

# THE GOVERNMENT’S PRIORITIZATION OF INFORMATION OVER SANCTION: IMPLICATIONS FOR COMPLIANCE

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## I INTRODUCTION

Who should be responsible for stopping misconduct within organizations?<sup>1</sup> One might think it should be the primary responsibility of federal prosecutors to aggressively seek to bring criminal cases against rogue corporations. Or one might look to regulators as those charged with creating a series of checks and balances to ensure that wrongdoing within firms is easy to detect and prevent. Still others might look to the corporations themselves to ensure that their employees are acting within the bounds of legal and regulatory requirements. In reality, each of these three actors—prosecutors, regulators, and the firm itself—are responsible, in different ways, for responding to the misconduct that occurs within corporations. And when they fail, there are often significant consequences.

Take, for example, Purdue Pharma. Prosecutors investigated Purdue Pharma in the mid-1990s and determined that it “knew about ‘significant’ abuse of OxyContin in the first years after the drug’s introduction in 1996 and concealed that information.”<sup>2</sup> Instead of indicting executives on felony charges, as recommended by the prosecutors investigating the company,<sup>3</sup> the Department of Justice (DOJ) decided to pursue less severe enforcement activity and settled the case. Purdue Pharma paid \$600 million in fines and other payments, a significant

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1. The arguments in this Article are applicable to organizations generally, regardless of form—non-profit, for-profit, etc. However, legal scholars seem to think of these concepts as falling in the corporate crime bucket, so I will use the terms corporate or corporation throughout the rest of the Article.

2. Barry Meier, *Origins of an Epidemic: Purdue Pharma Knew its Opioids were Widely Abused*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/health/purdue-opioids-oxycotin.html> [<https://perma.cc/5BPX-RMHB>].

3. *Id.*

and, at the time, one of the largest sums ever paid.<sup>4</sup> The Food and Drug Administration, the regulator overseeing Purdue Pharma, chose not to force the company to reformulate OxyContin in 2001, which would have made the drug more difficult to abuse.<sup>5</sup> And Purdue Pharma, on its own, chose not to reformulate OxyContin until 2010, despite the fact that it was allegedly aware that the drug was highly addictive, often abused, and associated with overdoses.<sup>6</sup> Unfortunately, the damage was done, and OxyContin wreaked havoc in communities all across the United States. Ultimately, Purdue Pharma entered into a nationwide settlement in 2019, which contemplated the dissolution of the firm,<sup>7</sup> and, in 2020, pleaded guilty to criminal charges for opioid sales.<sup>8</sup> Yet, it is safe to say that while the harms caused by OxyContin were known for over a decade, the actions taken by prosecutors, regulators, and the firm largely failed to adequately mitigate the damage the drug caused, and continues to cause, to people and communities.<sup>9</sup> The question is why?

When large scandals are discovered, the firm itself is certainly held to account by the public for its failure to prevent harm, but often the government also finds itself the subject of criticism. Why did regulators not act more aggressively towards Wells Fargo?<sup>10</sup> Why did the government not prosecute more individuals

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4. Barry Meier, *In Guilty Plea, OxyContin Maker to Pay \$600 Million*, N.Y. TIMES (May 10, 2007), <https://www.nytimes.com/2007/05/10/business/11drug-web.html> [<https://perma.cc/92Q2-Z74N>].

5. Barry Meier, *A Nun, a Doctor and a Lawyer—and Deep Regret over the Nation’s Handling of Opioids*, N.Y. TIMES (Aug. 18, 2019), <https://www.nytimes.com/2019/08/18/health/opioids-purdue-pennington-gap.html?smid=nytcore-ios-share> [<https://perma.cc/3X43-EWFY>]. See also *OxyContin: Balancing Risks and Benefits: Hearing on Examining the Effects of the Painkiller OxyContin, Focusing on Federal, State and Local Efforts to Decrease Abuse and Misuse of this Product While Assuring Availability for Patients Who Suffer Daily from Chronic Moderate to Severe Pain Before the S. Comm. on Health, Educ., Labor, and Pensions*, 107th Cong. 16, 33 (2002) (statement of Dr. John K. Jenkins, Director, Office of New Drugs, Ctr. for Drug Evaluation & Research, FDA) (noting the FDA’s cooperative efforts with Purdue Pharma to strengthen warnings on OxyContin labels and to reformulate the drug “as part of a longer-term strategy,” including discussion of concerns about how effective reformulation might be).

6. Meier, *supra* note 5.

7. Jan Hoffman, *Purdue Pharma Tentatively Settles Thousands of Opioid Cases*, N.Y. TIMES (Sept. 11, 2019), <https://www.nytimes.com/2019/09/11/health/purdue-pharma-opioids-settlement.html> [<https://perma.cc/K23A-8RR9>].

8. Jan Hoffman & Katie Benner, *Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales*, N.Y. TIMES (Oct. 21, 2020), <https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html> [<https://perma.cc/DH48-JL3R>].

9. See William N. Evans, Ethan M. J. Lieber & Patrick Power, *How the Reformulation of OxyContin Ignited the Heroin Epidemic*, 101 REV. ECON. & STAT. 1, 5 (2019), [https://www.mitpressjournals.org/doi/pdf/10.1162/rest\\_a\\_00755](https://www.mitpressjournals.org/doi/pdf/10.1162/rest_a_00755) [<https://perma.cc/KWB6-G6CG>] (discussing how even after its reformulation, abusers of OxyContin switched to the cheaper and easily-available heroin as a substitute).

10. See OFF. OF THE COMPTROLLER OF CURRENCY, OFF. OF ENTER. GOVERNANCE & THE OMBUDSMAN, *LESSONS LEARNED: REVIEW OF SUPERVISION OF SALES PRACTICES AT WELLS FARGO 4-14* (2017), <https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-wells-fargo-supervision-lessons-learned.pdf> [<https://perma.cc/L3QZ-RUWS>] (listing findings that permitted the Wells Fargo sales practices scandal and recommending nine courses of action); James Rufos Koren, *Bank Regulator Disputes Democrats’ Criticism that Agency Didn’t Reform After Wells Fargo Scandal*, L.A. TIMES (Jan. 25, 2018), <https://www.latimes.com/business/la-fi-occ-wells-response->

for the 2008 financial crisis?<sup>11</sup> The critique comes in a variety of forms, but often boils down to questioning why federal prosecutors and regulators are unwilling to enforce laws to the fullest extent possible against corporations who commit corporate misconduct through their employees or agents.<sup>12</sup> This Article puts forth a new account to help explain the decision by governmental actors to prioritize the receipt of information from, over the pursuit of high-level sanctions of, corporate offenders.

Part II discusses the current rationales for corporate criminal liability from law and economics scholarship<sup>13</sup> and the Holder Memorandum.<sup>14</sup> It next turns to the traditional justifications for punishing individuals for criminal conduct and their applicability to corporations in light of the goals laid out in the Holder Memorandum. It then provides two examples that demonstrate the tensions presented when the government chooses to levy a sanction below the highest possible penalty against a firm who is repeatedly engaged in misconduct.

Part III presents a new rationale for explaining the decision by governmental actors to provide leniency to firms engaged in misconduct. The Part argues that federal enforcers have, whether purposefully or not, adopted a model of enforcement that prioritizes gathering information from firms over levying significant sanctions against them. To ensure that corporations disclose information fully and completely, the government (i) exerts pressure to

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20180125-story.html [https://perma.cc/88P5-GZCN] (noting that government regulators had been criticized for failing to implement recommended changes to catch and correct bad practices that led to the Wells Fargo accounts scandal).

11. See William D. Cohan, *A Clue to the Scarcity of Financial Crisis Prosecutions*, N.Y. TIMES: DEALBOOK (July 21, 2016), <https://www.nytimes.com/2016/07/22/business/dealbook/a-clue-to-the-scarcity-of-financial-crisis-prosecutions.html> [https://perma.cc/46YS-WCHX] (discussing DOJ reluctance in prosecuting individuals for conduct responsible for the financial crisis and explaining the legal landscape on the issue); see also JESSE EISINGER, *THE CHICKENSHIT CLUB: WHY THE JUSTICE DEPARTMENT FAILS TO PROSECUTE EXECUTIVES* 19 (2017) (noting that “in response to the worst calamity to hit capital markets and the global economy since the Great Depression, the government did not charge any top bankers”).

12. See Katie Benner, David Enrich & Katie Thomas, *A Drug Company Wagers the U.S. Won't Dare Charge It with Crimes*, N.Y. TIMES (May 15, 2020), <https://www.nytimes.com/2020/05/15/us/politics/teva-antitrust-hydroxychloroquine-settlement.html?referringSource=articleShare> [https://perma.cc/TY6X-7UCB] (noting politics and public perception are the reasons Teva Pharmaceutical Industries believes it will not be charged with crimes by the federal government); Ben Protess, Robert Gebeloff & Danielle Ivory, *Trump Administration Spares Corporate Wrongdoers Billions in Penalties*, N.Y. TIMES (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/us/trump-sec-doj-corporate-penalties.html> [https://perma.cc/H8FD-5P4V] (noting that since the Trump Administration took office, there has been a “62 percent drop in penalties” imposed by the SEC, and a “72 percent decline in corporate penalties from the [DOJ’s] criminal prosecutions”). See generally BRANDON L. GARRETT, *TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS* (2014) (discussing the history leading up to and including the deferred prosecution approach and the various criticisms it has faced).

13. See generally Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997) (developing a framework for examining factors that make liability regimes on corporations effective).

14. Memorandum from Eric H. Holder, Jr., Deputy Att’y Gen., to All Component Heads and U.S. Att’y’s on Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter Holder Memorandum on Prosecuting Corporations], <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> [https://perma.cc/G859-W8BG].

incentivize firms to share information with the government, (ii) eschews sanctions in favor of oversight, and (iii) often sides with corporations in limiting the transparency of investigations into wrongdoing.

Importantly, the idea that federal enforcers gather information is not novel. Professors Jennifer Arlen and Samuel Buell have explained why prosecutors need to rely on information from corporations about misconduct within their ranks.<sup>15</sup> Professor Rory Van Loo has detailed the ways in which some federal enforcers—what he terms regulatory monitors, which include actors like Environmental Protection Agency engineers or Consumer Financial Protection Bureau examiners—have information collection as their principal function.<sup>16</sup> It is settled and accepted by both legal academics and federal enforcers that the transfer of information from the corporation to the government is integral to any federal enforcement model for a host of theoretical and practical reasons. This Article’s contribution, however, centers on the government’s priorities as evidenced by its actions, and suggests that federal enforcers’ pursuit of full and complete disclosure from embroiled firms colors almost all of their interactions, which helps explain why federal enforcers often fail to utilize the most severe sanctions available to them when engaging in enforcement activity.

Part IV next considers the compliance implications of the government’s focus on information disclosure over a regime of robust sanctioning. When the federal government fails to harness and share the insights it gathers from firms’ disclosure of information, it wastes a unique opportunity to curb corporate misconduct in a broad-based manner. In short, under federal enforcers’ current policies and customs, they are undermining, instead of strengthening, compliance efforts when they prioritize the receipt of information over obtaining robust sanctions. Government prosecutors and regulators should consider how they might utilize information garnered as a result of firms’ disclosure of information in a manner that might improve the effectiveness of firms’ compliance efforts on a widespread basis.

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15. See Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 704 (2020) (explaining that “the value to U.S. prosecutors of inducing corporations to investigate and provide prosecutors with information about misconduct rests, to a considerable degree, on a range of U.S. laws that give firms a comparative advantage over enforcers in gathering evidence of corporate misconduct, particularly in the early stages of inquiries”).

16. Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 369 (2019). I have written a variety of pieces on the role of monitors, which I define as “(i) an independent, private outsider, (ii) employed after an institution is found to have engaged in wrongdoing, (iii) who effectuates remediation of the institution’s misconduct, and (iv) provides information to outside actors about the status of the institution’s remediation efforts.” Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REG. 109, 111 (2016). Professor Van Loo’s use of the term monitor is distinct from my own.

## II UNWILLING ENFORCERS

What should happen when a corporation commits a crime? This question has drawn the attention of scholars, governmental leaders, policymakers, and the public for decades. One aspect of the problem is attributable to the legal fiction that is the corporation—the corporation does not actually commit a crime, its agents do.<sup>17</sup> This legal fiction creates tension when considering how and who or what to punish when misconduct occurs within a corporation. Should the corporation be sanctioned? Should the individuals? Both? And regardless of what person or entity is sanctioned, should it be severe or subject to mitigation or leniency?

This Part begins by outlining the enforcement strategy government actors commonly employ today, which was first formally articulated by Eric Holder in 1999 and tracks with predominant law and economics scholarship. Next, it turns to two traditional justifications of punishment under criminal law theory, which support the conclusion that much of corporate criminal enforcement today is concerned with achieving deterrence. The Part then provides two examples that demonstrate some of the tensions within the current enforcement strategy, which often results in an enforcement outcome where prosecutors or regulators choose not to utilize the full breadth of sanctions available to them.

### A. The Holder Memo and Beyond

In 1999, then-Deputy Attorney General Eric Holder issued a memorandum entitled “Bringing Criminal Charges Against Corporations.”<sup>18</sup> Since then, government enforcement policy has been premised upon the idea that corporations can and should be held responsible for the conduct of their agents.<sup>19</sup> Government enforcement policy has, however, also been premised on the idea that corporations should receive a lesser sanction if they can demonstrate that they have engaged in a good faith effort to prevent misconduct within their ranks.<sup>20</sup> This is often referred to as “mitigation credit.” For example, if a firm can show good faith by, for example, demonstrating a real commitment to implementing and maintaining an effective ethics and compliance program or by voluntarily disclosing potential misconduct to the relevant enforcement agent, then the sanction levied against them by the government is lessened, often significantly so.<sup>21</sup>

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17. See Kathleen F. Brickey, *Corporate Criminal Accountability: A Brief History and an Observation*, 60 WASH. U. L. Q. 393, 396 (1982) (noting that the law recognizes corporations “not as a natural person, but as an artificial entity. . . . [Corporations] could neither commit criminal acts . . . nor suffer imprisonment. [They] have no soul, and so c[an] not be blamed”).

18. Holder Memorandum on Prosecuting Corporations, *supra* note 14.

19. *Id.*

20. *Id.*

21. See *id.* (discussing the critical role that a corporation’s cooperation may be in “identifying culprits and locating relevant evidence” and how corporate “self-policing” is necessary to detect and prevent misconduct).

The principles laid out in the Holder Memorandum track quite closely to the arguments made by law and economics scholars during the same time period.<sup>22</sup> In short, because crime within a corporation will be difficult for outsiders to detect, it is important for firms to engage in self-policing efforts and to monitor the activities of their own agents. Given that individuals commit corporate crime, and because there will always be individuals within firms who have a taste for noncompliance, firms engage in some level of policing to protect themselves from liability.<sup>23</sup>

If, however, the government attempted to employ an enforcement strategy of strict liability, law and economics scholars argue that firms would be disincentivized to self-police. Scholars have long argued that “if the penalties imposed on the firm are sufficient to deter it, then it will take internal corrective action to prevent misconduct by its agents for which it is legally responsible.”<sup>24</sup> In other words, if the penalties levied against a firm are at an appropriate level of deterrence, the firm will be incentivized to effectively police the conduct of its employees and agents.<sup>25</sup> Thus, law and economics scholarship supports an enforcement strategy that encourages self-policing while providing avenues for mitigation, so that firms have the ability to access a lesser set of sanctions for the misconduct committed by their agents.

## B. Theoretical Justifications of Punishment & the Corporation

The traditional understandings or rationales for punishment—retributivist or utilitarian<sup>26</sup>—can be difficult to trace onto crime committed by the corporation. A retributivist “claims that punishment is justified because people deserve it.”<sup>27</sup> In the context of corporate crime, however, a retributivist rationale for punishment is difficult to justify, because the corporation is at the mercy of, and is held liable for the actions of, its agents. This is true even when the interests of a firm’s agent who chooses to engage in criminal activity fails to align with the interests of the corporation itself, for example, when the agent’s criminal activity is in fact harmful to the firm.<sup>28</sup> Whether a corporation deserves punishment, in the retributivist sense, is often a difficult question to answer, particularly because the punishment levied on a corporation will often impact individuals beyond the corporation itself, like shareholders or other stakeholders, such as employees.<sup>29</sup>

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22. See Arlen & Kraakman, *supra* note 13, at 735–36 (arguing that the best liability regime will deter corporate crime by allowing good faith self-policing of wrongdoing to mitigate the sanctions imposed against the corporation).

23. See *id.* at 693 (“[E]ntity liability can induce the firm to undertake a variety of actions that increase the probability that wayward agents will be sanctioned, which we term ‘policing measures.’”).

24. 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, 407–08 (1981) (citing RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 165–67 (2d ed. 1977)).

25. *Id.* at 408.

26. Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347–53 (1983).

27. *Id.* at 347.

28. Coffee, *supra* note 24, at 393–94.

29. *Id.* at 401–02.

A utilitarian “believes that justification for punishment lies in the useful purposes that punishment serves.”<sup>30</sup> And scholars and policymakers have typically relied upon such utilitarian rationales when thinking through mechanisms for dealing with corporate misconduct. In particular, the rationales for corporate criminal liability have focused significantly on the importance of deterrence— “[k]nowledge that punishment will follow crime deters [firms] from committing crimes, thus reducing future violations . . . .”<sup>31</sup> The Holder Memorandum exemplifies the focus on deterrence, noting that “a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees.”<sup>32</sup> Additionally, the law and economics rationales that support the awarding of mitigation credit are based, at least in part, on deterrence rationales. For example, Professors Jennifer Arlen and Reinier Kraakman’s seminal article explains that “strict vicarious liability may not be the best regime for inducing the firm to implement optimal deterrence measures.”<sup>33</sup>

Importantly, when a firm is punished for misconduct, it also has a spillover effect on those who observe the punishment being levied. Thus, the punishment creates a broad, general deterrent for not just the entity that engaged in wrongdoing, but also for those who might be tempted to participate in similar types of misconduct.<sup>34</sup> The Holder Memorandum explains that “prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. . . . [A]n indictment often provides a unique opportunity for deterrence on a massive scale.”<sup>35</sup> When a corporate offender is indicted, it sends a signal to other corporations to be on alert for similar misconduct within their own ranks, as it could result in criminal prosecution levied against the firm. Thus, the government has a variety of reasons to engage in corporate criminal prosecutions to ensure that it is effectively deterring corporations from engaging in misconduct.

And yet, the Holder Memorandum also reflects a fair amount of dissonance with the idea of sanctioning corporate offenders aggressively. It begins by stating: “Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public.”<sup>36</sup> But it goes on to explain a variety of factors prosecutors should consider when determining whether and how to charge a corporation, including the possibility that individual employees may take actions that are in contravention of the corporation’s instructions, requirements, and goals.<sup>37</sup> It then acknowledges the

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30. Greenawalt, *supra* note 26, at 347.

31. *Id.* at 351.

32. Holder Memorandum on Prosecuting Corporations, *supra* note 14.

33. Arlen & Kraakman, *supra* note 13, at 691.

34. Greenawalt, *supra* note 26, at 351.

35. Holder Memorandum on Prosecuting Corporations, *supra* note 14.

36. *Id.*

37. *Id.*

following: “In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. . . . Accordingly, a corporation’s cooperation may be critical in identifying the culprits and locating relevant evidence.”<sup>38</sup> Thus, the Holder Memorandum touts the importance of sanctioning corporate offenders in a significant way, but then quickly concedes that the government is likely ill-equipped to engage in effective investigations into corporate misconduct without the corporation’s cooperation. Government enforcers are constantly negotiating the tension between these two positions.

### C. Tensions Within Reduced Sanctions

Much progress has been made within compliance efforts since the release of the Holder Memorandum in 1999, which invigorated the prosecution of corporations for white collar crimes, and the 2003 Thompson Memorandum,<sup>39</sup> which emphasized the importance of a firm’s cooperation with law enforcement and the implementation of “effective rather than mere paper [compliance] programs.”<sup>40</sup> When federal prosecutors and regulators purposefully choose to pursue something less than the most severe of sanctions, it often leads many to question the adequacy of the governmental response to corporate misconduct. Judges,<sup>41</sup> scholars,<sup>42</sup> and the public<sup>43</sup> are often dissatisfied with the government’s method of punishment, or lack thereof, towards the firm that has engaged in misconduct.

The most common form of sanction levied against corporations for misconduct, fines, are often not seen as the most serious punishment that can be

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38. *Id.*

39. Memorandum from Larry D. Thompson, Deputy Att’y Gen., to Heads of Department Components and United States Att’ys (Jan. 20, 2003) [hereinafter Thompson Memorandum], [<https://perma.cc/9FY9-CAR4>]; see discussion *infra* note 84.

40. Alan Vinegrad, *Deferred Prosecution of Corporations*, N.Y.L.J., Oct. 9, 2003, [<https://www.cov.com/~media/files/corporate/publications/2003/10/oid26786.pdf>] [<https://perma.cc/3C3M-537N>].

41. 41. See, e.g., SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328, 335 (S.D.N.Y. 2011), *vacated and remanded*, 752 F.3d 285 (2d Cir. 2014) (rejecting a ruling from the district court refusing to approve a settlement between the SEC and the defendant and remanding for the district court to consider whether the public interest would be disserved by entry of the consent decree); United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at \*5 (E.D.N.Y. July 1, 2013) (“Just as a non-prosecution agreement is perceived as a public relations benefit to a company, perhaps the filing and maintenance of criminal charges was intended to produce a public relations benefit for the government. . . . [A] pending federal criminal case is not window dressing.”).

42. See Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1057–58 (2017); See generally, GARRETT, *supra* note 12 (detailing the ways in which prosecutors compromise with corporations and fail to hold corporations fully accountable for their misconduct).

43. See, e.g., EISINGER, *supra* note 11, at 19 (noting that after the 2008 financial crisis “[t]he public was furious . . . and lack of consequences for bankers radicalized both ends of the political spectrum and gave rise to two of the most potent social movements of our time: the Tea Party and Occupy Wall Street”).

imposed upon a corporation, and their limitations have long been recognized.<sup>44</sup> Indeed, non-monetary penalties are often seen as potentially having greater deterrence power than monetary penalties.<sup>45</sup> This Part discusses two types of non-monetary penalties that are often considered to be more severe than the imposition of fines alone, specifically (i) debarment and (ii) disqualifications. In each example, the government actor responsible for crafting the enforcement response to misconduct at the firm in question explicitly rejected an available non-monetary penalty.

### 1. Debarment

When corporations enter into guilty pleas with the government, they can be subject to a variety of collateral consequences. For companies with businesses that are dependent upon government contracting, one potentially severe collateral consequence is debarment. For example, “[u]nder federal guidelines governing procurement, an individual or company that violates the [Foreign Corrupt Practices Act (FCPA)] or other criminal statutes may be barred from doing business with the federal government.”<sup>46</sup> On more than one occasion, however, the government has chosen not to pursue a guilty plea from a corporation engaged in repeated instances of misconduct, while explicitly noting that to do so would result in debarment. In other words, the government purposefully made decisions about the appropriate enforcement strategy against a recidivist corporation for the express purpose of avoiding the collateral consequence of debarment.

For example, Biomet<sup>47</sup> entered into deferred prosecution agreements (DPAs) in 2007<sup>48</sup> and 2012<sup>49</sup> for various incidents involving unlawful payments and bribes.

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44. Coffee, *supra* note 24, at 388–89. *But see* Arlen & Buell, *supra* note 15, at n.7 (explaining that small owner-managed firms often cannot survive if required to pay the large monetary fines associated with negotiated settlement agreements).

45. See Root, *supra* note 42, at 1040–45 (explaining types of non-monetary penalties that firms may find more distasteful than monetary penalties).

46. U.S. DEP’T OF JUST., CRIM. DIV. & U.S. SEC. & EXCH. COMM’N, ENF’T DIV., FCPA: A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 70 (Nov. 14, 2012), <https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> [<https://perma.cc/6E59-HFQ9>].

47. Biomet was acquired by Zimmer Holdings, Inc. in June 2015, and is now known as Zimmer Biomet. Press Release, Zimmer Holdings, Inc., Zimmer Completes Combination with Biomet (June 24, 2015), <https://www.prnewswire.com/news-releases/zimmer-completes-combination-with-biomet-300104244.html> [<https://perma.cc/75ZR-97WQ>]. For ease of reading, this Article will refer to the company as Biomet throughout.

48. See Press Release, U.S. Dep’t of Just., Five Companies in Hip and Knee Replacement Industry Avoid Prosecution by Agreeing to Compliance Rules and Monitoring (Sept. 27, 2007), <https://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/hips0927.rel.pdf> [<https://perma.cc/6M2T-B3HP>] (explaining that the government was willing to enter into a DPA with Biomet due to their “commitment to changing its previous practices . . .”).

49. See Press Release, U.S. Dep’t of Just., Third Medical Device Company Resolves Foreign Corrupt Practices Act Investigation (Mar. 26, 2012), <http://www.justice.gov/opa/pr/third-medical-device-company-resolves-foreign-corrupt-practices-act-investigation> [<https://perma.cc/JFR5-55Y4>] (“Biomet Inc. has entered into a [DPA] with the Department of Justice to resolve improper payments by the company and its subsidiaries in violation of the [FCPA] . . .”).

In conjunction with the 2007 settlement, which included monetary penalties in the amount of \$26.9 million,<sup>50</sup> Biomet entered into a five-year Corporate Integrity Agreement with the United States Department of Health and Human Services Office of Inspector General. The agreement stated that if Biomet materially breached the agreement<sup>51</sup> and did not cure the breach within thirty days, it could be excluded from future participation in federal health care programs<sup>52</sup>—that is, suffer debarment. The DOJ’s decision to enter into yet another DPA in 2012, which included a monetary penalty of \$22.8 million,<sup>53</sup> was influenced by the fact that if it were “to initiate a prosecution of Biomet and obtain a conviction . . . Biomet would potentially be subject to exclusion from participation in federal health care programs.”<sup>54</sup> This is because companies that have been convicted of felonies related to health care fraud or crimes related to federal health care programs are required to be excluded from participation in any federal health care program.<sup>55</sup>

Thus, Biomet dodged possible debarment in both 2007 and 2012.<sup>56</sup> Yet in 2014, despite no mention of debarment, Biomet entered into another settlement agreement with the DOJ—paying over \$6 million—concerning allegations that a

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50. See Edith Honan, *Device Makers to Pay \$311 mln to Settle Kickbacks Probe*, REUTERS (Sept. 27, 2007), <https://www.reuters.com/article/us-medicaldevices-fraud/device-makers-to-pay-311-mln-to-settle-kickbacks-probe-idUSN2735855720070927> [<https://perma.cc/CNE7-ERHU>] (explaining that Biomet will pay a \$26.9 million civil settlement and avoid criminal prosecution by agreeing to reforms).

51. The Corporate Integrity Agreement defined material breach as: (i) any failure to report and take corrective action regarding any “probable violation of criminal, civil, or administrative laws applicable to any Federal health care program for which penalties or exclusion may be authorized” and bankruptcy filing; (ii) “repeated or flagrant violation[s] of the obligations under this [Corporate Integrity Agreement]”; (iii) failure to respond to payment notices of the stipulated damages owed; and (iv) failure to engage the independent review organization required under the agreement. U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. OF THE INSPECTOR GEN., CORPORATE INTEGRITY AGREEMENT BETWEEN THE OFFICE OF THE INSPECTOR GENERAL OF THE DEP’T OF HEALTH AND HUMAN SERVICES AND BIOMET, INC. 19, 31 (Sept. 27, 2007) [hereinafter Biomet CIA], <http://www.justice.gov/sites/default/files/usao-nj/legacy/2013/11/29/BiometCIA92707.pdf> [<https://perma.cc/7MAU-SYPY>].

52. Biomet CIA, *supra* note 51, at 31–32.

53. Richard L. Cassin, *Biomet Pays \$22.8 Million to Settle Bribe Charges*, THE FCPA BLOG (Mar. 26, 2012, 4:08 PM), <https://fcpublog.com/2012/03/26/biomet-pays-228-million-to-settle-bribe-charges/> [<https://perma.cc/EQ6H-8M4A>].

54. Letter from Jeffrey Knox, Principal Deputy Chief, Fraud Section, Crim. Div., U.S. Dep’t of Justice, and Kathleen M. Hamann, Trial Att’y, Fraud Section, Crim. Div., U.S. Dep’t of Justice, to Laurence Urgenson and Asheesh Goel, Couns. for Biomet, Inc., at 3 (Mar. 26, 2012), <http://www.justice.gov/criminal/fraud/fcpa/cases/biomet/2012-03-26-biomet-dpa.pdf> [<https://perma.cc/FTJ3-W2H4>].

55. 42 U.S.C. § 1320a-7(a) (2012).

56. Also note that in March 2015, the DOJ notified Biomet that it was extending the 2012 DPA for one year in response to Biomet’s notification to the DOJ of additional “alleged improprieties regarding its operations in Brazil and Mexico.” Biomet, Inc., Current Report (Form 8-K) (Mar. 17, 2015), [http://www.sec.gov/Archives/edgar/data/351346/000090342315000219/biomet-8k\\_0317.htm](http://www.sec.gov/Archives/edgar/data/351346/000090342315000219/biomet-8k_0317.htm) [<https://perma.cc/6E63-9384>]; see also Samuel Rubinfeld, *The Morning Risk Report: Biomet Hit by Recidivism*, WALL ST. J.: RISK & COMPLIANCE J. (Mar. 19, 2015, 7:25 AM), <http://blogs.wsj.com/riskandcompliance/2015/03/19/the-morning-risk-report-biomet-hit-by-bribery-recidivism> [<https://perma.cc/N9T4-V6MG>] (noting that the DOJ can extend the term of a DPA while investigating a breach and can impose additional penalties or remedial measures).

subsidiary paid kickbacks to physicians in an effort to induce them to order the subsidiary's bone growth stimulator.<sup>57</sup> Finally, in 2017, Biomet,<sup>58</sup> entered into yet another DPA as a result of alleged unlawful bribery in violation of the FCPA and agreed to pay \$30.5 million “to resolve DOJ and [Securities and Exchange Commission (SEC)] investigations into the company's ‘repeat’ violations of the [FCPA].”<sup>59</sup> The government allowed Biomet to enter into this agreement even while noting that Biomet “allowed the bribes to continue” and “disregard[ed] its obligations under the earlier [DPA].”<sup>60</sup>

Thus, over an approximately ten-year period, Biomet was found to have engaged in repeated instances of wrongdoing. Monetary fines were levied of over \$200 million, yet federal prosecutors refused to pursue a guilty plea out of concern that Biomet would then be subject to the collateral consequence of debarment.

## 2. Disqualifications

When financial institutions violate certain federal securities laws, they are subject to regulatory disqualifications. Disqualifications are harmful for a variety of reasons. For example, a firm with a status of well-known seasoned issuer (WKSI) “enjoys significant advantages in offering its securities under the Securities Act of 1933.”<sup>61</sup> Firms can, however, be automatically disqualified from receiving WKSI status if they engaged in misconduct: “[I]t is generally understood that the purpose of automatic disqualification provisions is to punish bad actors by preventing them from relying on certain accommodations provided

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57. Press Release, U.S. Dep't Just., Biomet Companies to Pay Over \$6 Million to Resolve False Claims Act Allegations Concerning Bone Growth Stimulators (Oct. 29, 2014), <https://www.justice.gov/opa/pr/biomet-companies-pay-over-6-million-resolve-false-claims-act-allegations-concerning-bone> [https://perma.cc/6SR8-HKSD]. Also during 2014, Biomet settled a civil lawsuit regarding a defective hip device, agreeing to pay at least \$56 million. Reuters Staff, *Biomet Reaches \$56 Million Settlement Over Faulty Hip Replacements*, REUTERS (Feb. 3, 2014), <https://www.reuters.com/article/us-biomet-settlement/biomet-reaches-56-million-settlement-over-faulty-hip-replacements-idUSBREA1305Y20140204> [https://perma.cc/674D-CT6B].

58. Now operating as Zimmer Biomet Holdings Inc. Press Release, U.S. Dep't of Justice, Zimmer Biomet Holdings Inc. Agrees to Pay \$17.4 Million to Resolve Foreign Corrupt Practices Act Charges (Jan. 12, 2017) [hereinafter 2017 Biomet Press Release], <https://www.justice.gov/opa/pr/zimmer-biomet-holdings-inc-agrees-pay-174-million-resolve-foreign-corrupt-practices-act> [https://perma.cc/3MSF-LMV6].

59. Richard L. Cassin, *Zimmer Biomet Holdings Pays \$30 Million to Resolve New FCPA Charges*, THE FCPA BLOG (Jan. 12, 2017, 7:22 PM), <https://fcpublog.com/2017/01/12/zimmer-biomet-holdings-pays-30-million-to-resolve-new-fcpa-c/> [https://perma.cc/LSM3-SY4K].

60. 2017 Biomet Press Release, *supra* note 58. The government did not, however, refer to the other instances of unlawful bribery resulting in enforcement actions brought against the company in 2007 and 2014. Additionally, there was no mention of sanctions that may ultimately lead to debarment.

61. Michael T. Rave, *Advantages of Being a Well-Known Seasoned Issuer*, LAW360 (Oct. 10, 2013), <https://www.law360.com/articles/477751/advantages-of-being-a-well-known-seasoned-issuer> [https://perma.cc/Q4WX-ZTR4].

in the securities laws.”<sup>62</sup> As explained by then-Commissioner Daniel Gallagher in 2015:

A common thread runs through the legislative and SEC records underlying each of these disqualification provisions: Congress and the SEC may be willing to allow for exemptions from otherwise applicable restrictions or burdens, but only to those persons who are unlikely to abuse that relief through fraudulent or other improper conduct. . . . Historically, the Commission and the staff have approached the disqualification and waiver process against the backdrop of the first policy goal of reducing recidivism.<sup>63</sup>

In response to these disqualifications, however, an entity can request that the SEC issue a waiver.<sup>64</sup> Financial institutions or entities that request a waiver have the burden of showing “good cause” for a waiver to be granted.<sup>65</sup> For instance, in determining whether “good cause” for a WKSI waiver has been satisfied, the SEC looks at “how the conduct that gave rise to the ineligibility related to the reliability of the issuer’s current and future disclosure, and if it does, what steps the issuer has taken to remediate any deficiencies.”<sup>66</sup> Moreover, the SEC looks at whether granting the waiver would be in line with “the public interest or the protection of investors.”<sup>67</sup>

The application of WKSI waivers to banks engaged in the LIBOR scandal provides an example of how the government allows entities engaged in long-term misconduct to avoid certain collateral consequences. In April 2015, DB Group Services, Ltd., a subsidiary of Deutsche Bank, pleaded guilty to wire fraud with regards to its manipulation of LIBOR and agreed to pay a \$150 million fine.<sup>68</sup> Deutsche Bank entered into a DPA, admitted to manipulating LIBOR and

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62. Richard A. Rosen & David S. Huntington, *Waivers from the Automatic Disqualification Provisions of the Federal Securities Laws*, INSIGHTS: CORP. & SECS. L. ADVISOR, August 2015, at 2, 3.

63. Daniel M. Gallagher, Comm’r, U.S. Sec. & Exch. Comm’n, Remarks at the 37th Annual Conference on Securities Regulation and Business Law: Why is the SEC Wavering on Waivers? (Feb. 13, 2015) (transcript available at <https://www.sec.gov/news/speech/021315-spc-cdmg.html> [<https://perma.cc/EJE2-L38B>]).

64. Luis A. Aguilar, Comm’r, U.S. Sec. & Exch. Comm’n, Public Statement on Enhancing the Commission’s Waiver Process (Aug. 27, 2015), <https://www.sec.gov/news/statement/aguilar-enhancing-commissions-waiver-process.html> [<https://perma.cc/Q42F-QWJV>]. When requesting a waiver, the entity should provide the Commission with the necessary background information, legal and factual issues that are involved, and the entity’s suggested grounds for granting the waiver. *Process for Requesting Waivers of “Bad Actor” Disqualification Under Rule 262 of Regulation A and Rules 505 and 506 of Regulation D*, U.S. SEC. & EXCH. COMM’N (Mar. 13, 2015), <https://www.sec.gov/divisions/corpfin/guidance/262-505-waiver.htm> [<https://perma.cc/TTA9-SCMX>].

65. Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, Remarks at the Corporate Counsel Institute, Georgetown University in Washington D.C.: Understanding Disqualifications, Exemptions and Waivers Under the Federal Securities Laws (Mar. 12, 2015) (transcript available at <https://www.sec.gov/news/speech/031215-spch-cmjw.html> [<https://perma.cc/592W-D8WL>]).

66. Daniel M. Gallagher, Comm’r, U.S. Sec. & Exch. Comm’n, Public Statement on WKSI Waivers (Apr. 29, 2014), at n.1, <https://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370541680627> [<https://perma.cc/9UZ3-8XPN>].

67. *Id.*; see also White, *supra* note 65 (“[T]he Commission’s ultimate objective is for the waiver decision to safeguard the public interest and protect investors.”).

68. Press Release, U.S. Dep’t of Just., Deutsche Bank’s London Subsidiary Agrees to Plead Guilty in Connection with Long-Running Manipulation of LIBOR (Apr. 23, 2015), <http://www.justice.gov/opa/pr/deutsche-banks-london-subsidiary-agrees-plead-guilty-connection-long-running-manipulation> [<https://perma.cc/3CH9-2VMF>].

conspiring to price-fix with other banks, agreed to a monetary penalty of \$625 million, promised continued cooperation with the DOJ during its investigation of LIBOR manipulation, and agreed to retain a corporate monitor for the duration of the three-year agreement.<sup>69</sup> Deutsche Bank also paid penalties of \$800 million to the United States Commodity Futures Trading Commission and \$600 million to the New York Department of Financial Services.<sup>70</sup>

As a result of the criminal conviction of its subsidiary, Deutsche Bank was to lose its WKSJ status.<sup>71</sup> The SEC, however, granted Deutsche Bank a waiver, over the emphatic objection of one of its commissioners, who explained:

Deutsche Bank's illegal conduct involved nearly a decade of lying, cheating, and stealing. This criminal conduct was pervasive and widespread, involving dozens of employees from Deutsche Bank offices including New York, Frankfurt, Tokyo, and London. Deutsche Bank's traders engaged in a brazen scheme to defraud Deutsche Bank's counterparties and the worldwide financial marketplace by secretly manipulating LIBOR. The conduct is appalling. . . .

. . . .  
. . . Among other factors, the egregious criminal nature of the conduct and the duration of the manipulation (almost a decade) weigh heavily in my mind when considering this waiver. Additionally, Deutsche Bank is a recidivist, and its past conduct undermines its current promise of future good conduct. . . .

. . . I do not find any basis to support the assertion that Deutsche Bank's culture of compliance is dependable, or that its future disclosures will be accurate and reliable.<sup>72</sup>

Stein's dissenting comments go on to demonstrate a concern about the ability of the SEC to incentivize firms to adopt an effective compliance program, when they are aware they may be able to avoid significant sanctions.<sup>73</sup>

The decision to grant Deutsche Bank a waiver was not an isolated incident. Indeed, it was the second bank involved with manipulation of LIBOR to receive a waiver to having its WKSJ status revoked.<sup>74</sup> Less than three weeks after Stein published her dissent in the Deutsche Bank matter, the SEC granted waivers to three other banks—UBS, Barclays, and Royal Bank of Scotland—that had been involved in both the LIBOR scandal as well as a “criminal conspiracy to

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69. *Id.*

70. *Id.*

71. See Kara M. Stein, Comm'r, U.S. Sec. & Exch. Comm'n, Dissenting Statement in the Matter of Deutsche Bank AG, Regarding WKSJ (May 4, 2015), <https://www.sec.gov/news/statement/dissenting-statement-deutsche-bank-ag-wksi.html> (explaining that, absent a waiver granted by the Commission, the criminal conviction of Deutsche Bank's subsidiary would trigger ineligible issuer status).

72. *Id.*

73. *Id.*

74. See *In re Royal Bank of Scotland Group, plc*, Securities Act Release No. 9578, Exchange Act Release No. 72032, 108 SEC Docket 15 (Apr. 25, 2014) (granting Royal Bank of Scotland a waiver from being considered an ineligible issuer); see also Kara M. Stein, Comm'r, U.S. Secs. & Exch. Comm'n, Dissenting Statement in the Matter of The Royal Bank of Scotland Group, plc, Regarding Order Under Rule 405 of the Securities Act of 1933, Granting a Waiver From Being an Ineligible Issuer (Apr. 28, 2014), <http://www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370541670244> [<https://perma.cc/4S8Z-REDH>] (noting how frequently the SEC has granted WKSJ waivers to large financial institutions and broker-dealers).

manipulate exchange rates in the foreign currency exchange spot market . . . a global market for buying and selling currencies.”<sup>75</sup>

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This Part highlights two instances where the government actor rejected an available non-monetary penalty that could have had an important deterrent impact on the firm. In a perfect world, fines would be levied against firms at amounts that would sufficiently deter them from misconduct, but the realities of the government’s enforcement efforts over the past two decades make clear that the optimal level of fines is often not sought by government enforcers. This is evidenced by the repeat misconduct one can see within firms, like Biomet and others.<sup>76</sup> In a world where the monetary penalties levied are not sufficient on their own to deter crime, non-monetary penalties are of even greater importance. When those non-monetary penalties are not pursued,<sup>77</sup> it leads to a situation where corporate crime is insufficiently deterred. The question, therefore, is why might the government pursue an enforcement strategy of this nature?

### III

#### THE PUSH FOR INFORMATION

When one looks at the treatment of Biomet, Deutsche Bank, and other firms<sup>78</sup> that have engaged in repeated incidents of misconduct,<sup>79</sup> it is easy to understand

75. See Kara M. Stein, Comm’r, U.S. Secs. & Exch. Comm’n, Dissenting Statement Regarding Certain Waivers Granted by the Commission for Certain Entities Pleading Guilty to Criminal Charges Involving Manipulation of Foreign Exchange Rates (May 21, 2015), <https://www.sec.gov/news/statement/stein-waivers-granted-dissenting-statement.html> [<https://perma.cc/4Y67-B28G>] (dissenting to the Commission granting UBS, Barclays, and Royal Bank of Scotland waivers on May 20, 2015, and noting the recidivism of the institutions).

76. See Root, *supra* note 42 (discussing corporate repeat offenders and arguing in favor of an increase in non-monetary penalties to deter misconduct).

77. This Article highlights two non-monetary penalties that are not being utilized by the government—debarment and disqualification—but there are others. For example, the DOJ’s use of monitors as part of corporate criminal resolutions has declined over the past few years. *2020 Mid-Year Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements*, GIBSON DUNN (July 15, 2020), <https://www.gibsondunn.com/2020-mid-year-npa-dpa-update/> [<https://perma.cc/RH3B-F4RB>] (noting that as of mid-year 2020, the “DOJ has not imposed any independent compliance monitors” and has instead “relied heavily on self-reporting”).

78. Indeed, in 2011, Johnson & Johnson (J&J) entered into a DPA for alleged violations of the FCPA. One of the government’s listed considerations for entering into the DPA was its concern that if the DOJ were “to initiate a prosecution of J&J or one of its operating companies and obtain a conviction, instead of entering into this DPA, J&J could be subject to exclusion from participation in federal health care programs.” Letter from Paul Pelletier, Principal Deputy Chief, Fraud Section, Crim. Div., U.S. Dep’t of Just., and Kathleen M. Hamann, Trial Att’y, Fraud Section, Crim. Div., U.S. Dep’t of Justice, to Eric Dubelier, Reed Smith LLP, Couns. for Johnson & Johnson (Jan. 14, 2011), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/04/27/04-08-11depuy-dpa.pdf> [<https://perma.cc/7NHJ-E9UT>]. And like Biomet, J&J went on to commit additional instances of unlawful off-label marketing and kickbacks to physicians and pharmacists. Press Release, U.S. Dep’t of Just., Johnson & Johnson to Pay More than \$2.2 Billion to Resolve Criminal and Civil Investigations (Nov. 4, 2013), <https://www.justice.gov/opa/pr/johnson-johnson-pay-more-22-billion-resolve-criminal-and-civil-investigations> [<https://perma.cc/FCV8-GXJN>].

79. See Root, *supra* note 42, at 1005–08 (detailing instances of repeat misconduct at HSBC entities).

why so many are concerned with the possibility that federal prosecutors and regulators are unwilling to enforce the laws broken by corporate offenders.<sup>80</sup> Indeed, to rephrase a reporter's 2017 insight, have "[t]oday's Department of Justice [and federal regulators] lost the will and indeed the ability to go after the highest-ranking corporate wrongdoers"?<sup>81</sup>

This Part puts forth the thesis of this Article, arguing that federal enforcers have, whether purposefully or not,<sup>82</sup> adopted a model of enforcement that prioritizes gathering information from firms over levying significant sanctions against them. Instead of pursuing one of the traditional aims of punishment—retribution or deterrence—the government's actions suggest that its priority is in ensuring that corporations fully disclose all relevant information of the corporation's misconduct to the government. This Part demonstrates how the government ensures firms disclose information by (A) exerting formal pressure to incentivize firms to share information with the government, (B) eschewing sanctions in favor of oversight, and (C) siding with corporations in limiting the transparency of investigations into wrongdoing.

#### A. Formal Pressure

Since the Holder Memorandum was issued in 1999, a variety of other guidance has been issued from the DOJ, which has often attempted to provide pressure or incentives to ensure that a corporation will provide large amounts of information about the underlying misconduct, the firm's internal investigation, and any remediation efforts undertaken or planned. As discussed above, the Holder Memorandum noted the need for cooperation from the corporation when attempting to detect, investigate, or remediate misconduct within the firm, and noted that a corporation's willingness to assist with the government investigation may be relevant to a prosecutor's ultimate charging decision.<sup>83</sup> In other words, cooperation via information disclosure might lead to less severe charges.

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80. See White, *supra* note 65 (“[T]he Commission’s decisions to grant or deny exemptions or waivers from regulatory disqualifications have been part of a broader public dialogue about the sufficiency of sanctions against entities that engage in wrongdoing.”); see also EISINGER, *supra* note 11, at 22 (“Today’s Department of Justice has lost the will and indeed the ability to go after the highest-ranking corporate wrongdoers.”); Renae Merle, *Repeat Offenders: Corporate Misdeeds Often Settled with Deferred Prosecution Agreements*, WASH. POST (Sept. 26, 2019), <https://www.washingtonpost.com/business/2019/09/26/repeat-offenders-corporate-misdeeds-often-settled-with-deferred-prosecution-agreements/> [<https://perma.cc/W79T-JDQP>] (noting that “[s]ince 1992, the Justice Department has entered 535 deferred prosecution and non-prosecution agreements with corporations” which has emboldened corporate crime).

81. EISINGER, *supra* note 11, at 22.

82. It is important to remember that decisions prosecutors make in individual cases may not always be a result of the government’s overall enforcement policy and may, instead, be attributable to a particular line prosecutor’s attempt to balance resource constraints with the need for holding corporate defendants accountable in a tangible manner.

83. See Holder Memorandum on Prosecuting Corporations, *supra* note 14 (explaining that a non-prosecution agreement may be permitted in exchange for cooperation when a firm’s “timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective”); see also Veronica Root Martinez, *Complex Compliance*

In 2003, the DOJ attempted to ramp up the pressure and issued the Thompson Memorandum.<sup>84</sup> In order for a corporation to claim that it was cooperating, the Thompson Memorandum required companies to (i) turn over materials from their internal investigations, (ii) waive any attorney-client privilege related to the underlying misconduct, and (iii) decline to provide an executive targeted for prosecution with a company-paid lawyer.<sup>85</sup> This attempt at aggressively pressuring companies to engage in cooperation and information disclosure—even the disclosure of privileged information—failed in 2006, when (i) a federal judge determined that the application of the Thompson Memorandum in a criminal case against ex-executives of KPMG violated their constitutional rights to counsel and fundamental fairness in a criminal proceeding,<sup>86</sup> and (ii) hearings before the United States Senate raised significant questions, from the American Bar Association and the white collar defense bar, about the requirement for firms to waive the attorney-client privilege.<sup>87</sup>

After the hearings, legislation was proposed to prohibit much of the most controversial aspects of the Thompson Memorandum, and new guidance, the McNulty Memorandum,<sup>88</sup> was issued shortly afterwards in December 2006. The McNulty Memorandum walked back much of the disputed policies within the Thompson Memorandum.<sup>89</sup> And yet, even while walking back the more

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*Investigations*, 120 COLUM. L. REV. 249, 259 (2020) (explaining that a firm with an effective compliance program will receive lesser sanctions than a firm that does not have an effective compliance program).

84. See Thompson Memorandum, *supra* note 39 (noting the focus of the memorandum's revision to DOJ corporate crime policy is to increase "emphasis on and scrutiny of the authenticity of a corporation's cooperation").

85. *Id.* at 7.

86. *United States v. Stein*, 452 F. Supp. 2d 230, 245 (S.D.N.Y. 2006), *vacated sub nom. on other grounds*, *Stein v. KPMG, LLP*, 486 F.3d 753 (2d Cir. 2007) ("[T]he government violated the rights of the KPMG Defendants to due process and to the assistance of counsel by interfering with KPMG's advancement of legal fees and other defense costs.").

87. See *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 22–36, (2007) (statements of Karen J. Mathis, President, American Bar Association, Andrew Weissmann, Partner, Jenner & Block, LLP, and Mark B. Sheppard, Partner, Sprague & Sprague) (explaining concerns about policies which lead the waiver of the attorney-client privilege and work product privilege); see also Ashby Jones, *Thompson Memo Out, McNulty Memo In*, WALL ST. J.: L. BLOG (Dec. 12, 2006, 1:27 PM), <https://blogs.wsj.com/law/2006/12/12/thompson-memo-out-mcnulty-memo-in/> [<https://perma.cc/L7DM-FBQB>] ("The Thompson memo was pointedly criticized by business groups and civil liberties organizations, who claimed that it eviscerated individuals [sic] constitutional rights.").

88. Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of U.S. Dep't of Justice Components and United States Att'ys (Dec. 12, 2006) [hereinafter McNulty Memorandum], [https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty\\_memo.pdf](https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf) [<https://perma.cc/QQG9-R3ZB>]

89. See *Id.* at 10 (noting that waiving attorney-client and work product protections is no longer "a prerequisite to a finding that a company has cooperated in the government's investigation"); see also *Department of Justice McNulty Memo Curtails Controversial Portions of Thompson Memo—Legislation Introduced in the Senate*, WILMERHALE (Dec. 13, 2016), <https://www.wilmerhale.com/en/insights/publications/departments-of-justice-mcnulty-memo-curtails-controversial-portions-of-thompson-memo-legislation-introduced-in-the-senate-december-13-2006> [<https://perma.cc/FK6H-7HQJ>] ("[C]urrent Deputy Attorney General Paul McNulty issued his own memorandum scaling back the more egregious aspects of the Thompson Memorandum.").

draconian aspects of the Thompson Memorandum, the McNulty Memorandum continued to espouse the government's desire for information. For example, the new guidance "expand[ed] upon the Department's long-standing policies concerning how [it] evaluate[s] the authenticity of a corporation's cooperation with a government investigation."<sup>90</sup> Additionally, while the DOJ stopped requiring waiver of the attorney-client privilege, the McNulty Memorandum explained that "a company's disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure."<sup>91</sup>

The McNulty Memorandum, however, was also short-lived and was superseded by the Filip Memorandum in 2008.<sup>92</sup> The Filip Memorandum moved even further away than the McNulty Memorandum from requiring firms to waive the attorney-client privilege.<sup>93</sup> Instead, the Filip Memorandum focused on corporations disclosing relevant facts to the government to obtain cooperation credit. Specifically, the Filip memorandum stated: "[T]he sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant *facts* concerning such misconduct."<sup>94</sup>

In 2015, the DOJ issued the Yates Memorandum, which focused on "Individual Accountability for Corporate Wrongdoing."<sup>95</sup> Similar to the Filip Memorandum, the Yates Memorandum states that "in order to qualify for any cooperation credit, corporations must provide to the Department all relevant

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90. McNulty Memorandum, *supra* note 88, at 2.

91. *Id.* at 10.

92. Mark Filip, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components and U.S. Att'ys (Aug. 28, 2008) [hereinafter Filip Memorandum], <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf> [<https://perma.cc/7JZN-76XV>].

93. Even as the government retreated from its more aggressive positions, like overt attempts to obtain privilege waivers, many still believe the government holds a significant coercive power over corporations just by virtue of the reputational harms that might occur if the government brings civil and criminal proceedings against the corporation. *See, e.g.,* Samuel W. Buell, *CAPITAL OFFENSES: BUSINESS CRIME AND PUNISHMENT IN AMERICA'S CORPORATE AGE* 29 (2016) (discussing the BP oil spill and explaining "[t]he Justice Department held a sword over the company's fictive neck: the threat of full criminal prosecution and parallel civil enforcement lawsuits for every possible violation in the sprawling federal code"). Others, however, have argued that firms obtain a reputational benefit by working with the government, by demonstrating to consumers and the public that it is trying to change and correct misconduct from within by being transparent with the entities charged with investigating them. *See* Mark Robeck, Amy Vazquez & Michael E. Clark, *Corporate Cooperation in the Face of Government Investigations*, *HEALTH LAW.*, Apr. 2005, at 20, 24 ("An internal investigation ferreting out wrongdoers may help the corporation's reputation.").

94. Filip Memorandum, *supra* note 92, at 9.

95. Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Assistant Att'ys Gen. for U.S. Dep't of Just.'s Antitrust, Civ., Crim., Env't & Nat. Res., Nat'l Sec., & Tax Divs., Dirs. of the Fed. Bureau of Investigation and Exec. Off. for U.S. Trs., and U.S. Att'ys (Sept. 9, 2015) [hereinafter Yates Memorandum], <https://www.justice.gov/archives/dag/file/769036/download> [<https://perma.cc/69BS-S5KW>].

facts relating to the individuals responsible for the misconduct.”<sup>96</sup> The Yates Memorandum was swiftly condemned by the white-collar bar for, amongst other concerns, creating potential conflicts between corporations charged with investigating wrongdoing and the employees and other agents who were aware of relevant information.<sup>97</sup>

Further, in 2018, then-Deputy Attorney General Rod J. Rosenstein walked back the requirements of the Yates Memorandum in a speech, announcing that corporations would be permitted to receive cooperation credit as long as they identified individuals that played a significant role “in setting a company on a course of criminal conduct.”<sup>98</sup> Rosenstein noted, however, that if the DOJ were to find “that a company is not operating in good faith to identify individuals who were substantially involved in or responsible for wrongdoing, [then the DOJ] will not award any cooperation credit.”<sup>99</sup>

Thus, while the mechanism of the DOJ’s pressure changed and at times lessened—due to objections from Congress, the American Bar Association, and the white-collar bar—the DOJ has consistently engaged in efforts to incentivize firms to provide fulsome information to the government in the twenty years since the Holder Memorandum was introduced. Importantly, the DOJ is not alone in its efforts to use pressure to ensure it receives the information it seeks; regulators also encourage information disclosure in a variety of ways. For example, in 2002, the SEC issued the Seaboard Report, which indicated that firms could demonstrate their willingness to cooperate by waiving their attorney-client privilege.<sup>100</sup> The upshot is that both prosecutors and regulators put a high-priority on obtaining a significant amount of information from firms found to have engaged in wrongdoing, and they have done so for two decades.

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96. *Id.* at 2.

97. See *Unpacking the Yates Memo: What the “New” DOJ Policy Really Means*, MCGUIREWOODS (Sept. 11, 2015), <https://www.mcguirewoods.com/client-resources/Alerts/2015/9/Unpacking-Yates-Memo-New-DOJ-Policy> [<https://perma.cc/36QW-SWUW>] (explaining that the Yates Memo will likely make “it more difficult for companies and their counsel to secure unfettered cooperation from executives in internal investigations”); see also Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 VA. L. REV. ONLINE 60 (2015); Elizabeth E. Joh & Thomas W. Joo, *The Corporation as Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. ONLINE 51 (2015) (noting a variety of potential deficiencies with the Yates memorandum that might not actually lead to greater individual prosecutions).

98. Rod J. Rosenstein, Deputy Att’y Gen., U.S. Dep’t of Justice, Remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018) (transcript available at <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rostenstein-delivers-remarks-american-conference-institute-0> [<https://perma.cc/Q49B-SEZN>]).

99. *Id.*

100. Report of Investigation Pursuant to Section 21(a) of the Sec. Exch. Act of 1934 and Comm’n Statement on the Relationship of Cooperation to Agency Enft Decisions, Securities Act Release No. 44,969, Accounting and Auditing Enforcement Release No. 1470, 76 SEC Docket 220 (Oct. 23, 2001), <http://www.sec.gov/litigation/investreport/34-44969.htm> [<https://perma.cc/Q9M3-AARR>].

## B. Oversight

The official pressure levied by federal prosecutors and regulators, however, is not the only way in which the government has made clear that its priority in corporate criminal enforcement is to obtain information. Federal prosecutors and regulators have also employed a variety of ways to require formal oversight and a reporting of firms' remediation efforts after reaching a resolution—whether that be a DPA, a non-prosecution agreement, or a guilty plea—for the misconduct that occurred. Indeed, as the DOJ walked back many of the requirements found within the Thompson Memorandum, it was simultaneously experimenting with a variety of “post-resolution oversight” strategies that would enable it to continue to receive information regarding firms' investigative and remediation efforts.<sup>101</sup>

Take, for example, the DOJ's resolution of FCPA cases from 2005 to 2014, around the time the Thompson Memorandum was being criticized and phased out by the McNulty and Filip Memorandums. During that time, “approximately three out of every five corporate FCPA resolutions . . . required some form of ongoing reporting or monitoring of the company's compliance program during a post-resolution period.”<sup>102</sup> This post-resolution monitoring took three basic forms: (i) an external monitor required to provide regular reports regarding the firm's progress on its remediation efforts (2005–2014),<sup>103</sup> (ii) a self-assessment period by the firm with regular reports to the DOJ on its progress (2007, 2009–2014), and (iii) a hybrid of these two, where a monitor was utilized for a specified time period followed by a self-assessment period (2012–2014).<sup>104</sup> Thus, the DOJ included additional guarantees within its enforcement resolutions to ensure corporations found to have engaged in misconduct would continue to provide the government with information regarding the firm's investigation and resolution of the relevant matters.

Importantly, regulators also use post-resolution oversight of firms' remediation efforts and began to do so more routinely and aggressively over the past twenty years. For example, the Federal Trade Commission (FTC) has utilized external monitors for over a decade to oversee remediation efforts to comply with Commission orders.<sup>105</sup> In explaining the importance of monitors to these situations, an FTC publication states that “these complex remedies typically require significant, and often highly technical, post-order cooperation and commitment from the merged entity.”<sup>106</sup>

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101. *2014 Year-End FCPA Update*, GIBSON DUNN (Jan. 5, 2015) [hereinafter *2014 FCPA Update*], <https://www.gibsondunn.com/2014-year-end-fcpa-update/> [https://perma.cc/G5AS-ZTYR].

102. *Id.*

103. Monitorships take a variety of forms, but those arising out of FCPA matters tend to be corporate compliance monitorships. Root, *supra* note 16, at 111.

104. *2014 FCPA Update*, *supra* note 102.

105. Susan Huber, *Monitors: Expert Eyes and Ears in Commission Orders*, FTC: COMPETITION MATTERS (July 14, 2015, 11:59 AM), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/07/monitors-expert-eyes-ears-commission-orders> [https://perma.cc/RJ6X-63YH].

106. *Id.*

The upshot is that federal enforcers have continuously sought ways to maintain oversight over a firm found to have engaged in alleged wrongdoing for a period of time after entering into a resolution with the firm.

### C. Limited Transparency

Federal prosecutors and regulators have demonstrated through their policy pronouncements and oversight mechanisms that a firm's disclosure of information is important to them. But the most persuasive evidence of the federal government's desire to obtain complete and fulsome information from corporate offenders is its willingness to fight on their behalf to keep that information secret. In case after case, the government demonstrates it is willing to withhold information from the public to ensure that corporations maintain their willingness to continue working with the government.

For example, in 2004, the SEC and AIG entered into a consent order regarding AIG's alleged improper accounting and financial reporting. The consent order required AIG to retain a monitor, who would provide reports to the SEC, the DOJ, and AIG's internal audit committee.<sup>107</sup> In June 2006, AIG and the SEC filed a motion with the district court to have the monitor's reports prohibited from being subject to public dissemination.<sup>108</sup> In 2011, a reporter attempted to gain access to the reports via a Freedom of Information Act request to the DOJ and the SEC, and then in subsequent litigation before the district court and D.C. Circuit.<sup>109</sup> The SEC joined AIG in contesting the reporter's request for information, with the SEC explaining that if confidentiality was not maintained it would have difficulty entering into "similar agreements in the future."<sup>110</sup> Thus, it went out of its way to ensure that the monitor's report remained secret.<sup>111</sup>

In 2015, an issue was raised before a district court in *United States v. HSBC Bank USA*,<sup>112</sup> regarding whether a monitor's interim report should be kept under confidential seal or made publicly available.<sup>113</sup> In this case the DOJ argued in favor of keeping the report confidential. In support of the argument, the DOJ quoted the following rationale:

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107. SEC v. Am. Int'l Grp., 854 F. Supp. 2d 75, 77–78 (D.D.C. 2012), *rev'd*, 712 F.3d 1, 5 (D.C. Cir. 2013).

108. *Id.* at 78.

109. SEC v. Am. Int'l Grp., 712 F.3d 1 (D.C. Cir. 2013).

110. *Am. Int'l Grp.*, 854 F. Supp. 2d at 82.

111. I have previously argued that cases of this nature should be entitled to a monitor-privilege. I am not meaning to be critical of the government's position in the case, but I am suggesting that the case exemplifies how much the government values cooperation and the lengths it will go to protect the incentives for firms to cooperate. See Veronica Root, *The Monitor-"Client" Relationship*, 100 VA. L. REV. 523 (2014) (arguing in favor of a privilege protecting communications amongst a corporate compliance monitor, corporation, and the government).

112. *United States v. HSBC Bank USA, N.A.*, No. 12-cr-00763, 2016 U.S. Dist. LEXIS 59231, (E.D.N.Y. May 4, 2016).

113. *Id.* at \*3.

Officials with law enforcement responsibilities may be heavily reliant upon the voluntary cooperation of persons who may want or need confidentiality. If that confidentiality cannot be assured, cooperation will not be forthcoming. . . . If release is likely to cause persons in the particular or future cases to resist involvement where cooperation is desirable, that effect should be weighed against the presumption of access.<sup>114</sup>

As evidenced by these cases, and others, the government has indicated both an ability and willingness to expend time and money to ensure its assurances of secrecy are not upended because, in part, it might impact its ability to ensure future disclosure of information from corporate offenders.

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The prioritization of information gathering by federal enforcers may seem unremarkable,<sup>115</sup> but it is quite significant. For over twenty years, federal prosecutors and regulators—through the formal pressure of policy, oversight measures of remediation efforts, and alliances with corporations it is in the midst of investigating, overseeing, and sanctioning—have prioritized their ability to obtain information from corporate offenders.<sup>116</sup> These prosecutors and regulators have done so even while facing criticism for being too lenient when levying sanctions against these same offenders. The federal government is not acting as if its primary task is to enforce the law. The federal government is, instead, acting as if its primary task is to gather information from corporations as part of its effort to ensure that that legal and regulatory requirements are adhered to by the corporations' agents and members.

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114. Mot. to File Monitor's Rep. Under Seal at 8, *United States v. HSBC Bank USA, N.A.*, No. 12-763-JG (E.D.N.Y. June 1, 2015), ECF No. 35, 2015 WL 11652652 (alteration in original) (quoting *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995)). The District Court Judge ordered the public disclosure of the report with redactions. The Second Circuit overruled. *United States v. HSBC Bank USA, N.A.*, 863 F.3d 125 (2d Cir. 2017).

115. See, e.g., William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 648 (2002) (explaining that corporations have "traded" cooperation with an investigation for "government-granted favors," like leniency).

116. There might, however, be other theories for explaining the government's seeming reluctance to utilize the full set of sanctions at their disposal besides unwillingness or an emphasis on information disclosure. For example, in 2016, Professor Jennifer Arlen argued that the increased use of deferred- and non-prosecution agreements is inconsistent with the rule of law, and she noted that the rise of these vehicles for sanctioning corporate offenders has imbued prosecutors with an enormous amount of power. Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 226 (2016). Assuming prosecutors are being influenced by a desire to preserve their own power, they could also still be motivated by a desire to receive full and complete cooperation from organizations under investigation for misconduct within their ranks. Indeed, one reason prosecutor's might want to preserve their own power is to ensure that they can pursue cooperative ends when crafting a set of sanctions to enter into with a corporate offender. Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 174–75 (2004) (noting that while criminal indictments "are not routine, the power to indict, combined with collateral consequences and market forces, enhances the power of prosecutors to investigate corporate crime. . . . [This] motivates firms to conduct in-house investigations, cooperate fully with prosecutors, distance themselves from the conduct of their agent, and jettison employees involved in the transaction.").

#### IV IMPLICATIONS

As argued in Part III, federal enforcers have, whether purposefully or by happenstance, adopted a model of enforcement that prioritizes gathering information from firms over levying significant sanctions against them. This insight raises a whole host of questions for diverse areas of scholarly concern, including criminal law, administrative law, corporate law and others, and there could be both benefits and costs to the government's quest to gather information that may change depending upon what lens one uses to frame the relevant issues.

This Part considers three sets of implications of this model, focusing on those related to federal enforcers' focus on obtaining information from corporate offenders regarding firms' efforts to create, implement, and adhere to effective ethics and compliance programs. It contends that the government's prioritization of information without a meaningful commitment to maximize the use of that information for the public's benefit is undermining compliance efforts. Specifically, the government is not utilizing the information it gathers to (i) maximize federal enforcers' understanding and evaluation of compliance best practices or (ii) empower the types of public and private partnerships known to create lasting change within organizations. As such, enforcers should determine how they might better utilize the information they are gathering so that the public benefits from the government's considerable and sustained efforts over the past two decades

##### A. Federal Enforcers' Evaluations of Compliance Programs

The government has long recognized the importance of incentivizing firms to engage in effective ethics and compliance programs. As noted above, this is, at least in part, because employees and agents of the corporation are going to have the best information about the inner workings of the organization, which is necessary information for creating or modifying an effective compliance program. And yet, the government must make a determination regarding the effectiveness of a firm's ethics and compliance program when deciding an appropriate resolution to the firm's misconduct.

During the Obama Administration, the DOJ created a new position for an internal, full-time compliance expert, whose job was to assist and advise prosecutors when they needed to assess whether a firm did or did not have an effective ethics and compliance program.<sup>117</sup> Importantly, having a dedicated individual in this role served to prompt line prosecutors to prioritize the compliance efforts at the firm when determining the appropriate resolution of a case against a corporate offender. Additionally, the compliance expert trained prosecutors on what they should look for in a compliance program and developed

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117. Press Release, U.S. Dep't of Just., New Compliance Counsel Expert Retained by the DOJ Fraud Section (Nov. 3, 2015), <https://www.justice.gov/criminal-fraud/file/790236/download> [<https://perma.cc/7YDU-MLUB>].

the DOJ's first Evaluation of Corporate Compliance Programs.<sup>118</sup> In short, the DOJ recognized the need not only for expertise in the area, but also for coordination within the DOJ that would allow it to better filter the information it gathered about the state of firms' compliance efforts.

The Trump Administration, however, has taken a different route. In October 2018, then-Assistant Attorney General Brian A. Benczkowski announced changes to the DOJ's approach to evaluating compliance.<sup>119</sup> Instead of utilizing a centralized structure for evaluating compliance, he decentralized the process, so that individual prosecutors would be responsible for assessing the compliance activities of firms on their own.<sup>120</sup> In doing so, he was careful to explain that prosecutors would receive training relevant to compliance efforts in their subject matter areas.<sup>121</sup> Additionally, the DOJ recently updated the Evaluation of Corporate Compliance Programs in an effort to "assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution."<sup>122</sup>

These efforts on the part of the DOJ do not appear to be performative. The DOJ took a great deal of time and effort to create, develop, and cement the government's commitment to ensuring firms prioritize the creation and implementation of effective ethics and compliance programs. Yet, the current policy positions undertaken by the DOJ are squandering opportunity after opportunity for the DOJ as an institution to deepen its knowledge and expertise regarding what does and does not work within the compliance space.

When the DOJ had a point person in charge of evaluating compliance, it allowed information regarding compliance activities across a whole host of firms to trickle up to that point person who could aggregate that information, make comparisons about what was occurring, and extrapolate from all of that information what sorts of activities might become industry best practices. And, importantly, those best practices could then become incorporated into the DOJ's resolutions with firms. But today, that information flows into particular line prosecutors and enforcement actors, without any formalized dissemination

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118. *Department of Justice Fraud Section Provides Guidance on Evaluating Corporate Compliance Programs*, JONES DAY (Feb. 2017), <https://www.jonesday.com/en/insights/2017/02/department-of-justice-fraud-section-provides-guidance-on-evaluating-corporate-compliance-programs> [<https://perma.cc/66RM-JJBX>].

119. Brian A. Benczkowski, Assistant Att'y Gen., U.S. Dep't of Just., Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (Oct. 12, 2018) (transcript available at <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program> [<https://perma.cc/PQ2F-B4W7>]).

120. *Id.*

121. *Id.*

122. U.S. DEP'T OF JUST., CRIM. DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS (June 2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download> [<https://perma.cc/E4PK-KA57>].

process across the DOJ itself or across other enforcement agencies that have information about firms' compliance activities.

Why might this be problematic or concerning? In previous work, I have determined that there are significant inter- and intra-agency coordination challenges associated with the government's ability to recognize and appropriately sanction corporate repeat offenders.<sup>123</sup> Indeed, corporate repeat offenders were not treated as recidivists and subject to a heightened sanction unless they were previously before the exact same enforcement agent or division (that is, DOJ Fraud or DOJ Antitrust), but not if they were previously before different divisions within the DOJ itself (that is, DOJ Fraud then DOJ Antitrust). If the DOJ is unable to incentivize intra-agency coordination when formal resolutions are occurring, why would one expect the DOJ to be engaged in robust coordination of disseminating information regarding compliance practices if no one at DOJ is actually in charge of doing so?

It is worth noting that this decentralized approach benefits the individual federal enforcers, in that they develop an expertise that is helpful to them going forward. As long as that individual enforcer remains with the government, their expertise also benefits the government. Benczkowski's own statement alludes<sup>124</sup> to the reality that many of the individuals who work in these positions will have "revolving door" careers, where they spend some time in government service, go back to private practice, and so on. As such, the benefits of the increased knowledge of the individual enforcer to the DOJ and other governmental agencies is limited to the time that individual remains with the government. For federal enforcers to truly harness the power of the information being gathered, they must find some way to transfer the knowledge and insights to the larger institution in a systematic and deliberate fashion.

## B. Failure to Effectively Leverage Public-Private Compliance Partnerships

While a great deal of information flows into the government regarding various firms' compliance practices, not nearly as much flows back out into industry. When federal regulators and prosecutors demand information from corporations but fail to reciprocate by collaborating with industry members in creating and developing best practices for achieving effective compliance programs, the government wastes a valuable opportunity to curb corporate misconduct more generally. To be fair, there are some federal regulators that actively share information with regulated entities, but many do not.<sup>125</sup> When the government's information regarding best compliance practices remains hidden, it constrains effective compliance.

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123. Root, *supra* note 42.

124. Benczkowski, *supra* note 119.

125. The Department of Education, for example, uses a variety of resources like "Dear Colleague Letters" to provide information to the entities it regulates and oversees. See U.S. DEP'T OF EDUC., OSEP POLICY DOCUMENTS, <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html#pl> [<https://perma.cc/CQ4Z-D3A7>].

As explained by Professor Miriam Baer, applying a new governance framework of public and private partnerships has been perceived as challenging within the corporate enforcement context, specifically for criminal prosecutors, because of the inherently adversarial posture of the initial interactions.<sup>126</sup> Yet, the changes in corporate enforcement activities, particularly the DOJ's more recent steps taken toward providing additional compliance guidance to firms,<sup>127</sup> suggests that even within the adversarial system, there may be more federal enforcers can do to ensure that the information they gather is better and more fully utilized to benefit the public via the dissemination of best practices observed by federal enforcers to regulated firms.

The government could harness the information it is receiving to create and publish best practices for achieving effective compliance within firms. This sort of information might seem odd to flow from federal prosecutors, but for federal regulators it should, in theory, be par for the course. A regulator is particularly connected with members of the regulated industry and should be comfortable providing guidance to firms it oversees.<sup>128</sup> Federal prosecutors are not thought to have the same sort of expertise regarding prosecuted firms. However, as noted by Benczkowski, the process preceding the resolution of alleged misconduct via a negotiated settlement agreement provides prosecutors the opportunity to obtain information about a firm and its compliance efforts.<sup>129</sup> Indeed, part of the role of external counsel representing a firm negotiating a settlement with DOJ is to convey the context surrounding the misconduct and any potential strengths and weaknesses of the firm's compliance program.<sup>130</sup> And while some negotiated settlement agreements do not require more detailed, formal disclosures than those already required under existing regulations and statutes, (i) we do not know what is communicated during the negotiation process and (ii) there are instances where a firm is required to do "more" under a settlement<sup>131</sup> or a compliance

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126. Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 954 (2009) (explaining that new governance is "often described as a theory of regulation characterized by a collaborative tone between regulator and regulated entity, a problem-solving orientation, continuous assessment and revision of both expected outcomes and implementation processes, pooling of information by and among regulated entities and regulators, and interagency cooperation").

127. *Supra* Part III.A.

128. For example, the FTC provides guidance easily available on its website "to help businesses understand their responsibilities and comply with the law." Federal Trade Comm'n, Guidance, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/guidance> [<https://perma.cc/GBB5-AED4>]. See also Van Loo, *supra* note 16, at 397 (explaining the collaborative approach to solving regulatory problems which emphasizes partnership between regulators and firms).

129. Benczkowski, *supra* note 119.

130. See, e.g., Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 529 (2004) ("Easier access to information makes untangling its complexity easier, but only a little; investigators still need expertise. Voluntary cooperation can provide that expertise as well as information access.").

131. See, e.g., Post, Veronica Root Martinez, *More Meaningful Ethics*, UNIV. CHI. L. REV. ONLINE (Jan. 7, 2020) (explaining that a settlement between Facebook and the FTC required Facebook to engage in activity that surpassed "current US law"), <https://lawreviewblog.uchicago.edu/2020/01/07/more-meaningful-ethics-by-veronica-root-martinez/> [<https://perma.cc/L6A2-BFT2>].

agreement than is required by law.<sup>132</sup> Finally, negotiated settlement agreements often mandate a variety of corporate governance reforms beyond just changes to the compliance program.<sup>133</sup>

Federal enforcers are taking in a great deal of information. If they could gather, aggregate, and analyze that information as is suggested in Part III.A., they could then facilitate the dissemination of information to companies regarding best practices for firms' compliance efforts. In doing so, federal enforcers could provide additional public benefits that would help to justify their prioritization of information over significant sanction.

### C. The Upshot

The government's key incentive to ensure that firms invest in effective ethics and compliance programs is the big stick threat of a significant sanction if the corporation fails to do so. The law and economics models that urge the government to provide mitigation credit to incentivize self-policing also note the need for the possibility of a significant sanction if firms fail to engage in that effort.<sup>134</sup> When the government prioritizes the receipt of information over obtaining sanctions, it is quite literally tying the hands working so hard to provide guidance on compliance programs behind its back.

If the government wants to prioritize information over sanctions, it should do so in a manner that does not diminish its efforts to incentivize the compliance project. And it can. As demonstrated in Part II.A., the DOJ and other federal regulators are generally free to adjust their policy preferences.<sup>135</sup> This means federal enforcers could choose to act in a manner that encourages, instead of undermines, collaborations both between the federal government and firms, and between firms themselves in an effort to improve compliance across entire industries. But taking the status quo as true, the government's current positions appear to be undermining compliance efforts and need to shift.

The upshot is that if the government wants to prioritize information over sanction, it should do so in a way that enables federal enforcers to utilize that information in a purposeful, cooperative manner that provides direct benefits to firms and, thereby, the public. This could be done in a variety of ways, but at least one of the government's goals should be to ensure better compliance with legal and regulatory requirements by corporations. Federal enforcers can actively

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132. See, e.g., Defendant's Memorandum in Aid of Sentencing at 6, *United States v. Princess Cruise Lines, Ltd.*, No. 16-20897 (S.D. Fla. Apr. 19, 2017) (noting that the fine was the "largest-ever" for intentional vessel pollution and that the ECP is the "most comprehensive" to ever have been imposed on a cruise line).

133. Arlen, *supra* note 116.

134. Arlen & Kraakman, *supra* note 13, at 691–94.

135. See, e.g., Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 AM. CRIM. L. REV. 109, 133–34 (2020) ("DOJ policies are merely guidelines. They are not binding on prosecutors and seek only to inform decision-making. The experience with the Yates Memo suggests that such guidance and policies may not be fully implemented if there are practical and resource-based obstacles to doing so.").

bolster the compliance project by purposefully using the information they are gathering to assist in this effort.

## V

### CONCLUSION

The actions of federal prosecutors and regulators over the past twenty years suggest that federal enforcers have, whether purposefully or not, adopted a model of enforcement that prioritizes gathering information from firms over levying significant sanctions against them. There is nothing inherently problematic about gathering information.

And yet, when the federal enforcers fail to harness and share the insights they gather from firms, it wastes a unique opportunity to curb corporate misconduct in a broad-based manner by strengthening the very compliance programs they purport to incent. Government prosecutors and regulators should consider how they might utilize information garnered as a result of firms' cooperation in a manner that might improve the effectiveness of firms' compliance efforts on a widespread basis.