

Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem

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Introduction

In 2007, the Foreign Corrupt Practices Act (FCPA) saw its thirtieth anniversary.¹ Although its first twenty-five years were relatively quiet, the

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1. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, amended by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 41 CORNELL INT'L L.J. 307 (2008)

same cannot be said for its last five years. In the current post-Enron, Sarbanes-Oxley Act (SOX) era,² the Securities Exchange Commission (SEC) and the Department of Justice (DOJ) have increased dramatically civil and criminal enforcement of the FCPA.³ Not only are these agencies bringing an increasing number of cases, but the DOJ is also starting to utilize novel theories of liability to prevent corrupt corporations from avoiding prosecution.⁴ Record fines and intrusive settlement agreements have accompanied the rise in enforcement actions.⁵ For example, in 2007, Baker Hughes Inc., a supplier of oil field equipment, signed agreements with the DOJ and the SEC in which the company admitted to paying over \$4 million in bribes to officials of a state-owned oil company in Kazakhstan.⁶ As part of the agreements, Baker Hughes was required to pay over \$44 million in fines and penalties—the largest monetary sum to date with respect to FCPA violations—and retain an independent monitor to oversee its implementation of a compliance program.⁷ The DOJ and the SEC reached similar settlements incorporating independent monitor requirements with other companies, including: Monsanto for payment of bribes to an Indonesian official to ease environmental regulatory requirements on its

Stat. 1415, amended by the International Anti-Bribery and Fair Competition Act of 1988, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. §§ 78m(b), 78dd-1 to -3, 78ff (1998)) [hereinafter FCPA].

2. For a review of the corporate scandals of 2001, including Enron, WorldCom, and the legislative response of the Sarbanes-Oxley Act, see Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work)*, 35 CONN. L. REV. 915 (2003).

3. See DANFORTH NEWCOMB, FCPA DIGEST OF CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977 (AS OF OCTOBER 5, 2007) 2 (2007) (stating that “[b]oth the DOJ and the SEC have become increasingly aggressive in pursuing potential FCPA violations.”); Justin F. Marceau, *A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions Under the Foreign Corrupt Practices Act*, 12 FORDHAM J. CORP. & FIN. L. 285, 285 (2007) (noting that “the Department of Justice has initiated four times more prosecutions over the last five years than over the previous five years”).

4. See Marceau, *supra* note 3, at 296-309 (describing ways that the DOJ has expanded the reach of the FCPA through theories of liability applicable to parent companies, franchisors, successor companies, and others); see also John P. Giraudo, *Charitable Contributions and the FCPA: Schering-Plough and the Increasing Scope of SEC Enforcement*, 61 BUS. LAW. 135, 135-36 (2005) (discussing Schering Plough’s 2004 settlement with the SEC, which followed the first FCPA violation to stem from charitable donations and which demonstrates the SEC’s willingness to bring actions against parent companies for actions committed by a subsidiary without the parent’s knowledge).

5. NEWCOMB, *supra* note 3, at 3.

6. Press Release, U.S. 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 (Apr. 26, 2007), available at http://www.usdoj.gov/opa/pr/2007/April/07_crm_296.html [hereinafter Baker Hughes DOJ Press Release]. In addition, the SEC complaint alleged that Baker Hughes violated provisions of the FCPA with its actions in Nigeria, Angola, Indonesia, Russia, Uzbekistan, and Kazakhstan. *SEC v. Baker Hughes Inc.*, Litigation Release No. 20,094, ¶ 6 (Apr. 26, 2007), available at <http://www.sec.gov/litigation/litreleases/2007/lr20094.htm> [herein-after SEC v. Baker Hughes Inc. Litigation Release].

7. Baker Hughes DOJ Press Release, *supra* note 6.

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genetically modified agricultural products;⁸ Schnitzer Steel Industries for its wholly owned subsidiary's payment of bribes in China and Korea to induce purchases of scrap steel;⁹ and Micrus Corporation for payment of bribes to doctors in Germany, Spain, France, and Turkey to sell medical devices.¹⁰

These enforcement developments are not without controversy. Some commentators question the harsh punishments imposed on corporations that have self-disclosed FCPA violations and have taken remedial actions.¹¹ Schnitzer Steel Industries, for example, discovered possible corrupt payments by its subsidiaries and then engaged in what the DOJ referred to as "exceptional cooperation" by disclosing the payments and then taking actions to improve its compliance program.¹² Despite these efforts, commentators complain that Schnitzer Steel received no real benefit from cooperation because the company still was required to pay large fines and had to enter a deferred prosecution agreement (DPA) with an independent monitor requirement.¹³

In FCPA actions, as well as other criminal and regulatory matters,¹⁴ the growing use of DPAs is creating the most controversy.¹⁵ In general,

8. Press Release, U.S. Dep't of Justice, Monsanto Company Charged with Bribing Indonesian Government Official: Prosecution Deferred for Three Years (Jan. 6, 2005), available at http://www.usdoj.gov/opa/pr/2005/January/05_crm_008.htm.

9. Press Release, U.S. Dep't of Justice, Schnitzer Steel Industries Inc.'s Subsidiary Pleads Guilty to Foreign Bribes and Agrees to Pay a \$7.5 Million Criminal Fine (Oct. 16, 2006), available at http://www.usdoj.gov/criminal/pr/press_releases/2006/10/2006-4809_10-16-06schnitzerfraud.pdf [hereinafter Schnitzer Steel DOJ Press Release].

10. Press Release, U.S. Dep't of Justice, Micrus Corporation Enters into Agreement to Resolve Potential Foreign Corrupt Practices Act Liability (Mar. 2, 2005), available at http://www.usdoj.gov/opa/pr/2005/March/05_crm_090.htm.

11. Michael Freedman, *Trust Us.*, FORBES, Dec. 25, 2006, at 132, 133.

12. Schnitzer Steel DOJ Press Release, *supra* note 9.

13. Freedman, *supra* note 11, at 132-33; see Joan McPhee, *Deferred Prosecution Agreements: Ray of Hope or Guilty Plea by Another Name?*, THE CHAMPION, Sept./Oct. 2006, at 12, 13-14 (arguing that DPAs are not always much of an improvement over a guilty plea, as the company may still be required to admit wrongdoing, the size of the fine may be the same, and the company often has to agree to highly intrusive government terms regarding compliance programs and corporate monitors).

14. Because both the DOJ and SEC enforce FCPA violations, our discussion of DPAs also includes settlements with the SEC, which often contain similar terms with respect to the implementation of compliance programs and the use of corporate monitors. For an overview of SEC actions in this area, see Jennifer O'Hare, *The Use of the Corporate Monitor in SEC Enforcement Actions*, 1 BROOK. J. CORP. FIN. & COM. L. 89 (2006). Although there are differences between the civil and criminal contexts, they are considered together for the purposes of this paper.

15. Under a deferred prosecution agreement, the prosecutor files an indictment against the corporation but agrees to defer prosecuting the charges if the corporation agrees to certain undertakings, such as admission of wrongdoing and rehabilitation through the implementation of a compliance program. Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1864 (2005). If, at the end of the term of the agreement, the prosecutor determines that the company has not breached the agreement, the prosecutor will dismiss the indictment. *Id.* Non-prosecution agreements (NPAs) are very similar, but the main difference is that an indictment is not actually filed. *Id.* at 1872 n.60. For overviews of the use of DPAs and NPAs and their develop-

there are concerns that prosecutors abuse their powerful bargaining position to extract overly intrusive—and in some cases arguably arbitrary—terms.¹⁶ In addition, commentators bemoan the costs of implementing a compliance program that meets government demands and the required use of corporate monitors without clearly defined powers as to who can take actions adverse to shareholder interests.¹⁷ Others, however, claim that DPAs are too lenient on corporations and result in “crime without conviction.”¹⁸

This article takes a closer look at the use of DPAs, particularly the use of corporate monitors in combating corruption. To understand the usefulness of this approach and suggest reforms to the process, the article situates the use of DPAs within the emerging category of regulation referred to as “new governance”¹⁹ regulation. A key feature of this form of regulation is that the government agency sets policy goals but then relies on the regulated entity to develop implementation techniques.²⁰ The foundation of this approach is based on the recognition that effective regulation often requires the utilization of local knowledge to determine what works in a particular context.²¹

The new governance approach is necessary for combating corporations’ corrupt payments by corporations because the root cause of the wrongful conduct is the individual corporation’s culture. One of the main problems in the FCPA context is the fit between the challenges presented and the solutions available to prosecutors and enforcers.²² Prosecutors and enforcers acting on their own have neither the resources nor the mandate to engage in the kind of large-scale, ongoing interventions into corpo-

ment over time, see generally Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45 (2006). For an in-depth case study of Bristol-Myers Squibb’s DPA from the prosecutor’s perspective, see Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043 (2006).

16. McPhee, *supra* note 13, at 14 (providing examples of DPA terms “requiring Bristol-Myers Squibb to endow a chair in business ethics at the law school from which the federal prosecutor received his law degree” or requiring MCI WorldCom to “use good faith and reasonable commercial efforts to add 1,600 employees to its workforce in Oklahoma”).

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17. O’Hare, *supra* note 14, at 102–06; see also Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713, 1735–37 (2007).

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18. *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, CORP. CRIME REP. (Nat’l Press Club, Wash., D.C.), Dec. 28, 2005, available at <http://www.corporatecrimereporter.com/deferredreport.htm> [hereinafter *Crime Without Conviction*]; see also Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 856 (2007).

19. Bradley C. Karkkainen, Reply, “New Governance” in Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping, 89 MINN. L. REV. 471, 471 (2004).

20. Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2107–08 (2005).

21. *Id.*

22. For an overview of the various methods of reform available to prosecutors to combat corporate organizational crime, see Garrett, *supra* note 18, at 861–86.

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rations' corporate governance, culture, policies, and procedures that would be required to fully address deep-seated corporate cultural pathologies.²³ Yet the prosecutor's most available and common recourse, deterrence through monetary fines, has considerable limitations as a tool for effecting corporate cultural change.²⁴ Even if prosecuting the hard FCPA cases were easier and more frequent, deterrence in the form of monetary fines can only be a partial response.²⁵ Monetary penalties do not address intractable problems of institutional culture except in the most accidental way.²⁶ Although monetary penalties may deter companies from engaging in open and obviously illegal conduct, such penalties are unpredictable as tools for effecting large-scale reform of organizational culture.²⁷ Encouraging firms to appear law-abiding through, for example, the use of cosmetic compliance programs or calculated cooperation with the government is not the same as encouraging firms to actually be law-abiding,²⁸ particularly in the face of collective action problems and the perceived business necessity of engaging in bribery in certain countries.²⁹

Fostering responsible self-regulation is another important response to the challenge of curbing corrupt practices. Broader societal pressures and the so-called license to operate may be even more important than regulatory action in encouraging corporate compliance with law.³⁰ The majority of corporations tend to be law-abiding, not only because the law requires it but also because they believe that the underlying legal requirements are legitimate and that compliance carries rewards within their broader communities.³¹ However, voluntary self-regulation is insufficient on its own. Many corporate managers in some countries believe that they need to pay bribes to remain competitive or even to conduct business at all.³² In addition, shareholders may put little pressure on corporations to end corruption, especially because the negative externalities associated with corruption are not primarily borne within the United States.³³

23. See *Crime Without Conviction*, *supra* note 18, at 5.

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24. Cristie L. Ford, *Toward a New Model for Securities Law Enforcement*, 57 ADMIN. L. REV. 757, 766-74 (2005).

25. See *id.* (discussing such issues in the context of general securities laws enforcement); see also *infra* Part I.D.

26. See Ford, *supra* note 24, at 769-74.

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27. See *id.*

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28. See *infra* notes 177-88 and accompanying text.

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29. David Hess & Thomas W. Dunfee, *Fighting Corruption: A Principled Approach; The C² Principles (Combating Corruption)*, 33 CORNELL INT'L L.J. 593, 608-09 (2000) [hereinafter Hess & Dunfee, *Fighting Corruption*].

30. See Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 329-39 (2004) (developing the idea of a "license to operate," which consists of social, economic, and legal demands on the firm).

31. See *id.* at 336-37.

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32. See Hess & Dunfee, *Fighting Corruption*, *supra* note 29, at 608-09.

33. However, investors taking a longer-term view should realize that both grand and petty corruption "reduce profits and skew competition." David Hess & Thomas W. Dunfee, *Taking Responsibility for Bribery: The Multinational Corporation's Role in Combating Corruption*, in BUSINESS AND HUMAN RIGHTS: DILEMMAS AND SOLUTIONS 260, 268 (Rory Sullivan ed., 2003) [hereinafter Hess & Dunfee, *Taking Responsibility*]. In addition, pub-

This article develops a new governance approach to combating corporate corruption that straddles the divide between self-regulation and traditional, command-and-control regulation. This approach involves the use of reform undertakings in settlement agreements with the SEC or DPAs with the DOJ. The reform undertaking is a novel remedial form that has emerged in securities law enforcement over the last few years.³⁴ A primary feature of this approach is the corporation's agreement to retain an independent monitor that has direct obligations to the government agency.³⁵ The article argues that when implemented in a transparent and participatory manner by a suitably qualified third party and augmented by centralized learning, the reform undertaking is the best available mechanism for grappling with difficult problems of organizational culture. Reform undertakings, as well as the use of DPAs in general, are a growing and controversial practice, but they have not yet received significant scrutiny by legal scholars. Although the particular focus of this article is on combating corruption, the insights gained from this article's use of a new governance perspective are applicable to the use of DPAs generally and to the DOJ's and SEC's use of corporate monitors in other settings.

This article proceeds in the following way. Part I reviews the extent and nature of corruption that continues to exist in international business. Part I also explains how corrupt practices can be rooted in a corporation's culture and thus persist despite external regulatory efforts to end bribery. Part II provides an overview of new governance regulation and then assesses the use of compliance programs under the organizational sentencing guidelines as a form of new governance regulation, finding some significant shortfalls. Next, Part III further develops the idea of a reform undertaking and identifies the necessary requirements for this approach to be an effective tool in combating corporate corruption.

I. The Continuing Problem of Corruption

A. The Paradox of Corruption

"[C]orruption is universally disapproved yet universally prevalent."³⁶

This paradox of corruption is as true today as it has ever been. Although international efforts to combat corruption continue to evolve and draw strong public support, corporations' payment of bribes continues as a common business practice. For example, a KPMG survey conducted in 2005 and 2006 found that 11% of employees working in regulatory affairs functions for their organizations observed others "[m]aking improper pay-

lic awareness of a firm's payment of bribes may have a negative impact on a corporation's reputation. *Id.* at 268–69. Public interest may also have an impact on a firm's broader, socially constructed license to operate. See generally Gunningham et al., *supra* note 30.

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34. See Ford, *supra* note 24, at 797–802.

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35. See *id.* at 798.

36. Hess & Dunfee, *Fighting Corruption*, *supra* note 29, at 595.

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ments or bribes to foreign officials.”³⁷ A survey by Control Risks Group Limited found that 32% of U.S. executive respondents believed that their competitors from the United States “regularly” or “nearly always”³⁸ used local agents as a way to attempt to circumvent anti-bribery laws.³⁹

There is even evidence to suggest that the prevalence of bribery is actually increasing in the post-SOX era of increasing attention to matters of corporate integrity and accountability. The Control Risks Group survey found that more U.S.-based corporations believed that they failed to win a contract due to a competitor paying a bribe in 2006 than they did four years earlier.⁴⁰ Overall, in 2006, 44% of the managers of U.S.-based corporations surveyed believed that they lost a contract due to bribery in the last five years and 20% believed that the same had occurred in the last twelve months.⁴¹ These managers were not optimistic that these trends would reverse any time soon, as 82% of respondents believed that corruption would increase or at least stay the same over the next five years.⁴²

B. The Limits of Deterring Corruption Through Enforcement

The United States became the global leader in the fight against corruption in international business with the passage of the FCPA in 1977.⁴³ Nevertheless, U.S.-based corporations continue to pay bribes at the same rate as corporations from other developed countries. Based on Transparency International’s⁴⁴ 2006 Bribe Payers Index, which ranks countries based on their corporations’ propensity to pay bribes when conducting business abroad,⁴⁵ the United States tied for ninth among the thirty lead-

37. KPMG FORENSIC, INTEGRITY SURVEY 2005–2006, at 5 (2006), available at http://www.kpmginsiders.com/pdf/050362_ForIntegritySurvNEW.pdf. The survey “asked employees whether they had ‘personally seen’ or had ‘firsthand knowledge of misconduct within their organizations over the prior 12-month period.’ *Id.* at 2. The survey results were based on 4,056 respondents from eleven different industries. *Id.* at 23.

38. CONTROL RISKS GROUP LTD. & SIMMONS & SIMMONS, INTERNATIONAL BUSINESS ATTITUDES TO CORRUPTION SURVEY 2006, at 13 (2006), available at www.crg.com/PDF/corruption_survey_2006_V3.pdf.

39. *Id.* at 12–13. An additional 44% indicated that they believed their competitors did so “occasionally.” *Id.* at 13.

40. *Id.* at 5.

41. *Id.*

42. *Id.* at 21 (finding that 28% of managers believed that corruption would increase, 54% believed it would stay the same, 12% predicted a decrease, and the remaining 6% were undecided).

43. The FCPA provisions can be divided into two categories. First, corporations are prohibited from bribing foreign officials. Marika Maris & Erika Singer, *Foreign Corrupt Practices Act*, 43 AM. CRIM. L. REV. 575, 578, 582–90 (2006). Second, corporations must meet certain accounting practices requirements with respect to adequate internal controls and accurate record keeping. *Id.* at 579–81.

44. Transparency International is one of the most well-known civil society organizations devoted to combating corruption in all of its forms. Its website is located at <http://www.transparency.org>.

45. TRANSPARENCY INT’L, BRIBE PAYERS INDEX (BPI): ANALYSIS REPORT 3 (2006). The rankings are based on an anonymous survey of 11,232 executives from 125 countries. *Id.* After these executives selected the nation of origin of the companies doing the most business in their country, they were asked to answer the following question by ranking the countries on a scale from “bribes are common” to “bribes never occur”: “In your

ing exporting countries.⁴⁶ Although a cluster analysis of the data that divided the countries into four groups placed the United States in the group least likely to pay bribes,⁴⁷ Transparency International makes a point not to congratulate these countries because “companies from all countries in the survey show a considerable propensity to pay bribes.”⁴⁸

There are several factors contributing to the failure of the FCPA to significantly restrict the payment of bribes by U.S. companies. First, although the DOJ and SEC have increased enforcement of the FCPA in the past few years,⁴⁹ it still may be insufficient to create much of a deterrent effect. A recent review of all cases prosecuted under the FCPA concluded that the Act is significantly under-enforced and that a large share of the convictions consisted of “easy”⁵⁰ cases that resulted from actions such as self-reporting of violations.⁵¹ In addition, many convictions relied on actions that the corporation could have easily disguised to avoid detection, suggesting that more careful firms are able to make similar payments without significant fear of prosecution.⁵² Overall, due to the DOJ’s inability to demonstrate that it can obtain convictions on cases of corruption involving complex flows of money—the “hard”⁵³ cases—corporations can continue to pay bribes with little fear of prosecution.⁵⁴

Even though the FCPA may not provide much of a deterrent effect, it serves an expressive function that tells managers that corrupt payments are immoral. In the face of strong economic pressures to either pay a bribe or lose business, however, moral suasion is not sufficient and many firms give in and pay the bribe out of a belief that it is a business necessity.⁵⁵ Other major exporting countries do not enforce their anti-corruption laws, which

experience, to what extent do firms from the countries you have selected make undocumented extra payments or bribes?” *Id.*

46. *Id.* at 3–4.

47. *Id.* at 5. The members of this group (in order from least likely to pay bribes to most likely) were: Switzerland, Sweden, Australia, Austria, Canada, the United Kingdom, Germany, Netherlands, Belgium, the United States, and Japan. *Id.*

48. *Id.* In fact, the press release accompanying the publication of the 2006 Bribe Payers Index contains the subheading “Foreign bribery by emerging export powers ‘disconcertingly high.’” Press Release, Transparency Int’l., Bribe Payers Index 2006 (Oct. 4, 2006), available at http://www.transparency.org/policy_research/surveys_indices/bpi/bpi_2006#pr.

49. See *supra* notes 3–5 and accompanying text (noting the recent increase in FCPA enforcement actions and the record fines imposed).

50. Philip Segal, *Coming Clean on Dirty Dealing: Time for a Fact-Based Evaluation of the Foreign Corrupt Practices Act*, 18 FLA. J. INT’L. L. 169, 187 (2006).

51. *Id.* at 170–71.

52. *Id.* at 171, 175, 189–94 (reviewing eleven convictions under the FCPA and showing how the corporation in each case could have easily avoided or significantly reduced the likelihood of detection).

53. *Id.* at 195.

54. See *id.* at 195–96.

55. See RONALD E. BERENBEIM, CONFERENCE BOARD RESEARCH REPORT: RESISTING CORRUPTION: HOW COMPANY PROGRAMS ARE CHANGING 9 (2006) (noting that of the twenty executives participating in a webcast conference poll, 84% believed that the FCPA failed to deter bribery in many cases due to a belief that there is a need to pay bribes in some countries).

exacerbates this problem.⁵⁶ If other countries are not enforcing their anti-corruption laws against their home corporations, then U.S. corporations will continue to feel that paying bribes is a business necessity in some situations. In other words, all major exporting countries must enforce their anti-bribery laws to ensure that all multinational corporations compete on a level playing field and feel less pressure to pay bribes.

A recent review of enforcement of the Organization for Economic Co-operation and Development's *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* by Transparency International presents some signs that international enforcement is improving, but a closer look reveals that there are many reasons to believe that prosecution is not a significant deterrent. As for positive signs, fourteen of thirty-four signatory countries show signs of enforcement as demonstrated by significant cases of prosecution or investigations.⁵⁷ However, eighteen countries have not prosecuted any companies or individuals for corruption,⁵⁸ and in both 2006 and 2007, the United States brought more prosecutions than the other thirty-three countries combined.⁵⁹ Furthermore, despite the increases in enforcement and international efforts to publicize new laws on corruption, many managers remain ignorant of their existence.⁶⁰ One survey found that 42% of executives of U.S. companies with international operations were "totally ignorant"⁶¹ of the laws covering bribery.⁶² Executives of corporations from such major exporting nations as France, Germany, and the United Kingdom were even more likely to claim total ignorance of these laws.⁶³

C. Solving the Problem of Corruption

Solving the problem of corruption requires that it be attacked with a variety of approaches that simultaneously address different causes of the problem.⁶⁴ These approaches must seek to both reduce the demand for bribes (which comes from public officials receiving the bribes) and restrict

56. See *supra* notes 36–48 and accompanying text (providing data on international enforcement trends).

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57. FRITZ HEIMANN & GILLIAN DELL, TRANSPARENCY INT'L, PROGRESS REPORT 07: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS 6 (2007).

58. *Id.*

59. *Id.* at 5 (calculated from the data on prosecutions). To get a sense of the involvement of a country's corporations in international business, it is useful to note that the United States accounted for 9.99% of world exports in 2006, compared to 56.87% for the other thirty-three countries. *Id.*

60. CONTROL RISKS GROUP LTD. & SIMMONS & SIMMONS, *supra* note 38, at 10.

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61. *Id.*

62. *Id.* This study was based on telephone interviews conducted in July 2006 of 350 high-level executives (the respondents were described as "senior decision-makers at or near board level"), fifty each from Brazil, France, Germany, Hong Kong, the Netherlands, the United Kingdom, and the United States. *Id.* at 22.

63. *Id.* at 10.

64. Thomas W. Dunfee & David Hess, *Getting from Salbu to the 'Tipping Point': The Role of Corporate Action Within a Portfolio of Anti-Corruption Strategies*, 21 NW. J. INT'L L. & BUS. 471, 472–73 (2001).

the supply (which comes from corporations paying the bribes).⁶⁵ This article focuses only on the supply side. It is important to remember, however, that the anti-corruption efforts of multinational corporations can assist in de-institutionalizing established norms of corruption in a host country and thereby reduce the demand for bribes.⁶⁶

There are many mechanisms available to reduce the supply of bribes. Increasing enforcement of existing criminal laws both within the United States and internationally can help provide a deterrent, as well as help level the playing field, which reduces the pressure to pay a bribe to win business.⁶⁷ As discussed previously, enforcement has been limited and is not a complete solution to the problem.⁶⁸ Some commentators argue that encouraging corporations that lose contracts to a bribe-paying corporation to sue the corrupt corporation for civil damages can bolster the deterrent effect of criminal enforcement.⁶⁹ In the past, there was an experiment with an international panel to hear complaints of competitors paying bribes, but this approach ultimately proved unsuccessful.⁷⁰

Finding ways to encourage effective self-regulation is also a necessity. A voluntary corporate principles approach seeks, in part, to encourage multinational corporations to band together in their promises and efforts not to pay bribes.⁷¹ Such initiatives are part of a larger and more general focus on corporate social responsibility. For example, the United Nations' Global Compact is a set of ten principles on core values that all corporations should support, including working against corruption in any form.⁷²

65. See generally *id.* (discussing how a portfolio of different approaches would be more effective in combating corruption by addressing different aspects in combination).

66. See Chuck C. Y. Kwok & Solomon Tadesse, *The MNC as an Agent of Change for Host-Country Institutions: FDI and Corruption*, 37 J. INT'L BUS. STUD. 767 (2006) (providing an empirical analysis supporting the idea that multinational corporations have a positive influence).

67. HEIMANN & DELL, *supra* note 57, at 15.

68. See *supra* notes 43–54 and accompanying text.

69. Ethan S. Burger & Mary S. Holland, *Why the Private Sector Is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 FORDHAM INT'L L.J. 45, 63–68 (2006) (reviewing cases filed in U.S. courts by corporations seeking damages from corporations alleged to have paid bribes to win contracts); *id.* at 72–73 (arguing in favor of a strong plaintiffs' bar for bringing civil lawsuits on the basis of corrupt payments).

70. Stuart Marc Weiser, *Dealing with Corruption: Effectiveness of Existing Regimes on Doing Business*, 91 AM. SOC'Y INT'L L. PROC. 99, 99–101 (1997) (presenting the comments of Francois Vincke). The International Chamber of Commerce established the panel, but the panel failed to have any impact on business behavior. *Id.* at 100–01.

71. See Hess & Dunfee, *Fighting Corruption*, *supra* note 29 (outlining a corporate principles approach to combating corruption); Hess & Dunfee, *Taking Responsibility*, *supra* note 33, at 263–64 (reviewing corporate principles approaches supported by the Caux Round Table, Social Accountability International, and Transparency International).

72. United Nations Global Compact, The Ten Principles (last visited May 20, 2008), <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>. The Tenth principle states that “[b]usinesses should work against corruption in all its forms, including extortion and bribery.” *Id.* For a critique of the Global Compact and how it fits into discussions of corporate social responsibility, see Justine Nolan, *The United Nations' Compact with Business: Hindering or Helping the Protection of Human Rights?*, 24 U. QUEENSLAND L.J. 445 (2005) (discussing three fundamental flaws of the Global Com-

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The FTSE4Good, a leading equity index of socially responsible firms,⁷³ has recently established anti-bribery criteria that firms must meet in order to stay in the index.⁷⁴

As a necessary addition to these various approaches, this article develops the idea of self-regulation through the lens of new governance regulation. For this purpose, it is important to recognize that corruption is not unlike other problems of wrongdoing committed by organizations, such as fraud, discrimination, or violations of environmental regulations. In all cases, wrongdoing is not simply a matter of corporations being “rational profit maximizers”⁷⁵ that make compliance decisions based on a cost-benefit calculation that weighs the benefits of noncompliance against the severity of potential penalties, discounted by the probability of being caught.⁷⁶ Instead, wrongdoing can become embedded in organizational policies, practices, and perceptions. Thus, any regulatory approach that seeks to combat corruption must find ways to improve the ethical culture of corporations engaged in bribery. Reform undertakings are a necessary tool in this endeavor. Therefore, the goal of reform undertakings is to encourage corporations to improve their cultures and to develop a better understanding of how those improvements are accomplished in order to develop best practices to be used throughout the industry. The next section shows why the issue of corporate culture must be addressed when attempting to combat corruption.

D. Why FCPA Enforcement Must Focus on Issues of Corporate Culture

Combating the supply side of corruption will not be successful without taking steps to ensure that corporations are developing cultures that are supportive of the effort to end corrupt payments. To illustrate, consider again this article’s opening case of Baker Hughes Inc. This company, headquartered in Houston, Texas, provides oil field services throughout the world.⁷⁷ In 2001, the SEC issued a cease-and-desist order claiming that the company made improper payments to an Indonesian official and that the company made payments in Brazil and India without assuring itself that

pact, namely “lack of clarity in the content and scope of the Compact’s principles; its limited notions of accountability and transparency; and the overemphasis on the value of the voluntary approach to improving corporate behavior”); see also Oliver F. Williams, *The UN Global Compact: The Challenge and the Promise*, 14 Bus. ETHICS Q. 755 (2004) (reviewing the lack of adequate accountability structures related to U.S. companies’ reluctance to join the compact while expressing optimism that the forum that the compact provides is the best means to achieve consensus).

73. See Oliver Balch, *Raising the Bar of Performance*, FIN. TIMES, Nov. 29, 2004, at 7.

74. See *Firms Must Meet Bribery Criteria for FTSE4Good*, SUPPLY MGMT., Mar. 16, 2006. The criteria went into effect on July 1, 2006 for firms in industries that are at high risk for paying bribes and on January 1, 2007 for firms considered at “medium” risk. *Id.* Details on the criteria can be found at FTSE, COUNTERING BRIBERY CRITERIA (2006).

75. Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMP. L. REV. 451, 453 (2003).

76. *Id.* at 453-55.

77. *In re Baker Hughes Inc.*, Exchange Act Release No. 44,784 § III(A) (Sept. 12, 2001), available at <http://www.sec.gov/litigation/admin/34-44784.htm>.

the payments would not ultimately be used for bribes.⁷⁸ In addition, the SEC alleged that the company did not properly record the payments and instead listed them as ordinary business expenses.⁷⁹ As part of the cease-and-desist order, Baker Hughes was required to develop internal accounting controls to prevent improper payments in the future.⁸⁰ In 2007, however, the SEC filed a complaint against Baker Hughes alleging that for several years after the date of the cease-and-desist order the company continued to make payments in countries such as Nigeria, Angola, Indonesia, Russia, Uzbekistan, and Kazakhstan without adequately assuring itself that these payments were not going to government officials.⁸¹ As part of its deferred prosecution agreement with the DOJ, Baker Hughes admitted to paying bribes in Kazakhstan until at least November 2003.⁸²

Can a few rogue employees be blamed for these numerous acts involving the payment of bribes and employees actively attempting to avoid direct knowledge of whether a payment will be used by an agent to pay a bribe? Will installing a better internal control system end these practices? Can the improper payments be explained simply by blaming leadership for not doing a better job of monitoring and supervising subordinates?⁸³ Business ethics researchers and other social scientists studying organizations know that the answer to all these questions is “no.”⁸⁴ Corrupt practices can become so ingrained in a corporation’s daily activities that simply adding more controls or increasing monitoring activity has only limited effectiveness because such actions do not address the root of the problem: the corporation’s culture.⁸⁵

Encouragingly, the importance of addressing the problem of corporate culture is gaining greater recognition in the law. As discussed further in Part II.B, the 2004 amendments to the Federal Sentencing Guidelines updated the list of characteristics required of an effective compliance program for organizations to receive a mitigated sentence.⁸⁶ In addition to updating the structural characteristics requirements of the original 1991

78. *Id.* at § IV(A).

79. *Id.*

80. *See id.*

81. *See SEC v. Baker Hughes Inc.* Litigation Release, *supra* note 6.

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82. Deferred Prosecution Agreement, United States v. Baker Hughes Inc., Attachment A, 10-13 (S.D. Tex. Apr. 11, 2007) (copy on file with authors) [hereinafter Deferred Prosecution Agreement, Baker Hughes].

83. See Susanne C. Monahan & Beth A. Quinn, *Beyond ‘Bad Apples’ and ‘Weak Leaders’: Toward a Neo-Institutional Explanation of Organizational Deviance*, 10 THEORETICAL CRIMINOLOGY 361, 361-62 (2006) (stating that commentators often attempt to explain deviant behavior within organizations by blaming individual “bad apples,” explicit orders from leadership for subordinates to commit wrongful acts, or the failure of leadership to monitor and supervise employees).

84. *See id.* at 362 (stating that explanations that focus only on individual failures downplay the importance of the organizational environment); *see also* Linda Klebe Treviño et al., *Behavior Ethics in Organizations: A Review*, 32 J. MGMT. 951, 966-68 (2006) (reviewing empirical studies on the influence of organizational culture on individuals’ ethical behavior).

85. *See Treviño et al.*, *supra* note 84, at 966.

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86. *See U.S. SENTENCING GUIDELINES MANUAL* § 8B2.1(a)(2) (2004).

Guidelines (e.g., anonymous reporting mechanisms and training programs), the amendments state that corporations also must “promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”⁸⁷ Likewise, the DOJ views the decision to indict a corporation as a potential tool to improve corporate cultures⁸⁸ and considers a corporation’s existing culture when making the decision of whether or not to indict a corporation.⁸⁹

The following subsections take a closer look at how corporate culture can influence whether employees make improper payments. This discussion provides a foundation for understanding the role of the law in improving corporate culture.

1. *Combating Corrupt Corporate Cultures: Understanding Individual Rationalizations*

To understand how the law can help corporations develop cultures that do not condone or unintentionally promote the use of corrupt payments, it is useful to first look at the individuals within the corporation and then take a step back to see how the organization influences individual behavior.⁹⁰ For individuals within corporations, the concern is that otherwise ethical employees pay bribes—or ignore obvious warning signs that the corporation’s agents are paying bribes—by rationalizing their behavior.⁹¹ There are several different ways that employees rationalize corrupt behavior. First, employees may take actions that they know are wrong by denying any responsibility for those actions.⁹² They do this by claiming that they have no alternative but to pay a bribe.⁹³ Employees rationalize

87. See *id.*

88. Memorandum from Paul J. McNulty, Deputy Attorney Gen., to Heads of Dep’t Components and U.S. Attorney 2 (Dec. 12, 2006) (on file with author) [hereinafter Memorandum from Paul J. McNulty] (stating that “[i]ndicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture”).

89. *Id.* at 6 (stating that a corporation’s “history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs”).

90. Vikas Anand et al., *Business as Usual: The Acceptance and Perpetuation of Corruption in Organizations*, 19 ACAD. MGMT. EXEC. 9, 9-10 (2005).

91. See *id.* at 10-14. Rationalizations allow individuals “to neutralize their negative feelings or regrets about their behavior.” *Id.* at 10. Although the authors use the word “corruption” in their article, they use the word to refer to general wrongdoing and not simply the payment of bribes. *Id.* Of course, it is important to recognize that both payment of bribes and avoidance of due diligence, which is intended to avoid direct knowledge that payments to an agent are being used for bribes, are not unlike other types of corporate wrongdoings, including price-fixing, securities fraud, and violations of environmental regulations.

92. See *id.* at 11-12.

93. See *id.* At Baker Hughes, managers responded to bribe requests by stating that the payments were “distasteful” but nevertheless “necessary.” Complaint at 11-13, SEC v. Baker Hughes Inc. (S.D. Tex. Apr. 26, 2007), available at <http://www.sec.gov/litigation/complaints/2007/comp20094.pdf>. One subcontractor grudgingly consented to making the payment and stated in an e-mail, “Our response to the question is do we have any option?” *Id.* at 11.

this behavior by claiming that they are trapped in a problem that is not of their creation (and is perhaps a long-standing “tradition” in a country) and thus do not have to take moral responsibility for doing what they know is wrong.⁹⁴

Employees also may deny that anyone is injured by their conduct.⁹⁵ Given the belief that no one is harmed and that the members of the organization are benefiting through the new business, employees do not feel bad about paying a bribe.⁹⁶ However, bribery causes real harms with long-term impact on a country’s economic development, the performance of a government’s vital functions, and citizens’ realization of essential human rights.⁹⁷ With their perceptions filtered by short-term economic demands, employees may find it difficult to see how their actions make these problems worse in any appreciable way or how their refusal to pay a bribe will make a difference for the better (especially considering that if they do not pay the bribe, a competitor likely will).

Moreover, euphemistic labeling⁹⁸ makes it easier for employees to avoid seeing the harm. Employees pay “facilitating payments,” which the FCPA specifically allows, rather than bribes.⁹⁹ This further muddies the moral problem of corruption. In other situations, a corporation may view its use of a local agent that is making improper payments as a failure to “adequately assure”¹⁰⁰ itself of the agent’s intentions and actions rather than directly condoning bribery, which hides the moral nature of the problem and treats it as an assurance problem.¹⁰¹ In addition, many view an omission to act that causes harm as less ethically wrong than an affirma-

94. See Anand et al., *supra* note 90, at 12.

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95. See *id.* at 12–13.

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96. See *id.* at 13.

97. Hess & Dunfee, *Fighting Corruption*, *supra* note 29, at 596–97; Hess & Dunfee, *Taking Responsibility*, *supra* note 33, at 261–62; Vito Tanzi, *Corruption Around the World: Causes, Consequences, Scope, and Cures*, 45 IMF STAFF PAPERS 559, 582–86 (1998).

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98. See Arthur P. Brief et al., *Collective Corruption in the Corporate World: Toward a Process Model*, in GROUPS AT WORK: THEORY AND RESEARCH 471, 485 (Marlene E. Turner ed., 2001); see also Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 226–28 (2004) (discussing language euphemisms and unethical behavior in organizations).

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99. The FCPA states that the prohibitions on bribery “shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.” 15 U.S.C. § 78dd-1(b) (2000); see also 15 U.S.C. § 78dd-2(b) (2000) (providing the same exception for “domestic concerns”). “Routine government actions” include such matters as obtaining mail delivery service and necessary permits, licenses, and visas. See 15 U.S.C. § 78dd-1(f)(3)(A)(i)–(v) (2000); 15 U.S.C. § 78dd-2(h)(4)(A)(i)–(v) (2000).

100. See SEC v. Baker Hughes Inc. Litigation Release, *supra* note 6 (listing instances in which Baker Hughes failed to adequately assure itself that an agent was not making improper payments).

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101. See Tenbrunsel & Messick, *supra* note 98, at 227 (noting problems that result from the use of certain terms in business situations, such as “transactions costs” and “profit maximization,” which “are . . . devoid of the human and potential ethical dimensions of decisions”).

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tive action that causes harm.¹⁰² Thus, employees may consider it morally unproblematic to ignore red flags and fail to conduct due diligence on an agent, even though they would have problems with affirmatively authorizing the payment of a bribe.¹⁰³ This is compounded by the fact that employees will likely feel greater loyalties to their team within an organization than to society generally¹⁰⁴ and, therefore, will be willing to pay bribes that provide a short-term benefit to the team at the expense of perpetuating a cycle of corruption.¹⁰⁵

Some employees actually may feel that they are doing the right thing for society by paying a bribe. Consider the ethical dilemma set out by Berenbeim:

Suppose, for example, you were a project manager bidding on a local governmental contract to build a bridge. You know that a bribe is necessary for your proposal to even receive serious consideration. Other companies that you believe do inferior work will not hesitate to pay the bribe. Should you sacrifice the lives and safety of a country's innocent citizens because of your company's unwillingness to accede to deeply ingrained cultural and political practices? No act of yours will put an end to this practice; the only consequence will be death and injury to those who use the bridge.¹⁰⁶

Many employees will rationalize their behavior through such a line of analysis.¹⁰⁷

Finally, because FCPA violations are apparently rarely enforced relative to the actual number of violations (or at least perceived violations),¹⁰⁸ individuals may begin to challenge the legitimacy of the law as it is applied and, therefore, not see noncompliance as unethical.¹⁰⁹ Arbitrary enforce-

102. David M. Messick & Max H. Bazerman, *Ethical Leadership and the Psychology of Decision Making*, 37 SLOAN MGMT. REV. 9, 15 (1996).

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103. See Tenbrunsel & Messick, *supra* note 98, at 226–28 (describing how language euphemisms allow actors to take actions that they would otherwise view as morally unacceptable).

104. See Anand et al., *supra* note 90, at 13.

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105. See Tanzi, *supra* note 97, at 24.

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106. Ron Berenbeim, Dir., Conference Board's Working Group on Global Bus. Ethics Principles, Cutting Off the Supply Side of Bribes: Being Against Corruption is More Difficult Than You Think: Address Before the OECD Washington Conference on Corruption (Feb. 23, 1999), in 65 VITAL SPEECHES OF THE DAY 408, 409 (1999) [hereinafter Berenbeim, Cutting Off the Supply Side of Bribes].

107. Berenbeim challenges a manager that believes paying a bribe in that situation is justified by asking: "How can the manager be certain that his company's bridge is sufficiently superior to justify the bribe? If we allow the justification for bridge bidding, what others must we also permit? Should those who believe themselves to be purveyors of other higher quality, lower cost products be allowed similar flexibility?" *Id.* at 409. Berenbeim hopes that those questions will cause managers to doubt their practices, but the questions also demonstrate how easy it is for managers to fall prey to this rationalization. That is, any managers who rightly or wrongly believe that they have a higher-quality product than their competitors could use this justification.

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108. See *supra* notes 49–54 and accompanying text (discussing enforcement trends).

109. See Anand et al., *supra* note 90, at 13. The same would apply to a company's provisions on the payment of bribes in its code of conduct. Prohibiting the payment of bribes is not as simple as those unfamiliar to the area may believe. Two challenging areas are facilitation payments and business courtesies, which include small gifts, travel expenses, and entertainment expenses. Dunfee & Hess, *supra* note 64, at 476–80. The

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ment of the FCPA and other countries' anti-corruption laws (as perceived by employees) raises issues of fairness. As established by Tom Tyler's work in social psychology, individuals feel less of a moral obligation to follow a law that is applied unfairly.¹¹⁰

Overall, employees can easily find rationalizations to take actions that are against a company's code of conduct or the law. The fault, however, does not lie only with (or even primarily with) the individuals. Organizations with unethical cultures push employees to use these rationalizations where they otherwise would not. The organization's socialization process, social norms, and incentive systems can all work to encourage employees to rationalize their actions and believe the corrupt practices are "business as usual."¹¹¹ Of course, organizational culture can also support the ethical values that make employees more likely to refuse to pay or authorize bribes and work to prevent those around them from engaging in corrupt acts.¹¹² The next section takes a closer look at how corporate cultures can encourage wrongful conduct by employees.

2. Combating Corrupt Corporate Cultures: Understanding Organizations' Social Architecture

To understand how corporate cultures function and evolve over time, it is useful to distinguish between a corporation's "hardware"¹¹³ and its "software."¹¹⁴ A corporation's hardware includes its formal structure, policies, and processes.¹¹⁵ "Software" refers to the informal norms of behavior within an organization,¹¹⁶ which includes the ethical culture and ethical climate of the firm.¹¹⁷ With respect to combating corruption, a corpora-

FCPA allows these payments, but at some point, they cross the line and become bribes. *Id.* Attempting to distinguish when a manager or agent has crossed that line is extremely difficult and depends on local laws and customs. *Id.* Thus, what one manager's company considers an improper payment may be allowed by a competitor. Tenbrunsel & Messick, *supra* note 98, at 228-29. Even within one company, similar payments made in different contexts may be treated differently. *Id.* To some employees, the distinctions may seem arbitrary and unfair. *Id.* In addition, the allowance of facilitation payments and business courtesies can place managers on a slippery slope, where they continually push the boundaries of what is an acceptable payment until they have crossed the line without being fully aware of the ethical and legal issues involved. *Id.*

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110. See generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

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111. Anand et al., *supra* note 90, at 10-11.

112. *Id.* at 19.

113. David Hess, *A Business Ethics Perspective on Sarbanes-Oxley and the Organizational Sentencing Guidelines*, 105 MICH. L. REV. 1781, 1806 (2007).

114. *Id.*

115. *Id.*

116. *Id.*

117. For purposes of this paper, we will use the term ethical culture to include the firm's ethical climate. "Ethical climate" refers to employees' perceptions of organizational practices that have ethical content. Linda Klebe Treviño et al., *The Ethical Context in Organizations: Influences on Employee Attitudes and Behaviors*, 8 BUS. ETHICS Q. 447, 448-50 (1998) [hereinafter Treviño et al., *The Ethical Context*]. "Culture," on the other hand, refers to the informal and formal systems of behavioral controls within the organization. *Id.* at 451-52. Ethical climate and ethical culture are considered to be strongly related. *Id.* at 474; see also Daniel R. Denison, *What is the Difference Between Organiza-*

tion's hardware includes its code of conduct, FCPA compliance program, and internal accounting controls.¹¹⁸ How those formal processes work in practice, however, depends on a firm's software.¹¹⁹ Thus, enforcement actions that simply require corporations to adopt a compliance program and adequate internal controls often will not be enough.¹²⁰ Although organizational hardware policies are necessary, they are not sufficient.¹²¹ Social norms within the organization can easily render compliance program requirements meaningless.¹²²

As one example, consider the use of employee hotlines. This is a tool to allow employees to anonymously report unethical or illegal behavior they have observed to upper management. These hotlines are considered a vital part of an effective anti-bribery compliance program.¹²³ To function as desired, however, hotlines must be supported by an organization's software, which requires leadership to actively manage the process.¹²⁴ Employees will not use the hotlines if they believe that they will face retaliation (a fear that exists even with anonymous reporting) or that the organization will not take action to correct the problem that they report.¹²⁵ To create an organizational culture that supports reporting wrongdoing, management must actually show employees that there is no retaliation for any reports filed and that all reports will be fully investigated and dealt with appropriately.¹²⁶ DuPont, for example, does this by distributing "Business Ethics Bulletins" to its employees that describe wrongdoing within the organization, how the wrongdoer was punished, and how the transgression came to the attention of management.¹²⁷ Without these extra efforts, upper management should not have confidence that this piece of organizational hardware will have any impact on reducing the payment of bribes.

If management does not attend to the software of the organization, then other aspects of the organization's hardware can end up having unintended, negative consequences that contribute to the routinization of cor-

tional Culture and Organizational Climate? A Native's Point of View on a Decade of Paradigm Wars, 21 ACAD. MGMT. REV. 619, 645 (1996) (arguing that scholars studying organizational climate and organizational culture are not making clear distinctions between the two, and that climate versus culture is more a matter of "differences in interpretation rather than differences in the phenomenon").

118. Hess, *supra* note 113, at 1807-11.

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119. *Id.* at 1811.

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120. Anand et al., *supra* note 90, at 19; Hess, *supra* note 113, at 1811.

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121. Hess, *supra* note 113, at 1807-11.

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122. *Id.* at 1811.

123. BERENBEIM, *supra* note 55, at 23.

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124. *Id.*; Hess, *supra* note 113, at 1811.

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125. A recent survey by the Ethics Resource Center supports this proposition. Of respondents witnessing misconduct of any form, almost half did not report the misconduct. ETHICS RESOURCE CTR., NATIONAL BUSINESS ETHICS SURVEY: HOW EMPLOYEES VIEW ETHICS IN THEIR ORGANIZATIONS 1994-2005, at 29 (2005). When asked what factors influenced their decision not to report the acts, 59% stated that they did not believe that the company would take corrective action, 46% stated a fear of retaliation, and 39% doubted that their report would really remain anonymous. *Id.*

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126. Hess, *supra* note 113, at 1795-97.

127. Andrew Singer, *DuPont's Daring Communications Formula*, ETHIKOS & CORP. CONDUCT Q., Jan./Feb. 2004, at 1, 1-2.

ruption within the corporation. Over a period of time, wrongdoing, including the payment of bribes and the failure of employees to heed warning signs that an agent of the corporation is paying bribes, can become institutionalized into the culture of the organization.¹²⁸ This occurs through a process in which the leadership of the organization condones or encourages the wrongful behavior (either explicitly or implicitly), employees choose to engage in the behavior, and then, over a period of time, the wrongful actions become routine.¹²⁹ The starting point of this process can be the intentional as well as unintentional acts of leadership throughout the organization.

A useful starting point in seeing how this process works is the implementation of the organization's incentive system, which is a key part of the organization's hardware. An organization's promotion and compensation systems can have significant influences on employees' attitudes on corruption.¹³⁰ Rewarding employees for only the end result (e.g., winning a contract) without considering the means (e.g., whether or not they paid a bribe), punishes employees for losing a contract where they refuse to pay a bribe or use a questionable agent.¹³¹ When employees see that their rewards are based on only the ends, they receive an implicit message that the organization encourages employees to use unethical means to reach those ends.¹³² This message gets communicated to employees even if the organization has clear policies on bribery, because it is the actual implementation of the incentive system that communicates what the organization "really values."¹³³ Moreover, poorly drafted anti-bribery policies also can send the message that a firm's true priority is winning contracts.¹³⁴ For example, one study found that less than half of firms involved in international business have a written policy stating that the company acknowl-

128. See Brief et al., *supra* note 98, at 473.

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129. *Id.*

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130. Anand et al., *supra* note 90, at 14 (referring to the process of co-optation).

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131. Hess, *supra* note 113, at 1796.

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132. Brief et al., *supra* note 98, at 474. A recent KPMG survey asked respondents what causes employees to engage in misconduct. KPMG FORENSIC, *supra* note 37, at 6. The most common response—selected by 57% of respondents—was that employees "feel pressure to do 'whatever it takes' to meet business targets." *Id.* In addition, 49% of respondents pinned blame on a belief that they would be rewarded only for their results and not for the means used, and 46% identified a fear of losing their jobs if they did not meet their targets. *Id.* Others have referred to this problem more generally as resulting from a "finance mode of control." See Monahan & Quinn, *supra* note 83, at 364–65. Under this mode, upper management pushes down the hierarchy the problems of managing "conflicts between imperatives for profit and for adherence to external regulations and norms" by setting "financial goals for subunits and set[ting] their workers loose to pursue those goals . . ." *Id.*

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133. John M. Darley, *The Dynamics of Authority Influence in Organizations and the Unintended Action Consequences*, in SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS 37, 40 (John M. Darley et al. eds., 2001) [hereinafter Darley, *The Dynamics*]. Darley summarizes this point by stating that "talk is meaningful to the extent that it connects with the incentives eventually provided through the incentive system." *Id.*

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134. See John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13, 25 (David M. Messick & Ann E. Tenbrunsel eds., 1996) [hereinafter Darley, *How Organizations Socialize*].

edges that refusing to pay a bribe may result in lost business.¹³⁵ Such an incentive system in practice works to further an employee's rationalization that he or she has no responsibility for his or her wrongful actions, because there is no alternative but to pay the bribe.¹³⁶ In addition to the reward system, the authority structure inherent in organizations gives legitimacy to these implicit or explicit orders to engage in questionable acts.¹³⁷

Over time, actions that once raised doubt in employees' minds and forced them to rationalize their behavior become routine.¹³⁸ Employees no longer question, for example, failing to conduct appropriate due diligence on agents so that they can avoid direct knowledge of the agents' acts or listing questionable payments as ordinary business expenses. Acts that may appear so clearly wrong to an outsider become the banal, day-to-day functions of a member of the organization (or a sub-group within the organization).¹³⁹ As new members enter the organization, they are slowly socialized into the standard practices of the organization and the system perpetuates itself.¹⁴⁰ In addition, the system can strengthen over time, as those who dislike the implicit practices leave the organization and those who participate stay and are promoted.¹⁴¹

Reinforcing this process is the expectation within the organization that employees must obey upper management without question. In some situations, management explicitly orders employees to commit questionable acts,¹⁴² but in other situations, employees wrongfully assume that they were ordered to commit the acts.¹⁴³ Employees make incorrect assumptions because they seek to stand out by taking the initiative and therefore act upon orders before they are given. They determine these orders by intuiting what management would want based on the objectives that they were told to accomplish and without asking a lot of questions.¹⁴⁴ In either the

135. BERENBEIM, *supra* note 55, at 18-19.

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136. See Anand et al., *supra* note 90, at 11-12.

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137. See Brief et al., *supra* note 98, at 477-79; Darley, *The Dynamics*, *supra* note 133, at 38-39.

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138. See Brief et al., *supra* note 98, at 482-83.

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139. *Id.* at 484.

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140. Anand et al., *supra* note 90, at 14-16; Brief et al., *supra* note 98, at 488-90.

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141. Anand et al., *supra* note 90, at 14; Darley, *The Dynamics*, *supra* note 133, at 37-38.

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142. At KPMG, senior partners allegedly attempted to use pressure to engage in potentially illegal acts related to tax shelters without questioning the appropriateness of the acts by sending out e-mails stating in red font, "You will do this now," or responding to questions that were asked by stating, "You're either on the team or off the team." Hess, *supra* note 113, at 1800-01 n.126.

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143. See Brief et al., *supra* note 98, at 478 (applying the "rule of anticipated reactions" in determining that "implementation of authority requires no a priori command").

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144. Darley, *How Organizations Socialize*, *supra* note 134, at 24-25. Darley also provides an example of an organizational cover-up of wrongdoing that is instructive here. *Id.* at 26-27. Once managers discover that their acts (or failure to act) have unintentionally caused an organization to commit a harmful act, social dynamics in the organization and psychological processes push those managers to deny that harm occurred or that the harm was caused by their actions. *Id.* Lower-level employees, who are more directly aware of the harm and its cause, then interpret management's denial as a tacit order to lie about the harm and its organizational causes. *Id.* at 27. This dynamic is

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case of explicit orders or assumed orders, the result is the same: employees are more likely to engage in unethical conduct, they do not deliver bad news to their superiors that could change those superiors' orders, and they do not report wrongdoing committed by others that they observe.¹⁴⁵ Overall, in a culture where employees are expected to have unquestioned obedience to their supervisors, employees rationalize their acts by believing that they are not morally responsible for their actions because they have no alternative but to follow their supervisors' orders.¹⁴⁶

Other aspects of an organization's software that matter more for improving ethical behavior than its hardware¹⁴⁷ include leadership's demonstrated commitment to ethics, leadership's fair treatment of employees, and employees' confidence in being able to have an open discussion on the ethical issues related to any decision that they must make.¹⁴⁸ When these factors are not present, wrongful behavior is more likely.¹⁴⁹ All these factors are involved in a complex process that top management likely does not fully understand and probably has misperceived.¹⁵⁰ The development of a corrupt corporate culture is an insidious process that evolves over time. As Sung Hui Kim states, employees become "complicit in [wrongdoing], not through any overt or explicit calculation, but through a subtle and implicit reconfiguration of preferences, self-conception, and motivation."¹⁵¹

more likely to occur in an organizational culture with a strong obedience to authority norm. Similarly, for corrupt payments, the same process can occur when an organization starts to see evidence that an agent who has been vital to winning new contracts in a country may be making improper payments.

145. Linda Klebe Treviño et al., *Managing Ethics and Legal Compliance: What Works and What Hurts*, 41 CAL. MGMT. REV. 131, 136-37, 143-44 (1999) [hereinafter Treviño et al., *Managing Ethics*].

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146. Anand et al., *supra* note 90, at 12.

147. See Treviño et al., *Managing Ethics*, *supra* note 145, at 136-40 (finding that formal characteristics of a compliance program were less important than informal aspects of implementation and the firm's culture for such outcomes as observed unethical or illegal behavior, awareness of ethical or legal issues, seeking advice on ethical issues, delivering bad news to management, reporting observed violations, and improved decision-making).

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148. *Id.* at 141-44; see also ETHICS RESOURCE CTR., *supra* note 125, at 60, 89 (providing data showing the importance of demonstrated ethical commitment by top management for reducing unethical behavior within organizations and fostering the conditions that make unethical behavior less likely); Tom R. Tyler & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct?: The Antecedents of Rule Following in Work Settings*, 48 ACAD. MGMT. J. 1143, 1153-54 (2005) (providing empirical evidence on the importance of the perceived legitimacy and morality of rules over command-and-control type approaches for obtaining organizational rule-following behavior).

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149. Treviño et al., *Managing Ethics*, *supra* note 145, at 136 tbl.2.

150. See ETHICS RESOURCE CTR., *supra* note 125, at 75 (discussing empirical evidence showing that although top management may believe that they are projecting a commitment to ethics, lower-level managers and employees often have different perceptions); Linda Klebe Treviño, *Out of Touch: The CEO's Role in Corporate Misbehavior*, 70 BROOK. L. REV. 1195, 1208-09 (2005) (stating that upper-level management often has a significantly more positive view of the organization's ethical culture than do lower-level employees).

151. Sung Hui Kim, *The Banality of Fraud: Re-situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 997 (2005). Kim's article is a discussion of inside

Of course, the key to preventing employees from rationalizing behavior or being socialized into unethical practices is prevention; an organization must establish an ethical culture before wrongdoing occurs and becomes institutionalized as routine.¹⁵² Part II reviews the current legal attempts to encourage corporations to develop ethical cultures and discusses how these approaches fit into a new governance approach to regulation. This sets the foundation for Part III's development of the necessary next steps for the effective use of reform undertakings.

II. New Governance Regulation and Corporate Compliance Programs

A. Understanding New Governance Regulation

New governance is an alternative approach to regulating business that has received recent attention from both regulators and legal scholars.¹⁵³ This approach to regulation is based on the basic belief that effective implementation of any law or regulation requires "empathetic understanding"¹⁵⁴ of the specific situation of a regulated entity and allowing that organization to have an active role in determining its strategies for compliance.¹⁵⁵ Such an approach "will be most effective if the firm . . . absorbs [those compliance strategies] into its meaning structure so that they become part of its mode of operation or existence."¹⁵⁶ Thus, this approach is both a move away from command-and-control regulation, where the government's only role is to set definite rules and then punish noncompliance, and a move toward a more decentralized approach, where the government sets basic goals and seeks direct involvement from corporations in developing individualized strategies to attain those goals.¹⁵⁷

Regulators are using this approach in such diverse areas as environmental regulation,¹⁵⁸ food safety,¹⁵⁹ occupational health and safety,¹⁶⁰ and employment discrimination.¹⁶¹ In each case, the organization plays a significant role in developing its own strategies for compliance with the law. This reflects basic new governance principles of experimentation at

counsel's complicity in corporate fraud, but the social psychology literature that she relies on directly applies to the corporate culture issues discussed here. *Id.*

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152. Anand et al., *supra* note 90, at 17-18.

153. See generally Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) [hereinafter Lobel, *The Renew Deal*].

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154. Rubin, *supra* note 20, at 2107.

155. *Id.* at 2107-08.

156. *Id.* at 2108.

157. *See id.* at 2108-09.

158. Robert F. Durant et al., *Introduction to ENVIRONMENTAL GOVERNANCE RECONSIDERED: CHALLENGES, CHOICES, AND OPPORTUNITIES* 1, 1 (Robert F. Durant et al. eds., 2004).

159. Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & SOC'Y REV. 691, 696-98 (2003).

160. See generally Orly Lobel, *Interlocking Regulatory and Industrial Relations: The Governance of Workplace Safety*, 57 ADMIN. L. REV. 1071 (2005).

161. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 475-76 (2001) [hereinafter Sturm, *Second Generation*].

the local level,¹⁶² but with the lessons from those experiments spread throughout the system through a process of dynamic learning that creates continual improvement.¹⁶³ The role of the law is to orchestrate this process by “facilitating innovation, standardizing good practices, and researching and replicating success stories from local or private levels.”¹⁶⁴

A primary example of this approach for organizations involves efforts to prevent employment discrimination. The challenge for the law in this area is to end what Susan Sturm refers to as “second generation” discrimination.¹⁶⁵ Second generation discrimination is rooted in the structural features of an organization and its culture,¹⁶⁶ as opposed to “first generation” discrimination, which is based on overt and intentional actions.¹⁶⁷ Likewise, as discussed previously, problems of corrupt practices within organizations are more complex than individuals making a rational decision to pay a bribe in full awareness of its wrongfulness and its potential consequences for themselves and their organizations. The observations that Sturm makes about the problems and limits of a traditional rule-enforcement model of reducing discrimination apply equally to combating corruption. In general, Sturm argues that a rule-enforcement model encourages lawyers and compliance officials to adopt strategies focused on reducing “the short-term risk of legal exposure rather than strategies that address the underlying problem.”¹⁶⁸ In the area of corruption, this is evidenced by the fact that the global growth in anti-corruption laws is causing more managers to state that legal risks are a more important factor in the development and monitoring of their anti-bribery compliance programs than are concerns related to ethics and the ethical culture of the organization.¹⁶⁹

Unlike a rule enforcement model, a new governance model utilizes the law as a tool to encourage corporations to use a problem-solving approach toward combating corruption. Through “legal orchestration,”¹⁷⁰ firms

162. Lobel, *The Renew Deal*, *supra* note 153, at 379–82 (2004) (discussing the importance of learning through a diversity of approaches and encouraging continual improvement).

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163. *Id.* at 395–400.

164. *Id.* at 401. For general overviews of the new governance approach, see *id.* at 348 (identifying the basic organizing principles of the new governance approach as “increased participation of nonstate actors, stakeholder collaboration, diversity and competition, decentralization and subsidiarity, integration of policy domains, flexibility and noncoerciveness, adaptability and dynamic learning, and legal orchestration among proliferated norm-generating entities”); Katherine R. Kruse, *Instituting Innocence Reform: Wisconsin’s New Governance Experiment*, 2006 WIS. L. REV. 645, 677 (2006) (identifying the core elements of the new governance approach as “experimentation, provisional rules, benchmarking of best practices, and structures of accountability based on transparency”). The seminal work on the theoretical development of this approach is Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

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165. Sturm, *Second Generation*, *supra* note 161, at 468.

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166. See *id.* at 468–69.

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167. See *id.* at 465–67.

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168. *Id.* at 476.

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169. BERENBEIM, *supra* note 55, at 17.

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170. Lobel, *The Renew Deal*, *supra* note 153, at 345.

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should be encouraged to engage with their employees and outside consultants to identify the problems rooted in the organization's hardware and software, and then develop (and continually improve) workable solutions.¹⁷¹

B. The Organizational Sentencing Guidelines

The Organizational Sentencing Guidelines (OSG) can be viewed as a form of new governance regulation.¹⁷² Under the OSG, if a firm adopts an effective compliance program (i.e., one that meets seven basic hardware requirements set out in the guidelines), then it will receive a reduced sentence if it is later found guilty of a crime.¹⁷³ The idea behind the guidelines is for the government to establish the goals and basic parameters of a compliance program, and then let the firm utilize its knowledge to best implement such a program so that it is both effective and consistent with the firm's structure and strategy.¹⁷⁴ In recognition of the importance of the firm's software in ensuring an effective program, the 2004 amendments to the OSG refer to "compliance and ethics programs"¹⁷⁵ and require that firms "promote an organizational culture that encourages 'ethical' conduct."¹⁷⁶ Thus, although the government cannot compel any organization to be "ethical," it can establish appropriate incentives for organizations to define ethical conduct (which, under the OSG, simply means compliance with the law) and to determine how to develop such an ethical culture for their organization.

Although many firms may attempt to meaningfully implement a compliance program, which empirical evidence suggests can be effective if done appropriately,¹⁷⁷ many other firms may seek the benefits of a mitigated sentence by adopting only the appearance of a compliance program.¹⁷⁸ More important, under the McNulty memorandum, a 2006 memorandum from Paul J. McNulty, the Deputy Attorney General, the benefits are not just a reduced sentence but avoidance of prosecution completely.¹⁷⁹ Because prosecutors cannot easily determine which corporations have meaningfully implemented a compliance program and which have not, creating only the appearance of a compliance program, without the cost and effort of actually adopting one, is an attractive strategy.¹⁸⁰ This is commonly referred to as "cosmetic compliance."¹⁸¹ At the

171. *Id.* at 420-21; Sturm, *Second Generation*, *supra* note 161, at 475.

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172. See Rubin, *supra* note 20, at 2108.

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173. *See id.*

174. *See id.* at 2108-09.

175. Paul Fiorelli & Ann Marie Tracey, *Why Comply? Organizational Guidelines Offer a Safer Harbor in the Storm*, 32 J. CORP. L. 467, 483 n.92 (2007) (noting that the revised guidelines make forty-five references to "[c]ompliance and [e]thics [p]rograms").

176. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(2) (2006).

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177. See Hess, *supra* note 113, at 1791-95 (providing a review of the empirical studies on the effectiveness of compliance programs).

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178. *Id.* at 1784.

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179. *See Memorandum from Paul J. McNulty*, *supra* note 88.

180. See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1408 (1999) [hereinafter Laufer, *Corporate Liability*].

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extreme, cosmetic compliance creates a moral hazard problem: Where corporations with largely symbolic compliance programs actually take less care to prevent wrongdoing because they have protection against prosecution, they can ultimately end up committing more wrongful acts.¹⁸²

A related problem may be referred to as “calculated cooperation.”¹⁸³ By cooperating with prosecutors, corporations become less likely to be prosecuted, and instead, the government will only file charges against individuals.¹⁸⁴ This policy is contained in both the McNulty memorandum and the Thompson memorandum that proceeded it.¹⁸⁵ Credit for cooperation¹⁸⁶ is not without controversy, however. Recently, there has been debate about prosecutors requiring corporations to waive attorney-client privilege to be considered as “cooperating.”¹⁸⁷ For this article’s purposes, the main concern is that credit-for-cooperation leads corporations to scapegoat certain employees to end the governmental inquiry without adequate examination of the organizational causes of the wrongful act, such as the corporate culture.¹⁸⁸

Due to problems of cosmetic compliance and calculated cooperation, the OSG does not adequately address the issue of requiring problematic firms to actually change their cultures. Instead, bribe-paying firms can easily decouple these efforts from the actual culture of the organization. In addition, granting leniency to corporations for calculated cooperation does not provide an incentive for firms to meaningfully conduct a full analysis of their culture to determine why corrupt payments persist and then take the necessary steps to right that culture. Thus, for corporations that have demonstrated that corruption is rooted deep in their culture, some other approach is needed.

C. Beyond Carrots and Sticks: The Challenge of Reversing Corrupt Corporate Cultures

As stated earlier, corruption is not necessarily a problem of “rational profit maximizers” making calculated cost-benefit decisions on whether or not a firm should make improper payments. In many cases, the use of improper payments becomes an unquestioned organizational norm that no

181. *Id.* at 1407; see also Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491–92 (2003).

182. Laufer, *Corporate Liability*, *supra* note 180, at 1415–18.

183. See Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 93–97 (2007).

184. *Id.* at 82–83.

185. *Id.* at 82–86.

186. See Ford, *supra* note 24, at 792–96.

187. See *id.* at 794 n.123.

188. Laufer refers to this problem as reverse whistle blowing. William S. Laufer, *Corporate Prosecution, Cooperation, and the Trading of Favors*, 87 IOWA L. REV. 643, 648–49, 657–62 (2002) [hereinafter Laufer, *Corporate Prosecution*]. Under reverse whistle blowing, it is possible for upper management to implicate lower-level management in the wrongdoing and thus end the government’s investigation even though the corporation had a culture of encouraging the wrongful behavior. See *id.* at 657–62.

longer raises a moral question with employees.¹⁸⁹ The initial cause of these norms can be either intentional or unintentional acts of upper management.¹⁹⁰ Either way, once these practices become embedded in the firm's culture, they are not easily reversed.¹⁹¹ Thus, simply requiring bribe-paying firms to improve their compliance programs and internal controls will likely not be sufficient. The firms must find ways to reverse their corrupt cultures and then maintain their improved cultures going forward.

Drawing on social psychology research, Arthur Brief and his colleagues suggest several ways to reverse a culture of wrongdoing and allow employees to stand up for what is right rather than blindly following implicit and explicit orders.¹⁹² In short, an organization must find ways to support "functional disobedience," which is an open challenge to the legitimacy of implicit or explicit orders to engage in unethical behaviors.¹⁹³ A primary way to do this is through social norms of open communication.¹⁹⁴ Such norms allow employees to state their ethical concerns with organizational practices and find others with similar misgivings.¹⁹⁵ With the support of others, an employee is more likely to respond with responsible behavior than simply to follow orders or comply with existing routines.¹⁹⁶ To promote functional disobedience, Professor Brief and his colleagues state that

the goal of disobeying morally questionable orders must be emphasized by management, methods and procedures for accomplishing this goal must be visibly in place, employees must be rewarded for functional disobedience, support (e.g., training) for accomplishing this goal must be readily available, and employees generally must feel their personal welfare is protected by management.¹⁹⁷

Brief and his colleagues emphasize that all of these factors must be present and that the absence of any one can result in a continued culture of wrongdoing.¹⁹⁸

Not surprisingly, the factors that can reverse an unethical culture are the same factors that researchers identified as necessary to maintain an ethical corporate culture.¹⁹⁹ The way to put these factors into operation is not simply through the adoption of a compliance program consistent with the OSG requirements but through the adoption of an integrity-based program.²⁰⁰ Integrity-based programs are compliance and ethics programs

189. See Brief et al., *supra* note 98, at 491-95.

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190. See *id.*

191. See *id.*

192. See *id.* at 491-92.

193. *Id.* at 492.

194. *Id.* at 493.

195. *Id.*

196. See *id.*

197. *Id.* at 494.

198. *Id.* at 495.

199. See Treviño et al., *Managing Ethics*, *supra* note 145, at 141-44.

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200. Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 *COLUM. BUS. L. REV.* 71, 104 (2002).

not based primarily on following the rules and punishment for violations but rather on the emphasis of shared organizational values.²⁰¹ Existing empirical evidence suggests that compliance programs with a stronger integrity-based foundation are more effective in attaining a positive ethical climate and reducing unethical behavior than programs based simply on rule enforcement.²⁰² External pressures to adopt a compliance program, however, can work against the adoption of an integrity-based program because such programs may look less rigorous and merely symbolic to outsiders.²⁰³ In addition, for an organization already heavily engaged in wrongful conduct, an external change agent may be necessary to reverse embedded wrongdoing and install an integrity-based program, as insiders "may lack the ability, will, and credibility to effect the needed changes."²⁰⁴

Overall, two things are necessary to reverse the cultures of corrupt corporations. First, firms must adopt a problem-solving approach to determine what about their cultures contributes to the continuation of corrupt payments. This is not an easy task, as corporate cultures related to ethical behavior involve complex interactions of multiple factors. Second, firms must reverse those cultures and ensure that ethical cultures exist going forward. This requires firms to find the right balance between a rules-based approach to compliance programs and an integrity-based approach. Because each corporation has a unique history and situation, this balance will vary between firms. Reform undertakings are the best mechanism available to prosecutors and enforcers to achieve these goals. Part III further describes reform undertakings and their necessary requirements for success.

III. Combating Corporate Corruption Through Reform Undertakings

A. Reform Undertakings and New Governance Regulation

1. *Reform Undertakings: What, Why, When*

Reform undertakings are agreements between the DOJ or SEC and corporations²⁰⁵ (or other regulated entities)²⁰⁶ that settle investigations

201. See Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.-Apr. 1994, at 106, 110-11; see also Gary R. Weaver & Linda Klebe Treviño, *Compliance and Values Oriented Ethics Programs: Influences on Employees' Attitudes and Behavior*, 9 BUS. ETHICS Q. 315, 315-16 (1999) (discussing different orientations of legal and ethical compliance programs).

202. For a review of the empirical literature, see Hess, *supra* note 113, at 1791-93, 1802-3.

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203. See Langevoort, *supra* note 200, at 105, 113.

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204. Anand et al., *supra* note 90, at 20-21.

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205. The examples are many, and they increase every month. Examples include Bristol-Myers Squibb Company for channel stuffing, *see generally* Christie & Hanna, *supra* note 15; Computer Associates for securities fraud, Deferred Prosecution Agreement, United States v. Computer Associates Int'l (E.D.N.Y. Sept. 22, 2004) (copy on file with authors); Aspen Technologies for securities fraud, *In re Aspen Tech., Inc., Securities Act Release No. 8827, Exchange Act Release No. 56,170* (July 31, 2007), available at <http://www.sec.gov/litigation/admin/2007/33-8827.pdf>; Delta & Pine Land Company for violations of the FCPA, *In re Delta & Pine Land Co.*, Exchange Act Release No. 56,138 (July 26, 2007), available at <http://www.sec.gov/litigation/admin/2007/34-56138.pdf>; and

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related to violations of securities law, including FCPA violations.²⁰⁷ As a term of a settlement or agreement, a corporation agrees to improve its compliance programs and to retain, at its own expense, an independent third-party monitor, consultant, or auditor (the Third Party) to provide expert assistance with, and possibly to oversee, the corporation's implementation of that program.²⁰⁸ The Third Party's role is to intervene in the firm over a period ranging anywhere from six months to three years and to identify compliance failures along with reasons for the alleged violation.²⁰⁹ The Third Party then reports back to the regulator or prosecutor as to his or her findings and recommendations for improvements to the compliance program, as well as the steps taken by the corporation in response to those recommendations.²¹⁰

Reform undertakings reflect a profound shift in prosecutorial and enforcement philosophy. In comparison to conventional sanctions, such as monetary penalties or criminal prosecution of individuals, the reform undertaking is more open-ended, less deterministic, and significantly more interventionist.²¹¹ As such, it is most appropriate for the "worst actor" cases.²¹² That is, it is best suited for cases where corrupt practices are the result of the insidious organizational culture issues discussed in Part I.D²¹³ and where such practices have continued to persist or are believed will continue to persist, notwithstanding other sanctioning efforts.²¹⁴ The clearest cases for the use of reform undertakings involve those corporations at the top of what Ian Ayres and John Braithwaite call the "enforcement pyra-

Statoil for violations of the FCPA, *In re Statoil*, ASA, Exchange Act Release No. 54,599 (Oct. 13, 2006), available at <http://www.sec.gov/litigation/admin/2006/34-54599.pdf>.

206. *In re Gen. Am. Life Ins. Co.*, Securities Act Release No. 8832, Exchange Act Release No. 8,832, Investment Company Act Release No. 27,925 (Aug. 9, 2007), available at <http://www.sec.gov/litigation/admin/2007/33-8832.pdf>; *In re Nat'l Stock Exch.*, Exchange Act Release No. 51,714 (May 19, 2005), available at <http://www.sec.gov/litigation/admin/34-51714.pdf>; Letter from David N. Kelley, U.S. Attorney, S.Dist. N.Y., to Robert S. Bennett, Attorney for KPMG LLP, KPMG - Deferred Prosecution Agreement (Aug. 26, 2005), available at <http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf>.

207. Ford, *supra* note 24, at 759–60. They also may be court-ordered or administratively ordered. *Id.* at 797–98. Previously, the term "reform undertaking" referred only to settlements with regulatory enforcement staffers, but for present purposes, it refers also to similarly structured agreements reached with criminal prosecutors pursuant to deferred prosecution and non-prosecution agreements. *See id.* Garrett focuses only on DOJ deferred prosecution and non-prosecution agreements, and uses the term "structural reform prosecution." Garrett, *supra* note 18, at 854–55.

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208. Khanna & Dickinson, *supra* note 17, at 1721–26.

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209. *See id.*

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210. *See, e.g.*, Deferred Prosecution Agreement, Baker Hughes, *supra* note 82, at 15–17 (requiring the corporate monitor to provide three separate reports during the term of the DPA, each providing the monitor's assessment of the company's progress in establishing a compliance program and adequate internal controls, and making recommendations for improvements in the company's policies and procedures).

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211. *See* Ford, *supra* note 24, at 804–05.

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212. *See id.*

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213. *See supra* Part I.D.

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214. *See supra* Part I.D (discussing Baker Hughes' compliance issues.)

mid.”²¹⁵ When dealing with these actors, regulators should not assume that voluntary (post-enforcement) steps toward ensuring the use of an effective compliance program are necessarily bona fide, rather than an attempt to mitigate sanctions solely through external appearances.²¹⁶ Regulators also should not automatically assume that corporations are credible where they claim their problems are the result of an insular group of “bad apples.”²¹⁷ In both situations—cosmetic compliance and calculated cooperation—the enforcement environment has created a skewing effect and encouraged strategic action by corporations in trouble with criminal or regulatory authorities. The cases for which reform undertakings are most appropriate are precisely those in which voluntary self-regulation has demonstrably failed.

Based on the available public records, Schnitzer Steel appears to be one such worst actor case. According to the SEC’s cease-and-desist order, two wholly owned subsidiaries of Schnitzer Steel made improper payments in China and South Korea on their own behalf and as an agent for other customers from 1999 to 2004.²¹⁸ Although most of the payments were in small increments ranging from \$3,000 to \$15,000, the payments totaled over \$1.8 million over the course of those five years.²¹⁹ In an attempt to hide the improper payments, the subsidiaries used schemes to disguise the payments as “refunds” or recorded payments to government officials as “sales commissions.”²²⁰ In some cases, the heads of the subsidiaries used secret bank accounts to make the payments.²²¹

The involvement of two subsidiaries, the frequency of the payments, and the attempts to disguise them over an extended period of time strongly suggest that these practices had become embedded as a routine practice within the corporate culture. Moreover, during this time, Schnitzer Steel neither implemented a system of controls to monitor compliance with the FCPA nor provided its employees or agents with even basic training on the requirements of the FCPA.²²² Even when company compliance officials notified executives of suspected improper payments in 2004, the company continued to pay bribes that were already promised and instructed employees to increase “entertainment expenses” to clients to make up for any reduction in direct cash payments.²²³ Thus, although the company engaged in “exceptional cooperation” with the government,²²⁴ Schnitzer

215. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 38-41 (1992).

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216. See *supra* notes 181-82 and accompanying text (discussing cosmetic compliance).

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217. See *supra* notes 183-88 and accompanying text (discussing calculated cooperation).

218. *In re Schnitzer Steel Industries Inc.*, Exchange Act Release No. 54,606, at 2-3 (Oct. 16, 2006), available at <http://www.sec.gov/litigation/admin/2006/34-54606.pdf>.

219. *Id.*

220. *Id.* at 3.

221. *Id.*

222. *Id.* at 4.

223. *Id.*

224. See *id.*

Steel has demonstrated that it belongs in the worst actor category and needs significant assistance in reversing its corrupt corporate culture.

Likewise, Baker Hughes, discussed in Part I.D,²²⁵ also appears to be a worst actor that suffers from an organizational culture where improper payments have become the norm and are not questioned. Despite the issuance of an SEC cease-and-desist order related to improper payments in 2001 that required the company to implement appropriate controls, the company continued to engage in the payment of bribes, falsifying those payments in company records.²²⁶ Furthermore, according to the SEC complaint, the company exercised willful blindness²²⁷ toward the use of possibly corrupt agents.²²⁸ Overall, the use of corrupt payments continued from at least 1998 to 2005 and occurred with agents or employees in six different countries.²²⁹ In addition, multiple heads of Baker Hughes operating divisions authorized over \$4.1 million in improper payments that Baker Hughes admitted to in its DPA.²³⁰ Although the legal department was allegedly made aware that the company planned to hire a new agent (whose commission was the improper payment), managers involved did not carry out proper due diligence and the legal department did nothing more than hand the necessary forms to the managers.²³¹

For these worst actor corporations, the reform undertaking has several advantages relative to conventional regulatory mechanisms, such as stand-alone monetary sanctions or sanctions targeting only individuals within the organization. Most important, the reform undertaking responds to concerns about cosmetic compliance, scapegoating, institutional capacity, and limitations of deterrence in effecting thoroughgoing reform of corporate cultures. Specifically, this mechanism recognizes and accepts both the strengths and weaknesses of the prosecutorial/enforcement model. That is, it accepts that prosecutors do not have the resources or inclination to engage in ongoing, deep reform efforts at individual corporations, although they have significant flexibility in crafting case-specific remedies.²³² In addition, to a certain degree, reform undertakings uncouple the

225. See *supra* notes 6–7 and 77–82 and accompanying text.

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226. Deferred Prosecution Agreement, Baker Hughes, *supra* note 82, at Attachment A, 11–13. The company recorded bribes as “commissions,” “fees,” or payments for “legal services.” *Id.* at 12.

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227. See generally William H. Simon, *Wrongs of Ignorance and Ambiguity: Lawyer Responsibility for Collective Misconduct*, 22 YALE J. REG. 1, 1, 25 (2005) (decrying institutional arrangements that permit “willful blindness” or “deliberate ignorance”).

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228. See *supra* note 81 and accompanying text.

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229. See *supra* note 81 and accompanying text. For a listing of the alleged corrupt payments made after the cease-and-desist order, see Complaint, *supra* note 93, at 31–33 (alleging that Baker Hughes made over 80 improper payments totaling over \$9.5 million after the 2001 cease-and-desist order, including payments the company did not adequately ensure were not used as bribes).

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230. Deferred Prosecution Agreement, Baker Hughes, *supra* note 82, at Attachment A, 8–9, 12.

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231. Complaint, *supra* note 93, at 13–14.

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232. Perhaps counterintuitively, prosecutors and regulatory enforcement staffers may in some ways be more receptive to new governance methods than mainstream regulators. See MALCOLM SPARROW, THE REGULATORY CRAFT: CONTROLLING RISKS, SOLVING PROBLEMS,

liability phase of prosecution or enforcement from the remedial phase. By setting parameters for a post-settlement process mediated by a Third Party rather than directly by a prosecutor, reform undertakings create a temporal, structural, and dialogical space for efforts to work through stubborn cultural problems.²³³ This reduces (though obviously cannot eliminate) the pressure toward strategic action by the corporation.²³⁴ At the same time, reform undertakings can be even more “destabilizing”²³⁵ to a corrupt corporation than regular prosecutions or enforcement actions but in a more constructive manner; they put in motion a process with unpredictable effects, amplifying the impact of the process on the corporation.²³⁶

Reform undertakings, through their explicit problem-solving methods, have the capacity to distinguish between cosmetic compliance and genuine compliance. Unlike one-shot deterrent sanctions where the broader effect is hard to ascertain, reform undertakings present an opportunity for prosecutors and enforcers to discern the underlying causes of corporate wrongdoing and then work toward determining how to reform corporate culture.²³⁷ This gives prosecutors and enforcers a stronger evidentiary basis for the application of Ayres’ and Braithwaite’s famous enforcement pyramid.²³⁸ Consequently, the entire process becomes more transparent and credible, which can potentially have positive effects throughout the industry or relevant community by granting a sense of legitimacy and fairness to the entire enforcement process.²³⁹

2. Reform Undertakings: How

There are certain fundamental attributes that are necessary to ensure that reform undertakings serve as a powerful tool for effecting meaningful change in corporate cultures. First, the reform undertaking must be transparent in its processes and explicit in its reason-giving. Transparency fosters credibility and trust, which are fundamental to the sort of iterative and

AND MANAGING COMPLIANCE 49–64 (2000). Some of the key priorities underlying the new governance regulation, such as pragmatism, flexibility, incrementalism, and learning by doing, should be familiar to them. Prosecutors and regulators work in flexible, temporary, case-specific teams. They work from the specific to the general, not the other way around. The nature of the concrete problem facing them requires that they take an outcome-oriented and pragmatic, rather than a philosophical or ideological, approach. Prosecutors and enforcers also have become accustomed to decentralization and delegation of some aspects of their operations, such as information gathering and more recently, implementation of compliance processes, to the corporations under investigation.

233. See Ford, *supra* note 24, at 798–99.

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234. *See id.* at 799.

235. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1020 n.13 (2004) (adopting Roberto M. Unger’s concept of destabilization to the public law litigation context).

236. Ford, *supra* note 24, at 805.

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237. *Id.* at 802.

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238. *See supra* note 215 and accompanying text.

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239. *See generally* TYLER, *supra* note 110 (observing that people are more likely to abide by laws they consider rational and fairly applied).

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investigative exercise contemplated here.²⁴⁰ Second, the Third Party must employ a forward-looking, problem-solving methodology rather than a retrospective, blame-allocating one.²⁴¹ This entails constructively identifying and responding to problems, and precludes whitewashing efforts by the corporation.²⁴² Although the process should be remedial instead of punitive, a credible enforcement capacity should be held in reserve should the reform undertaking fall apart, as is the case with current deferred prosecution agreements.²⁴³ Indeed, whether considering the regulatory environment (where purely punitive measures are impermissible) or the prosecutorial one (where purely punitive measures are almost assumed), forward-looking remedial mechanisms are better suited to dealing with corporate actors.²⁴⁴

Third, the reform undertaking process should be flexible. To be successful, reform undertakings must be capable of engaging in the experimentation necessary to determine what works, learn from past experience,

240. See Ford, *supra* note 24. The kind of transparency that matters here is transparency toward the participants in the reform undertaking process. Whether documents like the Third Party's reports should be made available to others, including members of the public, is a more difficult question. This kind of openness fosters accountability but also imposes a potentially crippling chill on parties' willingness to communicate freely. Existing reform undertakings make no provision for public dissemination of third-party reports. One of the authors of this article's requests for such documents under the Freedom of Information Act thus far have been declined, generally on the basis that the disclosure of documents could reasonably be expected to interfere with law enforcement activities. See 5 U.S.C. § 552(b)(7)(A) (2000).

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241. In other words, the Third Party must, in part, serve as a valued member of the team seeking to solve the problem at hand and achieve a common goal, as opposed to an external agent seeking to discover who is at fault. See Kathleen M. Eisenhardt et al., *How Management Teams Can Have a Good Fight*, HARV. BUS. REV., July/Aug. 1997, at 77, 80-81 (stressing the importance of a common goal to preventing discussions from deteriorating into unproductive arguments over blame); see also David A. Garvin & Michael A. Roberto, *What You Don't Know About Making Decisions*, HARV. BUS. REV., Sept. 2001, at 108, 110-11 (contrasting an advocacy approach, which focuses on persuading and blaming, with an inquiry approach, which focuses on problem solving and constructive criticism).

242. See Ford, *supra* note 24, at 806.

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243. See Deferred Prosecution Agreement, Baker Hughes, *supra* note 82, at 20-22 (stating that if Baker Hughes violates any terms of the agreement, as determined at the "sole discretion" of the DOJ, then it may be subject to prosecution, which "may be premised on information provided by Baker Hughes").

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244. For example, many argue that attributing criminal liability to corporations is incoherent. See, e.g., V. S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996). A classic statement of this position is: "Did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked?" John C. Coffee, Jr., "No Soul to Damn: No Body to Kick." *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981) (quoting Edward, the first Baron Thurlow, from the eighteenth century). Moreover, criminal enterprises aside, corporations provide important public benefits, including shareholder and economic value, employment, and goods and services, meaning that there is good reason to attempt to reform rather than vindictively hobble them. This concern is reflected in the McNulty memorandum's direction to prosecutors to consider the "collateral consequences" to society when deciding whether or not to prosecute a corporation. See Memorandum from Paul J. McNulty, *supra* note 88, at 4.

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and be updated based on new information.²⁴⁵ These capabilities are necessary to ensure the development of remedial measures tailored to each corporation's unique history and current situation.²⁴⁶ Organizational cultures are complex and the relevant factors, such as leadership, reward systems, communication norms, and employee perceptions of justice, combine in different ways in different corporations but the end result may be same: a culture that accepts the payment of bribes by employees and agents.²⁴⁷ Thus, flexibility is necessary to ensure that a reform undertaking is appropriately sensitive to the challenge at hand and has the capacity to evolve as the actors gain new knowledge of the root causes of the corporation's problems.

Fourth, the reform undertaking should seek to grow endogenous connections between its own processes and the corporation's unique profile. This fourth attribute is closely related to the third and goes to the ultimate goal of this regulatory approach. Because the problem of corruption within these worst actor firms is embedded in their culture, reform undertakings must seek to leverage a corporation's resources, capabilities, strategic orientation, and values in the service of effecting thoroughgoing reform.²⁴⁸ Among other things, this means avoiding unreflective mimicry of what may have worked for other corporations that engaged in similar conduct.²⁴⁹ Consistent with integrity-based compliance programs,²⁵⁰ the reform undertaking must encourage a corporation to internally develop its values and then support those values with the appropriate structures and systems.²⁵¹

In principle, none of the above attributes seem beyond the capacity of any existing reform undertaking, but empirical verification still remains to be done. However, three additional factors seem equally essential and anecdotal evidence suggests greater difficulty in incorporating these attributes into reform undertakings. First, there should be broad and well-managed participation by all levels of the organization in the process.²⁵² It is difficult to overstate the importance of such participation when the goal is to effect change to existing culture by questioning current practices²⁵³ and the internal development of organizational values that support ethics over the continuation of corruption.²⁵⁴ This importance becomes clear when

245. See Ford, *supra* note 24, at 809.

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246. See *id.* at 798–99.

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247. See *supra* Part I.D.2

248. See Ford, *supra* note 24, at 799.

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249. See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. R. 147 (1983).

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250. See *supra* notes 201–02 and accompanying text.

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251. Paine, *supra* note 201, at 112.

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252. See Ford, *supra* note 24, at 807–09.

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253. See *supra* notes 192–98 and accompanying text (discussing Brief and colleagues' arguments in support of "functional disobedience" to reverse corrupt corporate cultures).

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254. See *supra* notes 201–02 and accompanying text (discussing the importance of integrity-based compliance programs).

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considering such cases as Schnitzer Steel²⁵⁵ and Baker Hughes,²⁵⁶ where employees at various levels of the corporate hierarchy and in various geographic locations apparently participated in longstanding and widespread wrongdoing.²⁵⁷ Without the participation of employees representing these different positions, the organization is more likely to misperceive the true causes of the breakdown in the organization's software. In brief, changing corporate culture requires a combination of top-down, demonstration of leadership's commitment to ethics, and bottom-up, direct employee participation in self-governance. Top management, with its skewed view of the ethical climate of the firm and how employees perceive their ethical leadership,²⁵⁸ cannot meaningfully change corporate culture without this participation.

Although there is evidence that the drafters of some settlement agreements recognize the importance of broad participation,²⁵⁹ in other cases, this factor may pose significant challenges to allowing reform undertakings to achieve their full potential.²⁶⁰ This includes incorporating meaningful participation from not just lower-level employees but also top management.²⁶¹ For a number of Third Party monitorships in securities law enforcement, these problems result from an expert-centric approach to the role of the monitor.²⁶² Although these types of monitors can bring valuable expertise to the process, an approach centered on top-down recommendations for structural change from the Third Party cannot be a substitute for a corporation's own problem-solving process.²⁶³ The endogenous changes necessary to create a sustainable ethical culture must include the corporation's direct and meaningful involvement.²⁶⁴

Even if the Third Party takes on the more appropriate role of a consultant or team member, the selection of the monitor will play a significant role

255. See *supra* notes 218-24 and accompanying text.

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256. See *supra* notes 225-31 and accompanying text.

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257. See *supra* notes 218-31 and accompanying text.

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258. See *supra* note 150 and accompanying text (citing empirical evidence from the Ethics Resource Center and Treviño).

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259. For example, the Schnitzer Steel Settlement Order stipulates that "Schnitzer shall require the Compliance Consultant to formulate conclusions based on sufficient evidence obtained through, among other things . . . meetings with and interviews of Schnitzer employees, officers, directors and any other relevant persons." *In re Schnitzer Steel Industries Inc.*, Exchange Act Release No. 54,606, at 7 (Oct. 16, 2006), available at <http://www.sec.gov/litigation/admin/2006/34-54606.pdf>.

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260. See Ford, *supra* note 24, at 808-09.

261. *Id.* at 809.

262. For examples of such approaches, consider the Breeden reports in the WorldCom and Hollinger cases. See RICHARD C. BREEDEN, CORPORATE MONITOR, RESTORING TRUST: REPORT TO THE HON. JED S. RAKOFF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ON CORPORATE GOVERNANCE FOR THE FUTURE OF MCI 25 (2003), available at <http://www.sec.gov/spotlight/worldcom/wcomreport0803.pdf>; GORDON A. PARIS ET AL., HOLLINGER INT'L INC., REPORT OF INVESTIGATION BY THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF HOLLINGER INTERNATIONAL INC. (2004), available at <http://www.sec.gov/Archives/edgar/data/868512/000095012304010413/y01437exv99w2.htm>; see also Ford, *supra* note 24, at 807-09.

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263. See Ford, *supra* note 24, at 808.

264. See *id.*

in the ultimate success of the reform undertaking. For the DOJ's recent DPAs, monitors are generally legally trained and behave much like lawyers, collecting documents and assembling a case of sorts.²⁶⁵ This raises the question of whether the role performed by these Third Parties will lead to a sufficiently open-ended and participatory dialogic process.²⁶⁶ Meeting the necessary participation requirements is challenging, and they are costly to create and maintain relative to more centralized exercises in information analysis.²⁶⁷ Such a process cannot be expected to spring forth organically from the reform undertaking without direct attention to the matter on the part of those drafting the reform undertaking's terms and those implementing them.²⁶⁸

The selection of the Third Party, then, is crucial, not only because the Third Party's background and expertise affects his or her approach to the project but also because the Third Party's role requires him or her to have a formidable range of skills and qualifications to function effectively. As an external change agent, a monitor should audit corporate efforts to implement or improve compliance programs and internal controls, as well as work to ensure their effectiveness through changes in an organization's software.²⁶⁹ To do this, monitors need to understand the various organizational hurdles related to the flow of information (especially bad news) in the firm, the functioning of the incentive system in practice, the social norms of the organization, and other factors related to the firm's culture and ethical climate.²⁷⁰ In addition, to be successful and sustainable, the changes a Third Party proposes must be consistent with the strategic needs of the corporation.²⁷¹

To accomplish these goals, corporate monitors should have several necessary characteristics. First, a Third Party must have an appropriate skill set, including the ability to facilitate dialogue and manage a collective deliberative process with an appreciation for relevant power imbalances within the corporation.²⁷² Second, the Third Party must have credibility both with the corporation and with prosecutors and regulators.²⁷³ This likely requires experience in the industry (or in analogous business set-

265. See Khanna & Dickinson, *supra* note 17, at 1725 (describing how monitors carry out their role).

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266. *Id.* Khanna and Dickinson also note that third parties and their subject corporations frequently disagree about the scope and purview of the monitor's task. *Id.* This issue is called "scope creep." *Id.* This suggests, predictably, that subject corporations are preoccupied with circumscribing the process and minimizing the destabilization it represents, but third parties are, perhaps for any number of reasons ranging from ensuring efficacy of the process to paternalistic power-seeking, interested in expanding its ambit. *See id.*

267. *See id.* at 1727.

268. *See id.*

269. *See id.* at 1720-26.

270. *See id.*

271. *See id.*

272. *See id.* at 1726.

273. *See id.* at 1730-31.

tings) and a reputation for fair dealing.²⁷⁴ Furthermore, the Third Party must be both structurally and psychologically independent from the corporation.²⁷⁵ The monitor should have no prospect of future business with the firm²⁷⁶ and should have his or her own reputational capital at stake.²⁷⁷ Independence also requires that the Third Party be able to access outside support from prosecutors or regulators in the event of material non-compliance by the corporation. Third, the Third Party must be accountable for his or her own conduct and recommendations for the corporation to the SEC, the Department of Justice, or the court.²⁷⁸ Collectively, these characteristics allow the Third Party to develop the trust necessary to make the reform undertaking a meaningful process. Whether or not actual Third Parties conform to this profile remains to be seen, but reform undertakings, as products of the legal system, must not simply default to the selection of Third Parties that are more likely to possess legal skills than the broader problem-solving and facilitative skills that are necessary.

The selection of appropriate Third Parties may not be as daunting as it initially appears. Since the passage of the Sarbanes-Oxley Act, there has been significant growth in attempts to understand the appropriate role and qualifications of ethics and compliance officers²⁷⁹ and even to professionalize their roles.²⁸⁰ These developments should continue to be valuable for understanding the appropriate skills of Third Parties, identifying potential candidates to serve as Third Parties, and providing resources and experiences for understanding how to perform the role.²⁸¹

In addition, Susan Sturm's recent empirical work on ending discrimination within organizations provides significant insights.²⁸² As stated earlier, Sturm is concerned with "second generation" discrimination, which is discrimination embedded in an organization's structures and culture.²⁸³

274. Ford, *supra* note 24, at 811.

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275. *Id.*

276. *Id.* Most settlement orders underlying modern reform undertakings set out a period of time after the reform undertaking is concluded, during which the third-party monitor may not accept any other business from the corporation. *Id.* at 811 n.179.

277. See John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403, 1406 (2002) (using the term "reputational capital").

278. Ford, *supra* note 24, at 813-14.

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279. For organizations devoted to compliance and ethics professionals, see the Society of Corporate Compliance and Ethics website at www.corporatecompliance.org, and the Open Compliance and Ethics Group website at <http://www.oceg.org>. For a recent discussion of the appropriate role of an ethics officer, see CHIEF ETHICS & COMPLIANCE OFFICER (CECO) DEFINITION WORKING GROUP, ETHICS RESOURCE CTR., LEADING CORPORATE INTEGRITY: DEFINING THE ROLE OF THE CHIEF ETHICS AND COMPLIANCE OFFICER (CECO) (2007), available at http://www.darden.edu/corporate-ethics/pdf/Leading_Corporate_Integrity_Report.pdf.

280. See generally SOCIETY OF CORPORATE COMPLIANCE AND ETHICS, CCEP CANDIDATE HANDBOOK (2007).

281. *See id.*

282. See generally Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J. L. & GENDER 247 (2006) [hereinafter Sturm, *The Architecture of Inclusion*].

283. *See supra* notes 165-67 and accompanying text.

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Thus, Sturm's analysis is directly instructive to understanding how Third Parties can and should function in the reform undertaking context. In her study of anti-discrimination efforts at higher educational institutions, Sturm focuses, in part, on the role of key Third Parties, which she calls "organizational catalysts."²⁸⁴ Sturm describes organizational catalysts as "individuals who operate at the convergence of different domains and levels of activity"²⁸⁵ and who consequently "leverage knowledge, ongoing strategic relationships, and accountability across systems."²⁸⁶ As with the potential for Third Parties retained in reform undertakings, Sturm's organizational catalysts are effective in part because they have knowledge, influence, and credibility across domains.²⁸⁷ Their skill sets allow them to serve as "information entrepreneurs"²⁸⁸ by drawing together information from various sources to assist the corporation in improving its culture.²⁸⁹ They act as gadflies, keeping pressure on the organization to focus on the task at hand, and grant legitimacy and voice to those within the organization that seek positive change.²⁹⁰ In addition, these organizational catalysts cultivate new collaborative relationships among employees at all levels of the firm, as well as potentially with important outside entities.²⁹¹ This connects employees with mutual interests and complementary roles in reducing corruption that would not have otherwise met and cultivates the necessary open communication norms that allow employees to find support for their ethical beliefs.²⁹² This is consistent with the observations of several scholars, in different contexts, that the ability to foster dialogue and identify shared interests across seemingly impermeable group boundaries is an especially important trait of the dialogic, pragmatic nature of new governance problem-solving.²⁹³

The third outstanding attribute of a truly effective reform undertaking—in addition to broad participation and a qualified Third Party—exists at the macro level. This is the need for some form of centralized data collection, aggregation, and analysis.²⁹⁴ Information capture is a major advantage of reform undertakings relative to other prosecutorial and enforcement tools. Each undertaking captures a specific case study of what went wrong in a particular corporation and what steps seem to work

284. Sturm, *The Architecture of Inclusion*, *supra* note 282, at 250-51.

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285. *See id.* at 250.

286. *Id.* at 287.

287. *See id.* at 290.

288. *See id.*

289. *Id.* at 290-95.

290. *Id.* at 297-99.

291. *Id.* at 295-97.

292. *See supra* notes 192-198 and accompanying text (discussing mechanisms necessary to support "functional disobedience").

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293. *See, e.g.*, Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL'Y REV. 261, 323-27 (2004) (noting that in order to avoid majoritarian rule, experimentalist equal protection seeks to build common interests through participation by affected parties); Sabel & Simon, *supra* note 235, at 1097-100 (discussing the need in public law litigation for affected interests to participate and communicate).

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294. *See* Ford, *supra* note 24, at 814.

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(and not work) in breaking through and reversing the stubborn problems of organizational culture.²⁹⁵ This invaluable information for all stakeholders in reform undertakings, including regulators, prosecutors, compliance professionals, corporations, scholars, and interested members of the general public, strengthens the credibility of the reform undertaking project as a whole.²⁹⁶ Centralized data collection and analysis provides an opportunity to determine the generalizability of lessons from each corporation's experience.²⁹⁷

Third Party monitors, then, should have the responsibility to collect the information generated from each reform undertaking in a form that makes it possible to compare experiences across firms.²⁹⁸ Centralized coordination of discrete problem-solving exercises is a core component of the new governance approach.²⁹⁹ The SEC is positioned to have systems in place that can accommodate this informational task,³⁰⁰ and the DOJ should be encouraged to do likewise. Other interested parties, such as industry associations, also may play a role in aggregating and analyzing information arising out of reform undertakings.³⁰¹ Regardless, effective use of the information requires prosecutors and enforcement staffers to utilize greater data management skills than they have traditionally been required to use. In particular, those working with the data will only be truly effective if they operate as flexibly as the reform undertaking participants themselves, taking a nuanced and evolving view of the best practices that emerge from various undertakings as opposed to relying solely on

295. See *id.* at 815.

296. See *id.*

297. See *id.*

298. Currently, Third Party monitor's reports under deferred prosecution agreements are not required to be made public. Garrett, *supra* note 18, at 897; see *supra* note 240 (noting the lack of public access to Third Parties' reports). R

299. On the consensus among new governance scholars regarding the need for a clearinghouse, see Ford, *supra* note 24, at 814–15 n.187. R

300. Consider, for example, the SEC's Office of Risk Assessment (ORA). The ORA "was formed in 2004 to help the SEC anticipate, identify, and manage risks," but information about the ORA on the SEC website is still sparse. U.S. Securities & Exchange Commission, Office of Risk Assessment (Sept. 13, 2005), <http://www.sec.gov/about/offices/ora.htm>.

301. In addition to industry associations, other organizations, such as trade councils, public watchdogs like Transparency International, or nonprofit organizations focused on compliance and ethics programs, *see supra* note 279, may become involved. In Sturm's model, some combination of these groups and regulators could function collectively as "institutional intermediaries," which she defines as those "public or quasi-public organizations that leverage their position within preexisting communities of practice to foster change and provide meaningful accountability." Sturm, *The Architecture of Inclusion*, *supra* note 282, at 251. Institutional intermediaries perform such functions as pooling knowledge, structuring collaborative relationships among various interested entities, developing accountability processes for the knowledge created, and supporting a community of scholars, practitioners, and policymakers to sustain the process of knowledge creation. *Id.* at 251, 280, 312–23. Although Sturm focused on one institutional intermediary performing all of these functions, multiple organizations working collaboratively could serve the same purpose. R

static checklists or established practices.³⁰²

B. Institutionalizing Reform

For reform undertakings to produce sustainable change on a widespread basis, the learning processes they stimulate and the reforms they catalyze must be institutionalized.³⁰³ Even a reform undertaking's multi-year destabilization exercise will not overcome self-serving organizational stasis if it fails to change the ground rules by which the organization operates. This kind of institutionalization requires action by several different parties.

Prosecutors and regulators must be prepared to engage in their own ongoing education about, for example, best compliance practices so that they are credible in their interactions with corporations. Just as important, prosecutors and enforcers must maintain a credible enforcement "stick" at the ready, and they must be prepared to respond quickly and effectively to wrongdoing, including stonewalling in the course of a reform undertaking. Such a hard-line approach reinforces the understanding that the status quo is not an option. Reform undertakings should not be viewed as an all-purpose alternative to other available sanctions against corporations. In addition, new governance strategies such as reform undertakings do not have to, and should not, operate as a mutually exclusive alternative to traditional enforcement mechanisms.³⁰⁴ Rather, regulators and prosecutors should have at their disposal the full range of possible sanctions. Reform undertakings do not function primarily in terms of a deterrent capacity³⁰⁵ but instead seek to address problems to which deterrence alone can provide only a partial and unpredictable response.³⁰⁶ Overall, reform undertakings should be viewed as embedded within the more traditional

302. Other interested organizations, *see supra* note 301, also may play a role in articulating the "best practices" to emerge from reform undertakings. On the relationship between Third Parties, such as industry associations, trade councils, and regulators, with respect to reconciling a "best practices" approach within a "light touch" securities regulatory regime, see Cristie Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 Am. Bus. L.J. 1 (2008).

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303. See Sturm, *The Architecture of Inclusion*, *supra* note 282, at 299-301.

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304. Karkkainen, *supra* note 19, at 486-89 (clearing up any misconception that new governance means "soft law" and reiterating the importance of enforceability). There are very few actual instances in which a reform-undertaking-style monitor was appointed without the simultaneous imposition of fines, civil penalties, or a restitution order on a corporation. The rare exceptions in the criminal context appear to be Aurora Foods, Inc. in 2001 and Merrill Lynch in 2003. See Khanna & Dickinson, *supra* note 17, at 1745, 1750. In practice, clearly, reform undertakings co-exist with other sanctions. This is not to suggest that most, or even any, reform undertaking settlement agreements reflect the idealized or "true" reform undertaking model. However, even the "true" reform undertaking should be able to operate effectively in tandem with fines, restitution orders, individual penalties, and other sanctions.

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305. But see Khanna & Dickinson, *supra* note 17, at 1727-31 (describing corporate monitors as a deterrence mechanism and comparing their use to cash penalties).

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306. See *supra* Part II.B; see also Ford, *supra* note 24, at 769-72 (discussing the limits of deterrence-based approaches in addressing corporate cultural problems).

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enforcement and prosecutorial functions.³⁰⁷

The continual, active maintenance of the ethical culture must also be institutionalized within the corporation. The establishment of the necessary organizational hardware is not sufficient.³⁰⁸ The software of the corporation—which it should be noted is significantly less auditable for monitoring by external agents than a corporation’s hardware—must be actively managed and updated to handle the new risks that the corporation faces as it enters new markets, adjusts its strategies to remain competitive, and generally adapts to the changing business environment.³⁰⁹ For example, top management must ensure that employees appropriately perceive its demonstrations of ethical leadership and understand that norms of open communication on ethical issues are not eviscerated by the demands of short-term profitability.³¹⁰ In short, “functional disobedience” must be allowed to flourish and new employees must be socialized into positive organizational values and not into routinized corruption.

To create an environment in which the corporation no longer needs the reform undertaking to further its own compliance progress and solve its organizational culture problems requires a broader reorientation. To this end, Third Parties and all participants in the reform undertaking process should remain alert to new strategic alliances that emerge from its dialogic process. Third Parties also should take steps to entrench and encourage these alliances where they further law-abiding or “watchdog” behavior. Working in concert increases each party’s capacity to effect change.³¹¹ The multiple stakeholder groups that determine the content of the corporation’s broader “license to operate”³¹² also play a key role.³¹³ No prosecutorial or enforcement action can achieve meaningful reform on its own if it operates in isolation from, or in opposition to, the larger law-favoring forces at work on the corporation.³¹⁴ The reform undertaking is

307. The continuing specter of sanctions means that there will be costs at the margins. That is, the reform undertaking process may not be characterized by dialogue as free as that which would take place without any coercive “stick” in the background. Although trust is important to dialogue, reform undertakings do not require a level of mutual trust and open-ended dialogue between a corporation and a Third Party, which is impossible in the enforcement/prosecutorial context. Cf. Mark Tushnet, *Governance and American Political Development*, in LAW AND NEW GOVERNANCE IN THE E.U. AND THE U.S. 381 (Gráinne de Búrca & Joanne Scott eds., 2006). On the contrary, reform undertakings open up a space that would not otherwise exist within the enforcement superstructure. It is within this space that there is the best chance of having the type of dialogue necessary to sufficiently address corporate culture problems.

308. See *supra* notes 114–29 and accompanying text.

309. See Hess, *supra* note 113, at 181.

310. See *supra* notes 192–204 and accompanying text.

311. See Hess, *supra* note 113, at 1812–14 (discussing the potential role of intermediary groups in improving the use of integrity-based compliance and ethics programs).

312. Gunningham et al., *supra* note 30, at 329.

313. See *id.* at 329–39.

314. For example, in examining when financial executives would actually use their companies’ code of ethics in strategic decision-making, Stevens and colleagues found that regulatory pressure was insignificant. John M. Stevens et al., *Symbolic or Substantive Document? The Influence of Ethics Codes on Financial Executives’ Decisions*, 26 STRAT. MGMT. J. 181, 183–84, 188 (2004). Instead, significant factors included market pres-

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an important prosecutorial and enforcement tool not only for its processes during its active term but especially for the ongoing reformative process that it has the potential to catalyze in the future.

Conclusion

Over the past decade the problem of corruption has finally started receiving the attention that it deserves from policymakers.³¹⁵ Over the past few years, the Securities and Exchange Commission and Department of Justice have finally started making serious efforts to enforce the United States' anti-bribery laws against corporations.³¹⁶ These efforts will not be effective against the worst offenders, however, if they do not address the issue of corporate ethical culture. Over time, the use of improper payments can become embedded in a corporation's culture and its day-to-day routines. The organizational actors treat the payment of bribes or the use of agents that the company suspects of paying bribes solely as economic issues, not as legal and ethical issues. Through the DOJ's use of deferred prosecution and non-prosecution agreements and the SEC's use of settlement agreements, these agencies are attempting to address these root causes of corruption in many corporations. These agreements typically require corporations to adopt more effective compliance programs and to retain independent corporate monitors to oversee the implementation process.

This article analyzed the potential effectiveness of these agreements through a new governance perspective and developed the idea of a reform undertaking. Based on the essential features for effectiveness that this article identified, reform undertakings have much in common with current deferred prosecution agreements and SEC settlements, but there are also significant differences. Of primary importance is the role of the Third-Party independent monitor. This Third Party should serve not as a simple monitor or as an all-powerful czar³¹⁷ but must take on facilitating and problem-solving roles. These are roles that require significantly different sets of skills and characteristics than someone serving a monitoring role or a czar role. Overall, through the use of a new governance perspective, this article identified essential features of reform undertakings that can more effectively tackle the root cause of persistent corrupt behavior by corporations—the corporation's ethical culture—than alternative regulatory mechanisms.

sure, such as that from shareholders, customers, suppliers, and banks, and the need to develop a positive corporate image for stakeholders generally. *Id.* at 188-90.

³¹⁵ Hess & Dunfee, *Fighting Corruption*, *supra* note 29, at 600 (quoting the president of the World Bank, James Wolfensohn, who stated in September 1997, "Only 18 months ago, the word corruption was never mentioned. Today, there is a publicly expressed revulsion, on moral, on social, and on economic grounds.").

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³¹⁶ See *supra* notes 3-5 and accompanying text.

³¹⁷ Khanna & Dickinson, *supra* note 17, at 1727.

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