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Articles

COMPLEX COMPLIANCE INVESTIGATIONS

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Whether it is a financial institution like Wells Fargo, an automotive company like General Motors, a transportation company like Uber, or a religious organization like the Catholic Church, failing to properly prevent, detect, investigate, and remediate misconduct within an organization's ranks can have devastating results. The importance of the compliance function is accepted within corporations, but the reality is that all types of organizations—private or public—must ensure their members comply with legal and regulatory mandates, industry standards, and internal norms and expectations. They must police thousands of members' compliance with hundreds of laws. And when compliance failures occur at these complex organizations they can be significant and widespread in both scope and associated harms.

Yet, careful examination and assessment reveals that many of the most significant and damning scandals occurring within organizations of late were entirely avoidable. Research within the field of corporate governance focuses on how firms are structured because those structures can result in better decisionmaking within the firm. Structure refers to the manner of separating the work in an organization into subunits and dividing the control of and responsibilities for the work. The field of compliance relies heavily on these insights from corporate governance, which has led to a focus on what organizational structures will lead to compliance programs likely to prevent and detect misconduct within

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firms. When it comes time to investigate potential incidents of misconduct and determine whether they are material events, however, complex organizations must go beyond issues related to the best manner in which to structure a compliance program. Instead, this Article argues that firms must focus on process-based reforms—or the actions, practices, and routines firms employ to communicate and analyze information—that will bolster a firm's "Complex Compliance Investigations" and act as a safety net when compliance programs fail to detect or appropriately respond to misconduct within firms.

INTRODUCTION

Despite the best efforts of governments, regulators, prosecutors, private stakeholders, and academics to identify effective mechanisms for organizations to employ in an effort to prevent and deter improper conduct within their ranks, misconduct continues to persist within organizations of all types. Fake bank accounts. Faulty ignition switches. Sexual harassment. Protection of predators. Over and over again, the public learns of widespread and significant misconduct plaguing organizations that millions of individuals rely upon on a daily basis. Most troubling, however, is that the breadth and depth of many of these scandals were entirely avoidable.

For example, in 2016, Wells Fargo announced that it had entered into an agreement to pay "a combined $185 million penalty to the Consumer Financial Protection Bureau . . . , the Office of the Comptroller of the Currency, and the City and County of Los Angeles to settle charges" without admitting formal wrongdoing that it fraudulently opened accounts on behalf of customers without their knowledge.[1] The initial settlement, however, was just the beginning of difficulties for the bank, and it has now entered into multiple settlements with the DOJ,[2] the SEC,[3] and the Federal Reserve,[4] among others.[5] In addition to actions brought

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1. Bethany McLean, How Wells Fargo's Cutthroat Corporate Culture Allegedly Drove Bankers to Fraud, Vanity Fair (May 31, 2017), https://www.vanityfair.com/news/2017/05/wells-fargo-corporate-culture-fraud [https://perma.cc/6G23-MNAZ].

2. E.g., Press Release, DOJ, Justice Department Obtains $5.4 Million in Additional Relief to Compensate Servicemembers for Unlawful Repossessions by Wells Fargo Dealer Services (Nov. 14, 2017), https://www.justice.gov/opa/pr/justice-department-obtains-54-million-additional-relief-compensate-servicemembers-unlawful [https://perma.cc/MX78-FR6Y]; Press Release, DOJ, Justice Department Reaches $4 Million Settlement with Wells Fargo Dealer Services for Illegally Repossessing Servicemembers' Cars (Sept. 29, 2016), https://www.justice.gov/opa/pr/justice-department-reaches-4-million-settlement-wells-fargo-dealer-services-illegally [https://perma.cc/C4AY-TP2V]; Press Release, DOJ, Wells Fargo Bank Agrees to Pay $1.2 Billion for Improper Mortgage Lending Practices (Apr. 8, 2016), https://www.justice.gov/opa/pr/wells-fargo-bank-agrees-pay-12-billion-improper-mortgage-lending-practices [https://perma.cc/CVZ6-TUNB].

3. E.g., Order Approving Plan of Distribution, Exchange Act Release No. 80,302, 116 SEC Docket 1642 (Mar. 23, 2017); Order Instituting Administrative Cease-and-Desist Proceedings, Securities Act Release No. 9349, Exchange Act Release No. 67,649, Investment Company Act Release No. 30,167, 104 SEC Docket 1445 (Aug. 14, 2012); Press Release, SEC, Wells Fargo Advisors Admits Failing to Maintain Controls and Producing Altered Document, Agrees to Pay $5 Million Penalty (Sept. 22, 2014), https://www.sec.gov/news/press-release/2014-207 [https://perma.cc/6BBA-SEZQ].

4. E.g., Written Agreement Between Wells Fargo & Company and Board of Governors of the Federal Reserve System, Docket No. 18-007-B-HC (Feb. 2, 2018); Wells Fargo & Co., Wells Fargo Update: Federal Reserve Consent Order 1 (2018), https://mms.businesswire.com/media/20180202005711/en/638742/1/3837099cWells_Fargo_Consent_Order_en.pdf [https://perma.cc/XDP8-3ZEJ]; Press Release, Bd. of Governors of the Fed. Reserve Sys., Responding to Widespread Consumer Abuses and Compliance Breakdowns by Wells Fargo, Federal Reserve Restricts Wells' Growth Until Firm Improves Governance and Controls. Concurrent with Fed Action, Wells to Replace Three Directors by April, One by Year End (Feb. 2, 2018), https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180202a.htm [https://perma.cc/34LR-G72W] [hereinafter Fed. Reserve Wells Fargo Press Release].

5. See, e.g., Emily Flitter, Wells Fargo Agrees to Settle Auto Insurance Suit for $386 Million, N.Y. Times (June 7, 2019), https://www.nytimes.com/2019/06/07/business/wells-fargo-auto-insurance-lawsuit-settlement.html (on file with the *Columbia Law Review*); Imani Moise, Wells Fargo to Pay $575 Million in Settlement with U.S. States, Reuters (Dec. 28, 2018), https://www.reuters.com/article/us-wells-fargo-settlement/wells-fargo-to-pay-575-million-in-settlement-with-u-s-states-idUSKCN1OR19Q [https://perma.cc/8P9V-HL47]; Jonathan Stempel & Dena Aubin, Wells Fargo Officials Enter $240 Million Settlement over Bogus Accounts, Reuters (Mar. 1, 2019), https://www.reuters.com/article/us-wells-fargo-settlement/wells-fargo-officials-enter-240-million-settlement-over-bogus-accounts-idUSKCN1QI4P3 [https://perma.cc/LUA3-KAKW].

by governmental actors, alleged internal whistleblowers claimed that they were fired or retaliated against when they attempted to alert higher-ups within the corporation of the fraudulent activity.[6] In early 2018, one such claim resulted in a $577,000 settlement and an order to rehire the employee.[7] The significant failures throughout the organization's ranks led to an unprecedented sanction from the Federal Reserve in February 2018, which restricts the bank's ability to grow until it improves its internal governance and controls.[8] And yet, Wells Fargo had structured its compliance program in line with what was expected under industry standards at the time. Indeed, as one scholar explained, "[A]t the time of its massive fake accounts scandal . . . Wells Fargo had a robust, [Organizational Sentencing] Guidelines-based compliance program with all of the 'expected' tools aimed at eliminating typical compliance lapses. Yet the company was unable to foresee, let alone prevent, an extreme compliance failure . . . ."[9]

Likewise, General Motors failed to recognize and prevent an extreme compliance failure of a different sort, one that not only cost the organization billions of dollars, but also resulted in the deaths of at least 124 people.[10] In 2014, General Motors announced a recall of over seventeen million vehicles worldwide, over eleven million of which cited issues of the ignition switch that would abruptly cause the car to lose power "when keys [were] accidentally bumped or moved out of the 'Run' position."[11] In instances where the switch failed and the car stalled, airbags would not deploy, creating the potential for serious injuries to both drivers and

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6. Matt Egan, More Wells Fargo Workers Allege Retaliation for Whistleblowing, CNN (Nov. 7, 2017), http://money.cnn.com/2017/11/06/investing/wells-fargo-retaliation-whistleblower/index.html [https://perma.cc/RNF2-F7FT]. For Wells Fargo's legal assessment of alleged retaliation against whistleblowers, see Indep. Dirs. of the Bd. of Wells Fargo & Co., Sales Practices Investigation Report 87 n.26 (2017), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf [https://perma.cc/HT9K-TCHU] [hereinafter Wells Fargo Investigation Report].

7. C. Ryan Barber, Wells Fargo, Ending Its Appeal, Settles Whistleblower's $577K Retaliation Case, Nat'l L.J. (Jan. 19, 2018), https://www.law.com/nationallawjournal/sites/nationallawjournal/2018/01/19/wells-fargo-ending-its-appeal-settles-whistleblowers-577k-retaliation-case/ (on file with the *Columbia Law Review*).

8. See Written Agreement Between Wells Fargo & Company and Board of Governors of the Federal Reserve System, supra note 4, at 8–9; Fed. Reserve Wells Fargo Press Release, supra note 4.

9. Todd Haugh, The Power Few of Corporate Compliance, 53 Ga. L. Rev. 129, 157 (2018) [hereinafter Haugh, Power Few] (footnote omitted).

10. Kirsten Korosec, Ten Times More Deaths Linked to Faulty Switch than GM First Reported, Fortune (Aug. 24, 2015), http://fortune.com/2015/08/24/feinberg-gm-faulty-ignition-switch/ (on file with the *Columbia Law Review*); Eric D. Lawrence, GM Settles Deadly Ignition Switch Cases for $120 Million, USA Today (Oct. 20, 2017), https://www.usatoday.com/story/money/cars/2017/10/20/gm-settles-deadly-ignition-switch-cases-120-million/777831001/ [https://perma.cc/AFS8-CJ65].

11. Peter Valdes-Dapena & Tal Yellin, GM: Steps to a Recall Nightmare, CNN, https://money.cnn.com/infographic/pf/autos/gm-recall-timeline/index.html [https://perma.cc/4BWX-PUXY] (last visited Oct. 8, 2019).

passengers.[12] Notwithstanding this significant risk, the company chose not to fix the faulty switches, despite first receiving reports on the issue in 2004, and multiple reports thereafter.[13] Indeed, when General Motors first analyzed the issue, it improperly classified the problem as a customer convenience issue instead of a safety issue, leading it to determine that it was simply too costly to make the necessary changes to the switch design.[14] And over the next number of years, the company continued to demonstrate a "lack of urgency, lack of ownership of the issue, lack of oversight, and lack of understanding of the consequences of the problem."[15] This lack of urgency and oversight turned out to be exceptionally costly to General Motors, both in terms of its public reputation as well as its bottom line. In 2017, General Motors entered into a $120 million settlement with victims of its defective ignition switch scandal, a figure that came on top of roughly $2.5 billion worth of penalties imposed on the company.[16] These penalties included, for instance, a $900 million settlement with the DOJ in a criminal case, and multiple other settlements with accident victims.[17]

When organizations fail to properly address potential compliance failures, it presents a particularly problematic situation, because the responsibility for preventing and detecting misconduct within an organization lies primarily with the organization itself.[18] An underlying assumption of all modern compliance efforts is that organizations are in the best position to monitor and police the behavior of their members.[19] This understanding stems from past incidents of corporate misconduct and is uncontroversial.

For instance, when the Enron and Arthur Andersen scandals broke in 2001, they sent a ripple effect across corporate America and triggered a variety of responses from Congress, regulators, and prosecutors.[20] Legislation

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12. Anton R. Valukas, Jenner & Block, Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls 1 (2014), https://www.aieg.com/wp-content/uploads/2014/08/Valukas-report-on-gm-redacted2.pdf [https://perma.cc/VB9L-5BHD].

13. Id. at 2–4.

14. Id. at 2; see also Valdes-Dapena & Yellin, supra note 11.

15. Valukas, supra note 12, at 4, 9.

16. Lawrence, supra note 10.

17. Id.

18. See U.S. Sentencing Guidelines Manual § 8B2.1 (U.S. Sentencing Comm'n 2004) (describing an "effective compliance and ethics program," including due diligence, the promotion of ethical conduct, and compliance with the law); see also id. ch. 8, introductory cmt. (noting that the guidelines "provid[e] a structural foundation from which an *organization* may *self-police its own conduct* through an effective compliance and ethics program" (emphasis added)).

19. Miriam Hechler Baer, Governing Corporate Compliance, 50 B.C. L. Rev. 949, 959 (2009).

20. Lawrence A. Cunningham, Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform, 66 Fla. L. Rev. 1, 16–18 (2014).

was passed.[21] Enforcement priorities shifted.[22] And the manner in which corporate misconduct was settled and resolved changed dramatically.[23] The focus for corporations, regulators, and prosecutors shifted to "corporate compliance programs as the key to optimal deterrence."[24] As compliance programs catapulted in importance, it led to the intensification of "internal policing of corporate employees."[25] And as organizations took on this responsibility of policing their employees in an effort to comply with ever-increasing regulatory and legal requirements, they began to focus on the structure—the separation of work in an organization into subunits and dividing the control of and responsibilities for the work—of the compliance programs they created.[26] Focusing on the structure of an organization's compliance efforts was seen as essential to ensuring an effective and robust compliance and ethics program.[27]

Determining the proper structure of compliance programs has been a question scholars, practitioners, prosecutors, and regulators have wrestled with for decades.[28] Should the compliance program be segmented into particular subject areas or should there be one global compliance

21. See Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, § 302, 116 Stat. 745, 777–78 (codified at 15 U.S.C. § 7241 (2012)).

22. For example, within weeks of Arthur Andersen's conviction for obstruction of justice, then-President George W. Bush formed the President's Corporate Fraud Task Force within the Department of Justice. Compare United States v. Arthur Andersen, LLP, 374 F.3d 281, 284 (5th Cir. 2004) (noting that a guilty verdict was returned on June 15, 2002), rev'd, 544 U.S. 696, 708 (2005), with Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 11, 2002) (establishing the task force to "investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes"). For more information on the Corporate Fraud Task Force, see The President's Corporate Fraud Task Force, DOJ Archives, http://www.justice.gov/archive/dag/cftf/ [https://perma.cc/EKG4-VQYW] (last visited Oct. 9, 2019). Under then-President Barack Obama, the program shifted into the Interagency Financial Fraud Task Force. See Press Release, SEC, President Obama Establishes Interagency Financial Fraud Enforcement Task Force (Nov. 17, 2009), http://www.sec.gov/news/press/2009/2009-249.htm [https://perma.cc/NDN8-ATNR]; see also Cunningham, supra note 20, at 16–17 (outlining different changes to enforcement priorities as a result of Enron and other corporate scandals).

23. See Brandon L. Garrett, The Public Interest in Corporate Settlements, 58 B.C. L. Rev. 1483, 1498–511 (2017) (surveying the use of supervised probation, deferred prosecution agreements, and nonprosecution agreements in addressing corporate misconduct and collecting relevant citations).

24. Cunningham, supra note 20, at 17.

25. Id.

26. See infra section I.B.

27. See infra section I.B.

28. At a minimum, the question of how to structure a compliance program has been an issue since the 1991 passage of the original iteration of the Organizational Sentencing Guidelines, which is applicable to corporations, partnerships, unions, funds, trusts, nonprofits, and governmental entities. See Paula Desio, U.S. Sentencing Comm'n, An Overview of the Organizational Guidelines 2–3, https://www.hcca-info.org/Portals/0/PDFs/Resources/Conference_Handouts/Compliance_Institute/2006/707handout.pdf [https://perma.cc/R44R-2XGJ] (last visited Jan. 20, 2020).

program?[29] Should the chief compliance officer report to the general counsel or the audit committee?[30] Should compliance professionals be embedded within particular departments or remain separate as a deterrent to capture?[31] These and other foundational questions about how organizations should structure their compliance programs were necessary and important progressions for creating the compliance programs found within organizations today.

Yet despite spending a great deal of time, effort, and money to enact structural reforms and improvements within organizations' compliance programs, every year brings a new, more stunning example of how organizations' attempts to reign in misconduct often fail to prevent even the most extensive compliance failures within industries and firms. The scandals at Wells Fargo and General Motors each reflect an intense failure by the organization to effectuate its monitoring and policing responsibilities despite the presence of compliance programs that were structured in a manner expected to effectuate an appropriate amount of monitoring and policing.

There are a variety of accepted understandings—both within industry and academic scholarship—about what is necessary for the creation of an effective compliance program. However, when one considers the significant compliance failures that continue to occur despite the adoption of increasingly sophisticated internal compliance programs, it suggests that it may be time to affirmatively question certain understandings and assumptions that serve as the foundation of modern-day compliance programs.[32] This Article contributes to that effort.

Compliance programs within firms focus, for good reason, on preventing and detecting misconduct within their ranks. Those striving to create effective ethics and compliance programs spend a great deal of time on developing appropriate structures to house, manage, and support compliance efforts so that they will effectively prevent and detect wrongdoing within firms. But as demonstrated in prior work, prevention and detection are just the first two of four stages—the latter stages being

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29. Walmart, for instance, segments its compliance department by subject area and then by geography. Jay T. Jorgensen & C. Kevin Marshall, Corruption and Compliance: Promoting Integrity in a Global Economy, 49 U.C. Davis L. Rev. 425, 431–33 (2015); see also Global Ethics & Compliance, Walmart, https://corporate.walmart.com/our-story/global-ethics-compliance [https://perma.cc/HZ52-WBU5] (last visited Oct. 9, 2019).

30. See Michael W. Peregrine, Seeking Clarity at the Crossroads of Legal and Compliance, Corp. Couns. (Sept. 18, 2014), https://s3-us-east-2.amazonaws.com/mwe.media/wp-content/uploads/2019/04/05161327/cc091814.pdf [https://perma.cc/GVG3-PY56].

31. See id.

32. This effort is at nascent stages but has begun. For example, Professor Todd Haugh has recently argued that compliance programs have suffered in effectiveness because they assume that compliance failures will fall within a normal distribution amongst one's employees. In actuality, however, "[U]nethical employee conduct is just as likely to follow a skewed, or 'fat-tailed,' distribution." Haugh, Power Few, supra note 9, at 135 (quoting Daniel A. Farber, Uncertainty, 99 Geo. L.J. 901, 923 (2011)).

investigation and remediation—within compliance efforts.[33] This Article focuses on the detection and investigative stages and the continuum between them. It demonstrates that many recent compliance failures within organizations might have been avoided if more robust processes—meaning the actions, practices, and routines that firms can employ to communicate and analyze information—had been in place to ensure investigations were conducted in a manner that allowed the firm to analyze information from diverse areas within the firm. As such, this Article argues that firms must focus on adopting process-based reforms that will bolster internal investigations into complex compliance failures and act as a safety net when compliance programs fail to detect or appropriately respond to misconduct within firms.

Part I of this Article describes why the effort to curb corporate criminal misconduct came to rely heavily on self-policing within the organization, which contributed to the rise of the compliance function. This Part goes on to demonstrate, through the use of literature from the fields of organizational behavior and corporate governance, the importance of implementing certain structures within the creation of compliance programs. For purposes of this Article, structure refers to a firm's decisions on how to organize itself.[34] Part I then recounts current understandings of compliance within legal scholarship, which include an emphasis on the key structural components necessary for an effective compliance program and their focus on the prevention and detection of corporate misconduct.

Part II focuses on the evolution of the compliance function. It demonstrates that traditional compliance programs were narrow in scope, with a focus on particular subject matter areas. Yet, the rise of more complex organizations—organizations with many diffuse departments or complicated organizational structures with a variety of parents and subsidiaries—brought new challenges for compliance efforts. A complex organization for purposes of this Article might be one organizational entity with a number of departments, such as a university, but it may also be a complicated corporate family with many subsidiaries, like Walmart. These larger, more complex organizations often suffer from information silos, which occur when departments or divisions within a large organization are isolated from other parts of the organization.[35] These

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33. See Veronica Root, The Compliance Process, 94 Ind. L.J. 203, 219–27 (2019) [hereinafter Root, Compliance Process].

34. Tor Hernes, A Process Theory of Organization 69 (2014) (citing Stewart Ranson, Bob Hinings, and Royston Greenwood's definition of organizational structure as "the social structures of relationships that reside in organizations"); see also Nicola Faith Sharpe, Process over Structure: An Organizational Behavior Approach to Improving Corporate Boards, 85 S. Cal. L. Rev. 261, 266–68 (2012). But see Hernes, supra, at 69–71 (arguing that the duality of process and structure is a fallacy).

35. Cf. Richard E. Levy & Robert L. Glicksman, Agency-Specific Precedents, 89 Tex. L. Rev. 499, 510–14 (2011) (discussing effects of information silos on large government bureaucracies in administrative agencies).

information silos sometimes result in difficulty communicating properly throughout the organization and, in particular, can impede a firm's attempts to fully and properly investigate claims of potential misconduct.

Part III sets forth the thesis of this Article and argues that firms must focus on adopting process-based reforms that will bolster the firm's investigations into complex compliance failures, thereby acting as a safety net when compliance programs fail to detect or appropriately respond to misconduct within firms. Part III begins by presenting two case studies, which demonstrate that recent compliance failures at complex organizations suggest that many of these compliance programs—regardless of the program's organizational structure—suffer from information silos that result in improper or inadequate responses to significant organizational misconduct. Part III then highlights how process-based reforms might assist large, complex firms in detecting compliance failures before they become widespread, significant, or both. It applies specific process-based reforms to the compliance failures at Wells Fargo and General Motors in an effort to demonstrate how these types of additional interventions might add value to firm compliance programs. In particular, Part III suggests the creation of three interventions meant to bolster firms' detection and investigative efforts: (i) standardized internal investigation questions, (ii) materiality surveys, and (iii) reliance upon an aggregation principles when evaluating information. Relying on two additional case studies, Part III then highlights two limitations to process-related reforms: organizations without robust structural compliance programs, as evidenced by investigations into the Catholic Church, and organizations with corrupt cultures, as evidenced by the internal Uber sexual harassment scandal.

Part IV discusses some potential benefits raised by this Article's proposed framework. The Article then turns to highlighting some remaining questions. This Article, admittedly, focuses on a relatively narrow area within compliance efforts—failures within the detection and investigative continuum of compliance efforts within complex organizations—but shortcomings in this space are associated with potentially devastating consequences for firms.

I. THE COMPLIANCE FUNCTION

When corporate misconduct occurs, the first questions asked often center on how and why the organization's compliance program failed. In large part, the focus on compliance is a result of the firm's self-policing responsibilities. Firms police the conduct of their employees and agents in an effort to ensure their compliance with legal and regulatory requirements, industry standards, and internal policies and procedures. The earliest conceptions of the compliance function were motivated by this policing model, with the Organizational Sentencing Guidelines admonishing firms to have effective ethics and compliance programs that would prevent and detect misconduct.[36] When firms began developing their internal compliance programs, they were necessarily focused on how to structure those programs. How governance mechanisms should be structured within firms has long been discussed within corporate governance and organizational behavior literature. Indeed, while many current understandings of compliance within legal scholarship discuss the importance of the policing function of compliance, they also reflect the relationship between rote compliance with legal and regulatory requirements and issues often addressed by those charged with corporate governance.

A. *Self-Policing and the Rise of Compliance*

The concept of corporate misconduct is a bit of a misnomer, because a corporation cannot take any action on behalf of itself. Instead, the corporation's agents act on the corporation's behalf. Corporate misconduct, then, consists of improper acts undertaken by a corporation's agents that are attributable to the corporation.[37] And organizations are traditionally held responsible for the actions of their agents, including their employees and managers.[38]

As a result, one of the key challenges confronting governmental enforcement agents is how to incentivize corporations to rein in their employees.[39] The crux of this challenge for corporations is how to encourage their employees to comply with the firms' directives.[40] This effort—the task of monitoring one's own agents in an attempt to prevent them from engaging in misconduct and detect when misconduct occurs—is the act of self-policing. And attempts to determine the mechanisms needed to achieve effective self-policing have sparked debates within legal scholarship and amongst policymakers for over two decades.[41]

While organizations have employed a variety of strategies, a principal feature of the government's efforts to incentivize firms to create and implement corporate compliance programs comes from the Organizational Sentencing Guidelines (Organizational Guidelines), which were promulgated in 1991.[42] The Organizational Guidelines "apply to all organizations whether publicly or privately held, and of whatever nature, such as corporations, partnerships, labor unions, pensions funds, trusts, non-

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36. See, e.g., U.S. Sentencing Guidelines Manual § 8C2.5(f) (U.S. Sentencing Comm'n 2010) (mitigating culpability of organizations based on effectiveness of existing compliance program).

37. See Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. Rev. 687, 688 (1997).

38. Id.

39. See id. at 689–91.

40. See id. at 691.

41. See id. at 689–91.

42. John R. Steer, The Sentencing Commission's Implementation of the Sarbanes–Oxley Act 20 (2003), https://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/selected-articles/Steer-PLI-2003.pdf [https://perma.cc/PA2U-J5J3].

profit entities, and governmental units."[43] The Organizational Guidelines provide guidance on an appropriate sanction when firms are prosecuted and found guilty of engaging in corporate crime of some sort.[44] They are able to incentivize organizations to create "effective compliance programs," because firms that are found to have one are provided substantial mitigation credit if and when misconduct is uncovered.[45] They admonish firms to create a compliance program that is "reasonably designed, implemented, and enforced so that [it] is generally effective in preventing and detecting criminal conduct."[46] Thus, if an organization fails to prevent or detect misconduct but is found to have an effective compliance program, the sanction it will receive under the Organizational Guidelines will be less than if it did not have an effective compliance program.

This approach to enforcement is consistent with longstanding law and economics scholarship. Professors Jennifer Arlen and Reinier Kraakman explain the importance of adopting a regime that provides an incentive for organizations to self-police through some sort of leniency credit, as opposed to a strict liability regime that sanctions all corporate misconduct without consideration of corporations' attempts to rein in the actions of their agents and employees.[47]

Over time, however, the real power of the Organizational Guidelines to incentivize self-policing within firms came from their influence over the enforcement strategies of regulators and prosecutors. For example, the description of an effective compliance program outlined in the Organizational Guidelines was eventually "adopted by several federal regulatory agencies and the Department of Justice."[48] Thus, organizations knew that even if they were not found criminally liable and formally subjected to a punishment determination under the Organizational Guidelines, it was still to their benefit to adopt effective compliance programs, because the language from the Guidelines was directing the enforcement priorities of several governmental actors.

When the corporate scandals of the early 2000s occurred, self-policing was turned to yet again as an important component in the effort to decrease corporate misconduct. In particular, governmental actors emphasized the importance of corporate compliance programs as a tool organizations could use to deter misconduct within their ranks.[49] The goal was to create

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43. Desio, supra note 28, at 2.

44. Id. at 1.

45. Steer, supra note 42, at 22; see also U.S. Sentencing Guidelines Manual § 8C2.5(f) (U.S. Sentencing Comm'n 2010).

46. U.S. Sentencing Guidelines Manual § 8B2.1(a) (U.S. Sentencing Comm'n 2013).

47. See Arlen & Kraakman, supra note 37, at 689–91.

48. Steer, supra note 42, at 22.

49. See Cunningham, supra note 20, at 16–17 (describing the government's view of compliance programs, post-Enron and the passage of the Sarbanes–Oxley Act, "as the key

an enforcement regime that would encourage firms to engage in "internal policing of corporate employees."[50] Thus, when Congress passed the Sarbanes–Oxley Act of 2002 (Sarbanes–Oxley), Congress required the "United States Sentencing Commission [to] review the Organizational Sentencing Guidelines"[51] in an effort to strengthen the incentives for organizations to develop effective compliance programs that would encourage firms to self-police their employees and agents.

And after the passage of Sarbanes–Oxley and the corresponding changes to the Organizational Guidelines, the enforcement strategy within the United States saw a dramatic shift. Previous research demonstrates that instead of focusing on bringing organizations engaged in misconduct to trial in an attempt to achieve a guilty plea, like the case of Arthur Andersen,[52] the government began to employ a strategy in which "the overriding goal of corporate prosecutions was to try to rehabilitate a firm's culture, not to punish."[53] Prosecutors and regulators began to focus on obtaining negotiated settlement agreements—like deferred and nonprosecution agreements—as resolutions to corporate misconduct.[54] Indeed, from 2001 to 2012, sixty-three percent of companies that entered into deferred or nonprosecution agreements were required to create a compliance program, and thirty-five percent of such companies were required to hire new compliance employees.[55] These new strategies noted the importance of activities beyond policing, like "chang[ing] corporate cultures that foster criminal conduct," but the focus on compliance efforts targeted at preventing and detecting misconduct remained of great importance.[56]

B. *The Components of a Compliance Program*

As organizations confronted the challenge of mitigating particular risks or developing a plan of remediation in response to corporate misconduct, the reaction by firms was, and is, often to develop a compliance strategy dependent upon the institutional design elements of structure and

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to optimal deterrence, with a new emphasis on mandatory cooperation that intensified the internal policing of corporate employees").

50. Id. at 17.

51. David Hess, A Business Ethics Perspective on Sarbanes–Oxley and the Organizational Sentencing Guidelines, 105 Mich. L. Rev. 1781, 1783 nn.9–10 (2007) (noting that the Sentencing Commission was already slated to review the Organizational Sentencing Guidelines prior to the passage of Sarbanes–Oxley).

52. For a detailed account of the Arthur Andersen prosecution and subsequent appeal, see Brandon L. Garrett, Too Big to Jail: How Prosecutors Compromise with Corporations 37–44 (2014).

53. Id. at 47.

54. Id.

55. Id. at 48.

56. Id. at 47–48 (quoting Larry D. Thompson, Deputy Att'y Gen., DOJ, Remarks to the Michigan Federal Bar Association (Oct. 5, 2002), https://www.justice.gov/archive/dag/speeches/2002/100502dagremarks.htm [https://perma.cc/G8NG-ZP9H]).

composition. Within organizational behavior literature, structure refers to "the manner of separating the work in an organization into subunits and dividing the control. It is usually a system of hierarchical division of control and responsibility. Put another way, structure delimits organizational responsibilities and communication channels, and can be both formal and informal."[57] Relatedly, composition "often considered a subset of structure, focuses on the demographic makeup of the members, including the mix of insiders and outsiders, as well as their skills."[58] Lawyers and compliance departments appear to be quite comfortable developing compliance programs that rely upon the elements of structure and its subset, composition, in an effort to prevent and detect misconduct.

For example, Walmart's response to alleged misconduct within its ranks was, in large part, a response rooted in structure and composition. After the *New York Times* reported alleged unlawful bribery at Walmart de Mexico,[59] Walmart instituted a "new multi-tiered structure [that] combines many compliance areas into one global organization that funnels reports from local compliance officers in each market up to a [Regional Chief Compliance Officer] and then to the [International Chief Compliance Officer] reporting to the Global" Chief Compliance Officer.[60] The Global Chief Compliance Officer reports directly to the board's audit committee in an effort to create a unified and connected compliance program.[61] The modifications to Walmart's compliance program since 2016, which have also included separating the compliance department from the legal department and merging the ethics program with the compliance program, are largely focused on structure and composition and explicitly centered on improving the prevention and detection of wrongdoing within its ranks.[62]

57. Sharpe, supra note 34, at 291 (footnotes omitted) (citing Pamela S. Tolbert & Richard H. Hall, Organizations: Structures, Processes, and Outcomes 20, 24 (10th ed. 2009)).

58. Id.

59. See, e.g., David Barstow & Alejandra Xanic von Berktrab, How Wal-Mart Used Payoffs to Get Its Way in Mexico, N.Y. Times (Dec. 17, 2012), https://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html (on file with the *Columbia Law Review*); David Barstow, Wal-Mart Hushed Up a Vast Mexican Bribery Case, N.Y. Times (Apr. 21, 2012), https://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html (on file with the *Columbia Law Review*).

60. See Michael Scher, Walmart Is Now the World's Living Laboratory for Compliance, FCPA Blog (May 21, 2014), http://www.fcpablog.com/blog/2014/5/21/walmart-is-now-the-worlds-living-laboratory-for-compliance.html [https://perma.cc/4NMB-HHMM] (citation omitted) (citing Walmart Inc., Walmart's Global Compliance Program Report on Fiscal Year 2014, at 3, 9 (2014), https://cdn.corporate.walmart.com/44/e3/07ac7de54ab08acc97290650ba15/2014-compliance-report.pdf [https://perma.cc/CD4E-NQ6B] [hereinafter 2014 Walmart Compliance Report]).

61. Id.; see also Donna Boehme, Walmart Rolling Out Big Compliance Reforms, Compliance Strategists Blog (Apr. 29, 2014), http://compliancestrategists.com/csblog/2014/04/29/walmart-rolling-big-compliance-reforms/ [https://perma.cc/KX7V-EUUX].

62. I am not suggesting that Walmart has not included other important aspects in its compliance overhaul. It appears as if it has. But the primary modifications to the compliance

When a compliance program focuses on the elements of structure and composition, it provides clear, quantitative information to prosecutors, regulators, and the public about the tangible steps the firm is taking to improve compliance. Unsurprisingly, a firm's policing efforts are often rooted in these concepts. A firm may create certain new committees, for instance, to help "assign responsibility for improvements" and to clarify communication channels—a structural reform.[63] A firm may also make prospective determinations regarding whether internal or external actors will engage in certain compliance tasks, like conducting random audits to ensure compliance with legal and regulatory mandates—a reform based on composition.[64] Adopting strategies like this to address, for example, the risks associated with unlawful bribery, are reasonable and in many cases will be beneficial to the firm.

There are, however, a number of debates about how firms should structure their organizations. For example, should the compliance program be segmented into particular areas or should there be one global compliance program?[65] Should the chief compliance officer report to the general counsel or the audit committee?[66] Should compliance professionals be embedded within particular departments or remain separate to deter against capture?[67] These questions have been the subject of study and reasoned inquiry for at least a decade, revealing that firms are still attempting to determine the best structures necessary for creating an effective compliance program that will prevent and detect misconduct and appease enforcement authorities in the event of failure.

Yet, in addition to structure and composition, there is a third component available for those charged with designing compliance programs—process. The organizational behavior literature discussing the

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program highlighted by Walmart in its annual compliance reports appear to focus primarily on structure and composition. See 2014 Walmart Compliance Report, supra note 60, at 2–4; Doug McMillon, Global Ethics & Compliance Program Report, Walmart (Apr. 20, 2016), https://corporate.walmart.com/global-responsibility/global-compliance-program-report-on-fiscal-year-2016 [https://perma.cc/CYP8-T9UZ] [hereinafter 2016 Walmart Compliance Report].

63. For example, in 2014, Walmart "establish[ed] a Compliance and Ethics Committee in each of the company's international retail markets," with the purpose of providing an opportunity to regularly "discuss current issues relating to integrity and compliance, to assign responsibility for improvements and review progress on past assignments, and to ensure appropriate accountability." 2014 Walmart Compliance Report, supra note 60, at 6–7.

64. For example, in 2016, Walmart "partnered with external experts to develop a methodology for proactively auditing a sample of [its] third-party partners in [its] higher-risk markets." 2016 Walmart Compliance Report, supra note 62.

65. See infra section III.A.2 (discussing criticism of Wells Fargo for employing a decentralized structure and documenting its moves toward a centralized organizational structure).

66. See Peregrine, supra note 30 (noting survey results indicating "that for a majority of respondents the compliance officer reports to someone (e.g., the CEO) or something (e.g., the board) other than the general counsel").

67. See id.

importance of process is quite extensive.[68] If structure is about things like the division of work as reflected in an organizational chart, one might define process as the "actions, practice[s], or routines" undertaken by members of the firm.[69] In 1992, process was described by one scholar as having three meanings: "(1) a logic that explains a causal relationship between independent and dependent variables, (2) a category of concepts or variables that refers to actions of individuals or organizations, and (3) a sequence of events that describes how things change over time."[70] Building upon work from organizational behavior literature, in 2012, Professor Nicola Faith Sharpe articulated a definition of process targeted at corporate governance reforms studying the performance of boards of directors at firms. In particular, she explained that "[w]hen a board adopts a particular sequence of steps (a process) in response to the firm's endogenously determined needs and goals, it is better situated to improve its efficacy and thereby overall firm performance."[71] In providing this definition, she identified "process as an intermediate step, linking major board reforms to an increased likelihood of firm success."[72] While her work centered on the role of corporate boards and corporate governance reforms, her definition can be extended further to the field of compliance, which is strongly related to corporate governance efforts.[73] Thus, for purposes of this Article, process refers to the actions, practices, and routines firms employ to communicate and analyze information necessary for creating an effective ethics and compliance program.

While these three components—structure, composition, and process—are presented here separately, they are inherently connected.[74] Indeed, one finds all three within descriptions of compliance efforts within firms. For example, Professor Donald Langevoort articulated a framework that characterizes the important components of compliance programs, including:

> (1) a commitment from senior leadership to the task, setting a right "tone at the top;" (2) delegation of authority to officials with distinct compliance responsibilities and the resources to do their task; (3) firm-wide education and training about both the substance and process of compliance; (4) informational mechanisms to alert as to suspicious

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68. See Sharpe, supra note 34, at 291–303 (analyzing the benefits of adopting a process-oriented approach in order to improve the efficiency of a corporate board of directors).

69. Hernes, supra note 34, at 69.

70. Sharpe, supra note 34, at 295 n.183 (internal quotation marks omitted) (quoting Andrew H. Van de Ven, Suggestions for Studying Strategy Process: A Research Note, 13 Strategic Mgmt. J. 169, 169 (1992)).

71. Id. at 297.

72. Id.

73. Cunningham, supra note 20, at 14–15 (highlighting the importance of a corporation's compliance program in reducing potential criminal liability following the formation of the U.S. Sentencing Commission).

74. See Hernes, supra note 34, at 67–71 ("In this [book's] view, structure is not seen as separate from process; on the contrary, it belongs to process, much as process belongs to structure.").

> activity (e.g., whistleblowing procedures); (5) audit and surveillance tactics to detect compliance failures or risks; and (6) internal investigation, response, discipline and remediation so as to learn and adjust when failures occur.[75]

One can find elements of structure, composition, and process within this framework, and these elements are found elsewhere within legal scholarship.

C. *Scholarly Understandings of Compliance*

The emphasis on compliance within the enforcement efforts of the government when confronted with corporate misconduct has required academics, policymakers, governmental actors, and the public to begin to study and understand compliance. While there is a great deal of commonality in the understanding of the compliance function, there are some differences. Yet even within these differences, one can identify the importance scholars have attributed to the above components within compliance programs.

For example, one scholar argues that the government began to use compliance as a mechanism for the government to "dictate[] how firms must comply [with legal and regulatory requirements], imposing specific governance structures expressly designed to change how the firm conducts its business."[76] As such, some view compliance requirements as coming directly from governmental "prosecutions and regulatory enforcement actions."[77] Other scholars have focused on the influence of legal and regulatory requirements on the creation of compliance programs. Professor Miriam Baer defines compliance as "a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities that they are taking steps to deter violations of law."[78]

Many scholars, however, have noted that factors outside of rote compliance with legal and regulatory requirements have impacted firms when creating compliance programs. For example, Baer goes beyond the notions of prevention and detection and claims "[t]he common justification for corporate compliance programs is that they deter wrongdoing *and* generate ethical norms within the firm."[79] In order to achieve both deterrence and norm generation, Baer states "most corporate compliance departments include both policy-setting and investigatory functions."[80] Professor Geoffrey Miller defines compliance similarly, describing it as the manner "by which an organization seeks to ensure that employees and

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75. Donald C. Langevoort, Cultures of Compliance, 54 Am. Crim. L. Rev. 933, 939 (2017) (footnote omitted).

76. Sean J. Griffith, Corporate Governance in an Era of Compliance, 57 Wm. & Mary L. Rev. 2075, 2078 (2016).

77. Id.

78. Baer, supra note 19, at 958.

79. Id. at 959 (emphasis added).

80. Id. at 960.

other constituents conform to applicable norms—which can include either the requirements of laws or regulations or the internal rules of the organization."[81] Professor Sean Griffith defines compliance as "the means by which firms adapt their behavior to [legal, regulatory, and social] constraints," noting that compliance is "the set of internal processes used by firms to adapt behavior to applicable norms."[82] Compliance programs are also defined by Professor Todd Haugh as an "attempt to deter corporate wrongdoing by 'generating social norms that champion law-abiding behavior.'"[83] Finally, my own account explains that "[c]ompliance refers to a firm's effort to ensure that it and its agents adhere to legal and regulatory requirements, industry practice, and the firm's own internal policies and norms."[84]

When scholars turn to concerns like the creation of "ethical norms" and compliance with "internal rules" or "industry practice," they recognize, sometimes explicitly but at other times implicitly, the different ways in which the fields of organizational behavior and corporate governance relate to compliance efforts within firms. Inherent within all discussions about the creation of effective ethics and compliance programs is a concern about how those programs will be structured within an organization and the processes by which the compliance function will be effectuated.

* * *

As reflected above, the impact formal legal interventions have had on the creation of compliance programs and the rise of their importance is without question. Additionally, the compliance effort has been greatly impacted by insights from the fields of corporate governance and organizational behavior.[85] Thus, it is no wonder that concerns about (i) how to

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81. Geoffrey Parsons Miller, The Law of Governance, Risk Management, and Compliance 3 (2014).

82. Griffith, supra note 76, at 2082. As Griffith explains, "[T]he scope of compliance is greater than the enforcement of law and regulation. Compliance officers also administer corporate 'ethics' policies on a wide variety of subjects. Other soft standards such as 'reputation risk' also come within the ambit of the contemporary compliance function." Id. (footnote omitted). "Because any significant scandal or wrongdoing associated with the business can be and often is characterized as a 'compliance failure,' the compliance function effectively assumes general responsibility for business conduct consistent with social norms." Id. at 2082–83. Additionally, since "conduct that violates social norms can also lead to significant losses, the compliance function may be seen to overlap significantly with risk management. . . . Compliance may thus be seen as a risk or control function, the core mission of which is to minimize downside risk associated with misconduct." Id. at 2083 (footnote omitted).

83. Todd Haugh, The Criminalization of Compliance, 92 Notre Dame L. Rev. 1215, 1221 (2017) (quoting Baer, supra note 19, at 960).

84. Root, Compliance Process, supra note 33, at 205.

85. See, e.g., Griffith, supra note 76, at 2077–78; Sharpe, supra note 34, at 263–65; Zhong Xing Tan, Stewardship in the Interests of Systemic Stakeholders: Re-Conceptualizing the Means and Ends of Anglo-American Corporate Governance in the Wake of the Global

structure compliance programs, (ii) the proper composition of compliance frameworks, and (iii) the processes necessary to facilitate the compliance function are similarly emphasized within compliance. Indeed, these questions have become of even more importance as compliance programs have evolved over time.

II. Challenges Within Compliance Efforts

One of the biggest challenges facing an organization is how to design its compliance program. As one scholar has noted, "[A]n effective compliance program" is what "a rational, profit-maximizing firm would establish if it faced an expected sanction equal to the social cost of violations."[86] Other scholars have proposed a compliance model that "weigh[s] the tradeoffs between investment in compliance and risk of non-compliance" and "create[s] the possibility [for] effective compliance [to] be a source of competitive advantage over rivals."[87] The model "shows how firms decide whether—and to what extent—to comply along a compliance 'frontier' in order to optimize the relative benefits of compliance to the firm relative to cost, thereby minimizing avoidable costs resulting from inefficient deployment of firm resources."[88] In other words, organizations must make a series of choices when determining what to include within their compliance programs.

Compliance programs often focused on specific subject matter areas, but organizations today have increased in both size and scope, which has complicated the effort to create effective compliance programs. Whether it is one organization consisting of many independent departments or a sophisticated organizational structure with a variety of related parents and subsidiaries—the scope of compliance today has become much more complex. Recognizing this complexity, some firms are attempting to implement new structural components within their compliance programs in an effort to improve their effectiveness. Scandals, however, continue to occur. Yet when one reviews the results of after-the-fact investigations, a common flaw is revealed. Specifically, there is often a failure to share information across organizational units, leading to the creation of information silos. These silos damage compliance efforts because they impede a firm's effort to prevent, detect, and, importantly for purposes of this

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Financial Crisis, 9 J. Bus. & Tech. L. 169, 195–98 (2014) (discussing the deficiencies of board structure with regards to risk management concerns).

86. Geoffrey P. Miller, An Economic Analysis of Effective Compliance Programs, *in* Research Handbook on Corporate Crime and Financial Misdealing 247, 261 (Jennifer Arlen ed., 2018).

87. This is a simplified account of the relevant model. Robert C. Bird & Stephen Kim Park, Turning Corporate Compliance into Competitive Advantage, 19 U. Pa. J. Bus. L. 285, 293, 304 (2017).

88. Id. at 289.

Article, fully investigate the nature and scope of misconduct within the organization.

A. *Subject Matter Specific Compliance*

The earliest compliance efforts targeted particular areas of risk or legal mandates. For example, anti-money laundering compliance finds its origins in the Bank Secrecy Act of 1970.[89] Under the Act, banks must "(i) develop internal policies, procedures, and controls; (ii) designate a compliance officer to oversee the bank's efforts; (iii) provide training to employees on an ongoing basis in an effort to prevent money laundering; and (iv) implement an independent audit function to test the effectiveness of the bank's programs."[90] And the requirement to engage in anti-money laundering compliance has persisted over time. Indeed, in 2018, U.S. Bancorp entered into a $613 million settlement with the DOJ "over charges that it willfully failed to have an adequate anti-money-laundering program."[91]

Additionally, when organizations enter into settlements with governmental actors to resolve allegations of misconduct, they are often required to develop or strengthen subject matter compliance programs.[92] For example, in 2017, a Chilean chemicals and mining company, Sociedad Química y Minera de Chile, entered into a deferred prosecution agreement with the government to resolve allegations that it made improper payments to vendors associated with government officials.[93] As part of the settlement, the company agreed to "implement a compliance and ethics program designed to prevent and detect violations of the Foreign Corrupt Practices Act (FCPA) and other applicable anti-corruption laws throughout its operations."[94]

Focusing on specific legal and regulatory areas when creating compliance programs, particularly at the outset of the phenomenon,

89. See Geoffrey P. Miller, supra note 86, at 249 (citing Bank Secrecy Act, 31 U.S.C. § 5318(h)(1) (2012)).

90. Veronica Root, Coordinating Compliance Incentives, 102 Cornell L. Rev. 1003, 1010–11 (2017) [hereinafter Root, Coordinating Compliance Incentives] (footnotes omitted).

91. Pete Schroeder, U.S. Bancorp to Pay $613 Million for Money-Laundering Violations, Reuters (Feb. 15, 2018), https://www.reuters.com/article/us-usa-usbancorp/u-s-bancorp-to-pay-613-million-for-money-laundering-violations-idUSKCN1FZ1YJ [https://perma.cc/V7GD-ERLQ].

92. See Root, Coordinating Compliance Incentives, supra note 90, at 1033–36 (explaining that government enforcement actions focus on incentivizing compliance with particular regulatory areas, which then incentivizes organizations to focus on one regulatory area at a time).

93. Press Release, DOJ, Chilean Chemicals and Mining Company Agrees to Pay More than $15 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 13, 2017), https://www.justice.gov/opa/pr/chilean-chemicals-and-mining-company-agrees-pay-more-15-million-resolve-foreign-corrupt [https://perma.cc/7HU5-BWCH].

94. Deferred Prosecution Agreement at 9, United States v. Sociedad Química y Minera de Chile, S.A., No. 1:17-cr-00013-TSC (D.D.C. Jan. 13, 2017).

would seem to have a variety of potential benefits. First, the firm could develop expertise in the area, which might make it more effective at deterring improper conduct. Second, the firm might be able to engage in more accurate risk assessments based on the behavior of the relevant government enforcement agent and past enforcement activity. Third, the firm would have the opportunity to create training programs for employees to ensure compliance. Indeed, subject matter specific programs might even be perceived by some as relatively simple to create and implement. A particular statute or regulation would seem to have concrete boundaries and norms, allowing the firm to properly assess the requirements outlined therein.

The reality, however, is that even within compliance programs that focus upon particular subject matter areas, creating an effective compliance program is often not a straightforward task in today's environment. Over time, organizations have become more complex and this complexity has transformed the challenges faced by those charged with creating compliance programs.

B. *Increasingly Complex Organizations*

Organizations today look quite different than organizations from fifty years ago, which has impacted the development of compliance programs. The sheer size and scope of organizations has changed dramatically. Instead of having an organization with a relatively discrete scope that sells particular goods or services, there are more and more large, multinational conglomerates with a variety of corporate forms, parents, and subsidiaries.[95] Additionally, these larger organizations often have complicated contractual relationships with other vendors, which can trigger additional regulatory and legal liability.[96] And even when you do have an organization that has retained a particular niche, it often has large departments that function with high levels of autonomy and distinction from each other. Examples of each of these phenomena abound.

1. *Increased Size and Scope.* — Banks in both 1960 and 2017 were required to develop anti-money laundering compliance programs. Banks, however, have changed quite a bit over time. In 1960, there were approximately 13,000 independent banks within the United States.[97] By 2005, the

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95. See, e.g., Brian Roach, Corporate Power in a Global Economy 3 (2007), https://www.economicsnetwork.ac.uk/sites/default/files/Brian%20Roach/Corporate_Power_in_a_Global_Economy.pdf [https://perma.cc/8PMG-SUAB] (suggesting that the number of multinational corporations (MNCs) "has increased considerably in recent years, more than doubling since 1990, when there were about 35,000 MNCs").

96. See, e.g., Rebecca Perry, The Legal Department's New Nightmare: Your Vendors, ACC Docket (Oct. 15, 2018), https://www.accdocket.com/articles/the-legal-department-s-new-nightmare-your-vendors.cfm [https://perma.cc/R3QD-Q7XX] (describing third-party risk for corporations based on third-party vendor data privacy protection practices).

97. Hubert P. Janicki & Edward Simpson Prescott, Changes in the Size Distribution of U.S. Banks: 1960–2005, 92 Fed. Res. Bank Rich. Econ. Q. 291, 291 (2006).

number of banks dropped to about 6,500.[98] Additionally, "In 1960, the ten largest banks held 21 percent of the banking industry's assets. By 2005, this share had grown to almost 60 percent."[99] Thus, while anti-money laundering compliance has remained a priority over time, for the ten largest banks, the scope of their work increased nearly threefold.

These larger banks have tremendous power to do harm within the financial markets, as seen throughout the 2008 financial crisis.[100] Indeed, the lending policies of these larger banks, paired with improper foreclosure practices, have led to significant sanctions from the government and costly investigative and remediation efforts.[101] The harm caused from the banks' actions was not only to individual consumers, but also to the country as a whole.[102]

2. *Multinational Conglomerates.* — Walmart's response to an alleged bribery scheme led it to assess how its complicated organizational form should be structured to maximize the effectiveness of its compliance effort. In particular, Walmart determined it was necessary to adopt a Global Compliance Program, with a significant portion of its efforts focused on anticorruption policies and procedures.[103] This program applies across the entire Walmart organization, but is broken down more practically into subgroups based on region (United States and international), e-commerce operations, and retail and sourcing markets.[104] Subsidiaries beneath each of these four subgroups then report up to their respective organizational area.[105]

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98. Id.

99. Id.

100. See Robert Lenzner, The 2008 Meltdown and Where the Blame Falls, Forbes (June 2, 2012), https://www.forbes.com/sites/robertlenzner/2012/06/02/the-2008-meltdown-and-where-the-blame-falls/#ef1713da72a5 [https://perma.cc/BL89-6SHY].

101. See, e.g., Correcting Foreclosure Practices, Office of the Comptroller of the Currency, https://www.occ.gov/topics/consumer-protection/foreclosure-prevention/correcting-foreclosure-practices.html [https://perma.cc/TL5J-8JGM] [hereinafter Correcting Foreclosure Practices] (last updated Jan. 31, 2017); Independent Foreclosure Review, Bd. of Governors of the Fed. Reserve Sys., https://www.federalreserve.gov/consumerscommunities/independent-foreclosure-review.htm [https://perma.cc/D59V-5P6V] [hereinafter Independent Foreclosure Review] (last updated Aug. 30, 2019); see also Root, Compliance Process, supra note 33, at 235–38; Veronica Root, Modern-Day Monitorships, 33 Yale J. on Reg. 109, 110–13 (2016) (describing the "Independent Foreclosure Review" as a "modern-day monitorship").

102. See Correcting Foreclosure Practices, supra note 101 ("Under the Independent Foreclosure Review (IFR) Payment Agreement, more than $3.2 billion was distributed to more than 3.6 million eligible borrowers . . . . In June 2016, the Office of the Comptroller of the Currency (OCC) escheated approximately $270 million to state authorities . . . ."); Independent Foreclosure Review, supra note 101 ("The mortgage servicers reached an agreement in principle with the Office of the Comptroller of the Currency and the Board of Governors of the Federal Reserve System to provide approximately $10 billion in cash payments and other assistance to help borrowers.").

103. See 2014 Walmart Compliance Report, supra note 60, at 2–3; Scher, supra note 60.

104. 2014 Walmart Compliance Report, supra note 60, at 3.

105. Id.

Structurally, the global chief compliance officer now reports to the board's audit committee.[106] In order to create a unified and connected compliance program, "Walmart's new multi-tiered structure . . . combines many compliance areas into one global organization that funnels reports from local compliance officers in each market up to a [Regional Chief Compliance Officer] and then the [International Chief Compliance Officer] reporting to the Global [Chief Compliance Officer] connected to the audit committee."[107] Additionally, compliance and ethics executives now meet with the chief executive in each international market to discuss issues and progress in that region as part of Walmart's compliance and ethics committees.[108] To ensure the changes are effectively implemented, Walmart has tied certain compliance outcomes with its top executives' compensation.[109]

Further, the legal department is now separated from compliance.[110] To enable the global compliance program to be successful, Walmart also added personnel and clarified roles within compliance.[111] And from 2014 to 2016, Walmart invested more than $125 million in new ethics and compliance systems and upgrades to old systems.[112]

In 2016, Walmart merged its global ethics and compliance programs.[113] Walmart believed the merger was appropriate because the

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106. Scher, supra note 60.

107. Id.; see also 2014 Walmart Compliance Report, supra note 60, at 2–3 (noting that the CCO reports "directly" to the Audit Committee and that each regional officer reports to the international CCO). Jay Jorgensen, Walmart's executive vice president and global chief ethics and compliance officer, commented, "The chief compliance officer can't be buried in the organization. She can't be wearing half a hat." Boehme, supra note 61. Jorgensen recognized that a culture emphasizing integrity is not sufficient in a large corporation:

> Even with excellent training, not every employee will handle each situation the right way. Accordingly, we must have processes to monitor our performance and to provide correction where needed. Finally, we must provide mechanisms for allegations of wrongdoing to be appropriately reported, investigated and resolved. Only through these types of processes can the cultural desire to act appropriately be realized across a wide group.

Jay T. Jorgensen, The Foreign Corrupt Practices Act Turns 40: "Reflections on Walmart's Enhanced Ethics and Compliance Program," 5 Tex. A&M L. Rev. 237, 250 (2017).

108. Scher, supra note 60; see also 2014 Walmart Compliance Report, supra note 60, at 6.

109. See 2014 Walmart Compliance Report, supra note 60, at 2.

110. Scher, supra note 60. This is beneficial as it prevents the legal department's "defend and protect" mandate from contradicting the compliance department's mandate to "seek, find and fix the problem." Boehme, supra note 61.

111. 2014 Walmart Compliance Report, supra note 60, at 3.

112. 2016 Walmart Compliance Report, supra note 62. Walmart now utilizes technology systems that "screen third parties for corruption risk" and monitor and track "remediation of compliance issues identified by the company's compliance monitors." Scher, supra note 60.

113. 2016 Walmart Compliance Report, supra note 62.

"functions are closely related, as both are involved in identifying and preventing risks, responding to issues, and educating associates."[114]

3. *Contractual Relationships.* — An organization's corporate compliance responsibilities also extend beyond the organization itself—to other contracting parties. Policing third parties, while difficult, is necessary, and the basis for such policing is typically established contractually. For instance, both Clorox and Oracle police their contracting partners though a partner code of conduct.[115] A partner code of conduct lays out the organization's standards of practice, details the expectations for the third party, and may even impose a heightened standard, as Oracle's does, "where local laws are less restrictive than [the] Code."[116] Similarly, PricewaterhouseCoopers (PwC) also utilizes a partner code of conduct with a heightened standard.[117]

Apart from simply requiring third parties to sign such a code, the organization must also then provide a means for monitoring its compliance. To accomplish this, Oracle, for example, includes specific mechanisms in its code of conduct for reporting violations and states that such violations can be "the basis for [an] immediate termination" of the relationship.[118] Likewise, PwC requires its partners to report and "raise concerns" to the appropriate designee, and then promises to "review/investigate reported concerns and escalate [them] to Third Parties to be managed and investigated."[119] When necessary, PwC then requires its third party to execute a remediation plan or alternatively may simply suspend or terminate the contractual relationship.[120]

These contractual relationships are often mentioned explicitly when compliance failures are settled with the government. When firms enter into settlement agreements, they often agree to ensure the compliance not only of themselves but also of their business partners. For example, when Sociedad Química y Minera de Chile agreed to implement an FCPA compliance program through its operations, the scope of operations included "its affiliates, agents, and joint ventures."[121] It also agreed to

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114. Id.

115. Root, Coordinating Compliance Incentives, supra note 90, at 1016–17.

116. Id. at 1017 (internal quotation marks omitted) (quoting Oracle, Partner Code of Conduct and Business Ethics 2, http://www.oracle.com/partners/en/how-to-do-business/opn-agreements-and-policies/019520.pdf [https://perma.cc/6R53-RWUA] (last visited Jan. 31, 2017)).

117. PwC not only is a signatory to the U.N. Global Compact but also expects their contracting parties to comply with their code of conduct as well. PwC, Global Third Party Code of Conduct 2 (2018), https://www.pwc.com/gx/en/about-pwc/assets/3rd-party-code-of-conduct.pdf [https://perma.cc/588D-LBAD].

118. Root, Coordinating Compliance Incentives, supra note 90, at 1017 (quoting Oracle, supra note 116, at 2).

119. PwC, supra note 117, at 3.

120. Id.

121. Deferred Prosecution Agreement, supra note 94, at 9–10.

ensure that its "contractors and subcontractors" maintain compliance with the FCPA.[122]

4. *Large, Autonomous Departments.* — Finally, some organizations, such as universities, utilize a more siloed business structure. A university typically has one primary unit, with a number of autonomous departments and schools underneath its umbrella. The degree of coordination between the different stakeholders in such a setting varies depending on the organization, but coordinating compliance can certainly be a challenge regardless of size or structure. For instance, in the Title IX context, both the Title IX coordinator and department (if applicable) are to be independent from the rest of the organization.[123] This independence is desirable in order to avoid any real or perceived conflicts of interest, and extends not only to the structuring of the department but also to the very selection of the Title IX coordinator, who may have conflicting responsibilities if actively involved in another on-campus role.[124] Despite this desire and need for independence, however, universities must maintain and ensure compliance across autonomous units, including the Title IX department.[125]

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Today's complex organizations have difficult and important choices to make when structuring their compliance programs. They can focus on discrete regulatory areas or they can adopt global compliance programs. They can attempt to complete tasks in house, or they can take on the responsibility of the conduct of their contractual partners. Whatever a firm's choice, they remain responsible for the conduct of their organizational members and partners.[126] For complex organizations, one of the biggest challenges they face is how to manage the flow of information between these various organizational units.

C. *Information Silos*

There are many reasons why an organization might rationally attempt to limit information to a certain segment of the firm. For example, one of the Big Four accounting firms may limit information between its divisions responsible for auditing and consulting.[127] Similarly, a law firm might

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122. Id. at 10.

123. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. 2–3 (Apr. 24, 2015), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf [https://perma.cc/A4KG-VPQV].

124. Id.

125. See id. at 4–7.

126. Jennifer Arlen, The Potentially Perverse Effects of Corporate Criminal Liability, 23 J. Legal Stud. 833, 838–40 (1994).

127. See Craig Mellow, Auditing the Auditors, Global Fin., July 17, 2018, https://www.gfmag.com/magazine/julyaugust-2018/auditing-auditors [https://perma.cc/

screen off individuals with potential conflicts of interest, so that it can represent a client without violating ethical norms.[128] And a bank may determine it must maintain separation between certain divisions to ensure compliance with the law.[129] There are other instances, however, when obstructions to the free flow of information within an organization are neither purposeful nor healthy.[130]

An "information silo" or the "silo effect," within the world of business and management, refers to the "propensity of departments or divisions within a large organization to become isolated, with a resulting failure to communicate and pursue common goals."[131] For those charged with designing compliance programs, silos have the potential to be particularly dangerous. If individuals at a subsidiary in Mexico are bribing foreign officials, it may be well-known within the confines of that subsidiary, but it may not be known at the parent company, which will be held responsible for the conduct.

One of the most notorious illustrations of a harmful silo within an organization is that of the London unit of A.I.G., a 377-person office, known as A.I.G. Financial Products.[132] The London unit's participation in and reliance on credit default swaps "nearly decimated one of the world's

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H8UQ-KV2Z] (discussing the benefits of "Chinese wall[s]" between auditing and consulting departments within the Big Four).

128. See Dennis P. Duffy, Nat'l Emp't Law Inst., Conflicts of Interest 8–11 (2016), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/11/conference/papers/Underhill-Conflicts%20of%20Interest–Ethics%20Issues.pdf [https://perma.cc/ZXW9-PPTK].

129. See John Cunningham & Crystal Jezierski, Independence Day: The Separate and Equal Compliance Department, Glob. Compliance News (June 26, 2015), https://globalcompliancenews.com/independence-day-the-separate-and-equal-compliance-department/ [https://perma.cc/BY4Y-UHRM] (discussing the common perception that compliance programs must have sufficient "autonomy from management" in order to be effective under the law (emphasis omitted)).

130. See, e.g., Five Things to Consider When Realigning Responsibilities to the First Line of Defense, Treliant Talks (Oct. 31. 2018), https://soundcloud.com/treliant/five-things-to-consider-when-realigning-responsibilities-with-the-first-line-of-defense (on file with the *Columbia Law Review*) (speaking with Chief Compliance Officer of PNC, Mike Little, about how his company moved from siloed roles and responsibilities to a system in which compliance roles were defined and laid out across all lines of defense).

131. Levy & Glicksman, supra note 35, at 510; see also Steven Alter, Overcoming Silo Thinking in the IS Discipline by Thinking Differently About IS and IT 1 (2015), https://www.semanticscholar.org/paper/Overcoming-Silo-Thinking-in-the-IS-Discipline-by-IS-Alter/b612c7d36795b9f02b4303ab8dda82c0effbed5c [https://perma.cc/YV8J-DEN6]; Jean Egmon, Bridging Silos: A Proven Method for Effective Business Collaboration 1–2, https://www.kellogg.northwestern.edu/~/media/Files/initiatives/kale/KALE-Bridging-Silos.ashx [https://perma.cc/3232-CECX] (last visited Oct. 9, 2019); Vijay Govindarajan, The First Two Steps Toward Breaking Down Silos in Your Organization, Harv. Bus. Rev. (Aug. 9, 2011), https://hbr.org/2011/08/the-first-two-steps-toward-breaking-down-silos (on file with the *Columbia Law Review*).

132. Gretchen Morgenson, Behind Insurer's Crisis, Blind Eye to a Web of Risk, N.Y. Times (Sept. 27, 2008), https://www.nytimes.com/2008/09/28/business/28melt.html (on file with the *Columbia Law Review*).

most admired companies, a seemingly sturdy insurer with a trillion-dollar balance sheet, 116,000 employees and operations in 130 countries."[133] The London "unit's revenue rose to $3.26 billion in 2005 from $737 million in 1999."[134] This enormous growth was attributable to its entry into the credit default swap market, but during the market downturn of 2007–2008, the tides shifted. The London unit was forced to recognize a $352 million unrealized loss on its credit default swap portfolio for the quarter that ended on September 30, 2007.[135] Yet, it continued to maintain "that its risk assessments were reliable and its portfolios conservative."[136] In February 2008, auditors identified a number of problems with A.I.G.'s accounting regarding the credit default swaps.[137] Eventually, the losses within the London unit became untenable, resulting in devastating consequences not only for A.I.G. but also the global financial markets.[138] Because the London unit was able to operate on its own, others within A.I.G. failed to understand the nature of the business going on, making it a classic example of an information silo. And the effects were nothing short of devastating for the firm and the market.

Importantly, examples of silos abound both within private organizations[139] and the government. Indeed, in prior work, I demonstrate that when a corporation commits repeat offenses, it is treated as a recidivist and levied with a heightened sanction when appearing before the same government enforcement agent, but not when appearing before different governmental enforcement agencies.[140] This finding holds even when the underlying misconduct is quite similar, like the case of unlawful bribery.[141] When the government fails to work past its own inherent silos, it fails to create a robust set of incentives for corporations to identify systemic failures within their compliance programs.

D. *Limited Investigations*

When today's larger and more complex organizations fail to communicate across organizational units, it has the potential to create tangible harm to the firm. In prior work, I demonstrated that there are four stages within the compliance process—prevention, detection, investigation,

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133. Id.

134. Id.

135. Id.

136. Id.

137. Id.

138. Id.

139. See, e.g., Dennis R. Beresford, Nicholas deB. Katzenbach & C.B. Rogers, Jr., Report of Investigation by the Special Investigative Committee of the Board of Directors of WorldCom, Inc. 1, 218 (Mar. 31, 2003), https://www.sec.gov/Archives/edgar/data/723527/000093176303001862/dex991.htm [https://perma.cc/ZTP9-Z64E].

140. Root, Coordinating Compliance Incentives, supra note 90, at 1054–55.

141. Id. at 1056–57.

and remediation.[142] The Organizational Guidelines, and therefore firms' compliance programs, however, put a great deal of emphasis on the importance of prevention and detection. As a result of this emphasis, firms have spent millions of dollars implementing compliance programs with structures likely to effectuate their responsibility to prevent and detect misconduct.

The reality, however, is that many firms detect—or are aware—of information related to misconduct, but upon commencing an investigation of the potential wrongdoing, fail to identify that information as material or as information that suggests the firm has a potentially significant compliance failure brewing. The boundary between detection and investigation is one of particular vulnerability for firms. A failure to understand the implications of what one has detected or a failure to properly investigate potential misconduct can result in continued wrongdoing, which can lead to a much more significant and widespread compliance failure than if one had addressed the problem at an earlier point in time.

For those charged with conducting investigations of potential misconduct within a firm, information silos can have potentially devastating effects. For example, the "collective knowledge" doctrine aggregates knowledge and states of mind within a firm.[143] The existence of silos increases the risk that a firm technically aware of information (i.e., it has detected but failed to identify important or material information) will still be held responsible under the collective knowledge doctrine. As such, when information remains cordoned off, it creates the potential for liability.[144] An effective compliance program requires reliable, free flows of information.

Thus, when a firm has signals pointing it to information that might indicate a material compliance failure in some way, it is imperative that its investigation of the potential misconduct considers and has access to all relevant information. For complex organizations with a variety of information silos, however, it can be quite challenging for those charged with overseeing a firm's compliance efforts to manage these more complex compliance investigations.

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142. Root, Compliance Process, supra note 33, at 219–28.

143. United States v. Bank of New Eng., 821 F.2d 844, 856 (1st Cir. 1987) ("The acts of a corporation are, after all, simply the acts of all its employees operating within the scope of its employment."). The doctrine has been criticized and no longer applies in False Claims Act cases. See United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1273–77 (D.C. Cir. 2010). It remains applicable, however, in other areas of law. See United States v. Pac. Gas & Elec. Co., No. 14-CR-00175, 2016 BL 240175, at *2, *4 (N.D. Cal. July 26, 2016).

144. See, e.g., Sam F. Halabi, Collective Corporate Knowledge and the Federal False Claims Act, 68 Baylor L. Rev. 265, 272–73 (2016) (discussing deterioration of information quality as it flows through organizational channels—especially from the lower rank on its way to the top—using the Ford Pinto as a case study).

As is shown in the examples above, an abundance of information silos may contribute to significant, widespread, and avoidable scandals within complex organizations. The questions facing organizations remain: How might they best combat the harms associated with these silos? How do they take information they have detected about potential misconduct across the organization and properly utilize it in their investigative methods?

III. COMPLEX COMPLIANCE INVESTIGATIONS

As explained in Parts I and II, the importance of the compliance function within organizations is widely accepted within industries, by governmental enforcement agents, scholars, courts, and the public.[145] The shift from small, discrete organizations to complex ones, however, has made the task of creating effective compliance programs more challenging. The challenge for complex organizations is, quite simply, more complicated than what's faced by those with a smaller footprint and reach. As explained above, one of the reasons it is more difficult for complex organizations to design effective compliance programs is the reality that they are often plagued by information silos that make it difficult to identify and assess all relevant information when investigating the potential misconduct. A failure between the stages of detection and investigation—either by failing to properly detect the scope of misconduct or failing to trigger an investigation to ascertain that scope—can allow what starts as small levels of misconduct to become widespread.

Importantly, complex organizations appear to recognize this challenge. As such, those charged with instituting compliance programs across diffuse corporate entities and departments actively identify mechanisms to assist them in their efforts, which can be categorized as changes to the program's structure, composition, or process. Because "firms are subjected to significant internal and external pressures to over-comply or under-comply with regulations[,] [h]ow firms determine their allocative efficiency and technical efficiency depends upon a given firm's regulatory and resource mix."[146] The goal of an organization in designing a compliance program is to create one with the right balance of structure, composition, and process to ensure that it is an effective compliance program. Achieving this goal, however, often remains elusive.

In an effort to interrogate the ability of ethics and compliance programs that currently meet industry standards to combat information silos within complex organizations, this Part assesses recent compliance failures at General Motors and Wells Fargo. Importantly, each of these firms had adopted compliance programs that appeared effective but failed to appropriately address the misconduct before it became significant. This

145. See Root, Coordinating Compliance Incentives, supra note 90, at 1004–09 ("Compliance is king, and its subjects—regulators, prosecutors, courts, corporations, and academics—are quick to tout its power and potential for good.").

146. Bird & Park, supra note 87, at 312.

is despite multiple early reports about potential wrongdoing within the firms. The analysis suggests that currently employed ethics and compliance programs are limited in their ability to counteract the phenomenon of information silos. This conclusion leads to the thesis of this Article: Complex organizations should focus on adopting process-based reforms that will bolster the firm's investigations into complex compliance failures, thereby acting as a safety net when compliance programs fail to detect or appropriately respond to misconduct within firms. This Part demonstrates how the adoption of process-related reforms—standardized internal investigations, materiality surveys, and an aggregation principle—might assist firms in detecting and investigating the compliance failures within their ranks at an earlier date. This Part then goes on to address two limitations of successful process-related reforms, which demonstrate that to be effective, process-related reforms must be employed within a program that has a robust structure and an ethical culture.

A. *Silos Within Accepted Structures*

As explained above, an information silo exists within an organization when departments or a division within a large organization become isolated, resulting in a failure to communicate and pursue common goals. This section looks at recent scandals at organizations that appear to have suffered from information silos—General Motors and Wells Fargo. It then demonstrates that each organization had what appeared to be reasonable organizational structures aimed at preventing and detecting misconduct, yet significant failures occurred despite awareness within the organization of the risk that inevitably led to each scandal.

1. *General Motors.*[147]— In the mid-2000s, General Motors moved to a global ethics and compliance program.[148] As compliance has risen in importance,[149] many complex corporations have moved to creating global ethics and compliance programs. Indeed, as early as 2015, members within the compliance industry were noting a rise in "[g]lobal [c]ompliance [p]rogram [t]rends."[150] These global compliance programs were enacted,

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147. The description herein is meant to provide enough information to the reader to demonstrate that information silos existed that prevented a widespread compliance failure from being detected and properly investigated. It is not a full account of the ignition switch failure, which can be found in the Valukas Report. See generally Valukas, supra note 12 (outlining a complete timeline of the General Motors ignition switch controversy).

148. See Root, Compliance Process, supra note 33, at 222–23 (discussing General Motors's failure to identify flaws with its ignition switch).

149. See Deloitte, Compliance Modernization Is No Longer Optional 4 (2017) [hereinafter Deloitte, Compliance Modernization], https://www2.deloitte.com/content/dam/Deloitte/us/Documents/regulatory/us-compliance-modernization.pdf [https://perma.cc/G9ZP-3R5D].

150. Stephanie Gallagher, Global Compliance Program Trends, Compliance & Ethics Blog (Apr. 16, 2015), http://complianceandethics.org/global-compliance-program-trends/ [https://perma.cc/TR7Y-U55C].

in part, in recognition of the more complicated task facing complex organizations when designing compliance programs.[151]

Additionally, General Motors put into place a variety of firm-wide committees charged with identifying issues within its products. These committees, again, were structured, in part, to defeat information silos within the firm and to foster communication across departments. For example, the General Motors's Product Investigations group was charged with "identifying and remedying safety issues."[152] Additionally, the Executive Field Action Decision Committee "considers recalls and [its] members include three [General Motors] vice presidents, including its chief engineer."[153] These are just two of many committees within General Motors empowered to investigate issues identified as potential problems. Thus, it would appear that General Motors had enacted sophisticated mechanisms in its organizational structure to ensure that its products remained safe for consumers and that liability to the firm remained minimal.

General Motors failed, however, to detect a key flaw with an ignition switch in certain models of their car. The "ignition switch in certain cars . . . failed to keep the car powered on . . . resulting in moving stalls on the highway as well as loss of power on rough terrain a driver might confront moments before a crash."[154] Most harmful, "The failure of the switch meant that drivers were without airbag protection at the time they needed it most."[155] Importantly, different sets of individuals within General Motors were aware of problems with the switch. Indeed, "From the switch's inception to approximately 2006, various engineering groups and committees considered ways to resolve" problems with keeping the cars powered on, although they were unaware of the switch's impact on airbag deployment.[156] In 2005, General Motors's Product Investigations group opened and closed an investigation into the ignition switch, "[F]inding no safety issue to be remedied."[157] In 2007, a Field Performance Assessment engineer was told to track incidents of airbag nondeployments in the Chevrolet Cobalt. He did, but he was not given directions "about a deliverable nor a time frame," and he "was not aware of important [General Motors] records of prior problems with the ignition switch."[158] "By 2011, outside counsel, privy to the . . . engineers' data, had repeatedly warned [General Motors] in-house counsel that [General Motors] could be accused of egregious conduct due to its failure to address the problem

151. See Deloitte, Compliance Modernization, supra note 149, at 4 ("Silos [within compliance programs] are out of vogue . . . . Managing compliance risk is more effective when execution and oversight activities can be integrated . . . ." (emphasis omitted)).

152. Valukas, supra note 12, at 3.

153. Id. at 11.

154. Id. at 1.

155. Id.

156. Id.

157. Id. at 3.

158. Id. at 8–9.

of airbag non-deployment in the Cobalt."[159] In-house counsel eventually ordered an investigation in 2011, but that investigation lacked urgency and did not make headway until a plaintiff's expert, in April 2013, made plain the problems with the switch.[160] Even after learning of the precise source of the problem, "[I]t was not until February 2014 that [General Motors] issued" its first recall.[161]

Ultimately, by the time General Motors fully appreciated the problems with the ignition switch and issued a recall in 2014,[162] hundreds of consumers had been impacted by their failure to detect the flaw. Indeed, the individual appointed by General Motors to oversee the GM Ignition Compensation Claims Resolution Facility determined that 124 deaths and 275 injuries were linked to the faulty ignition switch, even though "General Motors . . . originally said it knew of only 13 deaths related to the switches."[163] And yet, from 2002 through 2014 when the recall was issued,[164] various employees of General Motors were aware of issues with the switch, but failed to put the information together in a way that alerted them to the significance of the problem. This failure occurred despite the fact that multiple individuals external to the organization, including a plaintiff's expert, a Wisconsin state trooper, and Indiana University researchers, identified the impact the switch had on airbag deployment and notified General Motors of that fact prior to 2014.[165] Various members of General Motors had pieces of the information, but those pieces remained siloed within particular divisions and departments.

2. *Wells Fargo.* — From the time Wells Fargo merged with Norwest in 1998, it utilized a decentralized corporate structure, with each line of the business operating independently.[166] In particular, risk management was housed within each particular business unit: "Management believed that this decentralized approach was a superior method for managing risk and had helped make Wells Fargo successful, and in particular had helped Wells Fargo come through the 2008 financial crisis relatively unscathed."[167] Importantly, within the industry at the time, there was nothing necessarily wrong with this choice. By housing risk management within particular business units, one is essentially relying upon a subject matter specific compliance program.

Thus, in 2002, when the Community Bank at Wells Fargo detected an increase in sales practice violations, risk management, as well as many other important departments, was housed within that business unit. In

159. Id. at 10.
160. Id. at 11.
161. Id. at 10–11.
162. Id. at 1–2.
163. Korosec, supra note 10.
164. Valukas, supra note 12, at 1–2.
165. Id. at 115–16.
166. Wells Fargo Investigation Report, supra note 6, at 60.
167. Id.

response to the violations, the Community Bank created a "sales integrity task force" to address the problem: "The task force undertook various initiatives, including the implementation of a sales integrity training program and certification, the modification of incentive plans to reduce the promotion of undesirable behaviors and utilization of audit programs to identify suspicious activity."[168]

Wells Fargo did, however, have certain groups that operated at the corporate level, or outside the particular business units. One such group was Wells Fargo's Internal Investigations group. In 2004, the Internal Investigations group drafted a memo regarding concerning sales practice issues, which noted an increase in violations.[169] In particular, it noted "an increase in annual sales gaming cases—defined as the manipulation and/or misrepresentation of sales to receive compensation or meet sales goals—from 63 in 2000 to a projected 680 in 2004."[170] Additionally, the number of associated terminations also grew, "from 21 in 2000 to a projected 223 in 2004."[171]

The problem with sales practice issues, however, continued to grow within the Community Bank despite the information from the Internal Investigations Group. Within the Community Bank, leadership "felt that the associated risks could be managed appropriately by increasing training, detecting wrongdoing and punishing wrongdoers."[172] Note that this strategy essentially tracks the law and economics models for addressing crime. When the costs of crime are increased through probability of detection and the expected severity of punishment, crime is expected to decrease.[173] Unfortunately, within the Community Bank this strategy failed.

From 2013 to 2015, the *Los Angeles Times* published a number of articles on sales practice issues at Wells Fargo that triggered internal policy changes and additional, fulsome reviews of the extent of the sales practice violations.[174] Information from these reviews made it all the way up to the then-Chief Executive Officer and others within senior management, but they failed to appreciate the potential severity of the information in front

168. Id. at 31.

169. Id.

170. Id.

171. Id.

172. Id.

173. See Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169, 176 (1968) ("The approach taken here . . . assumes that a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities.").

174. Wells Fargo Investigation Report, supra note 6, at 32, 44–45.

of them.[175] The decisionmaking authority to handle the sales practice violations remained solely within the Community Bank.[176]

Thus, by 2016, Wells Fargo found itself embroiled in a significant scandal regarding the opening of "fake accounts" on behalf of its customers.[177] The Office of the Comptroller of the Currency (OCC) determined that practices at Wells Fargo created pressure on employees to achieve certain sales goals, which ultimately led to employees engaging in the "unauthorized opening of deposit or credit card accounts and the transfer of funds from authorized, existing accounts to unauthorized accounts."[178] Wells Fargo was aware of this information since at least 2002 as a result of internal reviews conducted by individuals from the separate business units of the Community Bank, Internal Investigations, and Legal, amongst others.[179] The OCC sanctioned Wells Fargo in 2016, which resulted in a $35 million civil penalty.[180] Additionally, the OCC required Wells Fargo to "make restitution to customers who were harmed by the bank's unsafe or unsound sales practices."[181] As of August 2017, Wells Fargo indicated that its investigation "could reveal a 'significant increase' in the number of accounts involved, up from the 2.1 million that it previously estimated,"[182] and indeed, further abuses were discovered, which led the Consumer Financial Protection Bureau to levy a $1 billion fine on the company in April 2018.[183]

Ultimately, the Board of Directors for Wells Fargo initiated an investigation into the sales practices at the bank. The report blamed the

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175. Id. at 55.

176. See id. at 47 (noting that the head of the Community Bank "reinforced a culture of tight control over information about" sales practice violations, "[H]amper[ing] the ability of control functions outside the Community Bank and the Board to accurately assess the problem and work toward a solution").

177. Jackie Wattles, Ben Geier, Matt Egan & Danielle Wiener-Bronner, Wells Fargo's 20-Month Nightmare, CNN (Apr. 24, 2018), https://money.cnn.com/2018/04/24/news/companies/wells-fargo-timeline-shareholders/index.html [https://perma.cc/255T-QUGD].

178. Press Release, Office of the Comptroller of the Currency, OCC Assesses Penalty Against Wells Fargo, Orders Restitution for Unsafe or Unsound Sales Practices (Sept. 8, 2016), https://www.occ.gov/news-issuances/news-releases/2016/nr-occ-2016-106.html [https://perma.cc/3XXT-4RXX] [hereinafter OCC Press Release].

179. Wells Fargo Investigation Report, supra note 6, at 73. Within the Law Department, deputy general counsels for the Employment Law Section and the Litigation & Workout Division had "significant involvement with sales integrity issues." Id. at 72.

180. OCC Press Release, supra note 178.

181. Id.

182. Stacy Cowley, Wells Fargo May Have Found More Fake Accounts Created by Employees, N.Y. Times (Aug. 4, 2017), https://www.nytimes.com/2017/08/04/business/dealbook/wells-fargo-fraud-accounts.html (on file with the *Columbia Law Review*).

183. Bill Chappell, Wells Fargo Hit with $1 Billion in Fines over Home and Auto Loan Abuses, NPR (Apr. 20, 2018), https://www.npr.org/sections/thetwo-way/2018/04/20/604279604/wells-fargo-hit-with-1-billion-in-fines-over-consumer-abuses [https://perma.cc/M6YK-SX5J].

misconduct on a decentralized management structure.[184] In particular, it noted that the head of the Community Bank and its "group risk officer not only failed to escalate issues outside the Community Bank, but also worked to impede such escalation, including by keeping from the Board information regarding the number of employees terminated for sales practice violations."[185] These actions were not a sign of purposeful misconduct. Instead, "[Risk officers] likely did so to give themselves freedom to address these issues on their own terms, rather than to encourage improper behavior."[186]

In reality, Wells Fargo had both a centralized and decentralized organizational structure. Certain functions, like risk management and human resources, remained within particular business units and took a decentralized structure.[187] But other functions, like legal, in actuality had a centralized structure with all reporting lines ending with a top executive within Wells Fargo corporate.[188] The result of the combination of these various business units, departments, and divisions was that many different people at Wells Fargo were aware of sales practice issues, but that information was not properly communicated. Wells Fargo, like General Motors, suffered from a number of information silos. These silos allowed the problems at Wells Fargo to grow until they resulted in a rather explosive set of scandals for the bank.

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In each of the above examples, legitimate decisions about how to structure the organization led to information silos that contributed to the failure to properly detect and investigate misconduct when it first occurred. As a result, the compliance failures festered and grew. To be clear, that is not to suggest that there were no other significant causes of the compliance failures at issue. There were. But in each of these examples, the employees of the organization were notified of a potential area of misconduct or risk, and the organization failed to properly assess the information due, at least in part, to information silos. These information silos plagued organizations with centralized compliance and management structures—like General Motors—and those with decentralized compliance and management structures—like Wells Fargo. This admittedly anecdotal finding suggests that structure, while necessary, is not sufficient for the creation of an effective ethics and compliance program. More is needed.

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184. Wells Fargo Investigation Report, supra note 6, at 4.

185. Id. at 8.

186. Id.

187. Id. at 11–12.

188. See id. at 72 (explaining that the legal department at Wells Fargo is separated into divisions, "each of which is headed by a deputy general counsel who reports to the General Counsel").

This finding is important, in part, because structural reforms and changes to composition are often the knee-jerk response by firms and the government when significant misconduct is discovered. The Wells Fargo example makes this clear. The root cause of the misconduct at Wells Fargo was an environment with high-pressure sales goals tied to incentive compensation, but the root cause of the failure to detect the misconduct appears tied to the existence of information silos within the firm. The after-the-fact report to the Board blamed the lack of detection on Wells Fargo's decentralized management structure and then, in the brief "Overview of the Report" section previewing the findings of the more fulsome report, noted the following steps toward "Reform and Accountability" the bank was taking:

> The Board has taken numerous actions and supported management steps to address these issues. Wells Fargo has replaced and reorganized the leadership of the Community Bank. It has also eliminated sales goals and reformed incentive compensation. Centralization of control functions is being accelerated. The Board has separated the role of the Chairman and the CEO, strengthened the charters of Board Committees and established regular reporting to the Board by the new Office of Ethics, Oversight and Integrity. As a result of the investigation, the Board has terminated for cause five senior executives of the Community Bank and has imposed forfeitures, clawbacks and compensation adjustments on senior leaders totaling more than $180 million.[189]

The very clear response by the firm was to enact structural changes to its organizational structure, but other than establishing regular reporting to the Board by a newly created office, there has been no process-related reform.

This is not an isolated response. Indeed, the government's own response focused heavily on structural reforms. For example, in 2018 the Federal Reserve Board announced restrictions to the growth of the bank "until it sufficiently improves its governance and controls" and required it to replace four board members by year end.[190] In particular, the Federal Reserve Board's "consent cease and desist order . . . requires the firm to improve its governance and risk management processes, including strengthening the effectiveness of oversight by its board of directors."[191] This focus on board structure to cure what ails firms, as noted by Sharpe in 2012, is necessarily limited.[192] While there are many structural reforms that it makes sense for Wells Fargo to enter into, it also seems as if certain

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189. Id. (unpaginated opening page).

190. Fed. Reserve Wells Fargo Press Release, supra note 4.

191. Id.

192. See Sharpe, supra note 34, at 297 ("This Article adds a critical dimension to the discussion on boards by identifying process as an intermediate step, linking major board reforms to an increased likelihood of firm success.").

process-related reforms may have been equally important to ensuring the detection of the misconduct before it became widespread and significant.

B. *Process-Based Interventions*

Because complex organizations often encounter compliance failures that cannot be addressed through changes to structure and composition on their own, this Article argues that they should adopt process-based reforms—actions, practices, and routines a firm can employ to communicate and analyze information—that will bolster a firm's investigations into complex compliance failures and act as a safety net when compliance programs fail to detect or appropriately respond to misconduct within the firm. In particular, this Article puts forth three general areas in which complex organizations might focus on adopting process-related actions, practices, and routines that firms may employ to communicate information necessary to navigate the stages of detection and investigation within the compliance process.[193] These suggestions build upon my own empirical[194] and theoretical[195] research.

1. *Track Similar Unlawful Behavior Within the Firm.* — When firms focus on policing and structural components of a compliance program, they sometimes focus too heavily on particular compliance areas when they might otherwise benefit from assessing certain types of behavior. As is explained above, they focus on particular compliance areas, in part, because of the way enforcement actors assert their authority when resolving instances of misconduct. But complex organizations that are serious about creating and implementing effective compliance programs should also consider the adoption of processes that will identify similar problematic conduct across seemingly diverse compliance areas.

For example, since at least 2007, medical device manufacturer Biomet has struggled to address unlawful bribery within its organization on multiple occasions. As a result of misconduct at various subsidiaries, Biomet has entered into actions settling claims that it paid unlawful kickbacks to physicians in violation of the False Claims and Anti-Kickback

193. See supra section I.B.

194. See generally Root, Coordinating Compliance Incentives, supra note 90 (conducting an empirical case study of FCPA enforcement actions against firms, and concluding that federal regulators should employ a coordinated enforcement strategy to identify institutions with systemic compliance failures).

195. See generally Root, Compliance Process, supra note 33 (proposing a new method to evaluate compliance failures that focuses on discrete stages within the compliance process: prevention, detection, investigation, and remediation).

Acts in 2007[196] and 2014,[197] and unlawful bribery in violation of the FCPA in both 2012[198] and 2017.[199] As is often the case when settling these claims, the government incentivized Biomet to compartmentalize its compliance assessment. In particular, it emphasized the importance of Biomet "continu[ing] to implement a compliance and ethics program designed to prevent and detect violations of the FCPA."[200] In doing so, the DOJ emphasized the need for Biomet to develop an FCPA compliance program "throughout its operations, including those of its affiliates, agents, and joint ventures, and those of its contractors and subcontractors."[201] The last decade of misconduct at Biomet related to unlawful payments or bribery, however, may speak less to a problem with its commitment to adhering to the FCPA and more to its need to engage in a much broader effort to adopt processes throughout its global compliance program targeted at stopping unlawful payments more generally.

Many complex organizations, like Biomet, would benefit from modifying their compliance programs in an effort to address similar unlawful behavior throughout departments and corporate entities. In this regard, firms could harness the power of process interventions in two ways. First, firms could adopt processes to assist them in identifying trends and problem areas across diverse regulatory and legal areas and across departments and entities. In doing so, firms will have improved their decisionmaking systems by providing more relevant and necessary information needed for developing responses to particular types of misconduct that appear to reoccur within firms. Second, once common areas of concern, like unlawful bribery, are identified across a complex organization, a firm

196. Press Release, DOJ, Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring (Sept. 27, 2007), https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/hips0927.rel.pdf [https://perma.cc/J37F-9AJ7].

197. Press Release, DOJ, Biomet Companies to Pay over $6 Million to Resolve False Claims Act Allegations Concerning Bone Growth Stimulators (Oct. 29, 2014), https://www.justice.gov/opa/pr/biomet-companies-pay-over-6-million-resolve-false-claims-act-allegations-concerning-bone [https://perma.cc/Q7RU-YBH2].

198. Press Release, DOJ, Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation (Mar. 26, 2012), http://www.justice.gov/opa/pr/third-medical-device-company-resolves-foreign-corrupt-practices-act-investigation [https://perma.cc/59NR-9ALC].

199. Press Release, DOJ, Zimmer Biomet Holdings Inc. Agrees to Pay $17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017), https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act [https://perma.cc/9UEG-CMCC]. Biomet now operates as Zimmer Biomet Holdings Inc. See David Gelles & William Alden, Zimmer Holdings to Buy Biomet for $13.35 Billion, N.Y. Times (Apr. 24, 2014), https://dealbook.nytimes.com/2014/04/24/zimmer-to-buy-biomet-for-13-35-billion/ (on file with the *Columbia Law Review*).

200. Deferred Prosecution Agreement at 11, United States v. Zimmer Biomet Holdings, Inc., No. 12-CR-00080 (D.D.C. Jan. 13, 2017).

201. Id.

could then adopt "a particular sequence of steps (a process)"[202] targeted at mitigating the problematic situations.

An example of a process-based intervention that might assist in tracking unlawful behavior within a firm might be standardizing certain elements of internal investigations. In the medical space, there are many areas in which checklists must be followed. These checklists have been helpful in (i) reducing unnecessary errors in care and (ii) reducing bias.[203] Firms with large compliance risks might employ a similar approach to ensure that all internal investigations answer a limited but consistent set of questions. This would ensure that the firm got standardized information across different departments and risk areas, but would still allow for those charged with internal investigations to maintain their autonomy and judgment over the investigation as a whole. Once a firm has standardized data across internal investigations, it can then utilize that information to spot trends like similar unlawful behavior within its ranks.[204]

2. *Engage in Consistent Compliance Assessments.* — When a firm identifies potential misconduct, it often triggers a particular response in an effort to assess the scope and extent of the potential misconduct and, if necessary, to develop a remediation strategy. The firm's response to potential or actual misconduct may, however, look quite different across the organization's departments or corporate entities. But when a particular sequences of steps, a process, is adopted in response to a firm's compliance needs and goals, it may be "better situated to improve its efficacy and thereby overall firm performance."[205]

Many of the most significant compliance failures in recent memory were impacted, at least in part, by a failure of a firm to engage in robust and effective investigative methods.[206] And yet this is a relatively routine task that many firms engage in once they detect a compliance failure.[207] Complex organizations could choose to develop formal, prospective processes in an effort to ensure that members throughout their

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202. Sharpe, supra note 34, at 297.

203. See Mark L. Graber, Asta V. Sorensen, Jon Biswas, Varsha Modi, Andrew Wackett, Scott Johnson, Nancy Lenfestey, Ashley N.D. Meyer & Hardeep Singh, Developing Checklists to Prevent Diagnostic Error in Emergency Room Settings, 1 Diagnosis 223, 230 (2014) ("[T]he success of checklists to improve surgical safety . . . seems adequately established . . . ."); Jessica Nordell, A Fix for Gender Bias in Health Care? Check, N.Y. Times (Jan. 11, 2017), https://www.nytimes.com/2017/01/11/opinion/a-fix-for-gender-bias-in-health-care-check.html (on file with the *Columbia Law Review*) (explaining how checklists reduce gender disparities in treatment).

204. For instance, some firms find that compliance is "a great opportunity to automate" because the law is fairly straightforward and linear. Treliant Talks, supra note 130. As a result, the company can look for "anomalies in the data," which some have found to be a more effective way to tackle compliance issues than simple sample testing. Id.

205. Sharpe, supra note 34, at 297.

206. See Root, Compliance Process, supra note 33, at 205–09, 224–25, 238–42 (detailing investigative failures at Fox News, Wells Fargo, and Baylor University).

207. See id. at 224 (describing a standard investigatory phase for firms).

organizations engage in similar investigative methods when misconduct is detected. In doing so, a firm may better assess the nature and scope of compliance failures, as well as have more standardized methods of comparing compliance failures across diffuse departments and corporate entities.

For instance, a number of departments and divisions within Wells Fargo were aware of the need to investigate the firm's sales practices since at least 2002. Members of the Legal Department, in particular the Employment Section lawyers, "encountered sales misconduct and the termination of several employees at one time . . . dating back at least to 2002."[208] Also in 2002, "Internal Investigations determined that almost an entire branch in Colorado engaged in a form of 'gaming,'" a sales practice violation.[209] The Community Bank's human resources department established a task force in 2002 "to address the increasing focus on sales integrity issues in regional banking."[210] Finally, the Board of Directors' Audit & Examination Committee received materials referencing "sales conduct or 'gaming' issues" since at least 2002.[211] The Committee, however, failed to identify that the issue in front of them was significant.

Firms could employ a process-based reform when potentially significant information regarding misconduct arises, but there are questions about the breadth and scope of wrongdoing. For example, firms could employ materiality surveys.[212] Currently, many firms employ cultural assessment surveys to "understand program effectiveness, build a business case for resources or organizational changes, and develop reports for the C-Suite or Board."[213] Firms that are interested in creating consistent compliance assessments, however, might instead utilize a survey meant to ascertain the materiality of certain types of misconduct within the organization. Firms could disseminate a materiality survey when an issue arises that looks like it might become a material compliance failure in an effort to determine the current scope and severity of the concern. For example, the Wells Fargo Board was aware of sales practice violations, but discounted their importance based on how often they perceived the violations were occurring. They failed to consider that only some of the

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208. Wells Fargo Investigation Report, supra note 6, at 73.

209. Id. "Gaming" is a type of sales practice violation "defined as the manipulation and/or misrepresentation of sales to receive compensation or meet sales goals." Id. at 31.

210. Id. at 80.

211. Id. at 98.

212. See KPMG Int'l, Sustainable Insight: The Essentials of Materiality Assessment 4 (2014), https://assets.kpmg/content/dam/kpmg/pdf/2014/10/materiality-assessment.pdf [https://perma.cc/6KNP-5VTV] ("Materiality assessment is the process of identifying, refining, and assessing numerous potential environmental, social and governance issues that could affect your business, and/or your stakeholders, and condensing them into a short-list of topics that inform company strategy, targets, and reporting.").

213. Ethical Culture and Perceptions Assessment, Ethisphere, https://ethisphere.com/what-we-do/culture-assessment/ [https://perma.cc/W688-P7LF] (last visited Oct. 9, 2019).

violations were making it to the board. If, however, they had surveyed their workforce, they may have found that the problem was more widespread than they thought or that the Community Bank was struggling heavily in this area.

3. *Aggregate Potential Compliance Concerns.* — Not all reports of misconduct or potential culpability result in a determination that wrongdoing has occurred. Those tasked with overseeing compliance efforts at complex organizations will be presented with pieces of information that are eventually deemed innocuous or considered an isolated incident. But sometimes a seemingly innocuous or isolated event is actually an indication of a larger problem within the firm, and if complex firms with diffuse departments and corporate entities have not employed a process for tracking this information, devastating results may occur.

For example, in 2017, Larry Nassar, a former Michigan State University doctor, pled guilty to "seven counts of first-degree criminal sexual conduct involving more than 160 girls and women across more than two decades."[214] Based on statements from several alleged victims of Nassar, "[M]ore than a dozen Michigan State official[s] were notified through the years of Nassar's abuse."[215] Allegations vary on when Michigan State received its first complaints about Nassar, with some citing 1992[216] and others 1997.[217] Regardless of the date, multiple complaints were made and explained away as misunderstandings for approximately two decades.[218] Michigan State employees were aware of Nassar's abuse, and their failure to respond effectively to the complaints led to dozens of additional victims. Michigan State had a compliance program in place to address concerns of this nature via its Title IX program, but a 2014 investigation "found no evidence of misconduct."[219] It does not appear, however, that prior reports made their way to the Title IX office. If the seemingly isolated complaints had been aggregated and tracked—whether within the Title IX office or the human resources department—it may have helped to identify Nassar's misconduct at an earlier stage.

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214. Vic Ryckaert, Larry Nassar Case: What You Need to Know About the Abuser of More than 150 Young Athletes and the Fallout, Indianapolis Star (Jan. 25, 2018), https://www.indystar.com/story/news/nation-now/2018/01/25/larry-nassar-usa-gymnastics-sex-abuse-what-we-know/1066355001/ [https://perma.cc/P894-C9LD].

215. Id.

216. Caroline Kitchener & Alia Wong, The Moral Catastrophe at Michigan State, Atlantic (Sept. 12, 2018), https://www.theatlantic.com/education/archive/2018/09/the-moral-catastrophe-at-michigan-state/569776/ [https://perma.cc/795A-AHWQ].

217. Ryckaert, supra note 214.

218. See id; see also Rachael Denhollander, Rachael Denhollander: The Price I Paid for Taking on Larry Nassar, N.Y. Times (Jan. 26, 2018), https://www.nytimes.com/2018/01/26/opinion/sunday/larry-nassar-rachael-denhollander.html (on file with the *Columbia Law Review*) ("In many ways, the sexual assault scandal that was 30 years in the making was only a symptom of a much deeper cultural problem—the unwillingness to speak the truth against one's own community.").

219. Kitchener & Wong, supra note 216.

Complex organizations could adopt processes targeted at aggregating certain pieces of information—like complaints about an employee's conduct—so that they were actively reviewed together instead of in isolation. If firms were required to log complaints somewhere, particularly somewhere beyond the employee's direct reporting line or supervisor—and then later reviewed for trends or significant concerns—it might help to bring potential compliance failures to the forefront at an earlier stage. For example, General Motors and Wells Fargo could have aggregated information they had access to in a way to help them detect misconduct earlier, which would have minimized the scope and severity of their compliance failures. Importantly, aggregation of this type of information is a more reasonable task for firms now, as tools related to data analytics become increasingly more sophisticated.

a. Aggregate Liabilities. — General Motors settled several claims regarding the nondeployment of airbags that were later found to have been caused by a faulty ignition switch.[220] General Motors's product litigation staff attorneys were permitted, on their own authority, to settle claims up to \$100,000.[221] "Settlements of between \$100,000 and \$1.5 million (a limit which was eventually increased to \$2 million) required approval at a committee known as the 'Roundtable,'" while "[s]ettlement offers between \$2 and \$5 million required approval of a group called the Settlement Review Committee[,] . . . [which] was chaired by the head of global litigation."[222] Any settlements over \$5 million required approval by the General Counsel.[223]

Importantly, the processes General Motors had in place, however, did not explicitly require the lawyers who formed part of the Roundtable to "spot trends" indicating potential safety issues.[224] When interviewed after the fact, some lawyers believed they were supposed to spot trends, while others stated that "it was not the Roundtable's function to spot trends and that if a lawyer had to flag a trend, then the system had already failed."[225] And those investigating General Motors after the scandal came to light "discovered no formal written policies governing how settlement committees should handle safety issues."[226]

For an organization as large and diffuse as General Motors, whose primary function is to manufacture automobiles, it might have been beneficial to have instituted formal processes and guidance regarding how to elevate information about potential safety concerns. Indeed, it might have adopted an aggregation principle for the Roundtable. For instance, General

220. Valukas, supra note 12, at 102–15.
221. Id. at 106–07.
222. Id. at 107.
223. Id.
224. Id. at 108.
225. Id.
226. Id.

Motors could have required the Roundtable to group all settlements for the preceding one, three, and five years into similar categories. If a particular category exceeded the $5 million threshold for reporting to the General Counsel, the Roundtable could have investigated why the liabilities had gotten to such a significant amount and determined whether they should further refine the categories. Upon engaging in this process, the Roundtable could have then provided a report to the General Counsel about the categories they identified, how it came to be that a category exceeded the $5 million cap, and whether that suggested the need for further categorization or a potential settlement trend in need of further inquiry.

Instead, the Roundtable was left with murky guidance about what its responsibilities were to track trends over time and no processes by which to engage in that effort. Additionally, by structuring settlements within certain amounts and only triggering General Counsel review beyond a particular cap, General Motors's own structural decisions ensured that the General Counsel was unlikely to have the information necessary to identify important trends on its own. When senior management at General Motors failed to adopt a process or sequence of steps for elevating product safety concerns or aggregating settlement information in a manner that might trigger a safety review, it limited its ability to understand and respond to issues that could form the basis of firm culpability.[227] And yet, by employing a relatively simple process tweak—aggregation—it could more effectively assess the company's liability and potential compliance failures.

b. Aggregate Whistleblower Reports. — Several former Wells Fargo employees have alleged that they were dismissed from the company after reporting wrongdoing to the bank's internal ethics hotline regarding the opening of fraudulent accounts.[228] Additional employees have asserted allegations that "'they were terminated for raising concerns' about the improper mortgage rate fees."[229] And another claimed he had been retaliated against "for raising concerns regarding automobile lending practices."[230] In each of these instances, the allegations from internal whistleblowers, if true,[231] would suggest that the structures Wells Fargo had in place—structures that would fall within a compliance program's attempts to detect misconduct as part of its policing effort—failed.

And yet, if Wells Fargo employed an aggregation principle, the misconduct might have been easier for higher-ups within the organization to

227. Sharpe explains that "[w]hen a board adopts a particular sequence of steps (a process) in response to the firm's endogenously determined needs and goals, it is better situated to improve its efficacy and thereby overall firm performance." Sharpe, supra note 34, at 297.

228. Egan, supra note 6.

229. Id.

230. Id.

231. The report assessing the sales practices at Wells Fargo does not provide a robust account or assessment of these whistleblowers' claims. Instead, footnote twenty-six of the report details the steps the bank has taken to investigate the claims. Wells Fargo Investigation Report, supra note 6, at 87 n.26.

detect, investigate, and prevent from continuing. For example, assuming it is true that several employees reported improper conduct to the bank's internal ethics hotline, it would appear that these reports were discounted and discarded. One can imagine a world in which complaints made to an ethics hotline are investigated on an individual basis, found to be without merit, and discarded without any malicious intent.

Complaints to an ethics hotline or a human resources department are, however, a perfect opportunity to employ an aggregation principle. Each complaint could be categorized and logged, which would allow firms to aggregate like claims together. At the end of a predetermined reporting period, someone outside of the actual ethics hotline department, perhaps even individuals at the board of directors level, could review the aggregated data trends. It may be that each individual complaint regarding the opening of fraudulent accounts, when investigated, would appear innocuous once the firm interviewed the employees. But in the aggregate, if one sees many complaints for a particular person, group, or topic, it might trigger a more fulsome review into the issues, which could assist the firm in identifying, responding to, and ultimately preventing future compliance failures.

The type of information a firm should aggregate would depend upon the firm's business and corresponding risks. But in each of the above examples, the organizations were already employing tactics to help them identify potential compliance concerns, but they did so without creating process-related reforms that may have made it easier for the organizations to aggregate information. As technology continues to improve, the ability of firms to track information in an effort to spot trends will increase.[232] By aggregating information, complex organizations will be better equipped to prevent, detect, investigate, and remediate compliance failures within their ranks.

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Each of these three suggestions demonstrates how complex organizations might better create effective global compliance programs by adopting process-related reforms to complement their existing organizational structure and composition. If done properly, the implementation of more formalized processes may not only make certain compliance issues more accessible, but also increase the feasibility of detecting and addressing potential compliance failures in a proactive, prompt, and effective manner.

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232. Relatedly, this also increases regulators' expectations of what risks corporations can and should be able to prevent. See Deloitte, Compliance Modernization supra note 149, at 4 ("[I]n many industries [regulators] have more powerful analytical tools and practices to measure and identify compliance-related risks as well as bad behaviors and practices.").

C. *Limitations to Process*

Process, while important, cannot function on its own. As explained in section I.B, it is necessarily tied to an organization's decisions related to its structure and composition. In particular, process-related reforms will be unlikely to work if the firm (i) lacks certain structural components or (ii) suffers from a corrupt culture. Two recent scandals demonstrate these limitations.

1. *Lacking Structural Components.* — In July 2018, a Pennsylvania grand jury issued a report related to an investigation into the sexual abuse of children within the Catholic Church.[233] The report is over 800 pages long and includes a great deal of information. One takeaway from the report, however, is the lack of strong governance structures that may have prompted more fulsome reviews of misconduct. In particular, complaints were purposively and deliberately kept secret:

> While each church district had its idiosyncrasies, the pattern was pretty much the same. The main thing was not to help children, but to avoid "scandal." That is not our word, but theirs; it appears over and over again in the documents we recovered. Abuse complaints were kept locked up in a "secret archive." That is not our word, but theirs; the [C]hurch's Code of Canon Law specifically requires the diocese to maintain such an archive. Only the bishop can have the key.[234]

Additionally, a number of practices were employed to "conceal[] the truth."[235] For example, "[M]ake sure to use euphemisms rather than real words to describe the sexual assaults . . . . Never say 'rape'; say 'inappropriate contact' or 'boundary issues.'"[236] Additionally, "[D]on't conduct genuine investigations with properly trained personnel. Instead, assign fellow clergy members to ask inadequate questions and then make credibility determinations about the colleagues with whom they live and work."[237] The grand jury report goes on from there, but it suggests that the Catholic Church employed significantly deficient governance practices, which contributed to the continued, widespread, and in many instances, repeated misconduct within its ranks.

For an organization without strong structural components, process-related reforms will be limited in effectiveness, because there is nowhere

233. Office of the Att'y Gen., Commonwealth of Pa., Report I of the 40th Statewide Investigating Grand Jury (2018), https://www.attorneygeneral.gov/wp-content/uploads/2018/08/A-Report-of-the-Fortieth-Statewide-Investigating-Grand-Jury_Cleland-Redactions-8-12-08_Redacted.pdf [https://perma.cc/NM6D-YPBY].

234. Id. at 2.

235. Id. at 3.

236. Id.

237. Id.

for the process to go.[238] For example, even if one were to have aggregated complaints, those aggregations would have ended up in a secret archive. An organization must have the governance framework provided by strong structure in order for process reforms to thrive.

2. *Corrupt Cultures.* — Process-related reforms are also unlikely to work within organizations with corrupt cultures. "Culture becomes especially important, then, when—as is often the case—the structural aspects of compliance and supervision cannot or do not otherwise influence behavior."[239] Because process-related reforms are meant to augment structure and to fill gaps structure cannot reach, they are particularly susceptible to stagnation as a result of a corrupt culture.

For example, in February 2017, an employee detailed experiences of sexual harassment and ineffective reporting to human resources at Uber. In particular, her manager allegedly propositioned her to have sex over company chat.[240] When she took screenshots and sent them to human resources, she was allegedly told "by both HR and upper management that even though this was clearly sexual harassment . . . it was this man's first offense, and that they wouldn't feel comfortable giving him anything other than a warning and a stern talking to."[241] She was then allegedly given the choice of (i) finding another team or (ii) remaining on her team with the knowledge that she would likely receive a poor performance review.[242] A human resources representative also allegedly told her that the company would not consider a poor performance review retaliation because she had been given the option of joining another team.[243] Once she left the team, however, she learned that other women had reported the manager to human resources and that "both HR and management had been lying about this being 'his first offense.'"[244]

The employee subsequently published a blog post regarding her experiences, which resulted in a resolution by Uber's Board of Directors to establish a Special Committee of the Board to oversee an investigation into Uber's workplace environment and their policies and practices

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238. One scholar has noted that "the laity was reporting the abuse to the Church but the hierarchy buried those reports in secret files." Stephen M. Bainbridge, Restoring Confidence in the Roman Catholic Church: Corporate Governance Analogies 8 (UCLA Sch. of Law Pub. Law & Legal Theory Research Paper Series No. 18-32, 2018), https://ssrn.com/abstract=3249236 (on file with the *Columbia Law Review*).

239. Langevoort, supra note 75, at 944 ("An ideal culture of compliance would be one that accepts public responsibility to lessen the net social costs of its activities—the harms from legal wrongdoing—even if a private calculus of likely consequences suggests that there is money to be made by cautious cheating.").

240. Susan J. Fowler, Reflecting on One Very, Very Strange Year at Uber, Susan J. Fowler Blog (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber [https://perma.cc/9KXY-6T8P].

241. Id.

242. Id.

243. Id.

244. Id.

related to discrimination, harassment, and retaliation.[245] The employee's allegations suggested a potentially defunct corporate culture at Uber that prioritized "high-performing" managers over establishing a positive workplace culture that acted according to industry standards regarding sexual harassment and discrimination complaints.[246] Eric Holder and Tammy Albarrán oversaw the investigation into Uber, and their recommendations specifically referenced culture at Uber on several occasions. In particular, they recommended that Uber utilize its search for a new Chief Operating Officer to find candidates with "experience in improving institutional culture."[247] Additionally, they recommended that the Board of Directors "create an Ethics and Culture Committee or a similar body" to assist Uber's "efforts and enhance a culture of ethical business practices, diversity, and inclusion within the organization."[248]

In the case of Uber, it appears that human resources and high-level management were aware of the allegedly multiple complaints against the employee's manager. Because, however, the culture did not appropriately value claims of sexual harassment and discrimination, it took no action. A materiality survey or aggregation principle, given the cultural realities at the firm, would not have changed the firm's response to employee complaints.

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This Article argues that complex organizations should prioritize robust process-related compliance reforms that can act as a safety net when traditional monitoring structures fail to detect or appropriately respond to compliance failures because of the existence of information silos within the firm. Because firms have increased in complexity over time, they often suffer from information silos and these silos exist in both centralized and decentralized management structures. Compliance strategies rooted in structure and composition are limited in their ability to combat information silos, and therefore limited in their ability to properly detect, investigate, and ultimately prevent certain compliance failures from becoming widespread and significant. As demonstrated above, however, firms can employ a variety of process-related reforms to improve their compliance efforts. These process-related actions, practices, and routines employed by firms to communicate information necessary to prevent, detect, investigate, and remediate compliance failures will necessarily vary, because they will need to be tailored to specific firms' businesses and risk profiles in order to be effective. As the General Motors and Wells Fargo

245. The Holder Report on Uber's Workplace Culture 1 (2017), https://www.nytimes.com/interactive/2017/06/13/technology/document-The-Holder-Report-on-Uber.html (on file with the *Columbia Law Review*).

246. See Fowler, supra note 240.

247. The Holder Report on Uber's Workplace Culture, supra note 245, at 2.

248. Id.

examples demonstrated, process reforms have the potential to greatly improve compliance efforts within organizations. The promise of process is, however, limited. To be effective it requires a firm to (i) have a strong organizational structure and (ii) be free from a corrupt culture.

IV. Potential Benefits & Remaining Questions

As explained above, if complex organizations were to adopt more robust and formal processes, they would be better able to tackle the challenge of implementing complex compliance strategies that are equipped to combat compliance failures within organizations with diffuse departments and corporate entities. This Part discusses some of the potential benefits to the Article's argument. It concludes with a discussion of some remaining questions.

A. *Potential Benefits*

This Article argues that complex organizations would benefit from a compliance strategy focused on creating a set of standards that includes the adoption of formalized processes that can be applied across the firm. This section briefly discusses five benefits to this Article's proposal, but there are others.

1. *Tailored to Individual Firms.* — Legal and regulatory interventions, and sometimes even industry standards, often require firms to adopt particular programs and policies. These mandated elements of a firm's compliance program tend to focus on policing and structural components because those are relatively easy to impose on a firm. A limitation of mandated compliance reforms, however, is that they are not tailored to the specific firm and its organizational structure.

Each complex organization is unique. Walmart's web of subsidiaries, related entities, and departments will be distinct from that found at General Motors or Wells Fargo. As such, firms must tailor at least some elements of their compliance programs to their own individual business structures and anticipated risks. Thus, a primary benefit of the approach outlined in this Article is that individual firms can tailor it to their needs.

Even if multiple firms decide to adopt processes related to how they will conduct investigations, their implementation of those processes and the details of their plans will be different as a result of their varied corporate structures. Because of this, it is unrealistic to provide detailed suggestions regarding how a process for investigation should be implemented at all firms, because each firm will need to develop their own. But the ability to adapt and tailor the suggestions provided in this Article enables firms to take its high-level insights and craft individualized compliance programs likely to achieve the desired result of ensuring compliant behavior throughout their organizations.

2. *Respond Prior to Governmental Intervention.* — This Article's suggestion that firms adopt formal processes in an effort to develop more

complex compliance programs will support the self-policing function firms are expected to engage in. Indeed, process-related reforms may strengthen many firms' prospective efforts to prevent misconduct within their ranks and assist firms to develop strategies that will allow them to respond more quickly to potentially problematic behavior.

For example, if a firm has processes in place regarding how it should evaluate and aggregate certain types of information, it may identify trends and risks more quickly. Because the government will almost always receive information after a company is aware of it, developing strong processes may allow companies to respond to misconduct prior to the implementation of a formal investigation by the government. And when firms proactively respond to misconduct, adjust their compliance programs accordingly, and report their actions to the government voluntarily, they are often sanctioned less harshly than if the conduct was not discovered until prompted by a formal governmental investigation.[249] As such, complex corporations may not only improve their compliance programs by adopting formal processes across diffuse departments and entities, they may also reduce their potential liability from government enforcement agents when misconduct does occur.[250]

3. *Applicable Across Different Types of Complex Organizations.* — This Article's proposal is equally applicable to both multinational corporations with a variety of subsidiaries and a single organization with many diffuse departments within one organizational structure. The silos found within and between departments in a large enough organization can sometimes mimic what is found when an organization is divided up into different parent companies and subsidiaries. The goal of this Article's proposal is to find processes that individuals throughout the firm can utilize, even when the firm is made up of many departments that largely work on their own with minimal contact from members of the organization's different departments.

For example, universities are large organizations that are made up of several freestanding departments that operate on their own much of the time. The athletic department may have limited contact with individuals from the admissions department and the department of architecture. And each of these departments may have different organizational structures and methods of interacting with students. Yet each department might benefit from standardized processes related to how individuals are expected to handle confidential student information or respond to claims of sexual harassment. By utilizing consistent processes throughout the university, it will

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249. See, e.g., Alexandra Clark & Shawn Wright, Significant M&A Development: DOJ Urges U.S. Companies Acquiring or Merging with Foreign Companies to Self-Disclose FCPA Misconduct Identified During Due Diligence, BlankRome (Aug. 2018), https://www.blankrome.com/publications/significant-ma-development-doj-urges-us-companies-acquiring-or-merging-foreign [https://perma.cc/T677-V5KW].

250. Root, Compliance Process, supra note 33, at 216–18 (explaining why organizations are not held to the standard of ensuring "perfect compliance" within their ranks).

be better equipped to assess and evaluate certain areas of risk and concern at a high level.

Importantly, the processes advocated for in this Article are exportable to a variety of areas. A firm may be able to develop processes for responding to claims of sexual harassment even when applied to twenty different departments with varied methods of reporting lines and assessments. A firm may be able to develop processes for investigating claims by internal whistleblowers in response to varied compliance areas like anti-bribery, corruption, human rights, and environmental laws and regulations. A focus on process can bring an element of standardization to the sometimes unwieldy task of ensuring compliance throughout a complex organization.

4. *Concurrent Responses to Global Regulatory Concerns.* — One of the biggest challenges for complex organizations is centered on the sheer scope of the legal and regulatory requirements they must track and comply with.[251] By focusing on developing formalized processes for certain matters, firms can respond to multiple, related regulatory requirements through the lens of one consistent strategy.

For example, within the anti-bribery space, there are numerous laws that multinational corporations are required to comply with. In 2017, it was noted that "[s]everal countries have introduced or propose[d] to introduce new anti-bribery and corruption laws," including France, India, South Korea, Ireland, Mexico, China, Vietnam, Germany, Slovakia, Colombia, Jordan, and Kenya.[252] This is in addition to robust enforcement regimes within the United States, the United Kingdom, Germany, and many other jurisdictions.[253] There are distinctions within these laws that will sometimes require jurisdiction-specific adjustments to a firm's compliance program, but in general a firm will be able to create high-level processes targeted at deterring bribery throughout its organization in a manner that is responsive to the general concern of these sorts of prohibitions.

And other legal areas, like anti-bribery, have reached similar points of consensus throughout the world. Whether it is a concern regarding anti-

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251. See J.B. Ruhl & James Salzman, Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State, 91 Geo. L.J. 757, 758–65 (2003) (analyzing and identifying "regulatory accretion," which is the growth in both size and scope of applicable regulations); see also Edward Hida, Global Risk Management Survey, 10th Edition, Deloitte: Insights (Mar. 2, 2017), https://www2.deloitte.com/insights/us/en/topics/risk-management/global-risk-management-survey.html [https://perma.cc/DZ76-PH42] (noting that in a survey of financial institutions around the globe, "[M]ost institutions reported that regulatory reform in majority jurisdictions where they operate has resulted in important strategic impacts" and that "[t]he cost of compliance has been increasing across the industry").

252. Freshfields Bruckhaus Deringer, Anti-Bribery and Corruption: Global Enforcement and Legislative Developments 2017, at 1, 9 (2017), https://www.freshfields.com/globalassets/services-page/global-investigations/publication-pdfs/gi-abc-guide-2017.pdf [https://perma.cc/E9ZS-TT8y].

253. See, e.g., id. at 22–23, 31–32, 40–46 (describing the enforcement regimes of countries around the world, including the United States, the United Kingdom, and Germany).

bribery, antitrust, or human rights, complex organizations would benefit from developing formal processes to deal with risks that are of concern to multiple jurisdictions where they do business. It will streamline the firm's compliance efforts, make it easier to assess the success of the firm's program, and improve the firm's efforts to comply with the global norm at issue.

5. *Overcoming Personal Biases.* — One benefit of a compliance program that includes robust process-related reforms, like an aggregation principle, is that it requires a potential response regardless of the views that the person charged with investigating the potential compliance failure has about the alleged activity. For example, employees within General Motors may have believed they were building safe cars. Individuals at Michigan State may have believed Larry Nassar was an excellent and talented sports doctor. People within Wells Fargo may have believed their sales goals were unlikely to cause harm to consumers. These beliefs were wrong, but when individuals start off from these particular places, they may look for evidence that confirms their preexisting understandings of the world.

There are a variety of internal biases that may impact workplace investigations, but practitioners have identified "two broad types" of particular interest.[254] The first includes biases "toward social groups," like a bias toward men in management versus women at lower employment levels as was potentially seen in the Uber example.[255] The second includes biases "that lead to 'tunnel vision,' including confirmation bias, lie bias, and trustworthiness bias."[256] Confirmation bias refers to "'the tendency to [unconsciously] bolster a hypothesis,' belief, or expectation by seeking and/or favoring confirming information while minimizing or ignoring disconfirming information."[257] Biases of this type can interfere with the detection and investigation of compliance failures. By adopting certain processes that all employees must follow in response to certain events, firms can help their employees to overcome certain biases and engage in a more robust assessment of the situation.

254. Ashley Lattal, The Hidden World of Unconscious Bias and Its Impact on the "Neutral" Workplace Investigator, 24 J.L. & Pol'y 411, 425–26 (2016).

255. Id. at 425–33.

256. Id. at 426. Lie bias refers to "a bias towards believing a person to be deceptive rather than truthful." Id. at 439. Trustworthiness bias "suggests that instantaneous impressions of trustworthiness based on facial appearance may play a major role in both assessing the credibility of and ensuing decisions about the target." Id. at 441 (internal quotation marks omitted) (quoting Stephen Portera, Leanne ten Brinkea & Chantal Gustaw, Dangerous Decisions: The Impact of First Impressions of Trustworthiness on the Evaluation of Legal Evidence and Defendant Culpability, 16 Psychol., Crime & L. 477, 478 (2010)) (misquotation).

257. Id. at 435 (alteration in original) (quoting Barbara O'Brien, Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations, 15 Psychol., Pub. Pol'y & L. 315, 315 (2009)).

B. *Remaining Questions*

Notwithstanding the benefits described above, there remain some additional questions raised by this Article's suggestions and argument. This section briefly discusses several such questions.

1. *Does this Article's Proposal Fail to Consider the Impact of Paper or Cosmetic Compliance?* — Part III notes two limitations to the Article's suggestion for firms to pursue process-based compliance reforms: if the firm (i) lacks certain structural components or (ii) suffers from a corrupt culture. Some might, however, raise a third concern related to the imposition of "paper" or "cosmetic" compliance programs. There exist concerns "that internal compliance structures do not deter prohibited conduct within firms and may largely serve a window-dressing function that provides both market legitimacy and reduced legal liability."[258]

If too much emphasis is placed on internal compliance structures, it "raises potential dangers of underenforcement and social waste."[259] Indeed, one often hears government enforcement agents express concern about "paper" compliance programs.[260] If a firm is engaged in cosmetic or paper compliance efforts, they might attempt to adopt what looks like a process-based reform to help demonstrate that they have an effective compliance program when in fact they are not engaged in activities likely to be effective. Process-based reforms, which will be firm-specific and would likely require firms to enter into on their own initiative, may be just as, if not more, difficult for the public to evaluate and oversee. Additionally, because there is a dearth of information on the costs and benefits of compliance programs even within firms,[261] it may even be difficult for a firm to assess the effectiveness of a process-based reform.

The concerns expressed by Professor Kimberly Krawiec and others are important and necessary to keep at the forefront of all efforts meant to improve ethics and compliance programs within firms. The foundation of this Article is, in many ways, built on these insights. This Article recognizes that despite a significant commitment of time and resources by both firms and the government, compliance programs continue to fail. As firms have become more complex, information silos have increased in severity and import. As demonstrated above, the current focus of compliance reforms

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258. Kimberly D. Krawiec, Cosmetic Compliance and the Failure of Negotiated Governance, 81 Wash. U. L.Q. 487, 491 (2003).

259. Id.

260. See John J. Carney, George A. Stamboulidis, Andres A. Muñoz & Patrick T. Campbell, Pulling Back the Curtain: DOJ to Take Action Against Window Dressing Corporate Compliance Programs, BakerHostetler (Aug. 13, 2015), https://www.bakerlaw.com/alerts/pulling-back-the-curtain-doj-to-take-action-against-window-dressing-corporate-compliance-programs [https://perma.cc/DXZ4-RPRE] (describing how the DOJ was in the process of hiring a "full-time expert in compliance programs . . . tasked with investigating corporate compliance programs to determine whether they are effective or mere window dressing").

261. See Hui Chen & Eugene Soltes, Why Compliance Programs Fail—And How to Fix Them, Harv. Bus. Rev., Mar.–Apr. 2018, at 116, 120, 122–23.

via structure and composition will not, on their own, effectively combat these information silos. With that knowledge, it is imperative that firms attempt to find strategies they can adopt to combat information silos and improve compliance efforts. This Article contributes to that effort by relying on scholarship from management and organizational behavior to argue that current compliance efforts might benefit from adopting some process-based reforms as part of their compliance strategy. And while it is true scholars cannot empirically test this Article's thesis at this time, there will be no mechanism for this testing without experimentation from firms consistent with this Article's proposals.

2. *What About Efforts Already Advocated for Within the Compliance Industry?* — The idea that compliance should do more than policing is widely accepted within the industry, and each scholars' definition of compliance outlined in Part I puts forth the notion that compliance programs within firms must focus on more than complying with formal legal and regulatory requirements.[262] Currently, there is general consensus within the compliance industry about certain components that should be included within an organization's compliance program. For example, a high-quality compliance program is often described as emphasizing (i) tone at the top, (ii) corporate culture, (iii) risk assessments, (iv) testing and monitoring, and (v) empowerment of a chief compliance officer.[263] Thus, one critique of this Article's proposals may be that organizations are already implementing a variety of strategies beyond mere policing that include elements of structure, composition, and process.

As noted above, however, there may be particular challenges facing complex organizations that will make these various components difficult to implement or less effective than in smaller organizations. For instance, the importance of establishing a strong tone at the top has been emphasized within the compliance industry for years. As explained by Deloitte:

> The starting point for any world-class ethics and compliance program is the board and senior management, and the sense of responsibility they share to protect the shareholders' reputational and financial assets. The board and senior management should do more than pay "lip service" to ethics and compliance. They need to empower and properly resource the individuals who have day-to-day responsibilities to mitigate risks and build organizational trust.[264]

The top is, quite literally, the top and is commonly understood to include the senior management and leadership for the organization.

262. See supra section I.C.

263. See, e.g., Deloitte, Building World-Class Ethics and Compliance Programs: Making a Good Program Great—Five Ingredients for Your Program 3 (2015), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/risk/us-aers-g2g-compendium.pdf [https://perma.cc/2YFA-FM76] [hereinafter Deloitte, World-Class Programs].

264. Id.

The top within complex organizations, however, is often removed from most of the organization's agents and employees. There is evidence from behavioral ethics scholarship that the example set by firm leaders will have a trickle-down effect throughout the firm,[265] but for large, multinational organizations the distances between the top and the individuals on the ground expected to comply with legal and regulatory requirements can be quite large. One of the challenges for complex organizations will be connecting the decisionmaking of the board and other top management with the everyday activities of employees. Deloitte's definition acknowledges this and suggests that the board and top management must provide proper resources for employees with "day-to-day responsibilities" for mitigating risk within the organization.[266] But there are a variety of examples where top management within complex organizations have attempted to provide resources that were ultimately ineffective.

For example, Wells Fargo, in an attempt to grow its company and, presumably, add value to shareholders, initiated a program that included "product sales goals for retail bankers."[267] This was likely a relatively innocuous policy when adopted, but it resulted in its employees secretly opening accounts on behalf of its customers, so that they could "meet sales targets and receive bonuses."[268] Wells Fargo attempted to set a tone at the top that was not inherently problematic, but it had devastating results and spurred illegal conduct. And Wells Fargo's attempt to provide resources to lower level employees failed. As explained above, Wells Fargo set up an ethics hotline in an effort to empower employees to report potential misconduct.[269] Numerous individuals, however, have come forward to claim that after making a report via the ethics hotline, they were fired.[270] The board followed a common industry practice meant to help bridge the gap between high-level officials within the firm and low-level employees when it adopted an ethics hotline,[271] but it did so in a manner that

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265. See, e.g., Scott Killingsworth, Modeling the Message: Communicating Compliance Through Organizational Values and Culture, 25 Geo. J. Legal Ethics 961, 974–79 (2012).

266. See Deloitte, World-Class Programs, supra note 263, at 3.

267. Deon Roberts, Wells Fargo Unveils New Pay Plan for Branch Bankers in Wake of Scandal, Charlotte Observer (Jan. 10, 2017), http://www.charlotteobserver.com/news/business/banking/bank-watch-blog/article125692619.html (on file with the *Columbia Law Review*).

268. Deon Roberts & Rick Rothacker, Wells Fargo Fined $185M for 'Widespread Illegal Practices' that Hurt Customers, Charlotte Observer (Sept. 7, 2016), http://www.charlotteobserver.com/news/business/banking/bank-watch-blog/article100499067.html (on file with the *Columbia Law Review*).

269. See, e.g., Stacy Cowley, Wells Fargo Whistle-Blower Wins $5.4 Million and His Job Back, N.Y. Times (Apr. 3, 2017), https://www.nytimes.com/2017/04/03/business/04-wells-fargo-whistleblower-fired-osha.html (on file with the *Columbia Law Review*).

270. Id.

271. See, e.g., Allan Dinkoff, Corporate Compliance Programs After Dodd–Frank 14 (2011), https://www.weil.com/~/media/files/pdfs/corporate_compliance_post_dodd-frank_aelc_

ultimately was ineffective, because there were not adequate processes in place to ensure confidentiality and upward reporting of the information.

A fair response may be that Wells Fargo did not actually have a positive tone at the top. Indeed, maybe Wells Fargo had implemented a plan meant to pay lip service to ethics and compliance. The problem, however, is that Wells Fargo's plan appeared good enough that the federal government failed to act when warned about potential misconduct years prior to the ultimate discovery of misconduct at Wells Fargo.[272] If government regulators have difficulty understanding the depth and scope of corporate misconduct when receiving a direct report, how much more difficult would it be for a board member of a parent company with hundreds of subsidiaries worldwide? There is much that is good about establishing a strong tone at the top, but unique challenges exist for a complex organization when attempting to utilize tone at the top as a primary component of its compliance strategy.

Similarly, creating a consistent corporate culture[273] within a complex organization is a difficult endeavor. It may be relatively easy to say "[d]on't be evil," a phrase attributable to Google's former code of conduct,[274] but what constitutes "evil" may look quite different in Omaha, Nebraska than in Venezuela. Attempting to create continuity within one, cohesive corporate entity is very different than attempting to establish one across diffuse departments and countries. That is not to say it cannot be accomplished; it is to say it may be particularly challenging for complex corporations. For these more sophisticated organizations, it may be that more specificity is needed when discussing the components of a high-level compliance program.

As a final example, it is undisputed that organizations of all sizes must engage in risk assessments. As noted by Deloitte:

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oct.pdf [https://perma.cc/E4KF-BMRV] ("Many policies . . . limited . . . availability of the anonymous, confidential employee hotline and other internal complaint procedures to accounting and auditing matters within the audit committee's purview. Companies should . . . broaden[] . . . policies to cover all illegal and inappropriate behavior . . . encouraging . . . use . . . for any matter (particularly where employees are seeking anonymity and confidentiality).").

272. See Ann Marsh, Unprotected: How the Feds Failed Two Wells Fargo Whistleblowers, Am. Banker (Aug. 14, 2017), https://www.americanbanker.com/news/unprotected-how-the-feds-failed-two-wells-fargo-whistleblowers [https://perma.cc/KF38-ZTDW] (describing the mishandling of two whistleblower cases where the Occupational Safety and Health Administration failed to thoroughly investigate whistleblower claims and adequately protect them from retaliation).

273. Deloitte, World-Class Programs, supra note 263, at 3 ("A culture of integrity is central to any effective ethics and compliance program. Initiatives that do not clearly contribute to a culture of ethical and compliant behavior may be viewed as perfunctory functions instilling controls that are impediments to driving the 'value change' of the enterprise.").

274. Justin Wm. Moyer, Alphabet, Now Google's Overlord, Ditches 'Don't Be Evil' for 'Do the Right Thing,' Wash. Post (Oct. 5, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/10/05/alphabet-now-googles-overlord-ditches-dont-be-evil-in-favor-of-do-the-right-thing/ (on file with the *Columbia Law Review*).

> Ethics and compliance risk assessments are not just about process—they are also about understanding the risks that an organization faces. The risk assessment focuses the board and senior management on those risks that are most significant within the organization, and provides the basis for determining the actions necessary to avoid, mitigate, or remediate those risks.[275]

There cannot be an effective compliance program without an assessment of what sorts of activities one is going to focus upon.

Yet even in the area of risk assessment, large, international organizations are uniquely challenged due to the sheer breadth and scope of their potential risk. When faced with legal and regulatory requirements, as well as industry standards and practices across multiple jurisdictions, the compliance department must make decisions about what areas they are likely to focus on. General Motors was focused on FCPA compliance while significant risks were arising within the area of product safety.[276] FCPA violations are known for resulting in significant monetary damages and sanctions, sometimes from regulators worldwide, so today's firms are quick to develop strong anti-bribery and corruption programs. But for a company like General Motors, even if product safety violations result in potential fines that are substantially less than those found in the FCPA context, product safety may actually be the largest area of risk, although perhaps not monetary risk, for an automobile manufacturer.[277] Thus, ensuring its product safety compliance processes were effective arguably should have been at the top of the priority list for its compliance department and its personnel worldwide.

In short, while the general understandings throughout the compliance industry about the components necessary for a high-level compliance program often make sense, incorporating them into complex organizations can be associated with many unique limitations. As such, complex organizations must go beyond these generalized components and adopt formalized processes targeted to improve their compliance programs by merging policing and structural components into one complex compliance strategy.[278]

3. *Will the Move to Global Compliance Programs Combat Information Silos?*— This Article notes that many firms are adopting global compliance programs. As this process is ongoing, will firms be able to, over time, perfect the structural components of their compliance programs in a manner that will combat information silos?

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275. Deloitte, World-Class Programs, supra note 263, at 3.

276. See Veronica Root Martinez, The Outsized Influence of the FCPA, 2019 Ill. L. Rev. 1205, 1214–16 [hereinafter Martinez, The Outsized Influence].

277. Id.

278. See Miriam H. Baer, Confronting the Two Faces of Corporate Fraud, 66 Fla. L. Rev. 87, 93–94 (2014) (explaining that the "policing approach reduces corporate crime by empowering internal policemen to identify, punish, and deter actual and would-be transgressors" and contrasting with an "architectural approach [that] encourages corporate personnel to seek out and mitigate problematic situations as opposed to problematic people").

For example, Goldman Sachs has a "Global Compliance division" that is "dedicated to protecting the reputation of the firm and managing risk across all business areas."[279] Their global compliance program "is organized broadly into divisional compliance groups, which are embedded into the areas they support, and centralized compliance groups, which survey risks and manage regulatory affairs, services and resources related to all businesses and employees of the firm globally."[280] Structures of this type are meant to take on the benefits of centralization and decentralization in an effort to create effective compliance programs.

The problem, however, is that it would be misguided to think of structure and process as happening in a vacuum.[281] They are interconnected components necessary for the creation of an effective compliance program. While this Article does recount the limits of structural reforms, it does so in an effort to argue for the adoption of more robust process-oriented reforms to augment structures and create truly complex compliance programs.

4. *Are These Scandals Just Indicative of a Failure to Comply with the Compliance Program?* — As noted above, widespread and significant compliance failures have a variety of causes. Information silos contribute to their existence, but there are others. One might wonder whether these scandals are representative of failures by compliance programs or, instead, of a failure of employees within the organization to adhere to the compliance program. In each of these scandals, one can identify an employee or group of employees whose actions were questionable and hindered the organization's ability to stop the misconduct.

The reality, however, is that there are common understandings of what is and is not an effective compliance program. Those measures may be wrong, and legal scholars should continue to ask those questions, but the understandings remain. And whether a firm has or does not have an effective compliance program is assessed in an objective manner. If a firm is found to have an effective compliance program, their potential sanctions decrease dramatically.

For example, in 2018, following Nassar's guilty plea, the NCAA "cleared Michigan State of any rules violations" related to Nassar's abuse, suggesting it found no flaw within the Michigan State compliance program.[282] Additionally, a November 2017 external review of Michigan State's "Policy on Relationship Violence and Sexual Misconduct" determined

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279. Global Compliance, Goldman Sachs, http://www.goldmansachs.com/careers/divisions/global-compliance/ [https://perma.cc/9QJA-EZDJ] (last visited Oct. 10, 2019).

280. Id.

281. Hernes, supra note 34, at 69.

282. Will Hobson, NCAA Clears Michigan State of Rules Violations in Larry Nassar Case, Wash. Post (Aug. 30, 2018), https://www.washingtonpost.com/news/sports/wp/2018/08/30/ncaa-clears-michigan-state-of-rules-violations-in-larry-nassar-case/ (on file with the *Columbia Law Review*).

that Michigan State's "policies and procedures comply with current legal requirements and agency guidance, and in several places, reflect leading-edge policy concepts that other institutions might consider replicating in their own policies."[283] Thus, as demonstrated by Michigan State University's Title IX scandal, even something considered a "flawless" compliance program is often an environment in which misconduct occurs over long periods of time.[284] Unfortunately, misconduct can occur even within the ambit of an effective compliance program. As a result, it is crucial that compliance failures are probed beyond the point of identification of rogue actors. Firms must engage in a complete assessment of the cause or causes of the compliance failure and the remediation efforts needed to address the full breadth of the breakdown.

5. *What if There Is Incomplete or Inaccurate Data?* — For a process-based reform like aggregation to work, a firm would need to have a system in place for gathering relevant data. If either the data is poor (i.e., poorly classified or filed) or if important information is missing (i.e., unreported) then an aggregation principle will not add value to the firm's compliance efforts.

Yet, for many of the most significant recent compliance failures, data—in many instances a great deal of data—did exist. This information was identified after the misconduct had become widespread. The goal of this Article's proposals is to aid firms in catching potential misconduct at an early stage, which was a possibility for General Motors, Wells Fargo, Michigan State, Uber, and the Catholic Church. If the complaints had been synthesized and assessed in a more systematic way, the outcomes at each of these organizations could have looked quite different. The knowledge that a firm may sometimes have incomplete data is not an excuse for failing to act on the information of which it is in fact aware.

6. *Are the Costs Associated with Increased Process Worth It?* — One of the burgeoning questions in the compliance literature is focused around the need to develop measures for determining the effectiveness of compliance programs.[285] For scholars to assess and analyze the true costs associated with compliance, more measurement of compliance efforts would need to take place. The challenge is that anecdotal reports suggest that many firms do not break out the costs of the different components of their compliance programs in a meaningful way.[286] Because data on the costs of specific

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283. Husch Blackwell, Report 1 of 2: Review of Michigan State University's Policy on Relationship Violence and Sexual Misconduct 4 (2017), http://titleix.msu.edu/information-reports/msu_report_2017_external.pdf [https://perma.cc/SCX3-SECF].

284. See Hobson, supra note 282.

285. See, e.g., ComplianceNet Inaugural Conference: Measuring Compliance in the 21st Century, ComplianceNet (June 1–2, 2018), https://docs.wixstatic.com/ugd/20ab40_3c5b720ef0574bc9ad97f0629b1ee264.pdf [https://perma.cc/CEJ5-3GWY] (showing a schedule for a 2018 conference dedicated to discussing various compliance measurements and enforcements).

286. See Chen & Soltes, supra note 261, at 119 ("At its core, the idea is as simple as it is crucial: Firms cannot design effective compliance programs without effective measurement tools.").

compliance efforts are extremely challenging to obtain at this time, it is not possible to conduct a robust cost–benefit analysis testing the suggestions in this Article.

That said, some costs of misconduct are relatively easy to identify. There are costs associated with conducting internal investigations, costs associated with entering negotiated settlement agreements, costs associated with third-party litigation, and finally there are potential reputational costs associated when a firm allegedly engages in misconduct.[287] When a firm compares the many costs associated with a widespread and significant lapse in their compliance efforts, it may often be prudent to dedicate resources in an ex ante effort to prevent the ex post costs associated with non-compliance.

7. *Are there Compliance Failures that this Article's Proposal Fails to Address?* — A concern one may have with this Article's argument and proposals is that they appear to address only one aspect of compliance failures, which may mean that a firm could employ the suggestions presented and still find itself in a situation where it is dealing with a significant compliance failure. That is a fair critique.

This Article is not meant to address the root cause of every compliance failure within firms. Indeed, this Article is purposefully focused on a very specific type of compliance failure—when a firm has information about a compliance failure but fails to act on that information in a prompt manner. There are, however, other related issues that can lead to compliance failures. For example, this Article focuses on silos within firms, but silos can occur at the regulatory and enforcement level as well.[288] Additionally, this Article focuses on internal activities within firms, but many incentives for firms to engage in robust compliance efforts come from external sources.[289] The reality is that because the field of compliance within legal scholarship is a burgeoning one, many important questions remain unanswered at this time. This Article is just one of many aimed at

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287. See, e.g., Press Release, Walmart, Walmart Reaches Agreements with the DOJ and the SEC to Resolve Their FCPA Investigations (June 20, 2019), https://corporate.walmart.com/newsroom/2019/06/20/walmart-reaches-agreements-with-the-doj-and-the-sec-to-resolve-their-fcpa-investigations [https://perma.cc/433Z-RWNA] (noting that Walmart entered into a settlement with the government for $282.7 million and also "spent more than $900 million on FCPA inquiries and investigations, its Global Compliance Program and organizational enhancements"); Bernie Pazanowski, Walmart Avoids Suit over Alleged Mexican Bribery Scheme, Bloomberg Law (Dec. 26, 2018), https://news.bloomberglaw.com/us-law-week/walmart-avoids-suit-over-alleged-mexican-bribery-scheme (on file with the *Columbia Law Review*); Kim Souza, Walmart Agrees to a $160 Million Settlement of a Class-Action Lawsuit, Talk Business (Oct. 26, 2018), https://talkbusiness.net/2018/10/walmart-agrees-to-a-160-million-settlement-of-a-class-action-lawsuit/ [https://perma.cc/H5GE-T6PN].

288. See Root, Coordinating Compliance Incentives, supra note 90, at 1028–31 (noting challenges associated with intra- and interagency coordination).

289. Id. at 1010–17.

addressing the multifaceted challenges associated with firms' efforts to create and implement effective ethics and compliance programs.[290]

CONCLUSION

Whether it is General Motors, Wells Fargo, the Catholic Church, or Uber, complex organizations are in a constant battle to achieve better and more robust compliance within their ranks. But the effort to ensure compliance with legal and regulatory mandates, industry standards and practices, and their own internal policies and procedures is a difficult one in need of scholarship that challenges common understandings of compliance within firms.

This Article makes three distinct contributions to legal scholarship. First, it explains that complex organizations encounter more difficulty in creating compliance programs because they are responsible for developing programs that will successfully span diffuse departments and corporate entities. Second, it demonstrates that these complex organizations are likely to suffer from information silos that make it more difficult for firms to detect and investigate potential compliance failures. Third, it applies findings from organizational behavior and corporate governance regarding the power of process reforms to the efforts of complex organizations to adopt global compliance programs. In doing so, it demonstrates how focusing on process reforms will allow complex organizations to adopt more integrated and complex compliance programs that are better equipped to address corporate misconduct.

Complex organizations should find ways to incorporate process within their compliance efforts. They must identify mechanisms for implementing complex compliance reforms that will allow them to integrate structure, composition, and process within their compliance programs. When this is achieved, complex organizations will be better equipped to address misconduct within their ranks.

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290. The Author has several articles addressing various compliance issues. See, e.g., Root, The Compliance Process, supra note 33; Root, Coordinating Compliance Incentives, supra note 90; Veronica Root Martinez, More Meaningful Ethics, 1/8/2020 U. Chi. L. Rev. Online 1; Martinez, The Outsized Influence, supra note 276. There is, of course, additional scholarship in the compliance literature, much of which is cited above, but there are other recent pieces of scholarship. See, e.g., John Armour, Brandon Garrett, Jeffrey Gordon & Geeyoung Min, Board Compliance, 104 Minn. L. Rev. 1191 (2020); Stavros Gadinis & Amelia Miazad, The Hidden Power of Compliance, 103 Minn. L. Rev. 2135 (2019).