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Coordinating Compliance

Veronica Root
Notre Dame Law School
VRoot@nd.edu

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Abstract

In today's regulatory environment, a corporation engaged in wrongdoing can be sure of one thing: regulators will point to an ineffective compliance program as a key cause of institutional misconduct. The explosion in the importance of compliance is unsurprising given the emphasis that governmental actors—from the Department of Justice, to the Securities and Exchange Commission, to even the Commerce Department—place on the need for institutions to adopt "effective compliance programs." The governmental actors that demand effective compliance programs, however, have narrow scopes of authority. DOJ Fraud handles violations of the Foreign Corrupt Practices Act, while the SEC adjudicates claims of misconduct under the securities laws, and DOJ Antitrust deals with concerns regarding anticompetitive behavior. This segmentation of enforcement authority has created an information and coordination problem amongst regulators, resulting in an enforcement regime where institutional misconduct is adjudicated in a piecemeal fashion. Enforcement actions focus on compliance with a particular set of laws instead of on whether the corporate wrongdoing is a result of a systematic compliance failure that requires a comprehensive, firm-wide, compliance overhaul. As a result, the government's goal of incentivizing companies to implement "effective ethics and compliance programs" appears at odds with its current enforcement approach.

Yet governmental actors currently have the tools necessary to provide strong inducements for corporations to, when needed, engage in major restructuring of their compliance programs. This Article argues that efforts to improve corporate compliance would benefit from regulatory mechanisms that (i) recognize when an institution is engaged in recidivist behavior across diverse regulatory areas and (ii) aggressively sanction institutions that are repeat offenders. If governmental actors adopt a new enforcement strategy aimed at "Coordinating Compliance" incentives, they can more easily detect when an institution is suffering from a systemic compliance failure, which will deter firms from engaging in recidivist behavior. If corporations are held responsible for being repeat offenders across diverse regulatory areas, it may encourage them to implement more robust reforms to their compliance programs and, ultimately, lead to improved ethical conduct and more effective compliance programs within public companies.

Introduction

Compliance is king, and its subjects—regulators, prosecutors, courts, corporations, and academics—are quick to tout its power and potential for good. In 2015, the Director of the Securities and Exchange Commission's ("SEC") Enforcement Division stated, "strong legal and compliance functions are critical elements of any successful enterprise, particularly those operating in the securities industry. . . . When legal and compliance departments are not treated as full partners in the business, regulatory problems are inevitable."[1] In 2014, the Assistant Attorney General for the Department of Justice's ("DOJ") Criminal Division explained that the work of compliance officials "serves to protect the integrity of our public markets, the country's financial systems, our intellectual property, the retirement accounts of our hardworking citizens, and our taxpayer dollars."[2] In 2012, "36 percent of organizations sentenced had a judge order" the adoption of a compliance program, compared to just 6 percent in 2008.[3] And these strong signals, and others like them, have led corporations to focus on strengthening their internal compliance programs. For example, in 2014, the President and CEO of Walmart Stores, in the midst of weathering a stunning bribery scandal, discussed the company's goal "to become the model of excellence in global compliance and ethics."[4] Additionally, the President and CEO of Walmart International stated that "[a]s a global company, we have responsibilities to the countries in which we operate. We earn trust through our commitment to compliance." These are just a few of numerous examples that demonstrate an unabashed fidelity to compliance efforts within the current legal and regulatory environment.

Yet corporate misconduct continues, and many corporations suffer from multiple compliance failures within relatively short time periods. An excellent example of an institution with repeated instances of misconduct is HSBC Group ("HSBC"), a large, multinational financial services company with more than 50 million customers

[1] Andrew Ceresney, Remarks at SIFMA's 2015 Anti-Money Laundering & Financial Crimes Conference (Feb. 25, 2015) (including disclaimer that remarks expressed his own view and did not reflect the views of the SEC or its staff), *available at* http://www.sec.gov/news/speech/022515-spchc.html.

[2] Press Release, Dep't of Justice, Remarks by Assistant Attorney General for the Criminal Division Leslie R. Caldwell at the 22nd Annual Ethics and Compliance Conference (Oct. 1, 2014), *available at* http://www.justice.gov/opa/speech/remarks-assistant-attorney-general-criminal-division-leslie-r-caldwell-22nd-annual-ethics [hereinafter Caldwell, Remarks at Ethics and Compliance].

[3] BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 1, 164 (2014) [hereinafter Garrett, Too Big to Jail].

[4] Walmart Stores, FQ4 Results Earnings Conference Call (Feb. 20, 2014, 7:00 AM), *available at* http://finance.yahoo.com/news/walmart-stores-ceo-discusses-f4q-140113595.html.

in 73 countries and territories.[5] Each year, for the past five years, a governmental body has determined that HSBC, through one of its subsidiaries, has engaged in some type of regulatory or legal misconduct.

- In 2010, HSBC North America Holdings, Inc. ("HSBC NA") and the Federal Reserve Board ("Federal Reserve") entered into a consent Cease and Desist Order requiring HSBC NA to improve its firm-wide compliance risk-management program with a specific emphasis on its anti-money laundering efforts.[6]
- Also in 2010, HSBC Securities (USA) settled charges brought by the Financial Industry Regulatory Authority for failing to adequately disclose the risks associated with auction rate securities to customers.[7]
- In 2011, the Federal Housing Finance Agency, the conservator of Fannie Mae and Freddie Mac, sued HSBC NA for violations of the securities laws in connection with private-label mortgage-backed securities purchased by Fannie Mae and Freddie Mac during 2005-2007. In 2014, HSBC settled these claims for $550 million.
- In 2012, HSBC Holdings PLC ("HSBC Holdings") and HSBC Bank USA, N.A. ("HSBC USA") entered into an agreement with the DOJ and admitted to violating the U.S. Bank Secrecy Act, the International Emergency Economic Powers Act, and the Trading with the Enemy Act.[8] As part of its settlement agreement with DOJ, HSBC Holdings and HSBC USA agreed to retain a corporate compliance monitor for a five-year period.[9] The U.S. Department of the Treasury Office of the Comptroller of the Currency and the U.S. Federal Reserve Board were also involved in investigating the HSBC entities' unlawful activity.[10] In 2015, the monitor indicated that while HSBC Holdings has improved its compliance in some

[5] *Structure and Network*, HSBC, http://www.hsbc.com/about-hsbc/structure-and-network. HSBC has four major business areas: Commercial Banking, Global Banks and Markets, Private Banking, and Retail Banking and Wealth Management.
[6] Press Release, Board of Governors of the Federal Reserve System (Oct. 7, 2010), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/20101007a.htm.
[7] Press Release, FINRA, FINRA Fines HSBC Securities (USA) $1.5 million, US Bancorp $275,000 for Auction Rate Securities Violations (Apr. 22, 2010), *available at* http://www.finra.org/newsroom/2010/finra-fines-hsbc-securities-usa-15-million-us-bancorp-275000-auction-rate-securities.
[8] Press Release, Dep't of Justice, HSBC Holdings Plc. & HSBC Bank USA N.A. Admit to Anti-Money Laundering & Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), *available at* http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations.
[9] Deferred Prosecution Agreement, United States v. HSBC Bank USA, N.A. at 15-17 (E.D.N.Y. 2012) (No. 12-763), *available at* http://www.justice.gov/sites/default/files/opa/legacy/2012/12/11/dpa-executed.pdf.
[10] Press Release, Office of the Comptroller of the Currency, OCC Assesses $500 Million Civil Money Penalty Against HSBC Bank USA, N.A. (Dec. 11, 2012) *available at* http://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-173.html; Press Release, Bd. of Governors of the Fed. Reserve Sys. (Dec. 11, 2012) *available at* http://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-173.html.

areas, its corporate culture and compliance technology still do not meet the requirements of the deferred prosecution agreement the bank agreed to as part of a 2012 settlement.[11]

- Also in 2012, a United States Senate Permanent Subcommittee on Investigations case study determined that HSBC USA repeatedly failed to detect international money laundering, connections to terrorist financing, and violations of U.S. economic and trade sanctions.[12]
- In 2013, HSBC USA self-reported three apparent violations of the OFAC Global Terrorism Sanctions Regulations and agreed to remit $32,400 as part of its settlement with Office of Foreign Asset Control.[13]
- Also in 2013, HSBC entered into an agreement with the Office of the Comptroller of the Currency and the Federal Reserve to settle allegations that it engaged in mortgage foreclosure abuse.[14]
- In 2014, HSBC entered into a settlement with the U.S. Commodity Futures Trading Commission for charges related to manipulation of the foreign exchange market.[15]
- Also in 2014, HSBC Private Bank (Suisse) S.A. ("HSBC Suisse") settled charges related to its willfully providing "unregistered broker-dealer and investment services to U.S. Clients" from 2003 to in violation of the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940.[16]
- In 2015, HSBC Suisse was placed under investigation for potentially assisting its clients with tax evasion in the U.S., France, and other countries.[17]

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[11] Letter from Loretta Lynch et. al., U.S. Attorney, to the Hon. John Gleeson, J. for the U.S. Dist. Court, E. Dist. of N.Y., Re: United States v. HSBC Bank USA, N.A. and HSBC Holdings plc (April 1, 2015), *available at* http://www.nytimes.com/interactive/2015/04/01/business/dealbook/document-filing-on-hsbc-compliance.html?_r=0.

[12] U.S. S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., U.S. VULNERABILITIES TO MONEY LAUNDERING, DRUGS, AND TERRORIST FINANCING: HSBC CASE HISTORY (2012), *available at* http://www.hsgac.senate.gov/download/?id=2a76c00f-7c3a-44c8-902e-3d9b5dbd0083.

[13] Enforcement Information, Office of Foreign Asset Control, HSBC Bank USA, N.A. Settles Potential Civil Liability for Apparent Violations of the Global Terrorism Sanctions Regulations (Dec. 17, 2013), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20131217_hsbc.pdf.

[14] Pres Release, OCC, OCC and Federal Reserve Reach Agreement with HSBC to Provide $249 Million in Payments and Assistance (Jan. 18, 2013), *available at* http://www.occ.gov/news-issuances/news-releases/2013/nr-ia-2013-13.html.

[15] Press Release, CFTC, CFTC Orders Five Banks to Pay over $1.4 Billion in Penalties for Attempted Manipulation of Foreign Exchange Benchmark Rates (Nov. 12, 2014), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7056-14.

[16] Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges HSBC's Swiss Private Banking Unit With Providing Unregistered Services to U.S. Clients (Nov. 25, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543534789#.VQhOXkKprzI

[17] John Letzing, *HSBC Hit by Fresh Details of Tax Evasion Claims*, WALL ST. J. (Feb. 9, 2015), *available at* http://www.wsj.com/articles/hsbc-hit-by-fresh-details-of-tax-evasion-claims-1423482612. *See also* Martha M. Hamilton, et al., *New Countries Seek HSBC Data and Undeclared Cash*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Feb. 23, 2015, 6:30 AM), http://www.icij.org/project/swiss-leaks/new-countries-seek-hsbc-data-and-undeclared-cash

Thus, it is abundantly clear that HSBC is a complex organization that has repeatedly engaged in actions that violate statutory or regulatory requirements. HSBC has not, however, been labelled a repeat offender or recidivist by any governmental or regulatory authorities. Importantly, HSBC's history of compliance failures is neither remarkable nor unique.[18] Many other corporate entities have similarly long lists evidencing noncompliance with legal and regulatory requirements across a variety of legal areas. Thus leading to the question, why has the government failed to sanction corporate repeat offenders as recidivists?

Part I discusses the piecemeal origins of corporate compliance programs—diverse regulatory and statutory requirements, paired with the government's enforcement structure, as well as pressure from private parties. Part II systematically looks at the treatment of corporations entering into repeated settlement agreements over time through a case study of DOJ Fraud enforcement actions. The case study demonstrates that corporations that engage in misconduct that is similar in underlying purpose and behavior are not treated as repeat offenders when sanctioned by diverse governmental agents, but are treated as repeat offenders when before the same enforcement authority on multiple occasions.

Part III suggests that information, coordination, and lack of identified responsibility challenges may partially explain the findings of the case study. It then puts forth the thesis of this Article—efforts to improve corporate compliance would benefit from regulatory mechanisms that (i) recognize when an institution is engaged in recidivist behavior across diverse regulatory areas and (ii) aggressively sanction institutions that are repeat offenders. In short, governmental actors would benefit from more coordinated enforcement efforts, which in turn would increase incentives for private firms to engage in systematic revisions to their compliance programs. Part III then outlines a proposal for reform, which provides a framework for detecting recidivist public corporations through their current reporting obligations to the SEC and a structural mechanism for coordinating governmental efforts to incentivize private firms to implement more robust compliance programs. Part IV discusses benefits of and objections to the Article's proposal and then addresses some unresolved concerns raised by the case study and proposal.

[18] *See, e.g.*, Corporate Research Project, *Corporate Rap Sheets*, *available at* http://corp-research.org/corporaterapsheets.

I. A Regime of Piecemeal Compliance.

A focus on compliance within corporations has increased exponentially over the past two decades, and it appears poised to continue to grow in importance. Regulators, prosecutors, and industry insiders have all bought into the idea that establishing and maintaining an effective compliance program is key to ensuring corporations adhere to increasingly complex legal and regulatory requirements.

As this Part will demonstrate, the origins of compliance programs are a natural consequence of a number of circumstances. Statutory and regulatory dictates require firms within certain industries to develop compliance programs. Additionally, prosecutors provide concrete incentives for private firms to create effective compliance programs, because a program's existence can serve as a defense or mitigating factor to actual or potential criminal prosecution. Moreover, regulatory dictates and incentives created by governmental enforcement priorities encourage corporations to pressure their own private business partners to adhere to certain compliance standards.

A. Piecemeal Statutory & Regulatory Dictates.

Perhaps it is unsurprising that today's compliance regime has been undertaken in a piecemeal fashion when one considers the various statutory and regulatory dictates that have led to many corporate compliance priorities. There is no formal statute or regulation that requires firms to engage in comprehensive compliance efforts. Instead, there are specific statutory and regulatory admonishments that require firms within certain industries to implement discrete compliance programs.

For example, the Bank Secrecy Act of 1970 requires banks to adopt an anti-money laundering program.[19] Specifically, it requires banks to (i) develop internal policies, procedures, and controls; (ii) designate a compliance officer to oversee the banks efforts; (iii) provide training to employees on an ongoing basis in an effort to prevent money laundering; and (iv) implement an independent audit function to test the effectiveness of the bank's

[19] Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs* (Dec. 3, 2014) (forthcoming) (manuscript at 3), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533661 [hereinafter Miller, Economic Analysis] (*citing* Bank Secrecy Act, 31 U.S.C. § 5318(h)).

programs.[20] Thus, in as early as the 1970s, actions were taken in an effort to mandate that private firms engage in effective policing efforts; those efforts have continued to grow.[21]

In 2002, in response to the Enron and Arthur Anderson scandals,[22] Congress passed the Sarbanes-Oxley Act, which was described by President George W. Bush as "'the most far reaching reforms of American business practices since the time of Franklin Delano Roosevelt.'"[23] Sarbanes-Oxley "mandated a number of reforms to enhance corporate responsibility," as well as to "enhance financial disclosures and combat corporate and accounting fraud."[24] Specifically, it emphasized the importance of "internal compliance and enhanced internal corporate controls" [25] and "effectively forced corporate gatekeepers to 'commit' to corporate compliance."[26] As such, Sarbanes-Oxley and corresponding regulatory reforms increased the emphasis on compliance within private firms. "More than a decade following the enactment of Sarbanes-Oxley, both 'compliance' and 'risk management' have become key features within public corporations."[27] Today, it is very uncommon for regulators to encounter public companies that "do not have any compliance program."[28]

More recently, in response to the financial crisis of 2007-2009, Congress passed the Dodd-Frank Act in 2010,[29] which included a requirement that regulators overseeing banks implement the "Volcker Rule."[30] The Volcker Rule regulations prohibit banks from engaging in proprietary trading and restrict commercial banks and their affiliates from investing in hedge funds and private equity firms. The regulations detail the necessary "components

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[20] *Id.* at 3-4.
[21] Miriam H. Baer, Confronting the Two Faces of Corporate Fraud, 66 FLA. L. REV. 87, 114 (2014).
[22] Geoffrey P. Miller, The Compliance Function: An Overview (Nov. 18, 2014) (manuscript at 3) (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527621 [hereinafter Miller, Compliance Function].
[23] U.S. Securities and Exchange Commission, The Laws That Govern the Securities Industry, *available at* http://www.sec.gov/about/laws.shtml#sox2002.
[24] U.S. Securities and Exchange Commission, The Laws That Govern the Securities Industry, *available at* http://www.sec.gov/about/laws.shtml#sox2002.
[25] Baer, *supra* note at 21, at 114 (*citing* Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.)).
[26] *Id.* at 21, 114-15 (*citing* Manuel A. Utset, *Time-Inconsistent Management and the Sarbanes-Oxley Act*, 31 OHIO N.U. L. REV. 417, 442 (2005)).
[27] *Id.* at 143.
[28] Caldwell, Remarks at Ethics and Compliance, *supra* note 2.
[29] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, (2010).
[30] Miller, Economic Analysis, *supra* note 19, at 6 (*citing* Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and Securities and Exchange Commission, *Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships With, Hedge Funds and Private Equity Funds Subpart D*, 79 C.F.R. 5808 (January 31, 2014) [hereafter "Volcker Rule"] (requiring that banking agencies must develop and implement a program reasonably designed to ensure and monitor compliance with the prohibitions and restrictions on covered activities and investments)).

of an effective compliance program,"[31] and require mid-sized banks to adhere to the "following six elements: written policies and procedures; a system of internal controls; a management framework that clearly delineates responsibility and accountability for compliance; independent testing and audit of the effectiveness of the compliance program; training for trading personnel and managers; and making and keeping records sufficient to demonstrate compliance."[32] Additionally, the Volcker Rule requires that Chief Executive Officers ("CEO") at companies subject to the rule "attest that the company's compliance program 'is reasonably designed to achieve compliance with the rule.'"[33]

These are just a few of what are many different statutory or regulatory frameworks that require corporations to engage in specific compliance efforts. The manner in which these different requirements were enacted makes sense intuitively. As Congress or regulators encountered areas of corporate misconduct, they responded by requiring organizations to implement reforms targeted at improving policing within firms and compliance with specific legal and regulatory mandates. As these various requirements were enacted, private firms responded by creating or modifying existing compliance programs, on a piecemeal basis, so that their programs would adhere to the regulatory changes.

B. Diverse, Enforcement-Related Incentives.

A number of enforcement-related policies and practices have also resulted in changes to corporate compliance programs. Governmental actors adopt certain enforcement strategies in an effort to leverage companies' strong interests in avoiding sanctions for failing to comply with legal and regulatory requirements. The government is able to encourage private firms to engage in aggressive self-policing efforts by providing leniency to corporations who, though engaged in misconduct, nevertheless, have "effective compliance programs,"[34] and by ramping up sanctions for companies who failed to ensure that their agents comply with the law.[35]

[31] Miller, Economic Analysis, *supra* note 19, at 6.
[32] Miller, Compliance Function, *supra* note 22, at 13 (*citing* Volcker Rule, Subpart D).
[33] *Id.* at 8 (citing 12 CFR Part 248, Appendix B).
[34] *See generally Id*. *See also* Baer, *supra* note 21, at 142.
[35] Caldwell, Remarks at Ethics and Compliance, *supra* note 2 (discussing that a corporation that engaged in "massive disregard for compliance," was prosecuted, eventually plead guilty, and was ultimately required to pay a record $8.8 billion penalty)..

The framework empowering the government's enforcement-related incentives comes primarily through the U.S. Sentencing Commission's Organizational Guidelines. Twenty-five years ago, in 1991, the Federal Sentencing Guidelines were promulgated, and, in a section entitled "Effective Compliance and Ethics Program," organizations were admonished to "exercise due diligence to prevent and detect criminal conduct; and otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law."[36] The Organizational Guidelines, pursuant to requirements in the Sarbanes-Oxley Act, were revised in 2004 "to further define the meaning of an 'effective compliance and ethics program.'"[37]

Today, the Organizational Guidelines outline "seven key criteria for establishing an 'effective compliance program.'"[38]

- Oversight by high-level personnel
- Due Care in delegating substantial discretionary authority
- Effective Communication to all levels of employees
- Reasonable steps to achieve compliance, which include systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal
- Consistent enforcement of compliance standards including disciplinary mechanisms
- Reasonable steps to respond to and prevent further similar offenses upon detection of a violation[39]

These guidelines, if followed, provide concrete suggestions for corporations developing comprehensive compliance programs. Because of the different business realities that individual corporations face, the guidelines provide broad-based requirements that businesses can implement in a manner that makes the most sense for their particular business-risks. "Since companies have different characteristics, history, and cultures, any attempt to specify the ingredients of an effective program at a granular level will likely generate poor results. No regulator or prosecutor can hope to know as much about the internal workings of an organization than the existing managers

[36] Miller, Compliance Function, *supra* note 22, at 12 (*citing* Federal Sentencing Guideline §8B2.1, Effective Compliance and Ethics Program).
[37] Baer, *supra* note 21, at 142.
[38] Paula Desio, Deputy General Counsel, United States Sentencing Guidelines, *An Overview of the Organizational Guidelines*, *available at* http://www.ussc.gov/sites/default/files/pdf/training/organizational-guidelines/ORGOVERVIEW.pdf [hereinafter, Desio, Overview].
[39] *Id.*

who spend their professional lives there."[40] Thus, the Organizational Guidelines as currently written are generally considered a strong source of guidance for corporations interested in developing, on their own initiative, an effective compliance program.

There is, however, a limitation within the overarching framework of the Organizational Guidelines that encourages piecemeal compliance: they are invoked formally only when a prosecution is contemplated against a corporation engaged in misconduct, and prosecutions are often focused on a narrow aspect of misconduct. Prosecutors often "demand that targets upgrade compliance programs as a condition to deferred prosecution or non-prosecution agreements," and "[s]ettlements of regulatory enforcement actions often include undertakings to enhance compliance activities."[41] These enforcement-related incentives, however, do not typically encourage corporations to engage in comprehensive modifications to their compliance programs; instead, the focus is on a particular aspect of a firm's compliance program. Thus, while the compliance framework contemplated in the guidelines is quite broad, the actual enforcement mechanisms that lead to the invocation of the goals within the Organizational Guidelines are often quite narrow. Additionally, the Organizational Guidelines often serve in an advisory capacity, as they technically do not govern or restrict behavior associated with civil enforcement actions.

For example, the Fraud Section at the DOJ ("DOJ Fraud") is responsible for bringing prosecutions against corporations for violating the Foreign Corrupt Practices Act ("FCPA"). In the past decade, DOJ Fraud has employed a relatively aggressive enforcement strategy aimed at discouraging improper payments to foreign officials.[42] Many potential FCPA prosecutions, however, result in civil settlement agreements in the form of deferred or non-prosecution agreements, thereby making the Organizational Guidelines technically inapplicable. These civil settlement agreements often include a provision discussing the corporation's compliance program, but the discussion is often focused on the corporation's compliance with a specific legal area. For example, in a deferred prosecution agreement between DOJ Fraud and Biomet, Inc. ("Biomet"), the company agreed to "continue to implement and maintain a compliance and ethics program designed to prevent and detect violations

[40] Miller, Economic Analysis, *supra* note 19, at 16.
[41] Miller, Compliance Function, *supra* note 22, at 12.
[42] *See, e.g.*, Veronica Root, *The Monitor-"Client" Relationship*, 100 VA. L. REV. 523 (2014) [hereinafter Root, Monitor-"Client"]; F. Joseph Warin, Michael S. Diamant & Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321, 347-48 (2011).

of the FCPA and other applicable anticorruption laws throughout its operations, including those of its affiliates, joint ventures, contractors, and subcontractors, with responsibilities that include interactions with foreign officials or other high-risk activities."[43] Thus, the enforcement action included the admonishments contained in the Organizational Guidelines, but it did so in a narrow manner that focused solely on ensuring that Biomet employed a compliance and ethics program that was designed to ensure that another FCPA or similar violation would not occur.

C. Pressure from Private Parties.

In addition to direct governmental mandates and enforcement-related incentives to employ certain compliance programs, organizations must often find mechanisms to adopt compliance reforms in order to engage in certain business relationships with other private parties.[44] For example, Clorox has instituted a "Business Partner Code of Conduct," which explains that it expects "the practices of [its] partners to reflect [Clorox's] own."[45] The code details "business practice standards for [Clorox's] direct suppliers of goods, service providers, consultants, distributors, licensees, joint venturers, contractors and temporary workers."[46] Clorox's code provides general guidance on the importance of adhering to human rights requirements, safe working conditions, environmental regulations, and compliance with fair business practices and applicable laws.[47] It then provides information on how to make inquiries regarding appropriate compliance with the code, and then goes on to detail sanctions that could be levied against business partners for violating Clorox's code.[48] Specifically, the code states:

> We may pursue legal or other sanctions against any business partners who violated the Code or applicable laws when conducting Clorox business. We may also immediately terminate the business relationship, and any related contracts to the extent permitted by applicable laws. We may also choose, in our sole discretion, to enter into a remediation plan with non-compliant business partners, in which the business partner agrees to take corrective action to fix the business misconduct within a defined period of time.[49]

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[43] Deferred Prosecution Agreement at 6, United States v. Biomet, Inc., No. 1:12-cr-00080 (D.D.C. March 26, 2012), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/biomet/2012-03-26-biomet-dpa.pdf.
[44] Scott Killingsworth, *The Privatization of Compliance*, RAND Center for Corporate Ethics and Governance Symposium White Paper Series, Symposium on Transforming Compliance: Emerging Paradigms for Boards, Management, Compliance Officers, and Government (2014) (manuscript at 1), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443887.
[45] The Clorox Company, BUSINESS PARTNER CODE OF CONDUCT at 2 (2013) [hereinafter "Clorox"].
[46] *Id.* at 2.
[47] *Id.* at 4, 9-13.
[48] *Id.* at 6.
[49] *Id.* at 7.

Similarly, Oracle has a "Partner Code of Conduct and Business Ethics," which is applicable to Oracle Partners, "resellers, and to all personnel employed by or engaged to provide services to [the Oracle Partner] throughout the world."[50] Oracle's code explicitly requires a heightened standard of conduct by its business partners, stating "[w]here local laws are less restrictive than this Code, [the Oracle Partner] must comply with the Code, even if [the Oracle Partner's] conduct would otherwise be legal."[51] The Oracle code is primarily concerned with activities that might violate requirements under the FCPA and similar laws, antitrust and competition laws, intellectual property rights, securities laws, and export control laws.[52] Oracle's code also details mechanisms for reporting violations of the Code.[53] It concludes by explaining that "[a]ny violation of this code will result in the immediate termination of [the Oracle Partner's] distribution agreements with Oracle and the cancellation of any pending fees payable to [the Oracle Partner], pursuant to applicable laws and without any liability to Oracle."[54]

This type of private pressure for the adoption of compliance programs is necessary because companies are "increasingly accountable not only for their own compliance[,]" but also that of their business partners, which motivates corporations to obtain contractual assurances that business partners are engaged in acceptable compliance practices.[55] Additionally, in some arenas, a "prerequisite for conventional access to capital" is the utilization of a system of compliance risk management.[56] Indeed, "corporate credit agreements and securities underwriting agreements commonly include additional representations and covenants that the borrower/issuer has 'implemented and maintains policies and procedures designed to ensure, and which are reasonably expected to continue to ensure, compliance' with specified laws."[57]

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[50] Oracle, PARTNER CODE OF CONDUCT AND BUSINESS ETHICS at 2 [hereinafter "Oracle"].
[51] *Id.* at 2.
[52] *Id.* at 3-7.
[53] *Id.* at 7-8.
[54] *Id.* at 8.
[55] Killingsworth, *supra* note 44, at 1.
[56] *Id.* at 5. The government has made its preference for private parties to demand specific compliance requirements from their partners explicit in recent statements from senior government officials. *See, e.g.*, Stephen Dockery, *U.S. Justice Department Outlines Metrics for New Compliance Expert*, WALL ST. J. (Nov. 2, 2015, 11:27 AM), http://blogs.wsj.com/riskandcompliance/2015/11/02/u-s-justice-department-outlines-metrics-for-new-compliance-expert/ (explaining metrics for determining when to charge a company criminally will include whether third parties are informed of compliance expectations).
[57] Killingsworth, *supra* note 44, at 5.

Thus, the ad hoc system by which many private firms have instituted their compliance programs is motivated not only by governmental actors, but also by private parties that have a sufficient amount of influence to encourage their business partners to adopt specific reforms as a condition of the business relationship.

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Corporations today confront demands from a variety of sources to implement compliance programs that meet very specific requirements. Whether the pressure comes from a statute, regulation, prosecutor, or business partner, corporations that want to remain competitive must satisfy a number of different compliance priorities. And while the Organizational Guidelines provide a potentially strong incentive to encourage companies to employ comprehensive compliance programs, the impetus for developing or revamping compliance programs is often communicated to firms on an ad hoc basis that is tied to ensuring compliance with a specific area of the law.

Thus, it may be that corporations are being encouraged to implement piecemeal compliance programs at the possible expense of more comprehensive compliance efforts. Indeed, because corporations are often responding to the threat of sanction when engaging in reforms to their compliance programs, they may focus the majority of their efforts on areas where the firm deems itself vulnerable to receiving a sanction. The rationality of this approach becomes apparent when one looks at corporate repeat offenders more closely.

II. Corporate Repeat Offenders: A Case Study.

Governmental actors—both regulators and prosecutors—are often charged with evaluating the effectiveness of a corporation's compliance program when misconduct is discovered within a firm. This evaluation is necessary for determining an appropriate sanction to be levied against the firm engaged in misconduct. Yet, as shown in this Part, governmental actors are often focused on discrete issues within firms' compliance programs, which allows firms to engage in multiple violations of legal and regulatory requirements without governmental consideration of whether firms should be treated as recidivists. Given the variety of potential violations that can occur within a firm and the number of governmental actors that investigate and prosecute such violations, gatekeepers within firms may have an incentive to prioritize complying with regulations on a piecemeal basis instead of considering the effectiveness of the firm's compliance program from a more comprehensive standpoint.

As this Part reveals, many corporate entities settling claims of misconduct in one area of law go on to settle allegations of corporate wrongdoing in another legal area. Using FCPA enforcement actions brought by DOJ Fraud as a starting point, this Part demonstrates that firms are sometimes treated as recidivists when they engage in multiple violations of a legal requirement investigated by the same governmental enforcement agent, but are not treated as recidivists when subsequent violations of law are resolved with multiple governmental agencies or departments.

A. Methodology.[58]

The past decade saw a renewed effort to ensure companies adhere to the statutory requirements under the FCPA. As a result, FCPA enforcement actions have increased exponentially with high profile, governmental sanctions levied against companies in a variety of industries.[59] To determine how the government may be treating corporate repeat offenders, I began by identifying corporate entities that entered into deferred prosecution agreements, non-prosecution agreements, or guilty pleas settling FCPA violations with DOJ Fraud from 2004 to present.[60] I then reviewed other agency enforcement actions' websites, including the DOJ Antitrust division,[61] the

[58] *See* Appendix.

[59] *FCPA and Related Enforcement Actions*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/cases/a.html.

[60] I chose 2004 as a starting point, because it is generally understood as the time period that began robust FCPA enforcement by DOJ Fraud. *See, e.g.*, Warin, Diamant, & Root, *supra* note 42 at 325. One flaw that became apparent in this methodology is that companies in industries where FCPA violations apparently are less common were not captured in the research. For example, multinational bank HSBC has entered into at least five well-publicized settlement agreements with the SEC, DOJ, OFAC and the U.S. Federal Housing Finance Agency ("FHFA") since 2012. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges HSBC's Swiss Private Banking Unit With Providing Unregistered Services to U.S. Clients (Nov. 25, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543534789#.VQhOXkKprzI; Press Release, Dep't of Justice, HSBC Holdings Plc. & HSBC Bank USA N.A. Admit to Anti-Money Laundering & Sanctions Violations, Forfeit $1.256 Billion in Deferred Prosecution Agreement (Dec. 11, 2012), *available at* http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations; Enforcement Information, Office of Foreign Asset Control, HSBC Bank USA, N.A. Settles Potential Civil Liability for Apparent Violations of the Global Terrorism Sanctions Regulations (Dec. 17, 2013), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20131217_hsbc.pdf; Press Release, Fed. Hous. Fin. Agency, FHFA Announces Settlement with HSBC (Sept. 12, 2014), *available at* http://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-Settlement-with-HSBC.aspx; Press Release, U.S. Attorney's Office for the S. Dist. of N.Y., Manhattan U.S. Attorney Settles Civil Fraud Claims Against HSBC Bank For Failure To Monitor Fees Submitted For Foreclosure-Related Services (July 1, 2014), *available at* http://www.justice.gov/usao/nys/pressreleases/July14/HSBCSettlementPR.php. However, since HSBC has not entered into a settlement related to FCPA, its repeated violations are not reflected in this section of the Article. A different data set could be created by using a different agency enforcement action's database as the starting point, rather than the FCPA, or by searching a regulatory news column such as the Wall Street Journal Risk and Compliance Journal. *Risk & Compliance Journal*, WALL ST. J., http://www.wsj.com/news/risk-compliance-journal.

[61] *Antitrust Case Filings*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/atr/cases/index.html#page=page-1.

SEC,[62] the Federal Trade Commission,[63] Federal Communications Commission ("FCC"),[64] and the Department of the Treasury Office of Foreign Asset Control[65] for unrelated settlement agreements with that company. I also conducted internet searches using the name of a company with at least one known FCPA violation and searched for the terms "settlement," "fraud," and "false claims." I found this to be the most effective way to find additional violations, particularly for False Claims Act violations.[66]

B. High Level Results.

From 2004 to present, DOJ Fraud has entered into deferred prosecution agreements, non-prosecution agreements, or guilty pleas with 150 separate companies.[67] These separate companies, however, are often related entities. When the related entities are treated as one corporate entity, eighty-seven separate corporate entities are found to have entered into deferred prosecution agreements, non-prosecution agreements, or guilty pleas with DOJ Fraud from 2004 to present.[68] Of these eighty-seven corporate entities, thirty involved the entering of a guilty plea to settle an alleged FCPA violation.[69] Of these thirty corporate entities that entered guilty pleas, one appeared twice due to multiple FCPA violations a few years, and tracking the repeat offenses for each appearance would

[62] *Administrative Proceedings*, U.S SEC. & EXCH. COMM'N, http://www.sec.gov/litigation/admin.shtml. A Google search of the company name and "SEC" or "SEC settlement" may be more effective as this database is less searchable that other databases.
[63] *Cases and Proceedings*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/cases-proceedings.
[64] *Enforcement Bureau*, FED. COMMC'N COMM'N, http://www.fcc.gov/enforcement-bureau. A Google search of the company name and "FCC," "FCC violation" or "FCC settlement" may be more effective, as this database is not as easily searched.
[65] *Civil Penalties and Enforcement Information*, U.S. DEP'T OF THE TREASURY, http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx. A Google search of the company name and "OFAC," "OFAC violation," or "unauthorized export" may be more effective. *See also Enforcement*, U.S. DEP'T OF COMMERCE BUREAU OF INDUS. & SEC., https://www.bis.doc.gov/index.php/enforcement.
[66] The DOJ Civil Division prosecutes False Claims Act violations, but does not appear to maintain an enforcement actions database, unlike other agencies. *See e.g.* Press Release, U.S. Dep't of Justice, Biomet Companies to Pay Over $6 Million to Resolve False Claims Act Allegations Concerning Bone Growth Stimulators (Oct. 29, 2014), *available at* http://www.justice.gov/opa/pr/biomet-companies-pay-over-6-million-resolve-false-claims-act-allegations-concerning-bone [hereinafter 2014 Biomet Press Release].
[67] *See infra* Appendix A. There was an element of judgment in compiling the list of total companies entering into agreements, because the identity of each corporation was not reported in a uniform fashion. Sometimes each subsidiary entering into an agreement with the DOJ was apparent in a press release, in other instances the information was located within the body of the agreement, and in still other examples the information was found in an appendix to the applicable agreement. As a result, the more reliable and replicable number is the corporate entity number.
[68] The vast majority of these eighty-seven entities were identified by utilizing the "year" search function on the DOJ Fraud FCPA enforcement actions page. There were three companies from 2011, however, that were not properly tagged as occurring in that year. They were identified by going through the alphabetical list of enforcement actions on the DOJ Fraud website.
[69] *See infra* Appendix B.

result in double-counting, effectively leaving twenty-nine relevant corporate entities.[70] I focused on these twenty-nine corporate entities when attempting to identify repeat offenses, because if a company was required to enter into a guilty plea, as opposed to being allowed to enter into a civil enforcement action, it likely signals more egregious or troubling misconduct.

Of the twenty-nine corporate entities that entered into guilty pleas to resolve alleged FCPA violations, twenty did not engage in additional instances of misconduct within a five year period of the relevant FCPA offense,[71] yielding a data set[72] of nine corporate entities that have settled multiple allegations of FCPA violations or settled FCPA violations and settled charges of unrelated unlawful conduct under a different statute within a relatively short period (generally five years). The case study analyzes these nine corporate entities in an effort to glean insight regarding repeat misconduct by corporate entities.

C. Multiple Offense Categories.

Among the nine firms identified, similarities emerged where the unrelated settlements concern violations: (i) with the same or similar unlawful objectives and behavior, (ii) with the same or similar unlawful behavior but dissimilar unlawful objectives, and (iii) that do not share any characteristics in terms of the type of unlawful behavior or unlawful purpose.

1. Category 1: Same or Similar Unlawful Behavior and Unlawful Purpose.

The two corporate entities in this category—Hewlett-Packard and Marubeni—were involved in repeated violations that share the same or similar unlawful behavior and unlawful purpose. Hewlett-Packard entered into settlement agreements to resolve charges of bribery or improper payments under the FCPA and entered settlements related to entirely separate instances of paying customer kickbacks, improper payments or other unlawful inducements in violation of the Anti-Kickbacks Act, the False Claims Act, and related fraud regulations. Marubeni entered into two settlement agreements to resolve charges of bribery under the FCPA without

[70] *See infra* Appendix C, entries # 1 & #15.
[71] *See infra* Appendix C.
[72] *See infra* Appendix C.

committing violations of other regulatory or legal areas. This section discusses the Hewlett-Packard violations, as they demonstrate the challenge with deterring similar misconduct when it falls under diverse regulatory areas.[73]

Hewlett-Packard entered into three settlement agreements from 2010 to 2014 to resolve different instances of improper payments. Specifically, in August 2010, Hewlett-Packard agreed to pay $55 million to settle charges that it "knowingly paid kickbacks, or 'influencer fees,' to systems integrator companies in return for recommendations that federal agencies purchase 's products."[74] That settlement agreement also covered allegations that had submitted defective pricing under government contracts.[75] Then in November 2010, Hewlett-Packard entered into a $16.25 million agreement with the FCC to settle charges that it had provided improper inducement and gratuities to school officials in the Houston and Dallas Independent School Districts while was also bidding on contracts to supply equipment to the school districts under the FCC E-Rate program.[76] "Meals and entertainment -- including trips on a yacht and tickets to the 2004 Super Bowl -- were provided by the contractors to get inside information and win contracts that were supposed to be awarded through a competitive bidding process."[77] This behavior violated the FCC's competitive bidding rules.[78] Finally, in 2014, Hewlett-

[73] The case study outlined in this Article focuses on companies that entered into guilty pleas with DOJ Fraud. If expanded to include companies entering into DPAs or NPAs with DOJ Fraud, other examples similar to those of Hewlett-Packard become clear. For example, in 2011, Johnson & Johnson agreed to pay $21.4 million as part of a settlement agreement to resolve charges claiming that its subsidiaries had violated the FCPA by making improper payments to government officials in Greece, Poland, and Romania and paying kickbacks under the United Nations Oil for Food Program. Press Release, U.S. Dep't of Justice, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations (Apr. 8, 2011), *available at* http://www.justice.gov/opa/pr/johnson-johnson-agrees-pay-214-million-criminal-penalty-resolve-foreign-corrupt-practices-act. In 2013, Johnson & Johnson entered into a $2.2 billion settlement agreement to resolve criminal and civil charges of health care fraud, including paying kickbacks to physicians to induce them to prescribe medications that had been unlawfully misbranded and to pharmacies to encourage pharmacists to promote the use of Johnson & Johnson's pharmaceuticals. These improper payments resulted in the submission of false claims to federal health care programs, making Johnson & Johnson liable under the False Claims Act. Press Release, U.S. Dep't of Justice, Johnson & Johnson to Pay More Than $2.2 Billion to Resolve Criminal and Civil Investigations (Nov. 4, 2013), *available at* http://www.justice.gov/opa/pr/johnson-johnson-pay-more-22-billion-resolve-criminal-and-civil-investigations. In both cases, Johnson & Johnson employees made unlawful payments to facilitate broader use of their products or to secure contracts. Yet the settlement agreements concerning the civil charges, including the charges of improper payments and inducements, contain no consideration of Johnson & Johnson's previous violations.

[74] Press Release, U.S. Dep't of Justice, Hewlett-Packard Agrees to Pay the United States $55 Million to Settle Allegations of Fraud (Aug. 30, 2010), *available at* http://www.justice.gov/opa/pr/hewlett-packard-agrees-pay-united-states-55-million-settle-allegations-fraud [hereinafter HP Fraud Press Release].

[75] HP Fraud Press Release, *supra* note 74.

[76] Press Release, U.S. Dep't of Justice, U.S. Settles Lawsuits Against Hewlett-Packard and Intervenes Against Its Business Partners for Violating FCC Competitive Bidding Rules in Texas (Nov. 10, 2010), *available at* http://www.justice.gov/opa/pr/us-settles-lawsuits-against-hewlett-packard-and-intervenes-against-its-business-partners [hereinafter HP Bid Rigging Press Release].

[77] Press Release, Fed. Commc'n Comm'n, HP to Pay $16.25 million to Settle DOJ-FCC E-Rate Fraud (Nov. 12, 2010), *available at* http://www.fcc.gov/document/hp-pay-1625-million-settle-doj-fcc-e-rate-fraud-investigation.

[78] HP Bid Rigging Press Release, *supra* note 76.

Packard and its subsidiaries agreed for the subsidiaries to plead guilty to bribery of Russian officials and to pay more than $108 million to settle allegations that subsidiaries in Russia, Poland, and Mexico made unlawful facilitating payments or paid bribes to public officials to win contracts, which violated the FCPA.[79]

In each instance, employees gave unlawful payments or gifts with the purpose of inducing the recipients to award business opportunities. Hewlett-Packard was not, however, treated as a recidivist in any of the plea or settlement agreements. Indeed, in determining the appropriate fine for Hewlett-Packard's 2014 FCPA violation, the DOJ included two mitigating factors to support the imposition of a fine that was less than the minimum fine calculated under the United States Sentencing Guidelines, because "the misconduct . . . was largely undertaken by employees associated with ['s Russian subsidiary], which employed a small fraction of [Hewlett-Packard's] global workforce" and "neither [Hewlett-Packard] nor the [Russian subsidiary] ha[d] previously been the subject of any criminal enforcement action by the [DOJ] or law enforcement authority in Russia or elsewhere."[80] While it is true that Hewlett-Packard's alleged E-Rate fraud and alleged violation of the False Claims Act in 2010 were both civil offenses, not criminal offenses, in all three instances Hewlett-Packard employees paid unlawful bribes or other inducements to win contracts. While the offenses fall under three different regulations – the False Claims Act, the FCC's competitive bidding rules, and the FCPA – and the 2010 and 2014 offenses were prosecuted by different divisions of the DOJ – the Civil Division in 2010 and the Criminal Division in 2014 – there are clear similarities in both the manner and goal of Hewlett-Packard's misconduct.

[79] Press Release, U.S. Dep't of Justice, Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery (Apr. 9, 2014), *available at* http://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery. Hewlett-Packard, the parent company, did not enter into a plea agreement with DOJ Fraud, but it did enter into a settlement with the SEC and agreed to pay $31,472,250 in disgorgement and prejudgment interest.

[80] Plea Agreement at 17, United States v. ZAO Hewlett-Packard A.O. (N.D. Cal. 2014) (No. 5:14-cr-00201), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-zao/hp-russia-plea-agreement.pdf. This factor was only mentioned in HP's Russian subsidiary's plea agreement. The settlement agreements covering the Polish and Mexican subsidiaries do not contain any language to this effect. *See* Deferred Prosecution Agreement, United States v. Hewlett-Packard Polska, SP. ZOO (N.D. Cal. 2014) (No. 5:14-cr-00202), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-polska/hp-poland-dpa.pdf; Letter from Melinda Haag, United States Attorney et. al to F. Joseph Warin, Counsel for Hewlett-Packard Mexico, S. de R.L. de C.V. (April 9, 2014), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/hewlett-packard-mexico.html. HP's alleged 2010 E-Rate fraud and violation of the False Claims Act were both civil offenses, not criminal.

2. Category 2: Similarities in Unlawful Behavior but Not Unlawful Purpose.

The second category of repeat offenders contains two corporate entities that entered into settlement agreements regarding unlawful conduct where the goals of the conduct were different between the two settlements, but the manner of behavior was similar. Specifically, ABB, Inc. ("ABB")[81] and Bridgestone Corporation ("Bridgestone"),[82] each entered into settlement agreements related to FCPA violations and, separately, for engaging in anticompetitive behavior in violation of the Sherman Act.[83] The underlying unlawful behavior in these instances was similar in that for both the FCPA and the antitrust violations the firms were involved in conspiracies with other entities to achieve unlawful objectives. However, the unlawful purpose for the FCPA and antitrust violations differed. In the case of the FCPA violations, the firms were attempting to obtain a competitive advantage over their competitors, but in the case of the antitrust violations, the purpose of the conspiracy was to work with competitors to protect profits through bid rigging, price fixing, and agreeing to not compete for certain business.[84]

[81] *See* Press Release, U.S. Dep't of Justice, ABB Ltd. and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay $19 Million in Criminal Penalties (Sept. 29, 2010), *available at* http://www.justice.gov/opa/pr/abb-ltd-and-two-subsidiaries-resolve-foreign-corrupt-practices-act-investigation-and-will-pay; Press Release, U.S. Dep't of Justice, ABB Asea Brown Boveri Ltd. Subsidiary Pleads Guilty to Bid Rigging on USAID Construction Contract in Egypt (Apr. 12, 2001), *available at* http://www.justice.gov/atr/public/press_releases/2001/7984.htm.

[82] *See* Press Release, U.S. Dep't of Justice, Bridgestone Corporate Agrees to Plead Guilty to Participating in Conspiracy to Rig Bids and Bribe Foreign Government Officials (Sept. 15, 2011), *available at* http://www.justice.gov/opa/pr/bridgestone-corporation-agrees-plead-guilty-participating-conspiracies-rig-bids-and-bribe-0; Press Release, U.S. Dep't of Justice, Bridgestone Corp. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars (Feb. 13, 2014), *available at* http://www.justice.gov/opa/pr/bridgestone-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars.

[83] The fourth company in this category, Goodyear, reached settlements in 2010 and 2012 to resolve allegations that it had violated the Uniformed Services Employment and Reemployment Rights Act and the Americans with Disabilities Act, respectively. Goodyear is included in the second category because in both instances the company terminated individuals' employment in violation of employment related regulations, but the two instances do not share the same unlawful purpose. These violations could indicate a systemic problem with the company's compliance with employment related regulations, but the behavior likely does not rise to the level of recidivism. Press Release, Dep't of Justice, Justice Department Settlement with Goodyear Tire & Rubber Co. Secures $40,000 for Oklahoma Army Reservist (Mar. 2, 2010), *available at* http://www.justice.gov/opa/pr/justice-department-settlement-goodyear-tire-rubber-co-secures-40000-oklahoma-army-reservist; Press Release, U.S Equal Employment Opportunity Commission, The Goodyear Tire & Rubber Company to Pay $20,000 to Settle EEOC Disability Discrimination Suit (Jul. 23, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/7-23-12a.cfm.

[84] There is, of course, similarity in unlawful purpose in that the FCPA and antitrust conspiracies were both engaged in to achieve greater profits. Obtaining increased profits, however, is typically what motivates corporate misconduct. As Professor Geoffrey P. Miller has explained, "illegal behavior might increase rather than reduce profits." Miller, Compliance Function, *supra* note 22, at 7.

Interestingly, in separate enforcement activities each corporate entity was treated as a recidivist for repeated violations under the FCPA or antitrust regulations.[85] For example, when Bridgestone pleaded guilty in October 2011 for engaging in price-fixing within the marine hose industry, as well as to the FCPA violations, it failed to disclose that it had also participated in an anti-vibration rubber parts conspiracy.[86] When Bridgestone's additional anticompetitive behavior was discovered in 2014, it was sanctioned for not disclosing the misconduct in 2011.[87] A DOJ Antitrust official stated that, "[t]he Antitrust Division will take a hard line when repeat offenders fail to disclose additional anticompetitive behavior."[88] Thus, participating in multiple violations of the same, underlying statute triggered mention that the firm was a repeat offender, but as is shown in the Category 1 discussion, corporate entities that violated different underlying statutes are often not treated as repeat offenders.

3. Category 3: No Similarities in Unlawful Behavior or Purpose.

Five corporate entities engaged in multiple violations in compliance areas that were unrelated in both unlawful purpose and the manner of misconduct. For example, BAE Systems settled multiple incidents of unrelated

[85] As with the Category 1 offense type, if the data set were expanded to include DPAs and NPAs, additional corporate entities would be identified that would also fit within Category 2. *See e.g.*, Press Release, U.S. Dep't of Justice, Akzo Nobel Acknowledges Improper Payments Made by its Subsidiaries to Iraqi Government Under the U.N. Oil for Food Program, Enters Agreement with Dep't of Justice (Dec. 20, 2007), *available at* http://www.justice.gov/archive/opa/pr/2007/December/07_crm_1024.html; Plea Agreement, United States v. Akzo Novel Chemicals International B.V. (N.D. Cal. 2006) (No. 06-0160) *available at* http://www.justice.gov/atr/cases/f216300/216369.pdf.

[86] Press Release, U.S. Dep't of Justice, Bridgestone Corp. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars (Feb. 13, 2014), *available at* http://www.justice.gov/opa/pr/bridgestone-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars.

[87] Press Release, U.S. Dep't of Justice, Bridgestone Corporate Agrees to Plead Guilty to Participating in Conspiracy to Rig Bids and Bribe Foreign Government Officials (Sept. 15, 2011), *available at* http://www.justice.gov/opa/pr/bridgestone-corporation-agrees-plead-guilty-participating-conspiracies-rig-bids-and-bribe-0.

[88] Press Release, U.S. Dep't of Justice, Bridgestone Corp. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars (Feb. 13, 2014), *available at* http://www.justice.gov/opa/pr/bridgestone-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars.

misconduct from 2010 to 2015, including alleged violations of the FCPA[89] and the False Claims Act,[90] as well as allegations of wrongful discrimination[91] and violations of the Arms Export Control Act.[92]

* * *

While corporate entities with repeated violations of the same regulation or statute are sometimes treated as repeat offenders,[93] the firms in the above case study with multiple violations in different statutory or compliance areas have not been treated as recidivists, despite, in some instances, similarities in their unlawful behavior and unlawful purposes across multiple violations. There are plausible reasons for this. As explained in Part I, different governmental actors handle different types of statutory and regulatory violations in a piecemeal fashion. Additionally, it does not appear that the government is currently attempting to (i) track recidivist behavior across diverse statutory or regulatory areas or (ii) employ an enforcement strategy that would permit the government to levy heightened sanctions against firms that engage in repeated instances of legal violations across diverse regulatory or statutory areas. However, the reason the government's current enforcement strategy appears not to prioritize corporate repeat offenders may not be purposeful and may instead reflect information, coordination, or responsibility challenges.

III. Coordinating Compliance.

Parts I and II have established that current regulatory and enforcement priorities have led to a system of piecemeal compliance that fails to address firms that engage in repeated instances of misconduct. This Part begins

[89] Press Release, Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (March 1, 2010), *available at* https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine.

[90] Press Release, Dep't of Justice, Defense Contractors Settle Alleged Violation of the False Claims Act for $5.5 Million (Sept. 16, 2014), *available at* https://www.justice.gov/usao-mn/pr/defense-contractors-settle-alleged-violation-false-claims-act-55-million.

[91] Press Release, Dep't of Justice, Justice Department Reaches Settlement with Virginia-Based BAE Systems Ship Repair, Inc. (Dec. 28, 2011), *available at* https://www.justice.gov/opa/pr/justice-department-reaches-settlement-virginia-based-bae-systems-ship-repair-inc.

[92] Press Release, U.S. Dep't of State, BAE Systems plc Enters Civil Settlement of Alleged Violations of the AECA and ITAR and Agrees to Civil Penalty of $79 Million (May 17, 2011), *available at* http://www.state.gov/r/pa/prs/ps/2011/05/163530.htm.

[93] *See e.g.*, Plea Agreement at 11, United States v. ABB, Inc. (S.D. Tex. Sept. 29, 2010) (No. H-10-664), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/abb/09-29-10abbinc-plea.pdf; Press Release, Dep't of Justice, Bridgestone Corp. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars (Feb. 13, 2014), *available at* http://www.justice.gov/opa/pr/bridgestone-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars.

by explaining how information, coordination, and identified responsibility challenges may contribute, at least partially, to this different treatment of corporate repeat offenders. The Part then argues that efforts to improve corporate compliance would benefit from regulatory mechanisms that (i) recognize when an institution is engaged in recidivist behavior across diverse regulatory areas and (ii) aggressively sanction institutions that are repeat offenders. The Part next provides a proposal for reform, which utilizes existing reporting obligations, a new compliance officer model within the DOJ, and the Organizational Guidelines.

A. Information, Coordination, & Identified Responsibility Challenges.

Governmental enforcement agencies and actors are also subject to the information and coordination complexities that confront many regulatory agencies within the current administrative state. Importantly, these information and coordination challenges may lead to a responsibility vacuum when considering issues of corporate recidivists.

First is the inter-agency coordination problem.[94] "Congress often assigns more than one agency the same or similar functions or divides authority among multiple agencies, giving each responsibility for part of a larger whole."[95] When scholars consider these problems, they typically focus on the fact that multiple agencies deal with the same basic legal area or problem.[96] As a result, the traditional concern regarding interagency coordination is with "overlapping delegations of power"[97] and, for purposes of this Article, the redundancies that overlapping authority can create within enforcement efforts.[98] For example, both DOJ Fraud and the SEC have authority to sanction companies for FCPA violations.[99] As a result, many FCPA violations result in sanctions from both governmental entities, which necessarily requires sharing of information and procedural coordination between the two governmental actors.[100]

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[94] *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).
[95] *Id.* at 1134.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] David Zarfes, Michael L. Bloom, Sean Z. Kramer, *Complying with the Foreign Corrupt Practices Act: A Practical Primer* 1, 3, ABA CRIMINAL JUSTICE SECTION (Jan. 2012), http://www.americanbar.org/content/dam/aba/uncategorized/criminal_justice/FCPA_Compliance_Report.authcheckdam.pdf .
[100] *See, e.g.*, Warin, Diamant, & Root, *supra* note 42 (discussing FCPA enforcement actions brought from 2004-2011 and highlighting when those actions were brought by the SEC, DOJ, or both enforcement actors).

The inter-agency coordination problem arises a bit differently, however, when one considers the numerous governmental agencies and actors responsible for sanctioning corporate misconduct as segmented participants in a larger governmental enforcement strategy. The result is that agencies that traditionally might not be considered to have overlapping zones of authority may in fact have an element of shared enforcement space, because they may both need to sanction the same organization for engaging in corporate misconduct. For example, the FCC requires companies to comply with certain competitive bidding rules domestically, while the FCPA prohibits bribery of foreign officials.[101] The shared regulatory space of the two governmental actors is not necessarily apparent when one focuses in on the discrete statutory and regulatory area each actor is responsible for enforcing. But in practice, both the FCC and FCPA may end up sanctioning an organization for engaging in unlawful bribery activities.[102] This raises the question of when, if ever, it might be appropriate for seemingly diverse regulatory agencies to share information about corporate misconduct and sanctions in an effort to ensure that private firms have the proper incentives to adopt the "effective compliance and ethics program" outlined in the Organizational Sentencing Guidelines and espoused by senior governmental officials.

Second, is the intra-agency coordination problem.[103] Agency heads, "as opposed to Congress" are responsible for "design[ing] internal structures and processes to further their own regulatory agenda[]."[104] Thus, while the SEC is delegated authority from Congress to protect investors,[105] the agency itself makes decisions about its own organizational structure and processes.[106] Agencies responsible for ensuring corporations comply with certain legal and regulatory requirements routinely have to work through various intra-agency coordination problems. The DOJ, however, presents an interesting case.

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[101] *See supra* Part II.C.1.
[102] *Id.*
[103] Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421 (2016) (forthcoming).
[104] *Id.* at 429.
[105] U.S. Sec. & Exch. Comm'n, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation* (June 10, 2013), http://www.sec.gov/about/whatwedo.shtml.
[106] *See, e.g.*, U.S. Sec. & Exch. Comm'n, Release, No. 34-64649, *Delegation of Authority to the Director of its Division of Enforcement*, 17 C.F.R. Part 200 (outlining the SEC's amendment of its internal rules to delegate authority to issue witness immunity orders to the SEC Director of the Division of Enforcement)), http://www.sec.gov/rules/final/2011/34-64649.pdf.

The DOJ is a cabinet-level agency, [107] which is made up of a variety of traditional administrative agencies.[108] The DOJ is responsible for handling "all criminal prosecutions and civil suits in which the United States ha[s] an interest," but it does so through an organizational structure that includes "various components, offices, boards and divisions."[109] Thus, the intra-agency coordination challenges facing the DOJ are highly complex and, in some instances, include what look more like inter-agency coordination issues. At its most simplistic, however, DOJ has to determine how to coordinate enforcement actions and it has done so through a variety of specialized divisions. These intra-agency, specialized divisions, like DOJ Antitrust and DOJ Fraud, are faced with information and coordination problems when both divisions have the opportunity or responsibility to bring enforcement actions against the same organization for misconduct.[110] They can properly address the violations as separate instances of misconduct without engaging in information sharing and coordination between divisions, but they could also choose to work in a more cooperative manner.

Third, is a potential responsibility vacuum. When multiple agencies or divisions are responsible for maintaining enforcement actions against the same company, they tend to focus on their particular grant of authority. DOJ Antitrust focuses on ensuring companies are not engaged in anticompetitive behavior while the SEC ensures that public companies comply with the securities laws. But that leaves open the question of which, if any, enforcement actor or agency should be concerned when a company is engaged in repeated instances of organizational misconduct across diverse regulatory areas.

B. Greater Detection & Increased Sanctions.

Given current regulatory and enforcement behavior of governmental actors, compliance personnel within private firms have strong incentives to ensure that a company that is found having engaged in a particular type of misconduct, for example anticompetitive behavior, does not participate in future, similar misconduct.[111] Those responsible for effectuating the firm's compliance program have a strong incentive to revamp and bolster efforts

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[107] Dep't of Justice, *Organization, Mission and Functions Manual: Overview* (Oct. 16, 2015), http://www.justice.gov/jmd/organization-mission-and-functions-manual-overview;
[108] *See, e.g.*, Bureau of Alcohol, Tobacco, Firearms and Explosives, *Rules and Regulations* (explaining that "federal agencies such as ATF" must engage in public rulemaking), https://www.atf.gov/rules-and-regulations.
[109] Dep't of Justice, *About the Department*, http://www.justice.gov/about.
[110] *See supra* Part II.C.2.
[111] *See supra* Part II.C.

to ensure the firm's long-term compliance with the particular regulatory or statutory requirement that led to the firm receiving a governmental sanction.[112] For example, in 2012, Biomet entered into a deferred prosecution agreement with the DOJ and SEC to resolve allegations that it violated the FCPA[113] and agreed to retain a compliance monitor.[114] Two years later, Biomet disclosed possible further FCPA violations, which occurred both before and after Biomet entered into the 2012 deferred prosecution agreement. After a period of investigation, the DOJ "informed Biomet that the deferred prosecution agreement and the independent compliance monitor's appointment [would be] extended for an additional year."[115] Thus, an additional set of sanctions was levied upon Biomet due to the failure of the firm to effectively address flaws within its FCPA compliance program.

Compliance personnel, however, have less of an incentive to conduct a systematic overhaul or audit of the firm's entire compliance program in response to legally diverse instances of misconduct. For example, HSBC's conduct over the past several years has garnered a great deal of attention within certain segments of the media, yet it has not been the subject of additional sanctions based on its recidivist conduct.[116] Indeed, in 2012 HSBC was the subject of a highly critical investigation by a senate subcommittee, resulting in a 339-page report that determined the bank repeatedly failed to detect international money laundering, connections to terrorist financing, and violations of U.S. economic and trade sanctions. Yet even this strong evidence of significant compliance failures within HSBC has not prompted governmental actors to treat HSBC as a recidivist and require it to engage in a systematic, comprehensive overhaul of its compliance programs and policies.[117]

Thus, compliance personnel that serve as gatekeepers within firms currently have weak incentives to focus on comprehensive compliance overhauls. In particular, corporate "gatekeepers" are heavily relied upon to prevent and detect compliance failures,[118] but they are also rational actors that respond to the expected monetary fine that

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[112] *See generally* Miller, Economic Analysis, *supra* note 19.
[113] Biomet, Inc., Current Report (Form 8-K) (Mar. 17, 2015), *available at* http://www.sec.gov/Archives/edgar/data/351346/000090342315000219/biomet-8k_0317.htm [hereinafter Biomet Form 8-K]. *See also* Samuel Rubenfeld, *The Morning Risk Report: Biomet Hit by Recidivism*, WALL ST. J. (Mar. 19, 2015, 7:24 AM) *available at* http://blogs.wsj.com/riskandcompliance/2015/03/19/the-morning-risk-report-biomet-hit-by-bribery-recidivism/.
[114] Veronica Root, *Modern-Day Monitorships*, 33 YALE J. ON REG. 109, 124-25 (2016) (discussing the rise of monitorships and resulting differences amongst monitorship types).
[115] Biomet Form 8-K, *supra* note 113.
[116] *See supra* Introduction.
[117] *See* U.S. S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., U.S. VULNERABILITIES TO MONEY LAUNDERING, DRUGS, AND TERRORIST FINANCING: HSBC CASE HISTORY (2012), *available at* http://www.hsgac.senate.gov/download/?id=2a76c00f-7c3a-44c8-902e-3d9b5dbd0083.
[118] Root, Modern-Day Monitorships, *supra* note 114, at 120.

will be imposed if the firm's misconduct is discovered as well as the probability that such a fine will be levied.[119] By treating corporate misconduct across legal areas as separate and distinct violations, governmental actors may be missing an opportunity to make repeated violations more costly to corporations. If the government treated a firm that engaged in repeat offenses, within a specified period, as a recidivist that is subject to a heightened sanction regime, the government could make noncompliance with legal and regulatory requirements on a comprehensive level a greater priority by the firm.

A simple economic analysis of the compliance function would:

> Assume that employees in a rational, profit-maximizing, risk-neutral firm engage in random illegal on-the-job conduct. The government imposes a fine f on the firm for proven violations, which is administered with probability ρ. The firm thus experiences a sanction ρf for violations.[120]

If governmental actors increase both the probability and the potential fine or other penalties, they can effectively increase the sanction of compliance for *both* variables, thereby making recidivist behavior a particularly costly endeavor for the firm.

Thus, efforts to improve corporate compliance would benefit from coordinated regulatory mechanisms that (i) recognize when an institution is engaged in recidivist behavior across diverse regulatory areas and (ii) aggressively sanction institutions that are repeat offenders. By increasing the recognition of firms engaged in recidivist conduct, governmental actors could increase the probability that a sanction might be levied against the institution. By increasing the amount of monetary fines or other penalties that a firm faces when it engages in recidivist conduct, governmental actors can increase the "costs" of misconduct to the organization and encourage it to consider restructuring its entire compliance program.

C. A Proposal for Reform.

There are likely a variety of mechanisms that governmental actors can employ to increase the probability of detection and the potential fine or other penalties for organizations that engage in recidivist conduct. This Article proposes mechanisms aimed to make recidivism more costly within private firms, and these proposals rely upon

[119] Miller, Economic Analysis, *supra* note 19, at 9.
[120] *Id.*

tools that are already available to governmental actors. The proposal outlined below could be implemented almost immediately, without the need for Congress to pass a statute or for a regulator to engage in a lengthy notice-and-comment rulemaking process.

1. Proposal for Increasing Detection of Recidivist Behavior.

When the DOJ informed Biomet that it would be requiring the deferred prosecution agreement and appointment of the compliance monitor to be extended for another year, Biomet, on the same day, reported this information to the SEC via Form 8-K.[121] The SEC requires public companies to file a variety of reports. Form 10-K is an annual filing and Form 10-Q is a quarterly filing.[122] The SEC, however, requires public companies to "report certain material corporate events on a more current basis."[123] "Form 8-K is the 'current report' companies must file with the SEC to announce major events that shareholders should know about."[124] Thus, Biomet's filing of a Form 8-K on the day that the DOJ informed it that it would be subject to another year under the deferred prosecution agreement and monitorship was not an accident. It was a requirement.

All public companies that enter into agreements to resolve allegations of misconduct with governmental actors are required to file a Form 8-K disclosing the event to shareholders. The disclosures would also be found within the firm's quarterly 10-Q or annual 10-K, but the disclosure would be amongst other required filing information. The Form 8-K, however, is limited to discussions of current events, thus when they are filed it becomes readily apparent to those reviewing the document what "major event(s)" triggered the form's filing.

Government actors could implement a policy of reviewing Form 8-Ks as a mechanism for detecting recidivist behavior by firms. This system could be operationalized in a number of ways, but a new officer within the DOJ provides a model for how the DOJ could improve inter- and intra-coordination with regards to corporate recidivism.

In September 2015, DOJ announced that it was "creating a new compliance counsel position in the Criminal Division to assess the effectiveness of an entity's compliance program and help prosecutors decide whether or

[121] Biomet Form 8-K, *supra* note 113.
[122] U.S. Sec. & Exch. Comm'n, *Form 8-K*, *available at* http://www.sec.gov/answers/form8k.htm [hereinafter Form 8-K].
[123] Form 8-K, *supra* note 122.
[124] *Id.*

how to charge an entity under investigation."[125] One key component of the new counsel's position is to distinguish between an effective compliance program and a paper program.[126] In November 2015, the DOJ provided more details regarding the metrics the compliance expert would utilize in determining whether and how a company should be charged criminally. [127] The metrics have been summarized as follows for organizations.

- Do directors and managers offer strong support for corporate compliance policies?
- Do compliance personnel have stature in the company? Do the compliance teams get the resources they need?
- Are compliance policies clear and in writing? Are they easily understood and translated.
- Are the compliance policies effectively communicated to employees? Are they easy to find and do employees get repeated training?
- Are the compliance policies updated?
- Are there ways to enforce the compliance policies and is compliance incentivized and violators disciplined?
- Are third parties informed of compliance expectations?[128]

Additionally, the compliance counsel's assessment of compliance programs within financial institutions would also include the following.

- Can the financial institution identify its customers?
- Is the company complying with U.S. laws?
- Are reports of suspicious activity shared with other branches or offices?
- Do banks with a U.S. presence give U.S. senior managers a "material role" in compliance?
- Is the company candid with regulators? [129]

[125] Alison Tanchyk, Margaret Erin Rodgers Schmidt, & David A. Snider, *Morgan Lewis Explains New DOJ Counsel to Focus on Corporate Compliance*, CLS BLUE SKY BLOG (Sept. 11, 2015). The compliance counsel works specifically with DOJ Fraud at this time, but the DOJ could easily broaden the compliance counsel's scope of authority or employ another compliance counsel with oversight over multiple DOJ divisions.
[126] *Id.*
[127] Dockery, *supra* note 56.
[128] *Id.*
[129] *Id.*

Absent, almost shockingly so, is a metric looking at whether the organization has engaged in past instances of misconduct. Because the new compliance counsel is being delegated its authority via the intra-agency discretion of the DOJ, the DOJ department heads have complete authority and autonomy over the metrics the compliance counsel utilizes in making her assessments regarding an organization's compliance program.[130] Adding an additional metric to the compliance counsel's assessment tools would be relatively easy to implement, particularly given the compliance counsel's infancy within the DOJ.[131] The current compliance counsel works exclusively with DOJ Fraud, but the position could serve as a model for the type of position the DOJ could create to assist it in its efforts to detect recidivist behavior both within the DOJ and with other federal regulators and agencies.

Thus, under this prong of the proposal, the government could, for example, create a system whereby three settlement disclosures via Form 8-K's within a five-year period trigger an automatic referral from the SEC to a new DOJ compliance counsel as well as to any regulator with which the company settled allegations of institutional misconduct within the preceding five years. After a review of the past instances of misconduct, if DOJ compliance counsel were to determine that the company was engaged in behavior that warrants recidivist treatment, the DOJ could then flag the company as requiring recidivist treatment if future misconduct by the firm is uncovered. In essence, DOJ would have the tools necessary to create a list of firms that should be treated as recidivists. The list could be made available to all federal regulators along with a request that the DOJ be notified if a regulator is contemplating entering into an agreement to settle claims of misconduct by the relevant organization within the next few years.

In another formulation, the DOJ compliance counsel could make it a part of her routine to regularly check Form 8-Ks when assessing an organization's compliance program. If Form 8-Ks from a specified period of time, like five years, indicated multiple instances of misconduct, the compliance counsel could consider that when determining what and how the DOJ should ultimately pursue an enforcement action against the corporation.

Regardless of how the review of Form 8-Ks is operationalized by DOJ compliance counsel, the government is already in possession of all the data and resources it needs to allow it to effectively assess the types of misconduct

[130] Sue Reisinger, *Justice Dept. Names Chen to Controversial Compliance Counsel*, CORPORATE COUNSEL (Sept. 21, 2015), http://www.corpcounsel.com/id=1202737784530/Report-Justice-Dept-Names-Chen-to-Controversial-Compliance-Counsel-Post?slreturn=20151010192409.
[131] The compliance counsel began work at the DOJ on November 3, 2015. Dockery, *supra* note 56.

that corporations are resolving with governmental actors. The upshot is that the government could improve its ability to detect recidivist behavior without requiring corporations to disclose additional information. Increased detection of recidivist behavior could result in a greater probability that additional sanctions might be levied against firms that engage in repeated acts of misconduct across diverse legal and regulatory areas.

2. Proposal for Increasing Potential Fines or Other Penalties.

Traditional economic analysis suggests that a sufficient monetary fine can deter misconduct within private firms.[132] The sophisticated corporation of today, however, should probably budget for an expected monetary penalty as a result of institutional misconduct. HSBC, for example, has paid literally billions of dollars in fines over the past three years. As part of the company's 2012 deferred prosecution agreement alone, HSBC agreed to pay $1.92 billion in fines,[133] yet the company has continued to engage in various forms of misconduct and, as a result, has been subjected to additional penalties in the form of high fines.[134]

Thus, it appears that the private firms of today are all too willing to pay monetary fines as a consequence for failing to prevent and detect misconduct. These same firms, however, have shown a strong distaste for other forms of non-monetary penalties. Governmental actors, of course, routinely use a package of monetary and non-monetary penalties in their attempts to create incentives for corporations to behave in an ethical and compliant manner.[135] But this Article proposes that governmental actors should consider finding additional, non-monetary penalties that are uniformly considered to be undesirable to private firms and levy those "heightened" penalties against recidivist firms in addition to more standard monetary fines and non-monetary penalties. There are likely a variety of particularly distasteful non-monetary penalties—penalties that corporations would go to extraordinary lengths to avoid—that the government could promote as part of its enforcement strategies.

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[132] Miller, Compliance Function, *supra* note 22, at 17 (The most effective sanction against an offending organization is a fine; but fines can be obtained in civil enforcement actions without the high burden of proof and constitutional protections required in criminal cases.").

[133] Aruna Viswanatha & Brett Wolf, *HSBC To Pay $1.9 Billion U.S. Fine in Money-Laundering Case*, REUTERS (Dec. 11, 2012, 6:15 PM), *available at* http://www.reuters.com/article/2012/12/11/us-hsbc-probe-idUSBRE8BA05M20121211.

[134] *See supra* Introduction.

[135] *See e.g.*, Lawrence Cunningham, *Deferred Prosecution and Corporate Governance: An Integrated Approach to Investigate and Reform*, 66 FLA. L. REV. 1 (2014) (criticizing the ability of prosecutor's to engage in effective corporate governance reform efforts); Brandon L. Garrett, *Rehabilitating Corporations*, 66 FLA. L. REV. FORUM 1 (2014).

This Article proposes that the government focus on three such penalties, which are graduated in nature. Adopting these three penalties would permit the government to adopt an enforcement strategy that increases its criminal enforcement actions against recidivist corporations while substantially decreasing potential civil resolutions of corporate misconduct for recidivists. In particular, public companies that have engaged in wrongdoing are reluctant to (i) receive a concrete finding of guilt[136] that declares that the firm participated in conduct that violates legal and regulatory requirements; (ii) allow broad, direct access of its internal workings to governmental actors out of fear that this information could flow to third-parties and be used against the firm in subsequent civil litigation;[137] and (iii) cede authority to a court-appointed master, trustee, or monitor.[138] These sorts of penalties are considered to be especially unpalatable to private firms, which makes them particularly well-suited for creating incentives for corporations to make comprehensive compliance reform a priority before they engage in recidivist conduct and can become subject to these sorts of heightened penalties.

a. Pursue Official Findings of Guilt.

Governmental actors' reliance upon civil enforcement actions is rational given the reluctance on the part of corporations to enter into guilty pleas acknowledging criminal behavior.

> Organizational defendants don't want to admit to criminal behavior, both because doing so will damage their reputations and also because the plea may be used against them in subsequent civil litigation. In many cases, therefore, the need to admit guilt in a plea bargain will be a stumbling block to settlement. To avoid this problem, the government has devised alternative remedies: deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs).[139]

[136] Miller, Compliance Function, *supra* note 22, at 17.
[137] *See* Miller, Compliance Function, *supra* note 22, at 17 ("Organizational defendants don't want to admit to criminal behavior, both because doing so will damage their reputations and also because the plea may be used against them in subsequent civil litigation"); *see also* Root, Monitor-"Client", *supra* note 42 (discussing AIG's reluctance to enter into a settlement agreement without an order of binding confidentiality from the court that would prevent the monitor from turning over its findings to parties other than the government).
[138] Root, Modern-Day Monitorships, *supra* note 114 (discussing the use of traditional, court-appointed monitorships and the modern-day, court-ordered monitorship and the customary unwillingness of companies to enter into those types of monitorships).
[139] Miller, Compliance Function, *supra* note 22, at 17.

However, the government's reliance on civil enforcement actions puts limits on the government's ability to utilize the Organizational Guidelines, which contemplate a regime of increased sanctions for recidivist firms by providing heightened penalties for firms that engage in "similar misconduct."[140] If governmental actors pursue a strategy aimed at obtaining findings of guilt from recidivist organizations, whether by plea or fact-finder determination, it would function as a heightened penalty as compared to the status quo and, if a finding of guilt were obtained, it would make additional, non-monetary penalties available for the government to pursue against the recidivist corporation.

b. Allowing the Government Broad Access to the Firm's Internal Workings.

The Organizational Guidelines, which are the proper source of authority for determining an organization's sanction after a finding of guilt or guilty plea, provide a framework for levying higher penalties on firms that engage in recidivist behavior. Indeed, in its Introductory Commentary, the Organizational Guidelines outline four factors that will "increase the ultimate punishment of an organization," and one of those factors is "the prior history of the organization."[141] The guidelines explain that "[r]eoccurrence of similar misconduct creates doubt regarding whether the organization took reasonable steps to meet the" guidelines admonishment to adopt an effective compliance and ethics program.[142] Thus, the guidelines set out a variety of consequences for organizations that are found guilty or who have pleaded guilty to engaging in misconduct and for firms that engage in recidivist behavior.

One such consequence is a term of corporate probation.[143] The government cannot guarantee that a court will order a term of corporate probation, but it can adopt a strategy of aggressively recommending that the court order a period of corporate probation for firms that engage in recidivist conduct. The guidelines outline several conditions that "may be appropriate" to order as part of an organization's corporate probation.[144] One available condition states:

[140] U.S.S.G. §8A1.2, commentary.
[141] U.S.S.G. Chapter 8, Introductory Commentary.
[142] U.S.S.G. §8B2.1, Commentary 2.(D)
[143] *See generally* U.S.S.G. §8D1.1.
[144] *See generally* U.S.S.G. §8D1.1(b).

> The organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.[145]

Corporations who are engaged in misconduct often spend a great deal of time and money avoiding penalties of this nature, in part, because once information is provided to the government it can be subjected to certain reporting obligations under the Freedom of Information Act ("FOIA").[146] Additionally, information that becomes part of a "judicial record" is typically information that courts must make publicly available, and if a court uses the information gathered by the probation office or expert it could transform the businesses information into a publicly available, judicial record. [147]

Thus, if governmental actors adopt an enforcement strategy that attempts to achieve, as a condition of probation, broad access to the internal workings of recidivist firms, it would likely serve to heighten the penalties associated with engaging in recidivist behavior. This, in turn, would create an incentive for private firms to ensure their compliance programs are effective on a comprehensive, as opposed to a piecemeal, basis when incidents of misconduct occur and trigger a compliance review.

c. Court-Appointed Master, Trustee, or Monitor.

The Organizational Guidelines also outline a set of heightened penalties for firms that (i) were found to be guilty of engaging in misconduct, (ii) were ordered to undergo a term of corporate probation, and (iii) violated a condition of probation.[148] "Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization."[149] The Commentary to §8F1.1 goes on to explain that "[i]n the event of repeated violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court order."

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[145] U.S.S.G. §8D1.1(b)(5).
[146] *See* Root, Monitor-"Client", *supra* note 42.
[147] For a more in-depth discussion of these issues, s*ee* Root, Monitor-"Client", *supra* note 42.
[148] *See generally* U.S.S.G. §8F1.1.
[149] *Id.*

Corporations do not like retaining monitors in a civil context where, arguably, the corporation has some power to negotiate the scope of the monitorship and the breadth of the monitor's duties.[150] Thus, it is unsurprising that corporations (i) appear to hold a great deal of disdain for the imposition of *court-ordered* masters, trustees, or monitors and (ii) have engaged in protracted battles to invalidate court mandates imposing these sort of third parties.[151]

Again, governmental actors cannot guarantee that the court will appoint a master, trustee, or monitor, but they can choose to adopt an enforcement strategy that aggressively lobbies the court to formally impose a master, trustee, or monitor when a private firm is involved in repeated instances of wrongdoing. The adoption of such a strategy would likely serve to increase the non-monetary penalties that firms would be subject to in the case of recidivism, and it would provide a strong incentive for corporations to ensure that their compliance programs are designed to ensure comprehensive, as opposed to piecemeal, compliance with legal and regulatory requirements.

* * *

The proposals outlined would enable the government to adopt an enforcement strategy that increases the potential sanction for corporate repeat offenders by utilizing existing governmental resources and policies. Increased coordination amongst various governmental actors paired with a shift in the sanctions pursued against corporate repeat offenders would create a strong incentive for firms to assess the effectiveness of their compliance programs as a whole when misconduct occurs, as opposed to focusing narrowly on a particular compliance area.

IV. Benefits, Objections, & Unresolved Concerns.

This Article's proposed framework has several potential benefits if embraced by governmental actors, and this Part begins with a description of a few such benefits. The Part goes on to discuss objections to the proposal presented. This Part concludes by addressing some unresolved concerns raised by the Article.

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[150] *See generally* Warin, Diamant, & Root, *supra* note 42, Root, Monitor-"Client", *supra* note 42, Root, Modern-Day Monitorships, *supra* note 114.

[151] *See* Root, Modern-Day Monitorships, *supra* note 114 (discussing court-ordered monitorships).

A. Potential Benefits.

This Part will address five ways in which this Article's proposal might assist in efforts to improve compliance programs within private firms. First, it will improve the ability of the government to identify and sanction corporate repeat offenders. Second, the detection mechanism outlined allows for an unbiased standard for reviewing an organization's past misconduct. Third, the Article's proposal is based on a "standard" instead of an easy to manipulate "bright-line rule." Fourth, it will encourage organizations to put a greater emphasis on architecture, as opposed to policing, strategies when focusing on their compliance programs. Fifth, the proposal may encourage private firms to put a greater emphasis on promoting ethicality in their workforce.

1. Improved Ability to Treat Recidivists As Such.

Part III.A. explained how information, coordination, and reputation challenges or deficiencies contribute to the government's failure to properly detect and aggressively sanction corporate repeat offenders. This Article's proposal directly addresses these problems.

To the extent that a lack of information contributed to the government's failure to properly detect corporate repeat offenders, the proposal's reliance on Form 8-Ks allows reliable, non-biased information to serve the basis for a review of the relevant corporate entity for recidivist conduct. Form 8-K review will allow for both inter-agency coordination of the information, because any enforcement action brought by agencies outside of the DOJ would be captured in Form 8-K reporting, and intra-agency coordination, because enforcement actions brought by separate divisions of the DOJ would also be captured. Form 8-Ks provide a concrete and reliable mechanism for identifying prior civil and criminal enforcement actions brought against the corporate wrongdoer.

One might, however, question whether there is actually an information problem amongst governmental agencies and actors, because enforcement actions are often easy to discover when one runs an internet search or follows certain enforcement and compliance news sources. One might argue that governmental enforcement agents should begin enforcement actions by running a corporate background check, so to speak, and determining whether other corporate misconduct has recently occurred. If previous offenses are identified, the government enforcement agent could choose to require a more draconian sanction than what it would normally pursue. This is important, because if government enforcement agents are aware of past misconduct and actively choose not to

pursue heightened sanctions, it might not indicate an information problem per se, but instead reflect the government's unwillingness to sanction corporate repeat offenders. The lack of heightened sanctions for recidivists may just be a reflection of a lack of political will and not indicative of any sort of information problem or deficiency.

The information problem raised by this Article, however, does not take place in a vacuum, and the Article is not claiming that government enforcement agents are technically unaware of the enforcement actions brought by their counterparts at other agencies. Instead, the Article is arguing that the information problem is inextricably tied to the coordination and responsibility challenges associated with inter- and intra-agency coordination and related to the incentivizing of corporations to adopt ethics and compliance programs that will prevent corporate misconduct.

DOJ Fraud may be aware that a corporation it is entering into a settlement agreement with a company that entered into an agreement with the FCC the previous year, but DOJ Fraud has no current incentive to expend additional resources for pursuing recidivist conduct that is unrelated to the types of misconduct DOJ Fraud is charged with prosecuting. DOJ Fraud has a limited budget and limited resources in the form of attorneys and other employees, so it is likely rationale for DOJ Fraud to be concerned solely with the types of corporate misconduct within its zone of responsibility.

Thus, this Article's proposal seeks to coordinate formal review of enforcement actions brought by diverse governmental agents via Form 8-K review and to designate responsibility for this review to a particular person (or persons) responsible for considering whether a corporation has an effective ethics and compliance program. By tasking a specific individual with reviewing the Form-8Ks, someone within DOJ will have specific authority for making recommendations regarding the appropriate enforcement strategy against a particular corporation. This individual could be given direct responsibility and, if deemed appropriate by DOJ agency heads, could alert other interested governmental actors and agencies to the compliance counsel's findings. Thus, the individual line attorney at DOJ Fraud would no longer be responsible for considering whether a heightened sanction should be pursued in a particular manner due to the corporate defendants past, unrelated misconduct. Instead, the individual line attorney would get a formal recommendation by the new DOJ compliance counsel to pursue a more aggressive sanction. This formal recommendation would help motivate the individual line attorney to pursue more aggressive

sanctions against corporate repeat offenders as part of larger enforcement efforts that are more expansive than the goals of the attorney's particular agency or department.

Thus, this Article's proposal promotes a more coordinated enforcement effort amongst various governmental enforcement actors. This coordinated effort will allow for a more complete consideration of whether a corporation's compliance program is deficient in some manner.

2. Unbiased Standard for Detection and Evaluation.

Another benefit of the Article's proposal is it utilizes an unbiased standard for detecting and evaluating repeated instances of misconduct at private firms. Utilizing the Form 8-K for detecting repeat offenders ensures that the detection mechanism is not easy to manipulate based on the notoriety of the company or past instances of misconduct. This Article's detection mechanism allows an unbiased trigger to prompt the compliance counsel's review of past misconduct by public companies. Without an unbiased mechanism, one might be concerned that a recidivism review would be triggered most often when there was widespread knowledge of an organization's misconduct, but that would allow smaller companies or companies whose misconduct is of the sort that is unlikely to garner much media attention to escape heightened sanctions for recidivist conduct.

3. Proposes a "standard" verses a "rule."

Additionally, the compliance counsel's review is part of a "standard" not a "rule." Once a corporate entity is referred to the compliance counsel for consideration regarding the effectiveness of the firm's compliance program, the proposal allows for an independent review of the corporate entity's policies and procedures when making a determination as to whether the firm should be subject to more aggressive enforcement actions and sanctions. Thus, this Article's proposal is more of a standard than a rule, because it does not require recidivist treatment when a corporation has engaged in a particular number of offenses. Instead, the proposal leaves discretion with the compliance counsel and the relevant enforcement officials about the best way to proceed in addressing issues of compliance at a particular corporate entity given the particular facts and circumstances presented.

In this context, a rule might be easy for a corporate entity to game for its advantage. For example, if a rule was adopted that five settlement agreements within a five-year period automatically required a more aggressive

prosecutorial posture by the DOJ, a company might not be motivated to overhaul its compliance program until it entered the fourth settlement. Alternatively, the company may attempt to stall entering into a fifth settlement agreement until a time period where earlier settlement agreements fell outside the relevant five-year period. Rules are easy to predict and, therefore, easy to game.

However, the standard outlined in this Article's proposal is less vulnerable to corporate gamesmanship, because elements of prosecutorial discretion remain intact. The proposal addresses the coordination problems inherent in the U.S. enforcement structure and apparatus, but does not sacrifice the individualized review necessary to ensure that more aggressive prosecutions are brought only when warranted by the particular facts and circumstances surrounding the effectiveness of the ethics and compliance program at the firm being evaluated.

4. Greater Emphasis on Corporate Architecture Strategies.

This Article's proposal, by improving coordination amongst governmental enforcement agents and encouraging more aggressive prosecutions and sanctions for corporate repeat offenders, is aimed at incentivizing corporations to improve their compliance programs. There are, however, different types of compliance activity within firms.

Much of the work engaged in by compliance professionals falls into two broad categories: "the corporate policing approach that is familiar to many and a structural approach one might call 'corporate architecture.'"[152] "The policing approach reduces corporate crime by empowering internal policemen to identify, punish, and deter actual and would-be transgressors."[153] In contrast, the "architectural approach encourages corporate personnel to seek out and mitigate problematic situations as opposed to problematic people. It seeks proactively to improve decision-making systems, thereby reducing the opportunity and temptation for fraud. It is at once less judgmental and yet potentially more intrusive."[154]

The corporate policing approach is easier for firms to implement, but the corporate architecture approach is equally important. If governmental actors were to engage in efforts to treat repeat offender firms as recidivists, it might encourage corporations to increase the amount of time they spend engaging in corporate architecture

[152] Baer, *supra* note at 21, at 93.
[153] *Id.*
[154] *Id.* at 94.

strategies. Instead of focusing almost solely on detecting and punishing misconduct, firms would need to think more proactively about areas where they were vulnerable to compliance failures. In turn, firms would need to identify and implement proactive strategies aimed at mitigating compliance failures that might occur in the future based on their risk assessment.

An emphasis on increased policing, as opposed to better corporate architecture strategies is evidence in numerous responses to corporate misconduct. For example, JPMorgan recently adopted an aggressive policing strategy in response to "government probes into fraudulent mortgage-bond sales, the $6.2 billion London Whale trading loss, services provided to Ponzi-scheme operator Bernard Madoff and the rigging of currency and energy markets."[155] In the past three years, the company "has hired 2,500 [new] compliance workers and spent $730 million" to improve is compliance operations.[156] Additionally, the company is utilizing an algorithm with dozens of inputs in an attempt to "identify rogue employees before they go astray.[157] JPMorgan's clear response to corporate misconduct is to strengthen its internal policing strategies, but policing strategies are only one piece of an effective ethics and compliance program.

JPMorgan's emphasis on policing strategies is important, because excessive monitoring and policing of employees "may unintentionally erode compliance norms" within firms.[158] "For example, heavy-handed [policing] methods may trigger feelings of distrust among employees, thereby reducing internal motivations to comply with the law."[159] Corporate architecture strategies, however, require firms to collaborate with their employees to avoid engaging in misconduct, thereby empowering employees to assist the firm in its compliance efforts. The government's current enforcement regime promotes, and at times rewards, aggressive policing, but that appears to come at the expense of more difficult to craft corporate architecture strategies.

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[155] Hugh Son, *JPMorgan Algorithm Knows You're a Rogue Employee Before You Do*, BLOOMBERG (April 8, 2015), http://www.bloomberg.com/news/articles/2015-04-08/jpmorgan-algorithm-knows-you-re-a-rogue-employee-before-you-do.
[156] *Id.*
[157] *Id.*
[158] Baer, *supra* note at 21, at 136.
[159] *Id.* at 134.

5. Emphasizing Ethicality.

Today's discussions of compliance often take place without any corresponding emphasis on the importance of promoting ethicality. Many perceive issues surrounding ethicality to be separate from issues of compliance, yet research from the fields of behavioral ethics and behavioral legal ethics suggests that separating ethics from compliance strategies may in fact be harmful to the firm. [160]

In part, this is because "aggressive compliance monitoring can have an unfavorable effect on the motivation of agents to comply with rules."[161] Behavioral ethics literature demonstrates that when individuals are told to comply with rules for the sake of compliance instead of for the sake of acting ethically, it can actually diminish ethical behavior within firms.[162] Behavioral ethics research also demonstrates that mandating specific goals can create systematic problems. Specifically, they can encourage employees to "1. focus too narrowly on their goals, to the neglect of nongoal areas; 2. engage in risky behavior; 3. focus on extrinsic motivators and lose their intrinsic motivation; 4. and, most importantly . . . , engage in more unethical behavior than they would otherwise."[163]

By encouraging a more comprehensive overhaul of firms' compliance programs, governmental actors may prompt compliance gatekeepers within firms to consider questions of ethics in addition to questions associated with ensuring effective policing methods within the organization. The Organizational Guidelines already state that firms should engage in employing an effective compliance and ethics program, so a return to considerations of ethicality when considering issues of compliance within firms does not appear to be a dramatic or unprecedented action. Indeed, it could be a valuable use of time and energy for an organization attempting to create an organizational culture that discourages misconduct and encourages ethical conduct.

B. Objections.

Despite the many benefits to this Article's proposed framework, there are some potential objections. This section will outline three. First, whether it is appropriate to sanction organizations with complex structures in a

[160] Indeed, in Professor Miller's recent overview of the compliance function, he asserts that "the law of compliance shares an uneasy boundary with a broader set of issues that might loosely be termed 'ethics beyond compliance.'" Miller, Compliance Function, *supra* note 22, at 18.
[161] Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1970 (2006).
[162] Max H. Bazerman & Ann E. Tenbrunsel, BLIND SPOTS, 103-07 (2014).
[163] *Id.* at 104.

uniform manner. Second, whether a heightened sanction is appropriate for corporate repeat offenders. Third, whether the proposal's focus on public companies is too narrow in scope.

1. Is it Appropriate to Sanction Organizations with Complex Structures in a Uniform Manner?

Today's corporate organizations are complex. Some firms have a variety of related entities or subsidiaries. For example, HSBC, like many public companies, has several subsidiaries. The instances of misconduct outlined in the Introduction were committed by a variety of HSBC subsidiaries. Other organizations are extremely large organizations with relatively siloed departments that function autonomously as mini-companies. Thus, a legitimate question exists as to whether organizations with complex structures should be treated as one entity for purposes of a recidivism review.[164]

Importantly, this Article's proposal is consistent with the manner in which corporations and the DOJ currently negotiate settlement agreements. The DOJ treats related corporate entities as if they are one unit, so it would seem appropriate to develop a strategy that does the same. For example, when three Hewlett-Packard settled FCPA violations, the parent company, while not entering into an agreement with DOJ Fraud, "committed to maintain and continue enhancing its compliance program and internal accounting controls."[165] In another example, Alcatel-Lucent agreed to make changes to its compliance program across all of its related entities. Specifically, the agreement states

> Alcatel-Lucent represents that it has implemented and will continue to implement a compliance and ethics program designed to prevent and detect violations of the FCPA, the anti-corruption provisions of French law, and other applicable anti-corruption laws throughout its operations, ***including those of its affiliates, agents, and joint ventures, and those of its contractors and subcontractors***, with responsibilities that include interacting with foreign officials or other high risk activities.[166]

In yet another example, when Vetco International and four of its subsidiaries plead guilty to FCPA violations, the parent company agreed to assume all of the obligations on" behalf of its subsidiaries.[167] Thus, the

[164] A robust analysis of these issues is beyond the scope of this Article, and will be the focus of a future project. Veronica Root, *Complex Compliance & Collateral Consequences* (working draft).
[165] Deferred Prosecution Agreement, United States v. Hewlett-Packard Polska, SP.Z.O.O, No. CR-15-202, ¶ 8 (Apr. 9, 2011), *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2014/04/09/hp-poland-dpa.pdf.
[166]Deferred Prosecution Agreement, United States v. Alcatel-Lucent, S.A., No. 10-20907, ¶ 8 (Feb. 22, 2011) (emphasis added), *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/07/29/02-22-11alcatel-dpa.pdf.
[167] Plea Agreement, United States v. Vetco Gray UK Limited, No. CR-H07-04, ¶ 10 (Jan. 5, 2007), *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/02-06-07vetcogray-uk-plea.pdf.

DOJ and corporations appear not to adhere to technical concerns regarding the separate legal status of related corporate entities when entering into settlement agreements. As such, it appears appropriate to consider repeat misconduct across subsidiaries when considering whether a corporate entity may be a recidivist.

Additionally, this Article's proposal does not outline a broad-based rule; it outlines a standard by which DOJ compliance counsel can make an individualized assessment regarding an organization's compliance program. Nothing in the proposal prevents DOJ compliance counsel, or individual prosecutors charged with bringing an enforcement action against a company, from determining whether it appears appropriate to treat separate instances of misconduct separately. The proposal outlined leaves a great deal of discretion with prosecutors to make the charging decisions they deem appropriate given the totality of the circumstances before them.

Thus, while concerns regarding the appropriate treatment of corporations with complex organizational structures are legitimate in this context and would benefit from further research, those considerations are not dispositive to the claims outlined in this Article.

2. Is a Heightened Sanction Needed for Deterring Repeat Offenders?

This Article presumes that increased sanctions for corporate repeat offenders will result in more desirable incentives for corporate wrongdoers to engage in more effective self-policing through improved internal compliance programs. Classic law and economics literature regarding deterrence, however, assumes that "sanctioning repeat offenders more severely cannot be socially advantageous if deterrence always induces first-best behavior."[168] In those instances, '[r]aising the sanction because of [the repeat offender's] having a record of prior convictions would overdeter [the repeat offender] now."[169] Implicit, however, in this view of deterrence is that the government has chosen an appropriate sanction for corporate misconduct, when in reality the state will often "tolerate some underdeterrence in order to reduce enforcement expenses."[170]

[168] A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, in Handbook of Law and Economics 438 (A. Mitchell Polinsky & Steven Shavell eds., 2007).
[169] *Id.*
[170] *Id.*

This reality is unsurprising when one considers that law and economics theory has explained that strict liability enforcement, while the best regime "for inducing firms to sanction culpable agents,"[171] "may actually deter firms from monitoring, investigating, or reporting" corporate misconduct.[172] A private firm subject to a strict liability regime will have a decreased incentive to detect misconduct within its organization, because it will definitively result in a sanction for the firm without consideration of the corporation's actions or culpability.

The upshot is that achieving perfect compliance with legal and regulatory requirements within private firms may actually deter those firms from implementing effective compliance and ethics programs, thus the government chooses not to hold corporations responsible for obtaining perfect compliance. Creating a world where there is underdeterrence.

> [As such,] making sanctions depend on offense history may be beneficial for two reasons. First, the use of offense history may create an additional incentive not to violate the law: if detection of a violation implies not only an immediate sanction, but also a higher sanction for a future violation, [a repeat offender] will be deterred more from committing a violation presently. Second, making sanctions depend on offense history allows society to take advantage of information about the dangerousness of [repeat offenders] and the need to deter them.[173]

Thus, this Article's presumption—that providing for increased sanctions for repeat offenders will increase the incentives for private firms to engage in better self-policing and more effective ethics and compliance programs—merely takes into account the practical reality that the government's current enforcement regime does not in fact result in "perfect" deterrence and instead sometimes underdeters corporate misconduct in many instances. The proposal is not an effort to achieve perfect deterrence, but instead is a suggestion meant to strengthen the government's deterrence strategy.

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[171] Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. Rev. 687, 701 (1997).
[172] *Id.* at 707.
[173] Polinsky & Shavell, *supra* note 168, at 438-39.

3. Is a Proposal Aimed at Public Companies too Narrow?

This Article focuses on misconduct at public companies, and the proposal outlined in Part III is crafted in a manner meant to incentivize public companies to overhaul their compliance programs. Yet organizational misconduct is not limited to public companies. Thus, a legitimate criticism might be raised regarding the wisdom of putting forth a proposal that is inherently limited in its ability to deter all corporate misconduct, because only public companies are required to file Form 8-Ks, thus only public companies would receive a recidivism review.

Yet the reality is that incentivizing more ethical institutions, which will pursue strategies that may result in effective compliance programs, requires a multifaceted approach. This Article's proposals will not and cannot create a perfect set of incentives to ensure that all organizations establish effective ethics and compliance programs. However, this Article's proposal, if adopted, will address some of the coordination challenges that are an inherent part of the current U.S. regulatory structure and will provide an additional incentive for firms to implement policies that will address compliance deficiencies on a wholesale, as opposed to a piecemeal, basis.

C. Unresolved Concerns.

There are a variety of open questions raised by this Article's suggestions and proposal. This Part will discuss two such questions. First, the factors DOJ compliance counsel should consider when determining whether an organization should be treated as a corporate repeat offender. Second, what types of misconduct should be considered in a repeat offender assessment.

1. When Should an Organization be Treated as a Repeat Offender?

One question raised by the case study in Part III.C. is when an organization should be treated as a repeat offender. The case study identified three categories of repeated misconduct. Category 1 includes multiple offenses with the same or similar unlawful objectives and behavior. Category 2 includes multiple offenses with the same or similar unlawful behavior but dissimilar unlawful objectives. Category 3 includes multiple offenses that do not share any characteristics in terms of the type of unlawful behavior or unlawful purpose.

This issue might benefit from further research, particularly as it relates to Category 2, but it seems most important that companies falling into Category 1 be treated as repeat offenders. The companies outlined in

Category 1 appear to have institutional deficiencies in creating a culture that disavows bribery as a mechanism for obtaining a competitive business advantage. When organizational misconduct contains these types of similarities, it may be appropriate to treat the organization as a repeat offender. In contrast, the companies outlined in Category 3 do not appear to have entered into misconduct that looks in any way related. Thus, the misconduct identified looks less likely to reflect some sort of underlying deficiency with the firm's compliance program.

2. What Legal Areas Should be Part of a Repeat Offender Assessment?

There are a multitude of ways that a corporation can violate legal or regulatory requirements. Another legitimate question is what types of violations should "count" when determining whether to treat a corporation as a repeat offender.

Again, this issue would likely benefit from additional research, but it appears as if organizational misconduct can be divided into two basic groups. The first includes misconduct that is traditionally enforced through public means, so through formal, governmental action (e.g., governmental prosecutions). The second includes misconduct that is traditionally enforced through private means (e.g., employment discrimination lawsuits).

Because this Article is focused on how public enforcement agents can more effectively incentivize firms to implement effective ethics and compliance programs, it seems most appropriate for the former category to be considered when determining whether to treat a corporation as a repeat offender. There are likely other proposals for reform that would be better suited to address repeated instances of misconduct for firms that have engaged in the latter types of wrongdoing.

Conclusion

The government has dedicated a great deal of time, effort, money, and energy to incentivizing private firms to implement effective ethics and compliance programs. This Article makes three contributions to the academic discourse on organizational compliance efforts. First, the Article, through a case study, demonstrates that governmental enforcement agents are largely ignoring corporate recidivism. Second, the Article explains that the lack of focus by governmental agents on corporate recidivism appears to be based, at least in part, on inter- and intra-agency coordination challenges. Third, the Article argues that efforts to improve corporate compliance

would benefit from mechanisms that (i) recognize when an institution is engaged in recidivist behavior across diverse regulatory areas and (ii) more aggressively sanction institutions that are repeat offenders. By employing a more coordinated enforcement strategy that identifies an institution that is suffering from a systemic compliance failure and holds corporations responsible for being repeat offenders across diverse implement comprehensive reforms to their compliance policies and procedures. This could ultimately lead to improved ethical conduct and more effective ethics and compliance programs within public companies.

Appendix A

DOJ Fraud FCPA Enforcement Actions Brought against Corporations from 2004 – June 2016[174]

Each Enforcement Action Brought – 150 total
Actions Brought Against Related Corporate Entities – 87 total

Each. Enf. Action	Related Corp. Ent.	Year	Company	Parent (if applicable)	Enf. Action Type
1	1	2004	InVision Technologies, Inc.	General Electric	NPA
1	0	2004	General Electric	NA	NPA
1	1	2004	ABB Vetco Gray, Inc.	ABB Ltd.	Guilty Plea
1	0	2004	ABB Vetco Gray (UK) Ltd. (later named Vetco Gray UK Ltd.)	ABB Ltd.	Guilty Plea
1	1	2005	DPC (Tianjin) Co. Ltd.	Diagnostic Products Corporation (DPC)	Guilty Plea
1	1	2005	Micrus Corporation	NA	NPA
1	1	2005	Titan Corporation	NA	Guilty Plea
1	1	2005	Monsanto Company	NA	DPA
1	1	2006	Statoil	NA	DPA
1	1	2006	SSI International Far East, Ltd.	Schnitzer Steel Industries Inc.	Guilty Plea
1	0	2006	Schnitzer Steel Industries, Inc.	NA	DPA
1	1	2007	Lucent Technologies Inc.	Alcatel-Lucent	NPA
1	0	2007	Akzo Nobel N.V.	NA	NPA
1	1	2007	Ingersoll-Rand Company Limited	NA	DPA
1	0	2007	Ingersoll-Rand Italiana SpA	Ingersoll-Rand Company Limited	DPA
1	0	2007	Thermo King Ireland Limited	Ingersoll-Rand Company Limited	DPA
1	1	2007	York International Corporation	NA	DPA
1	0	2007	Paradigm B.V.	NA	NPA
1	1	2007	Textron Inc.	NA	NPA
1	0	2007	David Brown Transmissions France S.A.	Textron Inc.	NPA

[174] *FCPA and Related Enforcement Actions*, U.S. DEP'T OF JUSTICE, http://www.justice.gov/criminal/fraud/fcpa/cases/a.html.

Each. Enf. Action	Related Corp. Ent.	Year	Company	Parent (if applicable)	Enf. Action Type
1	0	2007	David Brown France Engrenage S.A.S.	Textron Inc.	NPA
1	0	2007	David Brown Guinard Pumps S.A.S.	Textron Inc.	NPA
1	1	2007	Omega Advisors, Inc.	NA	NPA
1	1	2007	Baker Hughes Services International, Inc.	Baker Hughes Incorporated	Guilty Plea
1	0	2007	Baker Hughes Incorporated	NA	DPA
1	1	2007	Vetco Gray Controls Inc.	Vetco International Ltd.	Guilty Plea
1	0	2007	Vetco International Limited	NA	Guilty Plea
1	0	2007	Vetco Gray Controls Limited	Vetco International Ltd.	Guilty Plea
1	0	2007	Vetco Gray UK Limited	Vetco International Ltd.	Guilty Plea
1	0	2007	Aibel Group Limited	Vetco International Ltd.	DPA
1	1	2008	AGA Medical Corporation	NA	DPA
1	1	2008	Volvo Construction Equipment, AB (VCE)	Aktiebolaget Volvo (AB Volvo)	DPA
1	0	2008	Renault Trucks SAS	Aktiebolaget Volvo (AB Volvo)	DPA
1	0	2008	Aktiebolaget Volvo (AB Volvo)	NA	DPA
1	1	2008	Westinghouse Air Brake Technologies Corporation	NA	NPA
1	1	2008	Siemens Aktiengesellschaft (Siemens AG)	NA	Guilty Plea
1	0	2008	Siemens S.A. (Argentina)	Siemens AG	Guilty Plea
1	0	2008	Siemens Bangladesh Limited	Siemens AG	Guilty Plea
1	0	2008	Siemens S.A. (Venezuela)	Siemens AG	Guilty Plea
1	1	2008	Willbros Group Inc.	NA	DPA
1	1	2008	Willbros International	Willbros Group, Inc.	DPA
1	0	2008	Faro Technologies, Inc.	NA	NPA
1	1	2008	Fiat S.p.A.	NA	DPA
1	0	2008	CNH France S.A.	Fiat S.p.A.	DPA
1	0	2008	Iveco S.p.A.	Fiat S.p.A.	DPA
1	0	2008	CNH Italia S.p.A.	Fiat S.p.A.	DPA
1	1	2008	Flowserve Pompes Sas	Flowserve Corporation	DPA

Each. Enf. Action	Related Corp. Ent.	Year	Company	Parent (if applicable)	Enf. Action Type
1	1	2008	Nexus Technologies, Inc.	NA	Guilty Plea
1	1	2009	UTStarcom Inc.	NA	NPA
1	1	2009	AGCO Corp.	NA	DPA
1	0	2009	AGCO Limited	AGCO Corp.	DPA
1	0	2009	AGCO Denmark A/S	AGCO Corp.	DPA
1	0	2009	AGCO S.A.	AGCO Corp.	DPA
1	1	2009	Helmerich & Payne, Inc.	NA	NPA
1	1	2009	Control Components, Inc.	NA	Guilty Plea
1	1	2009	Novo Nordisk A/S	NA	DPA
1	1	2009	Latin Node, Inc.	eLandia International Inc.	Guilty Plea
1	1	2009	Kellogg Brown & Root LLC	KBR Inc.	Guilty Pleas
1	0	2009	KBR	Kellogg Brown & Root, LLC	Guilty Plea
1	1	2010	Alcatel-Lucent, S.A.	NA	DPA
1	0	2010	Alcatel-Lucent Trade International A.G.	Alcatel-Lucent, S.A.	Guilty Plea
1	0	2010	Alcatel Centroamerica S.A.	Alcatel-Lucent, S.A.	Guilty Plea
1	0	2010	Alcatel-Lucent France, S.A.	Alcatel-Lucent, S.A.	Guilty Plea
1	1	2010	RAE Systems Inc.	NA	NPA
1	1	2010	Panalpina World Transport	NA	DPA
1	0	2010	Panalpina, Inc.	Panalpina World Transport	Guilty Plea
1	1	2010	Noble Corporation	NA	NPA
1	0	2010	Noble Drilling (Nigeria) Ltd.	Noble Corp.	NPA
1	0	2010	Noble Drilling Services Inc.	Noble Corp.	NPA
1	0	2010	Noble International Limited	Noble Corp.	NPA
1	1	2010	Shell Nigeria Exploration and Production Co. Ltd.	Royal Dutch Shell plc	DPA
1	1	2010	Pride International, Inc.	NA	DPA
1	0	2010	Pride Forasol S.A.S.	Pride International	Guilty Plea
1	1	2010	Tidewater Marine International, Inc.	Tidewater Inc.	DPA

Each. Enf. Action	Related Corp. Ent.	Year	Company	Parent (if applicable)	Enf. Action Type
1	0	2010	Tidewater Inc.	NA	DPA
1	1	2010	Transocean Inc.	Transocean Ltd.	DPA
1	0	2010	Transocean Ltd.	NA	DPA
1	1	2010	ABB Inc.	ABB Ltd.	Guilty Plea
1	0	2010	ABB Ltd	NA	DPA
1	1	2010	Alliance One Tobacco Osh, LLC	Alliance One International Inc.	Guilty Plea
1	0	2010	Alliance One International AG	Alliance One International Inc.	Guilty Plea
1	0	2010	Alliance One International Inc.	NA	NPA
1	1	2010	Universal Corporation	NA	NPA
1	0	2010	Universal Leaf Tabacos Ltda.	Universal Corporation	Guilty Plea
1	1	2010	Snamprogetti Netherlands B.V.	ENI S.p.A	DPA
1	0	2010	Saipem S.p.A.	ENI S.p.A	DPA
1	0	2010	ENI S.p.A.	NA	DPA
1	1	2010	Technip S.A.	NA	DPA
1	1	2010	Daimler AG	NA	DPA
1	0	2010	DaimlerChrysler China Ltd.	Daimler AG	DPA
1	0	2010	DaimlerChrysler Automotive Russia SAO (DCAR) (Now Mercedes -Benz Russia SAO)	Daimler AG	Guilty Plea
1	0	2010	Daimler Export and Trade Finance GmbH (ETF)	Daimler AG	Guilty Plea
1	1	2010	Innospec Inc.	NA	Guilty Plea
1	1	2010	BAE Systems plc	NA	Guilty Plea
1	1	2011	Bridgestone Corporation	NA	Guilty Plea
1	1	2011	Armor Holdings, Inc.	BAE Systems Inc.	NPA
1	1	2011	Tenaris S.A.	NA	NPA
1	1	2011	Johnson and Johnson (DePuy)	NA	DPA
1	1	2011	Comverse Technology, Inc.	NA	NPA
1	0	2011	Comverse, Inc.	Comverse Technology, Inc.	NPA

Each. Enf. Action	Related Corp. Ent.	Year	Company	Parent (if applicable)	Enf. Action Type
1	0	2011	Comverse, Ltd.	Comverse Technology, Inc.	NPA
1	1	2011	JGC Corporation	NA	DPA
1	1	2011	Tyson Foods, Inc.	NA	DPA
1	1	2011	Maxwell Technologies, Inc.	NA	DPA
1	1	2011	Aon Corporation	NA	NPA
1	1	2011	Magyar Telekom	Deutsche Telekom	DPA
1	0	2011	Deutsche Telekom AG	NA	NPA
1	1	2012	Tyco International, Ltd.	NA	NPA
1	0	2012	Tyco Valves and Controls Middle East, Inc.	Tyco Int'l Ltd.	Guilty Plea
1	1	2012	Pfizer H.C.P. Corporation	Pfizer Inc.	DPA
1	1	2012	The NORDAM Group, Inc.	NA	NPA
1	1	2012	Orthofix International, N.V.	NA	DPA
1	1	2012	Data Systems & Solutions LLC	NA	DPA
1	1	2012	Biomet, Inc.	NA	DPA
1	1	2012	Bizjet International Sales and Support, Inc.	Lufthansa Technik AG	DPA
1	0	2012	Lufthansa Technik AG	NA	NPA
1	1	2012	Smith & Nephew, Inc.	Smith & Nephew plc	DPA
1	1	2012	Marubeni Corporation	NA	DPA
1	1	2013	Archer Daniels Midland Company	NA	NPA
1	0	2013	Alfred C. Toepfer International (Ukraine) Ltd.	Archer Daniels Midland Company	Guilty Plea
1	1	2013	Bilfinger SE	NA	DPA
1	1	2013	Weatherford International Ltd.	NA	DPA
1	0	2013	Weatherford Services, Ltd.	Weatherford International	Guilty Plea
1	1	2013	Diebold, Inc.	NA	DPA
1	1	2013	Total, S.A.	NA	DPA
1	1	2013	Ralph Lauren Corporation	NA	NPA
1	1	2013	Parker Drilling Company	NA	DPA

Each. Enf. Action	Related Corp. Ent.	Year	Company	Parent (if applicable)	Enf. Action Type
1	1	2014	Alstom S.A.	NA	Guilty Plea
1	0	2014	Alstom Network Schweiz AG (formerly Alstom Prom)	Alstom	Guilty Plea
1	0	2014	Alstom Power Inc.	Alstom	DPA
1	0	2014	Alstom Grid Inc.	Alstom	DPA
1	1	2014	Avon Products, Inc.	NA	DPA
1	0	2014	Avon Products (China) Co. Ltd.	Avon Products, Inc.	Guilty Plea
1	1	2014	Dallas Airmotive	NA	DPA
1	1	2014	Bio-Rad Laboratories, Inc.	NA	NPA
1	1	2014	ZAO Hewlett-Packard A.O.	Hewlett-Packard Company (HP Co.)	Gulty Plea
1	0	2014	Hewlett-Packard Polska, SP. Z O.O.	Hewlett-Packard Company (HP Co.)	DPA
1	0	2014	Hewlett-Packard Mexico, S. de R.L. de C.V.	Hewlett-Packard Company (HP Co.)	NPA
1	1	2014	Marubeni Corporation	NA	Guilty Plea
1	1	2014	Alcoa World Alumina LLC	Alcoa Inc.	Guilty Plea
1	1	2015	Louis Berger International Inc.	NA	DPA
1	1	2015	IAP Worldwide Services, Inc.	NA	NPA
1	1	2016	Olympus Latin America Inc.	Olympus Corp. of the Americas (OCA)	DPA
1	0	2016	Olympus Corp. of the Americas	NA	DPA
1	1	2016	Vimpelcom Ltd.	NA	DPA
1	0	2016	Unitel LLC	VimpelCom Ltd.	Guilty Plea
1	1	2016	Parametric Technology (Shanghai) Software Company Ltd.	PTC Inc.	NPA
1	0	2016	Parametric Technology (Hong Kong) Ltd.	PTC Inc.	NPA
1	1	2016	BK Medical ApS	Analogic Corporation	NPA
1	1	2016	LATAM AIRLINES GROUP S.A.	NA	DPA

150	87	Total

Appendix B

DOJ Fraud FCPA Guilty Pleas Obtained from Corporations from 2004 – June 2016

Guilty Pleas Obtained – 43 total
Guilty Pleas Obtained Against Corporate Entities – 30 total

Each. Enf. Action	Related Corp. Ent.	Guilty Plea	Year	Company	Parent (if applicable)	Enf. Action Type
1	1	1	2004	ABB Vetco Gray, Inc.	ABB Ltd.	Guilty Plea
1	0	1	2004	ABB Vetco Gray (UK) Ltd. (later named Vetco Gray UK Ltd.)	ABB Ltd.	Guilty Plea
1	1	1	2005	DPC (Tianjin) Co. Ltd.	Diagnostic Products Corporation (DPC)	Guilty Plea
1	1	1	2005	Titan Corporation	NA	Guilty Plea
1	1	1	2006	SSI International Far East, Ltd.	Schnitzer Steel Industries Inc.	Guilty Plea
1	0	0	2006	Schnitzer Steel Industries, Inc.	NA	DPA
1	1	1	2007	Baker Hughes Services International, Inc.	Baker Hughes Incorporated	Guilty Plea
1	0	0	2007	Baker Hughes Incorporated	NA	DPA
1	1	1	2007	Vetco Gray Controls Inc.	Vetco International Ltd.	Guilty Plea
1	0	1	2007	Vetco International Limited	NA	Guilty Plea
1	0	1	2007	Vetco Gray Controls Limited	Vetco International Ltd.	Guilty Plea
1	0	1	2007	Vetco Gray UK Limited	Vetco International Ltd.	Guilty Plea
1	0	0	2007	Aibel Group Limited	Vetco International Ltd.	DPA
1	1	1	2008	Siemens Aktiengesellschaft (Siemens AG)	NA	Guilty Plea
1	0	1	2008	Siemens S.A. (Argentina)	Siemens AG	Guilty Plea
1	0	1	2008	Siemens Bangladesh Limited	Siemens AG	Guilty Plea
1	0	1	2008	Siemens S.A. (Venezuela)	Siemens AG	Guilty Plea
1	1	1	2008	Nexus Technologies, Inc.	NA	Guilty Plea
1	1	1	2009	Control Components, Inc.	NA	Guilty Plea
1	1	1	2009	Latin Node, Inc.	eLandia International Inc.	Guilty Plea
1	1	1	2009	Kellogg Brown & Root LLC	KBR Inc.	Guilty Pleas
1	0	1	2009	KBR	KBR Inc.	Guilty Plea

Each. Enf. Action	Related Corp. Ent.	Guilty Plea	Year	Company	Parent (if applicable)	Enf. Action Type
1	1	0	2010	Alcatel-Lucent, S.A.	NA	DPA
1	0	1	2010	Alcatel-Lucent Trade International A.G.	Alcatel-Lucent, S.A.	Guilty Plea
1	0	1	2010	Alcatel Centroamerica S.A.	Alcatel-Lucent, S.A.	Guilty Plea
1	0	1	2010	Alcatel-Lucent France, S.A.	Alcatel-Lucent, S.A.	Guilty Plea
1	1	0	2010	Panalpina World Transport	NA	DPA
1	0	1	2010	Panalpina, Inc.	Panalpina World Transport	Guilty Plea
1	1	0	2010	Pride International, Inc.	NA	DPA
1	0	1	2010	Pride Forasol S.A.S.	Pride International	Guilty Plea
1	1	1	2010	ABB Inc.	ABB Ltd.	Guilty Plea
1	0	0	2010	ABB Ltd	NA	DPA
1	1	1	2010	Alliance One Tobacco Osh, LLC	Alliance One International Inc.	Guilty Plea
1	0	1	2010	Alliance One International AG	Alliance One International Inc.	Guilty Plea
1	0	0	2010	Alliance One International Inc.	NA	NPA
1	1	0	2010	Universal Corporation	NA	NPA
1	0	1	2010	Universal Leaf Tabacos Ltda.	Universal Corporation	Guilty Plea
1	1	0	2010	Daimler AG	NA	DPA
1	0	0	2010	DaimlerChrysler China Ltd.	Daimler AG	DPA
1	0	1	2010	DaimlerChrysler Automotive Russia SAO (DCAR) (Now Mercedes -Benz Russia SAO)	Daimler AG	Guilty Plea
1	0	1	2010	Daimler Export and Trade Finance GmbH (ETF)	Daimler AG	Guilty Plea
1	1	1	2010	Innospec Inc.	NA	Guilty Plea
1	1	1	2010	BAE Systems plc	NA	Guilty Plea
1	1	1	2011	Bridgestone Corporation	NA	Guilty Plea
1	1	0	2012	Tyco International, Ltd.	NA	NPA
1	0	1	2012	Tyco Valves and Controls Middle East, Inc.	Tyco Int'l Ltd.	Guilty Plea
1	1	0	2013	Archer Daniels Midland Company	NA	NPA
1	0	1	2013	Alfred C. Toepfer International (Ukraine) Ltd.	Archer Daniels Midland Company	Guilty Plea

Each. Enf. Action	Related Corp. Ent.	Guilty Plea	Year	Company	Parent (if applicable)	Enf. Action Type
1	1	0	2013	Weatherford International Ltd.	NA	DPA
1	0	1	2013	Weatherford Services, Ltd.	Weatherford International	Guilty Plea
1	1	1	2014	Alstom S.A.	NA	Guilty Plea
1	0	1	2014	Alstom Network Schweiz AG (formerly Alstom Prom)	Alstom S.A.	Guilty Plea
1	0	0	2014	Alstom Power Inc.	Alstom S.A.	DPA
1	0	0	2014	Alstom Grid Inc.	Alstom S.A.	DPA
1	1	0	2014	Avon Products, Inc.	NA	DPA
1	0	1	2014	Avon Products (China) Co. Ltd.	Avon Products, Inc.	Guilty Plea
1	1	1	2014	ZAO Hewlett-Packard A.O.	Hewlett-Packard Company (HP Co.)	Gulty Plea
1	0	0	2014	Hewlett-Packard Polska, SP. Z O.O.	Hewlett-Packard Company (HP Co.)	DPA
1	0	0	2014	Hewlett-Packard Mexico, S. de R.L. de C.V.	Hewlett-Packard Company (HP Co.)	NPA
1	1	1	2014	Marubeni Corporation	NA	Guilty Plea
1	1	1	2014	Alcoa World Alumina LLC	Alcoa Inc.	Guilty Plea
1	1	0	2016	Vimpelcom Ltd.	NA	DPA
1	0	1	2016	Unitel LLC	VimpelCom Ltd.	Guilty Plea

63	**30**	**43**	**Total**

Appendix C

FCPA Case Study:
Repeat Offenders Data Set

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
1	**Parent:** ABB Ltd. **Other Related Entities**: ABB Vetco Gray, Inc.; ABB Vetco Gray (UK) Ltd. (later named Vetco Gray UK Ltd.)	2: Similar behavior, dissimilar purpose	2001, Antitrust, DOJ	No	Yes - ABB Middle East & Africa Participations AG	Press Release, Dep't of Justice, ABB Asea Brown Boveri Ltd. Subsidiary Pleads Guilty to Bid Rigging on USAID Construction Contract in Egypt (Apr. 12, 2001), *available at* http://www.justice.gov/atr/public/press_releases/2001/7984.htm.
			2004, FCPA, DOJ, SEC	No - credited for voluntary disclosure, violation unknown to gov't	Yes - ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd.	Press Release, Dep't of Justice, ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. Plead Guilty to Foreign Bribery Charges (Jul. 6, 2004), *available at* http://www.justice.gov/archive/opa/pr/2004/July/04_crm_465.htm.

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
			2007, FCPA, DOJ	Yes - 2004 settlement noted in plea agreement, did not receive minimum fine in 2007	Yes - Vetco Gray Controls, Inc., Vetco Gray Controls, Ltd. and Vetco Gray UK Ltd. - by the time settlement reached no longer subsidiaries of ABB	Press Release, Dep't of Justice, Three Vetco International Ltd. Subsidiaries Plead Guilty to Foreign Bribery and Agree to Pay $26 Million in Criminal Fines (Feb. 6, 2007), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/vetco-controls.html.
			2010, FCPA, DOJ, SEC	Yes - "The organization or separately managed line of business committed a part of the instant offense less than five years after a criminal adjudication based on similar misconduct." p. 11 of Settlement Agreement, but only given minimum calculated fine	Yes - ABB, Inc.	Press Release, Dep't of Justice, ABB Ltd and Two Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Will Pay $19 Million in Criminal Penalties (Sept. 29, 2010), *available at* http://www.justice.gov/opa/pr/abb-ltd-and-two-subsidiaries-resolve-foreign-corrupt-practices-act-investigation-and-will-pay

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
2	**Parent:** Diagnostic Products Corporation (DPC) **Other Related Entities:** DPC (Tianjin) Co. Ltd.	0: No Repeat Offenses				
3	**Parent:** Titan Corp. **Other Related Entities:** NA	0: No Repeat Offenses				
4	**Parent:** Schnitzer Steel Industries, Inc. **Other Related Entities:** SSI International Far East, Ltd.	0: No Repeat Offenses				
5	**Parent:** Baker Hughes Inc. **Other Related Entities:** Baker Hughes Services Inernational, Inc.	3: Unrelated behavior and purpose	2007, FCPA, DOJ, SEC	SEC Press release describes the FCPA violation as a violation of a 2001 SEC cease and desist order prohibiting violations of the books and records and internal controls provisions of the FCPA https://www.sec.gov/news/press/2007/2007-77.htm.	Yes - Baker Hughes Services International (BHSI)	Press Release, Dep't of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case, *available at* https://www.justice.gov/archive/opa/pr/2007/April/07_crm_296.html.

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
			2010, Antitrust, DOJ	No	No	Final Judgment, United States v. Baker Hughes Inc., No. 1:10-CV-00659 (July 23, 2010), *available at* https://www.justice.gov/atr/case-document/proposed-final-judgment-45.
			2016, Antitrust (only a complaint filed), DOJ	TBD - only complaint	No	Complaint, United States v. Halliburton Co., No. 1:16-CV-00233 (April 6, 2016), *available at* (https://www.justice.gov/atr/file/838661/download.
6	**Parent:** Vetco International Ltd. **Other Related Entities:** Vetco Gray Controls Inc.; Vetco Gray Controls Limited; Vetco Gray UK Limited; Aibel Group Limited	0: No Repeat Offenses				
7	**Parent:** Siemens AG **Other Related Entities:** Siemens S.A. (Argentina); Siemens Bangladesh Limited; Siemens S.A. (Venezuela)	0: No Repeat Offenses				

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
8	**Parent:** Nexus Technologies, Inc. **Other Related Entitites:** NA	0: No Repeat Offenses				
9	**Parent:** Control Components, Inc. **Other Related Entities:** NA	0: No Repeat Offenses				
10	**Parent:** eLandia International Inc. **Other Related Entitties:** Latin Node, Inc.	0: No Repeat Offenses				
11	**Parent:** KBR Inc. **Other Related Entitites:** Kellogg Brown & Root LLC	3: Unrelated behavior and purpose **outcome of pending litigation could change classification	2009, FCPA, DOJ, SEC	No	Yes - Kellogg Brown & Root LLC	Press Release, Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), *available at* http://www.justice.gov/opa/pr/kellogg-brown-root-llc-pleads-guilty-foreign-bribery-charges-and-agrees-pay-402-million.
			2010, False Claims Act, DOJ	No	Parent and 33 subcontractors	Press Release, Dep't of Justice, U.S. Sues Kellogg, Brown & Root for Alleged False Claims Act Violations Over Improper Costs for Private Security in Iraq (April 1, 2010), *available at* https://www.justice.gov/opa/pr/us-sues-kellogg-brown-root-alleged-false-claims-act-violations-over-improper-costs-private.

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
			2014, False Claims Act, Anti-Kickbacks Act, DOJ	No	No	Press Release, Dep't of Justice, United States Government Sues Kellogg, Brown & Root Services Inc. and Two Foreign Companies for Kickbacks and False Claims Relating to Iraq Support Services Contract (Jan. 23, 2014), *available at* https://www.justice.gov/opa/pr/united-states-government-sues-kellogg-brown-root-services-inc-and-two-foreign-companies.
			2015, Dodd Frank Whistleblower Provision/Anti-Kickback Act, SEC	No	No	Order Instituting Cease-And-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order, KBR, Inc., Exchange Release No. 74619 (April 1, 2015), *available at* http://www.sec.gov/litigation/admin/2015/34-74619.pdf.
			2015, False Claims Litigation Pending at Supreme Court	N/A	TBD - litigation pending	*See e.g.,* Ronald Mann, Argument Analysis: Justices Dubious of Government's Broad Readings of False Claims Act, SCOTUSblog (Jan. 13, 2015, 5:25 PM) http://www.scotusblog.com/2015/01/argument-analysis-justices-dubious-of-governments-broad-reading-of-false-claims-act/.

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
12	**Parent:** Alcatel-Lucent, S.A. **Other Related Entities:** Alcatel-Lucent Trade International A.G.; Alcatel Centroamerica S.A.; Alcatel-Lucent France, S.A.	3: Unrelated behavior and purpose	2007, FCPA, DOJ, SEC	No	Yes - Lucent Technologies Inc.	Press Release, Dep't of Justice, Lucent Technologies Inc. Agrees to Pay $1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), *available at* https://www.justice.gov/archive/opa/pr/2007/December/07_crm_1028.html.
			2010, FCPA, DOJ, SEC	No	Yes - Alcatel-Lucent France S.A., Alcatel-Lucent Trade International A.G., and Alcatel Centroamerica S.A.	Press Release, Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigations (Dec. 27, 2010), *available at* http://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt.
			2012, False Claims Act, DOJ	No **settlement agreement not available online	Yes - Lucent Technologies World Services Inc.	Press Release, Dep't of Justice, Alcatel-Lucent Agrees to Pay $4.2 Million to Settle False Claims Act Allegations (Sept. 21, 2012), *available at* http://www.justice.gov/opa/pr/alcatel-lucent-subsidiary-agrees-pay-us-42-million-settle-false-claims-act-allegations.

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
13	**Parent:** Panalpina World Transport; **Other Related Entities:** Panalpina, Inc.	3: Unrelated behavior and purpose	2005, OFAC Civil Penalties Enforcement, Tresury Dep't	No	Panalpina Inc.	Press Release, Dep't of Treaury, OFAC Civil Penalties Enforcement Information for May 6, 2005, *available at* https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/05062005.pdf.
			2010, FCPA, DOJ	No discussion of OFAC penalties	Panalpina Inc.	Press Release, Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (Nov. 4, 2010), *available at* https://www.justice.gov/opa/pr/oil-services-companies-and-freight-forwarding-company-agree-resolve-foreign-bribery.
			2010, False Claims & Anti-Kickback Act, DOJ	No	Yes - Panalpina Inc.	Press Release, Dep't of Justice, Freight Forwarder Panalpina Pays U.S. $375,000 to Settle False Claims and Kickbacks Allegations (July 30, 2010), *available at* https://www.justice.gov/opa/pr/freight-forwarder-panalpina-pays-us-375000-settle-false-claims-and-kickbacks-allegations.

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
			2011, Antitrust, DOJ	No	No	Plea Agreement, United States v. Panalpina World Transport, No. 1:10-CR-00270 (Nov. 4, 2011), *available at* https://www.justice.gov/atr/case-document/file/507141/download.
14	**Parent:** Pride International, Inc. **Other Related Entities:** Pride Forasol S.A.S.	0: No Repeat Offenses				
15	**Parent:** ABB Ltd.; **Other Related Entitites:** ABB Inc.	*See* #1 above				
16	**Parent:** Alliance One International Inc.; **Other Related Entitites:** Alliance One Tobacco Osh, LLC; Alliance One International AG	0: No Repeat Offenses				
17	**Parent:** Universal Corporation **Other Related Entities:** Universal Leaf Tabacos Ltda.	0: No Repeat Offenses				

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
18	**Parent:** Daimler AG **Other Related Entitites:** DaimlerChrysler China Ltd.; DaimlerChrsler Automotive Russia SAO (DCAR) (Now Mercedes-Benz Russia SAO); Daimler Export and Trade Finance GmbH (ETF)	0: No Repeat Offenses				
19	**Parent:** Innospec Inc. **Other Related Entitites:** NA	0: No Repeat Offenses				
20	**Parent:** BAE Systems plc **Other Related Entitties:** NA	3: Unrelated behavior and purpose	2010, FCPA , DOJ, SEC	No	No	Press Release, Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (March 1, 2010), *available at* https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine.

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
			2011, ITAR & AECA, State Dep't	No	No	Press Release, U.S. Dep't of State, BAE Systems plc Enters Civil Settlement of Alleged Violations of the AECA and ITAR and Agrees to Civil Penalty of $79 Million (May 17, 2011), *available at* http://www.state.gov/r/pa/prs/ps/2011/05/163530.htm.
			2011, FCPA, DOJ, SEC	No	Yes - Armor Holdings	Press Release, Dep't of Justice, Armor Holdings Agrees to Pay $10.2 Million Criminal Penalty to Resolve Violations of the Foreign Corrupt Practices Act (July 13, 2011), *available at* https://www.justice.gov/opa/pr/armor-holdings-agrees-pay-102-million-criminal-penalty-resolve-violations-foreign-corrupt.
			2011, Discrimination, DOJ	Couldn't locate agreement	Yes - BAE Systems Ship Repair Inc., on behalf of BAE Systems Ship Repair Inc's subsidiary BAE Systems Southeast Shipyards Alabama LLC	Press Release, Dep't of Justice, Justice Department Reaches Settlement with Virginia-Based BAE Systems Ship Repaire, In. (Dec. 28, 2011), *available at*https://www.justice.gov/opa/pr/justice-department-reaches-settlement-virginia-based-bae-systems-ship-repair-inc.

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
			2014, False Claims, DOJ	Couldn't locate agreement	Yes - BAE Systems, Inc. and BAE Systems Tactical Vehicle Systems LP	Press Release, Dep't of Justice, Defense Contractors Settle Alleged Violation of the False Claims Act for $5.5 Million (Sept. 16, 2014), *available at* https://www.justice.gov/usao-mn/pr/defense-contractors-settle-alleged-violation-false-claims-act-55-million.
			2015, False Claims & Truth-in-Negotiations Act, DOJ	No	Yes - BAE Systems Tactical Vehicle Systems LP	Complaint, United States v. BAE Systems Tactical Vehicle Systems, LP, No. 2:15-cv-12225 (June 18, 2015), *available at* (https://www.justice.gov/opa/file/479451/download.
21	**Parent:** Bridgestone Corporation **Other Related Entities:** NA	2: Similar behavior, dissimilar purpose	2011, FCPA & Antitrust, DOJ	No	Yes - Bridgestone Industrial Products of America, Inc. (parent company also involved)	Press Release, Dep't of Justice, Bridgestone Corporate Agrees to Plead Guilty to Participating in Conspiracy to Rig Bids and Bribe Foreign Government Officials (Sept. 15, 2011), *available at* http://www.justice.gov/opa/pr/bridgestone-corporation-agrees-plead-guilty-participating-conspiracies-rig-bids-and-bribe-0

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
			2014, Antitrust, DOJ	Yes - called repeat offender, Press Release states repeated antitrust violations a factor in calculating 2014 fine	Yes - Bridgestone Industrial Products of America, Inc. (parent company also involved)	Press Release, Dep't of Justice, Bridgestone Corp. Agrees to Plead Guilty to Price Fixing on Automobile Parts Installed in U.S. Cars (Feb. 13, 2014), *available at* http://www.justice.gov/opa/pr/bridgestone-corp-agrees-plead-guilty-price-fixing-automobile-parts-installed-us-cars.
22	**Parent:** Tyco International, Ltd. **Other Related Entities:** Tyco Valves and Controls Middle East, Inc.	0: No Repeat Offenses				
23	**Parent:** Archer Daniels Midland Company **Other Related Entitites:** Alfred C. Toepfer International (Ukraine) Ltd.	0: No Repeat Offenses				
24	**Parent:** Weatherford International **Other Related Entities:** Weatherford Services, Ltd.	0: No Repeat Offenses				

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
25	**Parent:** Alstom S.A. **Other Related Entities:** Alstom Network Schweiz AG (formerly Alstom Prom); Alstom Power Inc.; Alstom Grid Inc.	0: No Repeat Offenses				
26	**Parent:** Avon Products, Inc. **Other Related Entitites:** Avon Products (China) Co. Ltd.	0: No Repeat Offenses				
27	**Parent:** Hewlett-Packard Company **Other Related Entities:** ZAO Hewlett-Packard A.O.; Hewlett-Packard Polska, SP.ZO.O.; Hewlett-Packard Mexico, S. de R.L. de C.V.	1: Similar behavior and similar purpose	2007, Misleading Disclosures, SEC	No	No	Hewlett-Packard Co., Exchange Release No. 55801 (May 23, 2007), *available at* http://www.sec.gov/litigation/admin/2007/34-55801.pdf.
			2010, E-Rate Fraud, FCC, DOJ	No	No	Press Release, Federal Communications Commission, HP to Pay $16.25 million to Settle DOJ-FCC E-Rate Fraud (Nov. 12, 2010), *available at* http://www.fcc.gov/document/hp-pay-1625-million-settle-doj-fcc-e-rate-fraud-investigation.

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
			2010, False Claims, DOJ	No **settlement agreement not available online	No	Press Release, Dep't of Justice, Hewlett-Packard Agrees to Pay the United States $55 Million to Settle Allegations of Fraud (Aug. 30, 2010), *available at* http://www.justice.gov/opa/pr/hewlett-packard-agrees-pay-united-states-55-million-settle-allegations-fraud.
			2014, False Claims, DOJ	No **settlement agreement not available online	No	Press Release, Dep't of Justice, Hewlett-Packard Company Agrees to Pay $32.5 Million for Alleged Overbilling of the U.S. Postal Service (Aug. 1, 2014), *available at* http://www.justice.gov/opa/pr/hewlett-packard-company-agrees-pay-325-million-alleged-overbilling-us-postal-service.
			2014, FCPA, DOJ, SEC	No	Yes - Hewlett-Packard Polska SP. Z.O.O., ZAO Hewlett-Packard A.O., Hewlett-Packard Mexico, S. de R.L. de C.V.	Press Release, Dep't of Justice, Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery (Apr. 9, 2014), *available at* http://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery.

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
28	**Parent:** Marubeni Corporation **Other Related Entitites:** NA	1: Similar behavior and similar purpose	2012, FCPA, DOJ	No	No - Joint Venture with Kellogg, Brown & Root LLC	Press Release, Dep't of Justice, Marubeni Corporation Resolves FCPA Investigation and Agrees to Pay a $54.6 Million Criminal Penality (Jan. 17, 2012), *available at* https://www.justice.gov/opa/pr/marubeni-corporation-resolves-foreign-corrupt-practices-act-investigation-and-agrees-pay-546.
			2014, FCPA, DOJ	Yes - "The plea agreement cites Marubeni's decision not to cooperate with the department's investigation when given the opportunity to do so, its lack of an effective compliance and ethics program at the time of the offense, its failure to properly remediate and the lack of its voluntary disclosure of the conduct as some of the factors considered by the department in reaching an appropriate resolution."	No	Press Release, FBI, Marubeni Corporation Sentenced for Foreign Bribery Violations (Jan. 17, 2012), *available at* https://www.fbi.gov/contact-us/field-offices/washingtondc/news/press-releases/marubeni-corporation-sentenced-for-foreign-bribery-violations.

#	Company	Repeat Offender Category	Year, Legal Violation, & Agency(ies)	Treated as Recidivist?	Violation Committed by Subsidiary?	Citation
29	**Parent:** Alcoa Inc. **Other Related Entitites:** Alcoa World Alumina LLC	0: No Repeat Offenses				
30	**Parent:** VimpelCom Ltd. **Other Related Entitites:** United LLC	0: No Repeat Offenses				