COPYCAT COMPLIANCE AND THE IRONIES OF “BEST PRACTICE”

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ABSTRACT

For too long, corporate compliance “best practices” have been hiding in plain sight. While they are readily invoked, compliance scholars have yet to examine them in any depth. This Comment provides a corrective, arguing that a confluence of inter- and extra-organizational forces has driven many firms to engage in copycat compliance, whereby they mimic other firms’ “best practice” compliance structures. This tendency reveals two potentially problematic ironies about so-called “best practices” in the corporate compliance domain. First, they tend to reflect common practices rather than practices that are, in fact, “best.” Second, a formalistic focus on copying common practices may well undercut some of the most important or “best of the best” practices in compliance management—the promotion of ethical behavior within corporations and the customization of compliance structures so that they mesh with prevailing organizational cultures. In light of these ironies, this Comment proposes a conceptual framework that may provide a basis for identifying more fruitful types of convergence on common compliance best practices. Such best practices would trade rote mimicry for a more functional approach that permits greater variation in compliance structures and processes to suit the particular operational, cultural, and ethical needs of implementing firms.

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INTRODUCTION

It is our hope that our compliance examinations will encourage your firms to assess their compliance programs and to adopt best practices in fulfilling their compliance responsibilities.1

Complying with laws and regulations while simultaneously assuring the highest ethical conduct largely is dependent on a board’s commitment to compliance best practices.2

Corporate compliance has come of age as a field of legal practice and as an area of academic inquiry.3 Its salience has never been as pronounced

3. See Sean J. Griffith, Corporate Governance in an Era of Compliance, 57 WM. & MARY L. REV. 2075, 2077 (2016) (asserting that “American corporate governance has
as it is today—compliance program expenditures have reached unprecedented levels; recent compliance failures have generated record penalties; a burgeoning “cottage industry” of compliance consultants has emerged and never been more lucrative; and compliance-related scholarship has grown in prominence and sophistication. Alongside these developments, legal authorities in the United States have recently published new compliance guidelines. In May 2021, the American Law Institute, renowned for its various Restatements of the Law, approved a draft of its first-ever compilation of corporate compliance principles. And in April
2019 and June 2020, the Department of Justice released updated guidance regarding its evaluations of corporate compliance programs, notably stressing the importance of data-driven approaches to risk mitigation. Increasingly, foreign jurisdictions are publishing their own compliance program guidelines as well, and even international organizations with no prior involvement in compliance have published international standards purporting to codify generally accepted compliance principles. Collectively, these developments are indicative of a widespread trend in which academics, compliance professionals, regulators, and corporate actors are seeking to identify, develop, share, and implement so-called corporate compliance “best practices.”

The proliferation of best practices is as readily apparent in the compliance world as it is underexamined by compliance scholars. Indeed, while talk of best practices is pervasive, in-depth examination is sorely lacking. Many scholarly invocations of the phrase amount to little more than

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throwaway usage, citing “best practices” as if their meaning and desirability were self-evident.14 Such treatments are somewhat understandable given that those who actually flesh out the term tend to cite techniques that “are mostly commonsense: [the] ‘promulgation of codes of behavior, the institution of training programs, the identification of internal compliance personnel and the creation of procedures and controls[.]’”15 These conventional approaches, however, leave much to be desired. By failing to scrutinize best practices altogether or by compiling detailed lists of particular (and often commonsensical) practices, compliance scholars have overlooked the emergence of best practices as a distinct phenomenon and theoretical concept, one that universally drives compliance practice and provides a core logic underpinning much of contemporary compliance theory.

This Comment provides a corrective by proposing a spectrum of compliance best practices. In so doing, it argues that a confluence of inter- and extra-organizational forces (from government, industry, and the compliance profession) often drives firms to engage in a superficial and formalistic practice of “copycat compliance”16 in which they mimic each


16. This term was first used in the literature by Maurice E. Stucke, In Search of Effective Ethics & Compliance Programs, 39 J. Corp. L. 769, 820–21 (2014) in the context of
other’s compliance structures to minimize legal liability risks. This practice reveals two ironies about “best practices” in the corporate compliance domain. First, there is nothing inherently “best” about them; more often than not, they reflect what is commonly done rather than what is most effective in some empirically validated sense.¹⁷ Second, a formalistic focus on implementing common compliance practices may ironically undercut what are widely considered to be among the most important or “best of the best” practices: the promotion of ethical behavior—not just legal risk mitigation strategies—within corporations, and the tailoring of compliance structures to context-specific organizational dynamics to facilitate a culture of compliance.¹⁸

Together, these ironies illustrate some of the potential problems with corporations converging on common compliance “best practices.” Importantly, however, convergence and commonality need not always entail copycat behavior. As this Comment asserts, there can be different degrees of convergence and, by implication, different levels or conceptions of “best practices”—from a shallow convergence on common, high-level principles; to a more pragmatic, “functional” convergence on common outcome variables that permits significant variation in the approaches corporations take to achieve them; to a more rigid, formalistic convergence that tends to promote copycat compliance. Much of contemporary compliance practice trends toward the formal when it should be geared more toward the functional. This Comment identifies reasons for this state of affairs as well as ways in which it might be rectified, laying the groundwork for legal scholars to devote more sustained and nuanced attention to the concept of corporate compliance best practices going forward.

The remainder of the Comment proceeds as follows. Part I provides an overview of the corporate compliance field, defining its contours and describing its maturation over the past three decades from a taken-for-granted issue to a high-priority concern for firms and regulators. Part II examines the phenomenon of corporate compliance best practices. It proposes a conceptual framework that outlines three possible degrees of convergence on best practices: (1) an ideational convergence centered on broad, high-level commitments; (2) a formal convergence that generally
promotes mimicry; and (3) an in-between level of *functional convergence*.19 This Part then employs insights from isomorphism, a socio-legal theory of organizational homogeneity, to identify different drivers of convergence in the corporate compliance sphere, an analysis which ultimately shows that *formal convergence* best characterizes much of current compliance practice. Some concerns about this kind of convergence are then raised. Finally, Part III aims to provide additional clarity in two ways. First, it briefly examines convergence and best practices within a specific topical area—anti-bribery compliance—to make some of the Comment’s conceptual insights more concrete. Second, it suggests some ways in which scholars might further develop the study of compliance best practices, something that would benefit both compliance theory and practice.

I. THE NATURE AND RISE OF COMPLIANCE

In one sense, corporate compliance might not seem like a novel concept. For as long as corporations have existed, one of their chief concerns has been complying with pertinent laws and regulations.20 Indeed, it is a time-honored

19. “Ideational convergence” is my own term. The distinction between “formal convergence” and “functional convergence” has been adapted from the comparative corporate governance literature. See Ronald J. Gilson, Globalizing Corporate Governance: Convergence of Form or Function, 49 AM. J. COMPAR. L. 329, 332, 336, 356 (2001) (introducing and distinguishing these two types of convergence). The basic idea is that formal convergence entails a push toward the homogenization of legal rules and structures, whereas functional convergence preserves context-specific governance structures even as it entails a convergence on the same substantively desirable outcomes. See id. at 337 (providing an example of corporate governance systems that were widely divergent in a formal sense yet enjoyed an important degree of functional convergence in the sense that they each possessed successful systems for replacing poorly performing senior managers). Of course, as with any dichotomy, distinctions are often more easily drawn in theory than in the real-world. See John C. Coffee, Jr., The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications, 93 NW. U. L. REV. 641, 682 n.148 (1999) (observing that the line between “formal convergence” and “functional convergence” may at times be difficult to draw in practice). As such, a more fruitful way of thinking about the two concepts is in terms of a rough spectrum (i.e., leaning more/less toward formal convergence or more/less toward functional convergence) rather than in terms of rigid dichotomies. See infra Part II.B.

20. See James A. Burkhardt, The History of the Development of the Law of Corporations, 4 NOTRE DAME LAW. 221, 221–22 (1929) (discussing the development of corporations from ancient times to the twentieth century and noting “how at every turn the law . . . has been imposing restraints upon” them); Robert L. Raymond, The Genesis of the Corporation, 19 HARV. L. REV. 350, 350 (1906) (“Several persons associate themselves and comply with certain forms prescribed by law, and the result is something having an identity and existence entirely independent from these persons, and with rights, powers, and duties of its own.”); see also Lyman Johnson, Law and Legal Theory in the History of Corporate Responsibility:
principle of corporate law that corporations can only be chartered for lawful purposes, and many “courts have broadly interpreted [this dictate] to include the ongoing manner in which business is conducted.” Thus, “[l]egal compliance is a first-order requirement” for corporations, one that precedes their much-discussed profit-making function. As Leo E. Strine, Jr., former Chief Justice of the Delaware Supreme Court, and coauthors put it: “American corporate law embeds law compliance within the very mission of the corporation.”

Notwithstanding its historical pedigree, corporate compliance today—both as a profession and as a focus of regulatory scrutiny—is markedly different from anything found in prior centuries or even recent decades. Whereas compliance considerations were once implicitly and exclusively subsumed within the work of corporate legal departments, present-day compliance is a profession unto itself, with its own educational programs, professional associations, consulting companies, and standalone corporate departments. This profession, thanks in large part to the dizzying array of laws passed in recent years to curb corporate misconduct, is a booming one.

As Sean Griffith colorfully asserted, “American corporations have witnessed the dawn of a new era: the era of compliance.” This Part traces the rise of this unprecedented era, beginning with an exposition of corporate compliance—its general nature and conceptual contours—its general nature and conceptual contours—itself.

When it comes to charting the definitional parameters of compliance, scholars have reached common ground on some issues and diverged on

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21. E.g., DEL. CODE ANN. tit. 8 § 101(b) (2022).
23. Id. at 722.
27. See Pacella, supra note 6, at 953–63 (describing this “compliance boom”).
others. On the one hand, there is substantial agreement regarding the general elements of compliance; on the other hand, there are notable differences in the ways in which scholars construe its boundaries.\textsuperscript{29} In terms of commonality, scholars agree that compliance is fundamentally about “the interaction between rules and behavior.”\textsuperscript{30} Broadly conceived, corporate compliance encompasses the processes by which corporate actors seek to align corporate behavior with the requirements of external and internal rules.\textsuperscript{31} Scholars also generally agree that compliance is a pluralistic field, meaning that it consists of a breathtaking variety of rules—from formal laws and company policies to less formal private standards and voluntary codes to informal social norms and ethical values—all of which exert pressure on corporate actors to comply with varying requirements.\textsuperscript{32}

Beyond these areas of overarching agreement, however, there are some important differences. First, compliance scholars differ in how they conceptualize the relationship between rules and corporate behavior. Some view the relationship in a top-down fashion, focusing on how organizations react to legal rules and how these rules can be modified to induce greater corporate compliance.\textsuperscript{33} Others view the relationship in more bottom-up or

\textsuperscript{29} Veronica Root Martinez, Complex Compliance Investigations, 120 COLUM. L. REV. 249, 264 (2020). These differences are likely attributable to the interdisciplinary nature of compliance scholarship, with scholars conceptualizing compliance in different ways depending on their particular disciplinary backgrounds. See Fanto, supra note 25, at 223–24 (discussing different conceptions of compliance informed by different disciplines such as law, business ethics, organizational studies, management, and social psychology).

\textsuperscript{30} Benjamin van Rooij & D. Daniel Sokol, Introduction: Compliance as the Interaction between Rules and Behavior, in THE CAMBRIDGE HANDBOOK OF COMPLIANCE, supra note 7, at 1, 3.

\textsuperscript{31} See, e.g., Veronica Root, The Compliance Process, 94 IND. L.J. 203, 205 (2019) (defining compliance as “a firm’s effort to ensure that it and its agents adhere to legal and regulatory requirements, industry practice, and the firm’s own internal policies and norms”).

\textsuperscript{32} See van Rooij & Sokol, supra note 30, at 6 (“[T]he reality of compliance is that individuals and especially organizations face a multitude of rules and do so often on a continual basis.”); Root, supra note 31, at 209 (remarking on “the sheer breadth and diversity of issues compliance programs must confront”). On the pluralist nature of legal and normative orders more generally, see Paul Schiff Berman, Global Legal Pluralism, 80 S. CAL. L. REV. 1155 (2007).

\textsuperscript{33} See van Rooij & Sokol, supra note 30, at 3 (stating that compliance has traditionally been concerned with the question of “how people respond to rules and come to adapt their behavior to the rules”). Proponents of optimal deterrence theory and Law and Economics approaches to compliance tend to fall into this camp. See, e.g., Jennifer Arlen & Marcel Kahan, Corporate Governance Regulation through Nonprosecution, 84 U. CHI. L. REV. 323, 344–53 (2017) (examining different possibilities for incentivizing optimal corporate policing); Jennifer Arlen & Reinier Kraakman, Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. REV. 687, 687–95 (1997) (proposing a modified corporate criminal liability regime that aims to induce optimal corporate self-policing); D. Daniel Sokol, Policing the Firm, 89 NOTRE DAME L. REV. 785, 789–90 (2013) (proposing a carrots-and-sticks approach designed to optimize corporate antitrust
dynamic terms, arguing that rules and behaviors are mutually constitutive and, as such, require a conception of compliance that takes into account how corporate actors proactively shape the meaning of the rules with which they comply.  

Accounts that take both approaches into account are growing in the corporate compliance literature, a development which has led to increasingly more holistic and sophisticated conceptions of compliance theory.

Second, although compliance scholars universally acknowledge the pluralistic regulatory environment in which corporations operate, some tend to focus more on compliance with certain types of rules over others. For instance, Miriam Baer stresses adherence to formal legal rules, defining compliance as “a system of policies and controls that organizations adopt to deter violations of law and to assure external authorities that they are taking steps to deter violations of law.” By contrast, Todd Haugh defines compliance more in terms of informal normative pressure, describing it as an “attempt to deter corporate wrongdoing by generating social norms that champion law-abiding behavior.” Similarly, Veronica Root Martinez views compliance in broad terms as “a firm’s effort to ensure that it and its agents adhere to legal and regulatory requirements, industry practice, and the firm’s own internal policies and norms.” Others focus even more broadly
on the need for compliance to incorporate ethical precepts and values.\(^{39}\) The point here is not to establish which one of these lenses is more compelling.\(^{40}\) Rather, the point is to highlight how scholars have increasingly interpreted the scope of compliance in ever more expansive terms, broadening their understanding of it so that compliance involves more than just abiding by the letter of particular legal rules. This trend is emblematic of corporate compliance’s evolution and rise to prominence more generally.

While a comprehensive treatment of the evolution of compliance practice—and the emergence of today’s “era of compliance”\(^{41}\)—cannot be provided here,\(^{42}\) highlighting a few developments from the late twentieth century to the present should be more than sufficient to explain how compliance rose to the level of importance that it currently enjoys.\(^{43}\) Prior to the 1970s, “responsibility for policing the behavior of corporations and other business entities was perceived as resting on the shoulders of public officials,\(^{44}\) See, e.g., Joan T.A. Gabel et al., Letter vs. Spirit: The Evolution of Compliance into Ethics, 46 AM. BUS. L.J. 453, 454 (2009) (arguing that a focus on “letter-of-the-law” compliance shortchanges “spirit-of-the-law” ethics); Christopher Michaelson, Compliance and the Illusion of Ethical Progress, 66 J. BUS. ETHICS 241 passim (2006) (examining the tensions between ethical considerations and legal compliance); Lynn S. Paine, Managing for Organizational Integrity, HARV. BUS. REV., Mar.–Apr. 1994, at 106, 111 (promoting an integrity-based approach to ethics management that “is broader, deeper, and more demanding than . . . legal compliance”); Tom R. Tyler, Reducing Corporate Criminality: The Role of Values, 51 AM. CRIM. L. REV. 267, 274 (2014) (“We want [corporate actors] not just to comply with the law, but to be motivated by internal [ethical] values to willingly obey the law.”); Gary R. Weaver, Encouraging Ethics in Organizations: A Review of Some Key Research Findings, 51 AM. CRIM. L. REV. 293, 302 (2014) (“[I]t is essential to look beyond formal . . . compliance initiatives to a company’s overall ethical condition.”).

40. That said, I do think that a broader conceptual framing of compliance is more accurate as a descriptive matter and more desirable as a prescriptive matter than a narrow, law-centric conception of compliance.

41. Griffith, supra note 3, at 2077.


43. Eric C. Chaffee, Creating Compliance: Exploring a Maturing Industry, 48 U. TOL. L. REV. 429 (2017) also provides a succinct list of reasons for compliance’s evolution, although his discussion stretches back into the nineteenth century. These reasons include the passage of general incorporation statutes during the early 1800s, the concentration of wealth and power in certain industries in the late 1800s and early 1900s, the rise of the administrative state (and marked increases in business regulation as a result), and the articulation of state corporate law-based compliance obligations (e.g., Caremark duties). Id. at 429–31.
including regulators and prosecutors.”44 Beginning in the 1970s, however, government enforcement authorities began to rely more on corporations to engage in their own self-policing efforts, passing a variety of statutes (e.g., the Bank Secrecy Act of 197045 and the Foreign Corrupt Practices Act of 197746) that pressured corporations to implement internal compliance measures.47 For roughly the next two decades, scholars and practitioners conceptualized compliance in fairly narrow terms—compliance was mainly a concern for highly regulated industries, and within these industries companies crafted targeted compliance programs to meet the requirements of particular laws.48 “Thus, in their earliest iterations, most compliance programs focused on specific risk areas” such as antitrust, environmental law, anti-money laundering, and anti-bribery.49 While these developments put corporate compliance more explicitly on the map, they did so in a manner that advanced a narrow, statute-specific view of compliance.

This compartmental approach to compliance began to change in the early 1990s. In 1991, the United States Federal Sentencing Commission published a new chapter in the Federal Sentencing Guidelines dedicated specifically to organizational offenders.50 More than anything else, this new chapter—the Organizational Sentencing Guidelines—played a pivotal role in the development of compliance into a distinct discipline and high priority for firms and regulators.51 The Organizational Guidelines introduced a generally applicable, carrots-and-sticks approach to incentivizing compliance; the carrot was the promise of mitigated penalties for companies that implemented an “effective” compliance program, and the stick was a steep increase in criminal penalties for the commission of misconduct.52

44. Steven A. Lauer & Joseph E. Murphy, Compliance and Ethics Programs: What Lawyers Need to Know to Understand the Development of this Field, 75 BUS. LAW. 2541, 2543 (2020).
47. Lauer & Murphy, supra note 44, at 2543–44; see also Arlen & Kraakman, supra note 33, at 695–718 (discussing compliance incentives and the pivotal role they play within the United States’ respondeat superior system of corporate criminal and civil liability).
49. Id. at 2545.
51. See Griffith, supra note 3, at 2084 (arguing that “the present era of compliance began in 1991 with the adoption of the U.S. Sentencing Commission’s Sentencing Guidelines for Organizations”); Haugh, supra note 10, at 808 (describing the passage of the Organizational Guidelines as “a watershed moment” in compliance history); Lauer & Murphy, supra note 44, at 2549 (“The Organizational Guidelines had a dramatic impact on the field [of compliance].”).
52. Griffith, supra note 3, at 2084–85; see also Ketanji Brown Jackson & Kathleen
Importantly, the Organizational Guidelines incentivized *all* organizations (not just corporations in heavily regulated industries) to take compliance seriously and implement their own comprehensive compliance programs.\(^{53}\) As such, the Organizational Guidelines broadened the concept of compliance in a fundamental and lasting way, making it clear that “compliance programs should encompass more than discrete subject areas” and requirements covered by specific statutes.\(^{54}\) This broadening is perhaps best evidenced by the language of the guidelines themselves, which stress the importance of organizational culture and ethics in addition to legal compliance.\(^{55}\)

Since the publication of the Organizational Guidelines, compliance has exploded in popularity due to the ways in which courts, prosecutors, and regulators have applied them. In the seminal corporate law case of *In re Caremark*, Chancellor William Allen suggested that a board’s failure to develop an effective compliance program might amount to a dereliction of monitoring and oversight duties triggering director liability.\(^{56}\) In making this suggestion, he gave special attention to the importance of the Organizational Guidelines, remarking that “[a]ny rational person attempting in good faith to meet an organizational governance responsibility would be bound to take into account [the Organizational Guidelines] and the enhanced penalties and opportunities for reduced sanctions that it offers.”\(^{57}\) While the

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53. Haugh, *supra* note 10, at 809; see also Bird & Park, *Domains of Corporate Counsel*, *supra* note 14, at 212 (noting that, following the passage of the Organizational Guidelines, “[c]ompliance was no longer an FCPA problem or an antitrust matter, but a broad issue for organizations generally worthy of substantial attention”).

54. Lauer & Murphy, *supra* note 44, at 2550.


57. *Caremark, supra* note 56, at 970.
actual risk of liability is vanishingly low.\textsuperscript{58} Caremark and its endorsement of the Organizational Guidelines played a key role in driving compliance higher up on directors’ list of priorities.\textsuperscript{59}

That said, courts have played a relatively minor role in the growth of compliance over the past twenty-five years, mainly due to the fact that trials and plea deals dealing with corporate misconduct are exceedingly rare.\textsuperscript{60} In their place, prosecutors and regulators have turned almost exclusively to negotiated settlement agreements (i.e., deferred prosecution and non-prosecution agreements) to resolve alleged corporate transgressions.\textsuperscript{61} These agreements, while often (validly) criticized,\textsuperscript{62} have the undeniable benefits of (1) helping prosecutors and regulators address corporate crime in a cost-effective and expeditious manner, and (2) allowing corporations to resolve cases without risking an indictment that could result in disastrous collateral consequences.\textsuperscript{63} These benefits, however, only partially explain the exponential increase in negotiated settlements since the early 2000s.\textsuperscript{64}

\textsuperscript{58} See id. at 967 (characterizing a Caremark claim as “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment”); Stone v. Ritter, 911 A.2d 362, 372 (Del. 2006) (affirming that Caremark claims “are among the most difficult of corporate claims” to bring).

\textsuperscript{59} Hess, supra note 34, at 329. The fact that a handful of Caremark claims have recently survived motions to dismiss demonstrates that it is not an entirely toothless theory and reaffirms the importance of putting effective monitoring systems in place to minimize the risk of corporate oversight liability. See generally Elizabeth Pollman, Corporate Oversight and Disobedience, 72 Vand. L. Rev. 2013 (2019) (examining these developments in detail).

\textsuperscript{60} See generally BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014) (discussing this trend).

\textsuperscript{61} Id. Prosecutors use non-prosecution agreements to settle cases in which no formal charges have been filed, whereas they use deferred prosecution agreements to settle formally filed charges. Lawrence A. Cunningham, Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform, 66 Fla. L. Rev. 1, 18 n.90 (2014). In both cases, judicial scrutiny is virtually nonexistent in the United States. Id.; see also infra note 65 and accompanying text.

\textsuperscript{62} See, e.g., Jennifer Arlen, Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements, 8 J. Legal Analysis 191, 203 (2016) (criticizing prosecutorial abuse of deferred prosecution agreements for violating rule of law principles); David M. Uhlmann, Deferred Prosecution Agreements and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability, 72 Md. L. Rev. 1295, 1302 (2013) (arguing that deferred prosecution agreements “limit the punitive and deterrent value of the government’s law enforcement efforts and extinguish the sociatal condemnation that should accompany criminal prosecution”).

\textsuperscript{63} See generally Gabriel Markoff, Arthur Andersen and the Myth of the Corporate Death Penalty: Corporate Criminal Convictions in the Twenty-First Century, 15 U. Pa. J. Bus. L. 797 (2013) (discussing these putative benefits and arguing against the prevailing wisdom that negotiated settlements are necessary to avoid “corporate death penalties” and other disastrous consequences that an indictment might trigger).

\textsuperscript{64} On this marked increase in negotiated settlements, see Julie R. O’Sullivan, How Prosecutors Apply the “Federal Prosecutions of Corporations’ Charging Policy in the Era
Another crucial factor is the virtually unfettered discretion that prosecutors and regulators wield when deciding whether and how to charge corporations. Indeed, enforcement authorities’ eagerness to utilize this discretion is arguably the major reason for the emergence of the present-day compliance era. For one, the exercise of prosecutorial discretion has led to substantially more corporate enforcement actions. For another, prosecutors and regulators have notably used their discretion to scrutinize corporate compliance measures, often (1) deciding whether to charge or settle with corporations based on whether they possess an “effective” compliance program, and (2) imposing costly compliance reforms as a condition of settlement. With prosecutors preaching the “gospel” of compliance and effectively doing so from “in[side] the boardroom” by imposing specific structural and governance reforms, it is unsurprising that compliance has


65. See Arlen, supra note 62, at 191–92 (noting and criticizing the “broad discretion” that prosecutors possess in the area of corporate criminal enforcement); Rachel Brewster & Samuel W. Buell, The Global Market for Anti-Corruption Enforcement, 80 LAW & CONTEMP. PROBS. 193, 207 (2017) (“No prosecutor is vested with more . . . discretion than the federal prosecutor charged with handling corporate crime.”). As further evidence of unfettered discretion, it is notable that two recent attempts by district court judges to exercise more meaningful scrutiny over negotiated settlement agreements were ultimately overturned on appeal on separation of powers grounds. See Trevor N. McFadden & Maria McMahon, Reluctant Handmaidens: The Role of Judiciary in Corporate Settlement Agreements, GLOB. COMPLIANCE NEWS (July 3, 2016), https://www.globalcompliancenews.com/2016/07/03/reluctant-handmaidens-role-judiciary-corporate-settlement-agreements-20160703/ [https://perma.cc/ZU7A-FHP4] (discussing the holdings in United States v. Fokker Servs., 818 F.3d 733 (D.C. Cir. 2016), and SEC v. Citigroup Glob. Mkts., Inc., 752 F.3d 285 (2d Cir. 2014)).

66. See Griffith, supra note 3, at 2086–92 (highlighting the influence of government enforcement tactics on the rise of compliance); see also id. at 2078 (defining compliance as “a de facto government mandate imposed upon firms by means of ex ante incentives, ex post enforcement tactics, and formal signaling efforts”).

67. Laufer, supra note 6, at 1345.

68. See generally Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (collecting scholarship discussing prosecutors’ tendency to regulate corporations from within
risen to such prominence.

II. COMPLIANCE BEST PRACTICES AND A THEORY OF CONVERGENCE

Having documented the development of compliance into a burgeoning field, this Part turns to the underexamined topic of compliance best practices. It observes that a deep best practices logic underpins much of compliance policy and practice today, even though they are—perhaps ironically—better understood as common practices. The concept of “best practices,” then, implies some degree of convergence on compliance principles, structures, and practices. And, importantly, not all forms of convergence are created equal.

This Part presents a conceptual framework of compliance best practices predicated upon three different degrees of convergence: (1) ideational; (2) formal; and (3) functional. It further explores which of these types of convergence best characterizes current compliance practice. Drawing upon theoretical insights from organizational isomorphism, the discussion illuminates a host of dynamics that, in tandem, tend to promote a formal convergence on particular compliance structures. Problematically, this copycat-oriented adoption of so-called “best practices” will likely not advance, and may well impede, the implementation of well-established, “best of the best” practices in compliance theory and practice—the promotion of ethical behavior within firms and the customization of compliance structures to ensure that they mesh with prevailing organizational cultures.

A. The Rhetoric and Concept of “Best Practices”

It is fair to say that “corporate compliance” has become a popular buzzword of the day. Amid all this rhetoric, though, is a related buzzword that is just as readily invoked yet nowhere near as closely examined—best practices. At first blush, this might seem surprising. After all, one does not have to survey the compliance landscape for long before one is inundated with a plethora of lists, guides, and manuals purporting to provide by imposing specific compliance reforms).

compliance “best practices.” This vast array of sources can be overwhelming, frequently advertising some “magic” number of best practices for firms to implement—anywhere from three to five to seven to ten to fourteen to as many as 300,000.

For all their popularity in the public lexicon, however, best practices have not yet been systematically examined within the growing body of legal scholarship on corporate compliance. This is a glaring oversight given that so much of compliance policy and practice is driven by an apparent fascination with supposed “best practices.” Unpacking this phenomenon, therefore, would contribute to scholarly efforts seeking to identify common

72. A Google search for “compliance best practices” returned over 83,400 hits. See also supra notes 8–12 and accompanying text (surveying sources of best practices); MIKE KOEHLER, STRATEGIES FOR MINIMIZING RISK UNDER THE FOREIGN CORRUPT PRACTICES ACT AND RELATED LAWS 281 (2018) (acknowledging that lists of compliance best practices can be “overwhelming”).


78. See MARTIN T. BIEGELMAN, BUILDING A WORLD-CLASS COMPLIANCE PROGRAM: BEST PRACTICES AND STRATEGIES FOR SUCCESS app. C (2008) (describing a resource that purports to provide over 300,000 compliance best practices).


80. See supra notes 72–78 (illustrating this widespread fascination); Baer, supra note 13, at 968 (noting that various prosecutorial guidelines, which have great weight in the corporate compliance domain, seek to memorialize corporate compliance “best practices”). Regarding the frequent obsession with (some might even say fetishization of) best practices, see Peter Boxall, The Future of Employment Relations from the Perspective of Human Resource Management, 56 J. INDUS. RELS. 578, 581 (2014) (referring to this tendency as “best-practicism”), and Anand Sanwal, The Myth of Best Practices, J. CORP. ACCT. & FIN., July–Aug. 2008, at 51, 51 (same).
threads that unite corporate compliance as a distinct, cohesive discipline. It would also go some way toward addressing concerns that corporate compliance remains a “seriously undertheorized” subject.

As a threshold matter, it is important to first define the oft-unexamined concept of best practices and sketch its core features. Generally speaking, scholarly works that focus specifically on best practices, whether in the corporate context or otherwise, are rare. Among legal scholars, David Zaring has written the most comprehensive account, persuasively arguing that best practices are really not “best” at all: “[A]lthough best practices seem imbued with a sense of technocratic possibility . . . it need not necessarily be a particularly thoughtful concept. Indeed, the widespread adoption of best practices may tell us very little about the ‘bestness’ of the practice. Best practices work through copying.”

Many courts have seemingly recognized these limitations, holding on numerous occasions that failing to act in accordance with purported corporate “best practices” does not give rise to an actionable legal claim.

81. Cf. Root, supra note 31, at 244 (arguing that her proposed “compliance process” framework contributes to an understanding of compliance as a discrete field of study in its own right).

82. Griffith, supra note 3, at 2133. For some recent attempts to shore up these theoretical deficiencies, see Anna Donovan, Reconceptualizing Corporate Compliance: Responsibility, Freedom and the Law 13–18 (2021) (examining the problem of “creative compliance” and advocating for a reconceptualization of compliance that stresses adherence to the spirit (not just the letter) of the law); David Orozco, A Systems Theory of Compliance Law, 22 U. Pa. J. Bus. L. 244 (2020) (proposing a systems theory of compliance); Root, supra note 31 (proposing a processual framework of compliance).


84. Zaring, supra note 17, at 325–26. Professor Zaring treats best practices as a specific mode of regulation, one that regulators employ to encourage greater experimentation and input from regulated entities. See id. at 297 (“[B]est practices are a method of regulation that works through horizontal modeling rather than hierarchical direction.”).

Fundamentally, then, best practices present an irony—far from actually being “best” in any definitive or verifiable sense, they are essentially a euphemism for common practices.\(^{86}\) Indeed, according to two prominent political scientists, “[B]est practices largely represent a consensus on . . . existing practices, not on the types of practices that should or could be in place.”\(^{87}\) This “consensus” on common practices, furthermore, need not exist in any meaningful sense; all that is required for best practices to garner legitimacy, on their account, is the mere “appearance of consensus.”\(^{88}\) In other words, “best practices” are those that are commonly used and seem to be generally accepted by others as the way things ought to be done. This lack of sophistication should give pause to those who trumpet the promise of compliance best practices in panacea-like terms.\(^{89}\)

Having said that, the paradoxical nature of “best practices as common practices” does not necessarily mean that best practices are worthless or hopelessly problematic. Adopting similar or common practices may, at times, be desirable.\(^{90}\) To understand how and when this might (and might not) be the case, one must first appreciate that similarity or commonality is often a matter of degree. That is, there can be varying conceptions of “best practices,” each predicated upon a different degree of convergence on common practice—some firms may adopt best practices by essentially copying generally accepted compliance structures, whereas others may adopt best practices in a manner that permits greater structural variance and

\(^{86}\) Zaring, supra note 17, at 325–26; see also id. at 300 (“The paradigm is to keep up with the Joneses, instead of doing the Joneses one better.”).

\(^{87}\) Bernstein & van der Ven, supra note 83, at 538 (emphasis in original).

\(^{88}\) Id.


\(^{90}\) See Zaring, supra note 17, at 300 (“[S]ameness—even sameness with suboptimal standards—has its own attractions.”).
context-specific tailoring. The next section will develop these ideas by drawing upon insights from the comparative corporate governance literature on convergence.

B. Three Levels of Convergence

The adoption of similar governance practices has long interested corporate governance scholars. Typically, they have pursued this interest under the banner of convergence, examining the extent to which corporate governance systems have converged on common ideological orientations or governance structures. Importantly, convergence can take different forms, and these different manifestations can affect the extent to which a given convergence on “best practices” is (or is not) desirable.

This section proposes a conceptual framework of compliance best practices. This framework outlines three different degrees of convergence along a rough spectrum: (1) ideational; (2) formal; and (3) functional. The first type is my own term, while the second and third types are adapted from Ronald Gilson’s work on comparative corporate governance. First, ideational convergence pertains to a high-level consensus on general principles, ideals, and aspirations. There has clearly been a great deal of ideational convergence in the compliance field in recent decades, with high-level consensus on the importance of compliance within corporate law and

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93. Gilson, supra note 19; see also Coffee, Jr., supra note 19, at 649 n.27 (discussing Gilson’s theory of convergence).
governance, the need to tailor compliance programs to corporations’ particular cultural dynamics, and the value of integrating ethical considerations into the compliance function. Second, formal convergence entails the copying of formal governance structures found in other corporations. As the next section will show, the corporate enforcement landscape is replete with pressures pushing corporations toward a formalistic convergence on compliance structures and processes. Third, functional convergence involves “the use of strikingly different institutional forms to accomplish a common objective.” For example, corporate governance systems that are widely divergent in a formal sense (i.e., they rely on different policies or structural mechanisms) may nonetheless be similarly effective at disciplining poorly performing senior managers; such systems would therefore be functionally convergent.

Figure 1 illustrates the general relationship between these different degrees of convergence. The two extremes are ideational convergence and formal convergence—the former involves virtually no structural implementation and exists only on the level of shared ideas and aspirations, whereas the latter entails substantial structural mimicry of particular organizational processes and structures. In-between lies functional convergence, which involves a convergence on substantive outcomes that are more specific than ideational convergence entails along with a greater divergence of structure than formal convergence permits. Admittedly, the precise boundaries between these different degrees of convergence are hard to delineate, but this difficulty should not render the distinctions unilluminating. By conceptualizing these three types of convergence as degrees on a spectrum, one can reasonably navigate these difficulties by examining the extent to which a given practice seems to lean more or less toward one kind of convergence or another.

94. See supra Part I (illustrating convergence in these areas).
95. See Gilson, supra note 19, at 333 (characterizing this type of convergence as involving the adoption of similar “institutional forms”); cf. Iain MacNeil, Adaptation and Convergence in Corporate Governance: The Case of Chinese Listed Companies, 21 J. CORP. L. STUD. 289, 295 (2002) (“Formal convergence involves change in the legal infrastructure. . .”).
96. See infra Part II.C.2. Isomorphic Pressures and Compliance Responses (examining some of these pressures).
98. Gilson, supra note 19, at 337.
99. See Coffee, Jr., supra note 19, at 682 n.148 (discussing the difficulty of teasing apart formal and functional convergence in practice).
This section will apply the convergence spectrum to corporate compliance to assess what kind of convergence on “best practices” seems to be occurring. To guide this inquiry, the discussion will draw upon organizational isomorphism, a theory that explains the various forces encouraging organizations to adopt similar forms and structures. By examining the nature of the pressures driving convergence in corporate compliance, one can assess whether the type of convergence that is occurring is more ideational, functional, or formal in orientation. As will be shown, all signs point toward a fairly formalistic level of convergence on common compliance best practices.

1. Theoretical Foundations: Organizational Isomorphism

Before turning to an examination of convergence in the compliance field, it is worth briefly introducing organizational isomorphism, the theoretical lens that will guide this analysis. Isomorphism is a popularly used framework in the fields of management and organizational sociology, and among legal scholars it tends to be employed by adherents to the Law and Society tradition. As such, it stresses the central influences of social norms

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(which establish a “logic of appropriateness”) and the need to be perceived as socially legitimate on organizational behavior.\textsuperscript{102}

In basic terms, isomorphism means “being of identical or similar form or shape or structure.”\textsuperscript{103} Thus, the object of the theory is to explain what pressures lead organizations to become increasingly similar over time. Three different types of pressures are articulated: (1) coercive; (2) mimetic; and (3) normative.\textsuperscript{104} Coercive pressures generally stem from laws and their enforcement.\textsuperscript{105} Mimetic pressures stem from environmental uncertainty and lead risk-averse organizations to imitate the practices of their peers in response.\textsuperscript{106} Finally, normative pressures stem from professional values held by organizational members who belong to epistemic communities outside their organizations.\textsuperscript{107} Over time, their identification with these communities leads them to endorse particular policies within their organizations that, over time, leads different organizations to become increasingly similar.\textsuperscript{108} The next section will use these three different isomorphic pressures in turn to frame its examination of convergence in the corporate compliance domain.
2. Isomorphic Pressures and Compliance Responses

(a) Coercive Isomorphism and Compliance

Coercive isomorphism involves laws and enforcement practices that lead organizations to converge on similar organizational structures. Two different sources of coercive isomorphism are apparent in the context of corporate compliance: (1) the Organizational Sentencing Guidelines and (2) the terms of negotiated settlement agreements. First, the Organizational Guidelines explicitly state that “[a]n organization’s failure to incorporate and follow applicable industry practice” will count against it in an assessment of the adequacy of its compliance program.\footnote{ORG. GUIDELINES, supra note 55, § 8B2.1. cmt. n.2(A)–(B).} They also state that organizations may improve their chances of meeting the requirements of the guidelines by “modeling [their] compliance and ethics program[s] on existing, well-regarded compliance and ethics programs and best practices of other similar organizations.”\footnote{Id. cmt. n.2(C)(iii)(IV).} These statements, backed by the coercive nature of legal authority, ensure that corporations face substantial pressure to copy standard practices, procedures, and compliance structures commonly used by other corporations.

A second source of coercive isomorphic pressure stems from the language of negotiated settlement agreements. There are a couple of ways in which this pressure tends to manifest. First, many deferred prosecution and non-prosecution agreements explicitly state that the corporations agreeing to them must abide by “evolving international and industry standards.”\footnote{See, e.g., Deferred Prosecution Agreement at 33, United States v. Alstom Grid, Inc., No. 3:14-cr-00247-JBA (D. Conn. Dec. 22, 2014) (containing this language).} Second, these agreements frequently specify particular compliance reforms (e.g., the appointment of a Chief Compliance Officer and the separation of that officer from the corporation’s legal department\footnote{DeStefano, supra note 25, at 104; see also Cunningham, supra note 61, at 35–39 (criticizing the use of deferred prosecution agreements for promoting the implementation of “off-the-rack governance” mechanisms). Such requirements frequently “elevate form over function.” DeStefano, supra note 25, at 84; see also Kimberly D. Krawiec, Cosmetic Compliance and the Failure of Negotiated Governance, 81 WASH. U. L.Q. 487, 487 (2003) (arguing that internal compliance structures may often function as mere window-dressing).}, leading corporations to treat them as quasi-precedential\footnote{See Griffith, supra note 3, at 2090 (noting that negotiated settlement agreements “have a precedential impact on similarly situated firms”).} or as a kind of “‘common law’ of . . . compliance best practices[.]”\footnote{Roger M. Witten et al., Prescriptions for Compliance with the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies, 64 BUS. LAW. 691, 723 (2009).} Thus, both the
language of these agreements and their quasi-precedential status in corporate enforcement provide significant pressure on corporations to mimic other corporations’ formal compliance structures.

(b) Mimetic Isomorphism and Compliance

Mimetic isomorphism stems from uncertainty, something that is quite plentiful in the field of corporate compliance. Indeed, three different types of uncertainty might be identified: (1) inherent uncertainty; (2) enforcement uncertainty; and (3) empirical uncertainty. First, white-collar criminal law and other areas of law that are particularly applicable to corporate compliance are notoriously and inherently replete with ambiguities. Second, enforcement authorities (largely due to discretionary guidelines and a lack of judicial oversight) often do not craft negotiated settlement agreements in a clear or consistent fashion, resulting in the imposition of unpredictable penalties and compliance reform mandates. As a result, even though corporations treat the requirements articulated in negotiated settlement agreements as quasi-precedential, implementing measures that are mentioned in prior agreements is far from a guarantee that the corporation will make it through a future enforcement action unscathed. Third, although compliance programs have been in vogue for more than three decades, there remains an astonishing lack of empirical evidence as to which compliance measures actually work. Faced with these multiple sources of considerable uncertainty, it should come as no surprise that corporations often respond by mimicking popular compliance structures. Such mimicry may not be particularly effective, but it seems better than doing nothing, and


116. See Arlen, supra note 62, at 191–92 (criticizing inconsistent corporate enforcement practices); see also GARRETT, supra note 60, at 277 (arguing that “[t]elling a company to just adopt ‘best practices’ does not give real guidance”).

117. See Brandon L. Garrett & Gregory Mitchell, Testing Compliance, 83 LAW & CONTEMP. PROBS. 47, 50 (2020) (“[I]t is a pervasive problem that we lack metrics to evaluate whether compliance programs . . . actually reduce underlying violations.”); William S. Laufer, The Missing Account of Progressive Corporate Criminal Law, 14 N.Y.U. J.L. & BUS. 71, 80 n.28 (2017) (“It is remarkable and yet true that systematic reviews of corporate crime deterrence research reveal no systematic evidence of effectiveness.”).

118. See Baer, supra note 13, at 999 n.299 (“Firms take safety in practices that are widely heralded and used, regardless of their effectiveness.”); Stucke, supra note 16, at 822 (“Given the paucity of data of effective compliance programs, firms opt for the second best and find safety in numbers.”); see also Margaret Forster et al., Commonality in Codes of Ethics, 90 J. BUS. ETHICS 129, 139 (2009) (finding substantial mimicry among the ethics codes of firms on the S&P 500).
corporate actors can take some comfort in knowing (1) that they are following what appear to be generally accepted “best practices” and (2) that they may receive credit from prosecutors in future enforcement actions for adopting them.

(c) Normative Isomorphism and Compliance

Normative isomorphism involves the adoption of similar organizational structures on the basis of extra-organizational professional values to which certain organizational actors subscribe. Here, the relevant actors are compliance professionals, both those working within corporate compliance departments and those serving as external consultants to corporations. A major part of compliance’s ascendancy in recent years has been the growing popularity of compliance-specific conferences and professional societies. These developments have contributed significantly to the establishment of compliance as a distinct professional identity, one that transcends organizational boundaries and unites compliance professionals worldwide. In furtherance of this identity, the work of these conferences and professional associations “promote[s] standard compliance practices” and provides opportunities for compliance professionals to get together and share “best practices.” These professionals can then draw upon what they have learned in these settings and apply them to their own specific corporate work environments, making adjustments as necessary.

It is clear that normative isomorphic pressures stemming from compliance officers’ professional identity and associations are encouraging a convergence in compliance practice. However, the precise nature of this convergence—absent further empirical inquiry—is not entirely clear. On the one hand, the fact that compliance officers and consultants are acquiring knowledge about common practices and standard procedures is suggestive of a formal convergence. On the other hand, the importance of ethical considerations and tailoring compliance programs to meet corporations’ specific cultural realities are well-established principles of compliance, and they are surely emphasized in compliance officers’ professional networks, societies, and gatherings. This would suggest that normative isomorphism may be a force for functional convergence, one that results in corporations using different means to converge on common desirable outcomes such as the promotion of ethical organizational cultures. Even if this is the case, though, coercive (legal) and mimetic (uncertainty) pressures undoubtedly generate a strong pull toward “copycat” convergence, one that may

119. Fanto, supra note 25, at 211.
120. Id.
121. Id.
realistically hinder the capacity of compliance officers to do anything other than mimic other corporations’ formal compliance structures despite their best intentions.122 After all, from the standpoint of government enforcement authorities, “the best practice is to comply with the law”123—meaning that risk-averse compliance officers will face substantial pressure to adopt the formal structures and processes deemed necessary to appease prosecutors and regulators, however ineffectual or counterproductive they might be.124

3. Silver Bullets, Bandwagons, and Formal Convergence

While further empirical research is needed, the preceding conceptual discussion indicates that the isomorphic pressures brought to bear on corporations have, by and large, tended to promote a fairly formalistic convergence on common compliance “best practices.” That is, much of compliance policy and practice tends toward a copycat-type convergence on formal compliance policies and structures. The implications of this tendency are twofold, both of which are problematic from the standpoint of those looking to develop more effective ethics and compliance programs.

First, it encourages a “silver bullet mindset,” meaning that it leads compliance officers and other organizational actors to focus on identifying the “right” institutional structure or mix of structures that will satisfy government regulators.125 This focus, however, is misguided. No “right” mix of formal structures likely exists and, even if it did, such an emphasis loses sight of the central role that ethical and cultural considerations should play in the operation of a viable compliance program.126 Second, this

122. Cf. id. at 237 (characterizing corporate compliance in the United States, for all its emphasis on ethics and culture, as fundamentally—and perhaps unavoidably—“law centric”) (citation and internal quotation marks omitted).

123. Rod Rosenstein, Deputy Assistant Att’y Gen., U.S. Dep’t of Just., Remarks at Compliance Week’s 2018 Annual Conference for Compliance and Risk Professionals (May 21, 2018) (emphasis added).

124. See Haugh, supra note 37, at 1215–17 (describing how Intel adopted an “active approach” to compliance that “mimicked the actions of aggressive regulators[,]” which ultimately did more to exacerbate organizational misconduct); see also Krawiec, supra note 112, at 536 (“[C]ourts and regulatory bodies frequently measure compliance with the law against the industry standard . . . .”); Krieger et al., supra note 83, at 851 (highlighting the legal “[d]eference [afforded] to formalized business practices”).

125. MICHAEL JOHNSTON & SCOTT A. FRITZEN, THE CONUNDRUM OF CORRUPTION 67 (2021) was the source of inspiration for this “silver bullet” metaphor.

126. See Stucke, supra note 16, at 822 (“[W]idespread plagiarism of ethics codes raises significant concerns about the firms’ commitment to an ethical culture.”); Cheryl L. Wade, Corporate Compliance that Advances Racial Diversity and Justice and Why Business Deregulation Does Not Matter, 49 Loy. U. Chi. L.J. 611, 625 (2018) (“[B]est practices cannot change corporate cultures and climates.”); see also Coglianese & Nash, supra note 2626, at 584 (cautioning against “expecting too much from the mere formalization of a compliance
formalistic convergence on best practices promotes a “bandwagon effect” that encourages firms to engage in the rote mimicry of others’ compliance structures simply because these structures seem to be commonly accepted.\textsuperscript{127} As with the silver bullet mindset, this bandwagon effect is unlikely to promote an effective approach to compliance. On the contrary, it risks undermining the core tenets of ethics and cultural tailoring that are supposed to lie at the core of highly functioning compliance programs, promoting a one-size-fits-all mindset in their stead.\textsuperscript{128}

III. AN ILLUSTRATION AND FUTURE DIRECTIONS

A. The Case of Transnational Anti-Bribery Compliance

To further illustrate the nature of the formal convergence that has gripped compliance in recent years, this section will focus on a particular area of corporate compliance—transnational anti-bribery compliance. It will briefly show how an initial ideational convergence on the importance of combating and mitigating the risk of transnational corruption has increasingly developed into a more formalistic convergence on particular anti-bribery instruments. It will then provide a couple of suggestions as to how anti-bribery compliance might move toward a more desirable functional convergence.

Anti-bribery compliance emerged as an important global phenomenon at the turn of the century.\textsuperscript{129} While the U.S. Foreign Corrupt Practices Act (FCPA)—widely regarded as one of the most influential transnational anti-bribery laws in the world—was passed in 1977, it took many years for enforcement to grow and for other countries to pass similar laws criminalizing the bribery of foreign officials.\textsuperscript{130} However, beginning in the early 2000s, anti-bribery enforcement grew considerably and, with it, widespread consensus on the importance of anti-bribery compliance.\textsuperscript{131} This

\textsuperscript{127. See Baer, supra note 79, at 1065 (describing this “herd mentality”).}
\textsuperscript{128. See Todd Haugh, The Power Few of Corporate Compliance, 53 GA. L. REV. 129, 146 (2018) (“While it is oft-repeated that there is no ‘one-size-fits-all’ compliance program, the reality is that most programs look very much alike . . . .”).}
\textsuperscript{129. See JOHNSTON & FRITZEN, supra note 125, at 3 (“Over the past 30 years, corruption . . . has vaulted from obscurity to a place near the top of the international policy agenda.”).}
\textsuperscript{130. See Rachel Brewster, Enforcing the FCPA: International Resonance and Domestic Strategy, 103 VA. L. REV. 1611, 1645–46 (2017) (discussing the paucity of transnational anti-corruption enforcement during the latter part of the twentieth century).}
\textsuperscript{131. The reasons for this escalation in enforcement are too many to list here, but principal reasons include the passage of the OECD Anti-Bribery Convention, which led to the widespread criminalization of transnational bribery among its member states, and the rise of}
ideational convergence, however, has increasingly morphed into a more formalistic one. One major reason for this development is the global diffusion of corporate negotiated settlement agreements, which are used more frequently in the anti-bribery space than in any other area of compliance. In recent decades, some foreign governments have effectively mimicked U.S. policy by implementing similar systems of corporate liability and negotiated settlement to address transnational bribery. Such mimicry has given rise to an increasingly international convergence in anti-bribery compliance, one that arguably tracks the formalistic approach to compliance that characterizes the American system. Indeed, by their very nature, negotiated settlement agreements stress the implementation of formal compliance structures and tend to encourage the mimicry of other corporations’ compliance systems. The widespread diffusion of such agreements, therefore, would tend to promote more of a formal convergence in corporate anti-bribery policy.

There are at least a couple of ways in which firms and regulators might move toward a more desirable functional convergence. First, regulators could work to customize their approaches to negotiated settlements and do


134. Griffith, *supra* note 3, at 2090; see also Mike Koehler, *Foreign Corrupt Practices Act Enforcement and Related Developments*, 89 MISS. L.J. 227, 296 (2020) (arguing that, in the FCPA context, “the SEC often advances enforcement theories, with the perfect benefit of hindsight, that seem to equate failure to act consistent with ‘best practices’ (as fuzzy and undefined as that term is) with legal violations”).

135. See generally Simon St-Georges & Denis Saint-Martin, *The Global Diffusion of DPAs: The Not So Functional Remaking of the Rules Against Business Corruption*, in *THE TRANSNATIONALIZATION OF ANTI-CORRUPTION LAW* 469, 485–88 (Régis Bismuth et al. eds., 2021) (examining the global diffusion of negotiated settlements through the lens of isomorphism and arguing that more research is needed to better establish the extent to which mimicry has driven their proliferation).

136. Such efforts appear to be underway, with different jurisdictions developing systems of negotiated settlement that aim to address perceived weaknesses in the American system.
so in ways that take seriously the importance of tailoring anti-bribery compliance measures to organization-specific cultural dynamics, operational realities, and ethical aspirations. Second, firms might look to draw upon private anti-bribery compliance standards, data analytics tools, or governance indicators, which have risen in prominence in recent years and are designed to provide room for context-specific tailoring and empirical assessment. Although such mechanisms have their flaws, they do provide opportunities for corporations and government regulators to take customization and the measurement of compliance more seriously. While these are preliminary suggestions, they would go at least some way toward addressing the formalistic type of convergence that has emerged within the global anti-corruption regime.

B. Toward a “Best Practices” Research Agenda

This Comment takes the necessary first step of placing the study of corporate compliance best practices on the scholarly agenda. Looking ahead, legal scholars might look to advance this agenda in the following ways. First, scholars should strive to conduct more sophisticated empirical research to identify compliance practices that are, in a meaningful sense, “best” or most effective in specific policy areas (e.g., antitrust or anti-money laundering) and in light of particular contextual considerations. Second, scholars should pay greater attention to the interplay between different developers or sources of best practices, with a particular eye toward identifying ways to increase fruitful exchanges of information between

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See, e.g., Colin King & Nicholas Lord, Negotiated Justice and Corporate Crime 67–82 (2018) (discussing deferred prosecution agreements in the U.K. and how legislators have strived to make modifications that differentiate them from the U.S. system of negotiated settlement, most notably the introduction of more meaningful judicial oversight).

137. See sources supra note 12 and accompanying text (noting the emergence of new international compliance standards); Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, Indicators as a Technology of Global Governance, 46 LAW & SOC’Y REV. 71, 71–72 (2012) (discussing the rise of governance indicators); Haugh, supra note 10, at 816–18 (discussing the heightened use of data analytics in corporate compliance).

138. See, e.g., Heaston, supra note 12 (examining the pitfalls associated with an emerging international compliance standard-setting scheme).

139. See Laufer, supra note 117, at 93 (arguing that “a gestalt of models, measures, metrics, data, analytics, standards, committed compliance professionals, relevant compliance scholarship, and vast firm resources dedicated to promoting compliance” represents “an opportunistic convergence of formal and informal social controls” that may result in a more evidence-based approach to corporate compliance).

140. Calls for such research have been particularly forceful in recent years. See, e.g., Garrett & Mitchell, supra note 117; Eugene Soltes, Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms, 14 N.Y.U. J.L. & BUS. 965 (2018).
governmental and non-governmental actors so that all relevant parties can achieve a better understanding of specific best practices.\textsuperscript{141} Third, scholars should further explore the notion of “best practices as common practices” by (1) expanding on the convergence spectrum proposed in this Comment and (2) applying other theoretical frameworks to the corporate compliance domain to identify additional types of convergence on common “best practices” that might be conceptually insightful or practically useful.\textsuperscript{142}

**CONCLUSION**

The point of this Comment has not been to besmirch compliance best practices. Dismissing them out of hand would be imprudent, particularly when one appreciates that different degrees of convergence on best practices can exist. Rather, the point has been to call attention to the underexamined concept of compliance best practices and the problems they can pose when corporations adopt them in a formalistic, “copycat” fashion. Best practices, particularly to the extent that they are subjected to more robust empirical validation in the future, may indeed be helpful in some circumstances. However, they may also crowd out the ethical considerations and cultural-specific tailoring that compliance programs need in order to flourish. Corporate actors, enforcement authorities, compliance professionals, and legal scholars must become more cognizant of these pitfalls going forward. To do so, they will need to dispense with thoughtless invocations of “best practices” and, perhaps for the first time, ask themselves what they mean by the phrase and what (if anything) makes them “best.”

\textsuperscript{141} See, e.g., Veronica Root Martinez, *The Government’s Prioritization of Information Over Sanction: Implications for Compliance*, 83 Law & Contemp. Probs. 85, 109 (2020) (arguing that “[t]he government could harness the information it is receiving to create and publish best practices for achieving effective compliance within firms”).

\textsuperscript{142} For some potential theoretical frameworks and concepts, see John L. Campbell, *Institutional Change and Globalization* 65, 71 (2004) (using the concepts of “bricolage” and “translation” to depict variations in convergence); Jacoby, supra note 91, at 5–12 (outlining four different modes of policy emulation: copies, templates, thresholds, and patches); William Twining, *Legal Pluralism 101*, in *Legal Pluralism and Development* 112, 119, 125 (Brian Z. Tamanaha et al. eds., 2012) (discussing various theoretical concepts relevant to research on convergence, such as policy diffusion, legal transplantation, harmonization, imitation, adaptation, and partial integration).