

Valuing Corporate Compliance

Todd Haugh* & Suneal Bedi**

ABSTRACT: Depending on who you ask, corporate compliance is either the most valuable initiative a company can invest in, or simply a type of insurance policy purchased to avoid legal liability. This divergence is problematic because it leaves the compliance community—companies, regulators, compliance scholars—guessing as to whether and how much should be invested in compliance programs. There are two reasons for this ideological disagreement. One is that most compliance scholarship has thinly defined value, focusing on how compliance programs save companies money through legal liability avoidance or by generally improving corporate culture that will result in far off and ill-defined corporate benefits. The other is that when there have been attempts to measure the value of corporate compliance, they have largely suffered from a lack of empirical rigor. This Article seeks to address both deficiencies. First, we provide a more robust concept of corporate compliance value by focusing on how compliance can provide the potential for increased consumer sales revenue, a metric business leaders and regulators can easily understand and internalize. Second, by utilizing a validated statistical method called choice-based conjoint analysis, we directly and rigorously measure the revenue generation value of corporate compliance programs. This Article is the first to provide empirically sound, direct evidence that corporate compliance can create positive revenue enhancing value for companies. This more complete conception and measurement of compliance value has important implications for corporate stakeholders, including managers who design and implement compliance programs, regulators who

* Associate Professor of Business Law and Ethics and Arthur M. Weimer Faculty Fellow in Business Law, Indiana University; Board Member, The Poynter Center for the Study of Ethics and American Institutions; Supreme Court Fellow, Supreme Court of the United States (2011–12).

** Assistant Professor of Business Law and Ethics, Indiana University. Affiliated Faculty at the Center of Law and Society, Maurer School of Law. J.D. Harvard Law School; Ph.D., Marketing and Business Ethics, The Wharton School, University of Pennsylvania. The authors would like to thank Veronica Martinez, Branden Garrett, Sam Buell, Kevin Davis, Karen Woody, Stephan Gebauer, Jeremy McClane, and the other participants of Duke Law School's 2023 Compliance Roundtable, the 2023 ComplianceNet conference, and the 2023 Conference on Empirical Legal Studies, as well as Hui Chen, Zachary Coseglia, Kirsten Mayer, and Joseph Murphy, for helpful comments on early drafts.

monitor and enforce such programs, and legal scholars who research optimal compliance policy.

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INTRODUCTION

Depending on who you ask, a corporate ethics and compliance program is either one of the most important and valuable components of a company or something requiring minimal investment, a simple insurance policy against the possibility of incurring legal liability. For example, one compliance professional memorably stated that companies with a strong culture of ethics and compliance “make more money, drive nicer cars and live in better

neighborhoods.”¹ At the same time, a prominent business ethics scholar, in equally memorable fashion, characterized the compliance guidance followed by most large companies as “nothing more than an additional round in a pretend game.”² In case you may have missed his point, he followed up by suggesting that current compliance programs were the stuff of “business airport books.”³

These two are not alone in their beliefs. At one end of the spectrum, a host of business leaders, academics, and compliance providers contend that corporate compliance is essentially *invaluable* because it creates positive gains in every aspect of a company, from corporate culture to corporate returns.⁴ This sentiment, that there is a clear business case for compliance, is echoed by most regulators—officials from the Securities and Exchange Commission (“SEC”) to the New York Fed speak of ethics and compliance as part of a firm’s long-term investment in itself, an investment that inures to the benefit of all stakeholders and the larger public good.⁵ The same notion serves as the key motivation of the Organizational Sentencing Guidelines, the blueprint for modern compliance programs.⁶

At the other end, skeptics of corporate compliance question whether programs work in practice, pointing to daily headlines of corporate scandal.⁷ They say the value of compliance is limited to whatever gains come from it *appearing to work* to check a regulatory box that lowers the risk of legal liability and subsequent monetary penalties. This too is a type of business case for compliance, but an unsatisfying one. Under this conception, compliance’s only value is in avoidance, a difficult to quantify measure that is complicated by

1. Brent T. Wilson, *The Science of Compliance: Why Ethical Companies Make More Money, Drive Nicer Cars and Live in Better Neighborhoods*, ADVOC., Jan. 2018, at 23, 23.

2. William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 405 (2017). The more complete quote said the following: “nothing more than an additional round in a pretend game of evaluation science with an ultracrepidarian’s hand.” *Id.* (An ultracrepidarian is a person who expresses opinions on matters outside the scope of their knowledge or expertise.)

3. *Id.*

4. See, e.g., *Corporate Compliance: 10 Experts Weigh In on the Value*, GAN INTEGRITY: BLOG (Sept. 3, 2020), <https://ganintegrity.com/blog/value-of-corporate-compliance> [<https://perma.cc/PMA5-ZFWE>]; Thomas Kasperer, Kerstin Lopatta & Dennis Onnen, *Shareholder Value Implications of Compliance with the German Corporate Governance Code*, 38 MANAGERIAL & DECISION ECON. 166, 168 (2017) (reviewing empirical evidence from multiple countries and finding that corporate governance has a positive effect on stock market performance).

5. See Gurbir S. Grewal, Dir., Sec. & Exch. Comm’n Div. of Enf’t, PLI Broker/Dealer Regulation and Enforcement 2021 (Oct. 6, 2021), <https://www.sec.gov/news/speech/grewal-p-li-broker-dealer-regulation-and-enforcement-100621> [<https://perma.cc/KL7G-MFBB>]; Peter Eavis, *New York Fed Will Remain Focused on Bankers’ Ethics*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/business/dealbook/new-york-fed-ethics.html> (on file with the *Iowa Law Review*).

6. U.S. SENT’G GUIDELINES MANUAL ch. 8, introductory cmt. (U.S. SENT’G COMM’N 2021).

7. Hui Chen & Eugene Soltes, *Why Compliance Programs Fail and How to Fix Them*, HARV. BUS. REV., Mar.–Apr. 2018, at 116, 118.

compliance programs' steep and rising costs.⁸ This has led "[m]any corporations [to] simply purchase only the amount of compliance necessary to effectively shift liability away from the firm."⁹ Once liability is transferred, naysayers argue, there is little incentive for companies to invest in compliance, leading to compliance program atrophy and the inevitable next corporate scandal.

This ideological disagreement over the value of corporate compliance is a product of two glaring gaps, or deficiencies, in the compliance literature. First, scholars have construed the value of compliance too narrowly as a conceptual matter. Extant literature has focused either on how compliance can save companies money by decreasing litigation risk (and to a lesser extent employee turnover and unhappiness), or how compliance can improve corporate culture that leads to far-off and ambiguous increases in firm value.¹⁰ Second, when studies have attempted to empirically measure compliance value, they suffer from a lack of empirical rigor.¹¹ These studies are couched in terms of broad anecdotal evidence, do not directly link compliance to a return on investment, and are often undertaken with questionable methodologies—essentially, these studies have compounded the conceptual gap.

As a result, there is much confusion regarding both the value of corporate compliance and how it *can* be valued. Stakeholders, including company leaders, regulators, and compliance scholars, have thus become locked in a debate about compliance value armed with little more than anecdotal evidence. This is a decidedly thin foundation on which a multibillion-dollar global compliance industry has been built, one that continues to influence company behavior and firm governance. More importantly, it inevitably leads to the under- and overinvestment in compliance depending on one's view of its value, an inefficiency with broad implications for business ethics, law, regulation, and strategy.¹²

In this Article, we seek to address these deficiencies and advance corporate compliance scholarship along both the conceptual and empirical vectors, and in turn provide tangible guidance to corporate compliance practitioners, regulators, and scholars. We expand on existing concepts of value by focusing on the revenue implications of investing in corporate compliance. While existing scholarship has primarily viewed value in terms of cost savings from legal liability avoidance and other amorphous firm benefits, we directly link corporate compliance to increases in sales revenue and hence provide a more nuanced perspective of the ways in which compliance can be

8. *Id.* at 119.

9. William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1350 (1999).

10. *See infra* Section II.B.

11. *See infra* Section II.C.

12. *See generally* CORPORATE COMPLIANCE ON A GLOBAL SCALE: LEGITIMACY AND EFFECTIVENESS (Stefano Manacorda & Francesco Centonze eds., 2022) (discussing how choices about compliance programs have vast effects on regulatory bodies, legal principles, business strategy, and business ethics).

valuable to companies. Most simply put, extant work has largely been about how compliance programs can *save* companies money, whereas our study demonstrates that compliance programs can *make* companies money.

To do this, we introduce a validated statistical method called choice-based conjoint analysis,¹³ which allows us to measure the revenue implications of corporate compliance programs. We do this by determining whether consumers will select products or pay more for them if those products are offered by a company with an effectively designed compliance program.¹⁴ Thus, our study conceptually defines and measures compliance value in distinct and tangible ways—by focusing on an aspect of value that company leaders and regulators can understand, can quantify in clear monetary terms, and can employ when making decisions about future investments in compliance.

We find, based on an analysis of the purchasing choices of more than 1,600 study participants, that *compliance programs do create positive revenue value for companies*. This is true across multiple industries, product classes, and numerous product attributes. Three main findings emerge from our study. First, consumers value products from companies that invest in compliance programs more than they value other seemingly important attributes of those products. For example, consumers value a cell phone offered by a company that has a privacy compliance program more than they do a cell phone that comes in different colors or with additional data storage. Second, consumers are willing to pay a premium for products that come from companies with strong or effective compliance programs. This finding holds for various types of compliance programs across multiple products and industries. Third, we find that consumers are willing to pay higher price premiums for compliance programs that are targeted or linked to the products they are purchasing. For example, technology products have higher price premiums for privacy compliance programs than they do for environmental programs. In other words, compliance programs are not created equal in terms of their value to consumers; instead, their value is dynamic. This provides a nuanced and previously unidentified insight into compliance program value.

These results are significant for the corporate compliance field, both theoretically and practically. As to compliance theory, it is often said that

13. Choice-based conjoint analysis comes from marketing scholarship. It is a method that seeks to place a value on various attributes of a multicomponent product. For a more detailed discussion of the method and its derivations, see *infra* Section III.B. While there are many versions of the method, we used the choice-based method. Research has shown that when expressing preferences, consumers are more likely to express accurate preferences when they mimic buying decisions focused around choice. For a discussion of the reliability of choice-based conjoint, see *infra* Section III.C.

14. In crafting descriptions of effectively designed compliance programs, we focus less on the results of a program and more on the constituent elements of a well-designed program. We take these elements from existing literature and guidance on corporate compliance, including the seven elements of an effective program as outlined in the Organizational Sentencing Guidelines. We discuss specifics in Part III.

despite its importance, the field is incompletely conceptualized and imperfectly understood.¹⁵ The lack of theoretical work in this area is partly a function of the lack of demonstrated compliance program value. Company leaders, regulators, and even academics, have not been incentivized to develop robust theories of compliance when faced with a largely opaque value proposition for compliance. Our findings, by directly linking consumer price premiums to targeted compliance programs, create new avenues through which to explore compliance theories—ones that go beyond the current focus of how compliance programs lessen legal risk or impact employee culture. This approach allows for deeper theoretical connections to economic theories of the firm.¹⁶

Practical implications follow. All three of our main findings contribute new rationales for companies to invest in and take seriously their compliance programs. A compliance function that can be shown to impact consumer decision-making and increase sales revenue takes on an elevated status within the firm, allowing it to stand on equal footing with other business units, such as operations or marketing. This increase in status affects how in-house compliance professionals, managers, and corporate board members evaluate the virtues of compliance. Put another way, a compliance department that can quantify its value to consumers ceases to be seen as only a cost center or the “department of no”¹⁷ tasked with minimizing liability, instead becoming a strategic business unit within the company. Our findings also impact regulators, who along with corporate leaders will be better able to evaluate firm- and industry-specific compliance efforts, generally and as to targeted company products.

Some may argue that our conception of compliance value creates a risk that compliance may be viewed too instrumentally.¹⁸ We deem that

15. See Geoffrey P. Miller, *The Compliance Function: An Overview* 5 (N.Y. Univ. Ctr. for L., Econ. & Org., Working Paper No. 14-36, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527621 [<https://perma.cc/WEY4-NBV4>] (commenting on governance, risk management, and compliance).

16. See, e.g., William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1501 (1989); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 306 (1976).

17. Eric Pinckert, *Beyond the Department of “No,”* COMPLIANCE & ETHICS BLOG (May 5, 2021), <https://www.complianceandethics.org/beyond-the-department-of-no> [<https://perma.cc/V2UV-UV4S>].

18. Some may argue that expressing the value of corporate compliance in terms of revenue goes against the spirit of compliance, which is not making money, but rather about doing the right thing. This noninstrumental view of compliance and business ethics is well-founded and has been explored at length. See Matthew Caulfield & Andrew Lynn, *Federated Corporate Social Responsibility: Constraining the Responsible Corporation* 9–11 (June 29, 2022) (unpublished manuscript) (on file with the Academy of Management Review); Lynn Sharp Paine, *Does Ethics Pay?*, 10 BUS. ETHICS Q. 319, 327 (2000); Michael L. Barnett, *The Business Case for Corporate Social Responsibility: A Critique and an Indirect Path Forward*, 58 BUS. & SOC’Y 167, 175 (2019). We do not seek to bypass the ethical importance of compliance or diminish its noninstrumental value;

risk to be small, however. The compliance community has been trying to make “the business case” for years; our study and its follow-on implications simply advances that goal in a more robust way. Moreover, we are not advocating for a purely instrumental view of compliance. Rather, we suggest that by demonstrating how compliance can create consumer demand, the compliance community will have more ground to stand on when advocating for itself. Likewise, our concept of value is not to be confused with effectiveness. We recognize that value in terms of consumer price premiums is not a means of evaluating whether a compliance program is truly effective. Instead, we view our study and this Article as a step in the right direction to make compliance more central to corporate strategy—where its value to the firm and larger society can be recognized. That, in turn, will result in advancements in compliance effectiveness. Nonetheless, we address these and other critiques and counterarguments throughout.

This Article proceeds in four parts. Part I provides the necessary background on what corporate compliance is and how it operates, including a discussion of its evolution within the firm and as an industry. Part II explores the debate over the valuing of compliance programs, emphasizing how extant research has been restrained at the expense of rigorous empirical measurement. In Part III, we advance compliance research by introducing an empirical study that finds effective compliance programs do create positive value for companies through consumer price premiums. Part IV discusses theoretical and practical implications of our findings, limitations, and avenues for future study.

I. CORPORATE COMPLIANCE: EXPLANATION AND EVOLUTION

To understand the value of corporate compliance, it is necessary to first understand what compliance is, i.e., how it is defined, how it operates within a company, and what its purposes are. From there, one must also appreciate how compliance has evolved within companies and as a profession. This evolution, and the resulting explosion in the costs of compliance, is important because it has captured much of the scholarly and practitioner focus on compliance value, resulting in a too-narrow approach to defining and measuring that value.

A. DEFINITIONS AND PURPOSE OF CORPORATE COMPLIANCE

Unfortunately, there is no settled definition of corporate compliance, likely a result of the field’s relatively young age and its rapidly expanding scope.¹⁹ The most oft-cited definition is “any program that seeks to ensure a

investing in compliance is an important endeavor regardless of whether there is consumer value or not. Our point here is merely that in order to convince many business professionals to take compliance seriously, and in turn allow regulators actionable levers to pull, some flavor of instrumental ethics is required. *See infra* Part IV.

19. One legal scholar memorably pronounced compliance to be “the dawn of a new era.” Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2077

corporation's compliance with the law.”²⁰ This dovetails with a slightly more expansive definition found in the leading compliance textbook by Geoffrey Miller, which states that compliance is “the processes by which an organization polices its own behavior to ensure that it conforms to applicable rules.”²¹ While these definitions are straightforward, they can also be both too broad and too narrow.

These definitions are too broad because they provide little context as to what compliance programs might entail and exactly to whom they are directed. For example, some scholars focus on the specific components of a compliance program in their definitions, calling compliance “any written statement of ethics, law, or policy . . . delineating the obligations of one or more classes of corporate employees.”²² Others focus on function, defining compliance as “the means by which firms adapt their behavior” to “legal, regulatory, and social norms.”²³

This last conception of compliance also highlights how some definitions might be too narrow by ignoring important behavioral, cultural, and ethical components. Many in compliance would define their field to explicitly include business and professional ethics. A leading “desk book” for practitioners calls “ethics . . . job one” in compliance, defining it as the “standards and values by which an individual or organization behaves and interacts with others.”²⁴ Others pick up the thread of employee behavior and include a nod to individual ethical decision-making and behavioral science, which has advanced the field greatly in the past decade.²⁵ Finally, compliance is often

(2016). Others have commented that it may be “swallowing” risk management and governance. Todd Haugh, *Understanding and Managing Behavioral Ethics Risk*, in ROUTLEDGE HANDBOOK OF RISK MANAGEMENT AND THE LAW 52, 52–53 (Virginia A. Suveiu ed., 2023).

20. Kevin B. Huff, *The Role of Corporate Compliance Programs in Determining Corporate Criminal Liability: A Suggested Approach*, 96 COLUM. L. REV. 1252, 1252 (1996).

21. GEOFFREY PARSONS MILLER, *THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE* 3 (2d ed. 2017).

22. Harvey L. Pitt & Karl A. Groskaufmanis, *Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct*, 78 GEO. L.J. 1559, 1559 n.1, 1570–74 (1990).

23. Griffith, *supra* note 19, at 2082. The Department of Justice takes the approach of defining compliance in a way that highlights both function and components specific to certain crimes. See U.S. Dep’t of Just., Just. Manual § 9-28.800 (2023). *But see* Joseph E. Murphy, *Policies in Conflict: Undermining Corporate Self-Policing*, 62 RUTGERS U. L. REV. 421, 425–26 (2017) (critiquing the conflation of the tools of compliance with corporate compliance itself).

24. MARTIN T. BIEGELMAN, *BUILDING A WORLD-CLASS COMPLIANCE PROGRAM: BEST PRACTICES AND STRATEGIES FOR SUCCESS* 3 (2008). This is the approach of the U.S. Sentencing Guidelines and most regulators. *Id.*

25. See Todd Haugh, *Leading a Healthier Company: Advancing a Public Health Model of Ethics and Compliance*, 58 AM. BUS. L.J. 799, 825 (2021) (defining “[b]ehavioral ethics and compliance research [as] wide-ranging, but the core of it find[ing] that ‘cognitive heuristics, psychological tendencies, social and organizational pressures, and even seemingly irrelevant situational factors can make it more likely that good people will do bad things’” (quoting Robert A. Prentice, *Behavioral Ethics: Can It Help Lawyers (and Others) to Be Their Best Selves?*, 29 NOTRE DAME J.L., ETHICS & PUB. POL’Y 35, 36 (2015))). “Behavioral compliance” can be defined as the design and

described in management terms. One prominent scholar calls compliance “the *management discipline* of designing and implementing effective steps to ensure that an organisation [sic] actually complies with the laws, regulations and codes of practice relating to its operations.”²⁶

Although distilling all these definitions into a comprehensive description of corporate compliance would be a challenge, one can glean from them compliance’s main purposes. Two come to the forefront. Undoubtedly, the primary purpose is to deter employees and managers from committing legal violations, both criminal and civil. As to the criminal, compliance processes are aimed at preventing violations of state and federal law, as well as quasi-criminal regulatory violations—those regulations that can be both criminally and civilly enforced.²⁷ This ranges from “mainstay” corporate and white collar crimes like money laundering, bribery, antitrust, and fraud, to violations of regulatory regimes such as the Bank Secrecy Act or the Food, Drug, and Cosmetics Act, which can be the source of criminal and civil liability and invite regulatory scrutiny.²⁸

In addition, compliance programs attempt to prevent violations of purely civil law, such as torts like harassment and discrimination among employees.²⁹ Although this type of liability comes primarily through traditional private litigation, it still exposes companies to significant financial penalties and litigation costs.³⁰ Put together, corporate compliance programs are attempting to deter all unlawful behavior within the firm, so as to reduce the risk that the company will be held responsible under the broad umbrella of respondeat superior legal liability.³¹

management of compliance programs that draw from behavioral predictions about individual and organizational acts. See Donald C. Langevoort, *Behavioral Ethics, Behavioral Compliance*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 263, 263 (Jennifer Arlen ed., 2018).

26. BRIAN SHARPE, MAKING LEGAL COMPLIANCE WORK 1 (1996); see also Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, at 106, 107 (arguing that ethics in organizations is critically tied to management).

27. See Griffith, *supra* note 19, at 2082.

28. J. KELLY STRADER & TODD HAUGH, UNDERSTANDING WHITE COLLAR CRIME §§ 1.01–1.04 (5th ed. 2023). Self-regulatory organizations also may enter the picture here. While they cannot imprison violators, a violation of organizational rules can have significant effects on an individual’s career and their company’s standing. See William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1, 3 (2013).

29. See Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 467 & n.15 (2008) (discussing role of compliance to enforce sexual harassment and antidiscrimination laws).

30. See MILLER, *supra* note 21, at 471–72 (discussing the effects that compliance-based shareholder derivative suits have on companies).

31. See STRADER & HAUGH, *supra* note 28, § 2.03[A]; see also Pitt & Groskaufmanis, *supra* note 22, at 1570–74 (discussing the origins of the respondeat superior doctrine and its evolution and use over time).

The second purpose, arguably just as important as the first, is to generate prosocial norms within the company. Norm generation and enforcement—what can be thought of as essentially following the company’s own rules on how it wishes to operate and be managed—is often considered the “ethical culture” component of compliance. Many believe that creating a positive ethical culture consistent with firm values should be the overarching goal of compliance, if not the company as a whole.³² Positive corporate culture is critical, it is argued, because it fills gaps that legal rules ignore or have missed.³³ “There simply are not laws governing every action one takes in a company, nor would we want that; positive norms help guide good conduct in the interstices.”³⁴ The motivating idea behind ethics-focused compliance programming is that corporate employees will find common goals, purpose, and mission, which will create a set of shared norms governing behavior. Thus, no external legal incentives for good conduct will be needed nor triggered.³⁵

The purposes of corporate compliance are not self-effectuating, of course. In order to achieve them, compliance must simultaneously operate on different tracks. The first track, education and training, is a routinely implemented component of compliance programs.³⁶ By drafting and publishing a code of conduct, and then training employees on it, the company is “policy-setting” for its employees.³⁷ The company explains what the applicable laws and corporate rules are and how employees should comply with them. Monitoring, the second track, ensures that all the rules and policies employees learned are understood and followed, and that any violations are quickly identified and reported.³⁸ Monitoring occurs by direct and indirect means: direct through hiring screenings, performance reviews, and gathering observational data; indirect through helpline reports, whistleblower actions,

32. Griffith, *supra* note 19, at 2093–94.

33. See Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 960 (2009).

34. Todd Haugh, *Harmonizing Governance, Risk Management, and Compliance Through the Paradigm of Behavioral Ethics Risk*, 21 U. PA. J. BUS. L. 873, 882 (2019).

35. See CATERINA BULGARELLA, SAI GLOB., PREDICTING RISK: A STRATEGIC CULTURE FRAMEWORK FOR THE C-SUITE 10 (2018), https://m.comms.saiglobal.com/res/saiglob_mkt_prod1/SAI_Global_Strategic_Culture_Framework_Report_April2018.pdf [https://perma.cc/H52H-AJA2]. Joe Murphy also makes the point that appealing to values and employee’s ethical side, to do the right thing, is a much more effective and inspiring way to achieve legal compliance. Joe Murphy, *A Cost-Benefit Analysis for Your Ethics Program?*, ETHIKOS, July/Aug. 2015, at 1, 2.

36. Professor Donald Langevoort says that these education efforts are where all “compliance begins.” Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 81.

37. Baer, *supra* note 33, at 960. Some prefer to call this the advising function of compliance. James A. Fanto, *Advising Compliance in Financial Firms: A New Mission for the Legal Academy*, 8 BROOK. J. CORP., FIN. & COM. L. 1, 9 (2013). Trainings also create opportunities for skilled compliance practitioners to monitor and audit.

38. Langevoort, *supra* note 36, at 81.

financial audits, and increasingly sophisticated behavioral data analysis.³⁹ The third track, enforcement, seeks to deter future violations by investigating and punishing rule violators.⁴⁰ Most of the time this is an in-house process that results in a reprimand, but termination is a possibility.⁴¹ And when laws are broken, a range of more serious sanctions are on the table—for both the employee and the company. Compliance violations that are criminal in nature or otherwise carry significant regulatory penalties create conduct risk for firms, which compliance programs are intended to lessen.⁴²

B. EVOLUTION OF CORPORATE COMPLIANCE

Not surprisingly, as managers and compliance practitioners sought to effectuate the purposes of compliance along these three tracks, the field evolved. While there are various ways to consider that evolution (e.g., historically, functionally, professionally), it is important to recognize its significance to the question of compliance value. In fact, a recent survey indicates that compliance is at an “inflection point” in which companies are spending near peak dollars on compliance programs, yet “effectiveness [is] not yet in balance.”⁴³ This highlights the value proposition directly.

Regardless of how one looks at the evolution of compliance, it is clear that compliance has grown. In the early days, compliance was essentially ad

39. *Id.* at 81–82, 96; Eugene Soltes, *Designing a Compliance Program at AB InBev* 3–6 (Harvard Bus. Sch., Case 5-118-071, 2019), <https://www.hbs.edu/faculty/Pages/item.aspx?num=54264> (on file with the *Iowa Law Review*).

40. Griffith, *supra* note 19, at 2099. Ideally, this occurs after a full root-cause analysis. See Veronica Root, *The Compliance Process*, 94 *IND. L.J.* 203, 211 (2019) (explaining the importance of root-cause analysis so “an organization will be better equipped to take appropriate measures” in fulfilling its compliance obligations).

41. Griffith, *supra* note 19, at 2099; see also Baer, *supra* note 33, at 959–60 (discussing how companies can set protocols for addressing routine violations of company rules).

42. See Todd Haugh, *The Criminalization of Compliance*, 92 *NOTRE DAME L. REV.* 1215, 1224 (2017) (“For serious wrongdoing, the threat of termination is just the beginning; cooperation by the company with a regulatory agency exposes employees to formal censure, fines, debarment, and even prison.”). A company’s liability is derivative of its employee’s wrongdoing. See, e.g., Paul J. Larkin, Jr. & John-Michael Seibler, *All Stick and No Carrot: The Yates Memorandum and Corporate Criminal Liability*, 46 *STETSON L. REV.* 7, 23 (2016) (discussing corporate liability for acts of agents and the six factors federal prosecutors are to consider “when investigating and charging corporate wrongdoing”). Volkswagen, Wells Fargo, and Credit Suisse provide vivid examples of how employee wrongdoing can create ongoing and substantial conduct risk for companies. See, e.g., Matt Egan, *Wells Fargo Can’t Seem to Escape Its Troubled Past*, *CNN BUS.* (Jan. 15, 2021, 1:40 PM), <https://www.cnn.com/2021/01/15/investing/wells-fargo-bank-earnings-scandal/index.html> [<https://perma.cc/4DYN-EQJW>] (“Wells Fargo is still being haunted by its history of ripping off customers. . . . report[ing] . . . another \$321 million of quarterly losses tied to customer refunds.”).

43. Oliver Bevan, Piotr Kaminski, Ida Kristensen, Thomas Poppensieker & Azra Pravidic, *The Compliance Function at an Inflection Point*, *MCKINSEY ON RISK*, Jan. 2019, at 19, 20–21, 25, <https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Risk/Our%20Insights/McKinsey%20on%20Risk%20Issue%207%20Summer%202019/McKinsey-on-Risk-7-full-issue-vg.pdf> [<https://perma.cc/Y3KE-N9RY>] (basing analysis on surveys, interviews, and benchmark analysis of twenty-four banks).

hoc.⁴⁴ What compliance apparatus a company possessed depended almost entirely on the industry it occupied.⁴⁵ As new laws were passed related to that industry, companies reacted in kind by adding compliance functions.⁴⁶ Outside of that, only when major scandals hit the news did companies take notice and potentially alter their compliance procedures.⁴⁷ This was true from the very early days of compliance (pre-1960s) when self-regulation was the dominant model, and it continued during subsequent decades as corporate scandals brought more legislative and prosecutorial intervention and the attendant compliance obligations.⁴⁸ Companies simply added as they went; there was little urgency and little guidance on how to build a robust, firmwide compliance function.

That changed with the promulgation of the Organizational Sentencing Guidelines. What became the “lodestar” of corporate compliance and the blueprint for almost every company’s program, the Organizational Guidelines had a profound effect on corporate America.⁴⁹ The reason is that the Guidelines, for the first time, codified the minimum criteria for what constituted an “effective” corporate compliance program.⁵⁰ Companies that had such a

44. See Murphy, *supra* note 23, at 427 (describing siloed compliance efforts).

45. See Cristie Ford & David Hess, *Can Corporate Monitorships Improve Corporate Compliance?*, 34 J. CORP. L. 679, 690 (2009) (discussing companies’ adoption of compliance programs in response to government initiatives prior to 1991).

46. Haugh, *supra* note 42, at 1225–26.

47. *Id.* at 1226.

48. For example, in the mid-1970s, Congress passed the Foreign Corrupt Practices Act (“FCPA”) after the Watergate investigation uncovered that hundreds of companies were bribing foreign officials. See *id.* at 1226 n.68. The FCPA criminalized these bribes, prompting corporations to revamp their codes of conduct and training programs. See Pitt & Groskaufmanis, *supra* note 22, at 1585 n.157 (discussing early 1980s government survey that found passage of “the FCPA [caused] 98 [percent] of the corporate respondents to review their compliance policies; over 60 [percent]” changed their policies based on the FCPA’s provisions (citing U.S. GEN. ACCT. OFF., B-198581, IMPACT OF FOREIGN CORRUPT PRACTICES ACT ON U.S. BUSINESS 6 (1981))). Thus, while overall compliance increased, it did so in a manner localized to industry or business practice. See *id.* at 1587–90 (describing the rise of industry-specific scandals and penalties in the 1980s).

49. Haugh, *supra* note 42, at 1227, 1265. Bird and Park call the promulgation of the Organizational Guidelines in 1991 “a watershed [moment] in compliance regulation.” Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L.J. 203, 212 (2016).

50. U.S. SENT’G GUIDELINES MANUAL § 8B2.1(a)–(b) (U.S. SENT’G COMM’N 2021). What exactly is necessary to demonstrate an “effective” program exists has always been the central question, given that the reason the Guidelines are being invoked is because the program failed to stop wrongdoing. According to the Guidelines, effective compliance is judged on the following criteria:

- (1) “standards and procedures to prevent and detect criminal conduct”;
- (2) responsibility at all levels of the program, together with adequate program resources and authority for its managers;

program could lessen, or even avoid, legal liability in the event their employees committed wrongdoing.⁵¹ Although the number of companies actually subject to the Guidelines was (and remains) very small because so few companies are criminally prosecuted and convicted, the standards were quickly embedded in prosecutorial and regulatory guidance.⁵² In other words, the Guideline's list of compliance criteria—what became known as the “hallmarks” of an effective program—told companies not only how to lower criminal fines after conviction, but how to avoid being prosecuted in the first place.⁵³ This took compliance from being seen as protecting against an extremely unlikely possibility, a corporate prosecution and conviction for a narrow violation of law, to a proactive way for companies to blunt their exposure to all respondeat superior liability. In turn, corporate compliance programs modeled on the Guidelines spread widely, regardless of industry or jurisdiction.⁵⁴

The promulgation of the Organizational Guidelines coincided with two other developments that fostered compliance's growth. One was the *Caremark* ruling, which opened up the possibility of personal liability for corporate officers and directors whose companies did not have adequate compliance

(3) due diligence in hiring and assigning personnel to positions with substantial authority;

(4) communicating standards and procedures, including a specific requirement for training at all levels;

(5) monitoring, auditing, and nonretaliatory internal guidance/reporting systems, including periodic evaluation of program effectiveness;

(6) promotion and enforcement of compliance and ethical conduct; and

(7) taking reasonable steps to respond appropriately and prevent further misconduct upon detecting a violation.

Id. In addition, “organization[s] [must] periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each [of the above] requirement[s].” *Id.* § 8B2.1(c).

51. See Philip A. Wellner, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 500–02 (2005).

52. There are only roughly two hundred corporate convictions per year. See U.S. SENT'G COMM'N, 2022 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 165 fig.O-2 (2022), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2022/2022-Annual-Report-and-Sourcebook.pdf> [<https://perma.cc/M4MN-5LS4>]. Data collected by the Transactional Records Access Clearinghouse (“TRAC”) shows slightly different yearly numbers than the Commission, but the average is essentially the same. See *Justice Department Data Reveal 29 Percent Drop in Criminal Prosecutions of Corporations*, TRAC (Oct. 13, 2015), <http://trac.syr.edu/tracreports/crim/406> [<https://perma.cc/99AR-KFEY>] (displaying an average of 216 corporate convictions per year from 1996 to 2006); see also U.S. Dep't of Just., Just. Manual § 9-28.800 (2023) (providing policies for prosecutors to consider when charging companies).

53. Wellner, *supra* note 51, at 500–02.

54. Compliance became broadly applicable and “worthy of substantial attention” by everyone. Bird & Park, *supra* note 49, at 212. It should be noted that environmental compliance programs were on the forefront here. See generally David M. Uhlmann, *Environmental Crime Comes of Age: The Evolution of Criminal Enforcement in the Environmental Regulatory Scheme*, 4 UTAH L. REV. 1223 (2009) (explaining history of environmental crime and related compliance).

functions.⁵⁵ The other was the spate of corporate accounting scandals during the same timeframe, from Enron to WorldCom to HealthSouth.⁵⁶ Although more recent scandals dwarf these, at the time they were the largest in history and dominated the news cycle.⁵⁷ This “perfect storm” of scandal led to an unparalleled regulatory response, beginning with the Sarbanes-Oxley Act and extending through Dodd-Frank.⁵⁸ Corporate leaders were thus faced with massive increases in legal liability risk for their companies, along with seemingly concomitant increases in personal liability risk from *Caremark*. Presented with guidance on how to reduce both of those risks from the Organizational Guidelines, companies took it. It is no surprise, then, that compliance expanded rapidly as a corporate department, profession, and field.⁵⁹

All this growth, however, belied some underlying problems with compliance, problems that are still vexing it today. Although the Organizational Guidelines stated what constituted an effective program in general terms, companies struggled to translate the hallmarks into concrete steps. For example, companies were told they needed standards and procedures to prevent and detect criminal conduct, as well as adequately resourced programs; but there was no specific direction as to which procedures to use or how much

55. *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996). By Chancellor Allen's own rendering, the opinion's author, “[he] took it upon himself to reform Delaware's law on directors' duty to monitor.” Jennifer Arlen, *The Story of Allis-Chalmers, Caremark, and Stone: Directors' Evolving Duty to Monitor*, in *CORPORATE LAW STORIES* 323, 331 (J. Mark Ramseyer ed., 2009); see also Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 973 (2009) (explaining that Allen employed the extensive use of dicta “to author a mini-treatise on . . . oversight” liability); Todd Haugh, *Caremark's Behavioral Legacy*, 90 TEMP. L. REV. 611, 621–31 (2018) (describing psychological and behavioral science-based reasons for *Caremark's* impact on compliance). *Caremark* claims have been called “possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.” *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 372 (Del. 2006) (quoting *In re Caremark*, 698 A.2d at 967). The standard is “only a sustained or systematic failure of the board to exercise oversight—such as an utter failure to attempt to assure a reasonable information and reporting system exists—will establish the lack of good faith that is a necessary condition to liability.” *In re Caremark*, 698 A.2d at 971. *But see* Roy Shapira, *A New Caremark Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1863–66 (2021) (highlighting new cases eroding this seemingly insurmountable standard).

56. Haugh, *supra* note 55, at 630.

57. “When it collapsed, Enron was valued at approximately \$70 billion . . . WorldCom was valued at \$107 billion.” *Id.* at 631. “[T]he two . . . bec[ame] the first- and second-largest bankruptcies in U.S. history” at the time. *Id.*; see also Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 357–58 (2003) (describing the size of the Enron and WorldCom bankruptcies). In 2008, Lehman Brothers became the largest bankruptcy in U.S. history at almost \$613 billion. Erik Larson, *Lehman Recovery Seen as Justifying \$2 Billion Bankruptcy*, BLOOMBERG (Sept. 10, 2013, 11:00 PM), <https://www.bloomberg.com/news/articles/2013-09-11/lehman-recovery-seen-as-justifying-2-billion-bankruptcy#> (on file with the *Iowa Law Review*).

58. JED S. RAKOFF & JONATHAN S. SACK, *FEDERAL CORPORATE SENTENCING: COMPLIANCE AND MITIGATION* § 5.02[1][f] (rev. ed. 2023).

59. This has been referred to as “the golden age of compliance.” Haugh, *supra* note 42, at 1233.

resources were needed to support them.⁶⁰ While the SEC, the Department of Justice (“DOJ”), and other agency leaders gave speeches, issued memos, and drafted policies commenting on what effective compliance was,⁶¹ they tended to hedge when asked specifics, saying there were “no formulaic requirements regarding corporate compliance programs.”⁶²

As a result, companies were largely left “read[ing] the [] tea leaves.”⁶³ This was made worse when the Organizational Guidelines were amended to include promoting an ethical culture as part of an effective program—an important goal but undoubtedly difficult to operationalize.⁶⁴ In fact, it was not until 2019 that the DOJ provided a detailed list of questions prosecutors should consider when evaluating a compliance program.⁶⁵ But of course these were just questions without any definitive answers, and the questions were directed at prosecutors and not companies. Indeed, the DOJ’s own architect of the guidance document lamented that companies were misunderstanding its purpose and misapplying a checklist designed for criminal prosecutors.⁶⁶ As with the Guidelines, the new guidance contained only a few specific

60. U.S. SENT’G GUIDELINES MANUAL § 8B2.1 (a)–(b) (U.S. SENT’G COMM’N 2021).

61. U.S. Dep’t of Just., Just. Manual § 9-28.800 (2023); Press Release, Off. of Pub. Affs., U.S. Dep’t of Just., Criminal Division Announces Publication of Guidance on Evaluating Corporate Compliance Programs (Apr. 30, 2019), <https://www.justice.gov/opa/pr/criminal-division-announces-publication-guidance-evaluating-corporate-compliance-programs> [https://perma.cc/VZ3H-VAD6]; see also Report of Investigation Pursuant to Section 21(A) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, 76 SEC Docket 220 (Oct. 23, 2001) [hereinafter SEC Report] (setting forth thirteen “criteria [that the SEC] will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation”).

62. U.S. Dep’t of Just., Just. Manual § 9-28.800 (2023).

63. Carl Pry, *Compliance for 2023: What Does the Future Hold?*, ABA RISK & COMPLIANCE (Jan. 5, 2023), <https://bankingjournal.aba.com/2023/01/compliance-for-2023-what-does-the-future-hold> [https://perma.cc/D7RB-MZJX].

64. See Baer, *supra* note 33, at 965.

65. CRIM. DIV., U.S. DEP’T OF JUST., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 1–2 (2023), <https://www.justice.gov/criminal-fraud/page/file/937501/download> [https://perma.cc/4NBH-GNZZ]; see also Matt Kelly, *New Compliance Evaluation Guidelines*, RADICAL COMPLIANCE (Apr. 30, 2019), <http://www.radicalcompliance.com/2019/04/30/new-compliance-evaluation-guidelines> [https://perma.cc/ESTZ-DWWM] (explaining that the guidance drew on a set of questions posed roughly two years earlier and considered the first “fresh set of guidelines” since 2017 “on how prosecutors should evaluate corporate compliance programs”). There was existing guidance from other divisions and agencies, but nothing quite so detailed as the Evaluation report. For example, the SEC’s Seaboard Report set forth a list of criteria the agency may consider in determining whether and how much to credit corporate behavior. See SEC Report, *supra* note 61.

66. Interview by Broadcast with Hui Chen, Compliance Couns. Expert, U.S. Dep’t of Just. (Jan. 2021), <https://www.thebroadcast.com/hubfs/Downloads/Files/Compliance%20Training%20-%20What%20Does%20DOJ%20look%20for%20-%20Interview.pdf> [https://perma.cc/H P4J-8VYQ]; Chen & Soltes, *supra* note 7, at 120.

directives for companies as to what a compliance program should actually look like in practice.⁶⁷

In this type of information vacuum, companies often reached for what was available and easiest to implement; that is, what compliance vendors were offering.⁶⁸ This resulted in a proliferation of off-the-shelf policies, trainings, monitoring tools, etc., with little contemplation of their effectiveness.⁶⁹ While it was unclear exactly how these compliance measures were impacting employee behavior, they were easy to explain and benchmark against what other companies were doing.⁷⁰ And when a legal violation did occur, which is almost a certainty for large, heavily regulated companies, such “compliance inputs” were easy to line up against the current DOJ guidance and present to regulators during an investigation.⁷¹ Unfortunately, this approach fostered “an overly formalistic approach to compliance focused on avoiding legal liability rather than helping employees avoid committing wrongdoing in the first place.”⁷²

67. U.S. Dep’t of Just., Just. Manual § 9-28.800 (2023). The Justice Manual reiterates the three “fundamental questions any prosecutor should ask” and also says the following: “the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or permitting employees to engage in misconduct to achieve business objectives.” *Id.* Aside from that, the only direct statement for companies is that “[c]ompliance programs should be designed to detect and prevent the particular types of misconduct most likely to occur in a particular corporation’s line of business.” *Id.* Interestingly, when one regulator, the U.S. Department of Health and Human Services, attempted to develop metrics so that health care organizations could judge compliance programs effectiveness, they erred in the other direction, offering over 550 different indicators—hardly helpful for companies seeking actionable guidance. Chen & Soltes, *supra* note 7, at 122.

68. See Anthony Effinger, *The Rise of the Compliance Guru—and Banker Ire*, BLOOMBERG (June 25, 2015, 5:06 AM), <http://www.bloomberg.com/news/features/2015-06-25/compliance-is-no-w-calling-the-shots-and-bankers-are-bristling> (on file with the *Iowa Law Review*) (describing compliance departments’ dramatic expansion after the financial crisis and its effects).

69. It could also be argued that companies simply did not care enough to synthesize the guidance that was available at the time and put it into practice so as to create effective programs.

70. See Han-Kyun Rho, *A Review of Benchmarking Studies on Anti-Corruption Compliance Programmes* 8, (Int’l Anti-Corruption Acad., Rsch. Paper Series No. 01, 2018) (discussing the increased popularity of compliance benchmarking); Gary R. Weaver, Linda Klebe Treviño & Philip L. Cochran, *Corporate Ethics Practices in the Mid-1990’s: An Empirical Study of the Fortune 1000*, 18 J. BUS. ETHICS 283, 285 (1999) (reporting that almost eighty percent of responding Fortune 1000 firms had the same basic tools of compliance).

71. Chen & Soltes, *supra* note 7, at 120 (“Firms rely on [compliance training] completion rates not because doing so has been shown to be the ‘right way’ to measure success but because their objective is merely to demonstrate to regulators that they’ve accomplished the task—they can check that training box.”).

72. Haugh, *supra* note 25, at 815. This has been called a “Compliance 1.0” mindset. *Id.*; Donna Boehme, *What Is Compliance SME?: True Compliance Subject Matter Expertise Is Earned in the Field*, CORP. COMPLIANCE INSIGHTS (Apr. 11, 2019), <https://www.corporatecomplianceinsights.com/what-is-compliance-sme> [<https://perma.cc/6SC6-CMTE>]. Part of this dynamic also stems from who in companies are creating compliance policies and programs. Although it is changing, that tends to be lawyers, especially those with prosecutorial and regulatory backgrounds, thereby

There are a few problems with this approach to compliance, most notably it does not work. Formalistic compliance neither stopped the illegal behavior at the core of prominent corporate scandals nor provided a shield against regulators. A host of headline grabbing scandals prove this up. Take the GM ignition scandal, the Volkswagen emissions scandal, or the Wells Fargo fake accounts scandal; in all three cases, the companies had compliance programs that were robust in their formalistic inputs, but that failed to target, root out, and change the underlying illegal behavior.⁷³

The other problem with this approach is that it is not cheap. Setting aside the massive litigation and follow-on costs that come from corporate scandals, the day-to-day costs of formalistic compliance programs are extremely high.⁷⁴ As compliance obligations proliferate, so too must the inputs to keep up—more trainings, more sophisticated software, more compliance personnel. This leads to an ever-increasing compliance spend.⁷⁵ Compliance now costs large corporations tens and even hundreds of millions of dollars per year.⁷⁶ “[F]or companies with more than \$1 billion [in] revenue, [total] compliance costs”

causing compliance initiatives to be further filtered through a formalistic, rules-oriented lens. Haugh, *supra* note 25, at 810–11; Chen & Soltes, *supra* note 7, at 125; Markus Jüttner, *Corporate Compliance and Business Ethics Between Claim and Reality—Why Academic-Bureaucratic Compliance Programs Fail*, in *THE SILENCE OF ORGANIZATIONS: HOW ORGANIZATIONS COVER UP WRONGDOINGS* 197, 200 (Sebastian Starystach & Kristina Höly eds., 2021) (“Even [now], more than [three quarters] of compliance officers have a law degree . . .”).

73. See Haugh, *supra* note 25, at 812–15 (recounting problems with GM, Volkswagen, and Morgan Stanley’s “Compliance 1.0” programs).

74. Chen & Soltes, *supra* note 7, at 118–19. Siemens famously spent more than a billion dollars to settle allegations solely related to the government’s inquiry into the company’s payment of foreign bribes. Peter J. Henning, *The Mounting Costs of Internal Investigations*, N.Y. TIMES (Mar. 5, 2012, 11:07 AM), <http://dealbook.nytimes.com/2012/03/05/the-mounting-costs-of-internal-investigations/> (on file with the *Iowa Law Review*); Alexandra Wrage, *1.6 Billion Reasons to Get Anti-Bribery Compliance Right*, ASS’N CORP. COUNS. DOCKET, June 2009, at 84, 85.

75. Chen & Soltes, *supra* note 7, at 118 (describing the “staggering amount firms spend on compliance efforts”). As William Laufer puts it:

When firms made a reasonable investment in new compliance systems, technology, and training, and there were failures, corporate fraud cases were disposed of with increasingly large criminal fines and, by prescription, commitments for additional compliance hiring and expenditures. . . . More and then more of the same compliance ingredients are required. Over the past several years, and after decades of cooking with the same regulatory recipe, the compliance budgets of the largest companies for individual legal risk areas, such as anti-money laundering, are well in the billions. When all risk areas are aggregated, the regulatory spend for large financial institutions, for example, is nothing short of astronomical.

Laufer, *supra* note 2, at 406 (footnote omitted).

76. One study found that multinational companies spend on average approximately \$3.5 million a year on compliance, over twenty percent of which is allocated to incident management, legal defense, and redress. PONEMON INST., *THE TRUE COST OF COMPLIANCE: A BENCHMARK STUDY OF MULTINATIONAL ORGANIZATIONS* 7 fig.3 (2011), https://www.ponemon.org/local/upload/file/True_Cost_of_Compliance_Report_copy.pdf [<https://perma.cc/T6M9-Y3HZ>].

have been estimated to equal that of 190 full-time employees.⁷⁷ And during and just following the financial crisis, when compliance was likely at its zenith, big banks were spending almost a billion dollars each quarter.⁷⁸ The compliance industry as a whole was valued at roughly \$39.4 billion in 2022 and is expected to double by 2026.⁷⁹

While this has been a boon for the profession, it has also created a perverse pressure on compliance. As compliance costs within companies rise, so does a demand for a return on that investment.⁸⁰ But as will be seen in the next Part, compliance has never been able to point to definitive metrics tying compliance spending to lessened employee wrongdoing and legal liability.⁸¹ The compliance function, then, has come to be viewed within companies primarily as “a cost center.”⁸² This creates an insurance policy mentality. “From the firm’s perspective, the costs of compliance are paid as ever-increasing insurance premiums against liability.”⁸³ As a result, compliance is only invested in up to the level that reduces the risk of that legal and regulatory liability to an acceptable amount. Once that amount is met and the “risk of liability and loss is transferred,” a company’s incentive to bolster or innovate with its compliance programs goes away.⁸⁴ Compliance atrophy occurs as company leaders exhibit “decreasing levels of care.”⁸⁵

77. RICHARD M. STEINBERG, OPENPAGES, THE HIGH COST OF NON-COMPLIANCE: REAPING THE REWARDS OF AN EFFECTIVE COMPLIANCE PROGRAM 3 (2010), <https://www.securityexecutivecouncil.com/common/download.html?PROD=238> [<https://perma.cc/RA6Q-USEB>]. Another study found the costs associated with compliance to be almost \$10,000 per employee. Robert C. Bird & Stephen Kim Park, *Turning Corporate Compliance into Competitive Advantage*, 19 U. PA. J. BUS. L. 285, 286 (2017).

78. See John Maxfield, *We Finally Know How Much the Financial Crisis Cost Bank of America*, MOTLEY FOOL (Sept. 26, 2015, 9:18 AM), <http://www.fool.com/investing/general/2015/09/26/we-finally-know-how-much-the-financial-crisis-cost.aspx> [<https://perma.cc/RK5R-T2WQ>].

79. IMARC GROUP, GOVERNANCE, RISK AND COMPLIANCE PLATFORM MARKET REPORT (2023), <https://www.imarcgroup.com/governance-risk-compliance-platform-market> [<https://perma.cc/8EZ8-58PF?type=image>].

80. FTI CONSULTING & ETHICO, COMPLIANCE LEADERSHIP REDEFINED 13 (2023), https://6396478.fs1.hubspotusercontent-na1.net/hubfs/6396478/Compliance%20Leadership%20Redefined_FTI_Ethico_January%202023.pdf [<https://perma.cc/7WF6-SJTC>] (surveying two hundred chief compliance officers, half of which “report an increase in senior leadership’s focus on their organization’s compliance policies and procedures, and nearly half admit they have been asked to present ROI on their compliance program”).

81. See *infra* Part II; see also Laufer, *supra* note 2, at 406 (“The regulatory recipe could not be wrong, even in the absence of any empirical evidence.”).

82. Matt Kelly, *How to Change Compliance’s Cost Center Reputation*, GAN INTEGRITY: BLOG (Mar. 2, 2021), <https://ganintegrity.com/blog/compliances-cost-center-reputation> [<https://perma.cc/2GUP-FQX8>] (“People believe the compliance function is a drag on corporate finance and performance. We are a cost center to be tolerated, and nothing more.”).

83. Laufer, *supra* note 2, at 422.

84. Laufer, *supra* note 9, at 1350.

85. *Id.* at 1415.

One might ask why compliance officers and firm leaders would allow this to occur. While a complete discussion of that phenomenon is beyond the scope of this Article,⁸⁶ the short answer is that there has been a lot of conceptual neglect of compliance over the years—from all sides. As the field grew, compliance professionals were building programs while also fighting for status and budget within their companies.⁸⁷ They, perhaps understandably, were happy to implement and promote compliance tools that fostered their own long-term legitimacy and independence, even if those tools' ultimate effectiveness was not fully validated. Thus, compliance professionals argued the “business case for compliance” without a strong foundation.⁸⁸ Regulators tacitly approved of this strategy because it allowed them to transfer enforcement obligations to companies.⁸⁹ The result was a push for compliance growth from all sides, resulting in companies implementing increasingly costly programs without clear value. While there is promise for compliance's continued evolution, particularly through the adoption of behavioral science-based approaches, change has been slow.⁹⁰ And that change has been impeded by the inability of compliance to demonstrate its own value.

II. THE DEBATE OVER CORPORATE COMPLIANCE VALUE

The above raises an issue that must be clarified before going further: What is meant by the term “compliance value”? Similar to the definition of

86. See *id.* at 1383–94 (discussing new phase of corporate law enforcement and how it has been fostered by business, government, and the Sentencing Commission); Chen & Soltes, *supra* note 7, at 119–20 (positing how compliance “got to this point” through a series of interrelated steps between industry groups, the Sentencing Commission, prosecutors and regulators, business leaders, and the compliance provider industry).

87. See Geoffrey Parsons Miller, Dir., Program on Fin. Insts., N.Y. Univ., Compliance 2.0, Remarks at the Conference: Compliance in Brazil and in the World 6 (Dec. 9, 2015), http://www.law.nyu.edu/sites/default/files/upload_documents/Compliance%202.0.pdf [<https://perma.cc/S5S4-JL4Y>] (explaining various approaches to compliance over time and commenting that compliance's evolution has “greatly enhance[d] the powers and responsibilities of internal control functions and offices”); see also James A. Fanto, *The Uncertain Professional Status of Compliance*, in FINANCIAL COMPLIANCE: ISSUES, CONCERNS AND FUTURE DIRECTIONS 67, 74–76 (Maria Krambia-Kapardis ed., 2019) (ebook) (explaining that compliance practitioners lack the ultimate of professional features, authority given by government, and therefore lack professional status).

88. Alan Greenwood & Steven Lauer, *The Global Compliance Landscape: A Resource File*, ASS'N CORP. COUNS. DOCKET, Oct. 2009, at 32, 32, 38.

89. Laufer, *supra* note 2, at 395. *But see* Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING, *supra* note 25, at 247, 260 (arguing based on law and economic approach that “government [should] identify key components and general principles [of compliance,] and then allow the regulated entity to design the details”).

90. See Chen & Soltes, *supra* note 7, at 125 (highlighting compliance as less “a legal exercise . . . [and] really much more a behavioral science”); Haugh, *supra* note 25, at 802–03 (advancing a public health model of compliance focused on data-driven behavioral change).

compliance itself,⁹¹ when scholars and practitioners speak of the value of compliance, they often do so in muddled fashion.

A. *VALUE AS EFFECTIVENESS VERSUS VALUE AS RETURN ON INVESTMENT*

On one hand, discussing the value of compliance can be seen as a statement of effectiveness, i.e., whether a compliance tool or program element has done the job it set out to do. For example, an effective antibribery compliance program would undoubtedly include a training program on the Foreign Corrupt Practices Act (“FCPA”).⁹² The goal of this program would be to educate and train employees on what constitutes an FCPA violation and how to avoid it. An effective program would be one in which a company could demonstrate that its training resulted in employees not paying bribes to foreign officials, which the FCPA explicitly prohibits.⁹³ A compliance program that does so would certainly have value in reducing or eliminating the risk of this specific legal liability.

Another way compliance value can be discussed is in economic terms. This is what compliance practitioners are most often referring to when they argue “[t]he business case for compliance.”⁹⁴ Compliance’s economic impact on a company can be expressed in terms of return on investment, or how the revenue or savings a compliance program generates compares to the costs required for it to operate.⁹⁵ As will be explored below, practitioners have calculated this aspect of compliance value in various ways, with differing levels of sophistication. But it is important to note that return on investment, while

91. See *supra* Section I.A.

92. Veronica Root Martinez, *The Outsized Influence of the FCPA?*, 2019 U. ILL. L. REV. 1205, 1206–07. *But see* Nils Köbis, Sharon Oded, Anne Leonore de Bruijn, Shuyu Huang & Benjamin van Rooij, *Is Less More? Field Evidence on the Impact of Anti-Bribery Policies on Employee Knowledge and Corrupt Behavior* 34 (Apr. 6, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4255148 [<https://perma.cc/4AK9-D5CX>] (finding evidence that people form their beliefs about corporate rules and decide to engage in corrupt behavior based on norms, not corporate policies and communications).

93. See Chen & Soltes, *supra* note 7, at 123 (“[A] meaningful measure of effectiveness must be directly tied to a clearly articulated outcome—for example, employees’ demonstrated understanding of policies and procedures, their acquisition of useful skills for confronting anticipated scenarios, or a change in their behavior.”); see also Benjamin van Rooij & Melissa Rorie, *Measuring Compliance: The Challenges in Assessing and Understanding the Interaction Between Law and Organizational Misconduct*, in *MEASURING COMPLIANCE: ASSESSING CORPORATE CRIME AND MISCONDUCT PREVENTION* 1, 3 (Melissa Rorie & Benjamin Van Rooij eds., 2022) (identifying the problem of measuring the effectiveness of compliance management programs).

94. Greenwood & Lauer, *supra* note 88, at 32, 38; CLIFFORD CHANCE, *BRIEFING NOTE: THE BUSINESS CASE FOR AN EFFECTIVE COMPLIANCE PROGRAM* 1–3 (2011), <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2012/03/the-business-case-for-an-effective-compliance-program.pdf> [<https://perma.cc/8MFA-D374>].

95. A more technically correct way of viewing return on investment is the number calculated by dividing the profit earned on an investment by the cost of that investment; here, the investment is a compliance program or function. See, e.g., GEORGE T. FRIEDLOB & FRANKLIN J. PLEWA, JR., *UNDERSTANDING RETURN ON INVESTMENT* 3–6 (1996).

related to effectiveness, is a distinct concept. A compliance initiative could be very effective in reducing legal risk (say by reducing bribe-giving behavior of employees by forty-five percent) but be incredibly expensive for the company to implement. A compliance program, even an intrinsically effective one, that provides no perceived net economic value will not be long lived in any company that wishes to stay in business.⁹⁶ When we discuss how compliance value has been addressed up until now, we are primarily referring to this second conception, one of return on investment.

B. RETURN ON INVESTMENT AS COST SAVINGS

As we saw with compliance as a whole, views of compliance value have undergone their own evolution. At first, there was no real consideration of value at all. Because compliance obligations were small and ad hoc, the costs of compliance were minimal—usually just the expense of drafting and updating a code of conduct and providing it to employees, possibly with some nominal additional training.⁹⁷ These simple jobs fell under the general counsel's purview, who likely added them to their existing workflow.⁹⁸ But as business regulation increased and compliance functions expanded, along with the costs of operating a program, companies started paying more attention to value.

Initially, in order to make the business case for their programs, compliance professionals took a straightforward view of determining return on investment value. The main way this was done (and still is in many companies) involves tallying the costs of a compliance program and comparing it to how much legal liability the company is avoiding by operating the program.⁹⁹ Under this approach, the focus is largely internal and primarily about cost avoidance through limiting legal risk. Put another way, extant work by both practitioners and academics has focused on measuring return as a function of cost savings.¹⁰⁰

To do so, two variables need to be measured: the cost of a compliance program and the dollar amount saved by operating the program. While

96. *But see infra* Part IV (discussing the intrinsic value of compliance).

97. Kelly, *supra* note 82 (“[R]emember that once upon a time, . . . [c]ompliance was something that happened at fixed intervals, and happened at the end of the ‘real work’ of the organization—a document filed at the end of the quarter, a form returned to some government agency, an attestation signed at the close of a merger.”).

98. See Miller, *supra* note 87, at 6.

99. See *Rethinking ROI and Compliance*, STARCOMPLIANCE, <https://blog.starcompliance.com/rethinking-roi-and-compliance> [<https://perma.cc/9LFF-D5HA>] (“Companies typically judge a cost with Return On Investment, or ROI. The idea is to get to a clear-cut number that will quickly tell upper management whether or not something is worth spending money on. The problem with compliance efforts is, it’s much harder to get to that clear-cut number.”).

100. BROADCAT, WHY MOST COMPLIANCE TRAINING FAILS AND HOW TO FIX IT 59–61, <https://2391896.fs1.hubspotusercontent-na1.net/hubfs/2391896/Downloads/Files/broadcat-why-most-compliance-training-fails.pdf> [<https://perma.cc/4EG8-JFFN>].

conceptualizing compliance this way leads to the issues discussed previously (i.e., compliance as insurance policy and compliance as a cost center),¹⁰¹ more fundamentally, it results in an inherently flawed and narrow calculation of value.

One reason is that when measuring the costs of a program, it can be difficult to get an accurate accounting. Salaries and benefits for those in a compliance department or doing compliance-related tasks are easy enough to determine, as are the costs for new compliance-related software and technologies or consultants and lawyers to design and implement new training programs.¹⁰² But outside of that, those in compliance often fail to accurately calculate the costs of what they are asking employees to do as part of a compliance program. For example, every hour of yearly compliance training an employee is required to undergo costs a company money in real labor dollars, not to mention opportunity costs.¹⁰³ The same is true for every form that is necessary to fill out or guidance to be read to meet a compliance obligation. Moreover, to get a truly accurate cost calculation, one must measure the labor and other resources it takes to fix compliance violations that are discovered.¹⁰⁴ Few companies take this comprehensive approach to compliance costs, and even fewer regulators and academics recognize it.¹⁰⁵

But all this can be done with some effort. Measuring the amount of dollars saved, however, is a prohibitively difficult task. Simply put, legal liability avoidance—what most companies view as the primary goal of their compliance programs—is not a reasonably measurable metric. That is because corporate legal liability in most instances is a function of prosecutorial and regulator discretion.¹⁰⁶ While a company can exercise some control over how its employees behave, and it can measure those behaviors, it cannot control the legal conclusions a regulator will make or the actions they will take.¹⁰⁷ To put it in the context of an earlier example, “the company cannot control

101. See *supra* Section I.B.

102. BROADCAT, *supra* note 100, at 60–61.

103. Ricardo Pellafone, *Measuring Corporate Compliance: A Guide to Using Available Firm Data to Improve Employee Behavior*, in MEASURING COMPLIANCE: ASSESSING CORPORATE CRIME AND MISCONDUCT PREVENTION, *supra* note 93, at 120, 132 (calculating that a company with 50,000 employees, at an average labor cost of \$50 per hour per employee, would be incurring \$2.5 million in costs for an hour of anticorruption training for the entire company—a common compliance tool); see also Matt Kelly, *The Business Case for Compliance, Even Now*, HYPERPROOF: BLOG (Mar. 24, 2022), <https://hyperproof.io/resource/business-case-for-compliance> [<https://perma.cc/VG9F-ZVF7>] (discussing how compliance can be framed in terms of return on investment by focusing on “labor costs saved – and . . . human capital redeploy[ment]”).

104. See BROADCAT, *supra* note 100, at 59–61 (explaining that building the business case for compliance requires a measure of behavioral change converted to dollars to be compared against other business functions). This includes immediate internal and external costs and residual costs. *Id.*

105. *Id.* at 59.

106. STRADER & HAUGH, *supra* note 28, § 1.5.

107. Pellafone, *supra* note 103, at 123; Chen & Soltes, *supra* note 7, at 119–20.

whether a prosecutor at the US Department of Justice will, at some unknown point in the future, determine that it believes an instance of [gifted] travel crossed an ill-defined line between ‘legitimate business expense’ and ‘attempted bribe of a foreign government official.’”¹⁰⁸ Companies can only measure—i.e., cost—the behaviors of their employees “that could create a *basis* for liability, not a *finding* of liability itself.”¹⁰⁹

But that does not mean the compliance community has not tried. They look at past enforcement actions and other company conduct to try and determine the probability of enforcement. This is why so many in compliance hang on every DOJ press release and guidance document; they are trying to glean increases or decreases in enforcement risk.¹¹⁰ But that number is almost impossible to know based on another company’s actions at a previous point in time and how a regulator responded specifically to those actions. Determining the probability of an enforcement action is hard enough to do even after an investigation is underway at one’s own company because it depends on so many factors. Trying to project legal liability risk into the future during the normal course of running a compliance program is almost impossible. And any savvy business leader will quickly understand that assertions of compliance value based on these purported risks are equally difficult to draw.

Even if enforcement probability could be determined with any accuracy, the remediation amount that one would multiply by that probability to determine the costs avoided is also highly variable. While Siemens reportedly incurred fees of over a billion dollars for its single FCPA violation,¹¹¹ Novartis, another large healthcare company in trouble in the past for foreign bribery violations, settled for a third of that amount.¹¹² And neither of those figures included reputational costs, loss of consumer and employee trust, and other downstream effects, all of which are difficult to accurately measure.¹¹³ This

108. Pellafone, *supra* note 103, at 123.

109. *Id.* (emphasis added).

110. An article written for *Compliance Today* is emblematic of the approach. It begins by discussing a new alert from the Office of Inspector General targeting physician compensation agreements, and then goes on to discuss making the business case for compliance by making the C-suite aware of the “high-risk compliance space in healthcare” and the costs of noncompliance. Bret S. Bissey, *Making the Business Case for Compliance Resources*, COMPLIANCE & ETHICS BLOG (Nov. 15, 2016), <https://www.complianceandethics.org/making-business-case-compliance-resources> [<https://perma.cc/M3E8-5JAJ>]. Compliance providers, including law firms, cater to this approach by publishing numerous client alerts. See generally CLIFFORD CHANCE, *supra* note 94 (briefing note from a law firm on how to implement a functional compliance program).

111. See *supra* text accompanying note 74.

112. *The Largest FCPA Enforcement Actions Involving Healthcare Related Companies*, FCPA PROFESSOR (May 10, 2022), <https://fcpaprofessor.com/largest-fcpa-enforcement-actions-involving-healthcare-related-companies-2> [<https://perma.cc/KH9N-4S4E>] (indicating Novartis paid a total of \$347 million—\$234 million to the DOJ and \$113 million to the SEC—in 2020).

113. See, e.g., Christian Eckert, *Corporate Reputation and Reputation Risk: Definition and Measurement from a (Risk) Management Perspective*, 18 J. RISK FIN. 145, 151 (2017) (“However, measuring

uncertainty has caused those in compliance to simply generalize the “cost[s] of non-compliance,” relying on industry averages and otherwise loading the figures to the brim in order to justify compliance’s value.¹¹⁴ But the highly speculative nature of both compliance program costs and of the savings from liability avoidance leaves many wanting.¹¹⁵ As one expert put it, “relying on those conclusions . . . is an exercise in futility.”¹¹⁶

C. RETURN ON INVESTMENT AS REVENUE CREATION

Possibly sensing this, those trying to make the business case for compliance shifted focus to the benefits that compliance brings to a company. In other words, compliance practitioners (and thereafter regulators and academics) pivoted from how compliance could reduce costs to how it might generate revenue.¹¹⁷ This has taken what one might call a modest and grand form, both of which drew on compliance’s growing intertwinement with the notions of ethical culture.¹¹⁸ Both forms, however, lack empirical support.

The modest form is an extension of the costs of noncompliance approach—if a compliance program can help a company avoid the costs of enforcement actions and litigation, then positive revenue benefits must also come from being a law-abiding and ethical company. For example, a rule following company can, in theory, attract and retain labor more effectively, operate more efficiently without distraction from investigations, receive employee feedback more directly, and generally better manage its risks, all of

corporate reputation is difficult, as it is most often defined by perceptions of stakeholders (see previous section), which cannot be observed directly. Hence, there is no uncontroversial measurement method, but a number of different methods available (also due to the fact that there are a lot of different definitions for the term ‘corporate reputation’).”).

114. For example, an incomplete list provides:

The cost[s] of non-compliance includes not only fines and other judicial penalties, but also the expense of internal investigations, the legal defense of the company and its employees, and possible collateral consequences such as debarment from public contracts, denial of licensing privileges, the avoidance of contracts, and the loss of business relationships.

CLIFFORD CHANCE, *supra* note 94, at 1; see also Tim Brady & Sarah Gayda, *The True Cost of Non-Compliance*, COLLIGO (May 15, 2023), <https://www.colligo.com/cost-of-non-compliance> [https://perma.cc/EB49-UPJ7] (citing the average yearly costs of data and privacy program noncompliance at \$14.82 million versus the costs of compliance at \$5.47 million, and suggesting “[t]he average cost of non-compliance has risen more than 45 [percent] in 10 years”).

115. Pellafone, *supra* note 103, at 122–23 (explaining that liability as it relates to compliance should only really be judged within a company by the behavioral standards the company sets for itself).

116. *Id.* at 123.

117. To remain consistent with discussion earlier in this Article, the change would reposition compliance from “the ‘reduce cost’ side” to the “add revenue” side in order to add value to the company. BROADCAT, *supra* note 100, at 60.

118. See Baer, *supra* note 33, at 965 (“[T]he Sentencing Commission explicitly included provisions for board oversight and for compliance programs to educate employees on the importance of corporate ethics. As evidenced by the Commission’s claims at the time, the reforms were intended to transform corporate governance by improving corporate culture.” (footnote omitted)).

which should increase firm revenues.¹¹⁹ This conception of compliance value is revenue focused but modest in the sense of drawing from well-known liability avoidance arguments and still being focused internal to the company.

The grand form takes a broader, external view. A company whose compliance program allows it to avoid legal violations and reputational harms has, again in theory, a competitive advantage in the marketplace. Proponents of this view argue that companies with strong compliance programs beget ethical firm cultures, which then increases firm revenues by reducing costs of capital and allowing for more strategic investment, giving confidence to senior leaders to do business in high-risk but more lucrative markets, and attracting more reputable vendors and partners—all of which increases share price and overall market share.¹²⁰ Indeed, according to this view, there is little

119. See, e.g., Huong Van Vu, Tuyen Quang Tran, Tuan Van Nguyen & Steven Lim, *Corruption, Types of Corruption and Firm Financial Performance: New Evidence from a Transitional Economy*, 148 J. BUS. ETHICS 847, 854–55 (2018) (finding that anticorruption measures are vital for the financial performance of Vietnamese small businesses); Greenwood & Lauer, *supra* note 88, at 38 (describing quality control and risk management gains from compliance); *Rethinking ROI and Compliance*, *supra* note 99 (identifying gains in risk reduction from compliance); CLIFFORD CHANCE, *supra* note 94, at 2 (same as to employee feedback); *How to Make the Business Case for Compliance*, RISKOPTICS (Mar. 24, 2021), <https://reciprocity.com/how-to-make-the-business-case-for-compliance> [<https://perma.cc/ET8R-GNZ7>] (same as to improving efficiency and productivity). Oftentimes, the business case is made by lumping compliance under the broader umbrella of governance, risk, and compliance and extolling its virtues. See, e.g., Anh Nguyen & Daniel Jørgensen, *Does GRC Pay Off? Building the Business Case*, DELOITTE, <https://www2.deloitte.com/dk/da/pages/risk/articles/does-grc-pay-off.html> [<https://perma.cc/MK4P-E C29>] (arguing that compliance, as part of a firm’s governance, risk, and compliance functions, create efficiency improvements, reduce risk, and drive strategic performance); NICK HAYES, FORRESTER, BUILD THE BUSINESS CASE FOR GRC, BUSINESS CASE: THE GOVERNANCE, RISK, AND COMPLIANCE PLAYBOOK 4–5 (2015), http://info.acl.com/rs/497-RXE-029/images/Forrester_Build_The_Business_Case_2015.pdf [<https://perma.cc/L6VQ-8CH9>] (same).

120. See, e.g., Barkat Ullah, *Financial Constraints, Corruption, and SME Growth in Transition Economies*, 75 Q. REV. ECON. & FIN. 120, 122–23 (2020) (finding that firm-level corruption hinders small and medium firms’ access to financing and hampers growth in transition economies); Kelly, *supra* note 82 (explaining how compliance preserves company’s “ability to generate revenue”); Robert C. McMurrian & Erika Matulich, *Building Customer Value and Profitability with Business Ethics*, 14 J. BUS. & ECON. RSCH. 83, 85, 87–88 (2016) (arguing there is a positive correlation between an organization’s ethical behaviors and activities and the organization’s bottom line); *Rethinking ROI and Compliance*, *supra* note 99 (arguing compliance increases confidence in high-risk markets); Greenwood & Lauer, *supra* note 88, at 38 (arguing that compliance is “good corporate governance,” which correlates to “above-average stock returns” and better goodwill with stakeholders); CLIFFORD CHANCE, *supra* note 94, at 1 (suggesting that a compliant company should improve credit profile and access to financing, improve resilience, and create “competitive advantage as a preferred choice of ethically concerned customers, investors, suppliers and other stakeholders” (quoting PETER WILKINSON, TRANSPARENCY INT’L U.K., THE 2010 UK BRIBERY ACT ADEQUATE PROCEDURES 5 (2010), https://www.transparency.org.uk/sites/default/files/pdf/publications/Adequate_Procedures_-_Guidance_to_the_UK_Bribery_Act_2010.pdf [<https://perma.cc/EY5E-U2CG>])); Kelly, *supra* note 103 (stating that “a strong compliance program enhances the company’s resilience and responsiveness to risk” creating strategic value); Rim Zouari-Hadji & Yamina Chouaibi, *Corporate Ethical Behavior and the Cost of Equity Capital: Evidence from the World’s Most Ethical Companies*, 19 J. FIN. REPORTING & ACCT.

in a company that cannot be made better by compliance-initiated ethical corporate culture; thus, compliant “companies [will] make more money, drive nicer cars and live in better neighborhoods.”¹²¹ Much like the business case for corporate social responsibility (“CSR”)¹²² or environmental, social, and governance initiatives,¹²³ the grand form of compliance value holds that increased market competitiveness will more than justify a company’s investment in its compliance apparatus.¹²⁴

While both the modest and grand form of compliance value have much intuitive appeal, neither is well supported empirically. For one, much of what is asserted in the compliance space regarding the connection between program elements and value are just that—assertions without evidentiary support.¹²⁵ Even when research is cited, it often addresses more general characteristics of companies deemed ethical without tying specific compliance program elements to firm performance.¹²⁶ Moreover, many studies suffer from significant methodological limitations. They are either based on survey

939, 958 (2021) (finding that firms with better ethics scores are associated with a reduced cost of equity capital); Bing Yu, Shengxiong Wu & Mary Jane Lenard, *Do Ethical Companies Have High Stock Prices or High Returns?*, 15 J. RISK & FIN. MGMT., Feb. 14, 2022, at 2–3 (finding that a portfolio that consists of ethical firms provides shareholders higher returns in comparison to benchmarks, but those same firms are valued less than comparable firms when looking at stock price).

121. Wilson, *supra* note 1, at 23.

122. See generally Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT’L J. MGMT. REVS. 85 (2010) (reviewing and summarizing the debate regarding the business case for CSR); Philipp Schreck, *Reviewing the Business Case for Corporate Social Responsibility: New Evidence and Analysis*, 103 J. BUS. ETHICS 167 (2011) (same); Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767 (2005) (same).

123. See, e.g., Paul Gompers, Joy Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q.J. ECON. 107, 109–10 (2003) (finding that corporate governance and financial returns are related, where firms with strong shareholder rights generally have higher values and growth while firms with weaker shareholder rights are lower values and lower growth).

124. See generally Han Donker, Deborah Poff & Saif Zahir, *Corporate Values, Codes of Ethics, and Firm Performance: A Look at the Canadian Context*, 82 J. BUS. ETHICS 527 (2008) (creating a corporate value index and using it to show that corporate values have a positive effect on financial performance); Chen-Fong Wu, *The Relationship of Ethical Decision-Making to Business Ethics and Performance in Taiwan*, 35 J. BUS. ETHICS 163 (2002) (showing survey results which demonstrate that ethical decision-making by individuals, corporate business ethics, and organizational performance are related).

125. For example, it is common for compliance providers to state things like “[a]n effective compliance program . . . can result in substantial and direct benefits to a company’s bottom line,” without linking to empirical studies to support such claims. CLIFFORD CHANCE, *supra* note 94, at 1. These assertions then proliferate.

126. See, e.g., Alison Taylor, *We Shouldn’t Always Need a “Business Case” to Do the Right Thing*, HARV. BUS. REV. (Sept. 19, 2017), <https://hbr.org/2017/09/we-shouldnt-always-need-a-business-case-to-do-the-right-thing> (on file with the *Iowa Law Review*) (“A growing body of evidence shows that ethical companies outperform financially over time . . .”); RAJENDRA S. SISODIA, DAVID B. WOLFE & JAGDISH N. SHETH, *FIRMS OF ENDEARMENT: HOW WORLD-CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE* 14–16 (2007) (finding that firms selected on the basis of their humanistic profiles outperformed their market by an eight-to-one ratio over a period of ten years).

instruments that indicate little more than employee, manager, or supplier sentiment, or they are correlative at best.¹²⁷

For example, one of the most well-known designations in compliance is being named to Ethisphere's "World's Most Ethical Companies" list.¹²⁸ Ethisphere, a for-profit company that provides ethics evaluations and certifications, has been issuing the award since 2006.¹²⁹ In connection with the award, Ethisphere also calculates an "Ethics Index," which compares that year's most ethical companies that are publicly traded to a comparable index of large cap companies.¹³⁰ According to the 2022 award materials, the 136 most ethical companies outperformed their counterparts in the stock market by 24.6 percent over a five-year period, what is labeled the "Ethics Premium."¹³¹ That would seem to be a clear business case for an ethics and compliance program.

However, there are important limitations. The assessment process is survey based, meaning a company self-reports based on a series of questions; thus, its own perceptions of its ethics and compliance program influence the results.¹³² And while companies are required "to submit documentation . . . of certain aspects of their efforts" and there is a review and verification process, the materials are provided by the participating companies.¹³³ Moreover, companies pay to be part of Ethisphere's various groups, receive certifications, and advertise

127. A good example is Wu, *supra* note 124. The study's findings are based on a survey instrument, which resulted in the "significant finding" that there is "a correlation between 'innovation and customer performance' and 'business ethics.'" *Id.* at 173. Framed as exploring individual ethical decision-making and its effects on corporate performance, the study ends by explicitly stating the following: "Note, though, that when we speak of organizational performance in this study we necessarily exclude financial performance." *Id.* at 173.

128. See, e.g., Tim Erbllich, *Speaking Up: Let Values Lead the Way*, ETHISPHERE, Spring 2022, at 7, 7, <https://magazine.ethisphere.com/wp-content/uploads/Ethisphere-Spring-2022-WMEC.pdf> [<https://perma.cc/9X8K-J22A>]; Will Evans, *It's All Good: Beware of Corporate Consulting Firms Offering Awards for Corporate Ethics*, SLATE (Mar. 19, 2010, 5:50 PM), <https://slate.com/business/2010/03/beware-of-corporate-consulting-firms-offering-awards-for-corporate-ethics.html> [<https://perma.cc/TY4X-H67Z>].

129. Arthur J. Schwartz, *A Closer Look at the 'Most Ethical' Company Rankings*, PHILA. BUS. J. (May 13, 2016), https://www.bizjournals.com/philadelphia/morning_roundup/2016/05/widener-schwartz-ethic-rankings-pepsi-ups-intel.html (on file with the *Iowa Law Review*).

130. Douglas Allen, *By the Numbers: The World's Most Ethical Companies: 2022 Data and Trends*, ETHISPHERE, Spring 2022, at 8, 8, <https://magazine.ethisphere.com/wp-content/uploads/Ethisphere-Spring-2022-WMEC.pdf> [<https://perma.cc/9X8K-J22A>]; see also Shlomit Azgad-Tromer, *The Virtuous Corporation: On Corporate Social Motivation and Law*, 19 U. PA. J. BUS. L. 341, 354 (2017) (describing how Ethisphere's "annual list of the world's most ethical companies . . . outperformed the S&P 500"); Yu et al., *supra* note 120, at 2 (same). A graphic of the Ethics Premium can be found in the organization's magazine announcing the results. Allen, *supra*, at 8.

131. Allen, *supra* note 130, at 8.

132. *Id.* at 9. Ethisphere does, however, take the initial data from the self-reported company survey (which is approximately 240 questions) and conduct a review in order to validate the information. Yu et al., *supra* note 120, at 2; *The World's Most Ethical Companies – Overview*, WORLD'S MOST ETHICAL COS. ETHISPHERE, [hereinafter *Ethisphere FAQ*], <https://worldsmoethicalcompanies.com/faq> [<https://perma.cc/NZ6H-VNNJ>].

133. Allen, *supra* note 130, at 9; Evans, *supra* note 128.

in the organization's magazine.¹³⁴ While that is not necessarily problematic, and Ethisphere has erected "firewalls" between sales and evaluation teams, the practice has raised conflict of interest questions in the past.¹³⁵

More fundamentally, there is no concrete evidence that companies scoring high enough to be named a most ethical company are outperforming their peers based on any particular compliance function. In fact, the assessment criteria look not only at a company's compliance program, but at its ethical culture, corporate citizenship, governance practices, and its management of third parties.¹³⁶ It could be that companies with more robust compliance programs do better in the market because of the elements of their compliance programs, but it could also be largely unrelated. Stock market performance compared this way only demonstrates correlation, not causation.¹³⁷ And the likelihood of omitted variables or reverse causality is great when trying to link compliance efforts based on surveys and self-provided documents with overall share price performance, which is a product of hundreds if not thousands of variables.¹³⁸

134. Evans, *supra* note 128.

135. *Id.* Ethisphere reports that,

[It] receives revenue from [its] membership group, a broad range of solutions and advisory services, licenses, conferences, and sponsorships. No company that is honored with the World's Most Ethical Companies designation is responsible for more than 1.02 [percent] of Ethisphere's revenue. And no honoree may place advertising in the issue of Ethisphere Magazine that announces and highlights new honorees.

Ethisphere FAQ, *supra* note 132. It's unclear what percentage of revenue Ethisphere receives from the combined group of companies receiving the award.

136. *Ethisphere FAQ*, *supra* note 132; see also Yu et al., *supra* note 120, at 2 ("The score is comprised of a framework based on ethics and compliance programs (35 [percent]); corporate citizenship and responsibility (20 [percent]); culture of ethics (20 [percent]); governance (15 [percent]); and leadership, innovation, and reputation (10 [percent]).").

137. Ethisphere agrees, stating that its Ethics Premium demonstrates a multi-year correlation between its evaluation criteria and firm financial performance. *Ethisphere FAQ*, *supra* note 132.

138. This identifies the larger problem of endogeneity, i.e., when other reasons exist that give rise to a correlation between a treatment and an outcome, the overall correlation cannot be interpreted as a causal effect. See generally Roberto Garcia-Castro, Miguel A. Ariño & Miguel A. Canela, *Does Social Performance Really Lead to Financial Performance? Accounting for Endogeneity*, 92 J. BUS. ETHICS 107 (2010) (arguing that studies attempting to find a relationship between ethical behavior and firm performance often suffer from endogeneity problems). There are some academics that have fared better in overcoming these limitations. See Christina E. Banner, Anastasia Bauer, Yannik Bofinger & Corinna Ewelt-Knauer, *Corporate Compliance Systems – The Effect on Risk, Performance and Firm Value* 3, 22–23 (Apr. 4, 2019) (unpublished manuscript), https://www.uni-giessen.de/de/fbz/fbo2/fb/professuren/bwl/banner/dateien/copy_of_20190404Compliance.pdf [<https://perma.cc/H5DG-NBD5>] (finding based on "dynamic panel regressions" that "higher reported compliance activity reduces . . . downside risk and . . . increases [firm] performance," but return on equity is not affected); Thomas Kaspereit, Kerstin Lopatta & Dennis Onnen, *Shareholder Value Implications of Compliance with the German Corporate Governance Code*, 38 MANAGERIAL & DECISION ECON. 166, 173 (2017) (finding compliance scores are statistically significant as to positive firm market value). But see Maria Aluchna & Tomasz Kuszewski, *Does Corporate Governance Compliance Increase Company Value? Evidence from the Best Practice of the Board*, 13 J. RISK & FIN. MGMT., Oct. 15, 2020, at 1, 3 (finding negative and

None of this suggests that companies are wrong to seek Ethisphere's or any other organization's¹³⁹ stamp of approval or follow its guidance on building a robust compliance program. Undoubtedly, companies that do so will benefit along a number of fronts.¹⁴⁰ But that does not translate into there being empirical support for compliance value as it is currently conceptualized. We are thus back where we started—compliance being limited by its perception as a cost center, only warranting investment depending on anecdotal notions of value.¹⁴¹ That is, unless there is a better way of valuing compliance. Below we seek to demonstrate that better way by rigorously measuring the revenue creation side of the value equation.

III. MEASURING THE VALUE OF CORPORATE COMPLIANCE

A. OVERVIEW

As described above, extant research in corporate compliance suffers from two main weaknesses. First, it is too narrow. While most work has focused on the cost savings that accrue to companies with compliance programs, little work has articulated the revenue enhancing effects of these programs. That would include the consumer driven effects on revenue. Second, when research has attempted to measure value from a revenue standpoint, be it in the modest or grand form, there has been a lack of empirical rigor. Methodological limitations, endogeneity problems, and potential conflicts of interests have hindered the endeavor.¹⁴²

In this Part, we seek to address both weaknesses. By using a validated and rigorous empirical methodology called choice-based conjoint,¹⁴³ we show that

statistically significant relation between corporate governance compliance and firm value). Some have simply determined that making the business case is “not your best argument,” advocating instead for ethics and compliance leaders to focus on the normative arguments for business integrity. Taylor, *supra* note 126 (“But our fear of sounding naive means we’ve ended up in the unenviable position of trying to make a simplistic commercial case for corporate ‘purpose’—contradicting and exposing ourselves in the process.”); see also Murphy, *supra* note 35, at 3 (“We are not about simply making money and maximizing profits. We are not about mathematical formulae. We are about doing the right thing and preventing business crime and unethical conduct.”). We, of course, do see value in making the business case for compliance, albeit using more defensible methods.

139. See CRAIG MOSS, DOUGLAS ALLEN & LAURA J. SPENCE, ASIA-PACIFIC ECON. COOP., THE VALUE OF BUSINESS ETHICS FOR APEC SMES 13–14 (2021), https://www.apec.org/docs/default-source/publications/2021/11/the-value-of-business-ethics-for-apec-smes/221_sme_the-value-of-business-ethics-for-apec-smes.pdf?sfvrsn=631e9867_2 [<https://perma.cc/T4V7-GGK5>].

140. At a minimum, there is clear value in filling out the survey and gathering the supporting data as a self-assessment measure. Moreover, corporate members of Ethisphere's various groups learn from one another and through programming offered by the organization, including programming that the authors have participated in providing.

141. Laufer, *supra* note 2, at 410–13.

142. See *supra* Part II.

143. We describe the method more fully below, but most simply the method allows researchers to understand how much certain features of a product are valued to consumers. For

corporate compliance programs can drive consumer price premiums and market share. That is, consumers are willing to pay higher prices to buy products from companies that have robust compliance programs. We measure this willingness to pay by giving consumers hypothetical choices of products that vary on their constituent features. For example, we ask consumers to choose among several cell phones that vary by color, camera size, storage, etc. In addition to these types of standard attributes, we add in three compliance program attributes, as described below. We do this for three products: cell phones, dining tables, and credit cards.¹⁴⁴ By observing consumer choices, we can infer the value each feature has to a specific product, including features focused on compliance programs.

We chose the following three compliance programs to study: a privacy and cybersecurity compliance program; an environmental and health safety compliance program; and a fraud and corruption compliance program. These programs were selected and described based upon a number of sources. First, we drew from a popular white paper that articulates a compliance risk exposure framework and details sixteen compliance program topics.¹⁴⁵ From the sixteen compliance topics, we chose three that were easy to communicate to consumers and were relevant to many products and industries.¹⁴⁶

Once we determined the three compliance programs, we had to clearly and effectively explain what those programs were to consumers. To do this, we drew upon two more sources of compliance information. One was the Organizational Sentencing Guidelines and its description of the hallmarks of an effective compliance program.¹⁴⁷ The other was the DOJ's guidance document on the evaluation of corporate compliance programs.¹⁴⁸ Utilizing aspects of both sources, we devised a description of each of the compliance programs. This method allowed us to have diverse programs with robust definitions that reflect the existing literature—from governmental agencies,

a general background of the method, see Paul E. Green, Abba M. Krieger & Yoram (Jerry) Wind, *Thirty Years of Conjoint Analysis: Reflections and Prospects*, INTERFACES, May–June 2001, at S56, S57–58, S66–68 [hereinafter *Thirty Years of Conjoint Analysis*] (describing the method and how it has been applied in corporate product design); see also Suneal Bedi & David Reibstein, *Damaged Damages: Errors in Patent and False Advertising Litigation*, 73 ALA. L. REV. 385, 396–403 (2021) (describing in detail what conjoint analysis is and providing a lay person's description of how the method works); Paul E. Green & V. Srinivasan, *Conjoint Analysis in Consumer Research: Issues and Outlook*, 5 J. CONSUMER RSCH. 103, 103–04 (1978) (creating the choice-based conjoint method).

144. We describe further below why we chose these three products.

145. DELOITTE, COMPLIANCE RISK ASSESSMENTS: THE THIRD INGREDIENT IN A WORLD-CLASS ETHICS AND COMPLIANCE PROGRAM 3 (2015), <https://www2.deloitte.com/us/en/pages/risk/articles/compliance-risk-assessments-the-third-ingredient-in-a-world-class-ethics-and-compliance-program.html> [<https://perma.cc/E544-68FQ>].

146. We suspect similar results would be created had we chosen other compliance programs, but that the salience of these three compliance programs likely did drive to some degree the positive results we found.

147. U.S. SENT'G GUIDELINES MANUAL § 8B2.1 (a)–(b) (U.S. SENT'G COMM'N 2021).

148. See generally CRIM. DIV., U.S. DEP'T OF JUST., *supra* note 65.

compliance professionals, and corporations themselves—on compliance program elements.

To be clear, when we crafted the descriptions of these compliance programs, we focused not on the results of the program, but rather on their constituent elements. Describing a program as “effective” implies that the program works to some degree and has created procedures that cause the company to comply more consistently with legal and ethical norms. While we understand that this is the ultimate goal of compliance programs, describing them as such for our study would not be fruitful for at least two reasons. First, defining what makes a program “effective” is not easy and would likely be confusing to study participants. Second, and more importantly, when consumers are deciding on products that vary by several features, they are not often (or ever) privy to internal company information of compliance effectiveness.¹⁴⁹ Thus, it is not realistic to assume that consumers will know which compliance programs from which companies are “effective” in the traditional sense. Instead, what is more realistic is that consumers would know what elements of a compliance program a company has invested in because those elements would be apparent.

The three programs and their descriptions are reproduced below in Table 1.

149. There, of course, could be exceptions. For example, customers of Wells Fargo likely know the bank has suffered numerous, highly publicized compliance failures related to retail bankers creating false customer accounts. See Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2203 (2019) (discussing Wells Fargo compliance failures in depth). Our study design simply describes the elements of a well-functioning compliance program of an unnamed company; therefore, it does not test consumer decision-making as to legacy compliance program successes or failures, nor does it guard against spillover effects from other salient examples.

Table 1: Compliance Program Descriptions

Compliance Program Name	Compliance Program Description ¹⁵⁰
Privacy and Cybersecurity	A privacy and cybersecurity program is one that seeks to protect company, employee, and consumer information from external parties. A company with a strong program hires individuals in the company whose sole job is to monitor cybersecurity and privacy concerns. In addition, the company trains its employees to protect both company and consumer information.
Environmental and Health Safety	An environmental/health safety program is one that seeks to decrease the harmful impact that the company's actions have on the environment. In addition, this program seeks to protect the health and safety of employees as part of their working conditions. One component of the program is that the company hires individuals whose sole job is to monitor and reduce the company's environmental impact. Another component of the program is that the company trains its employees to increase their health and safety at work.
Fraud and Corruption	A fraud and corruption prevention program is one that seeks to minimize corrupt or fraudulent behavior by employees in the company. The program does this by training employees, monitoring for unethical behavior, and enforcing company or legal rules. This creates incentives for employees to act ethically and disincentives unethical/corrupt behavior, with the goal of creating a positive corporate culture.

Our studies produce three important takeaways. First, consumers value products coming from a company that invests in corporate compliance more than they value other standard features of those products. For example, in our cell phone study, we find that consumers value a cell phone that comes from a company that has invested in privacy compliance more than they do a cell phone that comes in different colors and more than one with lots of data storage.¹⁵¹ In effect, consumers are more likely to pay a premium for corporate compliance than they are for getting a different colored phone.

Second, we measure how much more consumers are willing to pay (the price premium) for products that come from companies that implement corporate compliance programs. We find that consumers are willing to pay positive premiums for various programs. For example, consumers will pay

150. This is exactly how the descriptions were presented to respondents in our scale.

151. See *infra* Section III.C.1 and Tables 3 through 5, for a detailed analysis of our results for cell phones.

more for a dining table offered by a company with a health and safety compliance program than one without such a program.¹⁵² Put in the most general terms, consumers will pay more for compliance.

Third, we show that compliance programs are not equal in terms of their value to consumers. Certain products seem to gravitate more toward certain compliance programs. For example, privacy compliance programs tend to have more value for technological products than environmental compliance programs. This means that managers should take stock of what industry they are in and how their company's compliance efforts match up with that so as to best market a specific compliance program to consumers.

All three results contribute new rationales for companies to invest in and take seriously compliance programs. In addition, our studies provide avenues for regulators to encourage companies to invest more in compliance programs.¹⁵³ Together, this may spur academics to focus more on compliance and widen their theoretical and empirical lens when researching its many nuances. We describe the choice-based conjoint method and each of our study's procedures and results below.

B. METHODOLOGY

We use an empirical method to measure the value of a compliance program called choice-based conjoint ("CBC"). This method was first developed by marketing scholars to measure the values of various product features.¹⁵⁴ Over time, this method has expanded in scope and has been used to measure the value of everything from labeling of health or sustainable facts

152. See *infra* Section III.C.2 and Tables 8–10.

153. We discuss these implications and more below. See *infra* Part IV.

154. The original method and its application were developed by Paul Green in the 1970s at The Wharton School, University of Pennsylvania. See Green & Srinivasan, *supra* note 143, at 103–17. Subsequently, it has been used in hundreds of articles. See, e.g., Anocha Aribarg, Katherine A. Burson & Richard P. Larrick, *Tipping the Scale: The Role of Discriminability in Conjoint Analysis*, 54 J. MKTG. RSCH. 279, 281–82 (2017); Joel Huber & John McCann, *The Impact of Inferential Beliefs on Product Evaluations*, 19 J. MKTG. RSCH. 324, 324–29 (1982); Joel Huber, *What We Have Learned from 20 Years of Conjoint Research: When to Use Self-Explicated, Graded Pairs, Full Profiles or Choice Experiments 1–12* (Sawtooth Software, Rsch. Paper Series, 1997), <https://sawtoothsoftware.com/resources/technical-papers/what-we-have-learned-from-20-years-of-conjoint-research-when-to-use-self-explicated-graded-pairs-full-profiles-or-choice-experiments> [<https://perma.cc/J4EN-AS3F>]; Richard D. Johnson & Irwin P. Levin, *More than Meets the Eye: The Effect of Missing Information on Purchase Evaluations*, 12 J. CONSUMER RSCH. 169, 169–72 (1985); Gastón Ares & Rosires Deliza, *Studying the Influence of Package Shape and Colour on Consumer Expectations of Milk Desserts Using Word Association and Conjoint Analysis*, 21 FOOD QUALITY & PREFERENCE 930, 930–32 (2010); Georgios Koutsimanis, Kristin Getter, Bridget Behe, Janice Harte & Eva Almenar, *Influences of Packaging Attributes on Consumer Purchase Decisions for Fresh Produce*, 59 APPETITE 270, 270–73 (2012); Pinya Silayoi & Mark Speece, *The Importance of Packaging Attributes: A Conjoint Analysis Approach*, 41 EUR. J. MKTG. 1495, 1502–06 (2007); Dick R. Wittink & Philippe Cattin, *Commercial Use of Conjoint Analysis: An Update*, J. MKTG., July 1989, at 91, 91–95; Erik L. Olson, *It's Not Easy Being Green: The Effects of Attribute Tradeoffs on Green Product Preference and Choice*, 41 J. ACAD. MKTG. SCI. 171, 174–77 (2013).

on packaged goods¹⁵⁵ to the curved edge on an iPhone.¹⁵⁶ In addition, the method has been used not only in marketing scholarship, but also more recently in legal scholarship.¹⁵⁷ It is now routinely used in legal disputes focusing on patents¹⁵⁸ and false advertising.¹⁵⁹

While a full discussion of the method is beyond the scope of this Article, we provide a brief overview here and explain how it is used to calculate the value of a given product or company feature.¹⁶⁰ The method is focused on giving consumers choices between hypothetical products. These hypothetical products are described by various features or attributes. For example, a CBC may ask consumers to choose among three cars. Each car would differ based upon various attributes: color, style, horsepower, or any set of interior features. Consumers would then be asked to choose which of the cars they

155. See, e.g., Mitsunori Hirogaki, *Estimating Consumers' Willingness to Pay for Health Food Claims: A Conjoint Analysis*, 4 INT'L J. INNOVATION MGMT. & TECH. 541, 542–43 (2013); Yuko Onozaka & Dawn Thilmany McFadden, *Does Local Labeling Complement or Compete with Other Sustainable Labels? A Conjoint Analysis of Direct and Joint Values for Fresh Produce Claims*, 93 AM. J. AGRIC. ECON. 693, 694 (2011).

156. See DAVID REIBSTEIN, CHRISTOPHER BOREK, ROBERT VIGIL & SUNEAL BEDI, IMPACT AT JMR: ACADEMIA IN COURT: HOW MARKETING SCHOLARSHIP INFORMS THE LAW 3 (2022), <https://www.ama.org/wp-content/uploads/2022/07/Academia-in-Court.pdf> [<https://perma.cc/NU2G-QYRR>] (describing how a conjoint was used in the seminal cell phone patent infringement case); see also *Apple, Inc. v. Samsung Elecs. Co.*, 920 F. Supp. 2d 1079, 1111–12 (N.D. Cal. 2013) (using choice-based conjoint analysis to determine patent damages), *aff'd in part, rev'd in part*, 786 F.3d 983 (Fed. Cir. 2015), *rev'd*, 580 U.S. 53 (2016), *remanded to*, 678 F. App'x 1012 (Fed. Cir. 2017).

157. Conjoint analysis is routinely used in valuation of features for patent damages and false advertising litigation. See, e.g., Bedi & Reibstein, *supra* note 143, at 403–09; Bernard Chao & Sydney Donovan, *Does Conjoint Analysis Reliably Value Patents?*, 58 AM. BUS. L.J. 225, 232 (2021); J. Gregory Sidak & Jeremy O. Skog, *Using Conjoint Analysis to Apportion Patent Damages*, 25 FED. CIR. BAR J. 581, 581 (2016).

158. See, e.g., *TV Interactive Data Corp. v. Sony Corp.*, 929 F. Supp. 2d 1006, 1020–21, 1026–27 (N.D. Cal. 2013); *Oracle Am., Inc. v. Google Inc.*, 872 F. Supp. 2d 974, 975–77 (N.D. Cal. 2012), *rev'd*, 750 F.3d 1339 (Fed. Cir. 2014), *remanded to* No. c 10-03561, 2016 WL 3181206 (N.D. Cal. June 8, 2016); Final Order and Judgment at 2, *Glenn v. Hyundai Motor Am.*, No. 15-cv-02052 (C.D. Cal. Aug. 26, 2019), 2019 WL 11790429; *Seven Networks, LLC v. Google LLC*, 315 F. Supp. 3d 933, 943 (E.D. Tex. 2018).

159. See, e.g., *Kurtz v. Kimberly-Clark Corp.*, 321 F.R.D. 482, 551 (E.D.N.Y. 2017); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 413–14 (S.D.N.Y. 2015); *In re ConAgra Foods, Inc.*, 90 F. Supp. 3d 919, 952–54 (C.D. Cal. 2015); *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1103–10 (N.D. Cal. 2018); *In re NJOY, Inc. Consumer Class Action Litig.*, 120 F. Supp. 3d 1050, 1120–22 (C.D. Cal. 2015).

160. For a further discussion, see Bedi & Reibstein, *supra* note 143, at 396–403; and Chao & Donovan, *supra* note 157, at 233–39.

prefer the most.¹⁶¹ For an example of how the choice task is presented to consumers, we provide screenshots below.¹⁶²

Using these choices, a researcher applies a multinomial logit model with Hierarchical Bayes estimation to calculate the value of each of the features to a given consumer.¹⁶³ Once these values are calculated, we simply average each

161. Often a “none” choice is included as well to make the choice set more realistic. For further details on how the “none” option affects results in a choice-based conjoint, see Rinus Haaijer, Wagner Kamakura & Michel Wedel, *The ‘No-Choice’ Alternative in Conjoint Choice Experiments*, 43 INT’L J. MKT. RSCH. 93, 105 (2001), finding that not including a “none” option can result in much lower model and predictive fit and even biased estimates.

162. Copies of each survey instrument are available by request from the authors.

163. Most research using CBC uses a multinomial logit model estimated with Hierarchical Bayes. We follow suit. The following briefly details the model we use to estimate the values of each of the features of the products we study: To estimate how much a feature matters for a consumer (the utility for a feature) we assume that consumers make decisions with the following random utility model:

$$U_{ik} = V_{ik} + \varepsilon_{ik}$$

Where U_{ik} is the utility derived by individual i for a given product k , V_{ik} is the utility from profile k and ε_{ik} is the random part of i 's utility for product k . We can further express V_{ik} as:

$$V_{ik} = \sum B_{jk}x_{jk}$$

Where V_{ik} is the value of the product k for individual i , x_{jk} is the value of the feature j for product k , and B_{jk} is the utility weight placed on feature j for product k for individual i . The values of each feature (B_{jk}) then become the exact parameters we hope to estimate. Most conjoint analyses use Hierarchical Bayes estimation to estimate these utilities and we do as well. Hierarchical Bayes allows for the estimation of utilities accounting for heterogeneity in consumer preferences. This estimation method assumes that the individual utilities of consumers follow a multivariate normal distribution of the following form:

$$B_i \sim N(\alpha, D)$$

Where B_i is a vector of utilities for individual i , α is a vector of means of the distribution of utilities, and D is the matrix of variances and covariances of the distribution of utilities across individuals. We also assume the following multinomial logit model for predicting which profile in each task a consumer will choose:

$$P_{ik} = e^{V_{ik}} / \sum_{k=1}^j e^{V_{ik}}$$

Where P_{ik} is the probability of individual i choosing product k , and j represents the number of alternative products in the choice context. We are then left with three parameters to estimate: B_i , α , and D . To estimate these parameters, we use a Markov Chain Monte Carlo iterative process with conservative starting points equal to zero for all three parameters. For more details on the specifics of the model we use, see Bedi & Reibstein, *supra* note 143, at 424–26. For discussions of random utility models, see generally Daniel McFadden, *Econometric Models of Probabilistic Choice*, in STRUCTURAL ANALYSIS OF DISCRETE DATA WITH ECONOMETRIC APPLICATIONS 198 (Charles F. Manski & Daniel McFadden eds., 1981); George Baltas & Peter Doyle, *Random Utility Models in Marketing Research: A Survey*, 51 J. BUS. RSCH. 115 (2001); Greg M. Allenby & Peter E. Rossi, *Marketing Models of Consumer Heterogeneity*, 89 J. ECONOMETRICS 57 (1999); and P.B. Seetharaman,

consumer's value for the various features to get an overall value of the feature. For example, in the car CBC described above, a researcher would be able to articulate how much consumers overall value a blue car versus a red car.¹⁶⁴ The method gives "utility scores" for each feature, and as long as price is included as one of the features, a researcher is able to measure the dollar value of a given feature. This dollar value is akin to how much a consumer is willing to pay for a given feature, i.e., how much more is a consumer willing to pay for a blue car versus a red car holding all other features of the car constant.¹⁶⁵

Much has been written on best practices for using CBC. We employ as many of those best practices as possible in our studies below, including limiting the number of features and levels that describe a product,¹⁶⁶ limiting the number of choices a consumer makes,¹⁶⁷ including a none option,¹⁶⁸ and providing details on what defines each feature.¹⁶⁹

C. PRODUCT STUDIES

We chose three products to study: cell phones, dining tables, and credit cards. For each of the products, we ran three separate CBC studies with three separate samples of consumers. We chose these three products because they represent diverse product categories. Cell phones represent a technology-focused product; dining tables represent a classic manufactured durable

Modeling Multiple Sources of State Dependence in Random Utility Models: A Distributed Lag Approach, 23 MKTG. SCI. 263 (2004). For a more detailed discussion of Hierarchical Bayes, see generally Greg M. Allenby & Peter E. Rossi, *Hierarchical Bayes Models*, in THE HANDBOOK OF MARKETING RESEARCH: USES, MISUSES, AND FUTURE ADVANCES 418 (Rajiv Grover & Marco Vriens eds., 2006); and Jeffrey N. Rouder & Jun Lu, *An Introduction to Bayesian Hierarchical Models with an Application in the Theory of Signal Detection*, 12 PSYCHONOMIC BULL. & REV. 573 (2005). For a more detailed discussion on Markov Chain Monte Carlo methods, see generally Don van Ravenzwaaij, Pete Cassey & Scott D. Brown, *A Simple Introduction to Markov Chain Monte-Carlo Sampling*, 25 PSYCHONOMIC BULL. & REV. 143 (2018).

164. Note that the model described in note 163 creates value estimates that are based upon the next best available option. That is to say, the value of the feature is pegged to a baseline feature. Again, take the car example described above. The value of a "color" of the car is going to be based upon some baseline color.

165. For a more detailed discussion of how the willingness to pay for a feature is calculated, see Bedi & Reibstein, *supra* note 143, at 388–91.

166. *See id.* at 399–400, 422; Green & Srinivasan, *supra* note 143, at 108.

167. *See, e.g.*, Kirk Bansak, Jens Hainmueller, Daniel J. Hopkins & Teppei Yamamoto, *The Number of Choice Tasks and Survey Satisficing in Conjoint Experiments*, 26 POL. ANALYSIS 112, 117–18 (2018); Richard M. Johnson & Bryan K. Orme, *How Many Questions Should You Ask in Choice-Based Conjoint Studies?*, 1, 22–23 (Sawtooth Software, Rsch. Paper Series, 1996), <https://content.sawtoothsoftware.com/assets/a24654f4-0553-4484-9c90-46a5899e8d57> [<https://perma.cc/7YVD-QLDT>] (finding that researchers can ask respondents at least twenty choices without seeing a degradation of results).

168. *See, e.g.*, Haaijer et al., *supra* note 161, at 93–94, 105.

169. *See, e.g.*, Felix Eggers, John Hauser & Matthew Selove, *Scale Matters: How Craft in Conjoint Analysis Affects Price and Positioning Strategies* 28–29 (June 2017) (unpublished manuscript), <https://mitsloan.mit.edu/shared/ods/documents?PublicationDocumentID=2874> [<https://perma.cc/UPT9-6FFM>] (showing that images of features provides more reliable data).

consumer good; and credit cards represent a financial product. In addition, these products have been studied by various marketing scholars using CBC.¹⁷⁰ We also thought that studying three diverse products would give us insight into whether any of the three compliance programs we chose more neatly mapped onto a product. For example, we would predict that a compliance program focused on data privacy would be more valuable to a consumer buying a cell phone in comparison to a dining table. We discuss the results of our three studies in detail below.

1. Cell Phone Study

Our first product category was cell phones. Cell phones have been used in many CBC studies.¹⁷¹ This is partly because most adult consumers have made a purchasing decision regarding a cell phone at some point. It is important that consumers are familiar with the various features that a product possesses, and cell phones allow for that. In designing the choice task, we chose four traditional features to describe the cell phones: price, color, camera quality, and storage capacity. These features are common for phone companies to advertise about and hence would seem to be important to consumers.¹⁷² We then added a compliance feature. Each of the features presented to consumers was described with three to four levels.¹⁷³ But for the compliance program feature, we simply chose two levels (either a program was present or was not present). Table 2 reproduces the features and levels we used in the study. Figure 1 provides a snapshot of the choice task that we asked consumers to complete.

170. For cell phones studies, see generally Raghuram Iyengar, Kamel Jedidi & Rajeev Kohli, *A Conjoint Approach to Multipart Pricing*, 45 J. MKTG. RSCH. 195 (2008). For furniture studies, see generally Roy C. Anderson & Eric N. Hansen, *The Impact of Environmental Certification on Preferences for Wood Furniture: A Conjoint Analysis Approach*, FOREST PRODS. J., June 2004, at 42. For credit card studies, see, for example, *Thirty Years of Conjoint Analysis*, *supra* note 143, at S57–59.

171. Most famously a cell phone conjoint was used in a multibillion-dollar lawsuit between Apple and Samsung. See REIBSTEIN ET AL., *supra* note 156, at 3; see also Iyengar et al., *supra* note 170, at 6 (using a cell phone conjoint study to discuss multipart pricing strategies); *Thirty Years of Conjoint Analysis*, *supra* note 143, at S67; Raj Sethuraman, Roger A. Kerin & William L. Cron, *A Field Study Comparing Online and Offline Data Collection Methods for Identifying Product Attribute Preferences Using Conjoint Analysis*, 58 J. BUS. RSCH. 602, 604–07 (2005).

172. A simple visit to any phone manufacture website will show that the features that are most described and marketed are color, camera quality, and storage capacity. For example, the Apple iPhone landing page immediately draws the consumer's attention to the price, color, camera, and storage of the various models. See *iPhone*, APPLE, <https://www.apple.com/iphone> [<https://perma.cc/T2EY-J4SR>].

173. As described, we tried to limit the features and levels so that the task was manageable.

Table 2: Cell Phone Features and Levels

Feature	Levels
Price ¹⁷⁴	\$700, \$850, \$1000
Color ¹⁷⁵	Blue, Red, Green, Black
Camera Quality ¹⁷⁶	3MP, 7MP, 12MP
Storage Capacity ¹⁷⁷	32GB, 128GB, 256GB

Figure 1: A Sample Choice Set for Cell Phone Study

	Phone 1	Phone 2	Phone 3	None
Color	Black	Blue	Black	None of these options
Camera Quality	3MP	12MP	12MP	
Storage	256GB	128GB	128GB	
Privacy and Cybersecurity Program	YES Privacy and Cybersecurity Program	YES Privacy and Cybersecurity Program	NO Privacy and Cybersecurity Program	
Price	\$700.00	\$850.00	\$700.00	
	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Our sample for this study was 582 consumers (note that these respondents each received only one compliance program to evaluate). We recruited our consumers using the Cloud Research platform,¹⁷⁸ and then

174. We chose prices based upon smartphone pricing of the Apple which can be found on the Apple website. The prices in our study represented prices of the phones at the time of our study. Current prices of similar phones are lower. See *Buy iPhone 13*, APPLE, <https://www.apple.com/shop/buy-iphone/iphone-13> [https://perma.cc/Q4VB-RKAU].

175. We chose these colors based upon historical launches of smartphones and the marketing campaigns around the colors of each. For example, the Apple iPhone recently introduced a “gorgeous new green finish.” *Apple Introduces Gorgeous New Green Finishes for the iPhone 13 Lineup*, APPLE: NEWSROOM (Mar. 8, 2022), <https://www.apple.com/newsroom/2022/03/apple-introduces-gorgeous-new-green-finishes-for-the-iphone-13-lineup> [https://perma.cc/L2KP-J786]. We provided examples of color blocks so that respondents would more easily visualize the products they were choosing among.

176. To help consumers visualize what each camera quality looks like, we included the same image that was taken from a camera representing each of the megapixel levels.

177. To help consumers understand what the storage capacity of each level was, we indicated how many photos a phone would hold if it had each of the levels of storage capacity.

178. Cloud Research is a platform that allows researchers to more efficiently recruit respondents from Amazon Mechanical Turk and pay them. See Leib Litman, Jonathan Robinson & Tzvi Abberbock, *TurkPrime.com: A Versatile Crowdsourcing Data Acquisition Platform for the Behavioral Sciences*, 49 BEHAV. RSCH. METHODS 433, 433–34 (2017). TurkPrime is now known as

fielded our survey on Amazon Mechanical Turk.¹⁷⁹ Our respondents were paid one dollar for their time, and the estimated time of completion was ten minutes for each survey.¹⁸⁰

When entering our survey, each respondent read a brief overview of the study and then was asked to carefully read the descriptions of each feature of the cell phone. After this, respondents were asked to correctly identify which features would be included in the choice tasks. Those that did not correctly identify each feature, or who identified features that were not included, were deviated away from the study.¹⁸¹ Respondents then made eight choices. Each choice presented three different cell phones that varied by features. After making these choices, respondents answered some demographic questions. We present our results in Tables 3 through 5 below.

Cloud Research. See CLOUDRESEARCH, <https://www.cloudresearch.com> [<https://perma.cc/VN5R-GNNF>].

179. Thousands of articles have used Amazon Mechanical Turk and currently do. See, e.g., Thomas Stevens, Aaron K. Hoshide & Francis A. Drummond, *Willingness to Pay for Native Pollination of Blueberries: A Conjoint Analysis*, 2 INT'L J. AGRIC. MKTG. 67, 70 (2015); Karoline Mortensen & Taylor L. Hughes, *Comparing Amazon's Mechanical Turk Platform to Conventional Data Collection Methods in the Health and Medical Research Literature*, 33 J. GEN. INTERNAL MED. 533, 533–36 (2018); Bansak et al., *supra* note 167, at 113; Cindy Wu et al., *What Do Our Patients Truly Want? Conjoint Analysis of an Aesthetic Plastic Surgery Practice Using Internet Crowdsourcing*, 37 AESTHETIC SURGERY J. 105, 106–08 (2017).

180. Our sample respondents across all studies were fifty percent female, had an average age of 35 to 44 years old, and an average household income of \$50,000 to \$60,000.

181. This is a common method in survey-based research to make sure respondents are paying attention to what the survey is asking them to do. For a discussion of these kinds of attention checks, see generally James D. Abbey & Margaret G. Meloy, *Attention by Design: Using Attention Checks to Detect Inattentive Respondents and Improve Data Quality*, 53-56 J. OPERATIONS MGMT. 63 (2017); and Adam J. Berinsky, Michele F. Margolis & Michael W. Sances, *Separating the Shirkers from the Workers? Making Sure Respondents Pay Attention on Self-Administered Surveys*, 58 AM. J. POL. SCI. 739 (2014).

Table 3: The Importance of Each Cell Phone Feature to a Consumer
(Privacy Compliance Program)

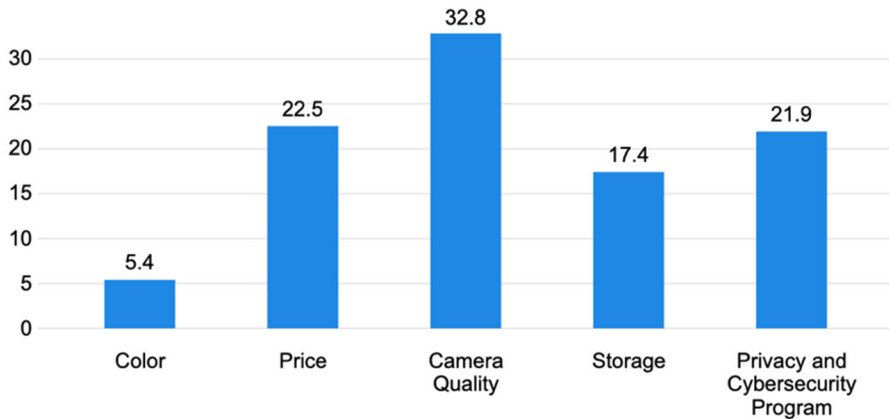


Table 3 represents how important each feature was to consumers in our privacy and cybersecurity compliance program survey. The higher the value, the more important the feature is to the consumer.¹⁸² These results show that camera quality and price are the most important features for consumers in deciding among cell phones, but buying a phone from a company that has a strong privacy and cybersecurity program is more important to consumers than both the storage the cell phone contains and the color of the phone.

This is an important finding, as many cell phone manufacturers spend significant funds developing and marketing various colors and storage capacities of their phones.¹⁸³ However, our results show that developing and marketing a compliance program focused on privacy would likely be more valuable to consumers and hence allow companies to charge more for a cell phone if they have a strong compliance program.

Likewise, we find that both an environmental compliance program and a fraud and corruption compliance program are valuable to consumers, and more valuable than having various colors. Table 4 and Table 5 detail our results for the other two compliance programs.

182. The numbers are actually percentages based upon the values that CBC showed. Using the utilities calculated from the choice data according to the model specified in note 163, we calculate out of one hundred percent what the importance of each feature is to the ultimate overall decision. A higher percentage indicates that the feature was more important than lower percentage features.

183. See, e.g., *Apple Introduces Gorgeous New Green Finishes for the iPhone 13 Lineup*, *supra* note 175; Hartley Charlton, *Full Range of iPhone 14 Color Options Revealed by Purported Leak from China*, MACRUMORS (May 11, 2022, 2:20 AM), <https://www.macrumors.com/2022/05/11/iphone-14-color-options-revealed> [<https://perma.cc/GUgV-FVXE>] (detailing the new colors that would be released).

Table 4: The Importance of Each Cell Phone Feature to a Consumer
(Environmental/Safety Compliance Program)

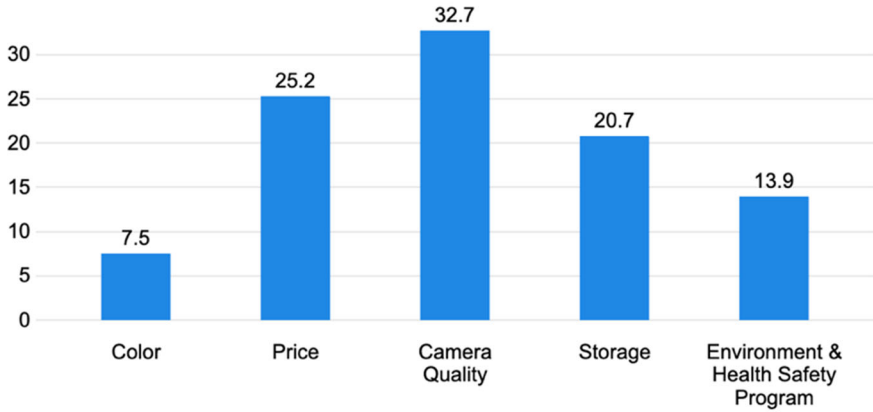
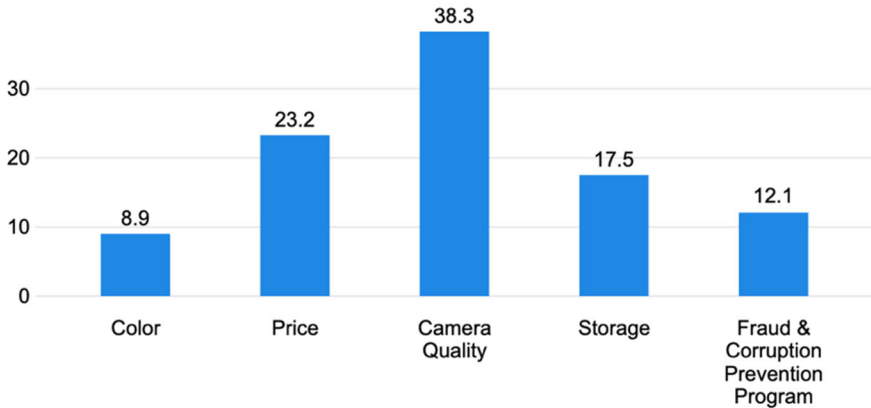


Table 5: The Importance of Each Cell Phone Feature to a Consumer
(Corruption Compliance Program)



Our results show that compliance programs matter to consumers, and that when deciding which kind of phone to purchase, compliance programs drive some, if not much, of the decision-making.

We now present the willingness to pay estimates for each of the compliance programs. These numbers represent how much consumers in our sample would be willing to pay for each the compliance programs when buying a cell phone in comparison to no compliance program. We note that the highest willingness to pay is for the data privacy program, which makes sense given that a cell phone is a technology product that routinely collects

and handles personal private information. We would thus expect consumers to value a cell phone from a company that has a privacy compliance program more than they would a cell phone from a company that has a fraud and corruption compliance program.

Table 6: Willingness to Pay of Compliance Programs for Cell Phones

CELL PHONE STUDY	
Compliance Program	Willingness to Pay
Privacy and Cybersecurity	\$272.70
Environmental and Health Safety	\$134.70
Fraud & Corruption	\$127.90

We do note that these dollar values are likely exaggerated. Previous research has shown the ways in which CBC can inflate consumers' willingness to pay for features that are not as commonly associated with a product (like our compliance features).¹⁸⁴ Therefore, we do not place great emphasis on the exact dollar value that our studies show related to these compliance programs. Instead, we simply demonstrate how empirical methodology can help illustrate the value of these programs to consumers. While we do not think these values are exactly correct (i.e., having an environmental and health safety compliance program would allow a company to charge \$134 more for a cell phone), the CBC does provide reliable relative values.¹⁸⁵ Therefore, we are confident that the results show compliance programs matter for a cell phone company, and that they create a price premium if advertised to consumers.

2. Dining Table Study

Our second product category was dining tables. We chose this product for a few reasons. First, while a cell phone is a technology-oriented product,

184. For a discussion of how the willingness to pay calculation can be inflated based upon the design of the conjoint, see generally Bedi & Reibstein, *supra* note 143, which argues that willingness to pay calculations are often inflated due to the choice aspect of the conjoint design, the fact that features are omitted, and potential over salience of unique features that may be included. Our studies likely show inflated willingness to pay values given previous work that has documented such biases. However, we do not present the information as a way to accurately place a dollar value on the compliance program, but rather simply to show that there is some price premium of compliance programs and that these premiums differ based upon the program and product interaction. See Chao & Donovan, *supra* note 157, at 128 (replicating in part Bedi & Reibstein, but also showing that corrections can be made to the conjoint design to make the willingness to pay estimations more realistic).

185. Bedi & Reibstein, *supra* note 143, at 430 ("If a CBC is only being used to determine whether a feature is more important than another, its application . . . is perfectly valid.")

we wanted a consumer good that was devoid of any technology so as to test whether the three compliance programs also impacted consumer decisions for this type of product. Second, furniture sales increased substantially during the Covid-19 pandemic¹⁸⁶; hence, it was a product that many people recently bought or thought of buying. Lastly, given that a dining table is a durable, manufactured product focused on materials rather than technology, it provided a good test of the environmental and health safety compliance program feature. We suspected that in comparison to both cell phones and credit cards, consumers would respond more positively to the environmental compliance program when making a decision on what dining table to buy.¹⁸⁷

We chose three to four levels of each the following features: price, seating capacity, material, and surface shape.¹⁸⁸ For each compliance program, we simply chose two levels (either the program was present or was not present), in exactly the same way as the study above. Table 7 reproduces the features and levels we studied. Figure 2 provides a snapshot of the choice task that we asked consumers to partake in.

Table 7: Dining Table Features and Levels

Feature	Levels
Price	\$300, \$600, \$800
Material ¹⁸⁹	Wood, Metal, Glass, Marble
Surface Shape ¹⁹⁰	Round, Rectangle, Square
Sitting Capacity	4 people, 6 people, 8 people

186. Abha Bhattarai, *Booming Furniture Sales Mean ‘Unprecedented’ Delays for Sofas and Desks*, WASH. POST (Mar. 8, 2021, 1:23 PM), <https://www.washingtonpost.com/business/2021/03/08/furniture-sales-pandemic/> (on file with the *Iowa Law Review*).

187. We discuss why we suspected this further below. But, most simply, research has shown that consumers do care that a product represents sustainable procedures. If that is the case, it is predictable that they will also care about patronizing a company that embodies sustainable procedures.

188. To determine these features, we went to various furniture websites and saw the ways in which those brands allowed consumers to filter among dining tables. We found that the major features by which consumers could filter were size, shape, material, and price. For example, see *Dining Tables*, CB2, <https://www.cb2.com/furniture/dining-tables> [<https://perma.cc/73F6-8VZ6>]. The first four categories to filter the tables are in order: “Shape,” “Seating Capacity,” “Price,” and “Material.” *Id.*

189. We provided detailed images to respondents of what each material looked like. We chose these materials as these are the main four materials that tables are made of based upon a survey of several furniture brands including CB2, IKEA, Article, Crate & Barrel, and Rooms To Go.

190. We provided detailed images to respondents of what each table shape looks like. Again, these were the main table shapes that our survey of furniture websites used. See *supra* note 188.

Figure 2: A Sample Choice Set for Dining Table Study

	Phone 1	Phone 2	Phone 3	None
Material	Marble	Marble	Glass	None of these options
Surface Shape	Rectangle	Rectangle	Round	
Sitting Capacity	8 people	4 people	8 people	
Privacy and Cybersecurity Program	NO Privacy and Cybersecurity Program	YES Privacy and Cybersecurity Program	NO Privacy and Cybersecurity Program	
Price	\$800.00	\$800.00	\$600.00	
	○	○	○	○

Our sample for this study was 579 consumers (note that these respondents each received only one compliance program to evaluate). This study proceeded in the same manner as the cell phone study above.¹⁹¹ We present our results in Tables 8–10 below.

Table 8: The Importance of Each Dining Table Feature to a Consumer (Privacy Compliance Program)

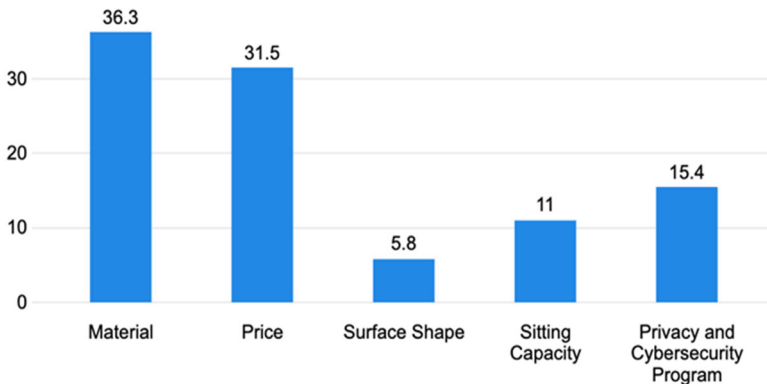


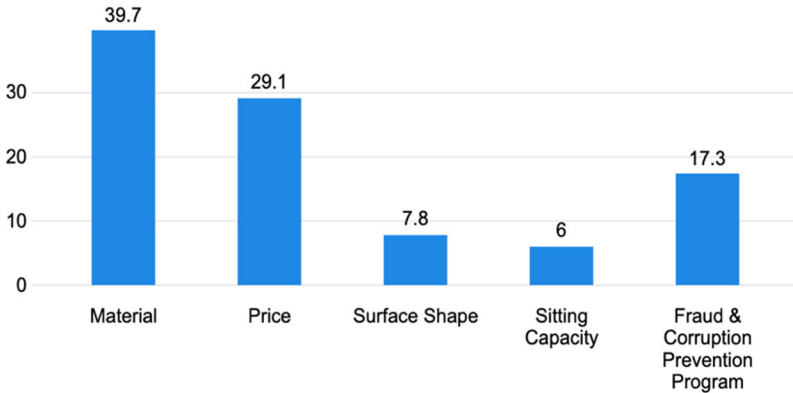
Table 8 above shows how important the various features of a dining table are to consumers. As is evident, consumers very much cared about materials and pricing of their tables. Surface shape, seating capacity, and a privacy program were not the primary drivers of decision-making. However, it is important to note that the privacy compliance program was more important than both surface shape and sitting capacity. This means that consumers do

191. For details on the study procedure, see *supra* note 163 and accompanying text.

value buying a table from a company that has a robust privacy compliance program, but the importance is dwarfed by both material and price.

This result is similar for a corruption focused compliance program, as we show in Table 9 below.

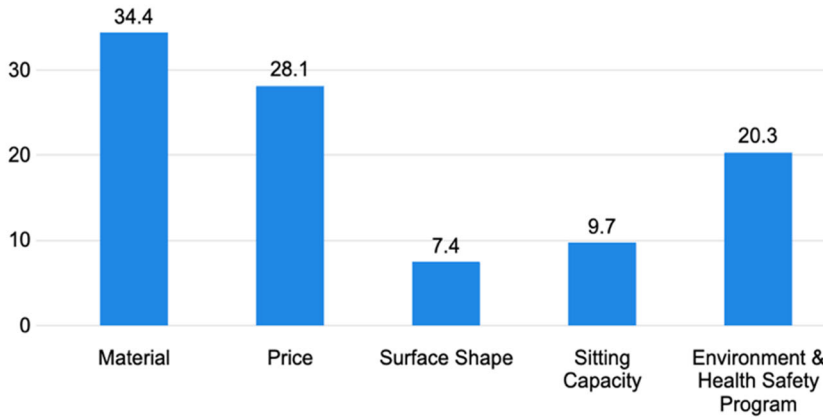
Table 9: The Importance of Each Dining Table Feature to a Consumer (Corruption Compliance Program)



Once again, there seems to be a clear distinction between the two driving factors of decision-making for our sample and the three lesser-important features. But of the three lesser features, the fraud and corruption compliance program still reigns supreme. There is clear evidence that consumers do value buying a table from a company that has a fraud and corruption compliance program, and they value it almost three times as much as having more seating at their table. This, and the results we found with a privacy compliance program point to the importance of compliance programs even for products as mundane as dining tables.

We predicted that when purchasing a dining table, a program focused on environmental and health safety would likely be more salient and hence more important for consumers than a cell phone or a credit card. This turned out to be exactly what our results showed. Table 10 below shows the importance of an environment and health safety program to consumers when buying a dining table.

Table 10: The Importance of Each Dining Table Feature to a Consumer (Environmental/Safety Compliance Program)



As is clear by Table 10, an environmental-focused compliance program is valued a fair amount more than the other programs. While Tables 8 and 9 showed a clear distinction between the driving factors of decision-making and the lesser three factors, Table 10 shows results that do not cleanly support that distinction. That is, it seems that for a dining table, consumers care quite a bit about an environmental compliance program, nearing the numbers for the price feature.

This result is also consistent with scholarship that shows people are willing to pay a premium for products like dining tables that are made with environmentally sustainable practices.¹⁹² While our results focus more on a company attribute—whether the company has a strong compliance program—rather than the product attribute, we view our results as being supported by scholarship focused on product-oriented environmental preferences.

To highlight this last point, we present the willingness to pay estimates for each of the compliance programs below for our dining table study.

192. See, e.g., Ramon Casadesus-Masanell, Michael Crooke, Forest Reinhardt & Vishal Vasishth, *Households' Willingness to Pay for "Green" Goods: Evidence from Patagonia's Introduction of Organic Cotton Sportswear*, 18 J. ECON. & MGMT. STRATEGY 203, 227–28 (2009) (showing that consumers are willing to pay for organic garments even though they do not perform better than alternatives); Paul J. Ferraro, Toshihiro Uchida & Jon M. Conrad, *Price Premiums for Eco-Friendly Commodities: Are 'Green' Markets the Best Way to Protect Endangered Ecosystems?*, 32 ENV'T & RES. ECON. 419, 424–25 (2005).

Table 11: Willingness to Pay of Compliance Programs for Dining Table

DINING TABLE STUDY	
Compliance Program	Willingness to Pay
Environmental and Health Safety	\$362.70
Privacy and Cybersecurity	\$244.30
Fraud & Corruption	\$194.10

While we do not place too much importance on the willingness to pay dollar estimates, as described above,¹⁹³ we do note that unlike in the cell phone context, an environmental compliance program seems to be important for companies to advertise and market when producing things like dining tables. This reinforces our argument that not only are compliance programs revenue enhancing, but also certain programs seem to interact with particular product categories more intuitively—hence, creating unique value opportunities for companies.

3. Credit Card Study

Our third product was credit cards. Here, we wanted to choose a product that involved financial services. We viewed this as distinct from both a technology product (cell phone) and a traditional consumer product (dining table). Financial services products have been studied and analyzed with conjoint analysis previously¹⁹⁴; as such, we anticipated this would be a good product to study compliance value through CBC. We suspected that consumers would respond more positively to the privacy or corruption compliance programs in comparison to the environmental and health safety programs. This is simply because the nature of the product would not seem to immediately create a desire for environmental sustainability or worker safety in consumer minds, but rather likely creates a desire for data privacy or antifraud protections.¹⁹⁵

193. See *supra* notes 184–85 and accompanying text.

194. See generally F. Christian Zinkhan & George M. Zinkhan, *Using Conjoint Analysis to Design Financial Services*, INT'L J. BANK MKTG., Jan. 1, 1990, at 31; Ali Kara, Erdener Kaynak & Orsay Kucukemiroglu, *Credit Card Development Strategies for the Youth Market: The Use of Conjoint Analysis*, INT'L J. BANK MKTG., Sept. 1, 1994, at 30.

195. Ample work shows that consumers are worried about privacy and identity theft in financial service-oriented products. See, e.g., Jay Stanley, *Why Don't We Have More Privacy When We Use a Credit Card?*, ACLU (Aug. 13, 2019), <https://www.aclu.org/blog/privacy-technology/consumer-privacy/why-dont-we-have-more-privacy-when-we-use-credit-card> [https://perma.cc/55PN-JBF4]; Burt Helm, *Credit Card Companies Are Tracking Shoppers Like Never Before: Inside the Next Phase of Surveillance Capitalism*, FAST CO. (May 12, 2020), <https://www.fastcompany.com/90490923/credit-card-companies-are-tracking-shoppers-like-never-before-inside-the-next-phase-of-surveillance-capitalism> (on file with the *Iowa Law Review*).

We chose three to four levels of each feature for the credit cards.¹⁹⁶ While the previous two studies used an explicit price for the products, credit cards do not easily fit that paradigm. Hence, in line with previous scholarship, we used credit card annual fees as a stand in for price.¹⁹⁷ This allowed us to still have a type of price feature with which we could calculate a price premium for each of the compliance programs tested. As before, for each compliance program we simply chose two levels (either the program was present or was not present).

Table 12 reproduces the features and levels we studied. Figure 3 provides a snapshot of the choice task that we asked consumers to partake in.

Table 12: Credit Card Features and Levels

Feature	Levels
Annual Fee	\$30, \$100, \$200
Card Design	Simple, Patterned, Unique Color
Interest Rate ¹⁹⁸	Below Industry Rate, Industry Rate, Above Industry Rate
Points on Purchases ¹⁹⁹	1x points, 2x points, 3x points, 4x points

196. To determine these features, we looked to websites which rated various credit cards, like Forbes Advisor and The Points Guy. See Caroline Lupini & Becky Pokora, *Best Credit Cards of September 2023*, FORBES ADVISOR (Sept. 14, 2023, 2:26 PM), <https://www.forbes.com/advisor/credit-cards/best-credit-cards> [<https://perma.cc/73ZV-MYB6>]; Madison Blancaflor & Christina Ly, *Best Credit Cards of September 2023*, POINTS GUY (Sept. 6, 2023), <https://thepointsguy.com/credit-cards/best> [<https://perma.cc/5SFY-3ZVU>]. Both of these websites summarize cards using various features. The top features they summarize cards with include the annual fee, the points structure of the card, an image of what the card looks like, and the APR (in our study, this was simply the interest rate).

197. See, e.g., *Thirty Years of Conjoint Analysis*, *supra* note 143, at S57–59.

198. Rather than choose specific interest rates, we decided to simply let respondents know that the interest rate was lower, higher, or the same as the industry rate, which would be consistent with the next best competitor. We did this for two reasons: first, often interest rates of credit cards are floating and are pegged at some industry average; and second, based upon prior research, giving respondents too many numbered features in a choice set will likely confuse respondents and therefore decrease the reliability of our results.

199. Based upon review of various cards from The Points Guys website, we determined that points ranged from one point per purchase to four points per purchase, depending on the card, and hence chose that range for our study. See Blancaflor & Ly, *supra* note 196.

Figure 3: A Sample Choice Set for Credit Card Study

	Credit Card 1	Credit Card 2	Credit Card 3	None
Card Design	Patterned	Patterned	Simple	None of these options
Interest Rate	Below Industry Rate	Below Industry Rate	Above Industry Rate	
Points on Purchases	3 X points	3 X points	1 x points	
Privacy and Cybersecurity Program	YES Privacy and Cybersecurity Program	YES Privacy and Cybersecurity Program	YES Privacy and Cybersecurity Program	
Annual Fee	\$30.00	\$200.00	\$30.00	
	○	○	○	○

Our sample for this study was 573 consumers (note that these respondents each received only one compliance program to evaluate). The study proceeded in the same manner as the studies above. We present our results in Tables 13 through 15 below.

Table 13: The Importance of Each Credit Card Feature to a Consumer (Privacy Compliance Program)

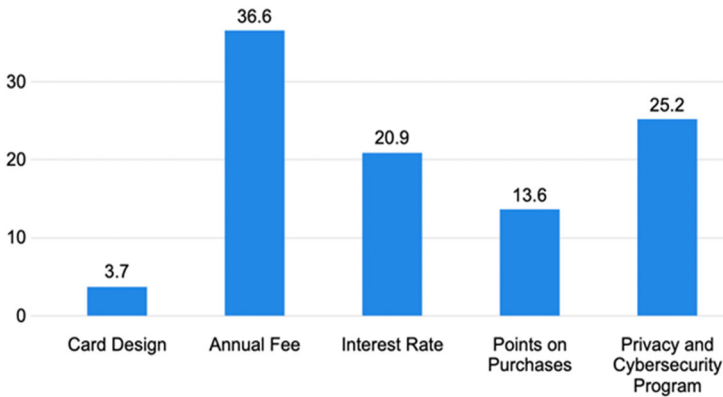


Table 13 above shows the importance of each feature to the consumers in our sample for credit cards. As is clear, the annual fee (price in our study) is the most important driver of value and purchasing decision for the consumer. This is not surprising and is consistent with our previous studies, in which the price of the dining table and cell phone were also large drivers of the purchasing decision. Interestingly though, right after annual fee, consumers cared most about a privacy compliance program. It was clear that consumers cared about this more than any other feature—features which are

commonly advertised by credit card companies.²⁰⁰ Given the nature of the product, consumers seemed to have responded positively to a privacy program.²⁰¹

Table 14: The Importance of Each Credit Card Feature to a Consumer (Corruption Compliance Program)

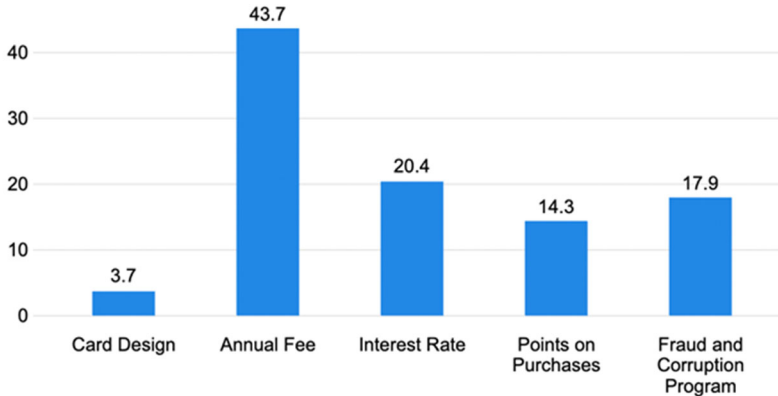


Table 14 above reflects the importance of a corruption compliance program to credit card purchasers. Once again, annual fee is the largest driver of decision-making. However, unlike the privacy program, we find that the corruption compliance program is of lesser importance, about as important as the interest rate a consumer will pay on the credit card.²⁰² Still, even though the corruption compliance program was not as important as a privacy program, we note that in our sample, consumers cared more about corruption than they did points, and significantly more than they did about credit card design.

200. See *supra* note 196 and accompanying text (discussing the most advertised credit card features).

201. Recently there have been many credit card data leaks and consumers have been targeted via their credit card purchases. See, e.g., Abi Tyas Tunggal, *The 72 Biggest Data Breaches of All Time*, UPGUARD (Aug. 3, 2023), <https://www.upguard.com/blog/biggest-data-breaches> [<https://perma.cc/KY8P-NN29>]. As such, it is quite understandable that consumers would care a lot about a credit card company that takes seriously a privacy compliance program.

202. We note that in our studies, qualitative data indicated that many users claimed that the interest rate was not that important to them as they paid off their credit card in full every month.

Table 15: The Importance of Each Credit Card Feature to a Consumer (Environmental/Safety Compliance Program)

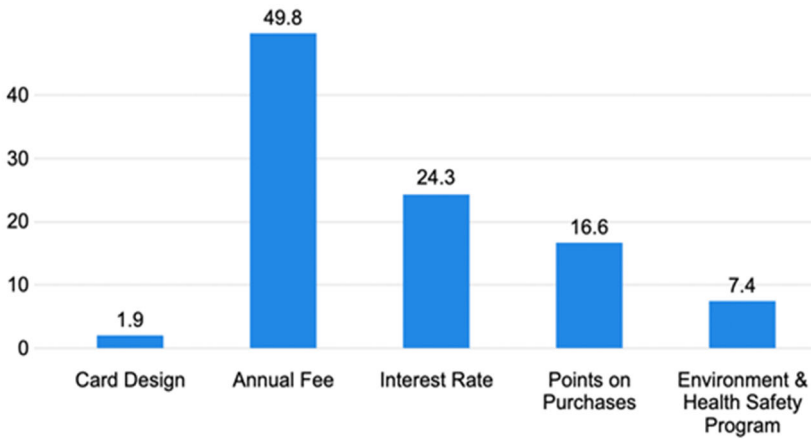


Table 15 presents the results of the importance of an environmental and health safety program for credit card purchasers. Consistent with our initial hypothesis, the environmental and health safety compliance program seems to be mostly unimportant to consumers in the context of a credit card. This is likely because financial products like a credit card do not tend to conjure up ideas of sustainability or worker safety—at least not as much as they do privacy and corruption. However, we note that even though this compliance program is valued less than both of the other programs tested, it is still valued more than credit card design. Credit card companies routinely tout their new designs and spend marketing and innovation dollars on creating such designs.²⁰³ Our study implies that these types of marketing and R&D efforts are better spent on creating and marketing any type of compliance program.

203. American Express has historically been known for spending large amounts of money touting new materials and designs in their cards. See, e.g., Alexandra Pastore, *Amex Brings Back Its Rose Gold Design, a Consumer Favorite*, WOMEN'S WEAR DAILY (Feb. 10, 2021, 10:36 AM), <https://www.wd.com/business-news/business-features/amex-rose-gold-design-1234727533> (on file with the *Iowa Law Review*); Jasmin Baron, *Amex Has Unveiled 2 New Platinum Card Designs, and They're Now Available to New and Existing Cardholders*, INSIDER (Jan. 20, 2022, 7:30 AM), <https://www.businessinsider.com/personal-finance/new-amex-platinum-card-design-art-2021-12> [<https://perma.cc/25EX-T3WX>].

Table 16: Willingness to Pay of Compliance Programs for Credit Card

CREDIT CARD STUDY	
Compliance Program	Willingness to Pay
Privacy and Cybersecurity	\$115.70
Fraud & Corruption	\$69.00
Environmental & Health Safety	\$22.50

Confirming our hypothesis, consumers in our sample showed lower price (annual fee) premiums for an environmental safety compliance program in comparison to both corruption and privacy programs.²⁰⁴ These willingness to pay figures are summarized in Table 16.

* * *

Overall, our findings show that consumers value corporate compliance programs when making purchasing decisions. Additionally, we argue that our results are impactful and reliable. When we analyze the results for each product, it is clear that the importance of traditional features does not change very much. That is, the relative importance of the features (or hierarchy of importance) does not change when we manipulate compliance programs. The only real changes we see are related to each of the three compliance programs. This supports the reliability of our studies because, independent of the compliance programs, different consumers in each sample seemed to value the remaining features in similar ways. Another way to understand this result is that adding various compliance programs to a decision task did not change how consumers viewed the remaining features—adding compliance does not skew results of other features, and hence our studies should be taken as reliable with respect to the relative importance of each of the features.

Below we summarize more succinctly our results and the significance they hold to both the internal decisions of managers when developing compliance programs and to the external decisions of regulators when they require companies to invest in these same programs.

IV. IMPLICATIONS, LIMITATIONS, AND THE FUTURE OF MEASURING COMPLIANCE VALUE

As described above, our results indicate that consumers are willing to pay more for products that come from companies that have clearly defined compliance programs. Thus, we have provided both a more robust conception

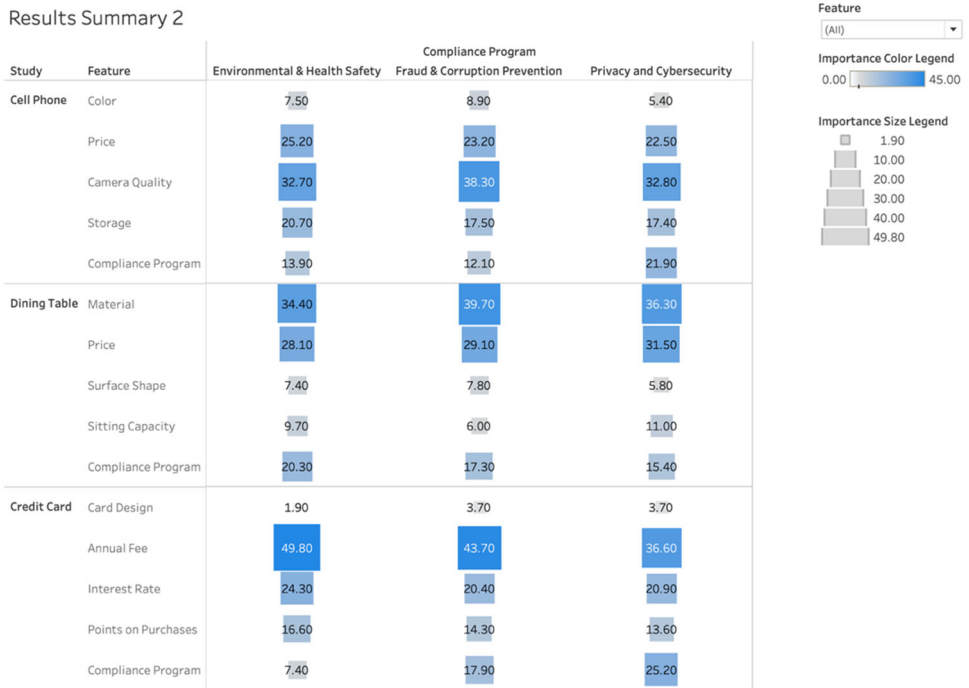
²⁰⁴. See *supra* note 184 and accompanying text (explaining why we do not place a large emphasis on the willingness to pay calculation).

of value focusing on revenue premiums that companies can achieve and a validated empirical strategy with which to measure those premiums. This Part seeks to elucidate our results, focusing on the limitations of our study and the implications our results hold for companies and compliance professionals, regulators, and compliance and corporate governance researchers.

A. OVERVIEW

To succinctly summarize our results, we present the following Table 17, which highlights the important takeaways of our various studies.

Table 17: Summary Results



This table shows the importance rankings of each of the features of the three products we tested. The larger the rectangle, the more important that feature is to a consumer when purchasing the respective product. There are two critical things to note in this table. First are the changes in importance of the various compliance programs as the products vary. For a credit card and a cell phone, a privacy compliance program is more important than programs focused on corruption and environmental safety. This relationship is reversed for the dining table, where environmental safety becomes the most valued compliance program. This means that compliance programs are not created equal—certain programs interact more fluidly with certain types of products.

Second is the global importance of compliance programs in comparison to other seemingly important and historically valued features. The color of a phone, the shape of a table, and the design of a credit card are all features that companies invest design and advertising dollars so they may tout them to consumers to drive purchasing decisions and gain market share. Our results show that these features are not as important to consumers as some compliance programs.

These results also show that empirically testing revenue-based value propositions of compliance programs is feasible and should be undertaken more readily by scholars and regulators alike. In addition, these compliance programs, which have been primarily thought to only provide savings through litigation risk mitigation or speculative gains from increased positive corporate culture, can provide revenue enhancing value to companies.

B. LIMITATIONS

Notwithstanding our results, we recognize that there are some limitations to our study, as with any choice-based conjoint. CBC has been criticized by scholars for its unreliability in generating accurate price premiums.²⁰⁵ Some have argued that the nature of the choice task can inflate the price calculated for lesser-important features.²⁰⁶ Recognizing this work, we place little emphasis on the actual willingness to pay dollar values calculated in our studies. We acknowledge that these dollar values could be inflated. However, previous work has validated the *relative* importance of included features in a CBC.²⁰⁷ As such, we do not focus on or particularly amplify the price premium numbers, but we do strongly believe that compliance programs are more important to consumers when making a purchase than some routinely touted features of phones, credit cards, and dining tables.

In addition, CBC only seeks to measure the demand side of a transaction, i.e., what consumers are willing to pay.²⁰⁸ Our results do not say anything about how the supply of products could influence the price premiums of the

205. See Bedi & Reibstein, *supra* note 143, at 403–05, 412–16.

206. For example, Bedi & Reibstein state:

There are three reasons that omitting major features biases the estimates of minor features upwards. First, the choice method itself forces respondents to make a choice amongst profiles. Often, the method creates a situation where the products presented to a consumer all match on major features. By this, we mean that the products have all the same major features. In those cases, the only difference among the products is the ostensibly minor feature or features. Therefore, the consumer is forced to make a choice wholly and solely based upon the minor feature, when in reality she would usually not base her decision solely on that feature.

Id. at 413 (footnote omitted).

207. *Id.* at 430 (“[W]e observe that the relative preferences of features can be validly estimated even [with conjoints].”).

208. See Greg M. Allenby, Jeff Brazell, John R. Howell & Peter E. Rossi, *Valuation of Patented Product Features*, 57 J.L. & ECON. 629, 649–52 (2014).

measured features. In any market transaction, an equilibrium occurs when demand equals supply, and this equilibrium then sets the price of a product. We do not model this equilibrium. Likewise, we do not calculate nor account for the cost associated with producing any of the products tested. We note that compliance programs are not cheap and sometimes have high costs associated with them.²⁰⁹ It is important for future work to take into consideration these costs and the supply side of the transaction in order to calculate an effective return on investment for compliance programs.²¹⁰ Our results simply stand for the proposition that compliance programs do drive price premiums in comparison to other features; we do not seek to measure the exact return those programs may yield.

Lastly, we recognize that CBC is still a scale methodology, and it cannot replicate an actual choice that consumers are making. While CBC is better than simply asking consumers what features of products they prefer,²¹¹ we note that the best method to measure price premiums would be to observe consumers making actual choices in a market setting.²¹² For various reasons, this would be infeasible for a study like this; therefore, the best alternative is CBC.²¹³ Its utility as a methodology has been demonstrated in the marketing literature and through its use by well-known, sophisticated companies.²¹⁴ We hope future work will seek to make our choice context as realistic as possible in order to more accurately and precisely measure price premiums of compliance programs.

209. For a discussion of the costs of compliance programs, see *supra* Part II.

210. Future work can begin to calculate equilibrium prices using the methodologies described in Allenby et al., *supra* note 208, at 647–52.

211. See, e.g., William L. Moore, *A Cross-Validity Comparison of Rating-Based and Choice-Based Conjoint Analysis Models*, 21 INT'L J. RSCH. MKTG. 299, 301, 310–11 (2004); Keith Chrzan & Bryan Orme, *An Overview and Comparison of Design Strategies for Choice-Based Conjoint Analysis* 1, 15 (Sawtooth Software, Rsch. Paper Series, 2000), <https://sawtoothsoftware.com/resources/technical-papers/an-overview-and-comparison-of-design-strategies-for-choice-based-conjoint-analysis> [<https://perma.cc/WR3H-E99S>].

212. See Bedi & Reibstein, *supra* note 143, at 397–98.

213. Bedi & Reibstein agree:

The ideal way to measure the values and tradeoffs of features is to run an experiment where several real products are introduced into a marketplace. Each product then is systematically manipulated in terms of the prices of the product and the features at issue in a patent or false advertising case. A researcher would then simply be able to observe which products sell and at what prices they sell for. This would give the researcher a precise estimate of the value of the features at issue. However, this is obviously costly and time consuming. Conjoint analysis is a survey methodology that attempts to simulate this ideal experiment with hypothetical products (and messages) shown to a sample of consumers.

Id. at 397.

214. For a survey of commercial uses of choice-based conjoint, see generally Wittink & Cattin, *supra* note 154.

In addition, we also note that CBC does not guide managers in how to best inform consumers about compliance programs generally or specific compliance program elements. Instead, CBC is simply a method that validates the hypothesis that consumers care about and value products coming from companies that have well-defined compliance programs. How best to incorporate this study into a comprehensive business strategy we leave to others (although we offer some implications below that may inform corporate strategy).

Finally, we note that our work only measures the value of compliance programs that have a clear set of elements. As described above, we did not attempt to measure the value of an “effective” program.²¹⁵ Future work should seek to determine how the value of compliance programs change when consumers are informed of effectiveness, i.e., how successful the program was in reducing wrongful employee behavior, which is the true measure of program effectiveness.²¹⁶ This is challenging of course because informing consumers of these details could be confusing and distracting from the purchasing decision. Yet, it is important to begin to measure how price premiums of compliance programs change when the information given to consumers about the programs changes.

C. IMPLICATIONS FOR THE COMPLIANCE COMMUNITY

1. Corporate and Managerial Implications

Our results have important implications for corporate managers who are deciding whether and how much to invest in compliance programs. We detail four of these implications below.

First, we note most simply that managers need to view compliance programs as a source of revenue. In addition to the cost saving nature of corporate compliance—the “savings through liability avoidance” view—it can also be a way to attract customers to a company and its products. This is consistent with various studies that have shown consumers care about companies that are doing good.²¹⁷ Managers should seek to invest more in compliance programs, not only based on normative goals, but because, as our studies suggest, they will be able to recoup this investment and then some. Put simply, there is clear economic value to compliance that companies can tap into.

215. See *supra* Section III.A.

216. Haugh, *supra* note 25, at 811.

217. See, e.g., Pat Auger, Paul Burke, Timothy M. Devinney & Jordan J. Louviere, *What Will Consumers Pay for Social Product Features?*, 42 J. BUS. ETHICS 281, 296 (2003) (employing analytical approach to estimate the values that different groups place on specific bundles of ethical product features); Patrick De Pelsmacker, Liesbeth Driesen & Glenn Rayp, *Do Consumers Care About Ethics? Willingness to Pay for Fair-Trade Coffee*, 39 J. CONSUMER AFFS. 363, 382 (2005); Elizabeth H. Creyer, *The Influence of Firm Behavior on Purchase Intention: Do Consumers Really Care About Business Ethics?*, 14 J. CONSUMER MKTG. 421, 428 (1997); Minseong Kim & Svetlana Stepchenkova, *Do Consumers Care About CSR Activities of Their Favorite Restaurant Brands? Evidence from Engagement on Social Networks*, 30 J. HOSP. MKTG. & MGMT. 305, 316 (2021).

Second, our studies show that all compliance programs are not created—or treated by consumers—equally. Managers need to think carefully about which programs to invest in depending on what is the nature of their industry and product mix. They should focus first on compliance programs that have some obvious connection to the products they produce. The stronger the relationship between the program and the characteristics of the products they sell, the more likely consumers will be willing to pay premiums for those products. This insight is critical as managers consider how to allocate resources in tight budgetary environments. It also likely compliments taking a risk-based approach to compliance because the manufacture and sales of a company's main products are also most likely its largest source of compliance risk.²¹⁸

Third, managers should begin to allocate funds toward the marketing of compliance programs. Marketing dollars are often spent on informing consumers about the characteristics of the products they are buying and how those characteristics are different and better than competitors' products. In addition, marketing dollars are spent to extoll company characteristics—how the company itself is better than competitors. These are not new practices. Scholars have found that marketing CSR endeavors and touting the ethical practices of a company can help build a company's brand and hence drive demand to the company's products.²¹⁹ We simply note that in addition to the existing efforts a company takes in highlighting these characteristics, marketing compliance is equally important. Based on our findings, that may include specific elements of a compliance program, how the program relates to individual products, and a company's commitment to compliance.

Fourth, however, managers should be cautious so as to not market compliance programs too aggressively. Many view compliance programs, particularly those centered around ethics and integrity, as something intrinsically more valuable than as a means to increase revenue for companies. Put another way, compliance programs have noninstrumental value that could be lessened by tying it too closely to the instrumental goal of increasing a

218. See Haugh, *supra* note 34, at 878 (advocating for a behavioral risk-based approach to compliance). This also may serve as an answer to regulators who want explanations as to why a company is focused on one compliance risk versus another. Linking products, consumers, and compliance would appear to be a compelling answer. For example, if consumers of financial products care most about privacy and cybersecurity, a bank would prioritize that as part of its compliance risk and devote resources accordingly—exactly what the DOJ guidance documents suggest. See CRIM. DIV., U.S. DEP'T OF JUST., *supra* note 65, at 2.

219. See, e.g., Bastian Mögele & Jörg Tropp, *The Emergence of CSR as an Advertising Topic: A Longitudinal Study of German CSR Advertisements*, 16 J. MKTG. COMM'NS 163, 178 (2010); María del Mar García-De los Salmones & Andrea Perez, *Effectiveness of CSR Advertising: The Role of Reputation, Consumer Attributions, and Emotions*, 25 CORP. SOC. RESP. & ENV'T MGMT. 194, 204 (2018); Sandra Diehl, Ralf Terlutter & Barbara Mueller, *Doing Good Matters to Consumers: The Effectiveness of Humane-Oriented CSR Appeals in Cross-Cultural Standardized Advertising Campaigns*, 35 INT'L J. ADVERT. 730, 745 (2016).

company's bottom line.²²⁰ Moreover, even if a compliance program is not immediately (or ever) revenue positive, that does not mean it should be abandoned or neglected by managers. Decreasing risk, aligning employee behavior with legal and ethical norms, and building positive culture is a critical aspect of any good business.²²¹ This is true even if the return on investment is small—in fact, some might argue this is a true case of good business ethics behavior.²²² As such, we are not arguing that the *only* or *most important* value of compliance is driving consumer price premiums. That is not our normative stance. Rather, we believe that managers should view and use our results as further evidence that compliance is important and should be taken seriously by companies.²²³

2. Regulator Implications

Our findings also have important implications for prosecutors and regulators who are evaluating and monitoring compliance programs. As a general matter, regulators can point to this study as confirmation that compliance pays, not just in terms of legal liability avoidance, which is their obvious focus, but as a return on investment. The DOJ has been arguing the “business case” for compliance for years to compliance officers and business managers, urging them to increase their companies’ focus on compliance. In fact, Deputy Attorney General Lisa Monaco just recently said as much when she announced new policies the Department would be adopting to combat corporate crime.²²⁴ However, these arguments ring hollow when there is little empirical support to back them up (and they are being made by an obviously

220. See, e.g., Paine, *supra* note 18, at 329 (recognizing tension between economics and ethics and suggesting that tying the latter to the former “devalues ethics as an independent point of reference on the quality of life”); Aneel Karnani, “*Doing Well by Doing Good*”: *The Grand Illusion*, CAL. MGMT. REV., Winter 2011, at 69–70.

221. Thomas Donaldson & Thomas W. Dunfee, *Toward a Unified Conception of Business Ethics: Integrative Social Contracts Theory*, 19 ACAD. MGMT. REV. 252, 260–62 (1994).

222. See Barnett, *supra* note 18, at 175; Thomas Donaldson, *Intrinsic Values and Human Rights: Corporate Duties Depend on Industry Values*, 7 BUS. & HUM. RTS. J. 189, 195 (2022).

223. Managers can actually face risk if they do not take seriously the intrinsic goals of compliance. Studies have shown that consumers will punish companies who are perceived as inauthentic in their CSR or ethics endeavors. Ike Silver, George Newman & Deborah A. Small, *Inauthenticity Aversion: Moral Reactance Toward Tainted Actors, Actions, and Objects*, 4 CONSUMER PSYCH. REV. 70, 71 (2021). Focusing solely on the revenue implications of compliance at the expense of taking the intrinsic goals of compliance seriously may make managers narrow-sighted and eventually cause reputational harm to their company. See, e.g., Ike Silver, Brooke A. Kelly & Deborah A. Small, *Selfless First Movers and Self-Interested Followers: Order of Entry Signals Purity of Motive in Pursuit of the Greater Good*, 31 J. CONSUMER PSYCH. 501, 515 (2021).

224. See also Luc Cohen, U.S. Justice Dept Announces ‘Carrots and Sticks’ Approach to Corporate Crime, REUTERS (2022), <https://www.reuters.com/legal/us-justice-department-crack-down-repeat-corporate-offenders-2022-09-15> [<https://perma.cc/6W9M-76XL?type=image>] (reporting that Monaco described the DOJ plan as one that would “let companies’ lawyers make a ‘business case’ for strong compliance”).

interested party, the government).²²⁵ With new evidence of compliance's value to consumers comes the ability to credibly argue that companies can and should invest in compliance—because it will not only lessen the risk of civil and criminal liability, but also enhance firm revenues.

In addition, our findings buttress one of the embedded ideas contained in the hallmarks of an effective compliance program, that compliance programs should take a risk-based approach. The Organizational Sentencing Guidelines specified early on that good compliance programs necessarily focus on where a company has significant risk.²²⁶ This was made clear again in the evaluation document provided to DOJ prosecutors.²²⁷ Risk assessments are key, as is demonstrating continuous improvement in mitigating known and emerging risk.²²⁸ Our study supports this approach because it indicates there is increased value in products that are linked to related compliance program elements, such as cell phones and privacy compliance. If a company can sell more phones or charge more for them by highlighting their compliance efforts that closely align with the product, it invites targeted compliance investment. As mentioned above, that most likely will result in companies focusing their compliance efforts on their largest product classes, which is an inherently risk-based approach. What it may also do is cause companies to cease chasing enforcement action announcements so much. While that may cut against regulators' current approach to fostering compliance, it is more consistent with the underlying approach to the Organizational Guidelines.

Finally, by giving companies a new way of considering and measuring compliance value through price premiums, our study opens up new avenues for companies, and therefore regulators, to benchmark programs. Because typical compliance benchmarking looks only at inputs such as compliance officer headcounts, dollars spent on compliance infrastructure, or hours of employee training, it ignores effectiveness and is entirely one-sided by focusing on costs. This leads to an arms race amongst firms so that no one looks like an outlier in the event of regulatory scrutiny. And this occurs largely irrespective of company size, revenues, or industry. But when companies are able to more accurately measure compliance value in terms of return on

225. Laufer, *supra* note 2, at 402.

226. U.S. SENT'G GUIDELINES MANUAL § 8B2.1 (a)–(b) (U.S. SENT'G COMM'N 2021); *see also* Jeffery M. Cross, *An Effective Compliance Program Under the Sentencing Guidelines and the Department of Justice Compliance Guidance*, in CORPORATE LEGAL COMPLIANCE HANDBOOK ch. 2, § 2.03[d] (Theodore L. Banks & Frederick Z. Banks eds., 3d ed. 2023) (“Compliance officers and management should identify legal risks and then design compliance programs to meet the most likely and serious risks.”).

227. *See* CRIM. DIV., U.S. DEP'T OF JUST., *supra* note 65, at 2. Risk-based approaches have expanded to include behavioral conduct risk, a welcome addition when considering corporate wrongdoing. *See* Haugh, *supra* note 34, at 878.

228. *See* CRIM DIV., U.S. DEP'T OF JUST., *supra* note 65, at 3, 15.

investment, regulators will be able to see who is more effectively and efficiently instituting programs. Our findings suggest that better targeted and marketed programs increase sales revenues. By reviewing CBC results for companies, especially over time, regulators can better understand within-firm compliance improvements and compliance across firms. While this is not a proxy for true effectiveness, it is a more nuanced data point for regulators to seek, review, and use in their assessment of programs.

3. Scholarly Implications

As we have argued here, compliance scholarship is lacking in terms of rigor and nuance when it speaks of value. While most research has focused on the cost savings of compliance, particularly related to avoiding legal liability and related harms, we highlight how compliance can be valued in terms of revenue generation for companies. Our work, as is any scholarship, is ongoing; hence, there is much room for further advancement by compliance scholars. We highlight three areas where scholarship can build upon our findings.

First, we note that our empirical study is just an initial step in understanding how and why consumers prefer to buy products from companies that engage in compliance. Future studies should seek to better understand this phenomenon, including what exactly consumers assume about compliance when they interact with it. We simply informed consumers that compliance programs existed at the respective companies in relation to a limited set of products. We did not measure what their impression of those compliance programs were. Future work can explore these impressions, and the preferences and expectations that may come from them, which will then allow managers to predict what is likely to happen if their programs fall short of consumer expectations.²²⁹

Second, as explained throughout this Article, we do not seek to measure the effectiveness of compliance programs. However, we think our studies can push forward endeavors to study effectiveness. In order to really understand how and whether a program is effective, scholars need to partner with companies and compliance professionals to study and experiment with

229. Indeed, this notion—the concern that companies would market compliance in a disingenuous manner to consumers as a type of compliance “greenwashing”—was raised by some compliance scholars. While this concern does not impact our study or its findings, it is a fair concern when considering implications. Our initial response is that while fraudulent or disingenuous claims are always a concern when considering any corporate communication, both the law and the market are well capable of addressing that concern. *See, e.g.*, Xingqiang Du, *How the Market Values Greenwashing? Evidence from China*, 128 J. BUS. ETHICS 547, 548 (2015) (finding significant negative market effects to firms that greenwash); Jacob Vos, *Actions Speak Louder than Words: Greenwashing in Corporate America*, 23 NOTRE DAME J.L., ETHICS & PUB. POL’Y 673, 674, 687–96 (2009) (identifying various ways to address the problem of greenwashing, “including implementable legal, legislative, and societal changes”). *But see* Miriam A. Cherry, *The Law and Economics of Corporate Social Responsibility and Greenwashing*, 14 U.C. DAVIS BUS. L.J. 281, 300–02 (2014). However, we hope compliance scholars will explore this concern in more depth in the future.

various types of programs. In the field A/B testing and comparisons across companies are critical to measuring the effectiveness of compliance. Before this can happen, of course, managers and companies must be amenable to embarking on these experiments. Our study provides the groundwork for convincing managers that experimenting with compliance programs and allowing researchers to better study them is a long-term beneficial strategy.²³⁰ As such, we hope that our results can create the environment for more compliance programs, more experimentation in compliance, and hence more studies on effectiveness.

Third, underlying our work is the notion that law and ethics is not simply an add-on to business strategy. While most legal and compliance scholarship views the law as distinct from management, marketing, sales, operations, or any other business unit, we have conceptualized compliance as part and parcel of business strategy.²³¹ That is to say, a compliance department can and should be treated as a valuable business unit, much like any other, and a compliance program should be treated as a valuable business component, like any other. Future work should build upon this concept by infusing the goals of business with the goals of compliance. This will only elevate the internal reputation of compliance within corporate governance, providing positive benefits for companies and larger society.

CONCLUSION

In this Article, we began with the assertion that corporate compliance value has been understood too narrowly, both conceptually and empirically. We argued that the compliance community has erred in viewing compliance value primarily through the lens of legal liability avoidance, a measure that is difficult to accurately assess and tends to collapse under scrutiny. While attempts have been made to expand the view of compliance value to include increased positive culture and resulting share price gains, that too has largely failed when moving beyond correlative effects. Together, this has limited the compliance research agenda, as well as the practical application of compliance insights by companies and regulators.

To remedy this, we sought to measure the value of compliance not in terms of cost savings, but in terms of revenue generation. Put simply, we set out to determine whether compliance programs can *make* companies money, as opposed to just *saving* companies money. Using choice-based conjoint analysis, a validated statistical survey methodology adopted from marketing

230. For an example of empirical compliance research conducted in partnership with companies, see generally Eugene Soltes, *The Frequency of Corporate Misconduct: Public Enforcement Versus Private Reality*, 26 J. FIN. CRIME 923 (2019).

231. See Bird & Park, *supra* note 77, at 283. But see Peter Robau, *Compliance After Crises: The Post-Covid Compliance Trilemma 2–3* (Mar. 12, 2021) (unpublished manuscript) (on file with authors) (discussing potential downsides of compliance's heightened role in business strategy).

literature, we measured how much more consumers were willing to pay for products that came from companies with robust compliance.

After giving choice tasks to over 1,600 participants, in which we measured purchasing preferences for three products (cell phones, dining tables, and credit cards) with distinct sets of features including three distinct compliance programs (privacy and cybersecurity, environmental and health and safety, and fraud and corruption), we found the following:

(1) Compliance matters to consumers. Consumers are willing to pay price premiums for products that come from companies with compliance programs. We describe this with the phrase, “*Consumers will pay more for compliance.*”

(2) Compliance matters more than many other features that companies invest money to develop and advertise. Across all product classes, a compliance program was valued more by consumers than at least one, and often two, traditional product features. We describe this as, “*Compliance is worth more than a pretty phone.*”

(3) Compliance programs are not created equal. Some programs appear to be linked more closely with a product than others, and therefore result in higher price premiums. This nexus between a compliance program and a given product is important for managers to recognize. We describe this with the phrase, “*Linking compliance programs and products is good business.*”

Taken together, these findings show for the first time in an empirically rigorous manner that compliance can offer revenue creation value and a clear return on investment for companies. Our study, therefore, expands the notion of compliance value, while also advancing the movement to make compliance an increasingly important part of business—a result that will positively impact the entire compliance community.