FOLLOW-UP ENFORCEMENT

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ABSTRACT

Firms sometimes break the law. When they do, a host of government agencies have power to bring enforcement actions against them, which serve to punish past wrongs, compensate victims, disgorge unlawful gains, deter others, and prevent recidivism. Each of these purposes but one—preventing recidivism—is either met or not once the case reaches settlement. Whether recidivism will occur, however, remains uncertain at the time a case is settled. In light of that uncertainty, this Article takes a critical look at how enforcers currently address recidivism prevention—what it dubs the "clawback" approach—under which defendant firms receive penalty credit today in exchange for remedial efforts that, it is hoped, will prevent recidivism tomorrow. This Article examines the incentives and constraints of the two parties—the enforcer and the firm—and concludes that an alternative "follow-up" approach that credits only firms' demonstrated results would be more effective and efficient at recidivism prevention.

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INTRODUCTION

Firms sometimes break the law.[1] When they do, a host of government agencies[2] have power to bring enforcement actions against them, which serve to punish past wrongs, compensate victims, disgorge

1. The relative merits, and appropriate roles, for civil and criminal enforcement against corporations is well covered in the literature. *See generally*, *e.g.*, Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (proposing alternative rules to strict vicarious criminal liability so as to mitigate potentially perverse effects of corporate criminal liability); John C. Coffee, Jr., *"No Soul To Damn, No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981) (proposing three approaches to corporate punishment); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996) (concluding that corporate criminal liability produces overdeterrence); Assaf Hamdani & Alon Klement, *Corporate Crime and Deterrence*, 61 STAN. L. REV. 271 (2008) (calling for greater reliance on purely financial corporate penalties); Wilson Meeks, Note, *Corporate and White-Collar Crime Enforcement: Should Regulation and Rehabilitation Spell an End to Corporate Criminal Liability?*, 40 COLUM. J.L. & SOC. PROBS. 77 (2006) (proposing that enforcement against corporate wrongdoing should be entirely civil). This Article, however, mostly does not differentiate between civil and criminal violations. The distinctions may matter, though, as the problems discussed throughout this Article most likely manifest when the enforcer is a generalist agency (a criminal prosecutor, say) versus when it is an expert regulator (an environmental-protection or banking agency, perhaps).

2. These agencies include criminal prosecutors (the U.S. Department of Justice ("DOJ") and state attorneys general), multi-industry regulators (the U.S. Securities and Exchange Commission ("SEC") and state workplace-safety commissions), and single-industry regulators (the Federal Reserve and state insurance commissioners). This Article looks mostly to the DOJ and SEC as stand-ins for their sister enforcers.

unlawful gains, deter others, and prevent recidivism.[3] Each of these purposes but one—preventing recidivism—is either met or not once the case reaches settlement.[4] Whether recidivism will occur, however, remains uncertain at the time a case is settled.[5] In light of that uncertainty, this Article takes a critical look at how enforcers currently address recidivism prevention—what it dubs the "clawback" approach—under which defendant firms receive reduced penalties today in exchange for remedial efforts that, it is hoped, will prevent recidivism tomorrow.[6] This Article examines the incentives and

3. *See* U.S. Dep't of Just., Justice Manual § 9-28.200(B) (2020) [hereinafter DOJ Manual], https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/K2ZM-YMU5] (instructing federal prosecutors to pursue the "general purposes of the criminal law" in enforcing against corporations, including "appropriate punishment for the defendant, deterrence of further criminal conduct by the defendant, deterrence of criminal conduct by others, protection of the public from dangerous and fraudulent conduct, rehabilitation, and restitution for victims").

4. For example, an enforcer might impose a penalty for past wrongdoing and require restitution to victims and disgorgement of illegal profits. By publicly announcing this sanction, it signals to other firms that violations will be punished and result in a financial loss, thereby deterring them from breaking the law. Some of these purposes can be fully achieved. For example, a victim who was defrauded of an exact sum may be made whole if a solvent firm is ordered to repay the money with interest. Deterrence, on the other hand, is generally incomplete: it is doubtful any enforcement action will persuade all firms against committing violations. Whether an enforcement action *does* deter future violations, either on its own or in aggregate with other actions, will vary. But by announcing an enforcement action and its sanctions, the enforcer will have used it for what it can contribute toward that purpose. *See* U.S. Sec. & Exch. Comm'n, Enforcement Manual § 6.3 (2017) [hereinafter SEC Manual], https://www.sec.gov/divisions/enforce/enforcementmanual.pdf [https://perma.cc/SYK9-BRMU] (directing SEC enforcement staff to include language in settlements touting the benefits of cooperation and to include similar language in press releases).

5. For simplicity, this Article uses the term "settlement" to refer to any negotiated resolution of an enforcement action. These resolutions result from an agreement between a corporate defendant and an enforcement agency. They sometimes require judicial approval, such as in criminal proceedings or civil cases filed in court (as opposed to those brought administratively). *See*, *e.g.*, FED. R. CRIM. P. 11(c)(3) (providing for judicial approval or disapproval of plea agreements); SEC v. Randolph, 736 F.2d 525, 529 (9th Cir. 1984) (recognizing that courts must satisfy themselves that proposed consent decrees are in the public interest). Enforcement settlements may be embodied in settlement and plea agreements, consent decrees, deferred- and nonprosecution agreements ("DPAs" and "NPAs"), corporate-integrity agreements, or documents with other titles. For examples of those documents, see *infra* notes 9 (nonprosecution agreement), 28 (settlement and corporate-integrity agreements), and 88 (deferred-prosecution agreement).

6. Since the adoption of the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010, the term "clawback" has been commonly used in the executive-compensation context. *See, e.g.*, *infra* notes 33 and 50. This Article, however, refers to its broader meaning of giving a benefit and then forcefully taking it back. *See Clawback*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "clawback" as "[a] statutory or contractual provision that for specified reasons reverses a distribution or payment," a definition added in 1965); *Clawback*, CAMBRIDGE BUSINESS

constraints of the two parties—the enforcer and the firm—and concludes that an alternative "follow-up" approach rewarding only firms' demonstrated results would be more effective and efficient at recidivism prevention.

Current practice rewards defendants with lighter sanctions in exchange for undertaking remedial efforts.[7] These efforts, in turn, are expected to address the root causes of corporate wrongdoing and thus prevent recidivism.[8] For example, a firm that has been caught paying bribes to foreign customs officers might identify inadequate employee training as a root cause for that misconduct.[9] As remediation, it would institute new anticorruption training.[10] The firm might also update its accounting systems to make it harder to get money for bribes or to hide illicit payments.[11] Because these efforts are the types of steps that the enforcer believes will reduce the likelihood of future violations, the enforcer will allow the firm to pay a lighter penalty than if there had

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ENGLISH DICTIONARY (2011) (defining "clawback" as "a situation in which a government or company takes back money that it has already paid"). This Article focuses on enforcer-driven recidivism prevention. It is not the only option for government-based response to corporate recidivism. Federal courts sentencing corporate defendants, for example, may order remedial undertakings. *See* 18 U.S.C. § 3551(c)(1) (2018) (authorizing probation as a sentence for an organization). Compared to sentencing courts, however, enforcers have less affirmative authority to require remediation absent the firm's agreement. *But cf.* 12 U.S.C. § 1818(b) (2018) (permitting bank supervisors to order that banks cease and desist unsafe and unsound practices).

7. Common remedial efforts include disciplining employees who engage in misconduct and introducing new compliance training, internal controls, due diligence, ethics policies, and monitoring tools. *See* PRINCIPLES OF THE L.: COMPLIANCE, RISK MANAGEMENT, AND ENFORCEMENT §§ 5.07–5.17 (AM. L. INST., Tentative Draft No. 1, 2019) (listing topics on "compliance risk assessment" and "employees, agents, and counterparties").

8. *See* CRIM. DIV., U.S. DEP'T OF JUST., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 17 (2020) [hereinafter EVALUATION OF CORPORATE COMPLIANCE PROGRAMS], https://www.justice.gov/criminal-fraud/page/file/937501/download [https://perma.cc/YMH4-XHX5] ("[A] hallmark of a compliance program that is working effectively in practice is the extent to which a company is able to conduct a thoughtful root cause analysis of misconduct and timely and appropriately remediate to address the root causes.").

9. *See* Non-Prosecution Agreement Between the SEC and the Ralph Lauren Corp., U.S. Sec. & Exch. Comm'n, at Ex. A ¶ 12 (Apr. 22, 2013), https://www.sec.gov/news/press/2013/2013-65-npa.pdf [https://perma.cc/52CT-JTHX] (reciting Ralph Lauren's remedial efforts in connection with a foreign-bribery investigation as "adoption of: (1) an amended anticorruption policy and translation of the policy into eight languages, (2) enhanced due diligence procedures for third parties, (3) an enhanced commissions policy, (4) an amended gift policy, and (5) in-person anticorruption training for certain employees").

10. *Id.*

11. *See* Stryker Corp., Exchange Act Release No. 70,751, 2013 WL 5757376, at *6 (Oct. 24, 2013) (Cease-and-Desist Order) (recognizing Stryker Corporation's new anticorruption training and "enhanced financial controls and governance" as among its remedial efforts in a foreign-bribery case).

been no remediation at all.[12] This credit is not binary, however. The more substantial the remediation—the more the defendant does to reduce the risk of recidivism—the greater the credit.[13] Remediation, then, is something that the public will pay for, in the form of forgone penalty revenue, because it wants to reduce future violations of the law, and it is something that a defendant does to reduce its penalty for past wrongdoing.[14]

This approach has pragmatic appeal: trade a corporate sanction for corporate reform. But three interrelated problems frustrate its aims.

First, by giving up-front credit for remediation, enforcers risk paying for recidivism prevention—by imposing lighter sanctions—without achieving a proportionate reduction in future violations.[15] The firm, for its part, locks in a deal at settlement. Regardless whether the remedial efforts it undertakes work (specifically, whether it avoids recidivating), the company receives the full benefit.[16] It receives credit,

12. *See* CRIM. DIV. OF THE U.S. DEP'T OF JUST. & ENF'T DIV. OF THE U.S. SEC. & EXCH. COMM'N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 60 (2d ed. 2012) ("Compliance policies cannot work unless effectively communicated throughout a company. Accordingly, DOJ and SEC will evaluate whether a company has taken steps to ensure that relevant policies and procedures have been communicated throughout the organization, including through periodic training and certification for all directors, officers, [and] relevant employees . . . ." (citing U.S. SENT'G GUIDELINES MANUAL § 8B2.1(b)(4) (U.S. SENT'G COMM'N 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf [https://perma.cc/7UC9-LCPD])).

13. Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 NYU J.L. & BUS. 965, 1000 (2018) (noting that "[c]ompliance effectiveness is not a binary condition" and that the "federal sentencing guidelines recognize that even effective programs can fail").

14. *See* Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 703 (2009) ("While many corporations surely enter into monitorships with a sincere desire to fix problems and regain their ethical footing, their immediate goal is to mitigate: to resolve the matter without a criminal indictment and at the least possible cost."); *cf.* Peter J. Henning, *Corporate Criminal Liability and the Potential for Rehabilitation*, 46 AM. CRIM. L. REV. 1417, 1431 (2009) (recognizing the risk that "civil enforcement will be viewed as only a price to be paid").

15. Because it represents forgone public revenue, a discount on a sanction is equivalent to the public paying defendants for remediation, which might or might not be adequately rendered. Economist Gary Becker observes that "[n]ot only do [nonmonetary] punishments fail to compensate, but they also require 'victims' to spend additional resources in carrying out the punishment." Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 194 (1968). Sometimes, it turns out, monetary punishments do too.

16. A remark in an interview by Professors Cristie Ford and David Hess captures the problem at this Article's heart: "Maybe it turned out okay, maybe it didn't, maybe nobody knows, because there's nobody out there evaluating these things. And unless a company gets caught

then, not for preventing recidivism but for efforts that the enforcer believes will reduce the *risk* of recidivism.[17]

Under standard terms of corporate settlements, recidivists could face a clawback of settlement benefits given for prior misconduct.[18] And they always face the threat of new enforcement actions for recidivist violations.[19] Those threats could theoretically motivate firms to ensure that their remedial efforts work so that they do not suffer consequences from clawbacks or new enforcement for fresh violations. But these postsettlement monitoring and accountability approaches do not adequately address the misalignment between when firms are paid for recidivism prevention (now) and when they must perform (later). Postsettlement monitoring will often fail to detect new violations, and enforcers will generally prioritize working new cases over policing old settlements.[20]

Beyond the difficulty of detecting recidivism and an enforcer's preference for new cases, clawing back settlement benefits or bringing

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doing something improper again nobody may find out whether the deferred prosecution agreement worked or didn't work." Ford & Hess, *supra* note 14, at 725.

17. This practice yields uncertain compliance effects because, as Professor Kimberly Krawiec explains, "the indicia of an effective compliance system are easily mimicked and true effectiveness is difficult for courts and regulators to determine." Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L. Q. 487, 491–92 (2003); *see also* Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 936–37 (2017) ("We are far enough along in the law of compliance that all major firms do something in the name of compliance, often with checklists at hand of 'to do' items. Successful firms are usually adept at impression management, and managers and employees often believe their own myths." (footnote omitted)).

18. For example, if a firm that received a nonprosecution agreement breached the agreement, it would be exposed to charges for the conduct underlying the agreement as well as to potential prosecution for conduct leading to the breach. *See*, *e.g.*, Letter from Sandra Moser, Acting Chief, Crim. Div., U.S. Dep't of Just., to F. Joseph Warin, Counsel for Petróleo Brasileiro S.A. – Petrobras (Sept. 26, 2018), https://www.justice.gov/opa/press-release/file/1096706/download [https://perma.cc/JZR4-JFUM] (designating the commission of a U.S. federal felony or the failure to implement a specified compliance program as material breaches).

19. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 166 (2014) (concluding after a review of corporate-enforcement cases that "[i]t is not at all clear that prosecutors take corporate recidivism seriously"). The advocacy group Public Citizen conducted an analysis of corporate criminal-enforcement data from the Duke University/University of Virginia School of Law Corporate Prosecution Registry. RICK CLAYPOOL, PUB. CITIZEN, SOFT ON CORPORATE CRIME 2 (Alan Zibel & Robert Weissman eds., 2019). The analysis found that of the companies that entered into a DPA or NPA with the DOJ, thirty-eight faced a subsequent criminal enforcement action. *Id.* at 5. Seven of those companies faced consequences for breaching their DPA/NPA (extensions of the supervision period, payment of a financial penalty, or both). *Id.* at 5, 33–34. And DPA and NPAs with recidivists accounted for 15 percent of the 535 such agreements entered into by the DOJ since 1992. *Id.* at 5.

20. *See infra* note 46 and accompanying text.

a new action runs into constraints on enforcer behavior. These constraints include contractual and due process limits on clawbacks and the need to allocate finite enforcement resources between cases. To claw back benefits, enforcers face real hurdles. They will typically need to complete an internal agency approval process to proceed.[21] Their discretion to act is further constrained by due process obligations and general contract principles.[22] More, settlements generally do not allow for incremental clawbacks. The most significant benefit in most corporate settlements is some form of nonprosecution or lesser charges.[23] The clawback authority afforded by many settlements is to revoke that benefit and proceed to litigation,[24] a severe remedy not usually imposed absent egregious recidivist violations. Enforcers will be reluctant to revoke settlement benefits in part because doing so could impose collateral consequences on constituencies they deem to be "innocent," including employees, shareholders, and commercial counterparties.[25] Indeed, avoiding those collateral consequences is often one of the enforcer's own motivations for settling with an offender firm. And although extending an agreement's monitoring term due to continued compliance failures offers an intermediate

21. *See* SEC Manual, *supra* note 4, §§ 6.2.2–6.2.3 (noting that SEC staff must obtain commission approval before bringing an enforcement action against firms for breach of nonprosecution and deferred-prosecution agreements).

22. *See* United States v. Cantu, 185 F.3d 298, 302 (5th Cir. 1999) ("Due process concerns preclude the government from unilaterally nullifying [nonprosecution] agreements where, as here, the government believes the defendant is in breach."); United States v. Stolt-Nielsen S.A., 524 F. Supp. 2d 586, 606 (E.D. Pa. 2007) ("Non-prosecution agreements, like any contract, require that each party fulfill its duty of good faith and fair dealing in its performance.").

23. *See supra* note 18 and accompanying text.

24. *But compare supra* note 18 (describing the severe consequence for breach as the loss of the nonprosecution benefit), *with infra* note 190 (describing relatively modest daily financial penalties for noncompliance).

25. *See supra* note 19 (discussing the relative lack of consequences for firms that breach their settlement agreements). Although settlement agreements typically commit broad discretion to enforcers in making clawback decisions, that discretion is constrained by the government's due process obligations, as well as by a contractual duty of good faith and fair dealing. *See supra* note 22 and accompanying text (discussing due process and contractual constraints on clawbacks). Enforcers do have the ability to express displeasure with a firm's performance under a settlement agreement and to demand that it address those concerns. Because those inquiries impose investigative costs on firms in the form of legal fees, executive time and angst, and the like, they would be akin to corporate process-as-punishment. *Cf.* MALCOM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 31 (1979) ("[P]retrial costs do not distinguish between innocent and guilty; they are borne by all, by those whose casses are nolled or dismissed as well as by those who are pronounced guilty.").

consequence between doing nothing and revoking the agreement, that step ultimately defers the hard decision.[26]

Combined, enforcers' motivations and constraints mean that the threats of clawback and new actions have limited credibility.[27] There is thus the risk that after making a deal, firms will shirk or fail at reform and then recidivate without consequence.

Second, the remedial efforts credited under current practice either are complete by settlement or are to be completed postsettlement. Because enforcers are weakly motivated to monitor old cases, they instead exert influence at settlement over how remediation will be done. They do so because it is their last realistic chance to promote and influence recidivism prevention at that firm. At settlement, however, there is considerable uncertainty around what must be done to effect lasting reform, and in any sufficiently complex reform process, adjustments will likely be needed along the way. The clawback approach creates rigidity in corporate behavior that can undermine the reform process by limiting a firm's ability to make adjustments. Because they lose practical leverage over firms after settlement, enforcers might require substantial remedial efforts that seem worthwhile but are, in fact, superficial or excessive.

And third, the first two problems are complicated by failures to establish objective outcomes for reform. Standard settlements require prospective general adherence to the law and specific adherence to mechanical terms (for example, hire a chief compliance officer who reports directly to the audit committee),[28] instead of more testable and meaningful mandates like "within X years, on an annual basis the defendant will have no instances of violation Y." When credit is not

26. *See, e.g.*, Jeffrey May, *U.S. Moves To Modify, Extend Antitrust Consent Decree with Live Nation/Ticketmaster*, WOLTERS KLUWER (Dec. 19, 2019), https://lrus.wolterskluwer.com/news/antitrust-law-daily/u-s-moves-to-modify-extend-antitrust-consent-decree-with-live-nation-ticketmaster/101841 [https://perma.cc/G3W9-LP43] (reporting on the DOJ's desire to extend a consent decree due to violations of the decree).

27. *See* GARRETT, *supra* note 19, at 278 ("DOJ prosecution guidelines do not require follow-up evaluation, and as a result, neither do most deferred prosecution and non-prosecution agreements.").

28. U.S. DEP'T HEALTH & HUMAN SERVS.: OFF. INSPECTOR GEN., CORPORATE INTEGRITY AGREEMENT BETWEEN THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES AND PFIZER, INC. 4 (2009) [hereinafter Pfizer CIA], https://oig.hhs.gov/fraud/cia/agreements/pfizer_inc.pdf [https://perma.cc/354Q-8G3A]; N.Y. ATT'Y GEN., SETTLEMENT AGREEMENT BETWEEN THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AND STATEN ISLAND UNIVERSITY HOSPITAL AND SIUH SYSTEMS, INC. 5 (2005), https://ag.ny.gov/sites/default/files/press-releases/archived/SIUH%20SETTLEMENT%20AGREEMENT.pdf [https://perma.cc/73LK-9KWV].

conditioned on measurable outcomes but is given up-front, there is little reason to rigorously test what effect the remedial efforts actually had.[29] Without those results to judge firms' performance, it cannot be known whether the public is paying for recidivism prevention or merely for "cosmetic" reforms.[30]

This Article proposes modest modifications to settlement practice to overcome the problems that inhere in the clawback approach. Under a follow-up approach, at settlement, enforcers and defendants would agree to reform objectives and set a maximum potential credit against a baseline penalty for achieving them. Management would itself decide how to achieve the reform objectives and lead the implementation. And, at a later agreed-upon point, the parties would assess what credit the defendant has earned based on whether it has fully or partially met its reform objectives. Importantly, this assessment would include actively looking for low-level recidivist violations that go undetected with today's passive monitoring style[31] but, in aggregate, reflect on the effectiveness of the firm's efforts.[32]

This approach would serve as a commitment mechanism for both parties. Firms would treat remediation more earnestly if they receive credit only for results. And enforcers would give greater focus to

29. GOV'T ACCOUNTABILITY OFF., GAO-10-110, DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS 20 (2009) ("DOJ cannot evaluate and demonstrate the extent to which DPAs and NPAs—in addition to other tools, such as prosecution—contribute to the department's efforts to combat corporate crime because it has no measures to assess their effectiveness."); s*ee also* Ford & Hess, *supra* note 14, at 725. At the close of his article on the use of corporate criminal prosecution to effect structural reforms, Professor Brandon Garrett observed that the DOJ did not appear to test whether reform-driven prosecutions "produced or will produce the sought-after compliance." Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 852, 934 (2007). Comparing these prosecutions to an earlier generation of civil-reform-driven litigation, he expressed hope that best practices would emerge. *Id.* Since then, however, it is unclear what progress the government has made on that front. *Id.*; *see also* Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 L. & CONTEMP. PROBS. 47, 50 (2020) ("[I]t is a pervasive problem that we lack metrics to evaluate whether compliance programs—the focus of so much litigation and regulation—actually reduce underlying violations.").

30. *See* Krawiec, *supra* note 17, at 542.

31. *See generally* Alexander Dyck, Adair Morse & Luigi Zingales, How Pervasive Is Corporate Fraud? (May 2020) (unpublished manuscript), http://faculty.haas.berkeley.edu/morse/research/papers/DyckMorseZingalesPervasive.pdf [https://perma.cc/J8L6-P7FB] (using analytical methods to estimate that only one in three frauds are detected in U.S. public companies and that ongoing fraud occurs in one out of seven of those firms).

32. Even if data on low-level violations were available in the context of the current clawback approach, enforcers would still face due process and resource constraints on effecting clawbacks or bringing new actions, two considerations that would demotivate them from responding to those violations. *See supra* notes 18 and 22 and accompanying text.

recidivism prevention because the settlement structure would force them to evaluate the results. In other words, this approach would shift the burden to defendants to earn remediation credit. If they fail, then at least the public will not have overpaid for recidivism prevention. In contrast, current practice places the burden on enforcers to detect recidivism and take affirmative steps to claw back benefits. This shift is subtle, but important. The threat of not giving benefits tends to be more credible than the threat of taking them away once given.[33]

A secondary effect of current practice is that enforcers miss opportunities to generate new public-good knowledge about what works for effecting corporate compliance. This lost opportunity means that firms undertaking remediation cannot build on data from prior remediations.[34] All else equal, losing out on this knowledge may result in less successful remediations and thus more recidivist violations. It also means that ex ante compliance programs cannot benefit from this knowledge and thus will be less successful than they otherwise could be, contributing indirectly to more violations. But, by structuring remediation credit around measurable objectives and evaluations of results against those objectives, the follow-up approach could force the development of new knowledge that could in turn drive more effective ex ante compliance and ex post remediation.

This Article unfolds in three parts. Part I explains why the clawback approach is not a credible enforcement mechanism for settlement agreements and why that lack of credibility can lead to settlements that are ineffective or inefficient for recidivism prevention.

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33. The executive-compensation context suggests how hard clawbacks can be. The Wells Fargo accounts scandal provides an example. As the scandal gained public and political attention, the bank announced that its CEO and head of community banking would together forfeit $60 million in unvested stock awards. Renae Merle, *Wells Fargo CEO To Forfeit $41 Million in Performance Pay After Sales Scandal*, WASH. POST (Sept. 27, 2016), https://wapo.st/2cTgMfq [https://perma.cc/9U4J-HT57]. Only after they left the company did its board act to claw back another $75 million in compensation the pair had already received. Stacy Cowley & Jennifer A. Kingson, *Wells Fargo To Claw Back $75 Million From 2 Former Executives*, N.Y. TIMES (Apr. 10, 2017), https://nyti.ms/2oimaRp [https://perma.cc/B5J3-LEB9]. In another example, in 2019, The Hertz Corporation sued former senior executives five years after the company announced that it would be required to restate its financial statements due to accounting errors. Complaint & Jury Demand at 1, Hertz Corp. v. Frissora, No. 19-CV-08927-ES (D.N.J. Mar. 25, 2019). In its restatement, the company cited "an inconsistent and sometimes inappropriate tone at the top" as a potential factor in its financial misstatements. The Hertz Corp., Annual Report (Form 10-K) 92 (July 16, 2015).

34. *See* Ford & Hess, *supra* note 14, at 736 (observing that "the absence of systematic methods for capturing the lessons of past monitorships is a major failing" and urging that enforcers use their leverage to capture data on best practices and indicators of performance).

Part II outlines an alternative: the follow-up approach, which also has the potential for generating data that can advance compliance practice. Part III closes with implications for how follow-up enforcement, the incentives it creates, and the data it produces can contribute to corporate governance, enforcement, and compliance. This Part also anticipates firm and enforcer objections and explains how entrepreneurial enforcement leaders might introduce follow-up enforcement despite those objections.

I. ENFORCEMENT SETTLEMENTS AND REFORM

During the enforcement process, enforcers and firms have divergent, but not always inconsistent, interests. In pursuing these interests, each has something it can trade when the stakes are sufficiently high. Firms facilitate public-protection functions of enforcers by self-reporting misconduct and cooperating with investigations, and, in return, enforcers reduce the sanctions firms face for past wrongdoing. These trades promise to leave each better off than if there had been an adversarial resolution. This Part focuses on one term of enforcement settlements—recidivism prevention or "reform"—and its potential to yield suboptimal results.[35] It examines enforcer and firm interests as they relate to reform, explains why misalignment in the timing of settlement process can lead to suboptimal terms, and identifies risks that misalignment poses to the prevention of corporate misconduct.

A. Enforcement Actions and Corporate Reform

1. *Trading Between Sanction and Reform.* Most enforcement actions involve relatively minor violations.[36] They are generally strict

35. This Article defines "recidivism" as a violation that follows an enforcement action and that shares a common cause, or has a nexus, with a prior violation. For example, a bank whose brokerage business is caught engaging in market manipulation would be said to recidivate if its brokers subsequently defraud customers. These violations deal with the same business and thus they likely stem from common causes, such as inadequate controls, compensation policies that incent misconduct, or inappropriate management tone. In contrast, if the bank's consumer-loan business is subsequently caught violating state fair-lending laws, then that violation would quite likely have distinct causes from the market manipulation in the brokerage business. The fair-lending violations thus might not be "recidivism," as this Article means it.

36. *See, e.g.*, Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 413–14 (2019) ("Although not all agencies release such figures, those that are available in agency reports reflect the [enforcement] pyramid's space allocation in that the quantity of less formal activity is significantly greater than more formal proceedings.").

liability offenses that do not on their own create a grave risk to public welfare (death or serious injury or significant financial loss).[37] These violations result in modest penalties, often capped by statute.[38] But some violations do gravely risk public welfare.[39] These violations, to be proven, typically require enforcers to show some form of scienter on the part of the firm,[40] and they are likely to result from systemic conditions, such as the tone set by top management.[41] For minor violations, the interests are too small, and the penalties too low, to justify the transaction costs of a bespoke settlement.[42] But in more serious cases—the subject of this Article—each party has substantial interests over which the other has some control, leading to negotiated

37. *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., FIELD OPERATIONS MANUAL 4-21 (2019), https://www.osha.gov/sites/default/files/enforcement/directives/CPL_02-00-163.pdf [https://perma.cc/8CBE-JSD6] (defining "Other-than-Serious" violations as occurring in "situations where the accident/incident or illness that would be most likely to result from a hazardous condition would probably not cause death or serious physical harm, but would have a direct and immediate relationship to the safety and health of employees").

38. *See, e.g.*, 86 Fed. Reg. 2264, 2972 (Jan. 14, 2021) (to be codified at 29 C.F.R. § 1903.15(d)(4)) (liming penalties imposed by the Occupational Safety and Health Administration on employers for "other-than-serious" workplace-safety violations to $13,653 per violation).

39. *Cf.* Occupational Safety and Health Act, 29 U.S.C. § 666(k) (2018) (defining a serious violation of workplace safety as one in which there is "a substantial probability that death or serious physical harm could result from a condition which exists . . . in [a] place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation").

40. V.S. Khanna, *Is The Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355, 366–69 (1999) (introducing varied mens rea that apply to corporate criminal conduct).

41. An example of such improper tone at the top would include a mining company whose leadership disregards workplace safety—and pushes local managers to do the same—leading to preventable injuries and deaths. *See* MINE SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION: FATAL UNDERGROUND MINE EXPLOSION 2 (2011), https://www.msha.gov/sites/default/files/Data_Reports/Fatals/Coal/Upper%20Big%20Branch/FTL10c0331.pdf [https://perma.cc/R39U-CPVD] (concluding that "the unlawful policies and practices implemented by PCC/Massey were the root cause" of the 2010 Upper Big Branch mine disaster in West Virginia that killed twenty-nine coal miners, and further concluding that "PCC/Massey promoted and enforced a workplace culture that valued production over safety, including practices calculated to allow it to conduct mining operations in violation of the law").

42. Professor Michael Klausner theorizes that standardized terms not only save contracting resources, but they also reduce the risk of error and create network effects among users of the terms. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 780–83 (1995). Standard enforcement terms would thus be expected to be desirable in areas of high-volume, but modest-stakes, enforcement, like routine workplace-safety and environmental cases.

settlements.[43] This Section reviews those interests as they affect the remediation provisions of settlement agreements.

Enforcers—as agencies and as individual agents—have public and reputational interests in settlement.[44] Within its resource and expertise constraints, an enforcer seeks to bring a meaningful number of cases that fit its public-protection priorities.[45] The enforcer also seeks to maintain its reputation with political institutions, industry, and the public.[46] Individual agents, like line enforcement attorneys, may share their agencies' institutional interests. They also have interests in their own professional reputations and advancement.[47]

Enforcers prefer finality. Closing a case frees up resources for new cases.[48] And obtaining "good" results—such as impressive penalties and credible-appearing remedial efforts—satisfies both public-protection and reputational interests.[49] Thus, even if it retains authority to claw back settlement benefits from a recidivist—possibly through a deferred- ("DPA") or nonprosecution agreement ("NPA")—the

43. *See* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1721 (2007) (explaining that "[b]oth the government and the firm have strong incentives to settle the case"). This Article's stylized discussion of negotiations does not imply that enforcers and defendants engage as equals. Indeed, it assumes that in most cases the enforcer has leverage to more or less impose its desired terms, subject to marginal concessions in favor of the defendant.

44. *See* Danné L. Johnson, *SEC Settlement: Agency Self-Interest or Public Interest*, 12 FORDHAM J. CORP. & FIN. L. 627, 670 (2007) ("The [SEC] is a collection of people, some interested in any or all of the following: justice; victory; reputation; and political gain.").

45. *See id.* at 671 (discussing the SEC's resource-constraint motivations for settlement); Khanna & Dickinson, *supra* note 43, at 1720–21 (listing the avoidance of the difficulty, complexity, and expense of corporate cases as incentives for enforcers to settle).

46. *See generally* ARTHUR LEVITT & PAULA DWYER, TAKE ON THE STREET (2002) (discussing the effects of political pressure on enforcement during Levitt's tenure as SEC chairman); Samuel W. Buell, *Why Do Prosecutors Say Anything? The Case of Corporate Crime*, 96 N.C. L. REV. 823, 840–47 (2018) (theorizing that in announcing corporate criminal actions, prosecutors seek to garner support from or to satisfy the public, Congress, and industry); Johnson, *supra* note 44, at 672–73 (discussing the SEC's reputational and political interests in settlement, including avoiding the reputational costs of trial losses and the pressure of "popular sentiment to act in response to market factors and scandals").

47. Individual agents might act in view of future rents in private-sector roles. *See* Buell, *supra* note 46, at 838–40 (discussing the careerist motivations prosecutors might have when prosecuting corporate crimes). Under this account, agents' earning potential will be affected by the types of cases they bring and how they manage them. *Id.*

48. *See* Ford & Hess, *supra* note 14, at 729 ("The prosecutor wants to close his file in a way that is reasonably calculated to ensure that the subject corporation has at least decent, industry-standard compliance processes in place (at least on paper), and then move on to the next case.").

49. *See* Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs*, *in* RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 247, 259 (Jennifer Arlen ed., 2018).

enforcer's preference for finality keeps it from closely monitoring the firm after settlement for signs of recidivism.[50] The same goes for bringing new actions for recidivist violations.[51] Instead, the enforcer accepts a substitute. It allows the firm to implement remedial efforts, or to undertake to do so, in exchange for a lighter penalty.[52] Although these efforts are not the same as an absence of recidivism, they potentially reduce the risk that the firm reoffends. Accepting this substitute for postsettlement policing allows the enforcer to advance its public-protection interest in preventing future violations while achieving finality.

Mirroring enforcers, firms—as organizations and as personified by individual managers—have institutional and personal interests. A firm seeks to emerge from an enforcement action with the lowest possible sanction, disruption to operations, and damage to reputation.[53] Individual managers want to reduce the attention they must give to an enforcement action and appreciate that an action could affect their personal compensation or retention,[54] as well as their professional

50. The clawback approach discussed in this Article is not, of course, the only use of clawbacks as a compliance-enforcement mechanism. The Dodd-Frank Act, for example, requires the SEC to adopt rules (which to date are still forthcoming) mandating clawbacks of excess incentive-based compensation at public companies that restate their financial results. 15 U.S.C. § 78j-4(b) (2018). Some companies have adopted clawback policies that apply to nonfinancial misconduct. *See* Jonathan Ocker, Justin Krawitz & Ben Gibbs, *The State of Play on Clawbacks and Forfeitures Based on Misconduct*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 7, 2019), https://corpgov.law.harvard.edu/2019/07/07/the-state-of-play-on-clawbacks-and-forfeitures-based-on-misconduct [https://perma.cc/L8K5-XNFE]. And in a recent article, scholars propose a clawback model for enhancing board governance in the compliance context. *See* John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously*, 37 YALE J. ON REG. 1, 50 (2020).

51. Although enforcers may have facial authority under settlements' terms to claw back benefits (for example, by lifting the deferral of a prosecution), this authority is constrained by the requirement to obtain supervisor approval and to comply with the due process requirements any government agency is bound by. Those barriers may in reality render clawback authority a paper tiger. *See* SEC Manual, *supra* note 4, § 6.2.2–6.2.3 (reviewing those barriers); *supra* note 19 (citing empirical evidence that corporate recidivists do not experience clawbacks).

52. In exchange for remediating, the enforcer gives the firm a discounted penalty, perhaps (hypothetically) charging it $10 million for past wrongdoing versus a $25 million baseline.

53. *See* Khanna & Dickinson, *supra* note 43, at 1721 (discussing reputational and business interests that incent firms to settle with the SEC); Johnson, *supra* note 44, at 664 (same).

54. *Cf.* Obeua S. Persons, *The Effects of Fraud and Lawsuit Revelation on U.S. Executive Turnover and Compensation*, 64 J. BUS. ETHICS 405, 418 (2006) (finding that revelations of fraud or lawsuits increase the likelihood that firms decrease executive cash compensation or experience executive turnover). *But see* Anup Agrawal, Jeffrey F. Jaffe & Jonathan M. Karpoff, *Management Turnover and Governance Changes Following the Revelation of Fraud*, 42 J.L. & ECON. 309, 339 (1999) ("Anecdotal evidence from highly publicized cases suggests that top managers of firms that are investigated or charged with criminal fraud lose their jobs . . . . [W]e find little systematic

reputations.[55] They may even wish to avoid personal liability.[56] Like enforcers, firms prefer finality in part because an ongoing investigation or enforcement action can disrupt business operations.[57] And even firms that enter settlements fully intending to remediate may flag in following through as competing business priorities with imminent consequences emerge.[58] Neither party, then, should be expected to focus on recidivism prevention absent some mechanism that commits it to that task.[59]

2. *The Effectiveness and Efficiency of Corporate Reform.* Entirely successful enforcement deals lead to remedial efforts that are both effective and efficient. As a matter of effectiveness, they should cause

evidence that firms suspected or charged with criminal fraud have unusually high turnover among either senior managers or directors.").

55. *See* Cathy Hwang, *Faux Contracts*, 105 VA. L. REV. 1025, 1064–65 (2019) (explaining that an executive's external contracting behavior may be influenced by a need to maintain personal reputation within the firm); Robert Zinko, Gerald R. Ferris, Stephen E. Humphrey, Christopher J. Meyer & Federico Aime, *Personal Reputation in Organizations: Two-Study Constructive Replication and Extension of Antecedents and Consequences*, 85 J. OCCUPATIONAL & ORG. PSYCH. 156, 172–73 (2012).

56. Brandon L. Garrett, *The Corporate Criminal as Scapegoat*, 101 VA. L. REV. 1789, 1795 (2015) [hereinafter Garrett, *Scapegoat*] ("The higher-ups, who may control negotiations with prosecutors, may themselves remain above the fray while lower-level employees are 'thrown under the bus.'"); *see also id.* at 1802 (observing that from 2001 to 2014, of 306 deferred- and nonprosecution agreements entered into between firms and the DOJ, the DOJ pursued related individual criminal charges in only 104 cases); *id.* at 1828 (speculating that corporate settlement agreements include tacit agreements not to charge individual employees criminally); Khanna & Dickinson, *supra* note 43, at 1721 (citing executives' fear of corporate or personal criminal charges as an incentive to settle).

57. More, the firm in some cases must disclose in its SEC filings that it is under investigation or faces enforcement. This embarrassing disclosure could result in investor displeasure. Item 103 of Regulation S-K, 17 C.F.R. § 229.103 (2020) (requiring disclosure of "material pending legal proceedings, other than ordinary routine litigation incidental to the business"); *see also* U.S. SEC. & EXCH. COMM'N, FORM 10-K: ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934 pt. I, at 8 (n.d.) (requiring issuers to disclose the information required by Item 103 of Regulation S-K).

58. *See* Ford & Hess, *supra* note 14, at 727–28 (quoting an interviewee who explained that there is a loss of reform momentum after settlement: "Just the everyday pressures that exist to do whatever business it is, to deal with whatever crisis there is, gets in the way of actually completing whatever it is people agree is the right thing to do"). The interviewee also explained that the presence of a corporate monitor can create discipline that overcomes that lost momentum. *Id. But cf. infra* notes 83–101 and accompanying text.

59. *Cf.* Claire A. Hill, *Why Contracts Are Written in "Legalese,"* 77 CHI.-KENT L. REV. 59, 69 (2001) (noting that private lawyers have little incentive to review contracts once they are signed and that they tend rather to move on to the next transaction).

the firm to achieve a target level of compliance.[60] And as a matter of efficiency, they should achieve that target at the least possible cost.

A *no-violation* effectiveness standard would mean that a law is never violated by a firm's employees or agents.[61] A more forgiving no-*avoidable*-violation standard, on the other hand, would excuse the firm from liability for acts of rogue employees, those whose misconduct could not have been deterred.[62] Beyond these standards, compliance targets can be set at de minimis, or nonactionable, violation levels.[63]

Ineffective remedial efforts are necessarily inefficient because they imply the firm incurred costs that did not result in the desired level of compliance. As an example, which recurs throughout this Article, imagine a pharmaceutical company whose salesforce is found to have engaged in systemic false off-label promotion.[64] With an eye toward remediation, the company decides that its target compliance level is for sales representatives to never make product claims except those on vetted talking points. It then invests heavily in retraining its salesforce in those talking points. If representatives continue unabated to make false off-label claims, this effort is both totally ineffective and totally inefficient. But if retraining leads to some reduction in false off-label claims, then the effort is only partially ineffective.

Even effective remedial efforts can be inefficient if they use more resources than needed to achieve a given level of compliance. Imagine that the pharmaceutical company's remedial efforts go beyond the salesforce retraining that was previously mentioned. It also changes its

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60. *See infra* note 128 and accompanying text.

61. *See infra* notes 123–25 and accompanying text (discussing the impossibility and inefficiency of total compliance).

62. Jennifer Arlen & Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*, 84 U. CHI. L. REV. 323, 331–32 (2017); *see infra* note 112 and accompanying text.

63. *See infra* note 124 and accompanying text for discussion on setting acceptable compliance levels.

64. Off-label drug promotion has traditionally been charged as unlawful misbranding under 21 U.S.C. § 331(a) (2018). *See* United States v. Caronia, 703 F.3d 149, 154 (2d Cir. 2012) (listing off-label-promotion prosecutions of GlaxoSmithKline, LLC; Merck Sharp & Dohme Corp.; Abbott Laboratories; and Allergan, Inc.). *But see id.* at 168 (construing the misbranding provision "as not prohibiting and criminalizing the truthful off-label promotion of FDA-approved prescription drugs"); FDA, MEDICAL PRODUCT COMMUNICATIONS THAT ARE CONSISTENT WITH THE FDA-REQUIRED LABELING — QUESTIONS AND ANSWERS 1 (2018) (providing guidance for medical-product firms to make truthful and nonmisleading off-label communications "about the approved or cleared uses of a product" (footnote omitted)); FDA, DRUG AND DEVICE MANUFACTURER COMMUNICATIONS WITH PAYORS, FORMULARY COMMITTEES, AND SIMILAR ENTITIES — QUESTIONS AND ANSWERS 18 (2018) (addressing communications "regarding unapproved uses of their approved/cleared/licensed products").

compensation plan to take into account an employee's contributions to compliance.[65] And to ensure that salespeople do not engage in improper sales practices, it requires all sales interactions to be recorded and reviewed by an outside vendor. These efforts cost the firm by losing high-performing salespeople who prefer the commission model, plus engaging the vendor to review each sales call.[66] Now imagine that combining compensation changes and stricter monitoring with retraining makes the difference: the company's salesforce consistently sticks to the approved script. Yet, if adding just the compensation changes or just the sales monitoring would have gotten the firm to that same level of compliance, it has overremediated. It paid for three initiatives when two would have sufficed. Its remedial efforts are effective but inefficient.

Ideally, settlement agreements would prescribe remediation that is both effective and efficient, or they would create structures that would yield such results even if they do not prescribe any particular remediation program. As this Section explains, from the public's perspective, it is desirable that remediation programs *work*. It is also desirable that they do so without requiring more resources than necessary because every dollar spent on remediation is one that cannot be spent on increasing wages, cutting prices, conducting research, or paying dividends. As the next Section explains, however, that ideal can break down in light of competing incentives and information constraints among the two sides.

B. Competing Objectives in Corporate Reform

Who controls the reform process—a defendant's management, the enforcer, or other parties—can affect whether reform is effective and efficient. This Section sketches several competing tensions between the players that this Article's follow-up approach can help reduce.

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65. *See* PRINCIPLES OF THE L.: COMPLIANCE, RISK MANAGEMENT, AND ENFORCEMENT § 5.16(a) (AM. L. INST., Tentative Draft No. 1, 2019) ("An employee's record of compliant or noncompliant behavior should be considered as a factor in setting his or her compensation."); *cf.* FINRA MANUAL r. 3170 (FIN. INDUS. REGUL. AUTH., amended 2019), https://www.finra.org/rules-guidance/rulebooks/finra-rules/3170 [https://perma.cc/9LVR-S9M3] (requiring certain broker-dealer firms to record all calls between salespersons and current or potential customers).

66. Audit-style compliance monitoring is especially costly to firms, both in the direct costs of employing the auditors and the indirect costs of demotivating intrinsic ethical employee behavior. *See* Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 93–97.

Management has practical control over the firm, as well as expertise that could allow it to implement remedial efforts to reduce recidivism.[67] This control and expertise mean that management not only can design and implement a reform plan, but it can also periodically assess whether the plan is working and make any needed course corrections.[68] Managers' incentives will make them sensitive to remediating efficiently—even if they recognize value in reform (for example, avoiding future penalties or reputational costs).[69] But enforcers, given their own public and reputational interests, will prioritize effectiveness, even if they appreciate that inefficiency leads to deadweight loss.[70]

Recidivism prevention is not, of course, management's only objective: it also needs to run a business. In balancing recidivism prevention with other objectives, management thus seeks to optimize reform efforts. It will avoid committing more resources—including decisions around operations and whether to pursue business opportunities—than necessary to achieve a target level of compliance. Imagine, for example, that the pharmaceutical firm determines it can prevent all avoidable recurrences of false off-label promotion by dedicating 2 percent of its total personnel hours to sales-compliance

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67. *See* Miller, *supra* note 49, at 260 (discussing management's superior knowledge and expertise in effecting reform within a specific firm).

68. David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT'L L.J. 307, 337–38 (2008) ("[T]he reform undertaking process should be flexible. To be successful, reform undertakings must be capable of engaging in the experimentation necessary to determine what works, learn from past experience, and be updated based on new information."). Professor Veronica Martinez identifies four stages of compliance process—prevention, detection, investigation, and remediation—and explains how compliance failures can be better understood by looking at what stage of the process they happened. *See* Veronica Root, *The Compliance Process*, 94 IND. L.J. 203, 219–25 (2019) [hereinafter Root, *Compliance Process*]. This Article zooms into Martinez's final stage—remediation—and explains why it too is a process. *See infra* Part II.B (sketching the remediation process).

69. SHARON ODED, CORPORATE COMPLIANCE: NEW APPROACHES TO REGULATORY ENFORCEMENT 10 (2013) (recognizing that compliance focuses on the agency problem between firms and their employees).

70. *But see* Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., U.S. Dep't of Just., to the Heads of Dep't Components and U.S. Att'ys 2 (Mar. 7, 2008) [hereinafter Morford Memorandum], https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf [https://perma.cc/XN3P-53JV] (instructing prosecutors to be mindful of "the cost of a monitor and its impact on the operations of a corporation" when negotiating settlements); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1497–99 (1996) (recognizing that nonmonetary corporate sanctions, such as probation, may impose higher social cost than cash fines).

efforts, such as training, auditing, and so on. If it in fact spends 4 percent of its personnel hours on these efforts, it will achieve no greater reduction in recidivism, but it will have unnecessarily lost 2 percent of its labor resources. Thus, by optimizing between reform costs and reform benefits—namely, by hitting target compliance levels at the least cost—management can avoid deadweight loss.[71]

Despite being positioned to effect reform, however, management's competency or motivation to do so is not a given.[72] At the extreme, managers who tolerated violations would lack the motivation to credibly grapple with reforming their firms.[73] Even in instances in which management failed to recognize that violations were occurring, or failed to prevent them despite trying to do so, enforcers might fairly question whether it has the needed competency to lead the reform process.[74] When management lacks the motivation or the competency to manage remediation credibly, there are three options: replace management, bring in outsiders, or do both.[75] Replacement is most likely when executives bear some responsibility for corporate wrongdoing or were negligent in preventing it.[76] In rare cases, enforcers might make the decision themselves, rather than waiting on the board to act.[77] Beyond these rare instances of direct control, enforcers can use

71. See *infra* Part II.B for a procedural discussion how management can go about optimizing between these costs and benefits.

72. *See* Khanna & Dickinson, *supra* note 43, at 1730 (observing that corporate recidivism may be caused by "errant management").

73. *See* Henning, *supra* note 14, at 1431 (noting that management may resist changes to corporate culture, but that the threat of criminal prosecution will motivate boards of directors to act to prevent recidivism).

74. *But cf.* Stone v. Ritter *ex rel.* AmSouth Bancorporation, 911 A.2d 362, 373 (Del. 2006) (holding that directors' good-faith failure to detect employees' criminal conduct does not necessarily breach a fiduciary duty); Claire A. Hill & Brett H. McDonnell, Stone v. Ritter *and the Expanding Duty of Loyalty*, 76 FORDHAM L. REV. 1769, 1784 (2007) (predicting that "directors' willingness to tolerate or engage in illegal conduct may be a proxy for their willingness to engage in conduct that more directly diverges with the shareholders' interests").

75. In an interview, a regulator explained that the imposition of corporate monitors is appropriate when prosecutors need to be persuaded "that there have been lapses but that [the defendant is] committed to rectifying these wrongs, including terminating responsible people and instituting new control mechanisms." Ford & Hess, *supra* note 14, at 699.

76. *See supra* note 33 (discussing two cases in which senior executives faced employment-related consequences for major compliance failures).

77. *See, e.g.*, 12 U.S.C. § 1818(e) (2018) (permitting bank supervisors to remove a financial institution's officers, directors, or employees); 15 U.S.C. § 77h-1(f) (2018) (permitting the SEC to bar individuals who commit securities fraud from serving as officers or directors of public companies).

their leverage in the settlement process to force personnel changes.[78] A firm might also preemptively discharge managers in hope of showing the enforcer that remediation credit is justified.[79]

Whether changes in executive leadership occur or not, there is the second question whether management has the motivation and competency to achieve the firm's reform goals. In some cases—especially the most complex—management itself will not have the expertise or resources it needs. In these instances, an enforcer requires that outsiders—such as the enforcer itself, consultants, or monitors—remain or become involved.[80] These outsiders provide supervisory and technical services.[81] In their supervisory role, outsiders help firms compensate for management's lack of sufficient motivation by monitoring its remedial efforts and postsettlement conduct.[82] In their

78. *See* Ford & Hess, *supra* note 14, at 701 (discussing the government's bargaining advantage over defendants given the severe consequences of charging decisions for firms).

79. *See*, *e.g.*, Letter from Daniel Kahn, Deputy Chief, Crim. Div., U.S. Dep't of Just. to Jay Holtmeier & Erin G.H. Sloane, Counsel to Johnson Controls, Inc. (June 21, 2016), https://www.justice.gov/criminal-fraud/file/874566/download [https://perma.cc/6J4L-KQW8] (declining to charge Johnson Controls, Inc. for foreign bribery due in part to the company's "separating . . . 16 employees found to be involved in the misconduct"). For a discussion why firms sometimes implement remedial efforts with uncertainty as to how they will be valued in an enforcement deal, see generally Part I.B.2.

80. Memorandum from Brian A. Benczkowski, Assistant Att'y Gen., U.S. Dep't of Just., to all Crim. Div. Personnel 2 (Oct. 11, 2018) [hereinafter Benczkowski Memorandum], https://www.justice.gov/opa/speech/file/1100531/download [https://perma.cc/9BCN-FXCW] (noting that monitors should be imposed only when "there is a demonstrated need for, and clear benefit to be derived from, a monitorship relative to the projected costs and burdens" and that when "a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will likely not be necessary"); *see also* Khanna & Dickinson, *supra* note 43, at 1723 tbl.I (finding that DOJ DPAs or NPAs requiring the appointment of monitor involved securities fraud (eleven cases), tax evasion (three cases), foreign corruption or bribery (six cases), Bank Secrecy Act violations (two cases), healthcare fraud (two cases), and unauthorized defense exports (one case)).

81. *See* Ford & Hess, *supra* note 14, at 707–09 (describing the monitor as a continuum of "advisor" to "auditor," to "associate," to "autocrat," with each gradation having a mix of supervisory and technical functions); *see also* Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REG. 109, 126 (2016) [hereinafter Root, *Monitorships*] ("Importantly, [remedial efforts] are activities each organization could have undertaken itself, but needed an outsider to monitor because of the lack of trust stemming from its misconduct. The outsider was necessary to assure that the organization was actually committed to reforming its past misconduct.").

82. *See* Morford Memorandum, *supra* note 70, at 2 ("A monitor's primary responsibility is to assess and monitor a corporation's compliance with the terms of the agreement specifically designed to address and reduce the risk of recurrence of the corporation's misconduct . . . .").

technical role, they help firms compensate for management's other deficits by making remedial recommendations.[83]

Like management, outsiders also impose potential disadvantages for achieving effective *and* efficient reform. Although enforcers may understand the nature and causes of violations, they lack the managerial expertise to design, implement, assess, and adjust remediations.[84] Enforcer-designed remedial efforts would thus presumably be less effective than efforts led by managers, one concern recognized by scholars as the "prosecutors in the boardroom" problem.[85] This problem of remedial expertise may appear in a wide array of enforcers, but it will be particularly acute in generalist agencies like criminal prosecutors. Beyond the difficulty enforcers face in designing effective remedial efforts, they further lack management's efficiency incentives.[86] Whereas managers must think about business

83. *See id.* at 1–2 ("As part of some negotiated corporate agreements, there have been provisions pertaining to an independent corporate monitor. The corporation benefits from expertise in the area of corporate compliance from an independent third party. The corporation, its shareholders, employees and the public at large then benefit from reduced recidivism . . . ." (footnote omitted)). Enforcers might also draw comfort from the presence of monitors because monitors frequently have similar professional backgrounds to their own. Guidepost, a leading provider of compliance consulting and monitor services, illustrates this point. Of the thirty-six professionals it identified on August 7, 2019 as members of its compliance practice, twenty-one were attorneys (fifteen of whom served as prosecutors or in other enforcement-related legal roles); eight had held senior leadership roles in private businesses, and twelve had served in law enforcement roles as special agents or analysts. Andrew K. Jennings, Guidepost Background Survey (Aug. 7, 2019) (unpublished spreadsheet) (on file with the *Duke Law Journal*); *see also Our Trusted Experts*, GUIDEPOST, https://www.guidepostsolutions.com/our-experts [https://perma.cc/Q9PT-H5H7].

84. This lack of expertise is greater in generalist agencies (e.g., criminal prosecutors) than in specialists (e.g., bank regulators). *See* Garrett, *supra* note 29, at 885 ("[Administrative a]gencies not only often detect the underlying crimes in the DOJ's cases, based on their own public reporting regimes, but they have specialized expertise."); Miller, *supra* note 49, at 260 ("The government should not micromanage the requirements for an effective [compliance] program . . . . No regulator or prosecutor can hope to know more about the internal workings of an organization than the existing managers who spend their professional lives there.").

85. *See generally* PROSECUTORS IN THE BOARDROOM (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (presenting scholars' analyses of normative and pragmatic implications for prosecutor-driven corporate reform). Of course, when they sentence organizations, courts have authority to directly mandate remedial efforts. *See* 18 U.S.C. §§ 3551(c), 3563(b) (2018) (authorizing flexible probationary sentences of criminal organizations). Because courts also lack managerial expertise, remedial sentencing could also exhibit the "prosecutors in the boardroom" problem. In the case of judicial sentencing, the problem might be exacerbated by a court having less understanding about the firm and its conduct than the enforcer who spent considerable time conducting the investigation.

86. *See* Khanna & Dickinson, *supra* note 43, at 1729 n.66 ("Of course, monitors are not usually appointed to run the firm in a more profit-maximizing manner than management but probably to run the firm in a more law-compliant manner.").

performance, enforcers have no direct efficiency incentives.[87] Indeed, an enforcer involved with planning remedial efforts might recognize that it lacks expertise and compensate by requiring a long list of highly detailed remedial efforts.[88] It would do so without regard to cost, hoping those efforts will achieve a desired level of recidivism prevention, even if some in truth are redundant to that goal.[89]

An enforcer will participate in remediation on its own—whether through tailoring remedial efforts, monitoring itself, or bringing in an outsider—when it doubts management's ability to lead the reform process, particularly if it questions management's follow-through.[90] In

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87. Miller, *supra* note 49, at 259 ("Governments have an incentive to require firms to overspend on compliance programs. The reason is that regulators do not pay the costs of the program, but obtain benefits by appearing 'tough on crime' and by deflecting blame for violations."). They might, of course, have indirect efficiency incentives, such as not wanting to cause unnecessary reductions in a firm's economic output, which could impose collateral costs on a firm's stakeholders, including shareholders, employees, and consumers. A speech by the assistant attorney general in charge of DOJ's Criminal Division belies the enforcer's efficacy–efficiency tension: "We want the corporate community to invest heavily in compliance, and do so efficiently and effectively." Brian A. Benczkowski, Assistant Att'y Gen., U.S. Dep't of Just., Remarks at the American Conference Institute's 36th International Conference on the Foreign Corrupt Practices Act (Dec. 4, 2019) [hereinafter Benczkowski Remarks], https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-american-conference [https://perma.cc/ME3C-BBSW].

88. The DOJ's deferred-prosecution agreement with hedge fund Och-Ziff Capital Management Group LLC over that firm's bribery of foreign officials presents one potential example of this phenomenon. The DOJ would not be expected to have expertise in the management of hedge funds or how to reform them. In turn, its agreement with Och-Ziff ran seventy-three pages, including seven pages specifying the remedial efforts the defendant was expected to complete as part of the agreement. *See* Attachment C, Deferred Prosecution Agreement at C-1 to C-7, United States v. Och-Ziff Capital Management Grp. LLP, No. 16-CR-00516 (E.D.N.Y. Sept. 29, 2016) [hereinafter Och-Ziff DPA], https://www.justice.gov/opa/file/899306/download [https://perma.cc/UD3W-FL9Y] (laying out the seven measures defendant must follow, including senior management commitments, periodic risk-based review, and training). Even the Federal Trade Commission, whose expertise includes credit reporting, saw a need to include nearly seven pages of specific information-security reforms in its settlement with Equifax over the company's 2017 cybersecurity breach. Stipulated Order for Permanent Injunction and Monetary Judgment at 12–19, FTC v. Equifax, Inc., No. 19-CV-03297 (N.D. Ga. July 23, 2019), https://www.ftc.gov/system/files/documents/cases/172_3203_equifax_order_signed_7-23-19.pdf [https://perma.cc/KP88-4MDG].

89. *See* Miller, *supra* note 49, at 259 (noting that, although a compliance level for which the marginal cost of compliance equals the marginal cost of avoided sanctions may be "socially inefficient, regulators may avoid criticism by observing that it reduces the rate of violations").

90. *See* Ford & Hess, *supra* note 14, at 698 (interviewing a regulator who found monitorships most appropriate when enforcers "don't have enough assurance that [violations have] been corrected, so the conduct or the problem might be ongoing"); *see also, e.g.*, 15 U.S.C. § 77h-1(a) (2018) (permitting the SEC to order that a firm that has violated federal securities laws "take steps to effect compliance" with the securities laws, including orders "requir[ing] future compliance or steps to effect future compliance, either permanently or for [a] period of time");

less complicated cases, it might require the firm to submit progress reports.[91] In harder cases, it might require the firm to hire a compliance consultant or monitor and to take that person's recommendations seriously, or even agree presumptively to adopt them.[92]

The imposition of compliance consultants or monitors on firms raises both effectiveness and efficiency concerns. Like enforcers, consultants and monitors lack the firm-level expertise that management has.[93] They also do not share management's efficiency incentives.[94] Nevertheless, consultants and monitors have sweeping access to the company's records, personnel, and decisionmaking. Their recommendations must be taken seriously or even presumptively adopted.[95] These recommendations might push firms toward efficiently

18 U.S.C. §§ 3551(c), 3563(b)(22) (authorizing probationary sentences for organizations convicted of criminal offenses and permitting a sentencing court to impose bespoke probation conditions).

91. *See, e.g.*, Walmart Inc., Exchange Act Release No. 86,159, Accounting & Auditing Enforcement Release No. 4054, Administrative Proceeding No. 3-19207, 2019 WL 2552354, at *11 (June 20, 2019) ("Respondent shall submit to the Commission staff a written report within twelve (12) months . . . ."); Summit Fin. Grp., Inc., Inv. Advisers Act Release No. 5168, Administrative Proceeding No. 3-19071, 2019 WL 1112742, at *3–7 (Mar. 11, 2019); Root, *Monitorships*, *supra* note 81, at 120–21 (discussing an enforcer's decision whether to engage in direct monitoring or to require the engagement of a third-party monitor as being partly driven by the enforcer's capacity and the costs of monitoring).

92. *See* Morford Memorandum, *supra* note 70, at 6 ("If the corporation chooses not to adopt recommendations made by the monitor . . . [t]he Government may consider this conduct when evaluating whether the corporation has fulfilled its obligations under the agreement."); *see also, e.g.*, UBS Fin. Servs., Inc. of PR, Securities Act Release No. 9318, Exchange Act No. 66,893, Administrative Proceeding No. 3-14863, 2012 WL 1514678, at *10 (May 1, 2012) (requiring UBS to implement its compliance consultant's recommendations but allowing it to request reconsideration of recommendations it considered "unduly burdensome or impractical"). Professor Veronica Martinez observes that monitorships are heterogeneous in terms of their roles, powers, and to whom they are accountable. In making that observation, she categorizes monitorships into a typology of being court-ordered, enforcement-based, compliance-based, or public-relations-based. *See* Root, *Monitorships*, *supra* note 81, at 142–47 (noting that "monitorships are understood as heterogenous remediation tools").

93. Ford & Hess, *supra* note 14, at 714 (interviewing compliance consultants who expressed concern that monitors, despite their investigative expertise, lack "experience in implementing and evaluating compliance programs in a way that takes into account how those programs are embedded in the corporation's culture").

94. *See* Morford Memorandum, *supra* note 70, at 5–6 ("Neither the corporation nor the public benefits from employing a monitor whose role is . . . too broadly defined (and, therefore, results in the monitor engaging in activities that fail to facilitate the corporation's implementation of the reforms intended by the parties).").

95. *See* Root, *Compliance Process*, *supra* note 68, at 230–31 (recounting controversy surrounding Michael Bromwich's sprawling antitrust monitorship of Apple Inc.); Stephanie Saul, *Bristol-Myers Chief Fired Over Patent Dispute*, N.Y. TIMES (Sept. 12, 2006), https://www.nytimes.com/2006/09/12/business/13bristolcnd.html [https://perma.cc/2MY4-MU4S] (reporting on the firing of the CEO of

achieving reform objectives. But outsiders can also drive overremediation—for example, when they act in view of maintaining their reputations in the market for compliance services.[96] That objective can lead outsiders to recommend more remediation than is necessary. After all, if a firm recidivates after its consultant or monitor recommended what might be called "modest" remedial efforts, then that violation might be partly blamed on the consultant or monitor.[97] Overremediation can help outsiders avoid such criticism.

Outsiders can also impose rigidity. Corporate reform is a complex undertaking.[98] Initial remediation plans should not be expected to achieve effective, efficient results without being adjusted during the process.[99] Although management has direct control over the firm and can assess progress and course correct, the same flexibility is not a given for remediation driven by outsiders.[100] For instance, a firm might be expected to adopt outsider recommendations.[101] Course correction

Bristol-Myers Squibb after that action was recommended by the company's monitor to its board of directors).

96. *See* Ford & Hess, *supra* note 14, at 729 (finding that, based on monitor interviews, monitors seek to enhance their professional reputations and make decisions with an eye toward obtaining future monitor appointments); Khanna & Dickinson, *supra* note 43, at 1736 (examining potential conflicts of interest between a monitor and a firm, including the monitor's reputational incentives for future monitoring work); Veronica Root, *Constraining Monitors*, 85 FORDHAM L. REV. 2227, 2241 (2017) ("Reputational capital makes it important for monitors to manage their conduct within the marketplace of entities that utilize monitoring services, but this incentive is inherently self-interested on the part of the monitor who wants to obtain additional monitorship engagements."). *But cf.* Morford Memorandum, *supra* note 70, at 5 ("[A] monitor also is not an agent or employee of the Government. While a monitor is independent both from the corporation and the Government, there should be open dialogue among the corporation, the Government and the monitor throughout the duration of the agreement.").

97. Direct conflicts can also manifest in the monitor-firm relationship. Monitors often practice at high-end law firms, meaning that they may charge fees that are financially material to defendants. *See* Steven M. Davidoff Solomon, *In Corporate Monitor, a Well-Paying Job but Unknown Results*, N.Y. TIMES (Apr. 15, 2014, 6:33 PM), https://nyti.ms/2kKaQNd [https://perma.cc/XX5K-BGU5] (reporting that former U.S. Attorney General John Ashcroft received $52 million in fees to serve as corporate monitor to Zimmer Holdings in connection with a physician-kickback scheme).

98. *See* Root, *Compliance Process*, *supra* note 68, at 209 ("[T]he sheer breadth and diversity of issues compliance programs must confront makes implementing effective compliance programs an intensely challenging endeavor.").

99. *Id.*

100. *Cf.* Miller, *supra* note 49, at 260 ("[R]egulatory requirements for compliance programs, if articulated at an excessive level of detail, are doomed to be unwieldy, inefficient, and insensitive to the particular circumstances and unique culture of any given organization.").

101. *See* Khanna & Dickinson, *supra* note 43, at 1724 (discussing the broad powers and influence of monitors); *see also* Saul, *supra* note 95 (noting the monitor recommended the firing of chief counsel).

on plans that originate outside the firm could require making a formal request or opening the firm up to renewed scrutiny. Although contemporary monitorships often emphasize a flexible relationship between monitors and firms[102]—including over what will be needed to achieve reform objectives—a firm still has reason to avoid expressing the need for course corrections. Doing so could signal, rightly or wrongly, that it is struggling to achieve effective remediation, thus harming the goodwill and credibility it earned up to that point. Remedial rigidity thus may push firms to follow through with initial plans, even if subsequent experience shows need for adjustment. These conflicting interests between enforcers, firms, and third parties like monitors are a key reason why a firm might not achieve effective, efficient reform. The next Section examines how information constraints can further frustrate that goal.

C. Uncertainty, Settlement, and Corporate Reform

After a company breaks the law, uncertainty abounds whether it will do so again. That uncertainty presents considerable challenges for incorporating recidivism prevention into the settlement process. This Section sketches those challenges and explains how they can lead to ineffective or inefficient remediation.

In settling enforcement actions, the public will pay the defendant, in the form of forgone penalty revenue, for three kinds of up-front mitigation: having an effective ex ante compliance program, self-reporting detected violations, and cooperating with an enforcer's investigation.[103] The public will pay for these mitigations because they aid enforcement and thus subsidize more robust policing than enforcers' resources would otherwise permit.[104] Because each of these mitigating efforts is completed at the time of settlement, the enforcer

102. *See* Veronica Root, *The Monitor-"Client" Relationship*, 100 VA. L. REV. 523, 551–53 (2014) (observing the need for a monitor to maintain a flexible stance that enables the monitored firm to achieve reform objectives).

103. The maximum penalty revenue that the public might receive must incorporate the probability that the government could succeed on the merits at trial and—if the court had discretion—the probabilistic penalty the court would impose. *See infra* notes 138 and 140 and accompanying text.

104. As then-SEC Commissioner Troy Paredes explained to an industry conference, "[S]ometimes the best choice is not to bring a particular case or advance a particular charge. When deciding how best to allocate the agency's resources, the Commission has to make difficult choices. Enforcement is no exception." Troy A. Paredes, Comm'r, U.S. Sec. & Exch. Comm'n, Remarks at the 43rd Annual Rocky Mountain Securities Conference (May 6, 2011), http://www.sec.gov/news/speech/2011/spch050611tap.htm [https://perma.cc/KG2Q-SN8T].

can retrospectively consider their values and incorporate their "prices" into the final settlement—that is, what discounts the firm receives on the pecuniary or nonpecuniary sanctions that its past wrongdoing would otherwise merit.

The public will also pay defendants for another, distinct type of mitigation: remediation. Unlike ex ante compliance programs, self-reporting, and cooperation, remediation offers the public value not because it helps enforcers detect and prosecute violations—thereby subsidizing public enforcement—but rather because it stands to reduce future violations.

Consider the following stylized example. Assume the enforcer handling the exemplar off-label-promotion case assesses that the appropriate penalty is $100 million.[105] Then, after assessing the quality of the defendant's ex ante compliance program or self-reporting, its cooperation during the investigation, and its remedial efforts, the enforcer gives a $25 million credit for each. The net penalty—what the company must pay—is $25 million.

Appropriate penalty	$100,000,000
Compliance/self-reporting	($25,000,000)
Cooperation	($25,000,000)
Remediation	($25,000,000)
Net penalty	$25,000,000

Unlike the other mitigating efforts, remediation will occur both before and after settlement. Its value thus cannot be fully assessed at settlement because whether the firm will recidivate—and, if so, to what extent—is necessarily unknown at that point. The following timeline illustrates the temporal alignment. A firm first has an ex ante compliance program that allows it to detect a potential violation. Then, it self-reports that potential violation to an enforcer, which opens a case. Next, it cooperates with the enforcer's investigation, such as by conducting its own costly internal investigation. Finally, the parties reach a settlement. From the investigative stage on past settlement, the firm might take remedial efforts, or undertake future efforts, that align with reducing its recidivism risk. At settlement, the enforcer can review

105. How the government should price penalties, and the value of mitigation, is beyond this Article's scope. From a neoclassical standpoint, pricing should be based on the social cost of violations and the social value of recidivist violations avoided. *See* Miller, *supra* note 49, at 256 (offering an effective-compliance model that assumes sanctions are set at their social cost).

the quality of the firm's ex ante compliance, self-reporting, and cooperation, assign prices to those mitigations based on their value to the enforcer, and set penalty credits accordingly. Because recidivism risk and future remediation are prospective in nature, however, the enforcer's pricing for remediation is necessarily predictive.

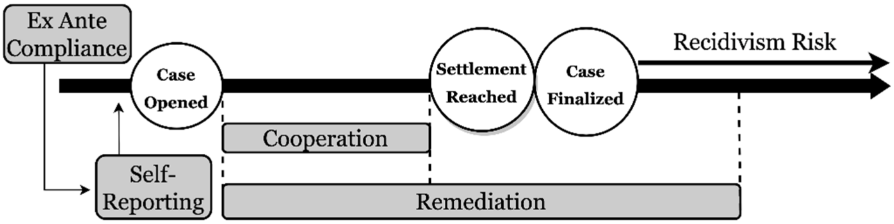

FIGURE 1: CLAWBACK ENFORCEMENT

Given this temporal alignment, the current approach of giving up-front credit for completed or promised remediation fails to account adequately for the uncertainty around recidivism, creating three challenges for corporate reform. First, it can lead to the public paying for recidivism prevention by accepting lower penalties, even in cases when defendants' remedial efforts will not be successful at effecting the reform that was implicitly bargained for. Second, it forgoes opportunities to generate data that can advance ex ante and ex post compliance, thus indirectly contributing to more violations. Third, it incents enforcers to compensate for uncertainty by requiring more presettlement remediation than is necessary, which tends to cause firms to overinvest in remediation, a deadweight loss.[106]

1. *The Effectiveness Challenge.* Corporate compliance emerges from vicarious liability and the enforcement practices that have grown up in its shadow. Whether compliance or remedial efforts are effective, however, has remained an elusive question that frustrates the ability of corporate enforcers to make optimal policing and sanctioning decisions.

Firms are strictly liable for violations that are committed by employees in the course of their employment and with some intent to

106. *See* Khanna, *supra* note 70, at 1503–04 (explaining that nonmonetary penalties' variability can lead to suboptimal sanctioning effects).

benefit the firm.[107] As a result, a firm sometimes finds itself responsible for the misconduct of a rogue employee who acts contrary to its genuine wishes or whose acts ultimately serve to victimize it.[108] As Professor Jennifer Arlen observes, the starkness of that doctrine has the potential to undermine law enforcement objectives.[109] Although a firm is liable for its employees' misconduct, it is individual employees who ultimately decide whether to engage in unlawful conduct. A firm that knows it will be held vicariously liable for its employees' misconduct has no incentive to assist the government in detecting and prosecuting those individual acts.[110] Because the government lacks the resources to detect most corporate violations without the assistance of insiders, vicarious liability can serve to hide misconduct from enforcers.[111]

Against these concerns, vicarious liability is modified by policies that encourage firms to prevent and detect employee misconduct and to cooperate with enforcers when violations do happen. Under the federal organizational sentencing guidelines, a court may mitigate a firm's criminal sentence if it has an "effective compliance and ethics program," or if it demonstrates "self-reporting, cooperation, or acceptance of responsibility."[112] To qualify, a compliance program must be "reasonably designed, implemented, and enforced so that [it] is generally effective in preventing and detecting criminal conduct," although a "failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective."[113] The

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107. N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 493 (1909).

108. *See* United States v. Twentieth Century Fox Film Corp., 882 F.2d 656, 660 (2d Cir. 1989) (holding that Fox's compliance program and lack of willfulness do not immunize it from its employee's violations); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1005 (9th Cir. 1972).

109. *See* Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion To Impose Structural Reforms*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 85, at 62, 69 ("In the 1990s, federal authorities abandoned the [strict-liability] approach to corporate criminal liability because it could not achieve its primary goal—deterring corporate crime . . . .").

110. *See id.* at 71–72 (observing that vicarious liability discourages firms from engaging in monitoring or reporting employee criminal conduct or cooperating with the government in prosecuting those crimes because doing so would increase their own criminal exposure).

111. *Id. See generally* Alexander Dyck, Adair Morse & Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2215–16 (2010) (examining the attributes of internal whistleblowers who report corporate wrongdoing to the government).

112. U.S. SENT'G GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENT'G COMM'N 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf [https://perma.cc/7UC9-LCPD].

113. *Id.* § 8B2.1. Although this guideline only directly applies to criminal cases, it has been influential in the civil-enforcement context, too.

Department of Justice ("DOJ"),[114] Securities and Exchange Commission ("SEC"),[115] and other enforcers' policies also offer penalty credit for the presence of an "effective" ex ante compliance program, policies that go beyond the organizational sentencing guidelines in encouraging firms to police internal misconduct.[116] In extraordinary cases, enforcers might even justify a declination by looking to a firm's ex ante compliance efforts, as well as other factors like self-reporting and cooperation.[117]

This easing of vicarious liability, coupled with a secular increase in corporate enforcement,[118] has helped fuel compliance's rise.[119] Investment in compliance has been substantial. Firms annually spend

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114. EVALUATION OF CORPORATE COMPLIANCE PROGRAMS, *supra* note 8, at 1.

115. *Report of Investigation and Statement*, Exchange Act Release No. 44,969, Accounting & Auditing Enforcement Release No. 1470 (Oct. 23, 2001), https://www.sec.gov/litigation/investreport/34-44969.htm [https://perma.cc/5274-LBA7].

116. *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618, 19,625 (Apr. 11, 2000) (providing reduced penalties for environmental violations by firms that, among other things, have a "compliance management system reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations"). The Department of Health and Human Services splits its compliance guidance among topical areas. *See, e.g.*, OIG Supplement Compliance Program Guidance for Nursing Facilities, 73 Fed. Reg. 56,832, 56,834 (Sept. 30, 2008) ("[A]n effective compliance program demonstrates a nursing facility's good faith effort to comply with applicable statutes, regulations, and other Federal health care program requirements, and may significantly reduce the risk of unlawful conduct and corresponding sanctions.").

117. Press Release, Andrew Weissman, Chief, Fraud Section, Crim. Div., U.S. Dep't of Just., The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance 7–9 (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download [https://perma.cc/V9UZ-UCTF] (offering that companies that voluntarily self-disclose, fully cooperate, and appropriately remediate may be considered for a declination for Foreign Corrupt Practices Act violations).

118. An analysis of DOJ criminal corporate settlements (plea agreements, NPAs, and DPAs), found eleven agreements in 1997, which fairly steadily climbed to roughly forty per year in 2011. Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred-Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537, 566 (2015).

119. *See generally* DAVID STRACHAN & REBECCA WALSH, DELOITTE, THE CHANGING ROLE OF COMPLIANCE (2015), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Financial-Services/gx-financial-changing-role-compliance.pdf [https://perma.cc/M8N2-7D5R] (noting the myriad responsibilities of the Chief Compliance Officer); EY, A TIME OF EVOLUTION FOR COMPLIANCE: LAYING FOUNDATIONS FOR FUTURE SUCCESS (2016), https://www.eycom.ch/en/Publications/20160309-Global-Insurance-CCO-Survey/download [https://perma.cc/8AEY-X9SB] (same); OLIVER BEVAN, PIOTR KAMINSKI, IDA KRISTENSEN, THOMAS POPPENSIEKER & AZRA PRAVDIC, MCKINSEY & CO., THE COMPLIANCE FUNCTION AT AN INFLECTION POINT (2019), https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/Risk/Our%20Insights/The%20compliance%20function%20at%20an%20inflection%20point/The-compliance-function-at-an-inflection-point-vF.pdf [https://perma.cc/R9F8-3LKT] (reporting survey results about the efficiency and effectiveness of compliance departments at leading international banking institutions).

tens of billions of dollars on compliance and ethics programs.[120] Even if a firm does not imminently face an enforcement action, it has good reason to invest in an "effective" compliance program because doing so will earn it credit in the form of a lighter penalty, or even a declination, should a violation occur and be disclosed.[121] In other words, contemporary enforcement policy offers firms a unilateral deal: if you implement a compliance program that will prevent violations or

120. *See Anti-Money Laundering Compliance Costs U.S. Financial Services Firms $25.3 Billion Per Year, According to LexisNexis Risk Solutions*, LEXISNEXIS RISK SOLS. (Oct. 10, 2018), https://risk.lexisnexis.com/about-us/press-room/press-release/20181010-true-cost-aml [https://perma.cc/35GP-RYNJ] (estimating that U.S. financial institutions annually spend between 0.08 and 0.83 percent of total assets on anti-money-laundering compliance); Peter Farley, *Spotlight on Compliance Costs as Banks Get Down to Business*, INT'L BANKER (July 4, 2017), https://internationalbanker.com/technology/spotlight-compliance-costs-banks-get-business-ai [https://perma.cc/42SY-8QVY] (estimating that tier-one banks collectively spend $270 billion annually on compliance); Nicole Lindsey, *Global 500 Faces GDPR Compliance Costs of $7.8 Billion*, CPO MAG. (Dec. 1, 2017), https://www.cpomagazine.com/data-protection/global-500-faces-gdpr-compliance-costs-of-7-8-billion [https://perma.cc/HRT5-6L2E].

121. *See* Maurice E. Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 781–82 (2014) ("Although the [Sentencing] Guidelines seek to deter corporate crime, the payoff ironically comes *after* the firm's agents commit a crime for which the firm is liable and sentenced."). Looking at corporate-sentencing data might make a firm question this investment, however. In 2018, for example, only one sentenced business organization (of ninety-nine) received effective-compliance-program credit. U.S. SENT'G COMM'N, 2018 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 174 tbl.O-4 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2018/2018-Annual-Report-and-Sourcebook.pdf [https://perma.cc/QC3R-HLG4]. Since 2009, only a limited number of defendants received the credit: one (of forty-seven) organizational defendants received that credit in 2016, *Table 54—Organizations Sentenced Under Chapter Eight: Culpability Factors, Fiscal Year 2016*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table54.pdf [https://perma.cc/JT9M-4YWB], two (of 55) in 2014, *Table 54—Organizations Sentenced Under Chapter Eight: Culpability Factors, Fiscal Year 2014*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/Table54_revised.pdf [https://perma.cc/98S4-K2BT], and one (of 65) in 2013, *Table 54—Organizations Sentenced Under Chapter Eight: Culpability Factors, Fiscal Year 2013*, U.S. SENT'G COMM'N, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table54.pdf [https://perma.cc/6MXM-JJDV]. Professor Jennifer Arlen suggests that the Sentencing Commission does "not grant enough mitigation for adopting effective compliance programs," leading to a failure to adequately incent firms to detect and report internal crimes. Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321, 361–62 (2012). Apart from external incentives, however, implementing an appropriate compliance program might also fulfill directors' fiduciary duties, as is the case for Delaware corporations. *See* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 373 (Del. 2006) (holding that good faith can be measured "by the directors' actions 'to assure a reasonable information and reporting system exists'" (quoting *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996))).

detect them if they do occur and report detected violations to the government, then you will receive credit.[122]

The difficulty, however, is that despite decades of firms committing enormous financial and other resources to compliance programs, uncertainty remains whether they work. In large part, a lack of empiricism—the absence of compliance objectives that are measurable and are measured—drives this uncertainty.

First, there is the threshold question what a compliance program is to achieve. In any sufficiently complex organization, total compliance is infeasible and economically inefficient.[123] Although management has some control over the firm's compliance, it cannot deter every employee from engaging in misconduct, especially when misconduct benefits the employee personally.[124] If firms cannot prevent every violation, then there is some level short of total compliance that they must accept.[125] Among compliance levels that are feasible to achieve, the firm will attempt to optimize between cost, compliance improvements that advance its business goals, and what enforcers will tolerate (that is, unprevented violations would not be frequent or egregious enough to justify an inquiry or to foreclose "effective" program credit).[126] Recall, for example, the pharmaceutical company discussed in Part I. It cannot ensure that its employees will never

122. Stucke, *supra* note 121, at 800 ("[T]he Guidelines adopt an implied contract. If a firm undertakes compliance . . . then courts will reduce the firm's future penalty . . . ."); *see also* RESTATEMENT (SECOND) OF CONTS. § 32 (AM. L. INST. 1981) ("In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.").

123. *See generally* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997) (analyzing the optimality of corporate compliance efforts in view of the social welfare they produce).

124. The organizational sentencing guidelines allow for this scenario. *See* U.S. SENT'G GUIDELINES MANUAL § 8B2.1 (U.S. SENT'G COMM'N 2018), https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf [https://perma.cc/7UC9-LCPD] ("The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.").

125. *See* Becker, *supra* note 15, at 170 (explaining that the optimal amount of enforcement as "depend[ing] on . . . the cost of catching and convicting offenders, the nature of punishments—for example, whether they are fines or prison terms—and the responses of offenders to changes in enforcement").

126. *See* Krawiec, *supra* note 17, at 542 (finding support for the conclusion that "internal compliance structures are largely window-dressing mechanisms implemented by corporate management to reduce liability or provide the appearance of legitimacy to corporate stakeholders and the marketplace at large"); *see also* Ford & Hess, *supra* note 14, at 719 ("For some corporations, compliance programs are simply a cost that they try to minimize. The company seeks to 'buy' just enough of a compliance program that is it has some protection in the event that internal wrongdoing comes to light.").

violate a law. It can, however, ensure that its salesforce does not *systemically* make false off-label claims, pay kickbacks to physicians, or engage in other improper sales practices, even if on occasion a sales representative does do one of those things.[127]

Second, there is the question whether the compliance objective is measurable. For the pharmaceutical firm, outcomes along the lines of "our salesforce will act in accordance with applicable law and our code of conduct" cannot be assessed in a quantitative sense. However, an objective that "our salesforce will not make off-label claims and will not pay kickbacks" can be measured. With proper instruments, did these things happen, how often did they happen, who did them, and what were the circumstances are reasonably knowable.

And third, there are the questions whether the firm is achieving its compliance objectives, whether it has appropriate metrics for assessing whether it is doing so, and whether it has instruments for generating the data.[128] Hui Chen, the DOJ's inaugural in-house compliance expert, and Professor Eugene Soltes identify the lack of compliance measurability as a key explanation for why some firms face significant enforcement actions despite having implemented compliance "best practices," like ethics training and codes of conduct.[129] Even when firms do attempt to measure their compliance performance, these efforts often fall short due to pitfalls like incompleteness and misalignment.[130] Compliance data can be incomplete—for example, a firm might point to employees it has discharged for misconduct while missing those who

127. Professor Todd Haugh warns, however, that merely identifying systemic issues may be inadequate because "unethical acts in complex organizations do not necessarily pop up one-by-one in a typical and predictable manner, so that they may be easily managed by standard compliance tools." Todd Haugh, *The Power Few of Corporate Compliance*, 53 GA. L. REV. 129, 179–80 (2018) (theorizing that compliance failures are driven by a few outlier actors within an organization, rather than being normally distributed).

128. *See* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2105–06 (2016) (observing that "compliance metrics track *activity* rather than *impact*" and thus the "metrics . . . do not answer the crucial question of efficacy"). In a survey of corporate compliance leaders, 53 percent reported analyzing internal audit findings to measure their compliance programs' efficacy. DELOITTE, IN FOCUS: 2016 COMPLIANCE TRENDS SURVEY 10 (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/governance-risk-compliance/us-advisory-compliance-week-survey.pdf [https://perma.cc/QTB6-T7P5]. Other methods included analyzing training completion (50 percent), ethics hotline calls (47 percent), employee surveys (39 percent), and proactive monitoring procedures (30 percent). *Id.* Despite these efforts, only 32 percent of respondents reported that they were confident or very confident that these sources offered appropriate measures of compliance effectiveness. *Id.*

129. Hui Chen & Eugene Soltes, *Why Compliance Programs Fail: And How To Fix Them*, HARV. BUS. REV., Mar.–Apr. 2018, at 116, 119, 123.

130. *Id.* at 122.

engaged in misconduct but went undetected.[131] Or assessment data might not actually align with whether a company is compliant, like when a firm points to completion rates for its ethics training without evidence that the training had an effect on conduct.[132]

In a roundtable discussion, Professors Soltes, Reinier Kraakman, and Karl Hofstetter considered the "major weakness" stemming from "lack of reliable quantitative data" for measuring the effectiveness of the compliance process, predicting noncompliance, informing managers about compliance performance, and benchmarking compliance across firms.[133] They reasoned that the lack of data around compliance impairs the ability of firms to undertake effective and efficient compliance efforts.[134] They further hypothesized that a collective action problem in which firms keep their compliance data confidential as trade secrets despite the potential for cross-firm gains from data aggregation is partly to blame for compliance's missing empiricism.[135] Another driver of this collective action problem might even be compliance itself. Firms might not share compliance data with competitors for fear of running afoul of antitrust laws.[136] Of course, fear of embarrassment over unflattering data might also motivate firms to keep their compliance data secret.

Enforcers, as consumers of compliance data, have the potential to overcome this collective action problem. The DOJ and SEC, for instance, are among the leading consumers of compliance data given that they must evaluate firms' compliance efforts as part of their enforcement activities. They could use their presettlement leverage to require firms to produce comparable compliance or remediation data that could be aggregated to provide a relatively rigorous understanding

131. *Id.*

132. *Id.*

133. Reinier Kraakman, Eugene Soltes & Karl Hofstetter, Compliance, Compensation and Corporate Wrongdoing 8 (May 18, 2018) (unpublished manuscript), https://ssrn.com/abstract=3373718 [https://perma.cc/F8AQ-P92N].

134. *Id.*

135. *Id.*; *see also* Bus. Scholarship Podcast, *Veronica Root Martinez on the Compliance Process*, ANDREW K. JENNINGS, at 15:10 (Oct. 24, 2019), https://andrewkjennings.com/2019/10/24/veronica-root-martinez-on-the-compliance-process [https://perma.cc/D2H7-66ZW] (recounting one chief compliance officer's reluctance to share compliance data with competitors for fear that doing so could violate antitrust laws); Garrett & Mitchell, *supra* note 29, at 54 ("Individual companies . . . have incentives not to share information about compliance failures, lest they risk liability. Nor do companies have strong incentives to share information about compliance successes, lest their competitors use their strategies too.").

136. *See* Bus. Scholarship Podcast, *supra* note 135.

of what works and how. Their existing policies for evaluating compliance programs, however, suggest that they too lack empirically rigorous standards for ex ante compliance or ex post remediation, and for testing whether those standards have been achieved.[137]

For example, in its 2001 Seaboard Report, the SEC articulated when it will give penalty credit to public companies that "seek out, self-report and rectify illegal conduct, and otherwise cooperate with Commission staff."[138]

In assessing remediation, the SEC asks several questions:

> What steps did the company take upon learning of the misconduct? Did the company immediately stop the misconduct? Are persons responsible for any misconduct still with the company? If so, are they still in the same positions? . . . Did the company take steps to identify the extent of damage to investors and other corporate constituencies? . . .
>
> What assurances are there that the conduct is unlikely to recur? Did the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct? Did the company provide our staff with sufficient information for it to evaluate the company's measures to correct the situation and ensure that the conduct does not recur?[139]

These questions are relevant for assessing the effectiveness of a firm's remedial efforts, of course, but they do not suggest an empirical framework for answering them. The DOJ Criminal Division advanced that goal when it released its *Evaluation of Corporate Compliance Programs* guidance.[140] Broadly, the guidance represents the most thorough statement to date for how the government should evaluate ex ante compliance or ex post remediation. It instructs line prosecutors in assessing ex ante compliance programs when making charging and settlement decisions,[141] as well as evaluating the need for postenforcement monitors.[142] It emphasizes the importance of assessing effectiveness—though, due to the uncertainty around

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137. *See* Miriam H. Baer, *Too Vast To Succeed*, 114 MICH. L. REV. 1109, 1126–28 (2016) (questioning the indeterminacy of government-driven corporate reform programs that are not empirically founded).

138. *Report of Investigation and Statement*, *supra* note 115.

139. *Id.*

140. EVALUATION OF CORPORATE COMPLIANCE PROGRAMS, *supra* note 8, at 1.

141. *Id.* (citing DOJ Manual, *supra* note 3, § 9-28.300).

142. *Id.* (citing Benczkowski Memorandum, *supra* note 80, at 2).

recidivism at the time of settlement, it does so by looking for indicia of effectiveness rather than direct tests for whether efforts prevent violations.[143] This guidance represents a significant step forward for compliance empiricism.[144] But even it leaves unanswered more concrete questions: What outcomes should compliance efforts produce, and how can firms' compliance be measured against them?

Under either policy, assessing whether efforts have prevented violations is ultimately left to enforcers' qualitative judgments. This approach to assessing compliance might work reasonably well in posterior cases: an enforcer can look to a firm's misconduct and compliance program to make a judgment whether the program was adequate to prevent the kind of misconduct that occurred, notwithstanding that it did. That assessment requires looking at historical conditions and drawing causal conclusions between the two, something a careful qualitative analysis can achieve. As the next paragraphs explain, however, qualitative assessment is less certain in its ability to predict what effects, if any, remedial efforts done by or agreed to at settlement will have months and years later.

2. *The Knowledge Challenge.* The uncertainty over what works in ex ante compliance implies even greater uncertainty over what remedial efforts will work in a firm that has already failed to comply with the law.[145] By giving up-front credit for remediation, enforcers face a double uncertainty. First, they do not know generally whether those efforts work at effecting compliance. Second, they do not know whether efforts will work at a specific firm.[146] Or, as explained below, initial efforts might prove ineffective and reaching a desired outcome will take periodic assessment and adjustment—an iterative, rather than one-step, process.[147] This uncertainty allocates recidivism risk onto the

143. *See id.* at 14–15. *But see* Krawiec, *supra* note 17, at 491–92 ("[T]he indicia of an effective compliance system are easily mimicked and true effectiveness is difficult for courts and regulators to determine . . . .").

144. *See* Aloke Chakravarty & Sam Ballingrud, *Insight Into the DOJ's Updated Guidance on Evaluation of Corporate Compliance Programs*, CORP. COUNS. (July 24, 2019, 2:30 PM), https://advance.lexis.com/api/permalink/71207bd8-15f2-4a0c-961b-2cb2ba47467b [https://perma.cc/CT9Z-2FKG] (discussing how to conform compliance programs to the DOJ guidance).

145. *Cf.* Garrett & Mitchell, *supra* note 29, at 51 ("[C]ompanies have no way to know, ex ante, which compliance measures will succeed in preventing violations . . . .").

146. *Cf.* Root, *Monitorships*, *supra* note 81, at 128 ("The necessary remediation effort in these instances—which involves an overhaul of the organization's corporate compliance program with respect to the area of misconduct—is difficult for the government to delineate at the outset.").

147. *See supra* note 68 and accompanying text.

public. It pays the firm by discounting the penalty at the time the settlement is agreed to, whereas the firm's performance in the future is uncertain.[148]

Giving up-front credit partly drives this challenge in that by essentially locking in a plan at the start of remediation, firms have less flexibility to recalibrate their reform processes and share the resulting data with enforcers.[149] If, however, these data were generated and available to enforcers, then subsequent defendants would be able to incorporate past learnings into their own remediation plans. This practice would spur a virtuous cycle in which iterative rounds of corporate remediation improve understanding of what works most efficiently. For example, enforcers could standardize and de-identify data and make it available to researchers, firms, and providers of compliance services for use in testing and improving ex ante compliance or designing ex post remediation. By implication, not producing these data risks there being more recidivism than would have occurred with the benefit of that knowledge.

The knowledge challenge also manifests in missing opportunities to advance ex ante compliance. One explanation for limited empiricism in compliance is a collective action problem:[150] firms do not share their compliance data, stymying the development of knowledge that would be useful to firms generally. Enforcers, however, are well positioned to overcome this problem.[151] They regularly work adjacent to complex remediations and have leverage through the settlement process to require data sharing.[152] Making some form of these data publicly

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148. With this public-borne risk, as the next subsection suggests, the measurement challenge can lead not only to ineffective reform outcomes, but it can also cause enforcers to overcompensate and, as a result, firms to overremediate.

149. The DPA and stipulated order for Och-Ziff and Equifax, discussed *supra* note 88, for example, were both approved by a federal court and contain detailed remedial undertakings. If the remediation process revealed that new terms were needed to accomplish the goals embodied by the settlements, the defendants would need not only to obtain the consent of the DOJ or the Federal Trade Commission ("FTC"), but also the courts, to amend them. Those amendments would also become publicly available, subjecting the defendants to a new round of negative press. Given such barriers, firms would be unlikely to seek changes, even if they were merited and would better serve to prevent recidivism.

150. *See supra* note 133 and accompanying text.

151. *See* Van Loo, *supra* note 36, at 384–95 (tracing the rise of regulatory agencies as data collectors, such as the Equal Employment Opportunity Commission's mandatory collection of employee demographic data from larger employers).

152. Indeed, it is already common for enforcers to require production of postsettlement data. For examples of such requirements, see sources cited *supra* note 91 (SEC agreements) and *infra* note 190 (U.S. Department of Health and Human Services agreements).

available would foster richer understanding for why violations happen and how they can be prevented.[153] These data would thus be a public good for use in deterring violations.[154] Giving up-front remediation credit, however, does not foster this sharing or public-good production, implying that violations will occur that could have been prevented.[155]

3. *The Overremediation Challenge.* Because postsettlement enforcement under the clawback approach has limited credibility, enforcers may seek, and firms may undertake, remedial efforts that overremediate. Overremediation, of course, undermines the ideal that corporate reform be both effective *and* efficient. Enforcers are not ignorant to reform's uncertain nature.[156] Their use of compliance consultants and monitors, as well as of DPAs and NPAs with clawback authority, shows uncertainty at settlement about recidivism. A consultant or monitor, for instance, allows an enforcer to pull back from an action and turn its resources to other priorities, assured that someone is there to push the firm toward not recidivating.[157] Setting a forward-looking period, whether it is one, three, or five years, in a DPA or NPA allows the enforcer at least the opportunity of doing a rough, high-level evaluation of the firm's remediation outcome.[158] It also keeps pressure on the firm not to recidivate, at least not to a degree that would draw a new enforcement action.[159] But, as noted earlier,

153. *See* Ford & Hess, *supra* note 14, at 736 (observing that greater capture of lessons learned from monitorships would create a virtuous circle for enhancing the quality of subsequent monitorships).

154. *See id.*

155. *See id.* (explaining that postmonitorship would foster sharing and public-good production); Garrett, *Scapegoat*, *supra* note 56, at 1838 ("The structural reform of a leading company can set a model for industry and assist in broader efforts by regulators to promote best practices to prevent violations from happening in the first instance.").

156. If a firm could *credibly* promise at the end of an enforcement matter that it has learned its lesson and will not break the law again, then there would be no need to mitigate its punishment for undertaking remedial efforts.

157. *See* Khanna & Dickinson, *supra* note 43, at 1730 (explaining one rationale for monitors as allowing enforcers to "subcontract[]" postsettlement supervision of firms and to transfer the cost of that supervision to firms themselves).

158. One study found twelve to thirty-six months to be the norm, although duration extended as high as sixty months. *Id.* at 1723 tbl.I; *see also infra* note 196 and accompanying text (discussing typical durations of the DOJ's DPAs and NPAs).

159. A firm might face consequences under a settlement (for example, loss of prior benefits) for subsequently charged offenses, but not for offenses that went undetected. This standard, though, risks that low-level violations numerous enough to reflect an aggregate failure of reform will go unnoticed or underenforced by enforcers. It also reduces firm incentives to monitor its organization and to self-report and remedy detected issues. In some cases, of course, the firm can

enforcers are not motivated to *use* their clawback authority, making the loss of settlement benefits a less-than-credible threat to would-be recidivists.

Beyond these explicit mechanisms, enforcers might also implicitly compensate for reform's uncertain nature. Two assumptions illustrate this point. First, an enforcer is uncertain whether a firm will recidivate and whether given remedial efforts will prevent recidivism. Second, it prefers finalizing the case, not wanting to police old settlements or use its clawback option. Under these assumptions, the enforcer will insist on seeing greater presettlement remedial efforts than are necessary to effect reform, or remedial efforts that are substantial but, in truth, poorly align with problems at that firm.[160] In this way, if it has a limited window to influence the course of the firm's remediation, then, because it values effectiveness above efficiency,[161] the enforcer will want the firm to apply as much effort as possible to fix the root causes of its violations. As part of this push, the enforcer will expect firms to adopt "industry-standard" compliance efforts, even if those efforts are not well aligned to the problems at the firm.[162] This kind of implicit compensation for reform uncertainty, however, creates the potential for overremediation, a deadweight loss.[163]

This compensating behavior can occur even if the enforcer takes a naïve or passive approach to remediation. Firms will act in anticipation of enforcers' preferences if those preferences are not explicitly stated.

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be required to self-report yet undetected offenses. *See, e.g.*, Walmart Inc., Exchange Act Release No. 86,159, Accounting & Auditing Enforcement Release No. 4054, Administrative Proceeding No. 3-19207, 2019 WL 2552354, at *11 (June 20, 2019) (requiring Walmart Inc. to report to the SEC previously undetected foreign bribes made by the company).

160. *See* Armour et al., *supra* note 50, at 50 (discussing the potential for "defensive decision-making" to cause overinvestments in compliance); Langevoort, *supra* note 66, at 113, 115 (explaining why compliance-program evaluators tend to be biased toward more substantial compliance monitoring, even when lighter programs would be reasonable).

161. Langevoort, *supra* note 66, at 113, 115.

162. *See* Krawiec, *supra* note 17, at 536 ("[C]ourts and regulatory bodies frequently measure compliance with the law against the industry standard, with little inquiry into the role played by the regulated group and other self-interested actors in establishing those standards."); *see also* GARRETT, *supra* note 19, at 277 ("Telling a company to just adopt 'best practices' does not give real guidance; prosecutors should impose provisions explaining how compliance should be implemented.").

163. *See* Miller, *supra* note 49, at 259 ("Governments have an incentive to require firms to overspend on compliance programs."). *See generally* WILLIAM M. HANNAY, III, JEFFREY M. KAPLAN & JOSEPH E. MURPHY, COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES (2020) (offering practitioner-oriented guidance on designing compliance programs that align to the prevention and detection expectations of the organizational sentencing guidelines).

Credit for remedial efforts is not binary. A firm that does more to convince an enforcer that it has lowered its recidivism risk will receive more credit than one that has done less.[164] But there is also a minimum threshold of remedial efforts an enforcer must see before giving any credit. Remedial efforts must reduce recidivism risk at a scale that evidences commitment to reform.[165] Below that threshold, any remedial efforts will not be credited.[166] Returning, for example, to the pharmaceutical company caught making false off-label claims, the firm would likely receive no remediation credit merely for sending an email reminder to the salesforce about its ethics policy, but it might receive some credit if it also requires employees to attend new sales-compliance trainings.

Beyond the minimum remediation credit, enforcers are willing to give a maximum credit that is capped at no more than the firm's total potential penalty. The enforcer will pay for remediation through a discount, but not out of pocket. Thus, if the pharmaceutical firm mandates new training, then it might receive the minimum credit. But if it institutes new training plus compliance-incenting compensation policies, then it might receive the maximum credit. If it also implements universal monitoring of sales calls in addition to the new training and compensation policies, it will still only receive the maximum. So, it has overremediated, at least as far as its penalty incentives are concerned.

The enforcer assigns a maximum value to recidivism prevention. It will pay only if there is expected to be some minimal recidivism prevention. And it will pay in proportion to the substantialness of the firm's remedial efforts at settlement. The parties cannot know at settlement whether the firm will recidivate. If they are willing to make reasonable assumptions about how effective remedial efforts will be at reducing the risk, then they can bargain for an approximately optimal deal. The enforcer pays only for a given level of recidivism-risk reduction, and the firm only undertakes efforts needed to earn that level of credit. But two interrelated effects can thwart such a roughly optimal deal.

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164. Miller, *supra* note 49, at 248–49.

165. *See* Soltes, *supra* note 13, at 1001–03 (recognizing that compliance falls along a continuum and considering what conditions must exist to demonstrate a "minimally sufficient" compliance program).

166. *See id.* at 1002 (stating that to assess a compliance program, the firm should demonstrate the effectiveness of the program).

First, the enforcer does not disclose the specific criteria it will use to evaluate remedial efforts for credit purposes, nor the function it will use for determining how much credit a given level of remedial effort is worth.[167] Indeed, it may not know itself.[168] Although firms will want to tout their remedial efforts during settlement negotiations, they must first institute those efforts without knowing how the enforcer will evaluate them. They know that the enforcer expects to see efforts that it is satisfied will reduce the risk of recidivism occurring—above the avoidable level, that is.[169] Below that threshold, there is no credit. They also know that there is a maximum credit the enforcer will give.[170] But they do not know what remedial efforts will satisfy the threshold condition or what the remediation-to-credit function is once they reach the threshold condition. This information constraint on the firm's part will tend to cause overinvestment in remediation if it believes that the credit it will receive is larger than the cost of the efforts it will offer.[171] Overremediation occurs because—without knowing the maximum and

167. *Cf. id.* at 975 n.24 (observing that without disclosure of these standards, firms will be unable to determine if they are in compliance); Stucke, *supra* note 121, at 787 ("The problem is that no one, except the DOJ, knows the extent to which firms' compliance efforts resulted in their avoiding criminal liability or a lower fine.").

168. An enforcer is not an expert in remediation or the organizational structure or functions of the firm, even if it—over the course of an investigation—gradually becomes more knowledgeable about the firm and the causes of its offenses. Given the limits of its knowledge even *after* extensive investigation, it is unlikely at the outset of a case to have a clear expectation what remedial efforts it will credit and how much credit it will grant for a given level of expected recidivism reduction.

169. The avoidable level is the level of violations that management—through its management, cultural, ethical, and other interventions—has the ability to prevent. Below that is the unavoidable level: even organizations that are deeply committed to compliance would be expected to have occasional rogue employees, especially if they are relatively large. *See supra* notes 62–63 and accompanying text.

170. The maximum possible discount is a complete waiver of penalties and undertakings, a declination. Beyond that, there is a local maximum (which, when the enforcer exercises discretion not to charge a prosecutable case, is the same as the global maximum). That local maximum may be explicitly known by an enforcer, or it may be revealed only through negotiations between the parties. *See* Vivi Nastase, *Concession Curve Analysis for Inspire Negotiations*, 15 GRP. DECISION & NEGOT. 185, 192 (2006) (explaining the concept of concession curves and maxima and minima in negotiations).

171. Presettlement remediation can be thought of in terms of an investment by firms to identify the enforcer's willingness to pay for remediation (whether it is completed pre- or postsettlement). Professors George Triantis and Albert Choi offer a model along those lines of sellers' ex ante investments in contracts (here, a firm's presettlements remediation) in which best and worst options are initially unknown to the parties. Albert H. Choi & George Triantis, Relationship-Specific Investment, Asymmetric Information, and the Role of Knowledge-Based Obligations in Contracts 7 (Jan. 25, 2021) (unpublished manuscript), https://ssrn.com/abstract=3330973 [https://perma.cc/W9RF-4EAY].

minimum conditions and without knowing the remediation-to-credit function between them—firms will choose to overshoot if the expected credit is still greater than the remediation cost.[172]

Second, in balancing reform uncertainty against finality, enforcers will compensate for uncertainty by requiring considerable remediation efforts that both convince themselves of the firm's recidivism-risk reduction and support their institutional and individual interests.[173] For example, an enforcement attorney will want to ensure that agency leaders are satisfied with the risk reduction expected in connection with remedial efforts.[174] These efforts, however, may be more substantial than is truly necessary, making them inefficient. In some cases, they may not align to the firm's reform objectives because what efforts are needed may be unknown or misidentified in the run-up to a settlement.[175] In the latter case, remediation's effectiveness is also compromised.

As a consequence of these effects, a firm must also invest in advocating to the enforcer, which might include paying defense attorneys to help persuade the enforcer that its remedial efforts merit credit.[176] This advocacy represents a transaction cost within the larger settlement process. In addition to advocacy, a firm might purchase outside advice from compliance experts on what remedial efforts will advance its advocacy and at what scale they should be undertaken. Outside advisers would be expected to have an approximate understanding of what remediation is required for a given amount of credit, knowledge gained from personal experience in enforcement or

172. *See* Miller, *supra* note 49, at 254–55 (offering a model in which a rational, profit-maximizing, and risk-neutral firm "will expend resources up to the point . . . where the marginal cost of compliance equals the marginal cost of sanctions avoided").

173. *See supra* note 88 and accompanying text.

174. One former federal prosecutor now working as a white-collar criminal-defense attorney explained that "[p]rosecutors recognize that . . . it's a bad outcome and is not flattering to the Justice Department if companies that settle with the Justice Department get in trouble again." Interview with Attorney A (Nov. 6, 2019) (on file with author).

175. *See supra* note 149 and accompanying text.

176. *See* Garrett, *Scapegoat*, *supra* note 56, at 1830 (acknowledging fears that defendants influence enforcers by hiring their former colleagues but suggesting that "these fears . . . may not have much explanatory power"). One white-collar defense attorney interviewed for this Article noted that remediation presentations to enforcers are often most effective when delivered by compliance personnel, rather than attorneys. Interview with Attorney A, *supra* note 174. The interviewee explained that compliance experts might be better able to explain the remediation to enforcers, versus attorneys delivering a "good remediation story." *Id.*

in advising other corporate defendants.[177] These professionals can thus help firms mitigate their overremediation risk. Policies like the DOJ's *Evaluation of Corporate Compliance Programs* guidance might also serve this purpose. Expectations around what is suitable remediation, however, might trend up and up.[178] If one-way ratcheting occurs, advisers can help firms avoid overremediation in discrete cases but not in the aggregate.

The measurability and knowledge challenges directly implicate the public interest in deterring violations by means of ex ante compliance or ex post remediation. The overremediation challenge also points to a social cost. Firms that expend more resources than necessary remediating, and seeking credit for doing so, will have fewer resources to engage in other socially beneficial activities—such as research, cutting prices, increasing wages, and paying dividends—at no greater compliance benefit. Although enforcers, and perhaps the public, will prioritize remediation's effectiveness over efficiency, the latter factor is nevertheless worth concern. The next Part provides a framework for incorporating remediation provisions into enforcement settlements that can help defendants achieve more effective, efficient reform outcomes.

II. FOLLOW-UP ENFORCEMENT

This Part explains how the effectiveness, knowledge, and overremediation challenges posed by the clawback approach can be addressed with modest modifications to settlement practice. Under an alternative follow-up approach, as part of settlement negotiations, an enforcer offers a minimum and maximum penalty credit for remediation and the parties agree to measurable reform outcomes. The twist is that the defendant receives credit only for the outcomes it achieves. After the defendant implements its reform efforts, the parties assess what the firm has accomplished, and the remediation credit is awarded accordingly. This approach means that the cost of failed reform falls on the firm, thereby protecting the public and committing management to follow through, which it also has incentive to do efficiently. By prescribing firms' reform obligations and enforcers' role

177. *See supra* note 83 (describing the professional backgrounds of professionals at a leading compliance-consulting firm).

178. Soltes, *supra* note 13, at 1003 (warning that the government's consideration of expenditure levels in assessing compliance programs would "encourage[] firms to focus on size and number of initiatives, rather than their effectiveness," leading to inefficient ratcheting).

in assessing firms' performance, it commits enforcers to give more attention to recidivism prevention while respecting their preferences for finality and for focusing time and other resources on new cases. For instance, under this approach, enforcers can police remediation without engaging in open-ended postsettlement monitoring. Beyond these direct effects, this approach enables the collection of data that can be used to improve future remediation efforts and ex ante compliance.

Consider the following update to the earlier stylized example.[179] Assume again that the enforcer handling the off-label-promotion case assesses that the appropriate penalty is $100 million. Then, after assessing the quality of the defendant's ex ante compliance program or self-reporting and its cooperation during the investigation, the enforcer gives a $25 million credit for each. It further determines that preventing future instances of false off-label promotion (or similar illegal sales practices) would be worth $25 million. It thus sets a potential remediation credit of $25 million, meaning that the net penalty—what the company must pay—will range between $50 and $25 million.

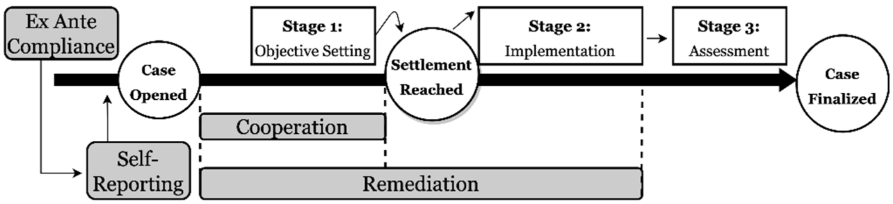
Appropriate penalty	$100,000,000
Compliance/self-reporting	($25,000,000)
Cooperation	($25,000,000)
***Potential* remediation**	($0 to 25,000,000)
***Maximum* net penalty**	$50,000,000
***Minimum* net penalty**	$25,000,000

To illustrate this modified approach, the prior timeline is updated to include the follow-up enforcement stages described in this Part. It shows the path of the earlier timeline, with the added steps of follow-up enforcement. A firm's reform objective is set at the time of

179. The example is stylized because prosecutors are generally not so explicit in how they price penalties, or even how they weigh various factors in doing so. *See* GARRETT, *supra* note 19, at 149–50 (finding that only 30 of 255 analyzed NPAs or DPAs disclosed how penalties were calculated). This example also illustrates a secondary benefit of follow-up enforcement. Under the clawback approach, a firm's credit for ex ante compliance, self-reporting, and cooperation are completed at the time of settlement, but they remain at risk via the enforcer's power to revoke the settlement agreement. Although that risk is fairly small, a rational calculation of the value of these mitigating efforts would require applying a revocation-risk discount. As a matter of promoting enforcement policy, enforcers should avoid implying discounts on the value of compliance, self-reporting, and cooperation. And as matter of equity, defendant firms should not be at risk of losing benefits for completed efforts merely because they fail at achieving recidivism-prevention obligations unrelated to the prior credited efforts.

settlement, along with a contingent remediation credit. Then, after settlement, the firm implements a remediation program, and finally, the enforcer and firm assess whether the firm achieved its reform objective.

FIGURE 2: FOLLOW-UP ENFORCEMENT



A. *Stage 1: Objective Setting*

At the objective-setting stage, follow-up enforcement requires identifying a measurable reform objective and pricing it. Clarity on these points makes it possible for the public to pay only for the recidivism prevention it bargains for, and it allows firms to avoid pursuing ineffective or inefficient remediation efforts.

Once an investigation nears its end, the enforcer and firm begin negotiating a settlement. As remediation goes, the firm will tout the efforts that it believes justify a mitigated penalty.[180] Beyond remediation, it will also point to the steps it has taken to cooperate with the government's investigation and avoid violating the law, including its ex ante compliance program.[181] In general, and unlike the stylized examples in this Article, the parties will negotiate a bottom-line penalty, rather than negotiating a top-line penalty and then pricing individual values for each mitigating factor, such as ex ante compliance,

180. *See supra* note 176 and accompanying text. Of course, the severity of the penalty is not the firm's only concern. In some circumstances, it will face criminal indictment or nonfinancial collateral consequences—such as bars on government contracting or bad-actor provisions under the securities laws—all of which it will want to avoid, perhaps even more so than financial penalties. *See, e.g.*, Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 745, 128 Stat. 2130, 2391 (barring corporations convicted of felonies from receiving federal contracts); 17 C.F.R. § 230.506(d) (2020) (barring certain bad actors from making exempt securities offerings under Rule 506 of Regulation D); *see also* DOJ Manual, *supra* note 3, § 9-28.300 (setting out factors for determining whether to criminally charge a business entity).

181. In the case of presentations to the SEC or DOJ, it will point to its satisfaction of factors in the SEC's *Report of Investigation and Statement*, *supra* note 115, or the DOJ's EVALUATION OF CORPORATE COMPLIANCE PROGRAMS, *supra* note 8. In turn, enforcers will point to that presentation to justify their decision to mitigate penalties. *See* Interview with Attorney B (Nov. 6, 2019) (on file with author).

self-reporting, cooperation, and remediation.[182] In this light, the mitigating factors are priced as a bundle. Even then, they may not be explicitly "priced" at all, but rather they might merely anchor an enforcer to negotiate at a certain penalty tier, such as a strong package anchoring the penalty negotiations around $X million versus a $1.5X million baseline.[183] This implicit approach to pricing can facilitate the settlement process by avoiding negotiations over composite price points, which could not only slow down negotiations but also create intradeal anchoring that would undermine the parties' ability to reach a satisfactory bottom-line figure.[184] For example, although an enforcer might have an analytical basis for a proposed penalty—like $X per violation in a case covering numerous violations—it might want to avoid being too explicit in its analysis. Doing so would make it harder

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182. Compare hypothetical settlement language "the Defendant Firm agrees to pay $100 million as an appropriate civil-money penalty, which will be reduced by $15; $20; and $20 million, respectively, in consideration of its pre-enforcement compliance program, cooperation during the investigation, and remedial efforts" with hypothetical settlement language "the Defendant Firm agrees to pay $45 million as an appropriate civil-money penalty, which incorporates $55 million in mitigation in consideration of its pre-enforcement compliance program, cooperation during the investigation, and remedial efforts."

183. A former federal prosecutor and current white-collar defense lawyer interviewed for this Article explained that the DOJ is more explicit on pricing than the SEC, and the Treasury's Office of Foreign Asset Control is more explicit than the DOJ. The interviewee described pricing in heuristic terms:

> For any case . . . the government either wants to kill you or give you something you could live with, either way you're not going to be happy. If you haven't cooperated, self-reported, remediated, there is not much of an incentive for the government to give you anything you could live with. It just informs the tenor of the conversation, whether at negotiations they start off at a billion or something more reasonable. At end of the day, you're starting off at 500, you'll end up somewhere in the middle. If you cooperated and remediated, then you end up at 400 rather than 500 . . . . It is very hard to quantify. When you're negotiating from a position where you've cooperated and remediated, there is a softer landing, a basis for doing that: okay, we'll give you another 10% or 20% off.

Interview with Attorney B, *supra* note 181; *see also* Och-Ziff DPA, *supra* note 88, at 3–8 (explaining the basis under the organizational sentencing guidelines for the hedge fund's fine range at $266 to $532 million but not explicitly pricing the 20 percent discount represented by the final $213 million penalty).

184. During a question-and-answer session at a conference on the Foreign Corrupt Practices Act, then-Assistant Attorney General Brian Benczkowski rejected the notion that a penalty is "a number taken out of the sky that's going to be cut in half two or three times just to get to an easy resolution." Dylan Tokar, *Justice Department Looks To Streamline Penalty Negotiations in Corporate Cases*, WALL ST. J. (Dec. 4, 2019, 5:59 PM) https://www.wsj.com/articles/justice-department-looks-to-streamline-penalty-negotiations-in-corporate-cases-11575500347 [https://perma.cc/NJ6B-F49E]. Instead, he offered, penalties are based on the organizational sentencing guidelines and an objective evaluation of the case. *Id. But cf.* Benczkowski Remarks, *supra* note 87 (acknowledging that, with respect to Foreign Corrupt Practices Act enforcement, in the past "the Department was less transparent about how it reached the results it did").

to justify negotiation-based deviations as having a law enforcement, rather than a transactional, rationale.[185] Similarly, if mitigating factors are explicitly and individually priced, the parties must expend additional efforts to justify changes that help them arrive at the final penalty.[186] For both enforcers and firms, it is preferable to avoid barriers to agreement. This implicit pricing, however, does leave the tradeoffs the parties make in the settlement process less transparent. Although a lack of transparency might facilitate settlement on the front end, on the back end it prevents the public from fully accounting for enforcement costs and thus reduces its ability to monitor enforcers.[187]

Focusing just on remediation credit, enforcers and firms using the follow-up approach must agree to the maximum and minimum remediation credits—that is, the most credit the firm can receive for remediation and the least it will receive if it achieves a minimal compliance threshold. Setting these prices explicitly is necessary because the firm does not receive remediation credit up-front, but rather only for outcomes.

If remediation credit is based on actual outcomes, then it follows settlements must include *measurable* outcomes that firms are to achieve. Setting measurable reform objectives also helps with setting explicit prices for achieving them, and vice versa. Recall the example of the pharmaceutical company. Setting explicit prices for remediation might be analytically challenging under current practice: What is the value, say, of implementing new training, compensation practices, and compliance monitoring if they are to satisfy a heuristic of "reducing the

185. Practice varies among enforcement agencies and individual enforcement attorneys in how transparent they are with defendants about setting penalties. The Fraud Section of the DOJ's Criminal Division, for example, has been more transparent about its penalty decisions than other enforcers. *See* Interview with Attorney A, *supra* note 174.

186. *See* Francesco Parisi, *The Market for Votes: Coasian Bargaining in an Arrovian Setting*, 6 GEO. MASON L. REV. 745, 762 (1998) (observing that bundling commodities—here, mitigation components in a settlement—reduces transaction costs versus bargaining over discrete commodities).

187. Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J.L. ECON. & ORG. 167, 174 (1990) (explaining that a constituent's costs to monitor a public actor "will vary for a single issue at a single point in time, depending on where the observer fits within the political system, her preexisting levels of information, and how 'distant' is the actor or how complicated and obscure is the process that she is observing"); *see also* GARRETT, *supra* note 19, at 274–75 (urging that "[p]rosecutors should also be far more transparent about how fines are calculated," among other reforms for improving the effectiveness and public accountability of corporate prosecutions).

risk of recidivism"?[188] With follow-up enforcement, however, the question is more concrete: What is the value to the public of a firm of X size and Y complexity not engaging in certain categories of unlawful conduct? Or, to flip the question, for a given level of remediation credit, what sort of corporate behavior would the public expect to see?

Under this follow-up approach, firms are rewarded not for reducing the risk of recidivism but for not recidivating. Just as compliance is not binary, however, neither should be remediation-for-credit pricing.[189] Whether a firm manages to follow through and achieve a given level of compliance is contingent on a number of factors inside and outside management's control, including its own motivation, intrafirm conditions, or external developments. The pharmaceutical company might not achieve perfect compliance in its sales practices, for example, though it might achieve a level that justifies some credit. Alternatively, it might continue to commit too many violations to merit credit. In this light, parties will agree what levels of compliance earn the minimum credit and the maximum credit, and between those extremes, what function yields the credit the firm receives for a given level of compliance.

For example, imagine that the pharmaceutical company can earn up to $25 million in remediation credit and that each postenforcement sales violation reduces the credit by $200,000.[190] If methods like the surveys described below were used to estimate how often the firm engaged in unlawful sales practices, then that award computation would be straightforward. If there were fifty instances of sales misconduct over the implementation period, the firm would receive a total $15 million in remediation credit. It did not achieve full reform of its sales practices, but it did achieve a level that the public is willing to

188. Compare this question to one asked by the DOJ's *Evaluation of Corporate Compliance Programs*, *supra* note 8, at 18: "What specific changes has the company made to reduce the risk that the same or similar issues will not occur in the future?"

189. *See supra* note 13.

190. Corporate-integrity agreements ("CIAs") used by the U.S. Department of Health and Human Services offer one model. CIAs impose stipulated penalties, typically $2,500, for each day a defendant fails to comply with its settlement obligations. *See, e.g.*, *Corporate Integrity Agreement and Conditional Exclusion Release Between the Office of the Inspector General of the United States Department of Health and Human Services and Insys Therapeutics, Inc.*, U.S. DEP'T HEALTH & HUMAN SERVS.: OFF. INSPECTOR GEN. 46 (June 5, 2019), https://www.justice.gov/usao-ma/press-release/file/1170126/download [https://perma.cc/PJG6-97JT]; Pfizer CIA, *supra* note 28, at 51. *See generally Corporate Integrity Agreements*, U.S. DEP'T HEALTH & HUMAN SERVS.: OFF. INSPECTOR GEN., https://oig.hhs.gov/compliance/corporate-integrity-agreements/index.asp [https://perma.cc/2DUT-W5Y7] (explaining typical CIA components and policies).

compensate it for. Additionally, there are several other reform-related terms to negotiate.

First, how long should the implementation period last? A firm might recidivate for as long as it remains in business, a prospectively indefinite period. Although the uncertainty around recidivism at settlement is reason not to award up-front credit, given the finality interests of both enforcers and firms, pragmatically there must be some end point.[191] More, if remedial efforts have effected a given level of compliance, then after enough time, observers might reasonably conclude that they will continue to do so as long as there is a steady state.[192] Thus, as part of the settlement process, the parties must determine how long management has to implement remediation, including time to course correct, and when the outcome will be assessed and the overall credit awarded. This timing requires case-by-case judgment on the likely scope and complexity of the firm's reform process.[193] The SEC's policy restricting DPAs to a maximum of five years offers an outer limit.[194] Corporate prosecutions by the DOJ are also instructive.[195] In 2,318 instances since 1990 in which some form of probation was imposed on a defendant, 28 percent of the terms were for five years, 6.9 percent for four years, 27.5 percent for three years, 18.4 percent for two years, and 15.8 percent for one year.[196] Only three

191. *Cf.* King-Seeley Thermos Co. v. Aladdin Indus., Inc., 418 F.2d 31, 34–35 (2d Cir. 1969) ("[A] decree may be changed upon an appropriate showing, and it holds that it may not be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree (the elimination of monopoly and restrictive practices) have not been fully achieved." (emphasis omitted) (quoting United States v. United Shoe Machinery Corp., 391 U.S. 244, 248 (1968))).

192. *See* Ford & Hess, *supra* note 14, at 734 ("Although monitorships are typically 24 to 36 months in duration, they are expected to have an impact that lasts significantly longer.").

193. There is a deep gap in knowing to what extent remediation efforts work. An interrelated question is how much time is needed to implement an effective remediation, test its effectiveness, and have reasonable confidence that newly achieved compliance is durable. This Article recommends keeping with existing DPA and NPA timing practice as an initial step toward follow-up enforcement, but experience should show whether a company can be reformed in a few years. *Cf.* GARRETT, *supra* note 19, at 193 ("We do not know if monitors can effectively reform an entire company in just a few years . . . .").

194. *See* SEC Manual, *supra* note 4, § 6.2.2.

195. Federal law limits probation sentences to a five-year maximum term. 18 U.S.C. § 3561(c)(1) (2018).

196. As of November 17, 2020, the Corporate Prosecution Registry includes 2,082 instances of some form of probation being imposed on a defendant firm. The percentages in the accompanying text were calculated from those data. *See* Brandon Garrett & Jon Ashley, Corporate Crime Table (CSV), CORP. PROSECUTION REGISTRY (last updated Nov. 17, 2020), https://corporate-prosecution-registry.s3.amazonaws.com/media/corp-crime.csv [https://perma.cc/NG7P-9H5U].

terms exceeded five years, and all others were in a range between zero and sixty months.[197]

Second, the parties must evaluate the appropriateness of periodic reporting, or the appointment of a compliance consultant or monitor, in a new light. Because a settlement with follow-up enforcement does not award remediation credit up-front, the management follow-through concerns that motivate enforcers to require these postsettlement monitoring mechanisms would not be as great. More, as the last Part explains, this kind of settlement would likely have higher salience with shareholders of public companies, adding an extra pressure point on management's follow-through.[198] Because management bears the burden to achieve reform objectives, it might also hire outside resources on its own when they are needed, lessening concerns around competency. These points suggest that in many cases when a monitor would be hired, follow-up enforcement might be a satisfactory substitute, or even a superior option in effectiveness or efficiency terms.

B. Stage 2: Implementation

In the objective-setting stage, the parties agree to measurable outcomes. Management must then turn to achieving those outcomes, recognizing that reforming complex organizations is a challenging undertaking that likely requires an iterative process.[199] These first two steps are covered in detail by the DOJ's *Evaluation of Corporate Compliance Programs* guidance.[200] The third, fourth, and fifth steps go further:

1. *Identify Root Causes.* First, management identifies the root causes of the violations it must prevent going forward. It will have already accomplished much of this work through its presettlement internal investigation, including by reviewing records and interviewing

197. *Id.* The three probation terms over five years were resolved through a DPA and NPAs, rather than a judicial sentencing. *Cf. supra* note 195.

198. *See supra* note 68 and accompanying text.

199. *See supra* note 68 and accompanying text; *see also* GARRETT, *supra* note 19, at 276–77 ("Organizational complexity itself enables more complex and damaging crimes. But complex organizations can also be more challenging to reform . . . .").

200. *See* EVALUATION OF CORPORATE COMPLIANCE PROGRAMS, *supra* note 8, at 3–4.

employees.[201] The exemplar pharmaceutical company might find, for instance, that by compensating sales representatives mostly in commission, it encouraged them to off-label market.[202] Or it might find that sales representatives were not so much motivated to earn higher commissions as they were not to fall short on sales quotas and thereby lose their jobs or be bullied by supervisors.[203]

2. *Design and Implement a Remediation Plan.* Identifying the root causes for violations leads to the second step, selecting and implementing remedial efforts that are reasonably designed and expected to resolve those causes.[204] Often, more than one initiative will be needed.[205] The pharmaceutical company, for example, might eliminate sales commissions from its compensation plan. But if sales representatives or their managers still face performance pressure to retain their jobs, to avoid being bullied, or to be promoted, violations might persist.[206] This example marks the potential tension between effectiveness and efficiency. Eliminating accountability for sales performance, for instance, might prevent sales violations, but it might also lead to shirking by employees, behavior that imposes a different set of costs on the business.[207] Management must pull multiple threads

201. Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 714 (2020) (describing early steps in internal investigations of potential criminal conduct).

202. *Cf.* Earl D. Honeycutt, Jr., Myron Glassman, Michael T. Zugelder & Kiran Karande, *Determinants of Ethical Behavior: A Study of Autosalespeople*, 32 J. BUS. ETHICS 69, 73 (2001) (evaluating whether commission-only compensation is a determinant of automobile-salesperson ethical behavior).

203. *Cf.* INDEP. DIRS. OF THE BD. OF WELLS FARGO & CO., SALES PRACTICES INVESTIGATION REPORT 5 (2017), https://wellsfargo.com/assets/pdf/investor-relations/presentations/2017/board-report.pdf [https://perma.cc/F4NL-K2T7] (finding that many Wells Fargo employees who engaged in inappropriate sales practices believed "that failing to meet sales goals could . . . result in termination or career-hindering criticism by their supervisors" and "associated their behavior with sales pressure, rather than compensation incentives").

204. *See* EVALUATION OF CORPORATE COMPLIANCE PROGRAMS, *supra* note 8, at 4 ("Any well-designed compliance program entails policies and procedures that give both content and effect to ethical norms and that address and aim to reduce risks identified by the company as part of its risk assessment process.").

205. *Cf.* GARRETT, *supra* note 19, at 276–77.

206. *See* INDEP. DIRS. OF THE BD. OF WELLS FARGO & CO., *supra* note 203.

207. Dominique Rouziès, Anne T. Coughlan, Erin Anderson & Dawn Iacobucci, *Determinants of Pay Levels and Structures in Sales Organizations*, 73 J. MKTG. 92, 95 (2009) ("Firms cannot afford *not* to reward salespeople when they generate results from their customers; otherwise, salespeople may shirk, behave unethically, sabotage, or quit.").

together to optimize between these at-tension goals: creating a salesforce that is motivated to sell but not in unlawful ways.

3. *Develop Assessment Methods.* Third, management must develop reliable methods for measuring whether relevant types of misconduct are occurring, aligning those methods to the outcomes it is responsible for achieving.[208] These methods often will need to be proactive. The exemplar pharmaceutical company might set up a hotline for physicians to report false off-label claims or kickback offers.[209] That step might identify some misconduct, but it would not be expected that every physician who encounters this conduct will report it. She might not care to do so, or she might even accept the kickback.[210] Instead, affirmative methods such as surveying salespeople about their own and colleagues' practices, randomly polling physicians, analyzing sales data for outlier patterns, or reviewing recordings of sales calls might identify a greater level of misconduct than could be seen if the firm relied only on passive monitoring.[211] After developing these methods, the firm must use them periodically to assess whether the remedial efforts it has implemented are in fact working.

4. *Adjust the Remedial Efforts.* Fourth, a firm should assume that its initial remedial efforts will not satisfy its reform objectives.[212] The third step's testing process is likely to reveal that these efforts are effective only to a certain level, or that they are ineffective in some contexts.[213] Faced with these results, management must course correct:

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208. Interview with Attorney A, *supra* note 174 ("The more targeted the remediation is to the actual facts, the better. If you can point to specific remedial acts that likely would have prevented what went wrong, that is good.").

209. *See* David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV. 1781, 1795–96 (2007) (discussing survey results in which many respondents witnessed misconduct but did not report it due to fear of retaliation or a belief that reporting would not lead to corrective action).

210. *See, e.g.*, *Physicians and Pharmacy Sales Reps Indicted for Kickback Conspiracy in Which Doctors Allegedly Received Money in Exchange for Writing Unnecessary Prescriptions of Nuedexta*, U.S. DEP'T JUST.: U.S. ATT'Y'S OFF. N.D. OHIO (Sept. 26, 2019), https://www.justice.gov/usao-ndoh/pr/physicians-and-pharmacy-sales-reps-indicted-kickback-conspiracy-which-doctors-allegedly [https://perma.cc/EA47-N7ET].

211. *See* Miller, *supra* note 49, at 258–59 (explaining that "it is probably cheaper to mandate an effective compliance program than to police the underlying conduct" because "[u]nlike primary misconduct, which is usually hidden from view, large parts of the compliance program are easy to observe").

212. *See supra* note 68 and accompanying text.

213. *See supra* note 68 and accompanying text.

determine the reason behind a deficiency and what additional remedial efforts, or changes to existing efforts, will address it.

5. *Iterate Steps (1) Through (4).* As a final step, management iterates the process. By adopting best practices initially and then testing their effect on the firm's compliance levels, management can refine its efforts until it either achieves the level it promised the enforcer or comes close to it.

C. Stage 3: Assessment

In the final stage, the parties assess whether the firm has achieved the level of reform it promised or, if not, how far it has fallen short. Based on that assessment, the contingent portion of the enforcement action's penalty becomes fixed: the firm must pay either the maximum penalty (receiving no credit),[214] no further penalty (receiving maximum credit), or some amount between those two points. If the enforcer deferred this portion of the penalty, a firm that does not qualify for the maximum credit will pay the enforcer the difference, plus an appropriate amount of interest. If the firm prepaid the full contingent penalty, the enforcer would issue a refund.[215]

The prior Section identifies the need for reliable instruments to test whether violations are happening and whether remedial efforts are working. Similar methods may be used at the assessment stage. As with any instrument, assessments of a firm's compliance should be adequately valid, accurate, and precise—does the instrument measure what it is intended to measure, are its measurements unbiased, and are they nonrandom?[216] If the exemplar pharmaceutical firm presented hotline data related to its sales practices, those data alone would be

214. Although enforcers have the ability to exert pressure through sanctions and incentives, firms cannot be fully coerced into reforming themselves. The immediate consequence for firms that fail to meet even the minimum threshold is that they are held fully responsible for past wrongdoing—namely, they must pay the full contingent penalty. Those instances may, of course, arise because the firm has recidivated at a level serious enough to face a new enforcement action. In that case, it will be fully punished for past violations apart from any sanctions it faces in connection with new violations. *But see supra* note 25 and accompanying text (expressing skepticism that those consequences are credible).

215. Charging interest is not necessary to this approach but doing so may promote the reform process. For example, a settlement might allow for a defendant to accelerate its remediation assessment if that process took less time than anticipated. It would be motivated to finalize the case early, and the accrual of interest would add incentive to avoid delay.

216. *See* DAVID LEBLANC, STATISTICS: CONCEPTS AND APPLICATIONS FOR SCIENCE 5–9 (2004).

valid (they do measure sales-practices violations) but inaccurate (they are biased by the omission of unreported violations). Although management is generally best positioned to develop these instruments, enforcers have a role in questioning their appropriateness. Indeed, enforcers that routinely use follow-up enforcement in settlements might do enough Stage Three assessments to justify hiring internal experts to help line enforcers evaluate the instruments and their results. At Stage Three, firms and enforcers will ideally cooperate in making the assessment and will mutually agree on the appropriate level of credit. In cases of impasse, however, the settlement's text should provide for a neutral who can hear each side and resolve disagreements.[217] In any case, firms should disclose their remediation methods, instruments, and data to the enforcer for use in advancing its own remediation expertise. More, enforcers should be allowed to provide these disclosures to scholars or the public for use in advancing the empirical foundations of compliance,[218] subject to reasonable anonymization.

III. Implications of Follow-Up Enforcement

Part I draws attention to problems in the clawback approach to recidivism prevention. Part II shows how follow-up enforcement can address these challenges while producing public-good compliance knowledge. This Part closes with implications of the follow-up approach for corporate governance, enforcement, and compliance. It also reviews potential objections by firms and enforcers as well as conditions that must be satisfied before follow-up enforcement would be expected to be incorporated in settlements.

A. Corporate Governance

This Article describes a new approach for crediting and promoting remediation for firms that have broken the law. There is much in it that management might favor. For example, firms need only implement remedial efforts that management believes will address the root causes

217. The Office of Inspector General of the U.S. Department of Health and Human Services has long incorporated postsettlement reviews by independent-review organizations ("IROs") into CIAs. *See supra* note 190. Although the IRO model might not be necessary for cases in other enforcement domains, it is one alternative to the approach proposed in this Article (in which the parties make the assessment and only then submit disagreements to a neutral).

218. *See* Stucke, *supra* note 121, at 792–93 (observing that despite significant scholarly research on the effectiveness of ethics programs in preventing corporate crime, "[t]he empirical foundation of effective compliance . . . remains incomplete").

of past violations and effect a target level of compliance. They themselves can choose the most cost-effective means to do so, versus choosing means that will impress enforcers during settlement negotiations or accepting recommendations from compliance consultants or monitors.[219] They are given time after settling an enforcement action to achieve these results, without pressure to commit to a specific remediation plan during an investigation, when the root causes are least understood and the effectiveness of remedial efforts is least certain.[220] More, firms would be less likely to experience the disruption and expense of a consultant or monitor.[221] And, if enforcer behavior appears to be driven by political considerations or becomes unpredictable between administrations, management might also favor settlements that minimize the enforcer's influence or discretion over the reform process.

Despite these benefits, other effects of follow-up enforcement might meet with less favor among managers. A chief objection would be that this approach cuts against finality in closing an enforcement action. It would leave one piece of the case open, potentially for years, after the settlement.[222] Relatedly, this loss of finality would coincide with a loss of certainty because the cost of recidivism would be reallocated from the public to the firm.[223] It removes the day-to-day burden from the enforcer to police the settlement and affirmatively to initiate clawbacks. In turn, it places the burden on management to show that remediation credit was earned.

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219. See generally *supra* Part I.C.3 for a discussion of these problems.

220. That is not to say that obvious remediation should not be done during an investigation. Firms should take immediate steps to stop unlawful activity. Employees should be told to stop an unlawful practice, for example. And an executive known to have directed unlawful acts should be discharged. *See, e.g.*, Kahn, *supra* note 79 (crediting the presettlement discharge of Johnson Controls employees who engaged in misconduct, including "high-level executives at the Chinese subsidiary"). In terms of a plan to manage recidivism risk at the margins, however, firms would have more flexibility under the follow-up approach.

221. *See* Benczkowski Memorandum, *supra* note 80, at 2 (directing that monitors should be appointed only when necessary and never for "punitive purposes").

222. See *supra* Part I.A.1 for a discussion of enforcers' and defendants' shared interests in finality. Of course, it is the case for DPAs and NPAs that the matter remains open, potentially for years, after settlement. This burden on finality interests thus may be nothing new. The follow-up approach might still even represent an improvement from a firm's view if the alternative is a DPA or NPA that includes the appointment of a monitor.

223. *See generally supra* Part II (identifying firms' finality interests and explaining how current enforcement practice allocates recidivism risk onto the public by giving remediation credit up front at the time of settlement).

But what bothers management might nevertheless be positive for the firm's governance, especially if it is a public company. Legal violations, and a corporate culture that enables them, represent an agency cost.[224] Shareholders bear this cost directly in the form of investigations, penalties, and other sanctions.[225] Corporate misconduct can also coincide with other agency costs.[226] In this light, shareholders might share an enforcer's concern about management's motivation to effect reform, while follow-up enforcement keeps pressure on it to do so.[227]

In public companies, follow-up-enforcement obligations would need to be disclosed to shareholders.[228] By publicizing that the firm has a remediation obligation and a related contingent liability,[229] the reform process is elevated as a matter of corporate governance.[230] Directors might monitor the remediation process more closely given its inclusion in the company's public disclosures.[231] A disclosed contingent

224. *See* Cindy R. Alexander & Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost*, 5 J. CORP. FIN. 1, 5 (1999) ("[S]hareholders do not typically seem to have benefitted from the encouragement of crime. The prospect of corporate crime appears to be one of the many agency costs that is limited but not eliminated through deployment of costly corporate governance mechanisms and the costly efforts of top management."); Langevoort, *supra* note 17, at 939 (noting that managers may enjoy private payoffs for corporate wrongdoing that ultimately imposes costs on firms).

225. *See* Alexander & Cohen, *supra* note 224; Stucke, *supra* note 121, at 777–78 (collecting literature on the salutary effects of effective compliance on business performance, as well as compliance's potential to deter misconduct from the start).

226. *See generally, e.g.*, Simi Kedia, Shuqing Luo & Shivaram Rajgopal, Profiling: Does Past Compliance Record Predict Financial Reporting Risk? (Jan. 11, 2017) (unpublished manuscript) (on file with author) (examining data on corporate product-safety, antitrust, worker-safety, worker-rights, and environmental violations and finding a statistically significant association between a record of compliance failures and financial misreporting).

227. *See* John C. Coffee, Jr., *Shareholder Activism in the Era of Trump: What Strategy Works?*, CLS BLUE SKY BLOG (Nov. 21, 2016), https://clsbluesky.law.columbia.edu/2016/11/21/shareholder-activism-in-the-era-of-trump-what-strategy-works [https://perma.cc/4YXR-3NH4] (discussing pressure from Wells Fargo shareholders in the wake of the bank's accounts scandal).

228. *See supra* note 57 and accompanying text (disclosure requirements of "material pending legal proceedings").

229. ACCOUNTING STANDARDS CODIFICATION § 450-20-50-5 (FIN. ACCT. STANDS. BD. 2020) ("Disclosure is preferable to accrual when a reasonable estimate of loss cannot be made.").

230. The integrity of management, or management's competence to effect integrity in others, is likely to be a significant governance concern for investors. William R. McLucas, Mark B. Lewis & Alma M. Angotti, *Common Sense, Flexibility, and Enforcement of the Federal Securities Laws*, 51 BUS. L. 1221, 1229 (1996); *see also* Armour et al., *supra* note 50, at 5 (theorizing that managers prefer not to make compliance-related disclosures because high levels of compliance investments could be interpreted as indicating high risk for misconduct).

231. *See supra* note 57 and accompanying text.

liability is also likely to be more salient for investors than a closed-out enforcement action.[232]

These disclosures could drive more than governance-based pressure. Prospective counterparties, including potential commercial partners or acquirers, will look to a company's disclosures for open-source diligence, perhaps before ever approaching the company about a deal.[233] Knowing that a firm is undergoing active remediation might give prospective counterparties pause. Recall the exemplar pharmaceutical company. A startup that has recently received approval for its first therapeutic might look for a distribution agreement with a larger player. If it sees that the exemplar company's salesforce is undergoing remediation, it might decide it cannot accept the compliance risks and so choose another distributor. Or it might insist on terms that compensate for the distributor's compliance risk. Given this potential burden on business development, firms will work to complete remediation quickly. Follow-up enforcement thus has the potential to reduce agency costs by enabling increased investor monitoring while forcing commitment by management to follow through and achieve the target compliance level it and the government agreed to.[234]

B. Corporate Enforcement

Follow-up enforcement would allow enforcers to carry out recidivism prevention more effectively and to transfer much of the burden and risk for that function to defendant firms.[235] Downstream, it

232. This point follows because there is uncertainty around a contingent liability, whereas there is no uncertainty around a finalized enforcement action. For example, in one study of market reactions to announcements of accounting-related investigations at public companies, announcements of informal inquiries and formal investigations resulted in -15.84 percent and -13.20 percent abnormal returns in share prices, whereas contemporaneous announcements of both an enforcement action and its settlement resulted in -6.71 percent abnormal returns in share price. Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, *The Cost to Firms of Cooking the Books*, 43 J. FIN. & QUANTITATIVE ANALYSIS 581, 592 (2008). The authors hypothesize that the smaller reactions to already-settled announcements were driven by the certainty they provided or by the fact that they were likely to involve less serious violations. *Id.*

233. *See* Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. ON REG. 499, 510 (2020) (explaining that SEC filings are used not only by shareholders but also by commercial counterparties).

234. Even for private companies, market pressure might emerge. For example, prospective counterparties' diligence might uncover settlement agreements, lists of ongoing remediations, or the results of completed processes. These findings could in turn affect the willingness of counterparties to deal and on what terms they will agree to.

235. *See generally supra* Part II (discussing follow-up enforcement).

would allow enforcers to develop knowledge that would not only make future enforcement-based remediation more successful but would also prevent—through advances in compliance practice—subsequent violations.[236] From a reputational perspective, using this approach would allow enforcers to tout that they are reducing the danger that the public "overpays" in settlements.

But this approach's consistency with enforcers' recidivism-prevention and reputational interests is partly offset by other interests. For individual enforcers, large-scale adoption of follow-up enforcement would serve to reduce future opportunities in the private sector.[237] That is because, for instance, compliance consultants and monitors would likely be engaged less frequently, meaning those lucrative mandates would not be as plentiful for former enforcers.[238] From a case-management perspective, individual agents would also keep cases open longer, waiting out the remediation until the assessment stage. If an agency has regular turnover, individual agents would need to do Stage Three work on cases inherited from predecessors. And enforcers might be reluctant to price remediation explicitly. But beyond those reasons, explicit pricing allows for greater public monitoring of enforcers, the actions they take, and the settlements they reach on behalf of the public: Is the public paying appropriate amounts for settlements and are settlements leading to reductions in recidivism? Increased monitoring in turn increases enforcers' reputational risk around settlement pricing and outcomes.[239]

A related caution is that the pricing and remediation transparency that follow-up enforcement requires should not teach firms how to avoid detection or game enforcement.[240] Enforcers have limited

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236. *See* Garrett, *supra* note 29, at 903–04 (describing the "prevention stage" of enforcement).

237. *See* Ford & Hess, *supra* note 14, at 712 (reporting one interviewee's view that recently departed state or federal prosecutors are likely to be selected by their former colleagues for monitorships); *see also Our Trusted Experts*, *supra* note 83 (listing the professional backgrounds of professionals at a leading compliance-consulting firm).

238. Although firms will still often need outside expertise to support their reform processes, as follow-up enforcements build new empirical understanding for implementing and testing remediation, enforcers who gained expertise in those methods might be sought out in the markets for ex ante compliance and ex post remediation services.

239. *See* Noah Kupferberg, Note, *Transparency: A New Role for Police Consent Decrees*, 42 COLUM. J.L. & SOC. PROBS. 129, 160–62 (2008) (calling for the use of police consent decrees to collect and publish data to enable greater public monitoring of law enforcement).

240. *See* Benczkowski Remarks, *supra* note 87 ("Although many aspects of prosecutors' work must be kept confidential, there is no need for there to be a black box around the principles and policies that guide our decisions.").

resources and so they must prioritize what investigations they open and the actions they bring.[241] They remain able to achieve a level of general deterrence by maintaining some informational asymmetry between themselves and firms on what their priorities are and how they will make investigative and charging decisions.[242] Too much transparency might enable firms to make rational calculations to break the law.[243]

These considerations suggest that line enforcers are unlikely to structure settlement agreements using this Article's follow-up approach, creative settlement practices being inconsistent with their personal risk and reward incentives. Instead, it would likely be agency leaders like U.S. attorneys or state attorneys general, who would have personal incentive structures that are more likely to award creativity, who lead the way. Even for those entrepreneurial leaders, though, if this approach is to be used, it is likely to emerge in cases susceptible to easily defining what recidivist acts lead to reductions in remediation credit and how they would be calculated. The earliest instances of follow-up enforcement might be quite rudimentary and only grow in sophistication with subsequent rounds of experience. Just as settlement practices have evolved over time, follow-up practices would be expected to evolve based on new circumstances and learning from prior settlements. Of course, whether recidivist acts themselves become subject to enforcement, or whether they are merely used to calculate remedial credit for past misconduct, is an open question for enforcers to decide. Presumably, the enforcers' costs to open and pursue a new case for modest recidivist violations would outweigh the social value of doing so, and thus it would rely on adjustments to the remediation credit as a sanction. Under the current clawback approach, modest recidivist violations would be unlikely to result in further enforcement, whereas they *would* yield consequences under the follow-up approach. This result would partly fulfill the policy aim of follow-up enforcement to increase monitoring of and consequences for corporate recidivism.

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241. *See supra* note 45 and accompanying text.

242. This informational asymmetry is reduced, of course, when enforcers announce priorities or when defense attorneys are former enforcers or repeat players in corporate investigation and enforcement defense. *But see* Garrett, *supra* note 29, at 903 (noting that enforcers announce enforcement priorities in speeches to white-collar attorneys as part of industry-wide deterrence efforts).

243. *See generally* Becker, *supra* note 15, 176–79 (describing conditions under which an actor will decide that the expected benefits of breaking the law exceed the expected consequences for doing so).

As a final note, because current settlement process is largely a creature of agency practice rather than an explicit statutory scheme, entrepreneurial enforcers have flexibility to graft follow-up enforcement onto their current practices. This Article sketches general approaches for doing so that can be tailored to a given regulatory jurisdiction and public-protection mandate. But this flexibility should be used cautiously. Professors Jennifer Arlen and Richard Epstein observe that current practice raises due process concerns.[244] In keeping with their observations, and given enforcers' inherent discretion and significant leverage over corporate defendants, agencies should consider how follow-up enforcement fits within their internal due process policies and adapt those policies as needed.[245]

C. Corporate Compliance

Businesses spend billions annually on compliance programs.[246] The compliance officer has become ubiquitous in firms across the United States and appears increasingly among senior leadership rosters.[247] While she was SEC chair, Mary Jo White remarked on compliance's central role in contemporary firms, noting that compliance officers are "gatekeepers" who might be personally charged if they shirk their duty to promote adherence to the law within the firm.[248] Parallel to this explosion in compliance, firms continue to

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244. Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 206–09 (2016) (discussing the need for process to limit discretionary prosecutorial authority); Richard Epstein, *Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions*, *in* PROSECUTORS IN THE BOARDROOM, *supra* note 85, at 38 (reviewing deferred prosecution through the lens of unconstitutional-conditions doctrine).

245. *See* Arlen, *supra* note 244, at 206–09.

246. *See* sources cited *supra* note 120 (collecting estimates of annual compliance spending).

247. *See* PRICEWATERHOUSECOOPERS LLP, MOVING BEYOND THE BASELINE: LEVERAGING THE COMPLIANCE FUNCTION TO GAIN A COMPETITIVE EDGE 12–13 (2015), https://www.pwc.com/us/en/risk-management/state-of-compliance-survey/assets/pwc-2015-state-of-compliance-survey-final.pdf [https://perma.cc/9RT4-G7DM] (reporting survey findings that 26 percent of respondents' chief compliance officers reported directly to the CEO, 21 percent reported directly to the board of directors or its audit committee, and 52 percent had a chief compliance officer separate from the general counsel).

248. Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n, Remarks at the Compliance Outreach Program for Broker-Dealers (July 15, 2015), https://www.sec.gov/news/speech/opening-remarks-compliance-outreach-program-for-broker-dealers.html [https://perma.cc/6L5E-ZGZQ] ("[W]e must, of course, take enforcement action against compliance professionals if we see significant misconduct or failures by them. Being a [chief compliance officer] obviously does not provide immunity from liability, but neither should our enforcement actions be seen by conscientious and diligent compliance professionals as a threat.").

invest in new ways to quantify their operations and manage based on those analytics.[249] Curiously, however, these trends remain parallel: compliance today has limited empirical foundation.[250]

The collective action problem discussed earlier partly explains a lack of empiricism. Firms withhold their compliance data, perhaps to avoid embarrassment or antitrust scrutiny or to protect trade secrets.[251] The consequence of keeping these data siloed and confidential is to prevent the measuring of compliance practices for effectiveness, or to test the validity, accuracy, and precision of the measurements and from those analyses to develop better instruments. Another influence is the lack of empiricism in enforcers' assessments of ex ante compliance and ex post remediation. The overremediation problem that is discussed above represents a type of Keynesian beauty contest in which firms pursue remedial efforts not based on their effectiveness but rather by anticipating whether enforcers believe in their effectiveness.[252] They thus might set up compliance programs with only secondary concern for effectiveness.[253] In this light, current practice might not only mean the loss of opportunities to advance empiricism, but it might also contribute to a lack of it.

Enforcers are in the unique position to participate in multiple remediations that represent unusual compliance challenges, given that violations were severe enough to warrant enforcement. They also have leverage through the settlement process to overcome firms' desire to keep compliance data to themselves. By collecting and sharing data from follow-up enforcements—by forcing the creation of public-good

249. MCKINSEY & CO., ANALYTICS COMES OF AGE 65–97 (2018), https://www.mckinsey.com/~/media/McKinsey/Business%20Functions/McKinsey%20Analytics/Our%20Insights/Analytics%20comes%20of%20age/Analytics-comes-of-age.pdf [https://perma.cc/7HFG-NU4Q] (discussing the rise and role of analytics in business functions like marketing and sales, operations, human resources, and risk); William Byers, *The Risks of Quantification*, HARV. BUS. REV. (May 18, 2011), https://hbr.org/2011/05/the-risks-of-quantification [https://perma.cc/N2MN-DDLK] (reacting to the accelerating trend toward quantification).

250. *See* Stucke, *supra* note 121, at 800–01. *See generally* Soltes, *supra* note 13, at 1006–10 (discussing methods to improve compliance measurement).

251. *See supra* notes 133–35 and accompanying text.

252. In a Keynesian beauty contest, actors make decisions based not on what *they* believe is the best decision but rather on their predictions of what *others* will believe is the best decision. *See* Robert J. Shiller, *The Beauty Contest That's Shaking Wall St.*, N.Y. TIMES (Sept. 3, 2011), https://www.nytimes.com/2011/09/04/business/economy/on-wall-st-a-keynesian-beauty-contest.html [https://perma.cc/G82Z-FZTY].

253. *See supra* note 17 and accompanying text (discussing this behavior).

knowledge—enforcers can advance not only their own enforcement missions but corporate compliance and deterrence more broadly.[254]

CONCLUSION

This Article offers a critical analysis of how enforcement agencies use corporate settlement agreements to keep firms from reoffending after they break the law. It calls attention to temporal misalignment inherent in awarding up-front credit for remedial efforts whose future outcomes are uncertain. This misalignment can undermine the prevention of corporate recidivism, and it can cause the public to overpay for recidivism prevention or lead to overremediation. It also explains why enforcers' clawback authority in settlement agreements lacks the credibility that would be needed to correct for that misalignment.

To address these challenges, the Article proposes a follow-up approach to enforcement. Under this framework, an enforcer and firm first define reform objectives, including explicit pricing for outcomes, as part of their settlement of an enforcement action. Management then works to achieve that objective, a process requiring testing, reassessment, and often adjustment. In the final stage, the parties assess what level of compliance the firm achieved and determine how much, if any, of the contingent portion of the settlement's penalty the firm must pay. This evidence-based approach not only prevents the public from paying for recidivism prevention that is not achieved, but it also produces a public good: data that can be used to advance compliance practice generally. Following this framework thus promises to promote both public protection and the empirical foundations for corporate compliance.

254. Professors Brandon Garrett and Gregory Mitchell propose alternatives for collecting this public-good data. Examples include encouraging firms with similar compliance profiles to form information-sharing "compliance cartels" or requiring firms generally to produce compliance-validation data to the government. *See* Garrett & Mitchell, *supra* note 29, at 78, 82.