from law and economics scholarship, the Holder Memo also recognizes the importance of providing mitigation credit for corporations that have implemented effective self-policing or compliance strategies.[84] In particular, one factor for prosecutors to consider is "[t]he existence and adequacy of the corporation's compliance program."[85] Moreover, the factors note that prosecutors should consider items like (i) the pervasiveness of the wrongdoing, including the complicity in the wrongdoing by corporate management; (ii) "[t]he corporation's history of similar conduct," whether in criminal, civil, or regulatory enforcement actions; and (iii) "[t]he corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."[86]

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[77] *See* U.S. SENT'G GUIDELINES MANUAL app. C, amends. 673, 744, 791 (Supp. U.S. SENT'G COMM'N 2010) (effective Nov. 1, 2004, Nov. 1, 2010, and Nov. 1, 2015, respectively); U.S. SENT'G COMM'N, THE ORGANIZATIONAL SENTENCING GUIDELINES: THIRTY YEARS OF INNOVATION AND INFLUENCE 10–11 (2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220829_Organizational-Guidelines.pdf [https://perma.cc/CJ5M-42GE].

[78] U.S. SENT'G GUIDELINES MANUAL § 8B2.1 (U.S. SENT'G COMM'N 2021).

[79] *See infra* Part II.B.

[80] Holder Memorandum on Prosecuting Corporations, *supra* note 42.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

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The external foundation upon which today's compliance programs are built assumed (i) that enforcement-driven and external incentives were key to the creation and implementation of compliance programs by firms and (ii) that perfect compliance would not be achieved by those firms. There is no expectation by the Delaware courts, legal scholars, or government enforcement authorities that all corporate misconduct within firms will be stopped via the firm's self-policing efforts. This presumption—that firms will have imperfect compliance—is, of course, completely pragmatic. Firms cannot monitor all activity engaged in by each and every employee,[87] and actors outside of the firm cannot efficiently utilize external means to ensure perfect compliance within a firm. And yet, given how long these external incentives have been in place, it seems reasonable for scholars and other compliance stakeholders to ask the practical question: what effect have these external incentives had on firms and their success, or lack thereof, for preventing corporate misconduct?

B. Case Study: An Enforcement Priority Pivots

One of the first areas of concern to receive significant attention from the DOJ and Securities and Exchange Commission ("SEC") after the enactment of the Holder Memo were violations of the FCPA.[88] Although the FCPA was passed by Congress in the 1970s, the modern era of corporate enforcement for FCPA violations likely started around 2004.[89] Over time, as the DOJ, sometimes with the SEC as part of parallel enforcement activity, settled FCPA matters for significant monetary amounts, the FCPA and anticorruption became a major compliance priority for private firms.[90] Indeed, since 2004, anticorruption has become a global enforcement priority, with several

[87] Nor should they. Excessive monitoring of employees erodes the employee's sense of autonomy over his own activities and what he observes. *See, e.g.*, Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1970–71 (2006). When individual accountability is diminished, it can lead to less speaking up and individual ownership over the events occurring within the corporate firm. *Id.*; *see also* Harvey S. James, Jr., *Reinforcing Ethical Decision Making Through Organizational Structure*, 28 J. BUS. ETHICS 43, 49 (2000) (noting that "monitoring processes," if "[p]oorly designed[,] . . . will not only fail to detect unethical conduct, but will inadvertently encourage such behavior").

[88] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, 1494 (codified as amended at scattered sections of 15 U.S.C.).

[89] *See* F. Joseph Warin, Michael S. Diamant & Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 325 (2011) ("Until the past decade, FCPA enforcement was fairly dormant. Years would pass without any prosecutions. In fact, federal authorities brought only five enforcement actions in 2004."); Veronica Root Martinez, *The Outsized Influence of the FCPA?*, 2019 U. ILL. L. REV. 1205, 1209 (detailing the increase in enforcement of FCPA violations); Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUDS. 409, 412 (2014).

[90] *See* Martinez, *supra* note 89, at 1207; Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 L. & CONTEMP. PROBS. 193, 193 (2017); GREG WOLSKI & VIRGINIA ADAMS, ERNST & YOUNG LLP, ANTI-CORRUPTION CONSIDERATIONS FOR PRIVATE EQUITY FIRMS (2013), https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/assurance/assurance-pdfs/ey-transaction-forensics-anti-corruption-for-private-equity-firms.pdf [https://perma.cc/6CEZ-9THM].

countries adopting anticorruption statutes[91] in tandem with increased Organization for Economic Co-operation and Development ("OECD") prioritization.[92]

Yet, when one looks at FCPA enforcement since 2004,[93] one does not see that long-term governmental enforcement efforts paired with significant increases in compliance have addressed the problem of bribery and corruption. Instead, one sees a steady, if slightly irregular, set of sanctions for FCPA non-compliance each year. For example, the largest FCPA settlements between corporations and the DOJ from 2014–2024[94] show that, despite the tremendous United States governmental resources dedicated to stopping foreign bribery and corruption since around 2004,[95] this type of misconduct within corporate firms continued to persist.

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[91] *See, e.g.*, Bribery Act 2010, c. 23 (UK); 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 relating to transparency, the fight against corruption, and the modernization of economic life], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 10, 2016 (Fr.); Lei No. 12.846, de 1 de Agosto de 2013, Diário Oficial da União [D.O.U.] de 2.08.2013 (Braz.).

[92] ORGANIZATION FOR ECON. CO-OPERATION & DEV., CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 3 (2025), https://legalinstruments.oecd.org/public/doc/205/205.en.pdf [https://perma.cc/32AH-3ZV2]; *see also* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1615–16 (co-development of the OECD and the FCPA).

[93] There were no corporate enforcement actions settled between DOJ Fraud and corporations in 2003. *See Related Enforcement Actions: Chronological List, 2003*, U.S. DEP'T OF JUST.: CRIM. DIV. (Dec. 16, 2024), https://www.justice.gov/criminal-fraud/related-enforcement-actions-chronological-list-2003 [https://perma.cc/F8J6-E479].

[94] I selected 2014 as my start date, as this was appropriately ten years after the market knew that DOJ Fraud was prioritizing enforcement against companies for engaging in FCPA violations. Additionally, during the 2014 to 2024 time period, significant multijurisdictional enforcement of antibribery and anticorruption efforts occurred. For example, the UK adopted a multifaceted antibribery and anticorruption effort in 2014. *See* Daniel Martin & Robert Finney, *The UK Fight Against Corruption: The UK's Anti-corruption Plan, SFO Convictions Under the UK Bribery Act and New Disclosure Obligations in the Extractive and Logging Industries, December 2014*, HFW (Dec. 19, 2014), https://www.hfw.com/insights/the-uk-fight-against-corruption-december-2014/ [https://perma.cc/4Z9J-XFFR]. Additionally, France's enforcement authority began its work in 2017. Kami Haeri, Malik Touanssa & Capucine Briand, *Bribery & Corruption Law and Regulations 2025 – France*, GLOB. LEGAL INSIGHTS (May 12, 2025), https://www.globallegalinsights.com/practice-areas/bribery-and-corruption-laws-and-regulations/france/ [https://perma.cc/8YL2-QYV8].

[95] The term anticorruption has come to reflect a focus on stopping governmental bribery. *See* Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT'L L. REV. 1307, 1308 (2004) ("Corruption is the use or abuse of public office for private gain."). The U.S.'s act, the FCPA, focuses on bribery of foreign officials. The anticorruption legislation passed by other countries more recently tends to focus on corruption both domestically and internationally. *See* Bribery Act 2010, c. 23 (UK); Lei No. 12.846, de 1 de Agosto de 2013, Diário Oficial da União [D.O.U.] de 2.08.2013 (Braz.).

Table 1: FCPA Monetary Penalties Paid to DOJ from 2004 – 2024[96]		
Year	**Firm**	**DOJ Penalty**
2014[97]	Alstom S.A.	$772 million
2015[98]	Louis Berger International Inc.	$17.1 million
2016[99]	Odebrecht S.A. (including Braskem S.A.)	$3.5 billion ($2.6 billion by Odebrecht, $957 million by Braskem)
2017[100]	Telia Company AB (subsidiary and parent)	$965 million
2018[101]	Société Générale S.A. (subsidiary and parent)	$860 million
2019[102]	Mobile Telesystems Pjsc (subsidiary and parent)	$850 million

[96] This Table focuses only on penalties paid to the DOJ, but that undervalues the penalties paid in a variety of ways. First, sometimes the parent or a subsidiary paid a separate additional fine to the DOJ. Second, at times additional fines were levied by the SEC or another domestic or international enforcement agent. This sort of fine data is relatively complex and this chart is not meant to demonstrate all of that complexity. Instead, this chart reflects the persistence of continued FCPA violations. For specific data, see *Enforcement Actions*, U.S. DEP'T OF JUST.: CRIM. DIV. (Dec. 16, 2024), https://www.justice.gov/criminal-fraud/enforcement-actions [https://perma.cc/FU9N-XERX], which notes when additional penalties or related cases were settled with other agencies or enforcement authorities.

[97] Press Release, U.S. Dep't of Just., Alstom Pleads Guilty and Agrees to Pay $772 Million Criminal Penalty to Resolve Foreign Bribery Charges (Dec. 22, 2014), https://www.justice.gov/opa/pr/alstom-pleads-guilty-and-agrees-pay-772-million-criminal-penalty-resolve-foreign-bribery [https://perma.cc/U5P2-52FS].

[98] Press Release, U.S. Dep't of Just., Louis Berger International Resolves Foreign Bribery Charges (July 17, 2015), https://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges [https://perma.cc/W4CL-YUPZ].

[99] Press Release, U.S. Dep't of Just., Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve [https://perma.cc/9ZLL-T9BG]. This would later get reduced in 2017 due to Obredecht's inability to pay to the point where other enforcement actions from 2016 (Teva, VimpelCom) were bigger. *See* Jody Godoy, *DOJ Taking $24M Haircut on Odebrecht's $2.6B FCPA Fine*, LAW360 (Apr. 12, 2017, at 16:50 EDT), https://www.law360.com/articles/912549/doj-taking-24m-haircut-on-odebrecht-s-2-6b-fcpa-fine [https://perma.cc/ANU9-XDEX].

[100] Press Release, U.S. Dep't of Just., Telia Company AB and Its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More than $965 Million for Corrupt Payments in Uzbekistan (Sep. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolution-more-965 [https://perma.cc/NY7Q-GZM5].

[101] Press Release, U.S. Dep't of Just., Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating LIBOR Rate (June 4, 2018), https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan [https://perma.cc/SM48-Z9FD].

[102] Press Release, U.S. Dep't of Just., Mobile Telesystems Pjsc and Its Uzbek Subsidiary Enter into Resolutions of $850 Million with the Department of Justice for Paying Bribes in Uzbekistan (Mar. 7, 2019), https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department [https://perma.cc/H2HF-Z2N5].

Table 1: FCPA Monetary Penalties Paid to DOJ from 2004 – 2024[96]		
2020[103]	Goldman Sachs Group Inc. (subsidiary and parent)	$2.9 billion
2021[104]	Credit Suisse Group AG (subsidiary and parent)	$547 million
2022[105]	Glencore International A.G. (subsidiary and parent)	$1.1 billion
2023[106]	Albermarle Corporation	$218 million
2024[107]	Gunvor S.A.	$374 million

This data, as well as other evidence,[108] suggests that significant FCPA violations continue to occur despite long-term investment by the government via its enforcement priorities and corporate firms through their anticorruption compliance programs. Monetary penalties paid to the DOJ over the last several years—over a decade after robust enforcement of the FCPA began by the DOJ—is often hundreds of millions or billions of dollars.

This prioritization, by the DOJ and other U.S. enforcement authorities, has resulted in widespread adoption of antibribery and anticorruption compliance programs by large organizations. This includes both public and private companies and nonprofits. Indeed, in prior work, I questioned whether the FCPA enforcement priorities by the government were resulting in a mismatch between companies' risk profiles and investment in compliance.[109] As an example, one saw robust discussion of antibribery and anticorruption risk by top compliance officials at General Motors during the same period of time where issues with its ignition switch were failing

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[103] Press Release, U.S. Dep't of Just., Goldman Sachs Charged in Foreign Bribery Case and Agrees to Pay Over $2.9 Billion (Oct. 22, 2020), https://www.justice.gov/opa/pr/goldman-sachs-charged-foreign-bribery-case-and-agrees-pay-over-29-billion [https://perma.cc/MZQ9-H68W].

[104] Press Release, U.S. Dep't of Just., Credit Suisse Resolves Fraudulent Mozambique Loan Case in $547 Million Coordinated Global Resolution (Oct. 19, 2021), https://www.justice.gov/opa/pr/credit-suisse-resolves-fraudulent-mozambique-loan-case-547-million-coordinated-global [https://perma.cc/9H5E-8BTB].

[105] Press Release, U.S. Dep't of Just., Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 24, 2022), https://www.justice.gov/opa/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-schemes [https://perma.cc/T6T5-P8UR].

[106] Press Release, U.S. Dep't of Just., Albemarle to Pay Over $218M to Resolve Foreign Corrupt Practices Act Investigation (Sep. 29, 2023), https://www.justice.gov/archives/opa/pr/albemarle-pay-over-218m-resolve-foreign-corrupt-practices-act-investigation [https://perma.cc/VLC7-3K3E].

[107] Press Release, U.S. Dep't of Just., Commodities Trading Company Will Pay Over $661M to Resolve Foreign Bribery Case (Mar. 1, 2024), https://www.justice.gov/archives/opa/pr/commodities-trading-company-will-pay-over-661m-resolve-foreign-bribery-case [https://perma.cc/8D5J-CATL].

[108] *See 2022 Year-End FCPA Update*, GIBSON, DUNN & CRUTCHER LLP (Mar. 2, 2023), https://www.gibsondunn.com/2022-year-end-fcpa-update [https://perma.cc/7575-BQC5]; Ariel A. Neuman & Jimmy Threatt, *FCPA Enforcement Continues Apace Under Trump Administration*, BLOOMBERG L. (Dec. 2019), https://www.bloomberglaw.com/external/document/X32NSNKC000000/corporate-compliance-professional-perspective-fcpa-enforcement-c [https://perma.cc/VN78-2UBW]; Manuel A. Abascal et al., *Latin America Likely to Face Continued Robust US Anti-Corruption Enforcement*, LATHAM & WATKINS, at 2 (Mar. 23, 2023), https://www.lw.com/admin/upload/SiteAttachments/Latin-America-Likely-to-Face-Continued-Robust-US-Anti-Corruption-Enforcement.pdf [https://perma.cc/ZT7T-G3WN].

[109] Martinez, *supra* note 89, at 1207.

to be identified as significant red flags at the corporation.[110] The enforcement priority of the government appeared to be driving spending within the compliance program, but a major risk tied to a critical aspect of the business—car safety—appeared to lapse. [111]

Now, firms were left reeling as an Executive Order from President Donald Trump appeared to require the United States government to significantly decrease its enforcement of the FCPA.[112] The Executive Order resulted in a flurry of activity by corporations, white collar law firm groups, and reporters, with many wondering what the shifting priorities meant for firms' compliance programs. If a firm's investment in antibribery and anticorruption compliance was motivated by the government's enforcement priorities—and not by an independent assessment by the company about its business risks—one can understand why the organization would question whether a continued commitment of finite resources would make sense in light of the order.[113] Yet, for companies that were invested in anticorruption compliance work based on their profile of risk, in theory, the new enforcement priorities should not change their work because the statute remains good law and enforcement could restart. [114] In other words, firms that have engaged in proactive risk assessments based on their business and its risks, as opposed to reactive risk responses based on the enforcement priorities of the government, will have a better understanding of how to interpret the impact of the executive order.

C. Case Study: A Firm's Repeated Compliance Failures

Every day, boards of directors, chief executive officers, chief compliance officers, prosecutors, courts, academics, and regular employees engage in a battle to ensure that corporations have in place compliance efforts that will prevent misconduct. These firms police the conduct of their employees in an effort to achieve compliance with "legal and regulatory requirements, industry standards, and internal policies and procedures."[115] And seemingly every day they fail. These failures sometimes continue to occur even after a corporation makes significant investments in its compliance program.

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[110] *Id.* at 1215.

[111] *Id.* at 1215–16; Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 252 (2020).

[112] Exec. Order No. 14,209, 90 Fed. Reg. 9587, 9587 (Feb. 10, 2025). Importantly, however, the FCPA remains good law, and enforcement actions and investigations have continued, even as enforcement priorities and resource allocations appear to have shifted. Sidley Austin LLP, *The Freeze Has Thawed: DOJ Issues New Directive to Pursue FCPA Cases that Vindicate U.S. National Interests* (June 11, 2025), https://www.sidley.com/en/insights/newsupdates/2025/06/the-freeze-has-thawed-doj-issues-new-directive-to-pursue-fcpa-cases-that-vindicate-us-national-interests.

[113] *See, e.g.*, Hui Chen, *Pause in FCPA Enforcement: Crisis or Opportunity?*, CDE ADVISORS (Feb. 11, 2025), https://www.cdeadvisors.com/better-way-blog/fcpa [https://perma.cc/RPF6-ZXSM]. It is worth noting that FCPA enforcement, while initially pursued almost solely by the United States, is now often the subject of multijurisdictional enforcement, with the UK, France, and other countries having agencies dedicated to robust antibribery and anticorruption enforcement. *See, e.g.*, Joan A. Akalaonu, *Growing International Coordination of Multi-jurisdictional FCPA Enforcements*, FAEGRE DRINKER BIDDLE & REATH LLP (Mar. 31, 2021), https://www.faegredrinker.com/en/insights/publications/2021/3/growing-international-coordination-of-multijurisdictional-fcpa-enforcements [https://perma.cc/5UW3-64S8].

[114] *See* Stephen E. Frank, Sarah Heaton Concannon & Sam Nitze, *Reports of the Death of Foreign Corrupt Practice Act May be Exaggerated: Executive Order Likely Spells Near-Term Shift, Not Demise*, REUTERS (Feb. 21, 2025, at 12:17 CST), https://www.reuters.com/legal/legalindustry/reports-death-foreign-corrupt-practices-act-may-be-exaggerated-executive-order-2025-02-21/ [https://perma.cc/Q8LQ-3WKA].

[115] Martinez, *supra* note 111, at 257. *See* Veronica Root, *The Compliance Process*, 94 IND. L.J. 203, 205 (2019).

Take, for example, JPMorgan Chase ("JPMorgan"). In 2013, JPMorgan entered into settlements with regulators in the United States and the United Kingdom for failing to properly oversee its trading operations as part the resolution to what was referred to as the "London Whale" scandal.[116] Around the same time that JPMorgan settled its claims, it also publicized its plans to make significant changes to its risk management and compliance program.[117] Specifically, JPMorgan announced that since learning of the scandal in 2012, "4,000 extra staff had been assigned to control areas such as risk, compliance, legal and finance and that 3,000 of those had been hired [that] year."[118] Additionally, JPMorgan spent an extra $1 billion on improving its internal controls and had ensured that its staff "had undergone 750,000 hours of training on compliance issues."[119] JPMorgan also announced significant investments in its anti-money laundering program efforts and its intention to pull out of risky product markets.[120] In other words, after the London Whale scandal, JPMorgan poured a great deal of resources—both in money, time, and talent—into ensuring its compliance program would be more effective going forward.

In 2024, the United States Federal Reserve and the Office of the Comptroller of the Currency ("OCC") fined JPMorgan $348.2 million for "its inadequate program to monitor firm and client trading activities for market misconduct."[121] Importantly, JPMorgan self-identified the issue—which means its compliance program worked in alerting it to misconduct.[122] That said, the misconduct occurred from 2014-2023, so even with heavy investments in its compliance program, it took quite some time for JPMorgan to identify and report the misconduct.[123]

Moreover, the 2024 settlement came after a 2020 civil settlement with the OCC for $250 million as a result of an alleged failure by JPMorgan "to maintain adequate internal controls and internal audit over its fiduciary business."[124] The OCC determined that JPMorgan's "risk management practices were deficient and it lacked a sufficient framework to avoid conflicts of interest."[125] And this settlement with the OCC came on the heels of JPMorgan settling allegations with three federal agencies "over its role in the alleged manipulation of precious metal and Treasury markets" for $920 million.[126]

These settlements of misconduct between JPMorgan and various government actors are, in many ways, not unique. Repeat corporate misconduct has been identified at firms like HSBC[127]

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[116] Chris Isidore & James O'Toole, *JPMorgan Fined $920 Million in 'London Whale' Trading Loss*, CNN MONEY (Sep. 19, 2013, at 14:15 ET), https://money.cnn.com/2013/09/19/investing/jpmorgan-london-whale-fine/ [https://perma.cc/6NBT-EZZS].
[117] Treanor, *supra* note 22.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] Pete Schroeder, *JPMorgan Fined Nearly $350 Million for Inadequate Trade Reporting*, REUTERS (Mar. 14, 2024, at 15:29 CDT), https://www.reuters.com/business/finance/jpmorgan-pay-nearly-350-million-penalties-inadequate-trade-reporting-2024-03-14/ [https://perma.cc/9BGT-LUTG].
[122] *Id.*
[123] *Id.*
[124] Press Release, Off. of the Comptroller of the Currency, OCC Assesses $250 Million Civil Money Penalty Against JPMorgan Chase Bank, N.A. (Nov. 24, 2020), https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-159.html [https://perma.cc/UF8X-WSG6].
[125] *Id.*
[126] Sergei Klebnikov, *JPMorgan Admits Wrongdoing in Illegal Trading Allegations, Will Pay Record $920 Million to Regulators*, FORBES (Sep. 29, 2020, at 16:07 EDT), https://www.forbes.com/sites/sergeiklebnikov/2020/09/29/jpmorgan-admits-wrongdoing-in-illegal-trading-allegations-will-pay-record-920-million-to-regulators/ [https://perma.cc/8PM3-353X].
[127] *See* Veronica Root, *Coordinating Compliance Incentives*, 102 CORN L. REV. 1003, 1005–08 (2017).

and Wells Fargo.[128] And these firms have been the subject of domestic and international enforcement activity and sanctions as a result of their misconduct. When one observes this sort of persistent misconduct at specific firms, one might attribute it to poor organizational cultures or potential deficiencies with that particular firm's compliance program. But given that repeat misconduct often occurs after significant government enforcement activity, which was accompanied by strong incentives for the implementation of robust compliance programs, one is left to wonder whether the current compliance paradigm is in fact working to prevent misconduct at corporate firms. And while this and other similar examples are not proof that compliance programs are not working, they do provide a reason for scholars who study compliance to question whether changes to accepted understandings of what does and does not result in effective compliance are in fact correct.

* * * *

The upshot is that compliance programs have grown in size, complexity, expense, and scope over the past 30 years. There is no denying that the sophistication of compliance programs today is stunning when one considers that this field of law was almost non-existent just a few decades ago.[129] That said, firms[130] and those consulting on compliance program improvements[131] have also internalized the ideas that (i) enforcement-driven compliance efforts are sufficient to incentivize firms to adopt robust compliance programs and (ii) perfect compliance is not their goal, thereby justifying civil and other more lenient sanctions in the event of corporate misconduct. As a result, the goal of those overseeing compliance programs is not to achieve perfect compliance; instead, it is to mitigate red flags[132] and other potential risks and to engage in a good faith effort to implement an effective ethics and compliance program.[133]

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[128] Kathy Kristof, *Wells Fargo Fined for Opening Millions of Fake Accounts*, CBS NEWS (Sep. 8, 2016, at 17:55 ET), https://www.cbsnews.com/news/wells-fargo-pays-record-fine-for-customer-abuse/ [https://perma.cc/U4AN-EFRS].

[129] The banking sector has had compliance obligations since the 1970 Bank Secrecy Act. *See* Bank Secrecy Act § 128, 12 U.S.C. § 1958. But these obligations were often not fully taken seriously until corporate criminal enforcement was rigorously pursued by the DOJ in the early-to-mid 2000s. *See, e.g.*, Brandon L. Garrett, *The Rise of Bank Prosecutions*, 126 YALE L.J.F. 33, 36 (2016).

[130] For example, when senior leaders at Wells Fargo were attempting to assess the impact of fraudulent accounts being opened by bank employees, they framed the issue as one where a certain level of misconduct was acceptable. *See* Wells Fargo & Co., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Schedule 14A) 32–33 (Apr. 10, 2017) [hereinafter Wells Fargo Schedule 14A], https://www.sec.gov/Archives/edgar/data/72971/000119312517118654/d375947ddefa14a.htm [https://perma.cc/G9Z6-Q7AT] ("When the data showed that 1% of employees had been terminated for such violations, Stumpf, Tolstedt and other Community Bank leaders received the figure positively, believing it proved that a vast majority of individuals were behaving appropriately.").

[131] In an interview, the then-monitor for Volkswagen, Larry Thompson, expressed his thoughts about possible future misconduct at Volkswagen. *See Independent Monitor at Volkswagen Calls for Internal Culture Change*, AUTO. NEWS (July 2, 2018, at 00:00 CT), https://www.autonews.com/article/20180702/OEM11/180709988/independent-monitor-at-volkswagon-calls-for-internal-culture-change [https://perma.cc/H4HJ-X8KQ].

[132] *See, e.g.*, Michael Volkov, *Red Flags and Compliance*, VOLKOV L. (May 10, 2012), https://blog.volkovlaw.com/2012/05/red-flags-and-compliance [https://perma.cc/QPX3-3YAZ].

[133] *See, e.g.*, Robert S. Kaplan & Anette Mikes, *Managing Risks: A New Framework*, HARV. BUS. REV., June 2012, at 1, 4.

III. Limitations of an Enforcement-Driven Program

This Article questions how the assumptions of today's compliance programs may advance or hinder the ultimate goals of the compliance function. This Part begins by describing some of the changes that have occurred in markets and enforcement policy since the 1990s that might be relevant to how one might assess the effectiveness of enforcement-driven compliance incentives today. The Part next discusses the costs and benefits of regimes that (i) accept imperfect compliance or (ii) attempt to achieve perfect compliance. The Part then turns to insights from scholarly literature as to why enforcement-driven compliance programs that tolerate imperfect compliance may contain inherent flaws.

A. New Market & Enforcement Realities

This Section discusses changes to market conditions and enforcement realities that have occurred over the past 25 years. In particular, it highlights the reality that corporations are much bigger than they once were, which means the challenge of self-policing for firms has changed in significant and meaningful ways. The Section then looks at how corporate criminal enforcement—which took off meaningfully in the mid-2000s, well after the original law and economics model was put forward—has become predictable. That predictability means that corporations are better able to budget and account for the ways in which corporate misconduct might impact the firm over the long-term. The Section then turns to a meeting point between these two insights: as firms have become larger, the ability to sanction them appropriately has sometimes become more difficult because harm to the company might harm markets, the economy, or society more generally.

1. Larger Firms

First, the number of firms going public is decreasing, but the size of public firms is increasing. For example, in Professors Mark Roe and Charles Wang's recent study, they note that in 1996 there were more than 7,000 public firms, but "by year-end 2021 that number had dwindled . . . to fewer than 4,000."[134] Professors Roe and Wang go on to explain that while the number of public firms is declining, "their collective economic weight is not."[135] Indeed, Roe and Wang determine that "[p]ublic firms are much bigger on average now than before, and in more concentrated industries."[136] The firms of the 2020s are significantly larger and more concentrated in particular sectors than the firms of the 1990s. The increased size of public firms may, in part, help to explain the rise of firms that are considered too big to fail, a phrase commonly heard since the 2008 financial crises,[137] or too big to jail, a phrased coined by Professor Brandon Garrett in a book of the same name.[138] The rise of these larger firms, which are more important to the financial sector and more difficult to sanction, have potential implications to the traditionally accepted law and economic models about how to best deter corporate crime. If a firm is too big to fail—even when the firm is engaged in rampant misconduct—the government may be reluctant to sanction the firm

[134] Mark J. Roe & Charles C.Y. Wang, Are Public Firms Disappearing? Corporate Law and Market Power Analyses 1 (Feb. 27, 2023) (unpublished manuscript) (on file with author).
[135] *Id.* (emphasis omitted).
[136] *Id.*
[137] *See* Kai Ryssdal & Maria Hollenhorst, *The History of "Too Big to Fail,"* MARKETPLACE (Apr. 13, 2023), https://www.marketplace.org/2023/04/13/the-history-of-too-big-to-fail [https://perma.cc/WUW6-6LW6].
[138] BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 1–3 (2014).

in a manner that is appropriate given its misconduct [139] because it might damage the firm itself,[140] other aspects of the economy, or the country. This same rationale would apply to firms deemed too big to jail.

2. Better Predictability in Potential Sanctions

Second, firms are aware that a standard penalty for engaging in corporate misconduct is to pay a monetary penalty. These monetary penalties are often based, in part, on what the Organizational Sentencing Guidelines suggest a firm should need to pay—and this is true even when the government is technically pursuing a civil action.[141] As a result, firms or their counsel can estimate what sort of monetary penalty the firm might face for the misconduct it has entered into. Given this reality, there is a concern that firms are incorporating a need to pay monetary fines directly into their budgets.[142] For example, when Meta (then Facebook) was ordered to pay a $5 billion fine for privacy violations in 2020, some posited that this was just part of the "cost of doing business" for the firm.[143] Indeed, Professors Dorothy Lund and Natasha Sarin conducted an empirical analysis to ascertain how corporations have responded to the federal enforcement regime within the United States.[144] While they noted the limitations to their data, they ultimately found that "[r]ecidivist companies are much larger than non-recidivist companies, but they receive smaller fines than non-recidivist companies when measured as a percentage of assets and revenue."[145] They explain that their results "indicate that it might not be politically feasible or legally possible to levy a sufficiently high fine to deter future incidents of corporate crime," because for large and complex firms, "criminal penalties may be just another cost of doing business—and a reasonable cost at that."[146]

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[139] For example, certain banks have been permitted to keep preferential status from the SEC even though they have engaged in repeated instances of misconduct. *See, e.g.*, Kara M. Stein, *Dissenting Statement in the Matter of Deutsche Bank AG, Regarding WKSI*, U.S. SEC. & EXCH. COMM'N (May 4, 2015), https://www.sec.gov/news/statement/dissenting-statement-deutsche-bank-ag-wksi [https://perma.cc/35PD-NZW5].

[140] Veronica Root Martinez, *The Government's Prioritization of Information over Sanction: Implications for Compliance*, 83 L. & CONTEMP. PROBS., no. 4, 2020, 85, 94–95.

[141] *See supra* notes 73–79 and accompanying text.

[142] *See* John Cassidy, *Will Anyone Hold Jamie Dimon Responsible for the London Whale Scandal?*, NEW YORKER (Sep. 19, 2013), https://www.newyorker.com/news/john-cassidy/will-anyone-hold-jamie-dimon-responsible-for-the-london-whale-scandal [https://perma.cc/YN7Q-3876] ("But megabanks like JPMorgan are so big these days that they can easily afford to pay out the odd billion dollars. Indeed, for heavily regulated entities that make much of their profits from trading and market-making, paying large fines is rapidly becoming just another cost of doing business—and not one that is prohibitive."); Carliss Chatman & Tammi Etheridge, *Federalizing Caremark*, FINREG BLOG (Aug. 18, 2022), https://sites.duke.edu/thefinregblog/2022/08/18/federalizing-caremark [https://perma.cc/K2RL-K29W] ("Over time, legal compliance becomes a simple cost-benefit analysis—if it is cheaper to break the law than to obey it, then businesses will break the law to either keep prices low to attract consumers or to maximize profits for its shareholders.").

[143] Paul Constant, *If We Don't Raise the Costs of Corporate Crime for Companies like Facebook, Breaking the Law Becomes Just Another Expense on the Balance Sheet*, BUS. INSIDER (Dec. 11, 2020, at 10:52 CT), https://www.businessinsider.com/for-companies-like-facebook-5-billion-fine-just-another-expense-2020-12 [https://perma.cc/4CZT-457H]; Cassidy, *supra* note 142.

[144] Dorothy S. Lund & Natasha Sarin, *Is Corporate Criminal Punishment Just Another Cost of Doing Business?*, REGUL. REV. (July 6, 2020), https://www.theregreview.org/2020/07/06/lund-sarin-corporate-criminal-punishment-another-cost-doing-business [https://perma.cc/FGY7-MU76].

[145] *Id.* (emphasis omitted).

[146] *Id.*

3. Too Big to (Fully) Sanction

Third, a key component to the mitigation or leniency suggested in law and economics scholarship is the idea that the appropriate level of sanction to deter the misconduct is on the table. For example, if the proper sanction for failing to stop employees from bribing a customs agent is $10,000, then in a world of strict liability, the firm—for purposes of this Article, Acme Corp.—would be required to pay the full $10,000. But in a world where leniency or mitigation credit is permitted, Acme Corp. could get a reduction in the amount of penalty if it met certain requirements. For instance, Acme Corp. might get a $3,000 reduction for having an effective compliance program. It might also get an additional $1,000 reduction for voluntarily disclosing the misconduct. In such a situation, the firm would pay a $6,000 penalty instead of the $10,000. There are several reasons, however, to believe that the original amount that would actually deter the misconduct—the $10,000—is never going to be levied today.

The work of Professors Lund and Sarin suggests that the fine amount necessary to deter the biggest and most complex firms is not being levied.[147] The fine amounts are not based on the assets of the firm, which means what sounds like a large fine—$5 billion—may not actually be a significant penalty for that particular firm. In the above example, I presumed the appropriate fine to deter paying a bribe to a custom official is $10,000, but what if Acme Corp. is a large, complex firm? What if for it, the real fine to deter the misconduct at Acme Corp. is closer to $20,000? If that is the case, then instead of getting a $4,000 discount, Acme Corp. is getting a $14,000 discount, which means Acme Corp. is not sufficiently deterred from stopping future bribery of customs agents. The "what ifs" could continue. What if Acme Corp. is able to gain market share for its goods by paying what it perceives as a relatively low bribe and fine, which allows it to be first to market, first to shelves, and first to develop brand loyalty amongst consumers? The $6,000 penalty is almost certainly worth it to the firm when one considers all of the benefits the firm is receiving for the misconduct its agents engaged in.

Additionally, the DOJ has worked hard to demonstrate that it will provide leniency to firms that engage in certain activities, but the DOJ does not appear to have engaged in an economic analysis to see if its leniency policies appropriately incentivize and deter corporate crime. The DOJ's leniency policies are extensive. For example, since 2016, the DOJ has allowed declinations for certain types of corporate misconduct.[148] As of 2023, a firm may receive a declination if it can prove that the self-disclosure of misconduct to the government was immediate, the company had an effective compliance program when that enabled the detection and disclosure of the violation, the firm provided "extraordinary" cooperation to the DOJ, the company also conducted "extraordinary" remediation, and, at least in some cases, the company agrees to disgorge all profits.[149] The policy makes sense as a tool for encouraging self-disclosure, but there is no public theoretical or empirical assessment of the policy and its ramifications on deterring corporate crime from the Department. It is a program that has changed and expanded over time, but whether it is working has not been publicly proven or justified.

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[147] *Id.*

[148] *See, e.g.*, Martin McElligott, *Declinations with Disgorgement: The DOJ's Recent Approach in FCPA Enforcement*, VEDDER PRICE, Winter 2016, at 8, 8, https://www.vedderprice.com/declinations-with-disgorgement-dojs-recent-approach-in-fcpa-enforcement [https://perma.cc/3VB9-FH5J]; Erin K. Sullivan, *DOJ Expands Availability of Declinations with Disgorgement for Corporations That Self-Disclose Misconduct*, BRADLEY ARANT BOULT CUMMINGS LLP (Jan. 30, 2023), https://www.eyeonenforcement.com/2023/01/doj-expands-availability-of-declinations-with-disgorgement-for-corporations-that-self-disclose-misconduct [https://perma.cc/5KPL-XUX7].

[149] Sullivan, *supra* note 148.

Moreover, in January 2023, the DOJ disclosed that it would offer a 75% reduction in fines to companies that admit crimes.[150] The purpose of the announcement and changes was to incentivize companies to self-disclose misconduct and cooperate with DOJ investigations.[151] The open question, however, is whether a 75% reduction is worth the cost of potentially under-deterring misconduct. The firms that would be most likely to have the apparatus in place to allow them to self-disclose will be the biggest firms with the most sophisticated compliance programs. And yet, if you consider the work of Professors Lund and Sarin, those are the same firms that would remain undeterred by the non-discounted fine amount, as the fines are not tied to the value of the firm. To put it more plainly, under the DOJ's new policies, Acme Corp. would receive a 75% reduction off of the $10,000 fine and pay only $2,500. But the true cost of deterring Acme Corp. would have been $20,000 given the reality of its size and assets. This makes the distance between the fine amount paid and the fine levied quite significant—perhaps even more significant than the DOJ realizes. Importantly, the DOJ is not the only government enforcement authority that allows for significant amounts of leniency in the face of corporate misconduct.[152]

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The law and economics model that much of corporate criminal enforcement is based upon today—which serves as the theoretical framework for identifying the proper set of external incentives for firms to engage in effective self-policing—was created during a different time. The enforcement-driven model for compliance may be building upon a set of initiatives that are in practice engaged in systematic underdeterrence.

B. Costs of Imperfect and Perfect Compliance

As outlined in Part II, government enforcement policy, state corporate law, and the law and economics model of deterring corporate crime all assume imperfect compliance at firms is acceptable. This Section will discuss some of the costs that arise when a firm employs a compliance program that assumes imperfect compliance and contrasts those with the costs of attempting to achieve perfect compliance.

1. Costs of Imperfect Compliance

There are a range of potential costs associated with a firm's decision to accept that its compliance program will sometimes fail to prevent or detect misconduct. This Section focuses

[150] Chris Strohm, *DOJ Offers 75% Reduction in Fines to Companies That Admit Crimes*, BLOOMBERG (Jan. 17, 2023, 14:26 CST), https://www.bloomberg.com/news/articles/2023-01-17/doj-offers-75-reduction-in-fines-to-companies-admitting-crimes [https://perma.cc/4XNV-VLQU].

[151] I have written about the government's willingness to trade information for decreased sanctions before, and the way that might have deleterious effects on the compliance effort. *See* Martinez, *supra* note 140, at 87–88, 105–08.

[152] See, e.g., Benefits of Cooperation with the Division of Enforcement, U.S. SEC. & EXCH. COMM'N (Sep. 15, 2025), https://www.sec.gov/about/divisions-offices/division-enforcement/benefits-cooperation-division-enforcement [https://perma.cc/7TT7-SFBV]; Timothy Puko, *EPA Plans to Show Leniency with Some Civil-Rule Violators*, WALL ST. J. (Mar. 26, 2020, 18:28 ET), https://www.wsj.com/articles/epa-plans-to-show-leniency-with-some-civil-rule-violators-11585257119 [permalink not working].

upon the costs[153] of (i) undetected misconduct and (ii) improperly assessed significant misconduct. To be clear, this Article does not contend that ethics and compliance professionals, regulators, or formal compliance frameworks endorse, excuse, or encourage violations of law. Nor does it suggest that organizations consciously design compliance programs to permit misconduct. Rather, the concern explored here is how enforcement-driven frameworks—when internalized primarily at the senior leadership and board levels—can shape how organizations interpret and contextualize detected misconduct. In particular, when compliance effectiveness is evaluated through the lens of enforcement exposure, resource prioritization, or statistical failure rates, leaders may come to view certain levels of detected misconduct as an acceptable or inevitable byproduct of organizational scale, complexity, or incentive structures. This framing risk is distinct from legitimate priority-setting under conditions of finite resources and is not attributable to the normative commitments of compliance professionals themselves. The analysis that follows therefore focuses on organizational interpretation, decision-making, and ethical framing at the leadership level, rather than on any claim that compliance functions or government standards affirmatively tolerate wrongdoing.

a. Undetected Misconduct

One potential cost of firms' adopting a regime of imperfect compliance is that they may craft compliance programs that they know will fail to detect misconduct. If members of the organization think they will not be caught, they might not be sufficiently deterred from engaging in misconduct. Importantly, there are some compliance failures that result from a failure to detect misconduct that occurred—even in sophisticated organizations with what appeared to be strong compliance programs.

For example, Kareem Serageldin, the only banker jailed in the U.S. after the financial crisis, falsified books and records on a consistent basis while serving as the Global Head of Structured Credit Trading at Credit Suisse.[154] Specifically, Serageldin hid more than $100 million in losses in a mortgage-backed securities trading book at Credit Suisse.[155] Credit Suisse had a strong incentive to stop this sort of misconduct, as the result of the hidden losses from Serageldin and others' conduct required the firm to take a $2.65 billion write-down of its 2007 year-end financial

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[153] The primary benefits of employing a strategy of imperfect compliance by firms have largely been detailed in Parts II and III of this Article. A firm that employs an imperfect compliance strategy may still get the benefits of leniency or mitigation credit if it has implemented a good faith compliance program. Because perfection is not what the government expects from firms, a firm can have an FCPA violation or anti-money laundering offense without significant enforcement consequences. Additionally, a firm can typically avoid significant threats of third-party litigation, as in, for example, the Delaware courts, if it has a good faith compliance program that is monitored in some way by the Board. Thus, the primary benefit of employing a strategy that accepts imperfect compliance is that that is the strategy the firm is expected to implement by the government and liability regimes.

[154] Joe McGrath, *The Making of a Mismarker: The Case of the Only Banker Jailed in the U.S. for His Role in the Financial Crash*, U. CHI. L. REV. ONLINE (Jan. 7, 2020), https://lawreviewblog.uchicago.edu/2020/01/07/the-making-of-a-mismarker-the-case-of-the-only-banker-jailed-in-the-u-s-for-his-role-in-the-financial-crash-by-joe-mcgrath [https://perma.cc/J763-9EMF]; Press Release, U.S. Dep't of Just., Former Credit Suisse Managing Director Sentenced in Manhattan Federal Court to 30 Months in Prison in Connection with Scheme to Hide Losses in Mortgage-Backed Securities Trading Book (Nov. 22, 2013), https://www.justice.gov/usao-sdny/pr/former-credit-suisse-managing-director-sentenced-manhattan-federal-court-30-months [https://perma.cc/3QQY-QTLZ]. *See also* Samuel W. Buell, *The Limits of Individual Prosecutions in Deterring Corporate Fraud*, 59 WAKE FOREST L. REV. 557, 587–89 (2024) (Serageldin's poor decisions).

[155] Press Release, U.S. Dep't of Just., *supra* note 154.

results.[156] When Serageldin was sentenced, however, the judge noted that there was a "'terrible climate' at the bank at the time."[157] As it turned out, the basic elements of the misconduct Serageldin engaged in was "duplicated by many others and in many other departments."[158]

The misconduct Serageldin engaged in was harmful both reputationally and financially to the firm. Moreover, the importance for banks to maintain accurate books and records is a well-known requirement,[159] for which banks' compliance programs should have relatively sophisticated systems in place. This was not an instance of a new or previously unconsidered area of misconduct. Yet, it does not appear that the firm attempted to implement a perfect compliance program. Firms typically know that some misconduct will occur within their ranks. But the reality is that when a firm accepts small amounts of misconduct as acceptable, it is hard to predict the nature and scale by which misconduct will eventually occur. Undetected misconduct is necessarily a cost—one that is hard to properly quantify—for firms that accept imperfect compliance and tolerate some level of misconduct when constructing their compliance programs.

b. Improperly Assessed Significant Misconduct

For imperfect compliance programs, there is also the risk that a compliance failure might be formally detected by the firm, but not acted upon explicitly because the firm understands perfection is not the goal of the program.

For example, in December 2013, the Los Angeles Times reported that employees at Wells Fargo were under intense sales demands at Wells Fargo branches, which forced many employees to decide to either cheat or risk being fired.[160] Specifically, bank branches were expected to meet "daily quotas for opening accounts and selling customers extras such as overdraft protection."[161] In response to this pressure from the firm, "employees . . . opened unneeded accounts for customers, ordered credit cards without customers' permission and forged client signatures on paperwork."[162] The scandal was reported widely by the newspaper, but a later internal investigation found that the firm—indeed, the CEO—was aware that fraudulent accounts were being opened.

After the publication of the article, "[s]ales integrity issues received heightened Board reporting and attention."[163] Indeed, "[s]ales practices and the cross-sell strategy were identified as a risk issue to the Risk Committee for the first time in February 2014."[164] The Board understood that these sales practice issues were significant, and in 2014 it "supported $60 million of additional

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[156] *Id.*
[157] Nate Raymond, *Former Credit Suisse Trader Serageldin Gets 30 Months in Jail*, REUTERS (Nov. 22, 2013, at 14:55 CST), https://www.reuters.com/article/idUSBRE9AL137/ [https://perma.cc/V5WL-9C4T].
[158] *Id.*
[159] *See, e.g.*, *Accounting and Records Keeping*, ALL. FOR INTEGRITY, https://www.allianceforintegrity.org/en/offer/Business-Risks/Accounting-and-records-keeping.php [https://perma.cc/3ELQ-LNAK] (last visited Nov. 13, 2025); *Books and Records*, FINRA, https://www.finra.org/rules-guidance/key-topics/books-records [https://perma.cc/SL6L-2FLC] (last visited Oct. 19, 2025).
[160] E. Scott Reckard, *Wells Fargo's Pressure-Cooker Sales Culture Comes at a Cost*, L.A. TIMES (Dec. 21, 2013, at 12:00 PT), https://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html [https://perma.cc/M6QV-PDE4].
[161] *Id.*
[162] *Id.*
[163] Wells Fargo Schedule 14A, *supra* note 130, at 100.
[164] *Id.*

funding for Corporate Risk," the department in charge of the concerns, "to take on additional personnel."[165] In April 2015, the then-head of the Community Bank division of Wells Fargo reported to the Risk Committee on sales practice issues. In particular, "Tolstedt emphasized that a large organization could not be perfect, and that the sales practice problem was a result of improper action on the part of individual employees."[166] To its credit, the Risk Committee viewed Tolstedt's presentation as unsatisfactory, but the idea that a large organization could not be perfect had permeated to other areas of the firm.

Indeed, the report into the sales practices at the Community Bank notes that "[e]ven when Wells Fargo investigated or terminated employees following publication of the *Los Angeles Times* articles in 2013, there was no adequate investigation to identify and address injuries that customers might have suffered."[167] Perhaps most important for purposes of assessing the costs of imperfect compliance, the report explained:

> The failure to frame the [sales practice] issue properly extended to senior management's view that firing 1% of the Community Bank workforce every year for sales integrity violations was acceptable. For example, in November 2013, in the wake of the first *Los Angeles Times* article on sales practice issues, John Stumpf asked for data on the number of terminations associated with sales integrity violations. When the data showed that 1% of employees had been terminated for such violations, Stumpf, Tolstedt and other Community Bank leaders received the figure positively, believing it proved that a vast majority of individuals were behaving appropriately. When the figure came up again in 2015, Stumpf reacted similarly in an email to Tim Sloan . . . . [An executive,] when presented with data showing ethics-related terminations of a similar magnitude in 2013, wrote that it was "mind boggling to me it's so low – I think it shows our [employees] are significantly more ethical than the general population (no data whatsoever to back that up, just impressionistic comment!)." The senior leaders did not consider that the 1% represented only employees who were caught engaging in sales practice misconduct. Moreover, even accounting for the Community Bank's high turnover rate, firing 1% of the workforce each year meant over time that more than 1% were engaging in terminable misconduct.[168]

In other words, the leaders at the firm saw a 1% rate of misconduct, and they were comforted that the risk management processes were working. As it turned out, the failures they detected were much, much more significant than they perceived. The assumption that imperfect compliance was acceptable—that a low failure rate was acceptable, even for what was clearly fraudulent activity—lulled the top leaders of the firm into a false sense of security.

2. Costs of Perfect Compliance

This Section focuses on the costs of achieving perfect compliance for the firm. To obtain perfect compliance would be, at best, extraordinarily challenging and, at worst, impossible.

[165] *Id.* at 102.
[166] *Id.* at 103.
[167] *Id.* at 32.
[168] *Id.* at 32–33.

a. Overdeterrence

Perhaps the most significant concern with a regime of perfect compliance is possible overdeterrence. Typically, overdeterrence arguments are concerned that an external body's incentives (e.g., the government's) to create an effective compliance program are overly draconian and will result in overdeterrence. Scholars argue that the appropriate deterrence level is linked to social welfare, which can be determined by assessing "the benefits that individuals obtain from their behavior, less the costs that they incur to avoid causing harm, the harm that they do cause, the cost of catching violators, and the costs of imposing sanctions on them (including any costs associated with risk aversion)."[169] If the government were to pursue a regime that would incentivize perfect compliance, it would necessarily be discounting certain costs such as the amount of harm an offense creates, the cost of catching the offenders, and the cost of imposing sanctions. As a result, economists tend not to argue in favor of a government enforcement regime that would incentivize perfect compliance, and they instead focus on optimal deterrence.[170]

This is not, however, the focus of this Article. The more precise question at issue here is: if a firm were to adopt a regime of perfect compliance internally, would that lead to overdeterrence? The answer depends, in part, on how one designs the compliance program.

Professor Todd Haugh has argued that if a firm employs a compliance program that takes the features of external criminal enforcement and incorporates them into the firm, it can have an extremely negative impact on the firm's creation of an effective compliance program.[171] Indeed, Haugh explains that when a criminalization model is incorporated into a firm's program, it can actually incentivize employees to cover up misconduct, which can ultimately lead to the delegitimization of the compliance effort overall.[172] Haugh's take is important, in part, because he "contends that corporate compliance is becoming increasingly 'criminalized'; that is, corporations are now approaching compliance primarily through a criminal law lens, using the precepts of criminal legislation, enforcement, and adjudication to advance their compliance goals."[173] If this criminalization framing of the compliance program is true at corporate firms, a push toward perfect compliance could result in very similar harms to what can occur when the government engages in strategies of overdeterrence. The costs of a criminalized version of compliance appear quite high.

b. Strict Liability

Regardless of the structure of a compliance program, however, one might worry that a push toward perfect compliance might result in a compliance program where the firm imposes a type of strict liability for any of its agents who engage in wrongdoing. A strict liability regime would send a clear signal that misconduct would not be tolerated, but there could be a number of costs. First, strict liability might create an incentive, similar to what Professor Haugh identified, to hide misconduct. If an employee broke a law or company requirement, then the employee will have an

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[169] A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, *in* 1 HANDBOOK OF L. & ECON. 403, 406 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

[170] *See generally* Alex Raskolnikov, *Deterrence Theory: Key Findings and Challenges*, *in* CAMBRIDGE HANDBOOK OF COMPLIANCE 179 (Benjamin van Rooij & D. Daniel Sokol eds., 2021) (discussing deterrence theory's efficiency focus and its challenges reconciling theory with real-world enforcement).

[171] Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215, 1218–19 (2017).

[172] *Id.*

[173] *Id.* at 1218.

incentive to cover up his activity in order to keep his job. Moreover, his coworkers might also have an incentive to hide the misconduct if they do not want to see their coworker out of work. Social science research suggests that a "sanction-based command-and-control" model, like a strict liability regime, has a number of flaws and is not the optimal method of creating a well-functioning compliance program.[174] Thus, to the extent that a firm's quest to ensure perfect compliance leads it to adopt a regime of strict liability, a number of significant costs might hinder the compliance effort associated with this decision. The upshot is that overdeterrence might occur within a perfect compliance regime, but the amount of overdeterrence is likely related to how the firm adopts its method of achieving perfect compliance. If a firm employs traditional enforcement models—just internally to the firm—or a strict liability regime, the costs of perfect compliance would look to be quite high.

c. *Collateral Harms*[175]

A common concern expressed when scholars and policymakers debate the proper enforcement regimes for corporate firms is about potential collateral harm. For example, there is a concept in corporate crime scholarship related to what has become known as the "Andersen effect."[176] Some argue that corporate prosecutors are reluctant to bring corporate liability because the effect of the prosecution of Arthur Andersen after the Enron scandal was to put the firm out of business.[177] Additionally, a line of conversation within legal scholarship is concerned that when corporations are forced to pay monetary penalties, it is the shareholders and not the firm itself that is harmed.[178] Perhaps most importantly, when a firm is harshly sanctioned by the government, it does not necessarily harm only the firm, the shareholders, or the executive of the firm; it can also have deleterious effects on janitors, mailroom staff, and secretaries. Thus, punishing a corporate offender can have significant spillover impacts into the surrounding community beyond the firm.[179]

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[174] Tom R. Tyler, *Self-Regulatory Approaches to White-Collar Crime: The Importance of Legitimacy and Procedural Justice*, *in* THE CRIMINOLOGY OF WHITE-COLLAR CRIME 195, 204 (Sally S. Simpson & David Weisburd eds., 2009).
[175] The above three potential costs could be framed as collateral harms. In this Part, I have addressed these costs separately, but I am aware that one could reframe the concerns outlined as collateral consequences of a firm's decision to pursue perfect compliance.
[176] Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1, 20–21 (2014). The Andersen effect may, however, be a bit overblown, because Arthur Anderson was a partnership and not a corporation. Individual partners were able to leave the firm relatively easily, but a corporation likely would not have dissolved as quickly in case of prosecution. That said, Andersen's conviction was overturned at the Supreme Court. Arthur Andersen LLP v. United States, 544 U.S. 696, 708 (2005). So the impact of a prosecution, the business ceasing to exist, when there is a debate about whether criminal conduct occurred, remains a cautionary tale for many.
[177] *See* Cunningham, *supra* note 176, at 18 ("Though a unanimous U.S. Supreme Court eventually overturned the firm's later conviction, by then the prosecutorial enthusiasm had destroyed the firm." (footnote omitted)).
[178] *See, e.g.*, Jill Fisch, *Criminalization of Corporate Law: The Impact on Shareholders and Other Constituents*, 2 J. BUS. & TECH. L. 91, 93 (2007) ("[C]orporate criminal liability and large criminal fines in particular have the effect of punishing the corporation's shareholders."); Dorothy S. Lund & Natasha Sarin, *The Cost of Doing Business: Corporate Crime and Punishment Post-Crisis*, CLS BLUE SKY BLOG (Mar. 18, 2020), https://clsbluesky.law.columbia.edu/2020/03/18/the-cost-of-doing-business-corporate-crime-and-punishment-post-crisis [https://perma.cc/EU6X-C56U] ("[A]n entity-level fine primarily affects shareholders, not necessarily the individuals who committed or even benefited from the crime.").
[179] *See, e.g.*, Shaker A. Zahra, Richard L. Priem & Abdul A. Rasheed, *Understanding the Causes and Effects of Top Management Fraud*, 36 ORGANIZATIONAL DYNAMICS 122, 122 (2007) ("Major scandals have rocked the U.S. (e.g.,

The concerns about collateral consequences when a firm is employing a perfect compliance program, however, do not look to be quite as concerning. If a corporate firm were to pursue a strategy aimed at achieving perfect compliance, the primary collateral consequence likely has to do with resource allocation at the firm.

If we assume a firm has a limited amount of resources to spend on departments such as legal, compliance, human resources, sales, research and development, then an increase in investment in one department is often perceived to mean there will be a decrease in investment in another area or other areas. Indeed, in the years after the Holder Memorandum, Professor Donald Langevoort noted that the "direct costs associated with involving a professional compliance staff . . . can be considerable."[180] Firms concerned about compliance costs would sometimes enact "less-than aggressive utilization" of the compliance function, "depending on the predicted benefits."[181] In the wake of the enforcement priorities of the past two decades, a corporate firm would be tremendously misguided—and fail to properly consider the risk of enforcement—to not invest in its compliance.

That said, there is still a great deal of debate about what level of guidance is appropriate to invest in compliance. After significant alleged compliance failures, it is common to see firms revamp and increase their investments in compliance. For example, JPMorgan, after a significant compliance failure, announced that it was adding 3,000 people to its compliance department.[182] When large resource allocations of this type are dedicated by a firm, there could be a question of what the firm pulled back on to allow for the increased investment in compliance. This does appear to be a risk that the firm would need to consider. That said, the risk of failing to adequately invest in compliance comes with its own set of risks. For JPMorgan, the scandal that resulted in the additional investment in compliance staff also resulted in the firm paying approximately $920 million in fines to four separate agencies—the SEC, Federal Reserve, OCC, and U.K. Financial Conduct Authority.[183] This was in addition to approximately $6 billion in losses tied to the failed trading strategy that was at the heart of the scandal.[184]

Thus, while an assessment of collateral consequences is of great concern when considering governmental enforcement strategy, it does not look to be as serious a cost to consider when the firm, on its own initiative, is looking at prioritizing the achievement of perfect compliance.

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This Section outlines some of the costs associated with a firm attempting to achieve perfect compliance. Perfect compliance, however, is unattainable for most firms. Yet, this discussion demonstrates that the costs of perfect compliance are tied to how such a regime is implemented by the leadership of the firm. There may be a way for firms to move beyond an enforcement-driven compliance regime to one that attempts to achieve "more perfect" compliance.

Enron Corp., Fannie Mae, Global Crossing and WorldCom Inc.), drawing attention to the serious consequences of fraud, not only for companies but also for their employees, communities and society at large.").

[180] Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 93.

[181] *Id.*

[182] Treanor, *supra* note 22.

[183] Matt Egan, *JPMorgan Chase to Pay $920M in 'London Whale' Settlement*, FOX BUS. (Mar. 10, 2016, at 01:26 EST), https://www.foxbusiness.com/features/jpmorgan-chase-to-pay-920m-in-london-whale-settlement [https://perma.cc/YTS7-JYLS].

[184] *Id.*

C. Theoretical Considerations

This Section presents justifications from social science literature for moving away from enforcement-driven programs. Scholars from a variety of disciplines have long-studied concepts such as corruption, misconduct, and ethics within organizations. These are just a few of the many insights legal scholars and policymakers might consider drawing upon from other fields of study that detail how to develop ethics and compliance programs to curb misconduct within organizations.

1. Standards of Conduct v. Standards of Review

Corporate law recognizes a distinction between standards of conduct and standards of review, but the two sometimes get muddled. As explained by Professor Melvin Aron Eisenberg, "[a] standard of conduct states how an actor should conduct a given activity or play a given role."[185] This contrasts with standards of review that "state[] the test a court should apply when it reviews an actor's conduct to determine whether to impose liability or grant injunctive relief."[186] Professor Eisenberg, to make the difference plain, suggested that the standard of conduct for automobile drivers is "that they should drive carefully," while "the standard of review in a liability claim against a driver is whether he drove carefully."[187] This distinction between the standard of care versus review is subtle but important. As applied to the argument outlined in this Article, a compliance program that meets the government's standard of review (e.g., program that gets leniency) or the *Caremark* requirements (e.g., a decision that is unlikely to be questioned beyond the motion to dismiss stage) should not be conflated by firms to be the standard of conduct by which they choose to govern themselves. There is a distinction between what will result in legal liability and how the firm should choose to conduct itself. In the compliance arena, the costs of failing to prevent and detect misconduct can be severely detrimental to the firm, even if a firm has what the government or Delaware courts would consider to be an effective compliance program.

2. Dishonesty Breeds More Dishonesty

Part of why the standard of conduct is important is because when a firm fails to aspire towards high conduct standards, it can have a deleterious impact on the firm and its members. Take, for example, concerns about unethical behavior within the firm. Researchers have determined that collaborative workplaces "can be a fertile ground for dishonesty. Indeed, people lie more when collaborating than when working alone."[188] Social science researchers argue that "in collaborative settings, dishonesty is contagious, spreading among group members."[189] Dishonesty and unethical behavior by members of a firm, as indicated above, can "harm the organization they work for" as well as other third parties.[190] To be clear, the research highlighted here is separate and distinct

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[185] Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 437 (1993) (emphasis omitted).
[186] *Id.* (emphasis omitted).
[187] *Id.*
[188] Margarita Leib et al., *Collaborative Dishonesty: A Meta-Analytic Review*, 147 PSYCH. BULL. 1241, 1241 (2021) (citations omitted).
[189] *Id.*
[190] *Id.* at 1246.

from the broken windows theory of deterring crime that has largely been rejected.[191] Broken windows theory assumed neighborhood disorder could cause criminal misconduct.[192] The research regarding collaborative dishonesty is based on research into how individuals behave towards each other when working together within an organization.[193]

Importantly, this research supports the public narrative surrounding misconduct at firms like Credit Suisse and Wells Fargo. For firms attempting to restructure their compliance programs from reacting to external incentives to being driven by the firm's internal values, part of what these firms will need to focus upon is how to stop dishonest conduct quickly within and throughout the organization. Given the size and complexity of firms today, to stop dishonesty, these firms will need to harness the power of their entire workforces to combat undesirable behavior within the firm.

3. Ethical Framing

Behavioral ethics researchers focused on misconduct within organizations have found that the way a decision is framed changes the ways people respond.[194] For example, if you look at a 1% percent rate of fraud within your workforce from a business perspective, you might think, "I can fire those individuals and easily replace them." If you consider the fraud from a legal perspective, you might determine that a 1% percent rate of failure is relatively low and unlikely to lead to significant legal sanctions. Both of these assessments may be correct and rational. But if instead of confronting that information as a business or a legal decision, what if the firm framed the concern of a 1% percent rate of fraud as a potential business risk or ethical issue for the firm?[195] Wells Fargo failed to identify the fraudulent opening of customer accounts as an ethical matter and, as a result, failed to adequately assess the risk the firm faced for the misconduct.[196] Behavioral ethics research empirically demonstrates that the way you frame a question dictates the sort of answer one will receive, and it suggests that providing questions in an ethical frame is more likely to activate an individual's moral awareness.[197] The activation of that individual's moral awareness better equips her to identify an issue as one that has ethical, and not just business or legal, considerations.[198] The hope is that by putting individuals in a situation where the ethical dimensions are explicitly considered, one can prompt employees to make better and more ethical

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[191] *See, e.g.*, Greg St. Martin, *Northeastern University Researchers Find Little Evidence for 'Broken Windows Theory,' Say Neighborhood Disorder Doesn't Cause Crime*, NE. GLOB. NEWS (May 15, 2019), https://news.northeastern.edu/2019/05/15/northeastern-university-researchers-find-little-evidence-for-broken-windows-theory-say-neighborhood-disorder-doesnt-cause-crime [https://perma.cc/FXP9-BY5F].
[192] *Id.*
[193] Leib et al., *supra* note 188, at 1241.
[194] *See generally* MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT (2011) (gap between intended and actual ethical behavior).
[195] *See* Cheryl L. Wade, *Corporate Compliance That Advances Racial Diversity and Justice and Why Business Deregulation Does Not Matter*, 49 LOY. U. CHI. L.J. 611, 634 (2018) ("However, '[l]ots of organizations focus on the latest compliance trends but fail to establish an ethical culture that deters misconduct.' Business managers must move beyond the check-the-box type of compliance in order to create more ethical climates." (footnote omitted)).
[196] Wells Fargo Schedule 14A, *supra* note 130, at 8 (noting that the then CEO "failed to appreciate the seriousness of the problem and the substantial reputational risk to Wells Fargo").
[197] BAZERMAN & TENBRUNSEL, *supra* note 194, at 4–5.
[198] *Id.* at 4.

decisions.[199] An enforcement-driven model of compliance that tolerates misconduct does not appear to activate a frame of decision-making that prompts these latter sorts of analyses.

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This Part has outlined some potential challenges with an enforcement-driven model of compliance when adopted by firms as the primary driver of their compliance programs. This Article does not contend that enforcement-based compliance frameworks—such as the U.S. Sentencing Guidelines and related DOJ policies—are misguided, illegitimate, or unnecessary. These regimes have played a critical role in catalyzing the development of modern ethics and compliance programs and continue to provide an essential baseline for corporate compliance efforts. The claim advanced here is more limited: enforcement-driven incentives, while necessary, are insufficient when they become the primary lens through which organizations define internal standards of conduct, assess risk, and evaluate compliance effectiveness. Recognizing these limitations, firms retain the capacity—and responsibility—to do more.

IV. PURPOSE-DRIVEN COMPLIANCE

Thus far, this Article has focused upon challenging two of the fundamental assumptions within compliance literature and practice: (i) that enforcement-driven incentives are the primary drivers of effective corporate compliance programs and (ii) that perfect compliance is unattainable and that imperfect compliance is acceptable. The literature on organizational behavior strongly suggests that when corporations create reactive compliance programs that are focused on meeting external, enforcement-driven incentives, they may be inadvertently promoting more unethical behavior and misconduct within their ranks. However, the Article also acknowledges that perfect compliance is almost certainly unattainable for most compliance areas,[200] and the pursuit of perfect compliance has its own costly ramifications. That leaves those with an interest in the creation of effective ethics and compliance programs in a bit of a bind. The original understandings of what would be necessary to create a set of external or enforcement-driven compliance programs may not be well-suited for today's market and enforcement realities, but a full shift toward attempting to create a perfect compliance program within corporations is likely not a reasonable or attainable goal for most organizations or regulatory areas.

As a result, this Article suggests a middle ground. Instead of focusing on enforcement-driven compliance programs or other external incentives as the primary drivers of a firm's compliance program, this Article argues that organizations should build upon these foundations and move

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[199] The field of behavioral science has been rocked with suggestions of fraud on behalf of researchers who claimed to be studying dishonesty. *See, e.g.*, Cathleen O'Grady, *Harvard Behavioral Scientist Faces Research Fraud Allegations*, SCI. (June 21, 2023, at 14:15 ET), https://www.science.org/content/article/harvard-behavioral-scientist-aces-research-fraud-allegations [https://perma.cc/B4UF-UMRM]; Cathleen O'Grady, *Fraudulent Data Raise Questions About Superstar Honesty Researcher*, SCI. (Aug. 24, 2021, at 16:10 ET), https://www.science.org/content/article/fraudulent-data-set-raise-questions-about-superstar-honesty-researcher [https://perma.cc/FHP9-56NV]. I have attempted to limit my research to those who currently appear unscathed by the allegations of misconduct. That said, readers should probably look at some of the behavioral science research with a more skeptical eye than they've done in the past. *But see* Rahem D. Hamid & Claire Yuan, *Embattled by Data Fraud Allegations, Business School Professor Francesca Gino Files Defamation Suit Against Harvard*, HARV. CRIMSON (Aug. 3, 2023), https://www.thecrimson.com/article/2023/8/3/hbs-prof-lawsuit-data-fraud-defamation [https://perma.cc/2EJY-URYF].

[200] *See supra* note 37.

toward purpose-driven compliance programs, which are compliance programs that are directed by the firm's (i) purpose, (ii) inherent risks based on the activities necessary to achieve that purpose, and (iii) ethical standards and goals. Importantly, the external incentives for firms to create compliance programs did not require firms to dictate the expectations they set for themselves. Firms could have chosen to adopt policies and procedures that moved beyond the floor set by these external interventions. This Article suggests that it is time for firms to set their own path forward.

A. Reorienting Towards the Firm

This Section outlines ways in which corporations can reorient their compliance programs from being enforcement-driven to purpose-driven. As the language suggests, the goal is for the firm to think about its own purpose, risks, and values when engaging in efforts to direct the compliance program.

1. Focusing on Business Purpose and Business Risks

The recent line of cases in Delaware that have allowed *Caremark* claims to go beyond the motion to dismiss stage have focused on a misalignment between companies' compliance programs and risks that were "mission critical" to the firm given its business purpose and associated risks.[201] The term "purpose" is a loaded one within corporate law scholarship, invoking debates about whether the proper purpose of a firm is to maintain fidelity primarily to shareholders or to a wider swath of stakeholders.[202] For this Article, regardless of one's view on the corporate purpose debate, creating a purpose-driven compliance program should create alignment, because the goal of management and officers in implementing and overseeing a compliance program would be tied to leadership's view of the firm's purpose. A firm that believes it has duties to both shareholders and stakeholders would be able to incorporate those beliefs into its compliance framework, but so would a firm that wants to limit its view of corporate purpose to focusing upon shareholders. The key is to reframe from a reactionary view of compliance as being motivated primarily from enforcement authorities' priorities—which ebb and flow as administrations change—toward a proactive view of compliance as one that is tied to the purpose by which management is leading the firm.

The concept of "purpose" as used in this Article is not intended to grant management unfettered discretion to define organizational goals in a manner that rationalizes or obscures misconduct. Nor does a purpose-driven compliance framework permit organizations to subordinate legal or ethical obligations to business objectives. Rather, purpose-driven compliance assumes that organizational purpose operates within baseline constraints imposed by law, by widely shared ethical norms, and by the firm's obligation to avoid causing foreseeable harm to stakeholders. Where purported business objectives can only be achieved through unlawful or unethical conduct, those objectives cannot legitimately constitute the firm's purpose for compliance purposes. In this sense, purpose-driven compliance does not replace legal compliance or risk assessment; it builds upon them by requiring firms to articulate and assess their compliance priorities in light of the firm's mission-

[201] *See, e.g.*, Noah Webster, Michael Mencher & Bradley Goldberg, *Managing Caremark Risks: Adapting Oversight to Evolving Case Law and Regulations*, ACC DOCKET (Aug. 1, 2024), https://docket.acc.com/managing-caremark-risks-adapting-oversight-evolving-case-law-and-regulations [https://perma.cc/P92F-KJAD].

[202] *See, e.g.*, Veronica Root Martinez, *A More Equitable Corporate Purpose*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 47, 48 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

critical activities, values, and risks, while rejecting instrumental misconduct as incompatible with organizational purpose.

In addition to a focus on purpose, management should focus on the risks the particular firm faces. Firms should already be engaged in risk assessments. Professor Sean Griffith has noted that "authorities . . . emphasize that internal enforcement efforts should be directed at areas with the highest risk of noncompliance. . . . [T]o achieve this, firms must engage in regular compliance risk assessments in which emergent risks are identified, mapped to the relevant policy and control processes, and residual risks are quantified."[203] In an enforcement-driven compliance program, the risks of governmental enforcement or civil litigation can drive the risk assessment. In the proposed purpose-driven model, those enforcement-driven risks remain relevant, but they should not be the primary drivers of the compliance program. For example, a bank's most salient risks might be related to ensuring customer data is secure, minimizing fraud, and ensuring transactions are legal. That independent risk assessment may very well intersect with enforcement priorities like anti-money laundering compliance or anticorruption concerns, but the starting point would be the bank's purpose and associated risks.

It is crucial to remember that compliance programs were always meant to be tailored by the organizations to their specific business needs. Professor Kimberly Krawiec noted this reality in 2003, explaining that it was up to the corporations themselves to develop "formal or informal . . . standard norms and practices."[204] And as a deputy attorney general explained: "There is, of course, no 'off the rack' compliance program that can be installed at every company. Effective compliance programs must be tailored to the unique needs and risks faced by each company."[205]

The upshot is that each firm is different, with a unique business purpose and a particular set of risks. These differences arise from a variety of factors, such as firm size, the markets where the firm operates, the company culture, the type of goods or services sold, and a whole host of other characteristics. Indeed, one of the challenges for those working in the compliance area is that there is good high-level information on what an effective compliance program looks like, but the operationalization of those tasks often needs to be firm or industry specific. Thus, for a compliance program to be effective at meeting the needs of the business and its risks, those designing, implementing, and overseeing that program need to be focused on the business as the starting point of creating the program.

2. Move from Mitigation to High, Ethical, and Aspirational Standards

Perhaps one of the most well-known thought leaders within the compliance industry is Hui Chen. Chen has vast experience both within the private and public sectors, and she writes and speaks about effective compliance practices.[206] She once said the following in an interview:

> There is one trait of compliance officers that I have professional respect for – the good ones, the ones who do a good job. And that one trait is that they are never

[203] Griffith, *supra* note 7, at 2099.
[204] Krawiec, *supra* note 15, at 522.
[205] Leslie R. Caldwell, Assistant Att'y Gen. for the Crim. Div., Dep't of Just., Remarks at the 22nd Annual Ethics and Compliance Conference (Oct. 1, 2014) (transcript available online with the Department of Justice), https://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-22nd-annual-ethics [https://perma.cc/2Z9X-9XF2].
[206] *About Hui Chen*, HUI CHEN ETHICS, https://huichenethics.com/about [https://perma.cc/6PRN-8ZQ8] (last visited Oct. 19, 2025).

> satisfied with their programs. One of the traits that I often see among compliance officers who do not perform as well is that they seem incredibly satisfied with their programs.[207]

Firms structuring their compliance programs should embrace the insight in Hui Chen's above statement and always strive to be better than they were yesterday at addressing misconduct within their organizations.

The goal of the compliance effort should be to set standards of conduct that have high, ethical, and aspirational standards that encourage its workforce to reject complacency when misconduct is discovered and, instead, encourage a resilient response aimed at curbing the root-causes of that misconduct. But the idea of stopping misconduct wholesale has not been the goal of firms' compliance programs.

Indeed, one columnist characterized the role of the chief compliance officer at a bank in the following way.

> Now, in practice, every day, a bank's compliance officer will face the choice of (1) leaving the dial alone, (2) turning it a touch toward More Crime or (3) turning it a touch toward Less Crime. Presumably most days she will mostly leave it alone and focus on other things. Some days, she will adjust it a scooch one way or the other, in ways that don't really get noticed much outside of the bank. Occasionally the dial will have drifted too far toward More Crime, the bank will have a huge scandal, she will be fired, and her successor will make a big show of cranking the dial a long way toward Less Crime. "We had too much crime," the new compliance officer will say, "but from now on we will have a zero-tolerance policy toward crime." This still won't be true, but it will (1) still almost be true and (2) be a bit more true than it was before the scandal.[208]

This is an admittedly colorful characterization of the compliance effort at firms today, but there is an element of truth to it. JPMorgan attempted to retool towards less crime in 2014 by investing in a whole host of resources, but the enforcement activity over the next decade suggests that, despite the firm's efforts, much was left undone.

This Article contends that firms should prioritize implementing a compliance program with express standards of conduct—ethical and aspirational standards—of their expectations for their agents and employees, and they should assess the effectiveness of their compliance programs through the lens of those standards. The government will not be using that lens, so it is understandable that firms often slip into a method of assessment based on what liability might be levied against the firm. But when firms frame assessments of their own conduct from the lens of enforcement authorities, they have lowered the expectations that their compliance programs should meet. Instead, firms should aspire to do more. An example may be instructive.

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[207] *Hui Chen on the State of Corporate Compliance*, CORP. CRIME REP. (Aug. 30, 2022, at 07:47 CST), https://www.corporatecrimereporter.com/news/200/hui-chen-on-the-state-of-corporate-compliance [https://perma.cc/49JN-JK4A].

[208] Matt Levine, *Bed Bath & Beyond Got its Deal Done*, BLOOMBERG (Feb. 8, 2023, at 13:24 CST), https://www.bloomberg.com/opinion/articles/2023-02-08/bed-bath-beyond-got-its-deal-done [https://perma.cc/LD6B-AMP2].

a. The Case of Wells Fargo

Wells Fargo presents a powerful example of how the adoption of an enforcement-driven mindset can have harmful consequences for a firm. In a 2017 report discussing the fraudulent account scandals, the following is noted:

> The failure to frame the issue properly extended to senior management's view that firing 1% of the Community Bank workforce every year for sales integrity violations was acceptable. For example, in November 2013, in the wake of the first *Los Angeles Times* article on sales practice issues, John Stumpf asked for data on the number of terminations associated with sales integrity violations. When the data showed that 1% of employees had been terminated for such violations, Stumpf, Tolstedt and other Community Bank leaders received the figure positively, believing it proved that a vast majority of individuals were behaving appropriately. When the figure came up again in 2015, Stumpf reacted similarly in an email to Tim Sloan, detailed at pages 55-56. Raphaelson, when presented with data showing ethics-related terminations of a similar magnitude in 2013, wrote that it was "mind boggling to me it's so low – I think it shows our [employees] are significantly more ethical than the general population (no data whatsoever to back that up, just impressionistic comment!)." The senior leaders did not consider that the 1% represented only employees who were caught engaging in sales practice misconduct. Moreover, even accounting for the Community Bank's high turnover rate, firing 1% of the workforce each year meant over time that more than 1% were engaging in terminable misconduct.[209]

If the senior leaders at Wells Fargo had looked at the 1% level of misconduct detected as an opportunity to do more, instead of a reason to celebrate, they might have approached the situation very differently. The internal investigation report suggests that senior leaders failed to appreciate the risks associated with the reports they received—a determination made easy by hindsight.[210] And yet, one of the potential lessons from that leadership team is that they were not aspiring toward perfection and that complacency contributed to their failure to properly identify what turned out to be a massive and expensive, risk for the firm. Borrowing from corporate law scholarship, the standard of review is the government's enforcement models and that standard must be met, but the standard of conduct must come from the firm itself, and that standard needs to be better articulated and used for assessment of firms' compliance programs.

b. An Acknowledgment on Risk

There is a potential cost to adopting a model that pursues a higher standard of conduct than what is legally required. Specifically, when a firm adopts a policy that is above what the firm is legally required to do, it can increase the firm's legal liability. For example, if the government requires a bank to permit homeowners to modify their home loans once per year, but the bank were to have a policy stating that homeowners could modify twice per year, the bank would have

[209] *See* Wells Fargo Schedule 14A, *supra* note 130, at 32–33.
[210] *See generally id.* (insufficient regard to the effect on customers and the non-financial harm to customers stemming from the misused personal information).

liability if it refused the modification twice in one year, even though legally they were not required to offer that second modification.[211] When firms decide to adopt a policy that is above the legal threshold, they are in effect increasing their potential legal risk. This is a cost that should be considered in the implementation of a purpose-driven compliance program, but, again, it is not the only risk. The costs of enforcement and shareholder litigation can compound, particularly when a scandal at a firm is pervasive or widespread. It is possible that firms sometimes underestimate the legal risk of a compliance failure.[212] Moreover, there are other risks—like reputational risks—that can accompany compliance failures. An assessment of whether a firm's decision to set a compliance policy above a legal threshold should consider the increased zone of legal risk, but it should also consider other types of risks that might be mitigated by that decision.[213]

3. Continued Reassessment of the Compliance Department

A final component of a purpose-driven compliance program should be to acknowledge that the work of the compliance department is dynamic and not static. The zone of responsibility for those engaged in compliance roles at corporate firms is in a constant state of change.

For example, at one time, issues like sexual harassment were considered matters for human resources and not for compliance personnel, but the post-#MeToo world has broadened the scope and risk for which compliance officers have responsibility.[214] Additionally, the new emphasis on environmental, social, and governance ("ESG") matters has created a new set of risks that compliance officers must address.[215] As this has occurred, the position where the Chief Compliance Officer ("CCO") sits within the organizational structure of the firm has often been reshuffled to ensure the CCO has direct reporting lines to the Board of Directors at the firm.[216]

As the nature of the role of compliance within firms shifts—both in topical scope and organizational structure—firms must think proactively about how the compliance program and its personnel are situated within the organization. There are a range of relatively new concerns that compliance is being asked to address in addition to the more routine matters the compliance function has been focused on for the last 15 years. As the responsibility of compliance broadens, it will become increasingly important for the compliance function to coordinate with other departments within the firm like, for example, human resources. Indeed, collaborative teams made

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[211] *See, e.g.*, Press Release, Off. of the Comptroller of the Currency, *OCC Takes Enforcement Action Against Eight Servicers for Unsafe and Unsound Foreclosure Practices* (Apr. 13, 2011), https://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-47.html [https://perma.cc/S4PZ-J7LT] (sanctioning several financial institutions for failing to follow bank policy in foreclosing on homeowners, among others).

[212] *See supra* notes 160–168 (discussing Wells Fargo's compliance failures).

[213] Additionally, a firm should consider what the right thing to do is. While this sort of analysis does not fit easily into a cost-benefit analysis, there are global, overarching concerns that impact much of the decision making within firms. And only considering questions as legal or business risks can sometimes cause one to ignore or fail to properly consider the attenuated ethical risks. *See* BAZERMAN & TENBRUNSEL, *supra* note 194, at 2–3.

[214] *See, e.g.*, McDonald's Corp. v. Easterbrook, No. 2020-0658-JRS, 2021 Del. Ch. LEXIS 20, at *5 (Del. Ch. Feb. 2, 2021) (noting that "independent members of the McDonald's board of directors . . . convened and instructed independent outside counsel to investigate" an alleged sexual harassment case).

[215] *See* Lisa M. Fairfax, *Board Committee Charters and ESG Accountability*, 12 HARV. BUS. L. REV. 371, 392–93 (2022).

[216] Suzanne Rich Folsom, *Corporate Compliance, Overview – Role of the Board, Senior Management, and the Chief Compliance Officer (CCO)*, BLOOMBERG L.: PRAC. GUIDANCE, https://www.bloomberglaw.com/external/document/X1GT2OMG000000/corporate-compliance-overview-role-of-the-board-senior-managemen [https://perma.cc/TH9X-EMMB] (last visited Oct. 19, 2025).

up of individuals from human resources, legal, compliance, and risk management may need to work together to make decisions about the appropriate response when misconduct is uncovered. Firms aimed at achieving a purpose-driven compliance program must think about how compliance should be situated within their organizational structure to maximize the firm's overarching goals and targets.

4. Value-Based Compliance Repackaged?

Importantly, a purpose-driven compliance program is analytically distinct from a values-based program. Values-based programs typically focus on articulating a set of aspirational principles—like respect, integrity, inclusion, or trust—and encouraging employees to embody them in their daily work.[217] The promise of such programs is that they can help shape culture and provide positive direction for behavior, especially in situations where the law is silent or ambiguous. But values-based programs often stop short of tying those values to the actual business activities, objectives, and risks of the firm. As a result, they may leave employees with abstractions that are too general to guide practical decision-making.[218]

A purpose-driven program, by contrast, grounds values in the organization's mission and the risks inherent in pursuing it. The touchstone is not simply what a company believes in, but how those beliefs connect to its operational purpose and the specific compliance challenges that flow from it. For example, a university that emphasizes values like respect, inclusion, and trust must also situate those values within its defining purposes—educating students, producing knowledge, and safeguarding academic freedom. When respect and inclusion are linked to academic integrity and freedom of inquiry, they take on sharper contours that can guide decisions about admissions, hiring, speech, and research conduct. Without that connection, the values remain high-level aspirations, admirable but insufficiently directive.

This distinction—subtle though it may appear—underscores why purpose-driven compliance offers a more practical and resilient model. By anchoring compliance expectations in the organization's core purpose and related risks, the program produces concrete decision-making tools that help employees operationalize values. This is evident in the codes of conduct at firms such as Wells Fargo and Novartis, where high-level commitments are translated into context-specific guidance. The broader lesson is that values-based compliance highlights aspirations, while purpose-driven compliance creates alignment between ethics, risk, and purpose—ensuring employees are not only encouraged to "do the right thing," but also equipped to discern what that means in practice.[219]

A central critique of values-based compliance programs—or of ethics programs more generally—is the indeterminacy of values themselves.[220] Who decides what integrity, fairness, or respect demand in a given context? What if one employee's understanding of integrity differs from

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[217] CORPORATEETHICS, *Values- vs. Compliance-Based Ethics Programs – Linda Trevino* (YouTube, Oct. 5, 2010), https://www.youtube.com/watch?v=-524ow6fIOA [https://perma.cc/QRR2-S7DT].

[218] Again, the business risks may be different than the priorities of enforcement authorities, which requires the firm to engage in its own risk assessment that goes beyond governmental enforcement priorities.

[219] *See* corporateethics, *supra* note 217.

[220] *See, e.g.*, James Weber & David M. Wasieleski, *Corporate Ethics and Compliance Programs: A Report, Analysis and Critique*, 112 J. BUS. ETHICS 609, 624 (2013) ("[T]he content of codes, for instance, is too generic and devoid of a real consideration of moral values. Without this normative meaning behind the code . . . these noble company efforts . . . will be rendered ineffective.").

another's?[221] These terms are too open-ended to provide consistent direction when complex business decisions are at stake. Purpose-driven compliance addresses this problem by rooting values in the actual mission of the enterprise. For example, when a university ties "integrity" to its educational and research purposes, the concept becomes more concrete, encompassing academic honesty, the safeguarding of knowledge, and fidelity to scholarly standards. Integrity, in that context, shifts from a lofty aspiration to a clear directive for behavior aligned with the institution's defining goals.

* * * *

The challenge is in creating the right balance when creating a compliance program. Professor Haugh's work argues, persuasively, that too much focus on a criminalization model of compliance can actually lead to more misconduct within a firm.[222] Professor Langevoort has noted that programs that choose a lower level of monitoring might be perceived as deliberately enacting a program that will be prone to compliance failures.[223] And in my previous work, I have critiqued compliance programs that focus almost exclusively on explaining to employees how to avoid legal and regulatory risk without similarly sketching out the need to act ethically.[224] I continue to remain supportive of these insights. Here, however, I suggest that firms should engage in a dual effort when approaching their compliance programs. First, firms must act in a manner that allows them to mitigate their legal and compliance risks, obtain leniency, and avoid shareholder litigation. To not act in that manner would be harmful to the firm. But firms must not stop there, and they must guard against incorporating the government's enforcement methods into their programs.

B. Applying Purpose-Driven Compliance

This Article argues that corporations should shift from compliance programs that are structured in an attempt to meet enforcement-driven, external incentives and instead implement programs that are driven by the values and ethical ideals of the firm itself. By reorienting the purpose of compliance programs from meeting external requirements to one focused on meeting internal goals intrinsic to the firm itself, corporations will be able to (i) develop a more coherent and comprehensive compliance program aligned with the values of the firm and (ii) decrease the reactive nature of its compliance program, allowing the corporation to be more proactive in its efforts. This Part identifies how adopting the strategies in this Article might play out in practice.

1. Wells Fargo

[221] When I teach ethics courses in both the law and business school, this is often the immediate response from students to the notion of ethics—who gets to decide whose ethics will win the day. For the corporate firm, the company should decide, but to do so, it must align the ethical standards it wants to promote with the business purpose it is attempting to achieve.
[222] Haugh, *supra* note 171, at 1218–19.
[223] Langevoort, *supra* note 180, at 105 ("This leads to one interesting insight: ethics- or integrity-based systems will often deliberately be designed in such a way that they look particularly leaky.").
[224] *See generally* Veronica Root Martinez, *More Meaningful Ethics*, 2020 U. CHI. L. REV. ONLINE 53, https://lawreview.uchicago.edu/online-archive/more-meaningful-ethics [https://perma.cc/T2K2-3SEE] (the role of ethics in firm compliance programs and different strategies for installing these programs).

When the fake accounts scandal at Wells Fargo initially came to light, the leadership at the firm initially attempted to move on quickly. For example, then-CEO John G. Stumpf, while testifying before Congress, "said he took responsibility for the problems, but would not admit that there [was] anything wrong with the bank's broader culture."[225] Stumpf's decision not to consider broader, systemic issues within the bank's culture was criticized by regulators and members of Congress, and it also was in contrast with accounts from employees, who alleged that the company had "a boiler-room culture of toxic sales pressure."[226] Ultimately, Stumpf resigned, "concluding that he would most likely continue to be the focus of much of the criticism being leveled at the bank."[227] The board of directors at the firm appointed a company insider, Timothy J. Sloan, as the new CEO.[228]

Upon becoming CEO, Sloan explained that "[t]here was clearly something wrong [at the company], and we will make the necessary changes to fix it."[229] He assured the public that the company had "a specific action plan in place to lead [the] company forward."[230] And Sloan oversaw the removal of "the sales incentive plan that led to millions of fake accounts."[231] Additionally, he spent a great deal of time "meeting with customers, employees and investors to rebuild trust."[232] Sloan also oversaw the implementation of a "new 'Building Better Every Day' brand platform and national advertising campaign," targeted at rebuilding trust with a variety of the bank's stakeholders.[233]

Unfortunately, Wells Fargo's reaction to the fake account scandal appears to be a classic, enforcement-driven response. I have previously written about the ways in which negotiated settlements create strong incentives for firms to look at particular compliance failures and not to more systemic issues within their compliance programs.[234] When this occurs, companies often focus heavily on the area that resulted in an enforcement action, but they fail to think more broadly about where there might be additional risk to the firm.[235] In the case of Wells Fargo, the years after Sloan became CEO revealed a range of additional issues within the firm. For example, regulators identified a deceptive auto insurance program at the bank.[236] Additionally, Wells Fargo settled claims that "it charged military veterans hidden fees to refinance their mortgages, and concealed

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225 Michael Corkery & Stacy Cowley, *Wells Fargo Chief Abruptly Steps Down*, N.Y. TIMES (Oct. 12, 2016), https://www.nytimes.com/2016/10/13/business/dealbook/wells-fargo-ceo.html [https://perma.cc/YEB-AXC9].
226 *Id.*
227 *Id.*
228 *Id.* When Stumpf retired, Sloan said Stumpf had made "an incredibly selfless decision." *Id.*
229 Evelyn Cheng, *Wells Fargo CEO Sloan: Senior Management Should have 'Done More,'* CNBC (Oct. 14, 2016, at 11:59 EDT), https://www.cnbc.com/2016/10/14/wells-fargo-ceo-sloan-senior-management-should-have-done-more-bank-will-use-new-performance-plan.html [https://perma.cc/WWL8-F5XY].
230 *Id.*
231 Susie Gharib, *Tim Sloan Breaks Down Wells Fargo's Turnaround Plan*, FORTUNE (July 27, 2027, at 14:59 EDT), https://fortune.com/2017/07/27/wells-fargo-ceo-tim-sloan-turnaround-plan/.
232 *Id.*
233 Press Release, Wells Fargo, Wells Fargo CEO Tim Sloan Announces Six New Long-Term Goals and Provides Update on Rebuilding Trust Actions (Mar. 21, 2017), https://newsroom.wf.com/English/news-releases/news-release-details/2017/Wells-Fargo-CEO-Tim-Sloan-Announces-Six-New-Long-Term-Goals-and-Provides-Update-on-Rebuilding-Trust-Actions/default.aspx [https://perma.cc/YNT6-EY2K].
234 Root, *supra* note 127, at 1041–42.
235 *Id.*
236 Gretchen Morgenson, *Regulator Blasts Wells Fargo for Deceptive Auto Insurance Program*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/business/wells-fargo-auto-insurance-comptroller.html?module=inline [https://perma.cc/7P2Z-UK3D].

the fees when applying for federal loan guarantees."[237] Moreover, the attempt to quickly remake the bank's culture was criticized by its employees as ineffective.[238] Ultimately, Sloan resigned a few years after becoming CEO amid criticism from lawmakers and regulators who expressed concerned with "the bank's 'inability to execute effective corporate governance and a successful risk-management program.'"[239]

The CEO appointed after the resignations of Stumpf and Sloan seems to have deployed a different strategy, one focused upon rooting out the full instances and causes of misconduct. Charles W. Scharf became CEO of Wells Fargo when the bank determined it needed to appoint an external individual to lead the company. Instead of attempting to fix the problems directly in front of the bank that had been revealed to enforcement authorities, Scharf took a more expansive approach to remediation and reform at the firm. For example, shortly after Scharf was appointed, he acknowledged that the bank's culture was broken,[240] and that the bank had "a lot to figure out," which might take "months" to complete.[241] He noted that his team's internal assessments of the bank were not yet done, and he could not yet forecast the full state of affairs of the bank.[242] In other words, he started off by ensuring he had a strong understanding of the effectiveness or not of the bank's compliance program, the importance of which is highlighted above in Section IV.A.2.

In 2022, Scharf testified before the House of Representatives, and he highlighted the numerous personnel changes at the bank from the board of directors on down.[243] Specifically, he noted that Wells Fargo has "a new management team and new board members who are transforming the company, including addressing historical issues."[244] And while he does not reference the compliance department itself as it relates to personnel changes, he did note that "over 50 percent of the senior-most people at our company, meaning those who are one level below the Operating Committee, are new to their roles, and a significant proportion of them were hired from outside the company."[245] In Section IV.A.3. this Article notes the importance of situating the compliance department so that compliance obligations are undertaken throughout the firm. Scharf seems to

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[237] Jonathan Stempel, *Wells Fargo to Pay U.S. $108 Million Over Veterans' Loans*, REUTERS (Aug. 4, 2017, at 14:34 CDT), https://www.reuters.com/article/business/wells-fargo-to-pay-us-108-million-over-veterans-loans-idUSKBN1AK1TZ/ [https://perma.cc/GT9G-QY7L].
[238] Emily Flitter & Stacy Cowley, *Wells Fargo Says Its Culture Has Changed. Some Employees Disagree.*, N.Y. TIMES (Mar. 9, 2019), https://www.nytimes.com/2019/03/09/business/wells-fargo-sales-culture.html [https://perma.cc/2SRF-NBE2].
[239] Emily Flitter, Stacy Cowley & David Enrich, *Wells Fargo C.E.O. Timothy Sloan Abruptly Steps Down*, N.Y. TIMES (Mar. 28, 2019), https://www.nytimes.com/2019/03/28/business/wells-fargo-timothy-sloan.html [https://perma.cc/R2GM-AS3A].
[240] Nupur Anand, *How Charlie Scharf Got Wells Fargo Out of the Penalty Box*, REUTERS (June 4, 2025, at 05:29 CDT), https://www.reuters.com/sustainability/boards-policy-regulation/how-charlie-scharf-got-wells-fargo-out-penalty-box-2025-06-03/ [https://perma.cc/2UTC-FEBE].
[241] Charles W. Scharf, Chief Exec. Off. & President, Wells Fargo & Co., Q4 2019 Earnings Call Transcript (Jan. 14, 2020) (transcript available at The Motley Fool), https://www.fool.com/earnings/call-transcripts/2020/01/14/wells-fargo-co-wfc-q4-2019-earnings-call-transcrip.aspx [https://perma.cc/JV8C-NBDV].
[242] Renae Merle, *Wells Fargo CEO: 'I Don't Have All the Answers Yet,'* WASH. POST (Jan. 14, 2020), https://www.washingtonpost.com/business/2020/01/14/wells-fargo-ceo-i-dont-have-all-answers-yet/ [https://perma.cc/YQ2T-ENTW].
[243] *Testimony of Charles W. Scharf, Chief Executive Officer and President, Wells Fargo and Company*: *Hearing Before the H. Comm. on Fin. Servs.* (Sep. 21, 2022) [hereinafter *Scharf Testimony*], https://www.congress.gov/117/meeting/house/115151/witnesses/HHRG-117-BA00-Wstate-ScharfC-20220921.pdf [https://perma.cc/Y7GT-QYMY].
[244] *Id.* at 3.
[245] *Id.*

have overseen such a transformation through hiring priorities at all levels of leadership within the bank.

However, the most important piece of Scharf's testimony is the discussion of the bank's changes to its culture. He explained that the "most significant part of [the bank's] transformation is the enhancement and implementation of an appropriate risk and control framework across the company."[246] He then says, "We are laser-focused on meeting our own expectations and those of our regulators."[247] Importantly, Scharf did not promise that problems at the bank were necessarily concluded; he instead explained that the bank still had "several years of work to do to meet our own high expectations for risk management and our regulators'."[248] Scharf's words are consistent with a shift from an enforcement-driven compliance program to one that is more purpose-driven. As suggested in Section IV.A.2., he has moved from attempting to mitigate the harm of past misconduct towards articulating a framework that is driven by the firm's own ethical standards and aspirations. He focuses on the standards the bank needs to set for itself.

Scharf was careful not to overpromise. He notes that the bank has "outstanding litigation, regulatory matters, and customer remediations to resolve, and until our broad book of risk, control and regulatory work is complete, [the bank is] at risk for setbacks."[249] That said, the statement seems appropriate given the dynamic nature of the cultural transformation he was overseeing at the firm.[250] A transformation that many believe has been successful. Indeed, prior to his testimony in 2022, reporting suggested that there were signs that his new strategies were in fact working to help turn around the bank.[251] In the summer of 2024, the assessments of Scharf's five years at the bank were similarly positive.[252]

The upshot is that while Wells Fargo, like all companies, is not willing to state that it will achieve perfect compliance, it has implemented strategies that go beyond an enforcement-driven compliance program over the past several years. It has pivoted to a purpose-driven program that seeks to meet the expectations the bank has set for itself and the expectations of its regulators.[253] These purpose-driven approaches appear to have been beneficial for the firm.[254]

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[246] *Id.*
[247] *Id.*
[248] *Id.* at 4.
[249] *Id.*
[250] The Wells Fargo Code of Conduct, published in 2023, instructs employees to ask the following five questions prior to going forward with a task. If the answer to one of the questions is "no," they are instructed not to proceed. These five questions reflect a purpose-driven compliance program. They are: "1) Is it legal? 2) Does it comply with Wells Fargo's Code of Conduct and policies? 3) Is it consistent with our expectations? 4) Does it align with our obligations to our customers or shareholders? 5) Are we comfortable if our decision is made public?" WELLS FARGO, CODE OF CONDUCT 6 (2023), https://www08.wellsfargomedia.com/assets/pdf/about/corporate/code-of-conduct.pdf [https://perma.cc/7XNX-85S7].
[251] Hannah Levitt & Kevin Orland, *Wells Fargo Shares Jump on Signs CEO's Turnaround is Taking Hold*, BLOOMBERG (Apr. 14, 2021, 15:56 CDT), https://www.bloomberg.com/news/articles/2021-04-14/wells-fargo-beats-profit-estimates-though-struggles-on-expenses [https://perma.cc/TL38-5FKP].
[252] *See, e.g.*, Morgan Chittum, *Buying into Charlie Scharf's 5-year Turnaround Plan for Wells Fargo Just Got a Bit Cheaper*, CNBC (July 14, 2024, at 10:00 EDT), https://www.cnbc.com/2024/07/14/buying-into-charlie-scharfs-5-year-plan-for-wells-fargo-got-cheaper.html [https://perma.cc/BKQ6-5HGN].
[253] *Scharf Testimony*, *supra* note 243, at 3, 13.
[254] This should not be read to suggest that the current Wells Fargo CEO has performed perfectly. He has not. *See, e.g.*, Chris Isidore & Matt Egan, *Wells Fargo CEO Apologies for Saying the Black Talent Pool is Limited*, CNN BUS. (Sep. 23, 2020, at 11:28 EDT), https://www.cnn.com/2020/09/23/business/wells-fargo-ceo-bias/index.html [https://perma.cc/F6HJ-PXYT].

2. Novartis

In 2010, Novartis, a Swiss pharmaceutical company, agreed to settle civil allegations that it "unlawfully marketed [several drugs] and caused false claims to be submitted to federal health care programs, as well as claims that the company paid doctors kickbacks to get them to prescribe the drugs."[255] As part of the settlement, Novartis entered into a five-year corporate integrity agreement with the Department of Health and Human Services, Office of Inspector General that required, amongst other items, "the implementation of a compliance program addressing promotional activities."[256]

Before the expiration of the 2010 corporate integrity agreement, new allegations were brought against Novartis for violating "the False Claims Act and the Anti-Kickback Statute . . . by giving kickbacks to specialty pharmacies in return for recommending" two high-priced prescription drugs.[257] In 2015, Novartis ultimately entered into a civil fraud settlement and agreed to pay a total of $465 million to federal and state authorities as a result of its participation in the alleged scheme.[258] As part of the settlement, Novartis agreed to "amend its corporate integrity agreement with HHS-OIG to subject NOVARTIS's specialty pharmacy relationships to independent review and extend the term of that agreement by five years."[259]

In 2016, Novartis agreed to pay $35 million to settle charges of illegally promoting a drug for infants.[260] Also in 2016, Novartis agreed to a $25 million settlement over bribery charges in China in violation of the FCPA.[261] In addition to these matters, the DOJ began investigating Novartis in 2013 regarding allegations that "the company defrauded federal health care programs by paying kickbacks to doctors."[262] DOJ alleged that Novartis paid "'hundreds of millions of dollars of kickbacks' from Novartis to prescribers in the form of 'lavish meals' and 'extravagant alcohol orders.'"[263] In 2020, Novartis entered into a $642 million settlement with the DOJ over these

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[255] Ben James, *Novartis Settles Criminal, Qui Tam Cases for $422.5M*, LAW360 (Sep. 30, 2010, at 14:29 EDT), https://www.law360.com/articles/197986/novartis-settles-criminal-qui-tam-cases-for-422-5m- [https://perma.cc/J7VA-9AU9].

[256] Press Release, U.S. Dep't of Just., Novartis Pharmaceuticals Corp. to Pay More than $420 Million to Resolve Off-Label Promotion and Kickback Allegations (Sep. 30, 2010), https://www.justice.gov/opa/pr/novartis-pharmaceuticals-corp-pay-more-420-million-resolve-label-promotion-and-kickback [https://perma.cc/R9AW-LHFE].

[257] Press Release, U.S. Dep't of Just., Manhattan U.S. Attorney Announces $370 Million Civil Fraud Settlement Against Novartis Pharmaceuticals for Kickback Scheme Involving High-Priced Prescription Drugs, Along with $20 Million Forfeiture of Proceeds from the Scheme (Nov. 20, 2015), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-370-million-civil-fraud-settlement-against-novartis [https://perma.cc/MVK2-KLCC].

[258] *Id.*

[259] *Id.*

[260] Dani Kass, *Novartis Pays $35M to End Elidel Off-Label Marketing Suit*, LAW360 (Oct. 5, 2016, at 18:44 EDT), https://www.law360.com/articles/848672/novartis-pays-35m-to-end-elidel-off-label-marketing-suit [https://perma.cc/EX7R-H2UX].

[261] Press Release, Sec. & Exch. Comm'n, Novartis Charged with FCPA Violations (Mar. 23, 2016), https://www.sec.gov/litigation/admin/2016/34-77431-s.pdf [https://perma.cc/69T7-Z33U].

[262] Scott Flaherty, *Novartis Faces Another DOJ Suit Over Alleged Kickbacks*, LAW360 (Apr. 26, 2013, at 16:38 EDT), https://www.law360.com/articles/436513/novartis-faces-another-doj-suit-over-alleged-kickbacks [https://perma.cc/99ZT-EHGM].

[263] Jeff Overley, *DOJ's Novartis Kickback Case Cleared for Trial*, LAW360 (Apr. 1, 2019, at 22:01 EDT), https://www.law360.com/articles/1145278/doj-s-novartis-kickback-case-cleared-for-trial [https://perma.cc/3WJN-6AE3].

claims.[264] Novartis also entered into a corporate integrity agreement with the Department of Health and Human Services, Office of Inspector General that requires Novartis to significantly reduce its paid speaker programs (which Novartis used to facilitate kickbacks) to only a limited number of virtual events.[265] The agreement also created an additional obligation for Novartis directors and senior executives to certify compliance.[266]

In May 2018, it was revealed that Novartis paid Cohen $1.2 million between March 2017 and February 2018.[267] A U.S. Senate investigation determined that "Novartis explicitly sought to hire Michael Cohen to provide the company 'access to key policymakers' in the Trump administration."[268]

But in 2018, Novartis began what was considered by many in industry to make a significant turnaround to the culture surrounding its compliance program. Novartis recruited a new chief ethics and compliance officer from Siemens—a company that was plagued by its own significant past of bribery.[269] When making the appointment, the Novartis CEO stated, "[w]e must hold ourselves to (the) highest ethical standards and always aim to win and maintain the trust of society and our many stakeholders."[270] After the appointment of the new chief ethics and compliance officer, Novartis began to enjoy notoriety as a firm on the upswing, as it implemented new, tangible changes to the compliance program. For example, Novartis instituted a policy that "employees only get a bonus if they meet or exceed expectations for ethical behavior."[271]

Perhaps more importantly, Novartis implemented a new code of ethics in 2020, that was "co-created with the inputs of thousands of Novartis employees" and "anchored in behavioral science."[272] The code contains the company's "principles and expectations for ethical business conduct which help guide [Novartis's] people in making the right decisions when they encounter difficult situations or ethical challenges during the course of their work."[273] Novartis includes an explicit definition of its business purpose—"our purpose – to reimagine medicine to improve and extend lives."[274] But it then notes that that the company's "ethical principles guide [the firm] in [its] everyday decision-making and ensure [all members] act with integrity."[275]

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[264] Press Release, U.S. Dep't of Just., Novartis Pays Over $642 Million to Settle Allegations of Improper Payments to Patients and Physicians (July 1, 2020), https://www.justice.gov/opa/pr/novartis-pays-over-642-million-settle-allegations-improper-payments-patients-and-physicians [https://perma.cc/A9BT-MV3G].
[265] *Id.*
[266] *Id.*
[267] STAFF OF S. COMM. ON FIN. ET AL., 115TH CONG., WHITE HOUSE ACCESS FOR SALE: MICHAEL COHEN, NOVARTIS AND THE BID TO SELL ACCESS TO THE TRUMP ADMINISTRATION 1–2 (2018) [hereinafter U.S. Senate Staff Report], https://www.finance.senate.gov/imo/media/doc/REPORT%20White%20House%20Access%20for%20Sale%20Michael%20Cohen%20and%20Novartis.pdf [https://perma.cc/NY3U-UN39].
[268] *Id.* at 3.
[269] John Miller, *Novartis Recruits New Compliance Head from Siemens After Ethics Stumbles*, REUTERS (Aug. 14, 2018, at 04:48 CDT), https://www.reuters.com/article/business/novartis-recruits-new-compliance-head-from-siemens-after-ethics-stumbles-idUSKBN1KZ100/ [https://perma.cc/UEK7-UHJ2].
[270] *Id.*
[271] John Miller, *Novartis Links Bonuses to Ethics in Bid to Rebuild Reputation*, REUTERS (Sep. 17, 2018, at 12:23 CDT), https://www.reuters.com/article/us-novartis-ethics/novartis-links-bonuses-to-ethics-in-bid-to-rebuild-reputation-idUSKCN1LX23B/?il=0 [https://perma.cc/K8AC-DTPM].
[272] *Code of Ethics*, NOVARTIS, https://www.novartis.com/esg/ethics-risk-and-compliance/ethical-behavior/code-ethics [https://perma.cc/SH4H-3DQQ] (last visited Oct. 14, 2025).
[273] *Id.*
[274] *Id.*
[275] *Id.*

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Both Wells Fargo and Novartis, after a series of compliance failures, pivoted and restructured their compliance programs. They acknowledged their business purpose, the risks associated with their businesses, and they rooted decision making in ethical standards of the firm. This does not necessarily suggest that Wells Fargo and Novartis will be free of compliance failures, but the set of reforms does appear to have allowed the firms to make cultural changes that had tangible impacts for each organization.

C. Benefits

A firm's choice to pursue perfect compliance could have a range of benefits.[276] This Section will highlight three such potential benefits.

1. Shareholders & Stakeholders

Adopting a compliance program aimed at achieving perfect compliance would have a range of benefits for several constituents of the firm.

Importantly, shareholders are likely to benefit if a firm is engaged in high-level compliance work. As a reminder, a firm's compliance responsibilities include compliance with (i) legal and regulatory mandates, (ii) industry standards and practices, and (iii) internal norms and policies.[277] By promoting a perfect compliance goal internally, the firm will help mitigate legal and regulatory failures. These failures can cost a firm anywhere from tens of thousands of dollars to billions of dollars. And the true costs of these failures are not just the fines paid. It is also the cost of (i) the internal investigation, (ii) any post-resolution monitoring that is required, (iii) the implementation of organizational structure changes, (iv) third-party shareholder litigation, and (v) potential class action settlements. These are relatively standard costs a firm can expect to need to pay when a

[276] It is important to note that this Article is not arguing that the government, courts, or policymakers enact a set of external incentives to encourage firms to achieve perfect compliance. That effort would seem both misguided and unlikely to work for a variety of reasons. First, the government does not have the resources—in either time or money—to engage in the type of monitoring necessary to ensure perfect compliance at firms. Second, the government will never have the ex ante tools necessary to predict the innovative ways that a firm's agents might engage in misconduct. Third, if the government pushes firms too far, as noted by Arlen, Kraakman, and others, the result may be to deter firms from engaging in a robust compliance program. *See supra* notes 64–72 and accompanying text. That is not to say there is not more the government can do. I and others have suggested targeted governmental reforms to improve the compliance effort. *See infra* note 284 (collecting my previous work). *See generally* Haugh, *supra* note 171 (explaining how industry self-regulation has led to compliance programs that mimic criminal law and foster employee misconduct); Arlen & Kraakman, *supra* note 41 (comparing vicarious liability for the wrongdoing of employees to duty-based liability regimes); Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949 (2009) (arguing against regulating compliance through an adversarial system); Samuel W. Buell, *Reforming Punishment of Financial Reporting Fraud*, 28 CARDOZO L. REV. 1611 (2007) (offering insight into the necessity of improved methodology in federal sentencing law for corporate offenders); GARRETT, *supra* note 138 (describing "concrete ways to improve corporate law enforcement by insisting on more stringent prosecution agreements, ongoing judicial review, and greater transparency"); JOHN C. COFFEE JR., CORPORATE CRIME AND PUNISHMENT: THE CRISIS OF UNDERENFORCEMENT (2020) (exploring "alternative arrangements and strategies that could be used to redress the logistical imbalance that cripples white collar law enforcement"). Instead, I am acknowledging that there is only so much the government can do, and this Article's interventions are premised on focusing on the firm's role in setting compliance expectations for itself.

[277] Root, *supra* note 115, at 212.

significant scandal is uncovered within a large, complex firm. And these are all costs that can be avoided if a firm stops misconduct early and often.

But even more than these direct costs to shareholders, both shareholders and stakeholders are often impacted by harder-to-quantify concerns like reputational damage. Reputational harm can impact the ways in which potential customers perceive the firm—as has been documented at Wells Fargo.[278] Reputational harm can also, however, discourage existing employees, causing retention issues, and lead to difficulty recruiting new employees. Decreases in retention and difficulty in recruiting require a firm to expend additional resources that could have been avoided had the firm acted ethically.

Additionally, employee stakeholders will benefit if firms adopt programs that encourage more employee autonomy and the exercise of their voice. The employees will feel more ownership at the firm and an increased responsibility for what happens within the organization.[279] And this increased use of voice, if these principles permeate throughout the culture of the firm, may have positive impacts to other areas of the firm. For example, if employees feel comfortable reporting opportunities for fraud within the firm, those same employees may feel comfortable reporting opportunities for improving a product or service or more efficiently manufacturing goods. These types of benefits are good for both the employee—who is able to feel pride and ownership over their own role in the firm—and for shareholders, who will benefit from any profitable innovations suggested by the employees. In other words, when a firm focuses on encouraging greater voice within its workforce for compliance purposes, it could have other positive spillover effects within the firm.[280]

In short, when a firm is able to better address potential misconduct within its organization, the firm will be able to avoid a range of costs that can be harmful to both shareholders and stakeholders. And while a firm may technically be able to obtain leniency from the government or a favorable outcome from the Delaware courts, the costs that occur along the way to obtaining those favorable outcomes are real and should not be discounted by firms.

2. Durability

The compliance programs at firms today are often credited to the external incentives created by various governmental policies.[281] This Article outlined various ways in which governmental interventions—whether the Organizational Sentencing Guidelines, the Holder Memorandum, or various other policy pronouncements from the DOJ—have laid the foundation for modern

[278] Mark Calvey, *Wells Fargo Could See Almost Half Its Customers Leave Bank Over Scandal*, S.F. BUS. TIMES (Oct. 24, 2016, at 14:20 PDT), https://www.bizjournals.com/sanfrancisco/news/2016/10/24/wells-fargo-bank-wfc-fake-accounts-scandal-study.html [https://perma.cc/J7ME-GGMU].

[279] Elizabeth Wolfe Morrison, *Employee Voice and Silence: Taking Stock a Decade Later*, 10 ANN. REV. ORG. PSYCH. & ORG. BEHAV. 79, 85 (2023) [hereinafter Morrison, *Taking Stock a Decade Later*]; Tom Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 Ann. Rev. Psych. 375, 390 (2006) (distinguishing legitimacy from morality)..

[280] The amount of voice that gets reported does vary by gender and manager styles. *See* Morrison, *supra* note 279, at 85–87; *see also* Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms' Risk Oversight?*, 70 SMU L. REV. 327, 363 (2017) (citing "[m]anagement literature [which finds a positive] impact of gender diversity on ethics and compliance concerns"); Kristin Johnson, Steven A. Ramirez & Cary Martin Shelby, *Diversifying to Mitigate Risk: Can Dodd–Frank Section 342 Help Stabilize the Financial Sector?*, 73 WASH. & LEE L. REV. 1795, 1814–15 (2016) ("[W]hen there is more gender diversity on the board, there is less securities fraud."). Firms should take these realities into account when implementing a restructured compliance program.

[281] *See, e.g.*, Griffith, *supra* note 7, at 2078.

compliance efforts.[282] That said, one clear downside of relying on governmental incentives is that the policy preferences of the Executive Branch, of which the DOJ is a part, have the potential to change quite quickly. These changes have created almost cyclical expansions and contractions regarding the expectations that firms are obligated to meet to demonstrate their commitment to creating and implementing effective compliance programs.[283] These cycles fail to create clear and durable expectations surrounding what a firm must do to create a proper ethics and compliance program.

This Article's proposals, however, are not dependent on the Executive Branch to adopt particular policy preferences. I am not suggesting that policy changes at DOJ cannot have a positive impact on the compliance effort. In fact, I have at times argued for policy changes that I thought would be beneficial for improving or encouraging compliance and positive behavior within corporate firms.[284] That said, the current state of affairs within corporate firms suggests that relying heavily upon governmental incentives to establish compliance programs has created a situation where imperfect compliance has thrived and, as a result, corporate misconduct has endured. As such, this Article's suggestions go beyond policy proposals from the DOJ in favor of interventions that are more durable and less reliant on governmental preferences at the time.[285] That durability will create a solid foundation on which a firm can create and implement compliance policies, procedures, and protocols. That durability may also help increase the legitimacy of the compliance effort over the long-term.[286]

3. More Informed Assessments of Compliance Effectiveness

Today's firms face pressure to ensure that their programs are effective and not programs on paper only. Indeed, various actors have begun to pressure firms to engage in analytical assessments about the effectiveness of their compliance programs. It is no longer good enough to have a compliance program; firms must also measure the program's effectiveness.[287] This push toward greater measurement and assessment has, perhaps unsurprisingly, resulted in an increased use of

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[282] *See supra* Sections II.A.3, III.A.

[283] *See* Baer, *supra* note 276, at 998–99.

[284] *See generally* Martinez, *supra* note 140, at 108–09 (critiquing federal enforcement practices that prioritize information-gathering over sanctions, thereby discouraging robust compliance); Root, *supra* note 127 (advocating reforms to align enforcement incentives and improve corporate compliance through interagency coordination); Veronica Root Martinez, *Public Reporting of Monitorship Outcomes*, 136 HARV. L. REV. 757 (2023) (emphasizing that effective compliance depends on transparent and accountable processes for addressing misconduct).

[285] If implemented, the result of these proposals is that there may be times where compliance efforts at firms may exceed what appears required by the Executive Branch's stated policy preferences. When a firm exceeds legal requirements, it can increase its zone of liability because the act of creating policies or procedures that a firm fails to meet can create its own source of liability. *See, e.g.*, Veronica Root Martinez, *The Diversity Risk Paradox*, 75 VAND. L. REV. EN BANC 115, 125 (2022). That said, the argument here is not to exceed legal requirements; it is to attempt to create an effective ethics and compliance program, which is required by various legal sources, and not contract when governmental preferences conflict. The durability and stability should, over the long-term, create better risk management for a firm than constant adjustments to the constantly shifting preferences of the Executive.

[286] *See* Tyler, *Self-Regulatory Approaches*, *supra* note 174, at 207 (noting that studies "suggest that one way that work organizations can motivate their employees is by exercising authority in ways that will be judged by those employees as fair").

[287] *See, e.g.*, DEP'T OF HEALTH & HUM. SERVS., MEASURING COMPLIANCE PROGRAM EFFECTIVENESS: A RESOURCE GUIDE 9–16 (2017), https://oig.hhs.gov/documents/toolkits/928/HCCA-OIG-Resource-Guide.pdf [https://perma.cc/T3F7-UMTP]; *see also Hui Chen on the State of Corporate Compliance*, *supra* note 207 (the importance of evaluating the effectiveness of a company's new compliance measures).

data analytics as part of firms' compliance programs.[288] To fully harness the power of data analytics, however, firms are required to ramp up the infrastructure of their compliance programs, which "requires significant [monetary] expenditures, buy-in from management and reliance on IT."[289] And the reality is that "[t]he compliance programs that receive accolades for having data-forward programs are, for the most part, the result of large and bespoke efforts, significant internal and external time and resources and a hefty budget."[290]

In line with this push for better assessment, there are at least two paths that firms attempting to move toward purpose-driven compliance programs should consider.

First, firms should demonstrate a willingness to engage in assessment even when that assessment might demonstrate that an initiative has failed. I question whether a compliance program is actually engaged in robust assessment if it only find success within their program. Not every intervention will be successful. Failure is inevitable with any attempt to implement interventions that will produce change. Failure is not necessarily indicative of a lack of commitment to the compliance effort; it may instead demonstrate a willingness to engage in robust analytical assessment as part of an effort to implement innovative and effective compliance strategies. A firm that cannot point to compliance initiatives that have failed is very likely a firm that is not experimenting or assessing enough.

Second, a firm should not adopt best practices within the compliance space without also adopting a plan to assess whether that intervention works for its particular organization. This is important because there is a range of compliance interventions in place that have yet to be empirically proven effective. Take, for example, the use of monitors and monitorships, something I have written about extensively.[291] A monitor is "(i) an independent, private outsider, (ii) employed after an institution is found to have engaged in wrongdoing, (iii) who effectuates remediation of the institution's misconduct, and (iv) provides information to outside actors about the status of the institution's remediation efforts."[292] Monitors are commonly used tools to help create or solidify the effectiveness of a firm's compliance program after a compliance failure, but they are typically utilized for a fixed period of time. It is unclear, however, what the goal of the monitorship would be if one were attempting to assess monitorship effectiveness. If effectiveness consists of stopping misconduct during the monitorship term, a recent study suggests that monitorships are achieving their goals.[293] But if the goal of the monitorship is to curb misconduct even after the conclusion of the monitorship, that same study suggests monitorships may not be effective.[294] The monitor appointed to oversee Volkswagen after it engaged in emissions misconduct made the following statement at the conclusion of the monitorship.

> I want your readers to understand this: When I issue a certification, it does not mean that there will never be another problem at this big company. I just want to make sure everybody understands that. But Volkswagen will be in a position to have a

[288] Valerie Charles, *Data Analytics in Compliance Remains Hot. Don't Let It Burn Your Budget.*, CORP. COMPLIANCE INSIGHTS (June 30, 2021), https://www.corporatecomplianceinsights.com/data-analytics-compliance-remains-hot [https://perma.cc/6SJT-UZSF].
[289] *Id.*
[290] *Id.*
[291] *See, e.g.*, Martinez, *supra* note 284, at 766, 768–78.
[292] Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REGUL. 109, 111 (2016).
[293] Lindsey A. Gallo, Kendall V. Lynch & Rimmy E. Tomy, *Out of Site, Out of Mind? The Role of the Government-Appointed Corporate Monitor*, 61 J. ACCT. RSCH. 1633, 1687 (2023).
[294] *Id.*

> more candid, open and timely response and thereby, through a more robust and effective ethics and compliance program, reduce its risks substantially.[295]

If the goal of the monitorship is about what occurs during the monitorship term, this statement seems perfectly reasonable. If the goal of the monitorship, however, is to put practices in place that will stop future misconduct, statements at the conclusion of a monitorship from a monitor that almost expect misconduct may seem concerning. Regardless of what one's aim is in pursuing a monitorship—or a whole host of compliance interventions—the focus should be on adopting best practices that will actually achieve the goals that the firm is attempting to meet, instead of adopting interventions for the sake of adopting interventions.[296]

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The effort to improve compliance is not a discrete exercise. There are innumerable external and internal factors that impact a firm's decision-making when creating and implementing a compliance program, just as there is a range of constituencies and concerns that impact how the courts and government structure incentives for firms to create compliance programs. As reflected by the discussion in this Part, much more work remains to be done. This Article contributes to the larger effort by scholars and policymakers to attempt to (i) consider how to best address the realities of corporate misconduct and (ii) incentivize the creation of organizations that are well-suited to address wrongdoing within their ranks. It suggests that the external, enforcement-related incentives that helped create today's compliance programs, are ill-suited to take compliance programs to their next stage: to curb misconduct and align compliance programs to the firm's business purpose and risks, internal ethics, values, and standards of conduct.

V. ADDITIONAL CONSIDERATIONS

This Part outlines some additional questions and considerations regarding the arguments presented thus far. There could be others, but this Part focuses on what appear to be the three most common concerns.

A. Corrupt Organizations

This Article argues that companies should pursue purpose-driven compliance programs, but that does require that the leadership at the company want to pursue such a path. This sort of proposal will not work if the company's leadership is content with overseeing an organization with a corrupt or unethical culture. Thus, one might wonder how this Article's proposal fits in with "corrupt" organizations. For the most part, it does not.

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[295] *Independent Monitor at Volkswagen Calls for Internal Culture Change*, AUTO. NEWS (July 2, 2018, at 00:00 CST), https://www.autonews.com/article/20180702/OEM11/180709988/independent-monitor-at-volkswagen-calls-for-internal-culture-change [https://perma.cc/H4HJ-X8KQ].

[296] To be fair, one reason to adopt a best practice even if a firm does not know it will be effective is because the Organizational Sentencing Guidelines state that one point of evaluation is whether the firm has met "industry practices." *See* U.S. SENT'G GUIDELINES MANUAL § 8B2.1 cmt. 2(A) (U.S. SENT'G COMM'N 2024). In addition to the suggestions being urged in this paper for private actors to better assess their compliance interventions, public authorities should engage in similar work.

This Article targets firms that are interested in developing effective ethics and compliance programs, but that have become overly focused on enforcement-driven and other external incentives as the primary basis for structuring their policies and procedures. The example of Wells Fargo, and the scholarly literature, suggest that for true change to occur within and throughout the company, it what its business purpose, risks, internal values, and ethical standards would require for an effective compliance program. The company's own priorities and expectations should drive much of the reform effort. This is important for a whole host of reasons, many of which have been detailed throughout this Article. But one important reason that it is important for a company to drive the expectations set out in its compliance program is that enforcement-driven incentives are almost always temporary.[297]

Enforcement authorities will never be able to fully provide a set of *ex ante* rules that will stop all misconduct, which means an enforcement-driven compliance program will also be underinclusive of the full set of risks a company will face. By focusing on a purpose-driven plan, the company can fill in the enforcement and regulatory gaps with its own set of guidelines about how employees should exercise their judgment. A corrupt firm may not want to fill in those gaps; instead, it might want to exploit the loopholes. And for those firms, one must hope they eventually get caught and sanctioned appropriately by the government. For long-term, durable change, the company must have a clear set of expectations surrounding its values and ethical standards, and it must create systems that encourage its employees to adhere to those purpose-driven standards.

B. Emerging Industries

Emerging industries present particular challenges for the adoption of a purpose-driven compliance program. Purpose-driven compliance presumes the existence of a baseline of controls and expectations that have developed over time through enforcement actions, regulatory guidance, and industry practice. This "floor" allows an organization to build a compliance program that ties purpose to risks and ethical commitments without first reinventing the scaffolding of monitoring, reporting, and internal control. In established industries—finance, pharmaceuticals, higher education—enforcement-driven programs and the experience of peers create at least a minimum framework against which firms can orient their compliance priorities. But in emerging industries, where regulation is minimal or fragmented, the basic floor may be absent. Without a baseline established by enforcement authorities, the purpose-driven model risks collapsing into aspirational rhetoric without the necessary infrastructure to give it teeth.

Decentralized finance ("DeFi") offers a useful illustration. Many DeFi projects operate outside of traditional financial regulatory structures, often without centralized management or compliance staff. Because enforcement actions against DeFi platforms remain sporadic and jurisdictionally complicated, there is no clear consensus on what constitutes an effective compliance "floor." As a result, projects lack the enforcement-driven incentives that have historically pushed banks and broker-dealers to adopt anti-money laundering programs, know-your-customer ("KYC") procedures, or fraud detection mechanisms. In this regulatory vacuum, it is difficult to imagine how a DeFi project could move straight to a purpose-driven program—say, aligning compliance with a mission of democratizing finance or promoting financial inclusion—when the basic mechanisms for identifying and mitigating misconduct are undeveloped. Purpose without a floor

[297] Indeed, an empirical study suggests that corporate monitors, like the ones appointed to oversee Binance, are associated with a reduction in violations while the monitor is on site, but they were unable to find a reduction after the monitorship term ends. Gallo, Lynch & Tomy, *supra* note 293, at 1687.

is unlikely to produce reliable compliance; in emerging industries, the first step may still need to be building a basic enforcement-driven foundation.

C. Profitable Criminality

One may wonder whether an investment in a purpose-driven compliance program makes sense if engaging in misconduct or wrongdoing helps a firm obtain a profit. Indeed, one might go so far as to argue that a firm should keep investment in compliance at the lowest possible amount, so that firms do not encounter situations where their ability to maximize shareholder wealth is impeded by investments in and restrictions from a compliance department,[298] which is often considered a cost-center within an organization. There are at least two reasons this sort of objection is not sound.

First, there are limits on firms' abilities to pursue profit—and engaging in misconduct is widely recognized as one of these limits. Professor Eugene Soltes has noted that while "it may be profitable for a firm to provide financial services to a drug cartel . . . [i]n return for the privilege of operating within a jurisdiction, firms agree to abide by certain rules and regulations or else face punishment."[299] The Honorable Leo E. Strine, Jr. and others have similarly noted that "the corporation's existence is premised on the nondefeasible promise that it will conduct only lawful business through lawful activities."[300] A concern about shareholder wealth maximization does not give a firm license to violate legal and regulatory standards, and because liability can attach for violating industry standards, firms must ensure that they are not falling behind the compliance expectations of their peers as well.[301]

Second, pursuing criminality—or misconduct or wrongdoing—may appear beneficial to a firm in the short-term, but it is not necessarily profitable over the long-term, because governmental enforcement activity and third-party litigation can create a range of significant risks for organizations.

VI. Conclusion

Compliance matters, perhaps more than the average person understands. An effective compliance program ensures that a customer's personal financial information is not disclosed by a bank to third parties.[302] Compliance is one way to discourage attempts to defraud the government. Compliance helps combat money laundering by terrorist groups and drug cartels.[303] Compliance

[298] *See, e.g.*, Langevoort, *supra* note 180, at 79 ("Within the securities business and elsewhere, there is no reasonable expectation of, or even desire for, perfect compliance with law. Although I suspect that some senior managers and boards of directors have higher ambitions in terms of their commitment to compliance as an ethical principle, throughout this paper I will make the moderate assumption that the commitment of the firm with respect to compliance is simply to maximize the firm's income over the long run.").

[299] Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965, 976–77 (2018).

[300] Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 651 (2010); *see also* Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1449 (2021) ("Stemming from this statutory language regarding chartering corporations for a lawful purpose, courts have held corporate fiduciaries to the dual requirements of legal obedience and oversight as part of their duty of good faith.").

[301] *See* U.S. SENT'G COMM'N, *supra* note 77, at 42.

[302] *E.g.*, Kristof, *supra* note 128.

[303] *E.g.*, Press Release, U.S. Dep't of Just., *supra* note 9 (noting that the bank had "severely understaffed its [anti-money laundering] compliance function").

ensures that firms do not put too many pollutants into the air.[304] Compliance supports the effort to create fair and efficient capital markets. And the zone of oversight for those engaged in compliance efforts is growing to include concerns related to diversity and ESG.[305] Corporations rely on their compliance departments to create the systems and processes that allow companies, their workers, and the communities where the companies operate to thrive.[306] And when compliance fails at its job, people are sometimes harmed. If today's compliance efforts are built upon flawed assumptions, they should be identified and critiqued. This Article contributes towards that effort.

In making this argument, this Article makes several contributions to the literature on corporate misconduct, corporate enforcement, and corporate compliance. First, this Article presents a novel question for legal scholars to consider, which is whether a firm's decision (i) to tailor its compliance programs to external enforcement priorities (ii) while tolerating imperfect compliance may actually serve to circumvent the effort to tamp down corporate misconduct and unethical behavior by the firm's agents. Second, the Article outlines the costs of both imperfect and perfect compliance within corporate firms, and it lays out the benefits of shifting away from an enforcement-driven framework for compliance. Finally, the Article draws on a literature that focuses on corruption, misconduct, and behavior within firms to argue that organizations should move toward purpose-driven compliance programs, which are compliance programs that are directed by the firm's (i) purpose, (ii) inherent risks based on the activities necessary to achieve that purpose, and (iii) ethical standards and goals. It is time for organizations to shift from enforcement-driven compliance programs and focus instead on what compliance strategies make the most sense given the organization's particular business purpose, risks, and values.

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[304] *E.g.*, Daniel Jacobs & Lawrence P. Kalbers, *The Volkswagen Diesel Emissions Scandal and Accountability*, CPA J. (July 2019), https://www.cpajournal.com/2019/07/22/9187/ [https://perma.cc/3FS7-G3WG] (noting that internal auditors had recommended measures for improving the governance and compliance function at the firm).

[305] *See, e.g.*, PAULA DAVIS, INT'L COMPLIANCE ASS'N, DIVERSITY, EQUITY & INCLUSION (DE&I): ESTABLISHING THE ROLE OF ETHICS & COMPLIANCE FOR IMPACT AND VALUE 4 (2024) (ebook); Melanie Taosuwan, *How Can Compliance Officers Help Their Companies Tackle ESG?*, DELOITTE (July 12, 2020), https://www2.deloitte.com/ch/en/pages/financial-advisory/articles/compliance-officers-and-esg.html [https://perma.cc/5MW3-EP4G].

[306] Root, *supra* note 115, at 205.

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