THE OUTSIZED INFLUENCE OF THE FCPA?

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The current power and influence of the Foreign Corrupt Practices Act ("FCPA") is really quite remarkable when one considers the statute was largely ignored for the first twenty-five years of its existence. This statute, meant to reign in corruption by United States companies doing business abroad, has generated billions of dollars in revenue for the United States government; prompted the development of law firm practice groups and law school courses; become the subject of numerous scholarly articles; and has, arguably, made anti-bribery efforts the highest of priorities for multinational corporations engaged in robust compliance efforts. Corporations, scholars, and the public would be silly to discount the importance of understanding and maintaining compliance with the FCPA and its international counterparts.

And yet, might it be that prioritization of FCPA compliance is misguided in some instances? This Essay argues that governmental actors, industry leaders, corporations, and scholars must critically assess whether the current focus on FCPA compliance has created an environment where the FCPA has developed an outsized influence within corporations' compliance efforts. This Essay asks firms to consider whether they have become so concerned with ensuring compliance with the FCPA that they sometimes fail to identify other areas of risk that are equally, and in some instances, more serious. Specifically, firms might assess whether they sometimes (i) miss when there are broader deficiencies within their compliance programs; (ii) fail to see trends across compliance areas involving diverse regulatory and legal areas; and (iii) improperly prioritize necessary revisions to their compliance programs after significant misconduct is discovered. Instead of starting with the FCPA when creating a compliance program,

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this Essay urges firms to assess their risks more broadly and develop compliance programs closely targeted to their risk profiles while paying careful attention not to allow the FCPA to dominate those efforts. By doing so, firms can appropriately guard against potential FCPA compliance failures while also ensuring that they properly consider and address other regulatory and legal areas of concern.

TABLE OF CONTENTS

I. INTRODUCTION

Foreign Corrupt Practices Act ("FCPA") enforcement, after a decade of explosive growth, remains alive and well. For example, in the closing days of 2016, Odebracht S.A. ("Odebracht"), a Brazilian global construction company, and Braskem S.A., a Brazilian petrochemical company, entered into the largest-ever resolution to a global foreign bribery matter.[1] As described by the Department of Justice ("DOJ"), "Odebracht and Braskem used a hidden but fully functioning Odebracht business unit—a 'Department of Bribery,' so to speak—that

1. Press Release, DOJ, Odebracht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve [hereinafter Press Release, Odebracht and Braskem].

systematically paid hundreds of millions of dollars to corrupt government officials in countries on three continents."[2] In a cooperative enforcement action, the United States, Brazilian, and Swiss authorities agreed to collect a combined total of at least $3.5 billion.[3]

In addition to bringing significant enforcement actions, in 2016, the DOJ experimented with a pilot program meant to encourage firms to voluntarily self-disclose FCPA misconduct, and the DOJ adopted the program as a permanent FCPA Corporate Enforcement Policy in November 2017.[4] When describing the policy, Deputy Attorney General Rod Rosenstein explained: "The new policy enables the Department to efficiently identify and punish criminal conduct, and it provides guidance and greater certainty for companies struggling with the question of whether to make a voluntary disclosure of wrongdoing."[5]

There is no question that it is to a firm's benefit to ensure that it will not run afoul of the anti-bribery and related accounting provisions found within the FCPA,[6] which can lead to serious enforcement actions brought by the DOJ, the Securities and Exchange Commission ("SEC"), or both agencies in tandem.[7] For corporate compliance departments, the robust enforcement of the FCPA paired with high-profile statements from government officials regarding its enforcement[8] have cemented the importance of adopting an effective anti-bribery and corruption program. This Essay, however, asks firms to consider whether they have allowed concerns about the FCPA to take an outsized portion of their compliance time, talent, and resources. To put it more plainly, have firms prioritized the FCPA at the expense of similarly, or possibly more, concerning legal and regulatory areas? These questions are just that—questions. They are not proof. But the questions are generated by a decade's worth of observations and conversations with individuals within the industry. Might it be that the FCPA is taking up too much time, thought, and money by those charged with creating effective compliance programs within firms?

Indeed, FCPA violations arguably were not at the heart of the most significant corporate scandals or enforcement resolutions of corporate misconduct occurring within the past three years.[9] For instance, in March 2017, Volkswagen

2. *Id.*

3. *Id.*

4. DOJ, U.S. ATTORNEY MANUAL, FCPA CORPORATE ENFORCEMENT POLICY, https://www.justice.gov/criminal-fraud/file/838416/download; *see also Client Alert: DOJ Expands and Codifies Policy Incentivizing Corporations to Voluntarily Self-Disclose FCPA Violations*, LATHAM & WATKINS (Nov. 30, 2017), https://www.lw.com/thoughtLeadership/DOJ-policy-corporations-voluntarily-self-disclose-FCPA-violations.

5. Rod J. Rosenstein, Deputy Att'y Gen., DOJ, Remarks at 34th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

6. *See* DOJ & SEC, A RESOURCE GUIDE TO THE FOREIGN CORRUPT PRACTICES ACT 1, 2, https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

7. *See, e.g.*, *DOJ and SEC Enforcement Actions per Year*, STAN. L. SCH. FOREIGN CORRUPT PRAC. ACT CLEARINGHOUSE, http://fcpa.stanford.edu/statistics-analytics.html (last visited May 13, 2019) (collecting all SEC and DOJ FCPA enforcement actions) [hereinafter *DOJ and SEC Enforcement Actions*].

8. *See, e.g.*, Rosenstein, *supra* note 5.

9. *See infra* notes 10–14 and accompanying text.

pleaded guilty in connection with a conspiracy to purposefully cheat U.S. Emissions Tests.[10] The breadth and pure audacity of the misconduct at Volkswagen resulted in terminations, prosecutions, formal enforcement actions, and a decrease in sales for the automobile manufacturer.[11] Additionally, the sexual misconduct scandal that rocked Fox News in 2016 caught up with one of its biggest stars in 2017, leading to a November 2017 settlement of $90 million to resolve claims from shareholders who were concerned that Fox News had created a company culture that tacitly permitted sexual harassment.[12] And Wells Fargo, after admitting to creating millions of fake accounts in 2016, was forced in 2017 to reveal that the fake account scandal was larger than it had previously disclosed and that it found additional areas of misconduct, including a fraudulent auto insurance scandal that may have contributed to up to 20,000 improper repossessions.[13] The difficulties at Wells Fargo culminated in an unprecedented settlement with regulators in 2018, which "banned [Wells Fargo] from getting bigger until it can convince regulators that it has cleaned up its act."[14] The failures highlighted here are, in part, failures of each firm's compliance program. And none is related to the FCPA.

Despite the diversity surrounding issues of compliance within firms, however, conversations around the importance of developing and maintaining an effective compliance program within legal circles often appear to focus quite heavily on FCPA compliance.[15] In Part II, this Essay begins by explaining why the FCPA has garnered attention and prioritization from industry leaders and how its enforcement compares to other regulatory and legal areas. In Part III, this Essay questions whether the FCPA has developed an outsized influence over corporate compliance efforts. It discusses two instances where firms emphasized FCPA compliance despite the presence of other similarly important, or perhaps even more pressing, areas of concern. The Part goes on to posit how increased attention to FCPA compliance might contribute to a less than optimal amount of concern for other potential areas of risk for multinational organizations. In Part IV,

10. Press Release, DOJ, Volkswagen AG Pleads Guilty in Connection with Conspiracy to Cheat U.S. Emissions Tests (Mar. 10, 2017), https://www.justice.gov/opa/pr/volkswagen-ag-pleads-guilty-connection-conspiracy-cheat-us-emissions-tests.

11. *Volkswagen Emissions Crisis*, CNN MONEY, http://money.cnn.com/news/volkswagen-emission-crisis/ (last visited May 13, 2019); *see also* Jack Ewing, *Engineering a Deception: What Led to Volkswagen's Diesel Scandal*, N.Y. TIMES (Mar. 16, 2017), https://www.nytimes.com/interactive/2017/business/volkswagen-diesel-emissions-timeline.html; Julia Kollewe, *Volkswagen Emissions Scandal—Timeline*, GUARDIAN (Dec. 10, 2015), https://www.theguardian.com/business/2015/dec/10/volkswagen-emissions-scandal-timeline-events; *Volkswagen Emissions Scandal*, NPR, https://www.npr.org/tags/443453659/volkswagen-emissions-scandal (last visited May 13, 2019).

12. Lucinda Shen, *The 10 Biggest Business Scandals of 2017*, FORTUNE (Dec. 31, 2017), http://fortune.com/2017/12/31/biggest-corporate-scandals-misconduct-2017-pr/.

13. *Id.*

14. Emily Flitter, Binyamin Appelbaum & David Enrich, *How Wells Fargo and Federal Reserve Struck Deal to Hold Bank's Board Accountable*, N.Y. TIMES (Feb. 4, 2018), https://www.nytimes.com/2018/02/04/business/wells-fargo-fed-board-directors-penalties.html.

15. This is an observation, as opposed to a quantifiable empirical claim that can be replicated and verified. Nonetheless, it is an idea that seemed quite plausible when presented to the other participants of this symposium on the FCPA and at other subsequent gatherings of compliance scholars and professionals throughout the year.

this Essay briefly outlines strategies regulators, prosecutors, and firms might employ to assist them in appropriately prioritizing concerns regarding the FCPA within an organization's broader compliance program. Part V addresses some additional questions raised by this Essay.

II. TODAY'S ENFORCEMENT REALITIES

Today's multinational corporations ignore the FCPA and related international anti-bribery provisions at their peril.[16] The past decade has seen a dramatic increase in both the number of FCPA enforcement actions brought against corporations and the size of the monetary sanctions levied against them as a result.[17] There are, however, a number of other regulatory areas where significant enforcement efforts result in high monetary penalties, which should receive the same or more attention by compliance departments at some firms.[18]

A. A Decade of Robust Enforcement

From 2008–2017, the DOJ brought 282 enforcement actions against corporations and individuals for FCPA violations, and the SEC brought 195.[19] In comparison, from 1998–2007, the DOJ brought 184 enforcement actions against corporations and individuals for FCPA violations, and the SEC brought 121; with the bulk of those actions occurring from 2001–2007, where there were 171 DOJ enforcement actions and 121 brought by the SEC.[20] Finally, from 1977, when Congress enacted the FCPA, through 1997, the DOJ brought 69 enforcement actions, and the SEC brought 34.[21] Thus, for the first two decades of its history, the FCPA saw very little enforcement activity, but since the early 2000s, authorities have prioritized compliance with the statute.[22]

16. The Bribery Act 2010, c. 1–23 (UK) (the United Kingdom's criminal law covering bribery offenses); OECD, CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND RELATED DOCUMENTS (2011), http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (including the official text of the 1997 OECD Anti-Bribery Convention, 2009 Recommendation of the Council for Further Combating Bribery, and other related documents); *see also* Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611 (2017) (arguing that the United States did not begin robust enforcement of the FCPA until after the 1997 Organisation for Economic Cooperation and Development ("OECD")).

17. *Total Bribery Alleged in FCPA-Related Enforcement Actions*, STAN. L. SCH. FOREIGN CORRUPT PRAC. ACT CLEARINGHOUSE, http://fcpa.stanford.edu/statistics-analytics.html?tab=5 (last visited May 13, 2019).

18. *See, e.g.*, *Issued Significant Enforcement Actions*, U.S. NUCLEAR REG. COMM'N, https://www.nrc.gov/about-nrc/regulatory/enforcement/current.html (last visited May 13, 2019).

19. This number reflects information as published by Stanford Law School. *DOJ and SEC Enforcement Actions*, *supra* note 7 (manipulating chart to how actions from 2008–2017 only). Depending upon how one counts certain variables, different results are possible. Additionally, if the SEC and DOJ brought a concurrent enforcement action, the enforcement action is counted for both, so adding the SEC and DOJ totals would result in double counting.

20. *DOJ and SEC Enforcement Actions*, *supra* note 7 (manipulating chart to actions from 1998–2007).

21. *Id.* (manipulating chart to actions from 1977–1997).

22. For a detailed history of the FCPA, see Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 OHIO ST. L.J. 929 (2012).

Moreover, the increased enforcement of the FCPA has dramatically changed the landscape for multinational corporations in the United States and international companies whose business touches the United States financial markets in some way.[23] For example, from 1977–1997, enforcement authorities collected over $104 million in monetary sanctions, with a yearly average of $4.3 million.[24] In contrast, from 1998–2007, enforcement authorities collected over $556 million in monetary sanctions, with a yearly average of over $8.3 million.[25] The settlement amounts have been even more dramatic over the past decade. From 2008–2017, enforcement authorities collected over $11 billion in monetary sanctions, with an average yearly sanction of $71 million dollars.[26] In addition to these monetary penalties, firms have (i) spent considerable resources to conduct internal investigations, (ii) managed liability in other jurisdictions with their own anti-bribery and anti-corruption laws, (iii) contended with civil liability as a result of their violations, and (iv) negotiated the ramifications of possible debarment from the ability to obtain government contracts.[27]

Thus, the actions of the government over the past decade have cemented the importance of FCPA compliance. Because FCPA violations often result in these extremely large monetary sanctions, as well as other collateral consequences, corporations maintain what appears to be a rational level of fear that an FCPA violation could result in a crippling sanction that has the power to harm the firm.[28] Additionally, increased enforcement activity, publicized speeches from high-ranking governmental officials, as well as the creation of law firm practice groups focused specifically on the statute, have all contributed to influence the behavior of organizations who fall within the statute's scope.[29]

23. *See* 15 U.S.C. § 78dd-2(h)(5) (2018) (defining "interstate commerce" as the "trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof").

24. *Total and Average Sanctions*, STAN. L. SCH. FOREIGN CORRUPT PRAC. ACT CLEARINGHOUSE, http://fcpa.stanford.edu/chart-penalties.html (last visited May 13, 2019) (manipulating chart to years 1977–1997). The sanction amounts refer to the year the case was initially brought by the enforcement authority; not the year the sanction was levied or the year the sanction was ultimately collected.

25. *Id.* (manipulating chart to years 1998–2007).

26. *Id.* (manipulating chart to years 2008–2017).

27. *See* Press Release, Odebracht and Braskem, *supra* note 1; *see also* Matt Kelly, *Walmart FCPA Update: $837 Million*, RADICAL COMPLIANCE (Apr. 4, 2017) (noting that Walmart has spent hundreds of millions of dollars on FCPA investigations and expenditures since allegations were revealed of improper bribery at its Mexican subsidiary), http://www.radicalcompliance.com/2017/04/04/walmart-fcpa-update-837-million/; Myles Udland, *Proxy Advisory Firm Reminds Walmart Investors of the $450 Million the Company Spent on an Ongoing Investigation*, BUS. INSIDER (May 27, 2014), https://www.businessinsider.com/iss-advises-walmart-investors-to-vote-down-board-members-2014-5.

28. Udland, *supra* note 27.

29. *See* Andrew Weissmann, Fraud Section Chief., DOJ, Keynote Address at the ACI 17th Annual New York Conference on the FCPA (May 20, 2015) (transcript available at https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/06/08/06-02-2015-aci-keynote.pdf); *see also* Max Stendahl, *Law360 Names 10 FCPA Powerhouse Firms*, LAW360 (May 24, 2013), https://www.law360.com/articles/441765/law360-names-10-fcpa-powerhouse-firms.

B. Other Areas of Risk

Today's multinational corporations are generally in a constant state of concern over their institutions' abilities to maintain compliance with the FCPA and related anti-bribery provisions worldwide.[30] Domestically, however, other regulatory and statutory areas should be just as, if not more, important priorities for firms considering the appropriate nature and scope of their compliance programs.

For example, in 2016, the United States Government Accountability Office provided a report discussing the monetary penalties paid by financial institutions from 2009–2015. It found that United States enforcement authorities levied approximately:

> $12 billion in fines, penalties, and forfeitures for violations of Bank Secrecy Act/anti-money-laundering regulations (BSA/AML), [FCPA], and U.S. sanctions programs requirements by the federal government. Specifically, GAO found that from January 2009 to December 2015, federal agencies assessed about $5.2 billion for BSA/AML violations, $27 million for FCPA violations, and about $6.8 billion for violations of U.S. sanctions program requirements.[31]

Thus, while financial institutions risk sanctions for FCPA violations, it looks like their monetary penalty risks may be greater in the areas of anti-money laundering and U.S. sanctions programs.

Additionally, other potential areas of regulatory and legal concern have resulted in significant monetary penalties levied against corporations. For example, in 2016 alone the SEC whistleblower program resulted in fines and whistleblower awards in the amount of approximately $89.67 million.[32]

30. *See* CONSERO, CORPORATE COMPLIANCE & ETHICS REPORT 3 (2017) (finding that 34% of companies surveyed named "bribery and corruption" a primary area of focus for the coming 12 months); CONSERO, CORPORATE COMPLIANCE & ETHICS REPORT 6 (2013) (finding that 33% of companies surveyed named "bribery/corruption" the current top area of risk at their company); DOW JONES & METRICSTREAM, GLOBAL ANTI-CORRUPTION SURVEY 9–10 (2016) (finding that 65% of those surveyed had delayed or stopped activities with business partners due to concerns about breaking anti-corruption regulations); DOW JONES, ANTI-CORRUPTION SURVEY 4 (2014) (finding that 65% of those surveyed had delayed or stopped activities with business partners due to concerns about breaking anti-corruption regulations); KPMG, KEY RISKS FOR INTERNAL AUDIT (2017/18) (outlining sixteen sources of risks for organizations in 2017–2018 and determining anti-bribery and anti-corruption concerns as number three); KROLL, ANTI-BRIBERY AND CORRUPTION BENCHMARKING REPORT 11 (2018) (finding that of companies surveyed 28% of respondents think their company's bribery and corruption risks will increase in 2018 and 65% believe their risk will stay the same); KROLL, ANTI-BRIBERY AND CORRUPTION BENCHMARKING REPORT 7 (2016) (finding that 40% of companies surveyed believed their organization's bribery and corruption risks will increase during the year); Henry Cutter, *C-Suite on Hot Seat Over Bribery, Study Says*, WALL ST. J. (June 28, 2018, 8:47 AM), https://blogs.wsj.com/riskandcompliance/2018/06/28/the-morning-risk-report-c-suite-on-hot-seat-over-bribery-study-says/.

31. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-297, FINANCIAL INSTITUTIONS: FINES, PENALTIES, AND FORFEITURES FOR VIOLATIONS OF FINANCIAL CRIMES AND SANCTIONS REQUIREMENTS 2 (2016), https://www.gao.gov/assets/680/675987.pdf.

32. *Press Releases*, SEC, https://www.sec.gov/news/pressreleases?aId=edit-year&year=2016&month=All&items_per_page=100&page=2 (last visited July 30, 2019) (manipulating press releases to only include releases during 2016).

TABLE 1

Date	Case	Fine or Whistleblower Award	Additional Information
Dec. 20, 2016	SandRidge Energy Inc.	$1,400,000	
Dec. 19, 2016	NeuStar Inc.	$180,000	
Dec. 9, 2016	Whistleblower Award	$900,000	
Dec. 5, 2016	Whistleblower Award	$3,500,000	
Nov. 14, 2016	Whistleblower Award	$20,000,000	
Sept. 29, 2016	International Game Technology (IGT)	$500,000	
Sept. 28, 2016	Anheuser-Busch InBev	$6,000,000	Fine is from both FCPA and whistleblower violations
Sept. 20, 2016	Whistleblower Award	$4,000,000	
Aug. 30, 2016	Whistleblower Award	$22,000,000	
Aug. 16, 2016	Health Net Inc.	$340,000	
Aug. 10, 2016	BlueLinx Holdings Inc.	$265,000	
June 9, 2016	Whistleblower Award	$19,000,000	
May 20, 2016	Whistleblower Award	$450,000	
May 17, 2016	Whistleblower Award	$5,000,000	Fine range is $5–6 million
May 13, 2016	Whistleblower Award	$3,500,000	
Mar. 8, 2016	Whistleblower Award	$1,930,000	Approximate fine amount
Jan. 15, 2016	Whistleblower Award	$700,000	Fine will be greater than this amount

As a result of the program, the SEC sanctioned companies for securities violations, securities fraud, and for retaliating against whistleblowers who attempted to report misconduct internally or directly to the SEC.[33]

Moreover, DOJ monetary penalties for antitrust violations in 2016 topped approximately $428 million.[34]

33. SEC, 2016 ANNUAL REPORT TO CONGRESS ON THE DODD-FRANK WHISTLEBLOWER PROGRAM, https://www.sec.gov/files/owb-annual-report-2016.pdf.

34. *Press Releases: Antitrust Division*, DOJ, https://www.justice.gov/atr/press-releases (last visited July 30, 2019) (reviewing only 2016 press releases).

TABLE 2

Date	Case	Fine	Additional Information
Nov. 15, 2016	Michelle Cho, an officer of Far East Construction Corporation	$35,000	Forfeiture of $169,166; combined total of $204,166
Nov. 8, 2016	Usui Kokusai Sangyo Kaisha Ltd.	$7,200,000	
Oct. 28, 2016	Fayez Sarofim	$720,000	
Sept. 15, 2016	Alpha Corporation	$9,000,000	
Sept. 13, 2016	Anthony B. Ghio, John R. Vanzetti, Theodore B. Hutz, Richard W. Northcutt, Yama Marifat, Gregory L. Jackson, Walter Daniel Olmstead, Robert Rose, Kenneth A. Swanger, Andrew B. Katakis and Donald M. Parker	$6,000,000	More than this levied against individual real estate investors
Sept. 2016	Rubycon	$12,000,000	
Aug. 23, 2016	Walter Crummy, a former officer and owner of MCC Construction Company	$105,618	Forfeiture amount
Aug. 10, 2016	Caledonia Investments	$480,000	
Aug. 9, 2016	John Bennett of Bennett Environemental Inc.	$12,500	$3,808,065 in restitution; combined total of $3,820,565
Aug. 9, 2016	Hitachi Automotive Systems Ltd.	$55,480,000	Fine is the minimum agreed to
July 20, 2016	Nishikawa Rubber Co. Ltd.	$130,000,000	
July 13, 2016	Wallenius Wilhelmsen Logistics AS	$98,900,000	
July 12, 2016	ValueAct	$11,000,000	Highest HSR fine as of that date
June 22, 2016	Thomas Harper, a former officer and owner of MCC Construction Company	$165,711	Restitution
June 16, 2016	GEO Specialty Chemicals Inc.	$5,000,000	
June 2016	Hitachi Chemical	$3,800,000	
May 16, 2016	Corning International Kabushiki Kaisha	$66,500,000	
May 12, 2016	American Society of Composers, Authors and Publishers	$1,750,000	
Apr. 20, 2016	Keiji Kyomoto, a former executive of an automotive body sealing products supplier based in Hiroshima, Japan	$20,000	
Mar. 29, 2016	James Jeffers Jr., a former bidder for a Pennsylvania tax liens investment company	$25,000	
Mar. 17, 2016	Omron Automotive Electronics Co. Ltd.	$4,550,000	
Feb. 2, 2016	Andrew Martingano, owner of American Pipe Bending and Fabrication Co. Inc.	$150,000	Also paid resitution of over $1.6 million jointly and severally with co-conspirators
Feb. 2, 2016	MCC Construction Company	$1,769,294	
Jan. 21, 2016	NEC TOKIN	$13,800,000	

Thus, while the FCPA is important, these admittedly brief examples demonstrate that other regulatory and legal areas also result in significant monetary penalties for firms engaged in misconduct unrelated to the FCPA.

As demonstrated above, organizations must carefully assess their compliance with the FCPA or risk having an enforcement action brought against them, which could result in significant monetary penalties. These same firms, however, must also consider where FCPA compliance must fit within their broader compliance program because they will often have other, significant areas of potential risk. The question, then, is whether the focus on the FCPA may sometimes be so significant so as to improperly incentivize firms to spend disproportionate amounts of time and resources on the FCPA to the detriment of other regulatory and legal requirements.[35] The examples discussed in Part III suggest this possibility.

35. A number of anti-corruption surveys indicate that this question may be warranted; although the information in these surveys may be skewed due to their subject-matter specificity. *See, e.g.*, DOW JONES & METRICSTREAM, *supra* note 30, at 1, 9, 21 (finding that 56% of companies surveyed reported that increased enforcement of the FCPA has a major impact on company policies and procedures; for North American companies this number was 60%; the UK Bribery Act as next highest regulation of impact at 45%; Dodd Frank was

III. OUTSIZED INFLUENCE?

This Part questions whether concerns regarding the FCPA disproportionately influence corporate compliance efforts to the detriment of the creation and implementation of a compliance program that takes into account other areas of risk. The Part begins with two case studies, which demonstrate how emphasis on the FCPA occurred while other significant compliance failures or concerns were present. The Part then turns to law and economics literature to help explain how the FCPA might develop an outsized influence over compliance efforts within firms.

A. Case Studies

This Section presents two case studies in an effort to demonstrate two ways firms might overemphasize the FCPA to the detriment of their organizations. First, a firm may focus on creating a robust FCPA compliance program when its greatest area of risk appears to be rooted to a different legal or regulatory source. Second, a focus on the FCPA may inhibit a firm's detection of widespread, similar misconduct within its ranks. These are just two of what are likely many ways in which an overemphasis on the FCPA could have detrimental effects on firms. Importantly, they are not presented to prove that firms overemphasize the FCPA; they are presented to demonstrate why firms should consider whether their internal compliance programs are appropriately balanced and nuanced.

1. General Motors

In 2005, General Motors Corporation's ("General Motors") Board Audit Committee created its Global Compliance Department, which was later rebranded as its Global Ethics and Compliance Department.[36] In 2008, the then executive director for Global Ethics and Compliance discussed the benefits of adopting a centralized compliance program at the company instead of having disjointed compliance personnel in charge of things like environmental or safety compliance.[37] The goal was to better equip the firm to address its unique risks by utilizing a centralized compliance department.[38] General Motors, when discussing risks associated with emerging markets where it did business, identified five areas of risk: (i) accounting and financial controls, (ii) FCPA/anti-corruption, (iii) export compliance, (iv) information security, and (v) political/economic

listed at 39%); KROLL, *supra* note 30, at 1, 7 (explaining that "[t]he data suggests that companies that dedicate less than half of their compliance resources on anti-bribery and corruption related concerns almost universally feel unprepared to deal with the strain of complying with global regulations"); DOW JONES, *supra* note 30, at 1, 11, 20 (2014) (finding that 49% of companies surveyed reported that increased enforcement of the FCPA has a major impact on company policies and procedures; for North American companies this number was 63%; the UK Bribery Act as next highest regulation of impact at 39%; Dodd Frank was listed at 34%).

36. Andrew Singer, *As GM Struggles, Its Ethics and Compliance Office Motors On*, ETHIKOS & CORP. CONDUCT Q. (Sept./Oct. 2008), http://www.singerpubs.com/ethikos/html/generalmotors.html.

37. *Id.*

38. *Id.*

risk.[39] In 2008, the executive director of General Motors's Global Ethics and Compliance Department explicitly identified the FCPA as absorbing most of the department's time and effort.[40]

As General Motors made significant changes to its global compliance program from 2005–2008, and while General Motors, in 2008, was focused on FCPA compliance within its emerging markets, it missed a significant problem within its domestic compliance program.[41] Between 2004 and 2006, several committees at General Motors were charged with considering a fix for a faulty ignition switch. The committees were made up of "engineers and business people whose job was to understand how [General Motors's] cars were built and how different systems of the car interact."[42] Indeed, "General Motors's Product Investigations group, charged with identifying and remedying safety issues, . . . opened and closed an investigation in 2005 in the span of a month[,]" finding no safety issue to be remedied with regards to the ignition switch at issue.[43] In 2007, entities outside of General Motors, however, made a connection between the operation of the ignition switch in certain General Motors vehicles and the non-deployment of airbags, yet General Motors continued to classify problems with the ignition switch as issues of "convenience" as opposed to issues of "safety."[44] Ultimately, General Motors took eleven years to identify the problems with its ignition switch and issue a recall.[45] In that time, hundreds of people died or were injured because of the company's failure to identify and respond to the problem.[46] A subsequent report found:

> While the issue of the ignition switch passed through numerous hands at [General Motors], from engineers to investigators to lawyers, nobody raised the problem to the highest levels of the company. As a result, those in the best position to demand quick answers did not know questions needed to be asked.[47]

Ultimately, a recall was not issued until 2014.[48]

Consider the timing of General Motors's implementation of a new global ethics and compliance program in 2005 with its simultaneous failure to set up a system likely to prevent, detect, and properly investigate issues related to product safety for at least nine additional years. General Motors is an automobile manufacturer; what bigger potential risk does the company have than the risks associated with building an unsafe car? Yet, while the executive director of its Global

39. *Id.*

40. *Id.*

41. ANTON R. VALUKAS, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 1 (May 29, 2014), https://www.aieg.com/wp-content/uploads/2014/08/Valukas-report-on-gm-redacted2.pdf.

42. *Id.* at 3.

43. *Id.*

44. *Id.*

45. *Id.* at 4.

46. Chris Isidore, *Death Toll for GM Ignition Switch: 124*, CNN MONEY (Dec. 10, 2015, 10:35 AM), http://money.cnn.com/2015/12/10/news/companies/gm-recall-ignition-switch-death-toll/index.html.

47. VALUKAS, *supra* note 41, at 3.

48. *Id.*

Ethics and Compliance Department emphasized the importance of FCPA compliance, the firm failed to effectively implement robust response systems to potential product safety concerns.

2. Hewlett-Packard

In 2014, Hewlett-Packard Company ("Hewlett-Packard") entered into a settlement with the SEC for FCPA violations.[49] Specifically, Hewlett-Packard subsidiaries in Russia, Mexico, and Poland made unlawful payments to various government officials to obtain business.[50] These false payments were improperly recorded in the subsidiaries' books and records, which resulted in errors in Hewlett-Packard's books and records, which violated Section 13(b)(2)(A) of the Exchange Act, the "books and records" provision.[51] Hewlett-Packard also "violated Section 13(b)(2)(B), the 'internal controls' provision, by failing to devise and maintain sufficient accounting controls to detect and prevent the making of improper payments to foreign officials and ensure that payments were made only to approved channel partners."[52] In 2014, Hewlett-Packard agreed to cease and desist from committing any future violations of Sections 13(b)(2)(A) and 13(b)(2)(B) of the Exchange Act and to pay disgorgement in the amount of $29,000,000 and prejudgment interest of $5,000,000.[53] Hewlett-Packard also agreed to submit written reports to the SEC discussing its efforts to better comply with the FCPA over a three-year period.[54] Additionally, Hewlett-Packard's subsidiaries resolved their FCPA claims with the DOJ.[55] The Russian subsidiary entered a guilty plea, while the Mexican and Polish subsidiaries entered into deferred prosecution agreements.[56] Ultimately, the three subsidiaries agreed to pay $76,750,224 in criminal penalties and forfeiture.[57]

As noted above, because of the subsidiary misconduct, Hewlett-Packard explicitly agreed to strengthen its FCPA compliance program.[58] This sort of subject matter specific admonition is quite common.[59] The focus on Hewlett-Packard's efforts to comply with the FCPA makes intuitive sense, because the underlying misconduct resolved by the settlement between Hewlett-Packard and the SEC was related solely to the FCPA. Given the size of the monetary penalties, which when including the subsidiary conduct exceeded $100 million, one can

49. Press Release, DOJ, Hewlett-Packard Russia Agrees to Plead Guilty to Foreign Bribery (Apr. 9, 2014), https://www.justice.gov/opa/pr/hewlett-packard-russia-agrees-plead-guilty-foreign-bribery [hereinafter Press Release, HP Russia].

50. *Id.*

51. Hewlett-Packard Co., Exchange Act Release No. 71916, 108 SEC Docket 2797 (Apr. 9, 2014) [hereinafter HP Case].

52. *Id.* at 12.

53. *Id.* at 13.

54. *Id.* at 14–15.

55. *Id.* at 13.

56. *Id.*

57. Press Release, HP Russia, *supra* note 49.

58. *Id.*

59. Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1010–13 (2017).

understand why focusing on FCPA compliance would be of great importance to leaders at Hewlett-Packard and, frankly, for other companies observing the matter. But when one looks at other misconduct Hewlett-Packard engaged in during the five years prior to the FCPA settlements, it begins to look as if the FCPA is just one of many areas the company should be focused on when restructuring and strengthening its compliance program.

Hewlett-Packard was directly involved in at least three additional, significant settlements with the government to resolve misconduct. In 2010, Hewlett-Packard settled claims that it defrauded the General Services Administration and other federal agencies by paying kickbacks or influencer fees "to system integrator companies in return for recommendations that the federal agencies purchase [Hewlett-Packard]'s products."[60] As part of the settlement, Hewlett-Packard agreed to pay a $55 million monetary penalty.[61] Also in 2010, Hewlett-Packard resolved allegations that it was involved in E-rate fraud, resulting in a monetary penalty of $16.25 million.[62] Hewlett-Packard improperly provided gifts, including trips on a yacht and tickets to the 2004 Super Bowl, to independent school district personnel in an effort to "get contracts that included some $17 million in [Hewlett-Packard] equipment."[63] In 2014, Hewlett-Packard settled claims that it had defrauded the U.S. Postal Service by overcharging it for products between October 2001 and December 2010 in violation of the False Claims Act, and agreed to pay a monetary penalty in the amount of $32.5 million.[64]

Thus, Hewlett-Packard's potential financial liabilities for engaging in fraudulent conduct appear to be comparable to those found for violating the FCPA. Perhaps more importantly, the 2014 resolution of FCPA claims was the third resolution Hewlett-Packard entered into with the government regarding improper payments—bribes—made for the purpose of influencing governmental officials in a manner that would assist Hewlett-Packard to enter into beneficial contracts. And yet, there was no discussion of these past instances of misconduct when settling the FCPA claim.[65] Indeed, in a company statement, the then-executive vice-president and general counsel explained: "The misconduct described in the [FCPA] settlement was limited to a small number of people who are no longer at the company."[66] There was no public recognition of any potential links to the other settlements Hewlett-Packard entered into.

60. Press Release, DOJ, Hewlett-Packard Agrees to Pay the United States $55 Million to Settle Allegations of Fraud (Aug. 30, 2010), https://www.justice.gov/opa/pr/hewlett-packard-agrees-pay-united-states-55-million-settle-allegations-fraud.

61. *Id.*

62. Press Release, Fed. Commc'n's Comm'n, HP to Pay $16.25 million to Settle DOJ-FCC-E-Rate Fraud Investigation (Nov. 10, 2010), https://apps.fcc.gov/edocs_public/attachmatch/DOC-302764A1.pdf.

63. *Id.*

64. Press Release, DOJ, Hewlett-Packard Company Agrees to Pay $32.5 Million for Alleged Overbilling of the U.S. Postal Service (Aug. 1, 2014), https://www.justice.gov/opa/pr/hewlett-packard-company-agrees-pay-325-million-alleged-overbilling-us-postal-service.

65. *See* Press Release, HP Russia, *supra* note 49.

66. Press Release, Hewlett-Packard, HP Announces Settlement with DOJ and SEC (Apr. 9, 2014), http://www8.hp.com/us/en/hp-news/press-release.html?id=1624050#.

As noted above, when FCPA claims are resolved, they are addressed as if they occur within a vacuum instead of as part of a broader and more complex compliance regime.[67] FCPA compliance is, of course, of great importance for many private firms. Yet, there may be other areas that should receive just as much, if not more, attention by compliance personnel. Given its history of corporate misconduct, it would seem that Hewlett-Packard, along with government regulators, should be just as concerned with ensuring that it roots out activity that may be fraudulent as it is with ensuring that it maintains compliance with the FCPA. When turning toward its remediation efforts, it may have been helpful if Hewlett-Packard was more explicitly sensitive to the history of bribery at the firm when considering its responses to the FCPA matter in 2014.

These two examples are meant to be illustrative of the potential harm that may arise when a firm prioritizes FCPA compliance over other risk areas. They are, however, just two examples, so one may be concerned that they are outlier cases. This objection is fair.[68] Even assuming, however, that these examples reflect atypical conduct, it may still be beneficial for firms to assess whether they have overemphasized FCPA compliance at the expense of other areas of potential risk. Other areas of risk may have devastating consequences for the firm and to those harmed by the potential misconduct, which makes it important for firms to consider the correct allocation of their compliance priorities.

B. Fidelity to Anti-Bribery Efforts

Creating and implementing a compliance program is just one of many responsibilities firms have. As such, firms typically allocate a specific amount of time, money, and personnel towards compliance efforts, just as they would for any department. Because the FCPA is just one of many potential regulatory areas of risks for firms, one might question why organizations might overemphasize FCPA compliance when they are aware of other potential areas of risk. Law and economics literature may reveal one answer.[69]

Today's corporate criminal liability regime is built largely upon the imposition of monetary penalties.[70] In part, this system was created because law and economics literature has long-stated that an appropriate fine will deter certain

67. Root, *supra* note 59, at 1019.

68. With regards to Hewlett-Packard, a previous empirical project I completed suggests that governmental regulators often fail to detect corporate repeat offenses across diverse regulatory areas, which then provides a disincentive for firms to identify when their compliance programs are in need of a more systematic overhaul. *See generally id.*

69. *See generally* Neal Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385 (1997).

70. Many modern resolutions of corporate criminal liability include other non-monetary reforms within organizations. There is debate about the appropriateness of these non-monetary reforms, which are essentially mandated corporate governance reforms. *See* Lawrence A. Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV. 1, 14 (2014). *But see* Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075 (2016) (arguing that compliance does not fit within traditional models of corporate governance).

levels of misconduct.[71] The problem, however, is that "criminal law can be seen as setting prices for crimes, and these price effects may cause substitution."[72] "[T]wo products are substitutes when they compete with each other . . . . Consumers will tend to use more of a good—to substitute in favor of the good—when its relative price falls, and to use less of it—to substitute away from the good—when its relative price increases."[73] As relevant to corporate criminal liability, significant FCPA enforcement over the past decade has incentivized firms to focus on creating robust FCPA compliance programs.[74] A firm acting rationally would be expected to increase its spending on all compliance efforts to the point where the marginal benefits no longer exceed the costs. Because, however, the return to expenditures on FCPA compliance is likely to exceed the return on investment for other forms of compliance expenditures, a focus on FCPA compliance has the potential to crowd out other forms of compliance.[75] For example, mitigation credit has long been given by those charged with enforcing the FCPA, but the antitrust division traditionally did not give such credit.[76]

There is evidence, however, that firms are not acting rationally in the compliance space and are instead acting reactively. For example, there is anecdotal evidence suggesting that firms are not calculating their anticipated costs and benefits for their compliance expenditures. The former compliance counsel at the DOJ has repeatedly commented on the lack of internal assessment and data generation by organizations with regards to their own compliance efforts.[77] She explained that while "in a room full of approximately a hundred compliance officers from among some of the most well-known and sophisticated companies, I asked how many of them had real-time visibility to all financial transactions in their enterprises. One person raised his hand. One!"[78] If firms are not gathering data associated with the costs, they are spending on their compliance programs and their various components; they also cannot be engaged in a rational actor-type analysis of the costs and benefits of their compliance expenditures.

If firms are responding reactively to compliance pressures, it causes one to wonder how firms assess what their compliance expenditures should actually look like. If corporations are committing finite sets of resources toward compliance efforts, then every dollar spent on the FCPA is a dollar not spent on some

71. *See, e.g.*, Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 701 (1997); Gina-Gail S. Fletcher, *Benchmark Regulation*, 102 IOWA L. REV. 1929, 1938 (2017) ("The effectiveness of sanctions depends on whether they can reflect the nature and magnitude of the harm.").

72. Katyal, *supra* note 69, at 2387.

73. *Id.* at 2386.

74. *See supra* notes 1–14 and accompanying text.

75. *See* Katyal*, supra* note 69, at 2387.

76. Root, *supra* note 59, at 1027 n.105. *But see* Press Release, DOJ, Antitrust Division Announces New Policy to Incentivize Corporate Compliance (July 11, 2019), https://www.justice.gov/opa/pr/antitrust-division-announces-new-policy-incentivize-corporate-compliance.

77. Hui Chen, *A Tale of Two Data Sets*, BUREAU OF NAT'L AFF., INC. (Apr. 23, 2018), https://huichenethics.files.wordpress.com/2018/04/tale-of-two-data-sets.pdf.

78. *Id*.

other potential area of risk. Thus, if firms overemphasize the importance of FCPA compliance, they will necessarily fail to properly address other legal and regulatory areas due to the absence of money allocated to address those areas.

As outlined in Part II, the rise of FCPA enforcement and sanctions has skyrocketed over the past ten to fifteen years. Corporations have responded to that rise by implementing anti-bribery and anti-corruption policies;[79] law firms have responded by creating dedicated practice groups;[80] law schools have responded by developing FCPA-specific courses;[81] and legal scholarship has responded with countless articles dissecting the ins and outs of the statutory regime and its enforcement.[82] Yet while those changes developed, firms with seemingly robust FCPA compliance programs failed to detect product safety concerns,[83] fraudulently opened accounts,[84] and repeated schemes of domestic bribery.[85] As the FCPA turns forty, one relevant question is whether the FCPA should continue to hold such a prioritized status.

IV. NEXT STEPS

This Essay questions whether there may be an overemphasis on FCPA compliance within organizations today as a result of the government's robust FCPA enforcement policy and associated sanctions regime. This Part suggests that instead of prioritizing FCPA compliance, regulators, prosecutors, and firms should focus on improving compliance programs more generally.

A. Connecting Repeat Compliance Failures

Government regulators and prosecutors should incentivize firms to think through their compliance programs in a comprehensive way, but to do so, the government must acknowledge, detect, and sanction corporate repeat offenses.

Coordinating Compliance Incentives[86] reveals that when corporate repeat offenders appear before the same regulator or prosecuting body, they are treated as recidivists and given a more robust sanction. When, however, a corporation

79. *See, e.g.*, *Global Integrity Policy: Gifts, Entertainment and Anti-Corruption*, GEN. MOTORS, https://www.gm.com/content/dam/gm/en_us/english/Group4/InvestorsPDFDocuments/GM_Global_Integrity_Policy.pdf.

80. *See, e.g.*, *Foreign Corrupt Practices Act and Anti-Corruption*, WILMERHALE, https://www.wilmerhale.com/en/solutions/foreign%20corrupt%20practices%20act%20and%20anti-corruption (last visited July 20, 2019).

81. *See, e.g.*, *Course Catalog*, U. NOTRE DAME L. SCH., https://law.nd.edu/academics/course-catalog/ (last visited July 30, 2019) (listing "Foreign Corrupt Practices Act (73403)").

82. A February 2018 search on Lexis Advance for the term "FCPA" from January 1 to December 31, 2017 in the "Law Review and Journals" database, netted 113 results. The first ten of which explicitly referenced the "FCPA" or "Foreign Corrupt Practices Act" in the article's title.

83. *See supra* Subsection III.A.1.

84. *Compare supra* Part I, *with* Jonathan J. Rusch, *Memorandum to the Compliance Counsel, United States Department of Justice*, 6 HARV. BUS. L. REV. ONLINE 59 (2016) (publishing open letter from senior vice president and head of Anti-Bribery & Corruption Governance at Wells Fargo to DOJ compliance counsel).

85. *See supra* Subsection III.A.2.

86. Root, *supra* note 59.

appears before multiple government regulators or prosecuting agencies, it is not treated as a repeat offender, even when the underlying misconduct, as found in the Hewlett-Packard example of improper bribery, appears to be quite similar.[87]

Thus, it may be 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.[88] By employing an enforcement strategy that detects when an institution is suffering from a systemic compliance failure and holding corporations responsible for being repeat offenders across diverse regulatory areas, federal regulators can encourage corporations to implement more robust reforms to their compliance programs. A change in practice of this nature could ultimately lead to improved ethical conduct and more effective compliance programs within public companies.[89]

B. More Precise Compliance Assessments

Beyond getting the enforcement incentives right, when compliance failures occur, and they will, organizations must employ tools that are likely to result in accurate, rigorous, and comprehensive compliance assessments.

The Compliance Process suggests that organizations may be able to improve compliance within their organizations by reframing the way they approach their assessments of compliance failures.[90] Currently, regulators, prosecutors, industry leaders, and academics often think of compliance failures through the lens of "why did the compliance program fail."[91] Compliance efforts within organizations, however, involve the four discrete stages of (i) prevention, (ii) detection, (iii) investigation, and (iv) remediation.[92] A compliance failure could occur at just one of these stages, but what initially seems like a solitary failure of a compliance program may actually involve failures across multiple stages within the compliance process.

Thus, when firms assess compliance failures, particularly significant or complex compliance failures, they may benefit from utilizing a process frame to complete the assessment. Instead of inquiring, "why did the compliance program fail," they might ask, "where within the compliance process did a failure or failures occur." By changing the inquiry slightly, firms may be able to develop a more precise understanding of the depth and breadth of the underlying corporate misconduct and develop more effective strategies for reform.

87. *Id.* at 1022.
88. *Id.* at 1058.
89. *Id.* at 1058.
90. *See generally* Veronica Root, *The Compliance Process*, 94 IND. L.J. 203 (2019).
91. *Id.* at 228.
92. *Id.* at 205.

C. Global Compliance Overhauls

Today's corporations have increasingly complex organizational structures. Whether it is a complicated web of parent and subsidiary relationships or complex joint ventures, those charged with implementing compliance programs are often responsible for hundreds, if not thousands, of employees across dozens of departments in countries around the world.[93] Those responsible for developing global compliance programs, like that implemented at General Motors in 2005, have an exceedingly challenging task.

Much of the current focus of compliance programs has been on their structural components.[94] For example, there are debates about whether the roles of general counsel and chief compliance officer should be consolidated or separate.[95] Similarly, there are debates about how the reporting lines should be structured between the chief compliance officer and the board.[96] As organizations have grown in size and scope, however, anecdotal evidence suggests that firms have failed to adopt sufficient processes to ensure that risks are appropriately managed.[97] Indeed, it often looks as if compliance programs are siloed within particular departments or regulatory areas.[98] These silos, however, can limit a compliance program's ability to detect similar types of misconduct across the organization.[99] As such, academics and organizational leaders may want to consider adopting internal governance processes that aggregate information in a systematic manner.[100]

93. *Id.* at 222.

94. *Id.* at 246–47.

95. Jose A. Tabuena, *The Chief Compliance Officer vs the General Counsel: Friend or Foe?*, (Dec. 2006), COMPLIANCE & ETHICS (Dec. 2006), https://www.corporatecompliance.org/Portals/1/PDF/Resources/past_handouts/CEI/2008/601-3.pdf. *See generally* John B. McNeece IV, *The Ethical Conflicts of the Hybrid General Counsel and Chief Compliance Officer*, 25 GEO. J. LEGAL ETHICS 677 (2012).

96. *See* Patrick J. Gnazzo, *The Chief Ethics and Compliance Officer: A Test of Endurance*, 116 BUS. & SOC. REV. 533 (Dec. 2011).

97. For example, Barclays retained outside counsel to conduct an internal investigation after its participation in LIBOR manipulation was revealed. ANTHONY SALZ, SALZ REVIEW: AN INDEPENDENT REVIEW OF BARCLAYS' BUSINESS PRACTICES (2013), https://online.wsj.com/public/resources/documents/SalzReview04032013.pdf. The investigation produced a 244-page report, which detailed "cultural challenges" resulting from the bank's rapid expansion prior to the financial crisis. "Barclays became complex to manage, tending to develop silos with different values and cultures." *Barclays' Salz Review Blames Bank Culture*, BBC (Apr. 3, 2013), http://www.bbc.com/news/business-22012261; *see also* Kristin N. Johnson & Steven A. Ramirez, *New Guiding Principles: Macroprudential Solutions to Risk Management Oversight and Systemic Risk Concerns*, 11 U. ST. THOMAS L.J. 386, 389 (2014) ("[C]onclud[ing] that the current regulatory and legal framework governing risk management in the financial services industry remains deficient and dependent on corporate governance-based solutions to mitigate risk taking by financial institutions . . . unnecessarily expos[ing] our financial system and economy to . . . further risk management failures.").

98. Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. (forthcoming 2020); Kristin N. Johnson, *Addressing Gaps in the Dodd-Frank Act: Directors' Risk Management Oversight Obligations*, 45 U. MICH. J. L. REFORM 55, 65 (2011) ("The traditional fragmented approach to risk management encouraged each business manager to evaluate risks relevant to her specific unit's performance.").

99. Martinez, *supra* note 98.

100. *Id.*

D. Challenging Compliance Assumptions

Finally, regulators, prosecutors, industry leaders, and academics should consider whether some of the assumptions surrounding compliance are ripe for challenge. For example, a foundational assumption within compliance scholarship and in practice is that perfect compliance is not the goal.[101] It is not possible to stop all misconduct, and thus there is no expectation that perfect compliance be achieved. But what if that assumption has resulted in a lowering of standards within organizations in a manner that makes dysfunctions more likely or more acceptable? What would happen if instead of tolerating certain amounts of noncompliance, firms were encouraged to achieve perfect compliance? Might that help stop what looks to be a revolving door of misconduct at many firms? There are a variety of assumptions within the field of compliance, and it may be time to question and push against the veracity of those commonly held understandings.

V. ADDITIONAL QUESTIONS

This Essay raises a set of questions about the importance of the FCPA within compliance efforts and suggests some routes corporations, the government, and scholars might want to consider going forward. There are, however, a variety of additional questions that this Essay has left unanswered, which this Part will briefly discuss.

A. Is There an Overemphasis on the FCPA?

This Essay questions whether there is an overemphasis on the FCPA within organizations but does not actually answer the question definitively. Answering this question empirically does not appear possible at this time. Firms do not break out their compliance cost metrics and, even if they did, it would be difficult, at least currently, to compare those metrics across firms.[102] Thus, this Essay puts forward a question for academics, governmental actors, and leaders within organizations to consider in an effort to encourage them to think through the correct balance of FCPA compliance in light of other areas of risk. It may be that one firm will determine it is focusing too much effort on the FCPA, while another firm may conclude that their FCPA compliance is appropriate, but its focus on other areas of concern are in need of improvement. The goal of this Essay is to encourage firms to think through the right balance of their compliance programs across a continuum of risks. The end result of such an assessment will necessarily vary.

101. *Id.*

102. There are efforts underway to identify ways to measure compliance, but for the most part these efforts are in nascent stages. *See, e.g.*, *Measuring Compliance in the 21st Century*, COMPLIANCENET (June 1, 2018), https://docs.wixstatic.com/ugd/20ab40_3c5b720ef0574bc9ad97f0629b1ee264.pdf.

B. Are Firms Acting Rationally?

The rise of FCPA compliance appears heavily associated with the government's increased prioritization of FCPA enforcement.[103] As such, might it just be a rational response on the part of firms to improve their FCPA compliance programs? Of course. And yet, the rationality of this commitment to ensure FCPA compliance does not negate that the implementation of FCPA compliance programs has possibly become overblown. This Essay is not suggesting that firms should ignore the FCPA. This Essay suggests that the current environment within the industry—including banks, corporations, law firms, accounting firms, consulting agencies, reporters, and even academics—appears to focus a great deal of time on the FCPA and questions the wisdom of that attention.

C. Could There Be Other Areas of Overemphasis?

This Essay discusses the FCPA, but could one just as easily question the wisdom of a bank's focus on anti-money laundering compliance or a hospital's emphasis on healthcare compliance, two specialized and highly developed compliance areas?[104] It is certainly possible. The reality is that the regulatory scope that complex organizations face today is quite broad, and there is always a chance that they may have based their allocation of resources on an incorrect risk assessment. The breadth of the FCPA, however, makes it applicable to a swath of organizations across an incredibly diverse range of industries, which has likely contributed to the scrutiny it has received.[105] This attention may be appropriately placed; but it also may have become overblown. This Essay urges leaders within organizations to grapple with that question. In the course of doing so they may determine that other areas within their compliance programs are receiving too much attention. That would still be a beneficial outcome.

VI. CONCLUSION

As the FCPA enters its fortieth year, regulators, prosecutors, industry leaders, and academics must critically assess the good it has brought to businesses within the U.S. and abroad. They must also, however, assess how it may be harmful to achieving compliance with legal and regulatory mandates within firms.

This Essay questions whether the influence of the FCPA on corporations' compliance efforts may have contributed to certain compliance failures within firms. In particular, this Essay asks whether firms are spending so much time and effort on ensuring compliance with the FCPA that they are failing to devote a sufficient amount of resources to other areas of legal and regulatory concern. Additionally, this Essay probes whether the reason that regulators and firms fail

103. *See supra* Section II.A.

104. *See, e.g.*, Sven Stumbauer, *Five Steps for Anti-Money-Laundering Compliance in 2017*, INT'L. BANKER (Feb. 27, 2017), https://internationalbanker.com/finance/five-steps-anti-money-laundering-compliance-2017/; *Homepage*, HEALTH CARE COMPLIANCE ASS'N, https://www.hcca-info.org/ (last visited May 13, 2019).

105. *See supra* Section II.A.

to identify trends across diverse compliance areas is because the potential liability for FCPA violations seems so much more significant than other legal and regulatory areas.

There are, however, a number of strategies that regulators, prosecutors, and firms can adopt to address these and other potential pitfalls. First, regulators and prosecutors can (i) employ methods for detecting repeat corporate misconduct and (ii) adopt policies aimed at levying increased sanctions for corporate recidivist. In doing so, regulators and prosecutors can incentivize firms to systematically assess failures within their compliance programs. Second, firms can adjust their methods of assessment when compliance failures occur so that they are more apt to discover the root-cause or causes of the corporate misconduct. Third, organizations with complex corporate structures can adopt strategies for developing comprehensive compliance processes that aggregate data across information silos. Finally, scholars can begin to challenge some of the current compliance assumptions that govern the conduct of regulators, prosecutors, and corporations.

By focusing on how to improve compliance programs within firms more generally instead of focusing on particular areas of concern like the FCPA, corporations may be able to respond more effectively to the challenges associated with creating and implementing an effective compliance program.