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THE NEW GATEKEEPERS: PRIVATE FIRMS AS PUBLIC ENFORCERS

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The world's largest businesses must routinely police other businesses. By public mandate, Facebook monitors app developers' privacy safeguards, Citibank audits call centers for deceptive sales practices, and Exxon reviews offshore oil platforms' environmental standards. Scholars have devoted significant attention to how policy makers deploy other private sector enforcers, such as certification bodies, accountants, lawyers, and other periphery "gatekeepers." However, the literature has paid insufficient attention to the emerging regulatory conscription of large firms at the center of the economy. This Article examines the rise of the enforcer-firm through case studies of the industries that are home to the most valuable companies in technology, banking, oil, and pharmaceuticals. Over the past two decades, administrative agencies have used legal rules, guidance documents, and court orders to mandate that private firms in these and other industries perform the duties of a public regulator. More specifically, firms must write rules in their contracts that reserve the right to inspect third parties. When they find violations, they must pressure or punish the wrongdoer. This form of governance has important intellectual and policy implications. It imposes more of a public duty on the firm, alters corporate governance, and may even reshape business organizations. It also gives resource-strapped regulators promising tools. If designed poorly, however, the enforcer-firm will create an expansive area of unaccountable authority. Any comprehensive account of the firm or

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regulation must give a prominent role to the administrative state's newest gatekeepers.

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INTRODUCTION

In 2018, Facebook Chairman and CEO Mark Zuckerberg faced senators on national television regarding conduct that prompted the Federal Trade Commission (FTC) to seek its largest ever fine.[1] The main issue was not what Facebook did directly to its users. Instead, the hearing focused on the social network's failure to restrain third parties. Most notably, the political consulting firm Cambridge Analytica had accessed

[1] Cecilia Kang, A Facebook Settlement with the F.T.C. Could Run into the Billions, N.Y. Times, Feb. 15, 2019, at B6.

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millions of users' accounts in an effort to support election candidates.[2] Before Zuckerberg's Senate testimony, the FTC had already sued Google and Amazon to force them to monitor third parties for privacy violations and in-app video game purchases by children that sometimes reached in the thousands of dollars.[3] In other words, the FTC is requiring large technology companies to act in ways traditionally associated with public regulators—by policing other businesses for legal violations.

Over time, policy makers have enlisted a large array of private actors in their quest for optimal regulatory design.[4] Scholarship on the private role in public governance has focused on third-party enforcers whose main function is to provide a support service. Those enforcers include self-regulatory organizations formed by industry and independent auditors mandated by regulators.[5] The corporate law strand of this enforcement literature emphasizes a network of "gatekeepers," such as lawyers, accountants, and certifiers who guard against compliance and governance failures.[6] For instance, before releasing annual reports, a

[2] Katy Steinmetz, Mark Zuckerberg Survived Congress. Now Facebook Has to Survive the FTC, Time (Apr. 13, 2018, 12:42 PM), https://time.com/5237900/facebook-ftc-privacy-data-cambridge-analytica/ [https://perma.cc/4SJJ-YHP9].

[3] See FTC v. Amazon.com, Inc., No. C14-1038-JCC, 2016 WL 10654030, at *8 (W.D. Wash. July 22, 2016) (finding Amazon accountable for in-app charges); Agreement Containing Consent Order at 5, Google Inc., No. 102-3136, (F.T.C. Mar. 30, 2011), https://www.ftc.gov/sites/default/files/documents/cases/2011/03/110330googlebuzzagreeorder.pdf [https://perma.cc/7R6W-5VNP] (ordering Google to require "service providers by contract to implement and maintain appropriate privacy protections").

[4] See, e.g., Kenneth A. Bamberger, Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State, 56 Duke L.J. 377, 453 (2006) (conceiving of regulators' decisions to let regulated entities fill in vague mandates as delegation); Cary Coglianese & David Lazer, Management-Based Regulation: Prescribing Private Management to Achieve Public Goals, 37 Law & Soc'y Rev. 691, 691, 726 (2003) (describing the "intertwining of the public and private sectors"); Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 549–56 (2000) (surveying the great diversity of private governance actors); Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1369 (2003) (conceiving of privatization of health care, welfare provision, prisons, and public education as delegation); Martha Minow, Public and Private Partnerships: Accounting for the New Religion, 116 Harv. L. Rev. 1229, 1237–42 (2003) (exploring implications of privatization for public values).

[5] See Bamberger, supra note 4, at 452–58; Freeman, supra note 4, at 635, 644. As another example, in policing stock exchanges, the Securities and Exchange Commission (SEC) relies heavily on self-regulatory organizations to monitor wrongdoing and propose rules. Jennifer M. Pacella, If the Shoe of the SEC Doesn't Fit: Self-Regulatory Organizations and Absolute Immunity, 58 Wayne L. Rev. 201, 202 (2012). Courts also order third-party monitors. See Veronica Root, The Monitor-"Client" Relationship, 100 Va. L. Rev. 523, 531–33 (2014).

[6] See John C. Coffee, Jr., Gatekeepers: The Professions and Corporate Governance 2–3 (2006) (chronicling the evolution of auditors, attorneys, securities analysts, and credit-rating

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publicly traded company must obtain the signoff of a certified accountant.[7] In these more familiar private enforcement contexts, the private "cops on the beat"[8] are ancillary actors rather than core market participants.[9]

This Article demonstrates how policymakers have enlisted a new class of more powerful third-party enforcers: the businesses at the heart of the economy. The ten largest American companies by valuation operate in information technology, finance, oil, and pharmaceuticals.[10] A regulator has put leading firms in each of these industries on notice about their responsibilities for third-party oversight.[11] In addition to the FTC, the Environmental Protection Agency (EPA)—along with the Department of Justice (DOJ)—requires BP Oil and other energy companies to audit

agencies in guarding against corporate governance failures); Assaf Hamdani, Gatekeeper Liability, 77 S. Cal. L. Rev. 53, 117–18 (2003) (discussing the need to expand gatekeeper liability in the wake of the Enron fraud scandal); Reinier H. Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, 2 J.L. Econ. & Org. 53, 54 (1986) (contrasting whistleblowers with gatekeepers, who are third parties that can "prevent misconduct by withholding support").

[7] 15 U.S.C. § 78m(a) (2018) ("Every issuer of a security . . . shall file with the Commission . . . such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants . . . .").

[8] Kraakman, supra note 6, at 53 n.1 (attributing to Jeremy Bentham the "cop-on-the-beat" metaphor and using it to describe gatekeepers).

[9] The literature has also extensively analyzed self-regulation as part of a broader new governance that arose in recent decades. Administrative agencies now pursue collaborative and responsive models of public governance designed to encourage the business sector to self-regulate. See, e.g., Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate 3 (1992); Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 6–7 (1997). Additionally, large businesses have dramatically grown their compliance departments to police the firm from within. See, e.g., Sean J. Griffith, Corporate Governance in an Era of Compliance, 57 Wm. & Mary L. Rev. 2075, 2077 (2016); Kimberly D. Krawiec, Organizational Misconduct: Beyond the Principal-Agent Model, 32 Fla. St. U. L. Rev. 571, 572 (2005); Veronica Root, Coordinating Compliance Incentives, 102 Cornell L. Rev. 1003, 1004 (2017). This important and nascent literature on corporate compliance has remained focused on the firm's role in overseeing internal operations, or on traditional gatekeepers doing so.

[10] Fortune 500 List, Fortune (last visited Oct. 18, 2019), http://fortune.com/fortune-500/list/filtered?sortBy=mktval (identifying the ten most valuable American companies as Apple, Alphabet, Microsoft, Amazon, Berkshire Hathaway, Facebook, JPMorgan Chase, Johnson & Johnson, Exxon Mobil, and Bank of America). One of these companies, Berkshire Hathaway, is a conglomerate operating in diverse industries, including finance, while Johnson & Johnson sells pharmaceuticals in addition to consumer goods. Berkshire Hathaway, Fortune (updated Mar. 29, 2018), https://fortune.com/fortune500/2018/berkshire-hathaway/; Johnson & Johnson, Fortune (updated Mar. 29, 2018), https://fortune.com/fortune500/2018/johnson-johnson/.

[11] See infra Part II.

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offshore oil platform operators for environmental compliance.[12] The Food and Drug Administration (FDA) expects Pfizer and other drug companies to ensure suppliers and third-party labs follow the agency's health and safety guidelines.[13] The Consumer Financial Protection Bureau (CFPB) orders financial institutions, such as American Express, to monitor independent debt collectors and call centers for deceptive practices.[14]

The widespread conscription of businesses as enforcers—also called "enforcer-firms" below—shares characteristics with, but differs meaningfully from, prior iterations of third-party regulation. For instance, the FTC's original administrative order required Facebook to hire a third-party auditor—an example of the old gatekeeper model—to certify Facebook's compliance.[15] In that arrangement, refusing to sign off on Facebook's biennial reports to the FTC constituted the auditor's main sanction.[16] Facebook could, however, respond to that sanction by bringing its business elsewhere.[17] That ability to retaliate weakens traditional gatekeepers' power and independence.[18]

In contrast, the enforcer-firm is usually the client—or at least a crucial business partner—of the third parties it regulates. Its main sanction is to cease doing business with those third parties, which can prove devastating.[19] The client relationship that weakens traditional gatekeepers thus strengthens the enforcer-firm. In short, policymakers have begun relying on third-party enforcement by the real gatekeepers of the economy: the firms who control access to core product markets.[20]

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[12] Consent Decree Among Defendant BP Exploration & Production Inc., the United States of America, and the States of Alabama, Florida, Louisiana, Mississippi, and Texas at 32–33, In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, No. 10-MDL-2179 (E.D. La. Oct. 5, 2015), ECF No. 15436-1 [hereinafter BP Consent Decree].

[13] 21 C.F.R. § 211.22(a) (2018) (explaining best practices for quality control of contractors); FDA Warning Letter from Cheryl A. Bigham, Dist. Dir., Kan. City Dist., Office of Regulatory Affairs, to Thomas Handel, President & Gen. Manager, Meridian Med. Techs., Inc., a Pfizer Co. (Sept. 5, 2017), https://www.fda.gov/iceci/enforcementactions/warningletters/2017/ucm-574981.htm [https://perma.cc/JMX9-V7VL].

[14] Am. Express Centurion Bank, CFPB No. 2012-CFPB-0002 (Oct. 1, 2012) (joint consent order).

[15] Facebook, Inc., FTC File No. 0923184, No. C-4365, at 3–4 (F.T.C. July 27, 2012) (decision and order).

[16] See id. at 6.

[17] The consent order does not prevent such a response. See id.

[18] See Joel S. Demski, Corporate Conflicts of Interest, 17 J. Econ. Persp. 51, 57 (2003).

[19] See infra Section IV.A.

[20] A diversified firm may play both a new and traditional gatekeeper role. For instance, by allowing a company to serve as both a commercial bank and investment bank, the law enables

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In highlighting an overlooked enforcement model, this Article builds on the literature scrutinizing the increasingly narrow divide between private businesses and the administrative state.[21] Although that scholarship has yet to examine the enforcer-firm in any sustained manner,[22] mandated third-party governance raises some similar accountability issues as previous generations of third-party enforcement. In particular, as a new area of quasi-regulatory activity unlikely to be overturned by judicial review, conscripted enforcement lacks transparency and traditional measures of public involvement, such as notice and comment rulemaking.[23]

However, if designed well, the enforcer-firm offers some hope for improving upon prior regulatory models' accountability. Because enforcer-firms often sell directly to consumers, they may prove more responsive to public concerns when compared to traditional gatekeepers, which interact most closely with regulated entities.[24] And because the enforcer-firm is itself a prime target of public regulation, it would be easier for an administrative agency to oversee it than to add a whole new category of firms as required for oversight of traditional gatekeepers.[25]

large financial institutions to operate as both traditional gatekeepers—overseeing their clients by underwriting securities, prompted by liability avoidance under the Securities Act of 1933—and as new gatekeepers, being the clients who hire third-party businesses. See infra Section II.A; Kraakman, supra note 6, at 82–83.

[21] See supra note 4 and accompanying text.

[22] To the extent scholars have discussed mandated third-party governance it has been in passing or in narrower contexts such as in criminal or international law. See, e.g., Larry Catá Backer, Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley, 2004 Mich. St. L. Rev. 327, 433–34 (2004) (referencing how the Bank Secrecy Act causes a larger number of businesses to become "part of the network of the state's eyes and ears"); John Braithwaite, Responsive Regulation and Developing Economies, 34 World Dev. 884, 889–90 (2006) (exploring how domestic firms can serve as a means of reaching foreign actors); Stavros Gadinis & Colby Mangels, Collaborative Gatekeepers, 73 Wash. & Lee L. Rev. 797, 910–11 (2016) (focusing on money laundering); Itai Grinberg, The Battle over Taxing Offshore Accounts, 60 UCLA L. Rev. 304, 304 (2012) (referencing a "growing consensus that financial institutions should act as cross-border tax intermediaries"). For other ways that scholars have recognized that businesses regulate other firms, see infra Part I.

[23] See, e.g., Rachel E. Barkow, Overseeing Agency Enforcement, 84 Geo. Wash. L. Rev. 1129, 1130 (2016) ("Most aspects of agency enforcement policy generally escape judicial review."); Freeman, supra note 4, at 647 ("Most self-regulatory programs lack the transparency and public involvement that characterize legislative rulemaking."); Lesley K. McAllister, Regulation by Third-Party Verification, 53 B.C. L. Rev. 1, 3–4 (2012) (identifying accountability challenges with third-party enforcement models).

[24] See, e.g., Coffee, supra note 6, at 15–18 (describing gatekeeper shortcomings).

[25] See infra Section IV.B.

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The conscription of businesses proved crucial in other administrative contexts, including the implementation of a personal income tax.[26] The enforcer-firm could, by analogy, enable the regulatory state to bring dispersed business actors into compliance.

None of this should be taken as an endorsement of the enforcer-firm, which is too new and understudied to yield strong normative conclusions. However, an openness to the upsides of the enforcer-firm responds to the critique that administrative law scholars have too often portrayed private actors as an intrusion into legitimacy, which prevents "imagining the means by which private actors might contribute to accountability."[27]

Mandated third-party governance also speaks to vibrant corporate law inquiries. Scholars have paid considerable attention to the duties of directors and officers, personal liability for corporate wrongdoing, and organizational structure.[28] Conscripted enforcement shapes each of these areas and pushes against depictions of the firm emphasizing its private nature. Those depictions are rooted in the influential metaphor—sometimes described as the most dominant theory of the firm—that the firm is a "nexus of contracts" among owners, managers, laborers, suppliers, and customers.[29] The firm remains exceedingly private. But by directing businesses to write enforcement-oriented contract clauses and monitor external relationships for legal violations, as a descriptive matter the state is pushing the firm toward a larger public role.[30]

That insight is relevant beyond theory and institutional design. In the highest legislative circles and corporate boardrooms, debates are unfolding about what duties corporations owe to society, with some taking particular aim at the idea that shareholders should come above all

[26] Ajay K. Mehrotra, Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877–1929, at 282–83 (2013).

[27] Freeman, supra note 4, at 675. Numerous scholars have taken up this call in other contexts. See, e.g., Sarah E. Light, The Law of the Corporation as Environmental Law, 71 Stan. L. Rev. 137, 139–41 (2019) (calling for a holistic view of corporations' role in promoting environmental goals).

[28] See generally Nicolai J. Foss et al., The Theory of the Firm, *in* 3 Encyclopedia of Law and Economics 631 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); infra Part III.

[29] See, e.g., Melvin A. Eisenberg, The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm, 24 J. Corp. L. 819, 820 (1999); Michael C. Jensen & William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305, 310 (1976); Steven L. Schwarcz, Misalignment: Corporate Risk-Taking and Public Duty, 92 Notre Dame L. Rev. 1, 26 (2016).

[30] See infra Section III.A.

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other stakeholders.[31] Conscripted enforcement marks a significant uptick in federal regulatory involvement in the firm by imposing more of an affirmative public duty to act.[32] Cast against the backdrop of the firm as public enforcer, calls for business leaders to do more for society appear less disconnected from reality than would be the case under a largely private conception of the firm.[33]

The Article is structured as follows. Part I provides an overview of the well-studied ways that private entities serve as enforcers. Part II offers four case studies of how regulators have implemented mandated enforcement of third parties in some of the largest U.S. industries: the FTC and technology, the CFPB and banking, the EPA and oil, and the FDA and pharmaceuticals. Part III examines how mandated enforcement alters the firm's contracts, relationships, and governance. It also explores shifts in liability at the personal and entity level, which could influence organizational structure. Part IV concludes by considering implications for the effectiveness and accountability of the administrative state.

I. TRADITIONAL FORMS OF THIRD-PARTY ENFORCEMENT

A decades-long debate in both corporate and administrative law scholarship concerns "how best to tap the private interests of enterprise participants to serve the public interest."[34] Historically, the starting point was the hope that firms would self-regulate—if not because of market incentives, then to avoid legal punishment for wrongdoing.[35] Although scholars recognize the heterogeneity of external private enforcers,[36] they

[31] See Elizabeth Warren, Companies Shouldn't Be Accountable Only to Shareholders, Wall St. J., Aug. 15, 2018, at A17; Larry Fink, Larry Fink's 2018 Letter to CEOs: A Sense of Purpose, BlackRock, https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/P9X6-HN85] (last visited Jan. 13, 2020); Martin Lipton et al., It's Time to Adopt the New Paradigm, Harv. L. Sch. F. Corp. Governance, https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm [https://perma.cc/3XH9-SSRS] (last visited Jan. 13, 2020); Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans,' Business Roundtable (Aug. 19, 2019), [https://perma.cc/9K2F-2HLG]. On shareholder primacy, see infra note 189 and accompanying text.

[32] See infra Section III.D.

[33] There is arguably a gap between rhetoric and reality. See Marcel Kahan & Edward Rock, Symbolic Corporate Governance Politics, 94 B.U. L. Rev. 1997, 2042 (2014).

[34] Reinier H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 Yale L.J. 857, 857 (1984); sources cited supra note 23.

[35] See Kraakman, supra note 6, at 56.

[36] See, e.g., Freeman, supra note 4, at 551–56.

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have stopped short of examining the emerging importance of how large firms are required to oversee third parties. I now turn to those prior narratives of third-party private regulation.

A. Independent Enforcement

The origins of businesses influencing other businesses for the public benefit lie in markets, rather than government. To see the public-private connection, it is instructive to first consider how the administrative state functions. Regulators have significant discretion in choosing which policymaking tools to deploy.[37] Their most prominent tools include writing legal rules and filing lawsuits.[38] However, as I have shown elsewhere, public regulators devote fewer resources to these legal functions than to monitoring businesses through on-site inspections and remote information collection.[39] When monitoring activities detect wrongdoing, the monitors—EPA inspectors, bank examiners, and others—can respond in many ways outside the court system. Responses range from informally requesting that businesses change behavior to mandating the suspension of business activities.[40] Private third-party enforcement has analogs to each of these main policymaking functions, but especially to monitoring.

Independent of any legal influence, firms monitor other firms solely out of self-interest. For instance, when land is the collateral for a loan, banks may inspect the property periodically to ensure that the borrowing firm is not releasing hazardous chemicals or otherwise damaging that collateral.[41] Insurance companies also monitor the businesses that they insure to prevent legal violations that would cause the insurer to make large payouts under the policy.[42] The prospect of reducing costs motivates such monitoring, but the monitoring advances the public interest. These

[37] M. Elizabeth Magill, Agency Choice of Policymaking Form, 71 U. Chi. L. Rev. 1383, 1384–86 (2004).

[38] See id. at 1384 (providing an overview of policy tools).

[39] See Rory Van Loo, Regulatory Monitors, 119 Colum. L. Rev. 369, 408–12 (2019).

[40] Id. at 373–75.

[41] See, e.g., Michael P. Vandenbergh, The Private Life of Public Law, 105 Colum. L. Rev. 2029, 2053–55 (2005); see also Kathryn Judge, Interbank Discipline, 60 UCLA L. Rev. 1262, 1321–22 (2013) (showing how banks influence other banks' risk-taking).

[42] See, e.g., Mark A. Cohen et al., Deepwater Drilling: Law, Policy, and Economics of Firm Organization and Safety, 64 Vand. L. Rev. 1853, 1899 (2011); Shauhin A. Talesh, Insurance Companies as Corporate Regulators: The Good, the Bad, and the Ugly, 66 DePaul L. Rev. 463 (2017).

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financial interests can push external parties to "constrain fundamental managerial decisions even in the ordinary course of business."[43]

Another type of private enforcer is the self-regulatory organization, which has been described as the new "fifth branch" of government but originates in industry.[44] Workers or companies in a given industry come together to form self-regulatory organizations. Traders formed the New York Stock Exchange (NYSE), for instance, "to improve their business by excluding unreliable, uncreditworthy, and unscrupulous brokers."[45]

In recent decades, private entities increasingly regulated to advance social causes for reasons beyond protecting their direct investments or members. For example, Walmart imposes recycling and energy conservation requirements on its vendors,[46] and Nike and Apple audit their manufacturing facilities to prevent child labor and other abuses.[47] Although businesses originally developed these types of programs mostly in response to negative publicity, firms are becoming more proactive: "Firms are not merely the objects of activist boycotts. They are becoming activists themselves."[48]

A final category of market-oriented constraints involves certification schemes. Organizations offer logos that tell grocery shoppers whether coffee, fruit, and other products meet fair-trade and environmentally sustainable standards.[49] Logos leverage the consumers' desire to motivate companies to adhere to better standards. Solely out of private initiative, businesses monitor other businesses in diverse ways.

[43] See Frederick Tung, Leverage in the Board Room: The Unsung Influence of Private Lenders in Corporate Governance, 57 UCLA L. Rev. 115, 120 (2009).

[44] William A. Birdthistle & M. Todd Henderson, Becoming a Fifth Branch, 99 Cornell L. Rev. 1, 34 (2013).

[45] Id. at 4.

[46] Michael P. Vandenbergh, The New Wal-Mart Effect: The Role of Private Contracting in Global Governance, 54 UCLA L. Rev. 913 (2007). But see Jonathan C. Lipson, Promising Justice: Contract (as) Social Responsibility, 2019 Wis. L. Rev. 1109, 1110.

[47] Barbara J. Fick, Corporate Social Responsibility for Enforcement of Labor Rights: Are There More Effective Alternatives?, 4 Global Bus. L. Rev. 1, 5–6 (2014).

[48] Light, supra note 27, at 139 (footnote omitted).

[49] See, e.g., Scott Burris et al., Changes in Governance: A Cross-Disciplinary Review of Current Scholarship, 41 Akron L. Rev. 1, 60 (2008); Jodi L. Short & Michael W. Toffel, The Integrity of Private Third-Party Compliance Monitoring, 42 Admin. & Reg. L. News 22, 22 (2016).

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B. Encouraged Enforcement

Although one motivation for voluntary regulation is to forestall public oversight,[50] the examples thus far cover situations in which private regulation occurs independent of existing legal influence. Policymakers sometimes wish to intervene but are reluctant to act paternalistically by forcing a private party to act.[51] Without mandating private enforcement, policymakers can still influence private parties to regulate voluntarily. For instance, if the law imposes vicarious liability on the pharmaceutical company for violations by its ingredient supplier, the pharmaceutical company may be motivated to audit the supplier's production process even though auditing is not required.[52]

Another straightforward application of encouraged enforcement is requiring companies to release product information in digital form so that intermediaries can use that data to help consumers.[53] Travel websites such as Expedia and Travelocity benefitted from government mandates that airlines release flight prices and times online.[54] These intermediaries help to regulate by enabling a marketplace filled with informed consumers, thereby deterring undesirable business practices.[55] Although legal authority made the information available, it did not require any private actor to use that information to regulate.

Private parties can also voluntarily serve as enforcers by bringing lawsuits or alerting authorities to legal violations. Private attorney general statutes in many fields give citizens the right to sue to enforce public laws.[56] These statutes may offer the plaintiff monetary incentives to file the suit, by awarding them a portion of any penalties paid by the offending company.[57]

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[50] See, e.g., Birdthistle & Henderson, supra note 44, at 14–15 (discussing the NYSE).

[51] See Colin Camerer et al., Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism," 151 U. Pa. L. Rev. 1211, 1212 (2003).

[52] Cf. Alan O. Sykes, The Economics of Vicarious Liability, 93 Yale L.J. 1231, 1255 (1984).

[53] See Rory Van Loo, Rise of the Digital Regulator, 66 Duke L.J. 1267, 1269–70 (2017).

[54] See id.

[55] See id.

[56] See, e.g., Barton H. Thompson, Jr., The Continuing Innovation of Citizen Enforcement, 2000 U. Ill. L. Rev. 185.

[57] See, e.g., id. at 216. Attorneys have monetary incentives to initiate lawsuits as well, which plays an important role in some enforcement areas. See Stephen J. Choi & A.C. Pritchard, SEC Investigations and Securities Class Actions: An Empirical Comparison, 13 J. Empirical Legal Stud. 27, 28 (2016).

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Rather than filing the lawsuit, citizens and nonprofits may instead serve as informants. Environmental watchdog groups patrol natural habitats to find evidence of pollution, a practice that has increased with the availability of powerful monitoring technologies.[58] Whistleblower statutes serve a related function by providing legal protections or monetary incentives for employees or third parties who come forward with information about wrongdoing.[59]

Scholars have also highlighted the instrumental role that contracts play in voluntary enforcement.[60] In particular, businesses enter into second-order agreements voluntarily in response to or in the absence of regulation.[61] Those agreements result from private bargaining and serve to limit a firm's risks of incurring legal liability, such as from common law torts.[62] Discretionary inspections help not only to minimize legal violations, but also to receive lower penalties per federal organizational sentencing guidelines.[63] Without directly mandating enforcement, policymakers have many options to motivate businesses to monitor other businesses.

C. Mandated Enforcement

The law can require private enforcers rather than merely encouraging them. "Corporate governance is often about gatekeeping,"[64] which Reiner Kraakman defines as situations in which a corporation must obtain the support of attorneys, accountants, and others before taking certain actions.[65] Instead of allowing an oil company to decide whether to hire a

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[58] See, e.g., Daniel C. Esty, Environmental Protection in the Information Age, 79 N.Y.U. L. Rev. 115, 209 (2004).

[59] See, e.g., Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841–49, 15 U.S.C. § 78u–6, 18 U.S.C. 1514A (2010) (adopting § 21F of the Securities Exchange Act); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802–04, 18 U.S.C. 1514A; SEC, Annual Report to Congress on Whistleblower Program 10 (2017), https://www.sec.gov/files/sec-2017-annual-report-whistleblower-program.pdf [https://perma.cc/5R7N-XZHF].

[60] See Jody Freeman, The Contracting State, 28 Fla. St. U. L. Rev. 155, 155 (2000).

[61] Vandenbergh, supra note 41, at 2030–31. But see Lipson, supra note 46, at 1110.

[62] See Vandenbergh, supra note 41, at 2033 & n.14.

[63] But see Jennifer Arlen, The Failure of the Organizational Sentencing Guidelines, 66 U. Miami L. Rev. 321, 322 (2012) ("[T]hese provisions offer too little mitigation to encourage firms to detect, report, and cooperate.").

[64] Mark J. Roe, Delaware's Competition, 117 Harv. L. Rev. 588, 622 (2003).

[65] Kraakman, supra note 34, at 868 & n.28; see also Jonathan C. Lipson, Price, Path & Pride: Third-Party Closing Opinion Practice Among U.S. Lawyers (A Preliminary Investigation), 3 Berkeley Bus. L.J. 59, 70–73 (2005) (discussing certifications in closing-opinion practice).

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third-party inspection service, for instance, the regulator may instead write a rule requiring certification from an accredited third-party inspector.[66] Thereafter, oil companies would no longer have the option of lowering costs by refusing to hire a third party. Statutes and court orders compel businesses in diverse industries to hire third-party monitors.[67] Scholars believe that more of this "regulation by third-party verification" could help to solve the problem of under-resourced public regulators.[68]

It is important to note that any individual gatekeeper may have only partial ability to prevent wrongdoing. A private auditor might refuse to provide the necessary approval for a fraudulent securities transaction, thus driving away one potential buyer who sees the non-approval as a "red flag."[69] However, without a requirement that the auditor disclose its findings, the securities seller may go to another auditor and attempt to obtain approval anew.[70]

To illustrate further, for most of American history stock exchanges were not gatekeepers. In the early 1900s, the NYSE accounted for only a fraction of the trades even in New York, because most deals unfolded "in brokers' offices, in coffee houses, and in the street."[71] Reforms throughout the 1900s gradually made the exchanges more attractive through licensing and other regulation. The reforms also encouraged enforcement, but it was not until 1983 that a federal law required every broker to register.[72] The old gatekeepers' influence depends on the extent of the exclusion mechanism that the law provides.

In light of gatekeepers' prominent regulatory role, many scholars have explored how the law should hold them accountable.[73] In 2001, this issue resurfaced when Enron, believed to be one of the most successful U.S. companies, suddenly collapsed, destroying billions of dollars in shareholder value and costing thousands of employees their retirement

[66] See Douglas C. Michael, Federal Agency Use of Audited Self-Regulation as a Regulatory Technique, 47 Admin. L. Rev. 171, 179 (1995).

[67] See id. at 179 & n.29; Root, supra note 5, at 529–30.

[68] See McAllister, supra note 23, at 5.

[69] Kraakman, supra note 6, at 58.

[70] Id.

[71] Stuart Banner, Anglo-American Securities Regulation, Cultural and Political Roots, 1690–1860, at 256 (1998).

[72] Act of June 6, 1983, Pub. L. No. 98-38, § 3, 97 Stat. 205, 206 (amending § 15(b)(8) of the Securities Exchange Act of 1934); Birdthistle & Henderson, supra note 44, at 17–20 (reviewing the history of exchange legislation).

[73] See, e.g., Hamdani, supra note 6, at 107–08.

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savings.[74] The swift downfall "stunned Wall Street" because Enron executives, alongside Arthur Andersen, one of the leading auditing firms, made hundreds of millions of dollars in losses look like a multibillion-dollar profit.[75]

Despite an academic consensus that insufficient gatekeeper liability contributed to this incident of securities fraud, Congress's main response, the Sarbanes-Oxley Act, did little to address that issue.[76] Instead, the Act instructed the SEC to write rules for directors overseeing auditors.[77] It nonetheless required auditors to "attest to, and report on, the assessment made by . . . management" of the company's internal controls.[78] The Act thus made auditors into mandated whistleblower-gatekeeper hybrids to increase the likelihood that a public regulator will learn of wrongdoing.

These diverse private actors—whether independent, encouraged, or mandated—operate in parallel not only to one another, but also to business self-regulation and public regulatory oversight. For this reason, regulation should be thought of in aggregate terms, in light of the mix of public and private actors.[79] These actors form a regulatory ecosystem, sometimes called "nodal governance," with many players supporting and monitoring one another.[80]

D. What Is Missing

Despite widespread recognition of the pervasiveness and heterogeneity of private enforcement, missing from these discussions is an examination of mandates that explicitly direct regulated entities to serve as enforcers. Instead, the focus has been on encouraging or mandating that other private parties help enforce the law against regulated entities. In the rare instances when scholars mention mandated third-party governance by the largest

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[74] See, e.g., Kathleen F. Brickey, From Enron to Worldcom and Beyond: Life and Crime After Sarbanes-Oxley, 81 Wash. U. L.Q. 357 (2003).

[75] Id. at 357, 369.

[76] See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); John C. Coffee, Jr., Understanding Enron: "It's About the Gatekeepers, Stupid," 57 Bus. Law. 1403, 1409–10 (2002); Hamdani, supra note 6, at 55–56.

[77] Sarbanes-Oxley Act § 303, 116 Stat. at 778.

[78] Id. § 404(b), 116 Stat. at 789.

[79] Freeman, supra note 4, at 549.

[80] Burris et al., supra note 49, at 25; see also Zachary D. Clopton, Redundant Public-Private Enforcement, 69 Vand. L. Rev. 285, 297 (2016).

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firms, it is in passing or in narrower contexts, such as criminal statutory requirements that banks identify money laundering transactions.[81]

As a result, although a rich literature on third-party enforcement spans corporate and administrative law, scholars have yet to connect the firm's growing regulatory role to theories of the firm and debates about its proper place in society. Monitoring in corporate law usually refers to internal contexts, such as the board of directors ensuring that officers exercise their duties or that the corporation obeys the law.[82] Corporate law scholars have nonetheless contributed valuable foundations, particularly by illuminating the centrality of gatekeepers to corporate regulation.[83]

Administrative law scholarship also provides valuable foundations by showing the evolution and growth of public-private collaboration.[84] The expansion of private enforcement from second-order to first-order firms not only raises the accountability stakes identified in that literature but also creates new dynamics. With more formal external oversight roles, the world's most valuable companies have the potential to profoundly shape governance, markets, and norms.

II. CASE STUDIES

The ten largest companies operate in four main industries: information technology, banking, pharmaceuticals, and oil.[85] This Part considers how regulators handle the largest companies in each industry. The industries with the ten largest companies were chosen because their power and reach enable them to exert influence on a broader swath of the economy than would smaller companies. Additionally, when a prominent company is subject to an enforcement action, its competitors adjust accordingly.[86] These case studies demonstrate how administrative agencies, after receiving authority from Congress, have delegated some of that authority to the largest regulated entities.

[81] See supra note 22.
[82] See, e.g., In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996); Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985); Stephen M. Bainbridge, Director Primacy: The Means and Ends of Corporate Governance, 97 Nw. U. L. Rev. 547, 566–67 (2003).
[83] See supra notes 37–41 and accompanying text.
[84] See infra Part IV.
[85] See Fortune 500 List, supra note 10.
[86] Griffith, supra note 9, at 2090.

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A. The FTC and Big Tech

The FTC has issued third-party oversight orders against Amazon, Facebook, and Google, as well as other large technology companies such as Lenovo.[87] The greatest amount of detail available relates to the agency's actions against Facebook, the subject of two rounds of investigations. In 2012, the FTC finished its original investigation of Facebook for violation of the Federal Trade Commission Act's prohibition on unfair and deceptive acts, concluding that the social network had "deceived consumers by telling them they could keep their information on Facebook private, and then repeatedly allowing it to be shared and made public."[88] One of the FTC's main concerns was how Facebook had verified the security practices of third-party service providers.[89]

The enforcement order left Facebook's responsibilities vague, but required the submission of auditor reports.[90] However, in the 2018 report, its auditor, PricewaterhouseCoopers, summarized Facebook's requirements imposed on app developers by referring to Facebook's publicly available policies.[91] Facebook also submitted to the FTC a mandatory follow-up report on what it had done to comply with each part of the commitment.[92] The report detailed an apparently extensive oversight program for third parties.[93] Facebook might send questionnaires to service providers to determine their security and privacy practices.[94] Depending on the answers to those questions, or merely the nature of the data shared, Facebook would initiate more targeted security audits. Those audits, which are sometimes conducted by Facebook and sometimes by a security

[87] See supra note 3 and accompanying text; see also Lenovo Inc., FTC File No. 152 3134, No. C-4636 (F.T.C. Dec. 20, 2017) (decision and order).

[88] Facebook, Inc., FTC File No. 0923184, No. C-4365, at 3–4 (F.T.C. July 27, 2012) (decision and order); Press Release: FTC Approves Final Settlement with Facebook, FTC (Aug. 10, 2012), https://www.ftc.gov/news-events/press-releases/2012/08/ftc-approves-final-settlement-facebook [https://perma.cc/V9VK-ZZUB].

[89] Facebook, Inc., No. C-4365, at 5–6. Facebook has treated app developers as similar to service providers. See infra note 96 and accompanying text. Additionally, the FTC's other agreements have signaled a broader expectation for regulated entities' oversight of third parties. See, e.g., Lenovo Inc., No. C-4636.

[90] Facebook, Inc., No. C-4365, at 7.

[91] See, e.g., Rory Van Loo, The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance, 72 Vand. L. Rev. 1563, 1600–01 (2019).

[92] Facebook, Inc., No. C-4365 (F.T.C. Nov. 13, 2012) (Facebook compliance report).

[93] Id.

[94] Id.

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firm, "assess . . . compliance with Facebook's security guidelines."[95] Facebook uses these audits to determine, for instance, whether an app developer complied with users' requests to delete their personal data.[96]

After Cambridge Analytica accessed millions of users' Facebook data to promote Donald Trump's election campaign, the FTC began investigating Facebook to determine whether that incident involved violations of the 2012 order.[97] Zuckerberg admitted that Facebook needed to better police app developers, stating in his opening testimony to Congress, "It's not enough to just give people control over their information. We need to make sure that the developers they share it with protect their information, too."[98]

The FTC's enforcement actions against Amazon demonstrate a different gatekeeper approach. Amazon operates an app store populated with products created and owned by third-party operators. These apps enable people on Android phones or Kindles to play games, among other activities.[99] While using these apps, consumers buy products, for which the third-party app developers set the prices and receive 70% of the payment.[100] The developers control the interface while consumers use the app, including the in-app purchases at the heart of the FTC's investigation.[101] Amazon thus had little direct involvement in the communications surrounding the disputed transactions.

Although Amazon does not operate the apps, induce consumers to make the purchasing decision, or set the prices, and only keeps 30% of the payment, the FTC treated the company as responsible for those purchases.[102] It did so by focusing on two points of contact between Amazon and consumers. First, Amazon operates the online store through which consumers purchase the apps.[103] With respect to this original

[95] Id. at 10.

[96] Facebook Platform Policy, Facebook, https://developers.facebook.com/policy/ [https://-perma.cc/43NN-2NTM] (last visited Feb. 4, 2020). App developers may be subject to Facebook audits of their apps, systems, and records. Id.

[97] See Steinmetz, supra note 2.

[98] Facebook CEO Mark Zuckerberg Hearing on Data Privacy and Protection, C-SPAN (Apr. 10, 2018), https://www.c-span.org/video/?443543-1/facebook-ceo-mark-zuckerberg-testifies-data-protection [https://perma.cc/6KKL-6ZAU] (quoted language begins at 26:25).

[99] FTC v. Amazon.com, Inc., No. C14-1038-JCC, 2016 WL 10654030, at *1 (W.D. Wash. July 22, 2016).

[100] Id.

[101] Id.

[102] Id. at *1, *11.

[103] Id. at *1.

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purchase, Amazon did not make it clear enough that in-app purchases would be possible.[104] Amazon's description of the apps, available below the purchase button, included such information.[105] However, Amazon imbedded the information in a long description of the app below the purchase button and displayed it in smaller font.[106] A federal court agreed with the FTC that the notice of in-app purchases "was not conspicuous."[107]

Amazon's second point of contact was the interface for making the purchase. For many months, upon pressing a button that led to a purchase, Amazon required no additional approval.[108] The customer simply received a follow-up email confirming the purchase.[109] Amazon later displayed a prompt that asked for a confirmation, requiring password entry, but only for purchases over $20.[110] Even the updated confirmation settings allowed children, in the course of playing a video game, to make many purchases that individually were under $20, but collectively produced large bills.[111]

Unlike the Facebook case, the FTC never reached a settlement with Amazon.[112] In 2017, the parties withdrew their appeals and announced a refund program for injured consumers.[113] The press release gave no indication that the FTC would mandate ongoing oversight.[114] That omission may reflect a new approach under the Trump Administration, or possibly suggests that privacy concerns command greater regulatory scrutiny of third parties than do monetary harms. Regardless, to lessen the risk of future liability, Amazon must ensure that third-party apps on its platforms do not deceive consumers.

[104] Id.
[105] Id. at *2.
[106] Id. at *2–*3, *10.
[107] Id. at *10.
[108] Id. at *2.
[109] Id. at *4–*5.
[110] Id. at *2.
[111] Id. at *2, *4.
[112] Press Release: FTC, Amazon to Withdraw Appeals, Paving Way for Consumer Refunds Related to Children's Unauthorized In-App Charges, FTC (Apr. 4, 2017), https://-www.ftc.gov/news-events/press-releases/2017/04/ftc-amazon-withdraw-appeals-paving-way-consumer-refunds-related [https://perma.cc/65PC-KPDX].
[113] Id.
[114] Id.

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B. The CFPB and Big Banks

Like banking regulators focused on financial stability, the CFPB could pursue its consumer protection mission by bringing enforcement actions directly against third-party service providers.[115] Instead, it has required banks to govern third parties, including call centers, debt collectors, software developers, and real estate lawyers.[116] Tools for overseeing third parties are likely to become even more important given the regulatory challenges created by the rise of non-bank fintechs offering digital consumer financial services, typically in partnership with traditional banks.[117] The agency has brought third-party actions against each of the four largest banks—JP Morgan Chase, Wells Fargo, Bank of America, and Citibank.[118]

The Bureau's third-party enforcement policy began with its first enforcement action. Capital One, one of the largest credit card issuers, had contracted with an independent call center that routed cardholders with low credit scores—also known as subprime borrowers—to different sales representatives when they called Capital One.[119] Those representatives talking with subprime cardholders had a Capital One script for how to sell additional payment protection products, but they frequently veered from the script.[120] Some representatives inaccurately described the add-on products as free, even though consumers

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[115] 12 U.S.C. § 1867(c) (2012) (granting third-party oversight to the Federal Reserve, the Federal Deposit Insurance Corporation, and other prudential regulators over third-party services, such as accounting and computation, that a bank "causes to be performed for itself"); 12 U.S.C. § 5514(e) (2012) (granting similar oversight authority to the CFPB over institutions offering consumer financial services).

[116] Dwolla, Inc., CFPB No. 2016-CFPB-0007, at 9–10 (Feb. 27, 2016) (consent order) (finding that digital payment systems violated the law by failing to oversee third-party software developers); Andrew Liput, What Real Estate Closing Attorneys Need to Know About the CFPB, the OCC, and Third-Party Vendor Management Rules Affecting Residential Mortgage Transactions, 28 Prob. & Prop., Mar.–Apr. 2014, at 1–2.

[117] On the challenges of regulating fintech, see Rory Van Loo, Technology Regulation by Default: Platforms, Privacy, and the CFPB, 2 Geo. L. Tech. Rev. 531, 541–44 (2018).

[118] JP Morgan Chase Bank, N.A., CFPB No. 2013-CFPB-0007, at 4–5 (Sept. 18. 2013) (consent order); Wells Fargo Bank, N.A., CFPB No. 2018-BCFP-0001, at 10 (Apr. 20, 2018) (consent order); Bank of America, N.A., CFPB No. 2014-CFPB-0004, at 8 (Apr. 7, 2014) (consent order); Citibank, N.A., CFPB No. 2015-CFPB-0015, at 26 (July 21, 2015) (consent order); see also Nationstar Mortgage LLC, CFPB No. 2017-CFPB-0011, at 7 (Mar. 14, 2017) (consent order) (finding "inadequate ongoing monitoring of vendors").

[119] Capital One Bank, (USA) N.A., CFPB No. 2012-CFPB-0001, at 3–4 (July 16, 2012) (stipulation and consent order).

[120] Id. at 4.

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collectively paid about $140 million over a two-year period for the products.[121] The representatives also often implied that the products were not optional.[122]

The CFPB found that the call center's employees engaged in deceptive acts and practices in violation of federal law.[123] Although the Bureau found no fault with the script Capital One provided to the call center, it argued that "the Bank's compliance monitoring, service provider management and quality assurance resulted in ineffective oversight which failed to prevent, identify, or correct the improper sales practices."[124] The settlement required Capital One to submit to the CFPB for pre-approval a written internal policy for implementing heightened third-party oversight.[125] Among other requirements, Capital One would conduct "periodic onsite audit reviews . . . of the Bank Service Provider's controls, performance, and information systems" and retain the right to exit the contract in the face of service provider non-compliance.[126] Capital One also paid $25 million in penalties, but was "prohibited from seeking or accepting indemnification . . . from any third party."[127] These indemnification-piercing stipulations provide greater motivation for the enforcer-firm to do a thorough job of monitoring and addresses the problem that many firms merely "window-dress[]" their compliance efforts without making a true effort.[128]

In its various cases and policy guidance, the CFPB has reinforced and clarified these initial expectations for third-party governance. Not long after its action against Capital One, the CFPB fined American Express for deceptively collecting debts, charging excessive late fees, and discriminating based on age.[129] Third-party service providers committed all but one of the violations.[130] Nonetheless, the agency explicitly faulted

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[121] Id. at 5–6.
[122] Id.
[123] Id. at 8.
[124] Id. at 4.
[125] Id. at 22–23 (requiring also that any subsequent changes to this policy must obtain CFPB approval).
[126] Id.
[127] Id. at 20–21.
[128] See Kimberly D. Krawiec, Cosmetic Compliance and the Failure of Negotiated Governance, 81 Wash. U. L.Q. 487 (2003) (discussing compliance measures as mere "window-dressing").
[129] Am. Express Centurion Bank, CFPB No. 2012-CFPB-0002, at 3–4 (Oct. 1, 2012) (joint consent order).
[130] Id. at 5.

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the board and senior management of American Express for ineffective compliance management, "particularly" their oversight of third-party service providers.[131]

Similar to the Capital One consent order, the enforcement action required American Express to develop policies for monitoring its service providers' compliance with consumer protection laws.[132] But American Express also agreed to have its compliance department submit quarterly reports to the board on "whether Service Providers are in compliance" with all contracts, and the consent order stipulated that "[t]he Board shall be responsible for ensuring that corrective actions are taken."[133] The American Express consent decree thus helped put the industry on notice that the CFPB would expect boards of directors to engage actively in the oversight of third parties.

Several years later, the CFPB went after a bigger target for its failure to oversee third parties: Citibank, one of the four largest U.S. banks.[134] Presumably aware of the Capital One enforcement action,[135] Citibank went further than simply providing a script by also reviewing recorded telemarketer calls.[136] The telemarketing firm knew, however, which calls would be later reviewed for legal compliance and used a misleading sales script only on unmonitored calls.[137] The CFPB ordered Citibank to adopt third-party oversight reforms and pay a $35 million penalty.[138] The Citibank action illustrates how having an oversight system in place is not enough—the oversight must produce results.

A rare case that went to trial produced more details about third-party governance setups. The court order required the British multi-national bank HSBC to audit samples of contracts between third-party service providers and customers to ensure that those documents comply with the law and that "only fees and costs that are lawful, reasonable and actually

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[131] Id. at 4.

[132] Id. at 17–19 (ordering the Bank to monitor and report its service providers' compliance with the agreement on an ongoing basis).

[133] Id. at 19.

[134] Lawrence G. Baxter, Betting Big: Value, Caution and Accountability in an Era of Large Banks and Complex Finance, 31 Rev. Banking & Fin. L. 765, 782 (2012) (listing biggest banks).

[135] Cf. In re Capital One Derivative S'holder Litig., 979 F. Supp. 2d 682, 696–99 (E.D. Va. 2013) (recognizing awareness of major legal actions in the same industry).

[136] Citibank, N.A., CFPB No. 2015-CFPB-0015, at 12–13 (July 21, 2015) (consent order). The bank hired a private third party to monitor compliance. Id.

[137] Id.

[138] Id. at 26–30, 45.

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incurred are charged to borrowers."[139] Banks are also expected to oversee the processes and compliance departments of third parties.[140]

After four years of these enforcement actions, the CFPB issued a guidance bulletin summarizing its expectations for third-party oversight. The bulletin offers many details, including a requirement that the financial institution's contracts and compliance management system must include ongoing monitoring of third parties.[141]

The CFPB's settlements contain more detail than the FTC's, since the FTC did not specify which parties within Facebook—whether the compliance department or the board of directors—must become involved. The CFPB also plays a more active role in the implementation of such settlement requirements by reviewing third-party governance policies before and after they are implemented.[142] Both agencies nonetheless rely on mandated enforcement by explicitly requiring large businesses to monitor for wrongdoing by third parties.

C. The EPA and Big Oil

The 2010 Deepwater Horizon oil spill, which discharged billions of gallons of oil into the Gulf of Mexico in one of the worst environmental disasters in U.S. history, heavily shaped offshore oil regulation.[143] BP Oil partially owned the rights to the well's oil, but in a straightforward sense, the problem began with the Deepwater Horizon offshore drilling platform, owned by Transocean, a Swiss company.[144] As the platform began to sink, it ruptured the pipe connecting it to the well below, thereby

[139] United States v. HSBC N. Am. Holdings, Inc., No. 16-0199, 2016 WL 1688047, at *11 (D.D.C. Mar. 14, 2016).

[140] Id.

[141] Bureau of Consumer Fin. Prot., Compliance Bulletin and Policy Guidance; 2016-02, Service Providers (Oct. 31, 2016).

[142] Bureau of Consumer Fin. Prot., BCFP Supervision and Examination Process Manual 7 (2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/032017_cfpb_examination-process_supervision-and-examination-manual.pdf [https://perma.cc/QV5W-XSUD] ("[C]ompliance expectations . . . extend to third-party relationships . . . .").

[143] See Nat'l Comm'n on the BP Deepwater Horizon Oil Spill & Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling—Report to the President 293 (2011) [hereinafter Deepwater Report], https://www.govinfo.gov/content/pkg/GPO-OILCOMMISSION/pdf/GPO-OILCOMMISSION.pdf [https://perma.cc/7389-95PJ].

[144] The ownership rights came in the form of a lease, and two other companies, Anadarko and MOEX, also had lessee ownership rights in the well. Id. at 94.

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causing the oil to discharge from the well thousands of feet underwater at the ocean floor.[145]

If environmental regulators had applied the CFPB's approach, they might have brought an enforcement action against BP alone and mandated that it monitor the other businesses it hired, such as Transocean. After all, BP is one of the ten largest companies in the world and hired the smaller Transocean as a contractor, just as Citibank hired smaller independent call centers to perform sales.[146] Like Transocean, the call centers controlled the specific violations.[147]

The EPA and the DOJ instead brought enforcement actions against both BP and Transocean.[148] However, pursuing Transocean is arguably different from pursuing call centers and app developers directly. Unlike call center operators and many app developers, Transocean is not a small company. It is one of the world's largest operators of offshore oil rigs and as recently as 2017 was ranked one of the 1,300 most valuable companies in the world.[149] Thus, multinational third-party oil contractors cannot escape regulatory scrutiny simply by working with an oil producer that is considerably larger.

Nonetheless, the EPA and the underlying law still placed the bulk of the responsibility on BP, which wound up paying close to $20 billion in regulatory enforcement actions, compared to $1.4 billion for Transocean.[150] Policy foundations for this allocation can be seen in an early judicial opinion on Deepwater Horizon liability. Finding the Clean Water Act's specific liability language to be unclear, the court relied on the Act's larger policy purpose, saying it was "designed to 'place[] a major part of the financial burden for achieving and maintaining clean

[145] See Order and Reasons as to Cross-Motions for Partial Summary Judgment at 2, In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, No. 2:10-md-02179-CJB-SS (E.D. La. Feb. 22, 2012) [hereinafter BP Summary Judgment Order]; Deepwater Report, supra note 143, at 132.

[146] See Deepwater Report, supra note 143, at 2; Global 500, Fortune, https://fortune.com/-global500/2019 (last visited Feb. 24, 2020); supra notes 134–38.and accompanying text.

[147] See supra notes 134–38 and accompanying text (discussing Citibank).

[148] Complaint at 5, 7–8, United States v. BP Expl. & Prod. Inc., No. 2:10-cv-04536 (E.D. La. Dec. 15, 2010). The EPA also brought actions against Anadarko and MOEX due to their investment interests in the well. See Deepwater Horizon—BP Gulf of Mexico Oil Spill, EPA [hereinafter EPA Enforcement Actions], https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill [https://perma.cc/WZY5-LM8E] (last visited Jan. 13, 2020).

[149] Global 2000 2017: #1290 Transocean, Forbes, https://www.forbes.com/companies/-transocean/#5fb61f6f15e0 [https://perma.cc/WV78-SB5F] (last visited Jan. 13, 2020) (noting that Transocean dropped off Forbes Global 2000 list in 2018).

[150] See EPA Enforcement Actions, supra note 148.

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water upon those who would profit by the use of our navigable waters and adjacent areas, and who pollute same.'"[151] Those who profit most are more likely to be valuable companies, giving them more resources to devote to monitoring.

Environmental regulators do not only rely on the imposition of liability, which by itself has led to extensive voluntary monitoring of firms by firms.[152] Following the Deepwater Horizon incident, new regulations required offshore oil operators to ensure that their contractors comply with environmental standards.[153] Regulators have expanded on those basic requirements through lawsuits. In its Deepwater Horizon settlement, BP agreed to extensive improvement of its deep water drilling safety, "including provisions related to contractor oversight."[154] Those stipulated provisions included the creation of Contract Governance Boards for both drilling and cementing operations, as well as audits of contractors.[155] The settlement required the BP board to oversee those improvements, as well as their ongoing execution.[156] These BP oversight measures are separate from the various audits that private third parties other than BP must also undertake of BP's contracts.[157] It is BP's responsibility to ensure that its contractors complete those independent audits.[158]

Transocean's settlement imposed no explicit ongoing third-party monitoring responsibilities on Transocean.[159] The settlement referenced regulations imposing broad safety management responsibilities, which include evaluation of all contractors to ensure they operate according to safety environmental management systems.[160] But the referenced regulations have numerous other requirements unrelated to third parties,

[151] BP Summary Judgment Order, supra note 145, at 20 (quoting United States v. Coastal States Crude Gathering Co., 643 F.2d 1125, 1128 (5th Cir. 1981)).

[152] See Vandenbergh, supra note 41, at 2041 (showing pervasive second-order agreements).

[153] 30 C.F.R. § 250.1914(c)(1) (2013); Bureau of Safety & Envtl. Enf't, Safety and Environmental Management Systems (SEMS) Fact Sheet, https://www.bsee.gov/site-page/fact-sheet [https://perma.cc/VZN3-HDZ6] (last visited Jan. 13, 2020).

[154] BP Consent Decree, supra note 12, at 33.

[155] Id. at app. 4, at 25.

[156] See id.

[157] Id. at app. 6, at 6–7.

[158] See id.

[159] Partial Consent Decree Between the United States of America and Defendants Triton Asset Leasing GMBH, Transocean Holdings LLC, Transocean Offshore Deepwater Drilling Inc., and Transocean Deepwater Inc., In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex., on Apr. 20, 2010, No. 2:10-md-02179-CJB-SS (E.D. La. Jan. 3, 2013).

[160] Id. at 16 (requiring a management system that "complies with Operators' Safety and Environmental Management System ('SEMS')"); see also 30 C.F.R. § 250.1914(c)(1) (2013).

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and thus it would be a stretch to see the settlement as mandating third-party monitoring.[161] Still, the existence of those regulations means that Transocean must, like BP, oversee all third parties with which it contracts.

For oil refineries located on land, the EPA imposes similar oversight duties. In a 2005 case, the EPA found that Exxon routinely emitted hazardous pollutants in violation of the Clean Air Act, in Illinois, Louisiana, and Montana oil refineries.[162] Among other stipulations, Exxon committed to an annual "review of each contractor's monitoring data which shall include, but not be limited to, a review of: (i) the number of components monitored per technician; (ii) the time between monitoring events; and (iii) abnormal data patterns."[163] The EPA is not always so explicit about third-party oversight expectations. In another Clean Air Act case, regarding similar violations in a manufacturing facility in Texas, the EPA did not specify exactly how Exxon should monitor its contractors.[164] Instead, it stipulated that, moving forward, Exxon "will not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree."[165] Exxon is also assumed to know everything that its contractors and agents "knew or should have known."[166]

Even when the EPA is less directive, as it was with Exxon, once the agreement is in place imposing such clear responsibility for the acts of third parties, government inspectors can fault the company if its contractor oversight capabilities are found to be insufficient.[167] Additionally, companies generally look to the larger body of a regulator's enforcement actions in deciding how to implement internal systems.[168] Thus, by explicitly mandating regular oversight of third parties in some cases, the EPA can create industry-wide standards. Either way, the largest oil companies—including their biggest contractors—have been subject to

[161] 30 C.F.R. §§ 250.1900–1933 (2013).

[162] Consent Decree at 1–3, United States v. Exxon Mobil Corp., No. 1:05-cv-05809 (N.D. Ill. Dec. 6, 2005) [hereinafter 2005 Exxon Mobil Consent Decree].

[163] Id. at 110.

[164] The settlement did, however, order Exxon's contractors to take affirmative actions, such as preserving records. See Consent Decree at 80, United States v. Exxon Mobil Corp., No. 4:17-cv-3302 (S.D. Tex. June 6, 2018).

[165] Id. at 10.

[166] Id. at 75.

[167] Id. at 66–67.

[168] See, e.g., Daniel J. Solove & Woodrow Hartzog, The FTC and the New Common Law of Privacy, 114 Colum. L. Rev. 583, 585 (2014).

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direct mandates to oversee third parties involved in both onshore and offshore oil activities.

D. The FDA and Big Pharma

Pharmaceutical companies manufacture drugs but contract with other companies for "processing, packing, holding, or testing."[169] The FDA has the most explicit third-party monitoring expectations of the four case studies. Rulemaking, guidance statements, and warning letters have communicated its policy.

One FDA rule states that in every pharmaceutical company there "shall be a quality control unit . . . responsible for approving or rejecting drug products manufactured, processed, packed, or held under contract by another company."[170] Monitoring the output is not, however, enough. The company must also directly monitor inputs used by the contractor, including ingredients and materials.[171] After specifying the contractor's internal compliance systems, the manufacturer should conduct audits.[172] Thus, the pharmaceutical company must oversee contractors' organizational processes, inputs, and outputs.

The FDA places responsibility for third-party activities at the top of the regulated entity. In its formal rules on liability for tainted products, the agency states that it "regards extramural facilities as an extension of the manufacturer's own facility."[173] It reiterated this point in its post-inspection warning letters.[174] In other words, the pharmaceutical company is responsible for the third-party contractor's activities as if they were one company. In guidance documents, the agency clarified that it was addressing "the relationship between owners and contract facilities."[175]

[169] FDA, U.S. Dep't of Health & Human Servs., Contract Manufacturing Arrangements for Drugs: Quality Agreements, Guidance for Industry 5 (2016) [hereinafter FDA Drug Contract Guidance], https://www.fda.gov/media/86193/download [https://perma.cc/H9UY-5MSK].

[170] 21 C.F.R. § 211.22(a) (2019).

[171] FDA Drug Contract Guidance, supra note 169, at 5.

[172] Id. at 4–5.

[173] 21 C.F.R. § 200.10(b) (2019).

[174] See, e.g., FDA Warning Letter from Art Czabaniuk, Program Div. Dir., Div. of Pharm. Quality Operations III, to James Stephen, President & Owner, Pharm. Labs. & Consultants, Inc. (Aug. 29, 2018), https://www.fda.gov/ICECI/EnforcementActions/WarningLetters/-ucm620002.htm [https://perma.cc/Z2RT-SDNE] ("FDA considers contractors as extensions of the manufacturer's own facility.").

[175] FDA Drug Contract Guidance, supra note 169, at 2.

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Contractual arrangements cannot shield pharmaceutical companies from liability. In one warning letter, the FDA told Pfizer, the largest pharmaceutical company in the world,[176] "You are responsible for the quality of combination products you produce as a contract facility, regardless of agreements in place with [your customer] or with any of your suppliers."[177]

The FDA does not, however, rely solely on Pfizer to regulate the company's independent contractors. The FDA routinely inspects and brings enforcement actions directly against those third parties. For instance, in one warning letter to an independent manufacturer, the FDA wrote, "You and your customer, Pfizer, have a quality agreement regarding the manufacture of drug products. You are responsible for the quality of drugs you produce as a contract facility, regardless of agreements in place . . . ."[178]

Pfizer implemented the FDA's organizational advice into its internal processes. It routinely monitors suppliers through audits, inspections, and review of systems.[179] Supplier agreements reflect these review procedures, and when Pfizer recognizes a violation, it can de-list the offender from its list of "qualified" suppliers or can report violations to the FDA.[180]

E. Summary of Case Studies

Federal regulators have established an expectation that today's largest companies regulate independent contractual parties for legal violations. Through direct enforcement actions or industry-wide mandates, the FTC, CFPB, EPA, and FDA have required the most valuable companies to monitor and punish third-party business wrongdoers. They serve as a new breed of gatekeepers, because the regulated entities must now decide whether to give the third parties market access based on regulatory

[176] Michael Christel, Pharm Exec's Top 50 Companies 2018, Pharmaceutical Executive (June 1, 2018), http://www.pharmexec.com/pharm-execs-top-50-companies-2018.

[177] FDA Warning Letter, supra note 13.

[178] FDA Warning Letter from Diana Amador-Toro, Dir., Div. of Pharm. Quality Operations I, to Ketan Mehta, President & CEO, Tris Pharma Inc. (Mar. 26, 2018), https://www.fda.gov/iceci/enforcementactions/warningletters/ucm603613.htm [https://perma.cc/ML9A-JMD7].

[179] Janeen Skutnik-Wilkinson, Pfizer Quality Strategy Dir., Management of the Supply Chain: Excipients & APIs 3 (2011), https://www.fda.gov/media/82786/download [https://-perma.cc/NEJ9-NXX9].

[180] Id. at 12.

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considerations.[181] Sometimes this private regulation benefits a specific party that will be contracting with one of the businesses, such as a consumer, but other times the benefits are more general, as in the case of environmental protection or financial stability.

The variations in approaches indicate design choices for new gatekeeper governance. In the case of wrongdoing, should the regulator prosecute only the enforcer-firm, or also the third party? How detailed of a gatekeeper mandate should the regulator provide, and how closely should the regulator oversee the enforcer-firm's gatekeeping? And should the regulator develop the gatekeeper governance model in a piecemeal manner through cases, or through more explicit means, such as guidance documents and formal rulemaking?

Though focused on a subset of industries and companies to manage scope, these case studies are part of a broader sphere of regulatory activity. These four regulators alone have jurisdiction over other large parts of the economy. The FTC, for instance, oversees retailers and other industries in addition to big technology, and the FDA regulates food and supplement manufacturers.[182] Additionally, other regulators deploy third-party mandated governance beyond these four industries. The Interstate Commerce Commission, for instance, obligates trucking operators to monitor contractual parties for roadway safety compliance.[183] A number of other federal and state laws similarly require companies to play some regulatory oversight role with respect to third-party businesses, including health care providers ensuring business associates safeguard health data.[184] Even if the regulatory state conscripted only the five largest companies, it would mean a substantial extension of regulatory resources.[185] But mandated enforcement is widespread enough to prompt a broader inquiry into the implications for the firm's evolving place in society.

[181] On the prior iterations of gatekeepers, see Kraakman, supra note 6, at 54.

[182] See FTC v. Staples, Inc., 970 F. Supp. 1066, 1069 (D.D.C. 1997); 21 U.S.C. § 350 (2012).

[183] The Interstate Commerce Commission also mandates that companies inspect leased equipment. 49 C.F.R. § 376.11 (2018).

[184] See, e.g., Neb. Rev. Stat. Ann. § 87-808 (West 2018) (mandating contractual service provider oversight); 45 C.F.R. § 164.504 (2018) (providing HIPAA requirements).

[185] See infra Section IV.A.

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III. EXPANDING THE PUBLIC INFLUENCE ON THE FIRM

This Article aims primarily to illuminate the rise of mandated enforcement, both in its form and scope. Once recognized, however, this development implicates prominent conversations and policy debates. By redrawing the lines between public and private, mandated enforcement adds a new layer to some of the most fundamental corporate law questions: how should the firm be conceptualized? And what duties does it owe to society?

The firm has a decidedly private core, as implicated by its prominent description as a nexus of contracts.[186] Because the firm's contractual foundations are necessarily incomplete, corporate law fills in the gaps to reflect the parties' intents.[187] Some scholars have proposed giving greater weight in corporate governance to a broader set of social issues, including employee rights or a cleaner environment, and have demonstrated how managers have discretion under the business judgment rule to pursue these goals.[188] Nonetheless, most commentators and judges see the primary goal of corporate law as advancing shareholder value.[189]

By some accounts, the depiction of the firm as a contractually-based private entity helped advance the notion that government intervention in those private agreements is "unnatural."[190] That line of reasoning views the firm's "market-oriented nature" as serving "to dismiss the notion that

[186] See supra note 29 and accompanying text.

[187] See, e.g., Frank H. Easterbrook & Daniel R. Fischel, The Economic Structure of Corporate Law 66–70 (1991); Bainbridge, supra note 82, at 578; Bengt Holmstrom, The Firm as a Subeconomy, 15 J.L. Econ. & Org. 74, 80–81 (1999). This view forms part of a larger contractarian view of the corporation. See, e.g., Henry N. Butler & Larry E. Ribstein, Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians, 65 Wash. L. Rev. 1, 3 (1990).

[188] See, e.g., Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247, 299–301 (1999); Lisa M. Fairfax, Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries, 59 Wash. & Lee L. Rev. 409, 438–40 (2002); Marleen A. O'Connor, The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation, 78 Cornell L. Rev. 899, 936–65 (1993).

[189] See, e.g., Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (dictum); see also Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010); Jill E. Fisch, Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy, 31 J. Corp. L. 637, 647 (2006); Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 Geo. L.J. 439, 439 (2001).

[190] Victor Brudney, Corporate Governance, Agency Costs, and the Rhetoric of Contract, 85 Colum. L. Rev. 1403, 1408–09 (1985).

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the corporation owes anything to the state."[191] Of course, the firm and its directors cannot pursue profit illegally. Under Delaware law, for instance, the firm's articles of incorporation cannot limit a director's personal liability when the director commits a "knowing violation of law."[192] Thus, the firm is private at its core, but public statutes define the limits. The rest of this Part illustrates how mandated governance constitutes a considerable expansion of that public side.

A. Conscripting the Firm as Regulator

Two of the most fundamental functions of administrative agencies are writing and enforcing rules. Firms now perform each of these functions for the public good. They do not undertake these activities voluntarily in response to laws or market incentives, but by direct public mandate.

1. Writing Rules

Mandated enforcement puts the firm in a rulemaking role by compelling it to write regulatory contractual clauses.[193] Firms' written contracts serve as a principal vehicle for implementing third-party governance. For example, in its FTC settlement, Facebook agreed to require "service providers, by contract, to implement and maintain appropriate privacy protections" for any data obtained from Facebook.[194] When the company later submitted its required compliance report, Facebook explained that it had implemented its third-party oversight through its contracts.[195] In particular, it developed a "Contract Policy" so that agreements with third parties operate through Facebook's "pre-approved standard contract templates."[196] Facebook's legal department "reviews contracts that deviate from the pre-approved templates to help ensure that contracts with applicable service providers contain the

[191] Grant M. Hayden & Matthew T. Bodie, The Uncorporation and the Unraveling of "Nexus of Contracts" Theory, 109 Mich. L. Rev. 1127, 1127 (2011).

[192] Del. Code Ann. tit. 8, § 102(b)(7) (2011); see also Edward B. Rock, Adapting to the New Shareholder-Centric Reality, 161 U. Pa. L. Rev. 1907, 1965 (2013).

[193] By analogy, Congress delegates to agencies. See Bamberger, supra note 4, at 381.

[194] Facebook, Inc., FTC File No. 0923184, No. C-4365, at 5–6 (F.T.C. July 27, 2012) (decision and order).

[195] Facebook, Inc., No. C-4365, at 10 (F.T.C. Nov. 13, 2012) (Facebook compliance report).

[196] Id.

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required privacy protections."[197] The case of Facebook embodies a broader theme of regulator-mandated contract clauses.

Consumer finance, pharma, and oil regulators also explicitly mention contractual requirements. A CFPB guidance bulletin states that all financial institutions should include "in the contract with the service provider clear expectations about compliance, as well as appropriate and enforceable consequences for violating any compliance-related responsibilities."[198] The FDA expects pharmaceutical companies to detail in their contracts the shape of third-party suppliers' compliance systems, and to reserve the right to audit these systems.[199] The EPA required BP Oil to include certain provisions in any new contract with a drilling rig, including requiring the rig to join an industry safety group.[200] The firm's contracts no longer contain only voluntary second-order regulatory components made in response to regulation, but now also include first-order clauses mandated by law.[201]

These mandated contractual clauses presumably become legally enforceable against the smaller companies agreeing to them.[202] Even if the counterparties do not expect the contract to ever reach a courtroom, however, their terms can define the contours of the ongoing relationship.[203] Businesses refer to their contracts for guidance as to their respective rights.[204] Through their inclusion in contracts, third-party enforcement clauses can influence many of the firm's relationships with external parties.[205]

More to the point, these mandates infuse a more significant public obligation into the firm's contracts. Motivated solely by profit and without any legal influence, businesses have long inserted contract clauses that incidentally advance the interests of consumers, the environment, or health.[206] Even second-order contractual clauses, inserted

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[197] Id.

[198] Bureau of Consumer Fin. Prot., Compliance Bulletin and Policy Guidance; 2016-02, Service Providers 5 (Oct. 31, 2016).

[199] FDA Drug Contract Guidance, supra note 169, at 4.

[200] BP Consent Decree, supra note 12, at app. 6, at 8.

[201] On second-order voluntary contracts, see Vandenbergh, supra note 41.

[202] This assumes, of course, that the contract is valid, and a meaningful remedy is crucial for any legal enforcement.

[203] See Lisa Bernstein, Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts, 7 J. Legal Analysis 561, 562 (2015).

[204] See id. at 563–65 (providing results on how businesses use contracts).

[205] See id. at 566 (describing the nature of remedies for firms' contractual schemes).

[206] See supra Section I.A.

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voluntarily in response to laws, still retain the autonomy of contracting parties and therefore a heavy private component.[207] Conversely, conscripted enforcement contracts impose more thoroughly public obligations because businesses do not write them voluntarily.

Do contractual third-party governance clauses differ from other contractual mandates? Various statutes influence the shape of particular contracts by requiring them to include certain information. For instance, credit card companies must prominently communicate the annual percentage rate under the Truth in Lending Act.[208] The Uniform Commercial Code provides a default warranty of merchantability and imposes a duty to act in good faith.[209] Legislative limits on freedom of contract are neither new nor unusual.

Conscripted enforcement clauses need not differ from other contractual mandates to mark a significant expansion of public influence on the firm's contracts. However, those traditional mandates do, in fact, differ because their most immediate beneficiary is one of the contracting parties. Arguably, these restraints advance freedom of contract, in that they help one of the parties to come to the agreement they would have wanted if both were economically rational and informed.[210] Disclosures, for instance, give information that both parties would want entering into the transaction about the nature of what they are receiving—such as the full cost of a loan, including fees.[211] Those laws may ultimately benefit the public by improving welfare through more efficient market transactions, but they remain more clearly internal-to-the-contract in terms of their direct beneficiary—one of the contracting parties.[212]

In contrast, mandated enforcement can benefit parties not involved in the contract. For example, mandates require Facebook, Citibank, and Pfizer to protect consumers by governing service providers and suppliers.[213] Exxon and BP must ensure that contractors safeguard the environment for the benefit of the public.[214] Granted, one or both of the contractual parties also arguably benefit from these requirements, by

[207] See Vandenbergh, supra note 41, at 2040–41.
[208] See 15 U.S.C. § 1637 (2012).
[209] U.C.C. §§ 1-203, 2-314 (Am. Law Inst. & Unif. Law Comm'n 1978).
[210] See Oren Bar-Gill, Seduction by Contract: Law, Economics, and Psychology in Consumer Markets 32–33 (2012).
[211] 15 U.S.C. §§ 1605, 1637–1638 (2012).
[212] See, e.g., id (providing an example of disclosure).
[213] See supra Part II.
[214] See supra Section II.C.

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preserving their reputation and strengthening industry standards.[215] Also, consumer-oriented protections benefit a party that will ultimately contract with the enforcer-firm—Facebook's users, or Citibank's customers.[216] The benefits to the contracting parties are less immediate and less definite, however—and they do not motivate the clause.

Congress regularly passes laws that require administrative agencies to write rules. Following the financial crisis of 2008, for instance, Congress tasked the CFPB with writing numerous consumer protection rules.[217] By analogy, in the case of third-party governance, regulators arguably delegate some of the rulemaking authority they receive from Congress to firms. Regulators could write the specific third-party governance clauses that they want firms to include in their contracts, but they do not. This non-directive approach reflects regulators' broader strategy of delegating complex decisions to private parties due to limited information and resources.[218]

Instead, regulators provide general guidance regarding what the firm should include, such as instructing Google to require "service providers by contract to implement and maintain appropriate privacy protections."[219] Although companies do not normally release the text of their contracts, Facebook's terms state to app developers, "We or an independent auditor acting on our behalf may audit your app, systems, and records to ensure your use of Platform and data you receive from us is safe."[220] Regulators thus, to varying degrees, let the firm determine how best to write that clause. In short, by writing contract clauses governing other private parties, businesses play a rulemaking role analogous to what Congress expects of administrative agencies.

2. Enforcing Law

Mandated third-party governance also compels large firms to enforce the law. In his testimony in front of the Senate, Mark Zuckerberg was

[215] Cf. Ryan Bubb & Prasad Krishnamurthy, Regulating Against Bubbles: How Mortgage Regulation Can Keep Main Street and Wall Street Safe—From Themselves, 163 U. Pa. L. Rev. 1539, 1609 (2015).

[216] See supra Sections II.A–B.

[217] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, 2095 (2010) (amending 15 U.S.C. § 6801 et seq.).

[218] See Bamberger, supra note 4, at 380–81 (identifying regulatory limits and complexity).

[219] Google, Inc., FTC File No. 102 3136, at 5 (F.T.C. Mar. 30, 2011) (agreement containing consent order).

[220] Facebook Platform Policy, supra note 96.

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asked by one senator why the company had not more closely monitored app developers and held them accountable for violating Facebook's privacy policies. Zuckerberg responded, "Before, we'd thought that when developers told us that they weren't going to sell data, [that was] a good representation. But one of the big lessons that we've learned here is that clearly, we cannot just take developers' word for it. We need to go and enforce them."[221]

As mentioned above, federal regulators use ongoing monitoring as their main enforcement tool, rather than simply bringing formal lawsuits.[222] The FDA and EPA conduct routine on-site inspections of laboratories and manufacturing facilities, for instance, and the CFPB visits banks to examine their records.[223] When the federal monitors—typically called inspectors or examiners—detect wrongdoing, they often handle the problem directly without involving lawyers.[224]

Mandated enforcement also emphasizes monitoring. As part of its consent order, Facebook now informs developers it may "audit" their app to ensure compliance.[225] Capital One must conduct "periodic onsite audit review[s]" of service providers.[226] A pharmaceutical company is expected to reserve the right "to audit its contractor's facilities for compliance."[227] Exxon is required by court order to review subcontractor monitoring data.[228] Thus, by public mandate, firms must undertake one of the core functions of the modern public regulator.

In implementing regulatory monitoring, private firms face similar challenges as public regulators long have. For instance, Volkswagen fooled regulators for years into thinking its cars met emissions standards through software that recognized when an emissions test was occurring and hid actual emissions levels.[229] Similarly, Citibank had an oversight

[221] Mark Zuckerberg, Testimony Before the House Energy & Commerce Committee, C-SPAN (Apr. 11, 2018), https://www.c-span.org/video/?c4822489/mark-zuckerberg-testimony-house-energy-commerce-committee [https://perma.cc/28CX-8PMY] (quoted language begins at 00:13).

[222] See supra Section I.A; see also Van Loo, supra note 39, at 412.

[223] See, e.g., Van Loo, supra note 39, at 382, 391 n.138, 411.

[224] Id. at 412.

[225] Facebook Platform Policy, supra note 96; see also Facebook, Inc., No. C-4365, at 9 (F.T.C. Nov. 13, 2012) (Facebook compliance report).

[226] Capital One Bank, (USA) N.A., CFPB No. 2012-CFPB-0001, at 23 (July 16, 2012) (stipulation and consent order).

[227] FDA Drug Contract Guidance, supra note 169, at 4.

[228] 2005 Exxon Mobil Consent Decree, supra note 162, at 110.

[229] Jack Ewing, Inside VW's Campaign of Trickery, N.Y. Times, May 7, 2017, at BU1, 5.

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regime that included reviewing call centers' phone conversations, but call center employees figured out which calls would be audited and only veered from the mandated script on unmonitored calls.[230] Businesses now have incentives to evade the enforcer-firm's detection as they long have had for public regulatory policing.

In monitoring third parties, large firms also look for similar things as do public regulators. A "critical component" of modern regulation is to move beyond the identification of specific violations to ensure that companies have "a robust and effective compliance management system."[231] This means scrutinizing a company's procedures to ensure a meaningful compliance system.[232] The enforcer-firm must also look for more than violations. As one example, when Facebook monitors app developers for privacy, it examines developers' data security procedures.[233]

Enforcement must come with some kind of sanction. One pervasive regulatory sanction is the ability to block access to the market, often through the revocation of a permit or license.[234] This gives regulators a potentially ruinous enforcement sanction, even if they rarely use it.

Big businesses are expected to enforce using a similar gatekeeper function by blocking access to markets. In one consent decree, the Comptroller of Currency and other governmental entities required HSBC to "perform appropriate due diligence" of "Third-Party Provider qualifications, expertise, capacity, reputation, complaints, information security, document custody practices, business continuity, and financial viability."[235] These factors reflect what bank regulators consider in extending bank charters.[236] More broadly, regulators may require firms to screen third-party qualifications at the outset, and then to reserve the right

[230] Citibank, N.A., CFPB No. 2015-CFPB-0015, at 12–13 (July 21, 2015) (consent order).

[231] CFPB, Supervisory Highlights: Fall 2012, at 4 (2012) https://files.consumerfinance.gov/-f/201210_cfpb_supervisory-highlights-fall-2012.pdf [https://perma.cc/BES2-76B8].

[232] See Griffith, supra note 9, at 2089.

[233] See Facebook, Inc., FTC File No. 0923184, No. C-4365, at 5–6 (F.T.C. July 27, 2012).

[234] Eric Biber & J.B. Ruhl, The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State, 64 Duke L.J. 133, 137, 209 (2014).

[235] HSBC Bank USA, N.A., No. AA-EC-11-14, at 11 (Office of the Comptroller of the Currency Apr. 13, 2011) (consent order).

[236] In awarding a bank charter, the Comptroller of Currency considers factors such as the reputation of the board members, the business plan, and the financial profile. See Michael S. Barr et al., Financial Regulation: Law and Policy 165 (2d ed. 2018).

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to end the contract in the event of misconduct.[237] Like public regulators, large private firms wield powerful blocking sanctions.[238]

Despite their private foundations, corporations increasingly must play a role similar to the public regulator—both by writing rules for the benefit of the public into their contracts with third parties and by actively monitoring and enforcing those rules. This new role not only changes the descriptive account of the firm, but promises to reshape corporate governance, liability, and structure.

B. Shaping Corporate Governance

Much of corporate law addresses the duties owed by officers and directors.[239] In public corporations, the shareholders do not exert day-to-day control, but rely instead on the board of directors and the officers of the corporation to run the business.[240] Fiduciary law is one of the main ways that shareholders can hold officers and directors liable if they manage the corporation in a way contrary to shareholders' interests.[241] Other civil lawsuits may also be brought against business leaders. This Section looks at the implications of third-party mandates for personal liability and the corporate governance principles that such liability seeks to promote.

In *In re Caremark International Inc. Derivative Litigation*, the Delaware Chancery Court observed that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may . . . render a director liable for losses."[242] Subsequent rulings have reinforced directors' fiduciary duty to ensure the corporation has reporting systems and controls that

[237] See, e.g., JP Morgan Chase Bank, N.A., CFPB No. 2013-CFPB-0007, at 7–8 (Sept. 18, 2013) (consent order).

[238] For more on the sanction effect and its variability among enforcer-firms, see infra Section IV.A.

[239] See William T. Allen & Reiner Kraakman, Commentaries and Cases on the Law of Business Organization 229 (5th ed. 2016).

[240] 2 James D. Cox & Thomas Lee Hazen, Treatise on the Law of Corporations § 9:1, at 2 (3d ed. 2010).

[241] Id. § 10:1, at 127.

[242] 698 A.2d 959, 970 (Del. Ch. 1996).

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enable them to monitor risks.[243] But the bar is high for such liability.[244] Directors do not violate their fiduciary duty simply by overseeing a company with objectively poor compliance systems, unless plaintiffs show that the directors' oversight of those systems was subjectively reckless or grossly negligent.[245]

How does third-party mandated governance alter board members' duties to shareholders? Shareholders tested that issue through a suit against Capital One.[246] Pointing to the CFPB's aforementioned enforcement action, shareholders first alleged that the board inadequately monitored the call centers.[247] The court noted that, under Delaware law, to establish a breach of fiduciary duty in monitoring third parties, plaintiffs must show that the board operated in bad faith.[248] Because Capital One had controls in place for call centers, the court found that the plaintiffs did not plead sufficient facts to show "a 'sustained or systematic failure of [the] board to exercise oversight' or that the board 'utterly failed to implement any reporting or information system or controls.'"[249] The court ultimately dismissed the suit on summary judgment because the plaintiffs did not put forth facts showing that the directors "consciously chose not to remedy the misconduct."[250] State law may eventually catch up, but the Capital One shareholder suit demonstrates how state corporate law imposes lower duties than regulators do upon the board with regard to third parties.[251]

Despite the lack of a strong influence on directors' state law liability, mandated third-party regulation could still alter corporate governance. By specifying actions the board must take in the wake of settlements, administrative agencies are dictating concrete board duties. In its settlement with Citibank, for instance, the CFPB required the board to form a sub-committee focused on compliance and for that sub-committee

[243] See, e.g., Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[244] See In re Fed. Nat'l Mortg. Ass'n Sec., Derivative, and "ERISA" Litig., 503 F. Supp. 2d 9, 18 (D.D.C. 2007), aff'd sub nom, Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. ex rel. Fed. Nat'l Mortg. Ass'n v. Raines, 534 F.3d 779 (D.C. Cir. 2008).

[245] *Stone*, 911 A.2d at 369, 372–73.

[246] In re Capital One Derivative S'holder Litig., 952 F. Supp. 2d 770 (E.D. Va. 2013).

[247] Id. at 785.

[248] Id. (citing *Stone*, 911 A.2d at 370).

[249] Id. (quoting *Stone*, 911 A.2d at 369–70).

[250] In re Capital One Derivative S'holder Litig., 979 F. Supp. 2d 682, 701 (E.D. Va. 2013) (emphasis omitted).

[251] The fiduciary duty imposes a generally low bar under the common law. See Kelli A. Alces, Debunking the Corporate Fiduciary Myth, 35 J. Corp. L. 239, 254 (2009).

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to meet monthly, take minutes, and submit quarterly reports to the CFPB's regional director on the bank's progress overseeing third parties.[252] Regulators' detailed instructions put responsibility at the top of the corporation for the ongoing oversight of third parties, leaving little room for the board to claim ignorance.[253]

Although regulators are unlikely to prosecute officers and directors for third-party mandates, and insurance would normally shield many from paying anyway,[254] the mandates move business leaders toward personal liability for the acts of third parties under various statutes. For example, the Federal Trade Commission Act holds individuals liable for a corporation's deceptive acts if the individual possessed authority to control the acts and knew or should have known about them.[255] Since many settlement agreements and guidance documents require the board of directors or officers to oversee third-party compliance and to receive reports,[256] regulators are essentially ordering them to have control and knowledge. Some regulators, including the CFPB and FTC, have pursued actions against individuals for failed supervision of third parties.[257] Individuals within the firm may thus in the future face greater personal liability for the acts of third parties as a result of current mandates to monitor and influence those third parties.[258]

More broadly, the mandates may still influence board members' conduct even if personal sanctions are unlikely. Enforcement actions against firms drove the explosion in many large corporations' compliance departments, which now often rival legal departments in size and influence.[259] Those large compliance departments often retain some formal relationship with the board.[260] The emergence of specific

[252] Citibank, N.A., CFPB No. 2015-CFPB-0015, at 32–34 (July 21, 2015) (consent order).
[253] See, e.g., BP Consent Decree, supra note 12, at app. 4, at 20–23.
[254] See Kraakman, supra note 34, at 859.
[255] FTC v. IAB Mktg. Assocs., LP, 746 F.3d 1228, 1233 (11th Cir. 2014).
[256] See supra note 252 and accompanying text.
[257] See, e.g., CFPB v. D & D Mktg., Inc., CV 15-9692, 2017 WL 5974248, at *1 (C.D. Cal. Mar. 21, 2017); FTC v. Lifewatch Inc., 176 F. Supp. 3d 757, 760 (N.D. Ill. 2016).
[258] Cf. Stavros Gadinis & Amelia Miazad, The Hidden Power of Compliance, 103 Minn. L. Rev. 2135, 2138 (2019) (showing how compliance officers can change the board's liability).
[259] See Geoffrey Parsons Miller, Compliance: Past, Present and Future, 48 U. Tol. L. Rev. 437, 438 (2017).
[260] Michele DeStefano, Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer, 10 Hastings Bus. L.J. 71, 120–21 (2014).

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requirements for third-party oversight could similarly shape industry norms for the board's oversight of other external companies.[261]

Put differently, regulators are moving the bar set by corporate law's compliance duties imposed on boards for third-party oversight. By requiring the firm to oversee third parties for legal compliance, regulators inevitably implicate those ultimately responsible for running the firm, including owners, board members, and managers. Regulators' specific requirements for board conduct, reaching details such as minutes and compliance plan approval, mean that even boards that have yet to be subject to enforcement actions operate in reference to them in managing their compliance programs. Mandated enforcement may overcome the formidable shield from liability that state law, business judgment rule, and other waivers[262] have provided to the board of directors.

C. Altering Entity Liability and Structure

Legal liability plays a prominent role in corporate law. By some leading accounts, the limitation of liability is the defining characteristic of the corporation and has driven its structural evolution.[263] Regulators' approach to third-party regulation has increased the firm's liability for the acts of other businesses.[264] That shift in liability implicates the firm's entity-level liability, which could alter the corporate structure in ways that policymakers did not intend.

Mandated third-party governance could change large companies' organizational structures. In recent decades, many businesses have outsourced activities previously conducted in-house.[265] Diverse considerations drive the decision to outsource, including cost savings and an enhanced ability to monitor remote parties,[266] but some scholars have

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[261] Directors' and officers' liability insurers could also exert pressure on individuals to engage in certain third-party governance practices to be eligible for coverage, thereby influencing without imposing personal liability.

[262] See, e.g., Del. Code Ann. tit. 8, § 102(b)(7) (2011).

[263] See, e.g., Hansmann & Kraakman, supra note 189, at 439–40.

[264] See supra Part II.

[265] See, e.g., Penncro Assocs., Inc. v. Sprint Spectrum, L.P., 499 F.3d 1151, 1152 (10th Cir. 2007) (explaining how Sprint began outsourcing its collection services).

[266] See George S. Geis, Business Outsourcing and the Agency Cost Problem, 82 Notre Dame L. Rev. 955, 963 (2007); George S. Geis, An Empirical Examination of Business Outsourcing Transactions, 96 Va. L. Rev. 241, 242 (2010) [hereinafter Geis, An Empirical Examination]; Paul A. Samuelson & William D. Nordhaus, Macroeconomics 32 (16th ed. 1998). The outsourcing could also protect against reputational harm.

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concluded that one goal is lessening the risks of legal liability.[267] Regardless of the motivation for the original outsourcing, the third-party service provider typically contractually shields the outsourcing firm from lawsuits.[268] For instance, a debt collector indemnified cell phone carrier Sprint from "all claims, damages, losses, liabilities, costs, expenses and reasonable attorney's fees" related to its collection services.[269]

Third-party mandates could make outsourcing less attractive if they remove some of these legal protections. As discussed above, this governance shift already prevents many of the largest companies from delegating away liability for *public* prosecution.[270] That fact alone presumably makes outsourcing less attractive in terms of shielding from third-party liability.

Outsourcing would become even less attractive if it stopped insulating the firm from *private* lawsuits. Agency law provides a primary avenue for private parties holding firms liable for the acts of third parties. The more a business controls the acts of another, the more likely courts will find the business to be the principal liable for an agent's acts.[271] Various other statutes also provide a private right of action against companies for acts by third parties they control, such as for unfair and deceptive acts committed against consumers.[272] The more Verizon controls the acts of the telemarketer, for instance, the easier it is for a customer harmed by the telemarketer to sue Verizon, rather than the telemarketer. Outsourcing

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[267] See Douglas Brown & Scott Wilson, The Black Book of Outsourcing: How to Manage the Changes, Challenges, and Opportunities 45–47 (2005); Henry Hansmann & Reinier Kraakman, Toward Unlimited Shareholder Liability for Corporate Torts, 100 Yale L.J. 1879, 1881 (1991).

[268] Harry Rubin, Supply-Side / Manufacturing Outsourcing—Strategies and Negotiations, 38 Geo. J. Int'l L. 713, 728 (2007). The enforceability of indemnity rules varies by industry. See, e.g., Roberts v. Williams-McWilliams Co., 648 F.2d 255, 264 (5th Cir. 1981); Michael D. Scott, Scott on Outsourcing Law and Practice § 3.03[H], at 3-56 (2010); Vandenbergh, supra note 41, at 2044.

[269] *Penncro*, 499 F.3d at 1156 (quotation marks omitted) (indemnifying Sprint against claims for work performed by the service provider).

[270] The FDA, for instance, states in its guidance document on third-party contracts, "It is important to note that quality agreements cannot be used to delegate statutory or regulatory responsibilities to comply with [Current Good Manufacturing Practice]." FDA Drug Contract Guidance, supra note 169, at 6. Environmental and consumer financial protection laws have similar limitations on delegation. See supra Sections II.B & II.C.

[271] 1 Cox & Hazen, supra note 240, § 1:24, at 119–20.

[272] For instance, several states have adopted Unfair and Deceptive Trade Practices Acts giving consumers the ability to sue companies. See, e.g., D.C. Code § 28-3905 (2018); Mass. Gen. Laws ch. 93A, § 11 (2018); Va. Code Ann. § 59.1-204 (2019).

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may provide less protection from liability in private lawsuits if third-party mandates closely map those factors considered by courts in determining control. In analyzing whether a third party, such as a telemarketer, is an agent, courts cite activities such as monitoring and editing the script used by telemarketers as demonstrating control.[273] Yet regulators often mandate third-party monitoring and explicitly require the implementation of "controls" over third parties.[274] It follows that conscripted enforcement may move the firm into a position of control sufficient for courts to hold the firm liable for the acts of third parties. In other words, the new gatekeepers may prompt a resurgence of *respondeat superior* liability.[275]

The additional risk of liability possibly imposed by third-party mandates might change the outsourcing calculus. Purchasing the service provider would not necessarily impose more liability. In *United States v. Bestfoods*, the EPA sued a parent company under common law liability for the cleanup costs of hazardous waste disposed of by a subsidiary.[276] The Supreme Court reasoned that something more than ownership control was needed to hold the parent liable under the common law.[277] Direct involvement by the parent company in the wrongdoing is needed.[278]

Although purchasing a subsidiary thus would not necessarily increase liability for the wrongdoing of the subsidiary, it could facilitate monitoring. As an independent company, the service provider would be reluctant to share private information with its client. Companies generally guard private information closely, and, if the client later used a different service provider, oversharing information could reduce the original service provider's competitive advantage. When the service provider is a subsidiary, however, the need for secrecy diminishes.

Thus, mandated third-party governance may cause businesses to either purchase the third-party service provider or develop a new service provider as a subsidiary to facilitate more effective monitoring. This assumes that the firm believes more effective monitoring would decrease the likelihood that the service provider will engage in wrongdoing. If so,

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[273] See, e.g., FTC v. Lifewatch Inc., 176 F. Supp. 3d 757, 776–77 (N.D. Ill. 2016) (finding agency in an unfair and deceptive acts lawsuit).

[274] See, e.g., Wells Fargo Bank, N.A., BCFP No. 2018-BCFP-0001, at 13–15 (Apr. 20, 2018) (consent order) (requiring "oversight controls" as part of a compliance plan).

[275] See Rory Van Loo, The Revival of Respondeat Superior 2 (Oct. 19, 2019) (unpublished article) (on file with the Virginia Law Review Association).

[276] 524 U.S. 51, 57–58 (1998).

[277] Id. at 61–62.

[278] Northbound Grp., Inc. v. Norvax, Inc., 795 F.3d 647, 651 (7th Cir. 2015).

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pervasive mandated enforcement could thereby influence firms' organizational structures.

D. Strengthening the Public Duty

Conscripted enforcement informs debates about what duties businesses owe to society. Firms must refrain from violating laws, but they usually do not need to take any particular action to benefit the public.[279] A strong norm discourages "unwarranted 'social' obligations on private enterprise."[280]

Industry-specific exceptions do exist, however. Utilities and common carriers must offer cable, internet, electricity, and gas services at comparable prices even to unprofitable customers, such as inhabitants of rural communities.[281] Under the Community Reinvestment Act, banks must extend credit in underserved neighborhoods.[282] Disparate state and federal laws obligate hospitals not to exclude patients.[283]

Unlike banks' and utilities' requirements to help some sector of the public, third-party mandated governance is not limited to companies offering essential services or serving as common carriers.[284] It thus reaches a broader swath of the economy.[285] Additionally, those essential service providers can fulfill the mandated public act by offering their core product—even for compensation.[286] In contrast, conscripted enforcement requires a public action other than offering the firm's core product, and without compensation, thus bringing the firm further outside its sphere of private enterprise.

Third-party mandates differ from the drastic growth in mandated internal compliance. Compliance departments have until now largely

[279] See 2 Cox & Hazen, supra note 240, at § 10:1.

[280] Morgan Ricks, Money as Infrastructure, 2018 Colum. Bus. L. Rev. 757, 833.

[281] See K. Sabeel Rahman, Infrastructural Regulation and the New Utilities, 35 Yale J. on Reg. 911, 917–20 (2018) (discussing duties of diverse utilities).

[282] 12 U.S.C. §§ 2901–2908 (2012).

[283] Nicholas Bagley, Medicine as a Public Calling, 114 Mich. L. Rev. 57, 85 (2015).

[284] On the essential services dimension of utilities and banking, see Ricks, supra note 280, at 768–69. Granted, in some regards the services offered by many large companies are essential. See K. Sabeel Rahman, The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept, 39 Cardozo L. Rev. 1621, 1690–91 (2018).

[285] See supra Part II.

[286] To satisfy the Community Reinvestment Act, for instance, banks can make loans to small businesses. See, e.g., Michael S. Barr, Credit Where It Counts: The Community Reinvestment Act and Its Critics, 80 N.Y.U. L. Rev. 513, 523–26 (2005).

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been seen as internally focused.[287] Conversely, third-party mandates are externally focused. That distinction matters because mandating internally focused compliance departments can be seen as merely a new mechanism for requiring the firm to do what it was always expected to do—regulate itself.

Although different in fundamental ways, conscripted enforcement is part of a broader shift that includes compliance departments, community reinvestment requirements, and the SEC's expanded substantive corporate law authority through the Sarbanes-Oxley Act.[288] These and related developments have over time marked greater federal intervention into corporate governance and operations.[289]

Conscripted governance adds a substantial new layer by allowing a large number of federal agencies beyond the SEC to shape the firm's relationships, contracts, board activities, and liability. In debates about what duties the firm owes to society, appeals to the private nature of the firm are less persuasive in light of this extensive public influence. Other arguments against government overstepping, such as the efficiency implications of regulatory burdens, retain their force and underscore the importance of weighing broader economic tradeoffs in designing corporate governance interventions.[290] However, as a descriptive matter, policymakers are proceeding as though the firm has a duty to act affirmatively in the public good.

IV. EXPANDING THE PRIVATE BRANCH OF THE REGULATORY STATE

The central preoccupation of administrative law is the accountability of unelected bureaucrats.[291] The effectiveness of administrative decisions

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[287] See, e.g., Griffith, supra note 9, at 2082, 2108 (portraying compliance department as "internal" and "intrafirm"); Krawiec, supra note 9, at 572 (discussing "internal compliance structures"); Root, supra note 9, at 1004–05 (describing compliance departments as focusing on the firms within which they sit).

[288] Roberta Romano, The Sarbanes-Oxley Act and the Making of Quack Corporate Governance, 114 Yale L.J. 1521, 1523 (2005).

[289] See Rachel E. Barkow, The Prosecutor as Regulatory Agency, *in* Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct 177, 177 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Coglianese & Lazer, supra note 4, at 691; Griffith, supra note 9, at 2088–89; Roe, supra note 64, at 591; Vandenbergh, supra note 46, at 916. Broadening this class of activities to include enforcing laws against individuals as well as criminal and national security law would expand the array of examples. See supra note 22.

[290] See, e.g., Bainbridge, supra note 82, at 591–92; Romano, supra note 288, at 1529.

[291] See, e.g., Margaret H. Lemos, Democratic Enforcement? Accountability and Independence for the Litigation State, 102 Cornell L. Rev. 929, 942 (2017).

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is also crucial to administrative law.[292] Scholars have already extended those projects to the growth in private governance.[293] This Part begins to map the normative path forward for integrating the enforcer-firm into the regulatory state.

A. *Effectiveness of the Enforcer-Firm*

A central question in business regulation is what set of incentives would optimally deter wrongdoing. The law can influence deterrence chiefly by adjusting the severity of the penalty or the likelihood of detection.[294] Studies of optimal deterrence have produced inconclusive results.[295] That indeterminacy will undermine any efforts to draw strong conclusions about the attractiveness of the enforcer-firm. Nonetheless, since the enforcer-firm is a tool for deterrence, it is necessary to consider when to deploy it.

One straightforward reason for use of the enforcer-firm is inadequate regulatory resources. The firm's compliance department plays a major role in enforcement.[296] In many public corporations today, the compliance group has grown to rival the legal department in size and influence.[297] At Goldman Sachs, the number of people in compliance more than tripled between 2004 and 2016, to about 950.[298] But the CFPB has only 416 personnel in its monitoring group to conduct examinations of Goldman Sachs, Citibank, and many other large banks.[299] As another example, Facebook recently hired thousands of new compliance reviewers, while

[292] See, e.g., Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2331–46 (2001). Effectiveness can be seen as part of accountability, in that one of the goals in holding agencies accountable is to ensure they are effective.

[293] See, e.g., Ayres & Braithwaite, supra note 9, at 101–32; Freeman, supra note 9, at 2.

[294] See, e.g., Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169, 176 (1968).

[295] In particular, it is difficult to know what would have happened in the alternative. See Richard L. Revesz, Quantifying Regulatory Benefits, 102 Cal. L. Rev. 1423, 1424–25 (2014); Keith N. Hylton, Deterrence and Aggregate Litigation (Bos. Univ. Sch. of Law, Law & Econ. Paper No. 17-45, 2019), https://ssrn.com/abstract=3059583 [https://perma.cc/S2C3-52TE].

[296] Part II provided several examples of this. See, e.g., supra note 124 and accompanying text.

[297] Griffith, supra note 9, at 2077.

[298] See Sean J. Griffith et al., The Changing Face of Corporate Compliance and Corporate Governance, 21 Fordham J. Corp. & Fin. L. 1, 37 (2016). Other large financial institutions have seen similar growth. See id. at 36–37, 39.

[299] Van Loo, supra note 39, at app. A, at 436.

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its main regulator, the FTC, has only 1,100 employees total.[300] By conscripting even a fraction of large companies' compliance departments to enforce, policymakers can dramatically expand the administrative state's regulatory workforce. In deciding whether that expansion is beneficial, observers will come to differing conclusions depending, in part, on whether they view current public regulatory resource levels as adequate.

Putting the question of adequate resources aside, there remain other tradeoffs in determining when it would be ideal to regulate directly rather than through the enforcer-firm. A sensible signal for when the enforcer-firm might prove more effective at regulating than a government entity is the presence of superior information or essential sophistication. A major concern about regulation is that bureaucrats have insufficient skills or information to keep up with the private sector.[301] Observers mention regulators' predicted inability to understand complex algorithms, for instance, as a counterpoint to calls for public regulation of Amazon, Facebook, and other tech giants.[302] Additionally, since traditional gatekeepers do not produce the product subject to regulation, they are less familiar with the intricacies of fast-moving, technical industries.

Most enforcer-firms already have greater access to information about their counterparties through the regular course of business than would regulators or traditional gatekeepers. This informational criterion also suggests that the enforcer-firm is best suited to regulate the types of activities already related to its interactions with the third party, or that "touch and concern" it.[303]

To be clear, the firm is not necessarily an expert in all that the service provider does—indeed, a lack of expertise sometimes motivates a firm to outsource.[304] For instance, banks have found the task of monitoring third-party vendors extremely difficult, particularly fintechs and others providing complex artificially intelligent services, such as chatbots, credit

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[300] Id.; Letter from Facebook, Inc. to Greg Walden, Chairman, House Comm. on Energy & Commerce 109 (June 29, 2018), https://docs.house.gov/meetings/IF/IF00/20180411/108090/-HHRG-115-IF00-Wstate-ZuckerbergM-20180411.pdf [https://perma.cc/WH96-GB5Q].

[301] Roy Andrew Partain, Public and Private Regulations for the Governance of the Risks of Offshore Methane Hydrates, 17 Vt. J. Envtl. L. 87, 117–18 (2015).

[302] See, e.g., Ryan Calo & Alex Rosenblat, The Taking Economy: Uber, Information, and Power, 117 Colum. L. Rev. 1623, 1633 (2017).

[303] A familiar common law property term, touch and concern, is used in other areas, such as the Alien Tort Statute. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

[304] See, e.g., Samuelson & Nordhaus, supra note 266, at 32.

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monitoring, and fraud detection.[305] Nonetheless, regulatory understanding exists along a spectrum. Given large firms' resources, talent, information access, and expertise, they will in many contexts deliver a monitor better situated to keep pace.

The informational advantages speak not only to the ability to detect wrongdoing, but also the cost of doing so. A chief criticism of regulation is that it increases transaction costs.[306] In highly fragmented industries, the regulator faces greater difficulty monitoring all entities than in a concentrated industry with a small number of large businesses.[307] It requires expenditures to establish communications, travel to the site of so many businesses, and understand institutional idiosyncrasies. Unlike administrative agencies and third-party inspectors, the enforcer-firm already is in contact with its counterparties and already has a high baseline level of expertise, meaning that it can spend less to collect information and develop monitoring sophistication.[308] The regulated third party also then spends less on transferring and explaining information. The enforcer-firm can thereby lower the cost of regulation.

Regulatory informational savings are only part of the efficiency analysis. Efficiency would be improved if new gatekeeper governance caused the enforcer-firm to better internalize the full costs of its business activities. But if enforcer-firms responded by bringing external services in-house, it could either increase or decrease efficiency. If cost savings or other business advantages would otherwise drive the firm to rely on external service providers in the first place, then those losses from insourcing would need to be compared to the gains from increased compliance and regulatory informational savings. If instead the avoidance of liability is the sole reason for the firm to use some specific external

[305] Kate Berry, CFPB Catches Flak from Banks, Credit Unions on Risks of AI, Am. Banker (Dec. 6, 2018, 5:36 PM), https://americanbanker.com/news/cfpb-catches-flak-from-banks-credit-unions-on-risks-of-ai [https://perma.cc/H2JB-62ZX].

[306] On the importance of transaction costs in regulatory analyses, see, e.g., Freeman, supra note 4, at 573 n.108; Sidney A. Shapiro, Outsourcing Government Regulation, 53 Duke L.J. 389, 390 (2003).

[307] Nicholas R. Parrillo, Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries, 36 Yale J. on Reg. 165, 209 (2019); cf. Kevin M. Stack & Michael P. Vandenbergh, The One Percent Problem, 111 Colum. L. Rev. 1385, 1393–94 (2011) ("Given economies of scale, it is often the case that with small-percentage contributors the costs of regulation exceed the benefits.").

[308] Cf. Judge, supra note 41, at 1262 (discussing the informational advantages that banks have in influencing risk-taking by other banks).

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services, then insourcing in response to new gatekeeper governance would not necessarily prove inefficient.[309]

A further efficiency complication arises because some of the compliance information needed may be competitively sensitive. Amazon is notorious for hiring outside businesses—whether cloud computing providers, small clothing manufacturers, or shipping companies—and then ultimately deciding to take those products or services in-house after having had the chance to study them closely.[310] By forcing the sharing of sensitive information, gatekeeper governance could facilitate anticompetitive displacement or takeover of service providers, and even encourage enforcer-firms to become inefficiently large.

In the alternative, the sensitivity of information may cause service providers to avoid sharing crucial monitoring information with the enforcer-firm. If the monitor is instead an administrative agency or private inspection firm, the risks to the service provider are lower because the monitor would not be a potential competitor.[311] Information is the "lifeblood" of effective governance.[312] When competitively sensitive information is necessary for monitoring compliance, a public option or third-party monitor may prove more effective, or at least necessary as a complement to the enforcer-firm.

Another risk is that dispersed regulators create problems with overlapping jurisdiction. There is evidence that administrative agencies with overlapping jurisdiction are less likely to act, partly because each feels less pressure.[313] By analogy, the public regulator, the firm, and the service provider have overlapping jurisdiction. As a result, each may assume someone else is paying adequate attention. Strategic shirking is also possible, since the multiple businesses working with any given service provider may realize they can benefit from other businesses'

[309] There is disagreement about whether liability concerns drive a small or large amount of outsourcing. See Geis, An Empirical Examination, supra note 266; Hansmann & Kraakman, supra note 267, at 1881.

[310] Julie Creswell, Amazon the Brand-Buster, N.Y. Times, June 24, 2018, at BU1; Jay Greene & Laura Stevens, How Amazon Wins, Wall St. J., June 2, 2018, at B1.

[311] Granted, competitors of the service provider could still hire government employees who had gained knowledge from monitoring. See, e.g., David Zaring, Against Being Against the Revolving Door, 2013 U. Ill. L. Rev. 507, 511–12.

[312] Matthew C. Stephenson, Information Acquisition and Institutional Design, 124 Harv. L. Rev. 1422, 1423 (2011).

[313] Jason Marisam, Duplicative Delegations, 63 Admin. L. Rev. 181, 211–12 (2011); see also Catherine M. Sharkey, Agency Coordination in Consumer Protection, 2013 U. Chi. Legal F. 329, 357.

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monitoring of that same service provider without incurring the costs of rigorous monitoring.[314]

The possibility of shirking reflects a broader concern that the enforcer-firm's monitoring may serve merely a "cosmetic" function—allowing the firm to show regulators that it is doing something, and thereby defend itself from regulatory liability, without actually exerting considerable influence.[315] One FTC lawsuit uncovered email evidence that a health care industry company's written reprimands of third-party telemarketer misconduct may have been all about appearances.[316] The company's representative assured the telemarketer after sending compliance emails, "I just have to cover all bases so nobody can say that I never told them lol."[317]

This concern about shirking indicates that the regulatory cost savings and sophistication advantages in using the enforcer-firm should be adjusted for any public resources needed to oversee the enforcer-firm. Still, administrative agency oversight represents another area in which the enforcer-firm has inherent advantages over traditional gatekeepers. With private inspectors, accountants, self-regulatory organizations, or auditors, agency oversight of the private enforcer would require interacting with additional entities. Those interactions would necessitate devoting agency resources to communicating with, understanding, and prosecuting new institutions. In contrast, the agency already oversees the enforcer-firm, and could merely add gatekeeper-related oversight. Public accountability of the enforcer-firm is thus lower-cost and more likely to occur than for many traditional gatekeepers.[318]

A final drawback is that the enforcer-firm's sanctions are more limited than that of an administrative agency. The enforcer-firm's main sanction is exit: if the third party is in violation, the firm can stop doing business with the service provider. That punishment is far narrower than those available to the public regulator, and still allows the third party to do business with other firms. Over time, the typical enforcer-firm may wield

[314] On multiple clients per service provider, see Brown & Wilson, supra note 267, at 47.

[315] Krawiec, supra note 128, at 487 (discussing compliance department window-dressing).

[316] FTC v. Lifewatch Inc., 176 F. Supp. 3d 757, 776–77 (N.D. Ill. 2016).

[317] Id.

[318] On the net of traditional gatekeepers typically involved, see Andrew F. Tuch, Multiple Gatekeepers, 96 Va. L. Rev. 1583, 1585 (2010).

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more substantial sanction power as industries become more concentrated.[319] But when the service provider serves a large number of clients, as many do, exit becomes less harmful.[320]

This limitation on the enforcer-firm raises questions about its potential use in peer-to-peer settings. Often two large companies work closely together and surely have informational advantages—thus providing the possibility of cost savings by relying on them to police one another. Facebook, for instance, allows Amazon, Netflix, and Microsoft to access user data, including the ability to read private messages.[321] The expansion of the enforcer-firm to oversee peers could, in theory, decrease the resource and information gap between regulator and regulated entity even further.[322] Peer-to-peer gatekeepers may still have a regulatory role to play, but such relationships depend on gatekeepers with less relative power. Overall, regulators may need to be more involved as the enforcer-firm's market power diminishes with respect to the counterparty.[323]

Part of the problem with assessing these diverse costs and benefits is that the largest firms remain untested as external regulators. In contrast, research demonstrates that public regulators' monitoring promotes compliance. In one study, increasing the frequency of EPA inspections lowered pollution from factories by about three percent.[324] Policymakers would benefit from similar research on the enforcer-firm's benefits and which of the diverse institutional design models, outlined above, are most effective. But there are sufficient examples of public regulators, private third-party monitors, and self-regulation failing.[325] A crucial variable in any such analysis is the potentially substantial costs imposed on the enforcer-firm and its counterparties.

[319] James W. Brock, Economic Power, Henry Simons, and a Lost Antitrust Vision of Economic Conservatism, 58 S.D. L. Rev. 443, 452, 457 (2013).

[320] Brown & Wilson, supra note 267, at 47.

[321] See Gabriel J.X. Dance et al., Facebook Offered Users Privacy Wall, Then Let Tech Giants Around It, N.Y. Times, Dec. 19, 2018, at A1.

[322] For a proposal to leverage interbank discipline, see Judge, supra note 41, at 1321–22.

[323] This is about more than size. Some service providers have greater power in indemnity negotiations. See Jason D. Krieser & Shawn C. Helms, Outsourcing Law and Business § 11.02[3][e] (2019).

[324] Jinghui Lim, The Impact of Monitoring and Enforcement on Air Pollutant Emissions, 49 J. Reg. Econ. 203, 203 (2016).

[325] See, e.g., Policy Shock: Recalibrating Risk and Regulation After Oil Spills, Nuclear Accidents and Financial Crises (Edward J. Balleisen, Lori S. Bennear, Kimberly D. Krawiec & Jonathan B. Wiener eds., 2017) (summarizing the relationship between regulation and crises).

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In short, the question of whether the enforcer-firm is better than other regulators will hinge on factors that include information access, the sensitivity of the regulatory information needed, the power that the enforcer-firm has over its counterparty, the organizational efficiency of outsourcing, and the societal gains from increased compliance. In theory, in the absence of direct empirical study, large firms' greater information and sophistication should make them more cost-effective than a public regulator or new class of private third-party regulators performing the same function.

Difficult design questions remain about which party should be incentivized to what degree—the enforcer-firm or its counterparties. Another fundamental choice is whether explicit governance mandates for the enforcer-firm are needed beyond leveraging indirect liability, vicarious liability, and strict liability. Also, legal reforms could address some of the enforcer-firm's downsides. To increase sanctions, the law could give it a private right of action against the third party for noncompliance. Or the law might require the enforcer-firm to report violations.[326] Greater antitrust attention to the enforcer-firm would help ensure it did not abuse its position and any access to sensitive information.

In assessing the enforcer-firm, it is important to be realistic about the alternatives. The practical choice may not be between public monitors and the enforcer-firm, or between the enforcer-firm and the old gatekeepers. Industry lobbying may block congressional allocation of adequate public resources to oversee a large universe of smaller third-party firms.[327] Given these resource constraints, the real-world question may simply be whether the enforcer-firm, despite its imperfections, is better than no direct oversight of dispersed third parties. Assuming that greater compliance with those laws is desirable, the enforcer-firm offers a promising avenue for more effective regulation.

B. Accountability of the Enforcer-Firm

A central administrative law concern about prior generations of privatization is that they "insulate" the government from accountability because the public has limited visibility or interaction with the private entity.[328] The delegation of regulatory responsibilities to the enforcer-firm

[326] See, e.g., Gadinis & Mangels, supra note 22, at 910 (proposing reporting requirements).
[327] See, e.g., George J. Stigler, The Citizen and the State: Essays on Regulation, at ix (1975).
[328] See Freeman, supra note 60, at 175–76.

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can further insulate from accountability. It is therefore worthwhile to consider how the public can ensure that enforcer-firms are promoting compliance. Three potential responses would be through courts, private actors, and administrative agencies.[329]

Judicial review provides a check against industry capture of bureaucrats. Enforcer-firms can write monitoring contracts or make enforcement decisions free from accountability mechanisms that apply only to government, such as the Administrative Procedure Act[330] and the Freedom of Information Act.[331] A related concern would be that by delegating regulation to the enforcer-firm, the state allows large firms to write and enforce rules to cement or further concentrate existing market shares, thereby harming smaller firms and new entrants.

In the absence of a clear statutory mechanism for review, one existing proposal would have courts hold delegations unconstitutional if the agency imposes inadequate constraints on the private actor.[332] Overall, solutions relying on the nondelegation doctrine seem unlikely. Congress must only provide "an intelligible principle" within lawful bounds,[333] a lenient standard that has traditionally proved highly tolerant of government delegations to private parties.[334] However, courts have occasionally indicated hostility to "empowering private parties to wield regulatory authority"[335] and indicated the need to "subject private delegations to a more searching scrutiny than their public counterparts."[336] Most prominently, in *Department of Transportation v. Association of American Railroads* the Supreme Court avoided ruling on the nondelegation issue by holding that Amtrak was a government actor, but, in a concurring opinion, Justice Alito observed that "handing off regulatory power to a private entity is 'legislative delegation in its most

[329] Executive review plays a related anti-capture function. Michael A. Livermore & Richard L. Revesz, Regulatory Review, Capture, and Agency Inaction, 101 Geo. L.J. 1337, 1340 (2013).

[330] Administrative Procedure Act § 2, 5 U.S.C. § 551 (1994).

[331] Freedom of Information Act, 5 U.S.C. § 552(b) (2018).

[332] On agency reliance on private actors as delegation, see Metzger, supra note 4, at 1370.

[333] See J.W. Hampton, & Co. v. United States, 276 U.S. 394, 409 (1928).

[334] See Freeman, supra note 4, at 589–90 (reviewing cases upholding privatization).

[335] See Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 671 (D.C. Cir. 2013), vacated and remanded sub nom. Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43 (2015).

[336] See Tex. Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 469 (Tex. 1997) ("[C]ourts should subject private delegations to a more searching scrutiny . . . .").

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obnoxious form.'"[337] It is thus not inconceivable that the nondelegation doctrine might at some point gain relevance to the enforcer-firm.

Others have explored imposing constitutional constraints on businesses as state actors under the Due Process Clause of the Fourteenth Amendment.[338] The most relevant tests for a state actor seem immediately applicable to the enforcer-firm—"joint participation" sufficient for interdependence, a sufficient "nexus" between the private and public actor, and performance of a "public function" traditionally exclusively reserved for the state.[339] But courts have consistently found that private companies failed these tests, even when involved in activities with a heavy public component, such as operating electric utilities and nursing homes.[340] Self-regulatory organizations like the Financial Industry Regulatory Authority (FINRA), which is congressionally authorized to protect investors, present a closer case, but courts still do not usually see them as state actors.[341]

It is worth considering whether it matters that—unlike utilities and nursing homes—the enforcer-firm is engaging in a public service outside of its normal business operations.[342] While that distinction could be relevant, and deserves a more extensive analysis, the "protections courts afford those affected by private decisions, and the scope of judicial review they provide, remain minimal."[343] If the enforcer-firm produces similar judicial outcomes as other private enforcers, the administrative state has another large area of governance that will likely proceed unconstrained by judicial review.

Private actors present another possibility for holding the enforcer-firm accountable. For some perspective, it is instructive to consider again how

[337] 575 U.S. at 62 (Alito, J., concurring) (quoting Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936)). For the Court's holding, see id. at 55 (Kennedy, J., majority opinion).

[338] See, e.g., Ira P. Robbins, The Impact of the Delegation Doctrine on Prison Privatization, 35 UCLA L. Rev. 911, 915 (1988).

[339] See Jackson v. Metro. Edison Co., 419 U.S. 345, 351–52, 357–58 (1974).

[340] See id. at 358 (finding that a public utility with a monopoly is not a public actor); see also Blum v. Yaretsky, 457 U.S. 991, 1010–12 (1982) (holding that nursing home decision to provide Medicaid patients with less care was not state action despite heavy regulations).

[341] See Michael Deshmukh, Note, Is FINRA a State Actor? A Question that Exposes the Flaws of the State Action Doctrine and Suggests a Way to Redeem It, 67 Vand. L. Rev. 1173, 1178–80 (2014). Courts have in rare instances found self-regulatory organizations to be government entities. See Roberta S. Karmel, Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies, 14 Stan. J.L. Bus. & Fin. 151, 173 (2008).

[342] See supra Section III.D (distinguishing the enforcer-firm from utilities).

[343] See Freeman, supra note 4, at 591.

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the regulatory architecture differs between enforcer-firms and more traditional private enforcement models. When lawyers, accountants, and auditors serve as gatekeepers, the entity they are regulating is the one paying their bills.[344] That client relationship makes it easier for the firm to capture the gatekeeper—in the sense of influencing it to enforce lightly—because the gatekeeper has financial interests in keeping the client happy.[345] With the enforcer-firm, however, the gatekeeper pays the service provider's bills—perhaps indirectly, as in the case of Amazon and Facebook, by providing some crucial access to users.[346] If "the client is king,"[347] the old gatekeepers are subjects, while the new gatekeepers are royalty. Enforcer-firms should thus prove inherently more resistant to capture, and more independent, than hired monitors.

Moreover, in contrast to the old gatekeepers, the enforcer-firm deals directly with consumers. As a result, some enforcer-firms' employees will have more of a natural affinity for consumers, and thus potentially some of the groups needing protection from the laws to be enforced. Also, consumers have a means of directly affecting most enforcer-firms, by taking their business elsewhere. That direct relationship enables advocacy, such as consumer boycotts, that has pushed businesses toward compliance in other contexts.[348] It also at least partly addresses some of the concerns in the literature that the old gatekeepers "are biased away from the public interest simply because close affinity with the client renders the desired independence psychologically impossible."[349]

There are many shortcomings with relying on markets to hold private firms accountable. A customer can easily choose another coffee shop or store, but it is harder for a consumer to switch banks or social networks.[350] There may not be many other options for digital products, and if there were, it would take time to learn a new interface, and all of one's pictures, posts, and contacts may not be readily portable to the new system.[351]

[344] See Kraakman, supra note 34, at 892 (discussing gatekeepers' profit motives).
[345] Cf. Root, supra note 5, at 531 (describing court-ordered monitor relationships).
[346] See supra Part II.
[347] Wilson Hunter, Independent or Adrift at Sea: How the Concept of Independence Has Warped American Legal Ethics, 34 J. Legal Prof. 367, 367 (2010).
[348] See, e.g., Vandenbergh, supra note 46, at 917.
[349] See Demski, supra note 18, at 57.
[350] On the challenges of switching and comparing bank products, see Rory Van Loo, Making Innovation More Competitive: The Case of Fintech, 65 UCLA L. Rev. 232, 244–45 (2018).
[351] Cf. Digital Dominance: The Power of Google, Amazon, Facebook, and Apple 29–30 (Martin Moore & Damian Tambini eds., 2018) (discussing data portability across platforms).

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Indeed, when consumers have little choice, the enforcer-firm may hardly care about reputation or the public shaming aspect of violations.[352] Thus, one consideration for whether to mandate enforcement may simply be the ease of exit: the more easily consumers can switch to competitors, the greater the accountability enforcer-firms face.[353]

Moreover, for consumers to hold the enforcer-firm directly accountable, they must have both visibility into the firm's enforcement and the ability to assess its efficacy. Visibility implicates one of the primary mechanisms for administrative accountability: transparency.[354] Greater transparency into the firm's role as enforcer could come in any of the forms used currently for administrative agencies, such as annual reports on enforcement activities.[355] Many firms would likely not release such information voluntarily, however. Public transparency for the enforcer-firm would depend on mandates, or, alternatively, on public regulators releasing summaries of enforcer-firms' activities.

For the public to hold the enforcer-firm accountable based on that information, however, people must also be able to assess its efficacy, which may prove difficult except in cases of extreme failure. Behavioral law and economics has demonstrated how consumers ineffectively weigh various shrouded attributes in a product, such as the warranty or fees.[356] It cannot be ruled out that some kind of independent grading scale, akin to restaurant health scores, could facilitate consumer-driven accountability. Still, in many industries, including banking and technology, consumers rarely switch because of the time and costs of doing so.[357] Given challenges related to information, decisionmaking, and switching, consumer spending and advocacy likely provide only a limited additional layer of accountability for the enforcer-firm.

These legal and nongovernmental shortcomings underscore the importance of active administrative agency oversight of the enforcer-

[352] On shaming, see Sharon Yadin, Regulatory Shaming, 49 Envtl. L. 407 (2019).

[353] See Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States 24 (1970).

[354] But see Michael D. Gilbert, Transparency and Corruption: A General Analysis, 2018 U. Chi. Legal F. 117, 117 (explaining how transparency can promote corruption).

[355] See, e.g., U.S. Nuclear Regulatory Comm'n, Enforcement Program Annual Report 4, 18 (2015), https://www.nrc.gov/docs/ML1606/ML16069A146.pdf [https://perma.cc/9PWR-4M6Y].

[356] See, e.g., Bar-Gill, supra note 210, at 5–6; Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1217–18 (2003).

[357] See, e.g., Barbara van Schewick, Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like, 67 Stan. L. Rev. 1, 92–95 (2015).

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firm. The CFPB provides one such model because it routinely checks whether financial institutions are overseeing third parties. For instance, as part of its routine examinations, the CFPB found that credit reporting agencies engaged in "insufficient ongoing monitoring, or re-vetting" of third-party furnishers of credit data.[358] With that message delivered industry-wide, credit agencies adjusted their internal processes enough that two years later the CFPB concluded, "In recent follow-up reviews, we determined that these policies and procedures have improved."[359] Improvements included "monitoring for furnishers that do not comply" and enforcement mechanisms such as "ceasing to accept data from furnishers."[360] The CFPB thus not only examines enforcer-firms' monitoring, but also communicates some of its findings to the public.

This Part's discussion is not meant to be an exhaustive list of the factors influencing the enforcer-firm's effectiveness and accountability. Additional risks include the possibility that the state relies too much on self-serving firms to regulate, thereby diminishing agencies' expertise or prompting Congress to allocate suboptimal resources. Another risk is perverse incentives for regulators to prefer concentrated industries with large companies because they facilitate regulation and wield more powerful sanctions, thus putting mandated enforcement even further in tension with antitrust.[361]

More broadly, expanding the state's ability to coopt businesses implicates more universal governance problems, such as how to prevent regulatory arbitrage and how to control a nefarious government wielding additional power. Those problems help motivate many existing checks on the administrative state. It may be necessary to extend analogous checks to enforcer-firms, such as requiring the inspector general to investigate them. These and other effectiveness and accountability implications are ripe for systematic study.

Overall, as a regulatory tool, conscripted regulators offer a number of potential advantages over prior privatization models. They present the possibility of greater efficiency, expertise, and responsiveness to consumers. Designed poorly, however, they risk creating a vast sphere of

[358] Consumer Fin. Prot. Bureau, Supervisory Highlights: Consumer Reporting Special Edition 6 (2017), https://files.consumerfinance.gov/f/documents/201703_cfpb_Supervisory-Highlights-Consumer-Reporting-Special-Edition.pdf [https://perma.cc/775P-8JFR].

[359] Id.

[360] Id. at 7.

[361] Anticompetitive enforcer-firm purchases of counterparties is another possible result.

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regulatory arbitrage out of public sight and judicial review. A crucial feature is ensuring that an administrative agency watches the new gatekeepers.

CONCLUSION

The public role of the firm and the private reach of the administrative state expand farther than is commonly understood. With large companies' immense resources at their disposal, administrative agencies now direct a large shadow regulatory workforce. That development offers some promise of filling in the regulatory policing gap left by resource-deprived and technologically less sophisticated administrative agencies.

Conscripted enforcement marks one of the federal government's boldest encroachments into the firm by shaping its contracts, relationships, structure, and governance. Moreover, as a descriptive matter, the world's largest firms now have affirmative duties to act for the public benefit. Policymakers may have thereby strengthened the case of those calling on firms to do more for society, at least in the sense of providing a breathtaking precedent for the state enlisting businesses into its service.

Shareholders remain the greatest beneficiary of the firm, and administrative agencies are still the most important regulators. However, any account of either the firm or regulation is incomplete without recognizing that the frontier of enforcement is policed by large businesses serving as gatekeepers for some of society's most important laws.