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**USING FORM TO COUNTER CORRUPTION:
THE PROMISE OF THE PUBLIC BENEFIT CORPORATION**

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Using Form to Counter Corruption: The Promise of the Public Benefit Corporation

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TABLE OF CONTENTS

INTRODUCTION	623
I. TAKING CORRUPTION SERIOUSLY.....	626
II. COMPLIANCE	631
III. COMPLIANCE AND FORM	634
A. <i>The Public Benefit Corporation</i>	636
B. <i>PBCs and Anti-Corruption Compliance</i>	641
1. Primacy of Mission.....	641
2. Signaling.....	643
CONCLUSION.....	646

You've got to learn your instrument. Then, you practice, practice, practice. And then, when you finally get up there on the bandstand, forget all that and just wail.

Charlie Parker¹

INTRODUCTION

Imagine an entrepreneur who plans to launch a clean-energy startup in California. Though based in the United States, she believes her company's services will fill an important market gap in places like

* Copyright © 2015 Joseph W. Yockey. Professor and Michael and Brenda Sandler Fellow in Corporate Law, University of Iowa College of Law. I'm grateful to the editors of the *UC Davis Law Review* for inviting me to participate in this symposium; my fellow panelists and moderators for their helpful comments; and Xiao Xiao and Jay Stirling for their excellent research assistance.

¹ *Charlie Parker*, JAZZ QUOTES, <http://jazz-quotes.com/artist/charlie-parker/> (last visited Aug. 31, 2015).

Africa, Asia, and Eastern Europe. One factor that these emerging markets have in common, though, and which might pose a problem for our protagonist, is endemic corruption. All the regions she is considering receive poor marks for the amount of perceived corruption within their borders. Indeed, more than two-thirds of the 177 countries in Transparency International's most recent survey score below 50 on a 100-point scale, indicating high perceptions of corruption.² The sad reality for any entrepreneur pursuing opportunities in the developing world is that she can expect a plethora of bribe requests and corrupt demands.³

Many startups and young businesses are ill-prepared to face these situations and the corresponding risk of scrutiny under anti-corruption laws like the U.S. Foreign Corrupt Practices Act ("FCPA").⁴ Founders and managers are pulled in a thousand different directions. They must select an organizational form, develop a business plan, secure financing, and hire an initial team.⁵ They also need to weigh marketing strategies, intellectual property rights, and tax implications.⁶ Developing an internal anti-corruption compliance program is usually much farther down the to-do list. Amid the flurry of excitement surrounding a new business, the bureaucratic baggage of compliance is often seen as a distraction, only to be revisited if and when the company matures.⁷ Entrepreneurs prefer to "move fast and break things."⁸ The aura they seek is one of innovation, efficiency, and

² TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX 2014 (2014), available at <http://www.transparency.org/whatwedo/publication/cpi2014>.

³ Corruption eludes easy definition, but it generally involves a government official who exploits her authoritative discretion for personal gain. See generally Patrick Radden Keefe, *Corruption and Revolt*, NEW YORKER, Jan. 19, 2015, available at <http://www.newyorker.com/magazine/2015/01/19/corruption-revolt> (surveying the corruption landscape in different countries). It covers activities including bribery, nepotism, bid-rigging, extortion, embezzlement, and protection rackets. *Id.*

⁴ See Lawrence J. Trautman, Anthony J. Luppino & Malika Simmons, Some Key Things U.S. Entrepreneurs Need to Know about the Law and Lawyers 68-69 (Sept. 24, 2015) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2606808.

⁵ See generally *id.* at 49-50, 67-68 (discussing steps entrepreneurs must take in starting a business).

⁶ See generally *id.* at 15-18, 20-24, 36-38 (describing the issues that a business entity must consider).

⁷ Claire Cain Miller, *Yes, Silicon Valley, Sometimes You Need More Bureaucracy*, N.Y. TIMES (Apr. 30, 2014) [hereinafter *Silicon Valley*], <http://www.nytimes.com/2014/05/01/upshot/yes-silicon-valley-there-is-such-a-thing-as-not-enough-bureaucracy.html>.

⁸ *Id.*

quick-thinking — not necessarily one driven by law, order, and employee handbooks.⁹

Yet building a framework for compliance at inception is vital for improving the long-term prospects of any enterprise.¹⁰ Doing so makes it easier to attract investors, prevents costly regulatory mishaps, boosts employee retention, heads off reputational damage, and simplifies the path to an eventual IPO or buy-out.¹¹ In this essay, I use the issue of corruption to illustrate how founders and entrepreneurs can simplify the road to compliance through one of their very first decisions: choice of form.

Many observers argue that much of the blame for corruption should be placed on legal form — that traditional corporate norms and their emphasis on maximizing shareholder wealth explain why corrupt practices are so prevalent.¹² This essay shifts that argument to examine whether there are characteristics among corporate forms that can boost the efficacy of internal compliance strategies. In doing so, my primary recommendation is for founders to focus greater attention on an emerging new corporate association — the public benefit corporation — as a promising step toward blueprinting sustainable anti-corruption compliance.¹³ The beauty of the benefit corporation form is that it directs managers and agents to filter their activities through a distinctly social purpose and a set of values inapposite to corrupt practices. This dynamic offers a new route for entrepreneurs hoping to establish a company culture capable of confronting corruption without feeling as though they are detracting from speed, invention, or other core business priorities. Even companies that opt

⁹ See Alan G. Robinson & Dean M. Schroeder, *Keep Innovation Flowing as Your Startup Grows*, ENTREPRENEUR (Mar. 17, 2014), <http://www.entrepreneur.com/article/232233>.

¹⁰ See generally James N. Baron & Michael T. Hannan, *Organizational Blueprints for Success in High-Tech Start-Ups*, 44 CAL. MGMT. REV. 8 (2002) (describing the impact of early choices on companies' development); Miller, *Silicon Valley*, *supra* note 7 (describing the possible negative effects of changing personnel practices later in the company's life).

¹¹ D. Daniel Sokol, *Teaching Compliance 4-7* (June 10, 2015) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616884; Jonathan Rogers, *Putting Compliance at the Heart of Fintech Startups*, TECHWORLD (Dec. 9, 2014), <http://www.techworld.com/blog/industry-insight/putting-compliance-at-heart-of-fintech-startups-3589097/>.

¹² Janine S. Hiller, *The Benefit Corporation and Corporate Social Responsibility*, 118 J. BUS. ETHICS 287, 287 (2013).

¹³ As described in greater detail in Part III.A below, my specific focus is on the Delaware public benefit corporation as authorized by DEL. CODE ANN. tit. 8, § 362 (2015).

against organizing as benefit corporations stand to gain from the compliance lessons that the form provides.

I. TAKING CORRUPTION SERIOUSLY

The World Bank identifies corruption as the most significant obstacle to economic progress in emerging economies.¹⁴ Over \$1 trillion in bribes are paid to public officials each year, adding ten percent to business costs across the globe.¹⁵ Corruption limits competition, hinders democracy, undermines public trust, reduces the quality of infrastructure, increases poverty, and chips away at the rule of law. It also leads to higher levels of pollution and less spending on education.¹⁶ Like an “odorless gas,” it touches everything from terrorism to the FIFA World Cup.¹⁷

Global efforts to address these harms began with the enactment of the FCPA in 1977.¹⁸ During a perfect storm of corporate wrongdoing in the 1970s, the Watergate investigation revealed that hundreds of American firms were using offshore slush funds to pay bribes throughout the world.¹⁹ Congress responded by passing the FCPA in an effort to repair foreign relations and restore confidence in the

¹⁴ Press Release, The World Bank, Corruption Is “Public Enemy Number One” in Developing Countries, Says World Bank Group President Kim (Dec. 19, 2013), available at <http://www.worldbank.org/en/news/press-release/2013/12/19/corruption-developing-countries-world-bank-group-president-kim>. My focus is on a particular form of corruption, bribery, and in particular bribes paid by firms to “facilitate legal transactions (e.g. to accelerate the purchase of legitimate government licenses), to avoid potentially costly government regulations (e.g. to evade pollution regulations), or to secure lucrative government contracts.” Paul Healy & George Serafeim, *Causes and Consequences of Firm Disclosures of Anticorruption Efforts* 2 n.1 (Harvard Bus. Sch., Working Paper No. 12-077, 2012), available at <http://mba.americaeconomia.com/sites/mba.americaeconomia.com/files/corruption.pdf>.

¹⁵ Keefe, *supra* note 3; David Cameron, *Corruption Is the Cancer at the Heart of So Many of the Problems We Face Around the World*, HUFFINGTON POST (June 6, 2015), http://www.huffingtonpost.co.uk/david-cameron/david-cameron-fifa-corruption_b_7524550.html; *Who We Are*, TRANSPARENCY INT’L-USA, <http://www.transparency-usa.org/who/mission.html> (last visited June 29, 2015).

¹⁶ ORG. FOR ECON. COOPERATION & DEV. (OECD), ISSUES PAPER ON CORRUPTION AND ECONOMIC GROWTH 23 (2013), available at <http://www.oecd.org/g20/topics/anti-corruption/Issue-Paper-Corruption-and-Economic-Growth.pdf>.

¹⁷ Keefe, *supra* note 3 (quoting SARAH CHAYES, THIEVES OF STATE: WHY CORRUPTION THREATENS GLOBAL SECURITY 184 (2014)); see also Cameron, *supra* note 15.

¹⁸ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd (2012)).

¹⁹ See Joseph W. Yockey, *Solicitation, Extortion, and the FCPA*, 87 NOTRE DAME L. REV. 781, 785-86 (2011) [hereinafter *Solicitation*].

honesty of the United States' free-market economy.²⁰ The statute makes it unlawful to corruptly offer anything of value to foreign officials for the purpose of getting business.²¹ It also requires companies with securities listed in the United States to institute various internal controls and maintain accurate books and records.²²

Though other nations feature similar anti-corruption laws, the United States has been responsible for nearly seventy-five percent of all international bribery enforcement actions since 1977.²³ Most of these cases arose during the past decade amidst a surge in enforcement activity. The number of firms prosecuted under the FCPA averaged two per year from 1998–2006; since then, that number has risen to thirteen.²⁴ Some high-profile results during this period include the \$800 million in sanctions paid by Siemens AG in 2008; the \$579 million paid by KBR/Halliburton in 2009; the \$398 million paid by Total S.A.; and the \$185 million paid by Daimler AG in 2010.²⁵ Also making headlines were allegations in 2012 that Wal-Mart paid over \$24 million in bribes to Mexican officials to fuel the company's

²⁰ *See id.*

²¹ 15 U.S.C. §§ 78dd-1 to -3 (2012). The FCPA's anti-bribery provisions apply to "issuers," "domestic concerns," agents acting on behalf of issuers and domestic concerns, and any foreign person who acts in furtherance of an FCPA violation while in U.S. territory. *Id.*

²² *Id.* § 78m (2012). As part of the statute's accounting rules, issuers must maintain reasonable internal controls to prevent and detect potential FCPA violations, and they must further "accurately and fairly" record every transaction and disposition of assets. *Id.* These rules are meant to supplement the statute's anti-bribery framework, but, in practice, are often used by prosecutors when they lack the evidence to prove actual bribery or are looking to gain leverage during settlement discussions. Firms face criminal fines up to \$2 million per violation of the FCPA's anti-bribery provisions, which applies to each illegal payment, or twice the gross pecuniary gain or loss resulting from the offense, whichever is greater. *See id.* §§ 78dd-2(g), 78dd-3(e), 78ff(a) (2012); 18 U.S.C. § 3571(d) (2012). Individual violators face up to five years in prison, fines up to \$100,000 or twice the gross pecuniary gain or loss, whichever is greater, or both a fine and imprisonment. *See* 15 U.S.C. §§ 78dd-2(g), 78dd-3(e), 78ff(c); 18 U.S.C. § 3571(d). Violations of the accounting or internal control provisions carry the possibility of criminal fines up to \$25 million for firms and up to \$5 million for individuals. *See* 15 U.S.C. § 78ff(a). Individual violators further face the possibility of imprisonment for a maximum of twenty years. *See id.* As with the anti-bribery provisions, the maximum fine for either firms or individuals may be raised to twice the gross gains or losses from the offense. *See* 18 U.S.C. 3571(d).

²³ Healy & Serafeim, *supra* note 14, at 12 n.9.

²⁴ Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and Enforcement of the Foreign Corrupt Practices Act*, 11 J. EMPIRICAL LEGAL STUD. 409, 412-13 (2014) (noting that few FCPA matters proceed to trial, with nearly all ending in settlement).

²⁵ GIBSON DUNN, 2014 YEAR-END FCPA UPDATE 4 (2015), <http://www.gibsondunn.com/publications/Documents/2014-Year-End-FCPA-Update.pdf>.

unprecedented growth in the region — allegations that continue to have repercussions on the company.²⁶

Every indicator suggests that FCPA enforcement will remain a priority for the foreseeable future. Department of Justice (“DOJ”) officials say they have “no greater mission than to work toward eradicating corruption across the globe.”²⁷ They continue to diversify detection tactics in FCPA investigations, and prosecutors are expanding the range of charges they bring to include offenses like wire fraud and money laundering.²⁸ The former head of the DOJ’s FCPA unit said last year that his office had more personnel than ever before.²⁹ The \$1.6 billion in corporate FCPA penalties paid in 2014 was more than double the previous year’s total and the second-highest total in the past seven years.³⁰

These developments add up to make FCPA compliance one of the most significant issues facing transnational businesses today. It also poses several unique practical challenges. For one, amidst a growing morass of foreign licensing and permitting requirements, firms of all sizes are increasingly dependent on help from third-party agents and suppliers to navigate the subtle nuances of local markets.³¹ These

²⁶ David Barstow, *Vast Mexico Bribery Case Hushed Up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES (Apr. 21, 2012), <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html?pagewanted=all>; David Barstow & Alejandra Xanic von Bertrab, *The Bribery Aisle: How Wal-Mart Got Its Way in Mexico*, N.Y. TIMES (Dec. 17, 2012), <http://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html>; see also Elizabeth A. Harris, *After Bribery Scandal, High-Level Departures at Walmart*, N.Y. TIMES (June 4, 2014), <http://www.nytimes.com/2014/06/05/business/after-walmart-bribery-scandals-a-pattern-of-quiet-departures.html>.

²⁷ Lanny A. Breuer, Assistant Att’y Gen., U.S. Dep’t of Justice, Remarks at the 26th National Conference on the Foreign Corrupt Practices Act (Nov. 8, 2011), (transcript available at <http://www.justice.gov/criminal/pr/speeches/2011/crm-speech-111108.html>).

²⁸ See SHEARMAN & STERLING LLP, FCPA DIGEST at v, xii (2014), http://www.shearman.com/~media/Files/Services/FCPA/2014/January_2014_FCPA_DigestFCPA010614.pdf.

²⁹ See Zachary J. Harmon & Grant W. Nichols, *Understanding the Government’s Stated FCPA Priorities for 2014*, METRO. CORP. COUNSEL (Apr. 29, 2014), <http://www.metrocorpocounsel.com/articles/28697/understanding-government%E2%80%99s-stated-fcpa-priorities-2014>.

³⁰ Sidley Austin LLP, *In the Interim*, ANTI-CORRUPTION Q., 1st Quarter 2015, at 2, available at <http://www.sidley.com/~media/update-pdfs/2015/05/anticorruption-quarterly-1st-quarter-2015.pdf>.

³¹ See Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT’L L.J. 419, 431-34 (2015); see also Keefe, *supra* note 3 (“The predicament is familiar: the foreign interloper [in a new market] . . . arrives ignorant of the local languages and customs, and needs [a third party agent] who can serve as interpreter and guide. The foreigner often pays (or overpays) for this arrangement, with money or some other

parties provide critical services, but they often work in places where bribery is seen as an expected cost of doing business.³² Several recent tragedies, including the collapse of a garment factory building in Bangladesh, underscore the risks of outsourcing in markets with widespread corruption.³³ Add to this the fact that foreign agents frequently operate in multiple opaque tiers and the situation becomes “one of the most complex compliance projects we’ve ever seen.”³⁴ This is of particular concern in the FCPA context because of the statute’s provision for vicarious liability.³⁵ FCPA liability may accrue when a company is aware of a high probability that a third party will engage in misconduct, even if the company does not possess actual knowledge of the offense.³⁶

A related complication stems from the descriptive ambiguity that corruption presents. Foreign officials rarely ask firms to hand over the proverbial suitcase full of cash. Rather, they often insinuate what bribes will accomplish without getting into specifics, or they make it apparent that nothing happens in the local economy without bribes.³⁷ Employees and agents facing these situations frequently struggle with the context-specific nature of corruption as they try to draw lines between legal and illegal actions.³⁸

Disparate cultural norms and the varying responses that jurisdictions take to so-called “grease” payments are especially vexing. As an example of the former, countries view gift-giving along a spectrum, with lavish wining-and-dining seen as a perfectly acceptable business tactic in some places and fundamentally illicit in others.³⁹ With respect to the latter, the FCPA is unique in that it provides an exception from liability for side payments that expedite the

inducement, and thus a codependence between proxy and patron is born.”).

³² Yockey, *Solicitation*, *supra* note 19, at 792.

³³ See Sarfaty, *supra* note 31, at 419.

³⁴ *Id.* at 458 (quoting partner and leader of sustainability services at Ernst & Young). “Global supply chains frequently include multiple layers of suppliers, which may be difficult to trace and therefore regulate. Since companies often rely on first-tier suppliers to identify and audit those in the second-tier, who in turn identify and audit the next tier and so on, comprehensive monitoring by the company may not be possible. Usually, companies can locate first-tier suppliers, but those suppliers in the lower tiers are not so visible.” *Id.* at 431.

³⁵ See 15 U.S.C. § 78dd-1(a)(3) (2012).

³⁶ See *id.* § 78dd-1(f)(2)(B).

³⁷ Yockey, *Solicitation*, *supra* note 19, at 807.

³⁸ See Lindsey D. Carson, *Deterring Corruption: Beyond Rational Choice Theory* 23-24 (Nov. 6, 2014) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2520280.

³⁹ See *id.* at 22-23.

performance of a “routine governmental action.”⁴⁰ The United Kingdom, by contrast, expressly prohibits all bribes to foreign officials irrespective of size or purpose. A modest payment off the books to secure a shipment might clearly violate U.K. law while an agent thinking only of U.S. law might not be so sure.⁴¹ Such variations suggest that defining corruption for the purposes of calculating liability is not always intuitive or constant. In 2012, the DOJ went so far as to issue 130 pages of regulatory guidance on the FCPA’s scope, but critics still argue that this effort falls short given the complexity of the subject.⁴²

A final consideration is the way in which bribery can infect multiple aspects of organizational activity beyond just the risk of liability for a particular payment. For instance, employees and agents who make side payments — regardless of their technical legality or illegality — frequently attempt to shield their behavior by altering company books and records.⁴³ Not only does this hinder overall transparency and accuracy, but it also opens the door for wider legal exposure due to the misreporting of financial information. A similar concern is employee morale. Employees who succumb to pressures to pay bribes may trigger a decrease in firm confidence, expose other employees to bribery demands or extortion threats, and generally destabilize internal attitudes toward the benefits of compliance.⁴⁴ Worse still, incidents of bribery may reduce product quality, pose safety threats to employees and customers, encourage employee theft, and scare away human capital.⁴⁵ These effects strongly correlate to firm size, becoming more severe as firm size decreases.⁴⁶

⁴⁰ *Id.* at 23.

⁴¹ *Id.*

⁴² See, e.g., GRANT THORNTON LLP, NEW FCPA GUIDELINES STILL UNCLEAR TO MANY EXECUTIVES 1 (2013), available at <http://www.granthornton.com/~media/content-page-files/advisory/pdfs/2013/FIDS-2013-FCPA-Guidelines.ashx>; Bruce Carton, *U.S. Chamber of Commerce Pushes for Further FCPA Clarity and Reforms*, COMPLIANCE WK. (Feb. 20, 2013), <http://www.complianceweek.com/blogs/enforcement-action/us-chamber-of-commerce-pushes-for-further-fcpa-clarity-and-reforms#.VbMrcvmpdnk>; Peter J. Henning, *In Bribery Law, the Watchword Is Uncertainty*, DEALBOOK, N.Y. TIMES (Nov. 15, 2012, 1:29 PM), <http://dealbook.nytimes.com/2012/11/15/in-bribery-law-the-watchword-is-uncertainty/>; Samuel Rubinfeld, Joe Palazzolo & C.M. Matthews, *The Guidance: The FCPA Bar Reacts*, CORRUPTION CURRENTS, WALL ST. J. (Nov. 14, 2012), <http://blogs.wsj.com/corruption-currents/2012/11/14/the-guidance-the-fcpa-bar-reacts/>.

⁴³ See Barstow & Xanic von Bertrab, *supra* note 26.

⁴⁴ See Healy & Serafeim, *supra* note 14, at 3; see generally Keefe, *supra* note 3 (describing the culture of corruption in different countries).

⁴⁵ Healy & Serafeim, *supra* note 14, at 18.

⁴⁶ See *id.* at 14.

II. COMPLIANCE

Firms that take the threat and consequences of corruption seriously, as all firms hoping to do business abroad should, can turn to a range of compliance strategies for support.⁴⁷ The goal of each strategy is to develop an anti-corruption compliance program capable of preventing violations of applicable laws, rules, policies, and ethical norms.⁴⁸ At the firm level, compliance minimizes the risk of financial penalties, private suits, and reputational damage.⁴⁹ For individuals, compliance represents a path to avoiding fines, incarceration, termination, or professional debarment.⁵⁰

Most compliance programs revolve around systems of internal controls that center on risk assessment, monitoring, reporting, and auditing.⁵¹ Usually the idea is to scare agents into obedience. This approach draws on classic economic theory and assumes that people make decisions about whether to comply in light of their rational

⁴⁷ As a general matter, and as Sokol notes, the term “compliance” captures a range of different issues:

For some, compliance relates to board level issues. For others, it relates to directors, senior managers, mid-level managers or employees. Compliance risk may be a function of issues that any company faces (e.g., Sarbanes Oxley, Dodd-Frank, antitrust, FCPA, data privacy, insider trading, auditing, and tax) or sector specific issues (e.g., financial services, health care).

Sokol, *supra* note 11, at 3 (internal citations omitted).

⁴⁸ Geoffrey P. Miller, *The Compliance Function: An Overview 1* (Nov. 18, 2014) [hereinafter *Compliance Function*] (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2527621.

⁴⁹ See Sokol, *supra* note 11, at 4-5.

⁵⁰ *Id.* at 6.

⁵¹ Consider, for example, the following measures that a leading law firm recommends for companies worried about FCPA exposure from foreign third-party agents: (a) Perform a comprehensive risk assessment of firm operations and third-party activities; (b) Formalize due diligence procedures in a written policy; (c) Determine which third party agents interact with government officials; (d) Include contractual clauses and certifications to formalize a third party’s commitment to compliance; (e) Employ internal or external mechanisms to oversee the third party’s adherence to its commitment, perhaps training third-party agents on compliance policy; (f) Use internal or external auditors to verify all payments to third parties and the payments made by third parties; (g) Document all interactions with third parties; and (h) Encourage upper level managers to set an appropriate “tone at the top” regarding the importance of compliance. See Keith Korenchuk, Marcus Asner & Samuel Witten, *Anti-Corruption Compliance: Mitigating Risks of Third Party Misconduct*, 45 SEC. REG. & L. REP. 1839 (2013), available at <http://www.bna.com/anti-corruption-compliance-mitigating-risks-of-third-party-misconduct/>.

economic self-interest.⁵² If detection risks are low or the potential personal gain from disobedience is high, then the rational-actor model suggests that we should expect agents to commit a wrong.⁵³ By contrast, if the likelihood of detection is high or the severity of sanctions is great, then compliance ought to be more likely.⁵⁴ The vast majority of the compliance tools in use today reflect this mentality, including corporate boards, supervisory personnel, audits, electronic monitoring, penalty guidelines, and whistleblower hotlines. These are the same structures that federal authorities identify as hallmarks of a strong compliance program when recommending how to avoid FCPA scrutiny.⁵⁵ They are meant to deter, detect, and punish wrongdoing, in that order.

Over time, the popularity and intuitive appeal of rational choice theory has given way to a few concerns about its efficiency. For one, programs that rely on it must counter the practical problems inherent in any system that relies primarily on monitoring.⁵⁶ These include high operating costs, the need for constant surveillance, the danger of making agents too cautious or unduly timid, and the creation of an atmosphere of distrust.⁵⁷ Corruption adds the complicating factor that bribery takes place in secret, often with the help of robust institutions that spring up to disguise off-the-books transactions.⁵⁸ Foreign agents are particularly difficult to monitor given the distance that separates them and the frequent use of disguised fees to cover their tracks.⁵⁹

Another worry is the rational-actor model's dependence on setting clear boundaries up front so that agents know what behavior is acceptable and what is not. If agents are confused or ignorant about relevant legal or environmental factors, then they will be unable to

⁵² See Jonathan Jackson et al., *Compliance and Legal Authority*, in INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 456, 456 (2d ed. 2015); Christopher Hodges, *Corporate Behaviour: Enforcement, Support or Ethical Culture?* 24 (Apr. 28, 2015) (unpublished manuscript), available at <http://ssrn.com/abstract=2599961>. See generally Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176, 190-93 (1968) (using economic theory and equations to calculate a potential offender's propensity to commit crimes).

⁵³ See Jackson et al., *supra* note 52, at 456; Becker, *supra* note 52, at 190-93.

⁵⁴ See Jackson et al., *supra* note 52, at 456; Becker, *supra* note 52, at 190-93.

⁵⁵ See Miller, *Compliance Function*, *supra* note 48, at 5-19.

⁵⁶ See Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325, 356-58 (2013) [hereinafter *Choosing Governance*].

⁵⁷ See *id.*

⁵⁸ See Keefe, *supra* note 3; Carson, *supra* note 38, at 6-8.

⁵⁹ See Sarfaty, *supra* note 31, at 433; Yockey, *Choosing Governance*, *supra* note 56, at 357.

assess (or “price”) the risk of non-compliance.⁶⁰ While this framework may work well in straightforward situations with black-and-white distinctions, it struggles in the face of phenomena that involve multiple or evolving dimensions. For corruption in particular, differences in jurisdiction, cultural norms, social practices, and community values limit one’s ability to precisely quantify expected costs and rates of detection.⁶¹

Recent work in the behavioral sciences similarly reveals that agents commonly act irrationally, at least in an economic sense, by making decisions without strictly balancing financial considerations.⁶² Many people, for instance, claim that the fear of disappointing friends and family holds as much or greater deterrent value than monetary fines.⁶³ Many offenders further report suffering from optimism bias, where even though they were eventually apprehended, they did not perceive any risk of being caught when trying to decide whether to break the law.⁶⁴ Others are tempted to pay bribes because of “softer” factors like peer pressure or the social atmosphere of their workplace.⁶⁵

Modern theorists answer the limits of rational choice by placing greater emphasis on more nuanced approaches to authority and accountability. Firm leaders increasingly recognize that risk awareness can no longer be limited to executives and directors; it must instead permeate all aspects of company strategy, from top to bottom. As a result, there is a push to move past static, incentive-based compliance programs in favor of innovations that seek to instill a corporate culture driven by ethics and moral values.⁶⁶ This approach aims to encourage agents to internalize an enduring set of beliefs, ideals, and practices that are capable of consistent application as situations and performance goals change.⁶⁷

⁶⁰ See Carson, *supra* note 38, at 24-25.

⁶¹ See *id.* at 36-38.

⁶² Joseph W. Yockey, *The Compliance Case for Social Enterprise*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 10-11 (2014) [hereinafter *Compliance Case*]; see Hodges, *supra* note 52, at 17-18.

⁶³ See Hodges, *supra* note 52, at 13 & n.102, 16-17 & n.137. Reputational consequences also serve a greater deterrent role for some businesses more than others. *Id.* at 13.

⁶⁴ *Id.* at 12 & n.91.

⁶⁵ *Id.* at 3.

⁶⁶ See Yockey, *Compliance Case*, *supra* note 62, at 18-19; Hodges, *supra* note 52, at 25-26.

⁶⁷ See Yockey, *Compliance Case*, *supra* note 62, at 18-19; Hodges, *supra* note 52, at 27-28.

Agents are helped along the way to an intrinsic understanding of right and wrong through legitimate opportunities to review and question the purpose behind applicable policies. Such a process ought to make it easier for them to respond proactively to complex ethical challenges. Their support will come from buying into core values instead of the narrow and opaque lessons often found in rulebooks. Since most individuals operate with a sense of justice, values-based compliance strategies seek to mine it so that it becomes the company's guiding force and barometer for assessing positive organizational performance.⁶⁸ Failure in this model results if all that remains is mindless, unblinking submission to authority or the reflexive avoidance of physical or financial harm. It is better, cheaper, and more sustainable for agents to see compliance as harmonious with their own beliefs, independent from whatever surveillance and sanctioning architecture a firm deploys.⁶⁹

III. COMPLIANCE AND FORM

Among its other contributions, the shift toward values-based compliance marks a point where choice of form takes on new significance. Whatever form of association a firm selects signals something about the values that its founders and controllers will likely prioritize.⁷⁰ For standard-form for-profit businesses, they are traditionally understood as vehicles meant to maximize financial gains for their owners.⁷¹ Their default accountability structures — along with strong historical and industry pressures — lean heavily toward promoting profits for shareholders.⁷² Indeed, recent studies confirm that a majority of managers reject long-term planning in favor of short-term financial gain.⁷³ It is only natural for organizational values, beliefs, and patterns of behavior to come to reflect this outlook.⁷⁴

⁶⁸ See Hodges, *supra* note 52, at 15-16, 27-28.

⁶⁹ See Yockey, *Compliance Case*, *supra* note 62, at 18-19.

⁷⁰ See generally Usha Rodrigues, *Entity and Identity*, 60 EMORY L.J. 1257 (2011) (arguing that entity form alone can create meaning).

⁷¹ Flora Stormer, *Making the Shift: Moving From "Ethics Pays" to an Inter-Systems Model of Business*, 44 J. BUS. ETHICS 279, 283 (2003) ("In corporate circles, the number one ethic is to behave economically because the world has been simplified to the tenet of 'maximize profits.'").

⁷² Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 238-39 (2014); see Hodges, *supra* note 52, at 25.

⁷³ David Benoit, *BlackRock's Fink, McKinsey Lead Group Fighting Wall Street Myopia*, *MoneyBeat*, WALL ST. J. (Mar. 11, 2015, 2:20 PM), <http://blogs.wsj.com/moneybeat/2015/03/11/blackrocks-fink-mckinsey-lead-group-fighting-wall-street-myopia/tab/print/>

Of course, it is not a given that wrongdoing and corrupt practices will follow. The profit-making goals of capitalism are responsible for improving the lives of millions. But the danger of making short-term profits a top priority is that agents will be tempted to skirt ethical lines if they think doing so is necessary to hit financial targets or to keep pace with their competitors. Hodges notes that many observers today misinterpret capitalist policy as a license to act selfishly.⁷⁵ He sees this as triggering a “cultural drift,” where market and economic forces steadily push agents to put their principals’ interests ahead of their own ideological preferences.⁷⁶ It is perhaps unsurprising, then, to see that a recent report cited by Chief Justice Strine of the Delaware Supreme Court finds that fifty-three percent of finance executives believe that their careers will stall if they are not flexible on personal ethics.⁷⁷ There are plenty of examples, from Enron to the recent global financial crisis, where the prioritization of speculation and financial gain came to overshadow interests in compliance or the pursuit of the common good.

(citing study showing that a majority of corporate executives “wouldn’t be willing to make an investment to increase their profits by 10% over three years if it meant missing quarterly earnings”); *see also* DARRELL WEST, GOVERNANCE STUD. AT BROOKINGS, THE PURPOSE OF THE CORPORATION IN BUSINESS AND LAW SCHOOL CURRICULA *passim* (2011), *available at* http://www.brookings.edu/~media/research/files/papers/2011/7/19%20corporation%20west/0719_corporation_west.pdf (finding that the top 20 business and law schools primarily teach that maximizing shareholder wealth is and should be the primary purpose of the corporation).

⁷⁴ *See* Matthew T. Bodie, *The Post-Revolutionary Period in Corporate Law: Returning to the Theory of the Firm*, 35 SEATTLE U. L. REV. 1033, 1033-34 (2012) (“Although the vibrancy of shareholder primacy has at times been called into question as a matter of law, both boardrooms and courts have taken the normative call for shareholder wealth maximization increasingly to heart. There is little doubt that the revolution has not only substantially affected legal theory but also legislation, court decisions, and corporate behavior.”); *see also* Lyman Johnson et al., *Rethinking How Business Purpose Is Taught in Catholic Business Education*, 32 J. CATHOLIC HIGHER EDUC. 59, 61 n.4 (2013) (“If profit maximization and shareholder wealth are the assumed corporate purpose, the focus in corporate governance correspondingly becomes how to better govern corporations to achieve that end. But if corporate purpose is not the pursuit of a singular financial objective, then governance structure and processes must also change to best attain the identified institutional goal(s). In this way, the *how* of corporate governance is vitally linked to the *what* of corporate purpose.”).

⁷⁵ Hodges, *supra* note 52, at 24.

⁷⁶ *Id.*; *see* Johnson et al., *supra* note 74, at 81 (“Indeed, faulty beliefs about the supposed legal or market necessity of zealous profit maximization may lie behind the disturbing failure of many leaders to exercise sound moral judgment.”).

⁷⁷ Strine, Jr., *supra* note 72, at 241.

A. *The Public Benefit Corporation*

One way to push back against the potentially deleterious effects of traditional norms and systems in business is to expand the institutional playbook. The public benefit corporation (“PBC”) represents an opportunity to do just that. The PBC is a new statutory form that requires controllers to pursue social goals in tandem with shareholder profits.⁷⁸ It looks and acts like a traditional for-profit firm in almost every way but adds the extra dimension of expressly serving the public interest. Thirty states and the District of Columbia have passed PBC legislation within the past five years.⁷⁹ This essay focuses on Delaware’s PBC statute for the simple reason that Delaware is the undisputed leader of corporate law invention and influence. When Delaware moves, “other states invariably follow suit, revising their codes to follow Delaware’s innovations.”⁸⁰

The cornerstone of Delaware’s PBC statute is a requirement that adopting firms identify one or more “public benefit” purposes in their articles of incorporation.⁸¹ Permissible purposes are ones that create a positive effect or lessen a negative effect on persons, entities, communities, or interests, including those of a cultural, charitable, religious, educational, or technological nature.⁸² Delaware PBCs must further operate in a “responsible and sustainable manner,” and their directors are duty-bound to balance (i) the financial interests of shareholders; (ii) the public benefit(s) set forth in their articles; and (iii) the best interests of anyone materially affected by the firm’s activities.⁸³

Though other states require PBCs to measure their social performance pursuant to an independent third-party standard, doing so is optional under Delaware law.⁸⁴ Delaware is also unique in requiring PBCs to provide a report on their social performance every

⁷⁸ J. Haskell Murray, *Social Enterprise Innovation: Delaware’s Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 347-48 (2014).

⁷⁹ *State by State Status of Legislation*, BENEFIT CORPORATION, <http://benefitcorp.net/policymakers/state-by-state-status?state=0> (last visited Sept. 21, 2015) (depicting the number of states that have passed PBC laws, and the number of states working on passing laws).

⁸⁰ Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387, 509 (2001).

⁸¹ DEL. CODE ANN. tit. 8, § 362(a) (2015).

⁸² *Id.* § 362(b).

⁸³ *Id.* § 362(a).

⁸⁴ Murray, *supra* note 78, at 351-52.

two years instead of the more common annual approach.⁸⁵ Finally, shareholders in Delaware PBCs have the right to file a unique derivative action — a benefit enforcement proceeding — to enforce directors' duty to balance social and financial goals.⁸⁶

Importantly, the PBC form did not emerge in a vacuum. It was born out of the larger “social enterprise” movement.⁸⁷ Though this concept is still maturing, a social enterprise is generally defined as a for-profit company that uses market-based strategies to mitigate social, humanitarian, or ecological problems.⁸⁸ In this sense, social enterprises occupy a different space than firms professing a commitment to “corporate social responsibility” (“CSR”). CSR efforts seek to make businesses more mindful of their impact on people and the planet.⁸⁹ Accordingly, CSR advocates encourage firms to make philanthropic donations, pay fair wages, minimize their carbon footprints, and the like. Social enterprises do not oppose these practices, but one of their biggest concerns is fragmentation. Frequently the trouble with incorporating social concerns into governance is the temptation to compartmentalize them — to view them as important but still separate from overriding financial considerations.⁹⁰ An advantage of the traditional norm of shareholder wealth maximization is that it gives managers a clear directive for decision-making: do whatever raises profits, avoid whatever does not. As managers attempt to move beyond this narrow view to weigh additional factors, they may become confused about priorities or feel bound to make trade-offs between social and financial goals whenever the two appear at odds.⁹¹

⁸⁵ See tit. 8, § 366(b); Murray, *supra* note 78, at 346, 358-61.

⁸⁶ Under the Delaware statute, PBC shareholders must own, individually or collectively, at least two percent of outstanding shares or, if the firm is publicly listed, the lesser of two percent and at least two million dollars in market value to bring a benefit enforcement proceeding. Directors are deemed to have satisfied their fiduciary duties in this regard if the challenged decision was both informed and disinterested, and not one that no person of ordinary, sound judgment would make. See tit. 8, §§ 365, 367.

⁸⁷ See *Social Enterprise*, SOC. ENTERPRISE ALLIANCE, <https://socialenterprise.us/about/social-enterprise/> (last visited Nov. 10, 2015) (providing description of a social enterprise including the history of the social enterprise movement).

⁸⁸ Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 769 (2015) [hereinafter *Social Enterprise Law*].

⁸⁹ *Id.* at 773.

⁹⁰ See Marjorie Kelly & Allen L. White, *From Corporate Responsibility to Corporate Design*, 33 J. CORP. CITIZENSHIP 23, 24 (2009).

⁹¹ Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 22 J. APPLIED CORP. FIN. 32, 32-33 (2010) (arguing that CSR

So often the result of this tension is to see CSR as strategic, framed solely in terms of how it will help financial performance rather than what is in the best interests of society. In large part this is why “many researchers concentrate on ‘selling’ socially responsible behavior to corporations (based on a neoclassical economic framework of profit maximization) by attempting to establish a positive relationship between CSR and financial performance.”⁹² Corporations increasingly produce sustainability reports and publicize their “green” behaviors, but these efforts often appear driven more by public relations and marketing considerations than by any core commitment to responsibility.⁹³

Social enterprises and the PBC form offer an antidote to these concerns. They seek to forge a new path in the current environment by reimagining the fundamental purpose of the firm. They view the purpose of business as being about more than financial considerations and strive to integrate social and financial goals toward the singular end of human flourishing.⁹⁴ Their thought process is not to make money first but instead is to prioritize issues such as charitable donations or curbing emissions. The idea is to make social mission the point of the business from its conception.

Greyston Bakery is a good example of this model. Greyston is a large commercial bakery famous in part for providing baked ingredients in Ben & Jerry’s ice cream.⁹⁵ At first blush, Greyston looks like a traditional business that makes money by selling goods and services — something it must do to remain solvent. Yet the company is also a PBC that follows a strict workforce development directive.⁹⁶ It hires hard-to-employ workers and then teaches them skills that they can apply when seeking jobs elsewhere.⁹⁷ It organizes its business activities

activities divert time away from core managerial obligations).

⁹² Stormer, *supra* note 71, at 282.

⁹³ *See id.* at 282-83.

⁹⁴ Or, as Brakman Reiser puts it, they “pursue social and business goals together, viewing them as synergistic and mutually reinforcing, as equal partners in their business vision.” Dana Brakman Reiser, *For-Profit Philanthropy*, 77 *FORDHAM L. REV.* 2437, 2450 (2009).

⁹⁵ *Greyston Bakery*, BEN & JERRY’S, <http://www.benjerry.com/greyston> (last visited Nov. 16, 2015).

⁹⁶ *See Benefit Corporation*, GREYSTON, <http://greyston.com/the-bakery-open-hiring/benefit-corporation/> (last visited Aug. 28, 2015); *Benefit Corporation in Action*, GREYSTON, <http://greyston.com/the-bakery-open-hiring/benefit-corporation-in-action/> (last visited Sept. 22, 2015).

⁹⁷ GREYSTON, ANNUAL REPORT (2014), available at http://greyston.com/wp-content/uploads/2013/09/annual_breport_2014_expanded.pdf.

around the goal of making money to solve an unmet social problem — providing jobs to individuals with criminal records or poor credit histories.⁹⁸

Observers correctly note that PBC laws trace their origins at least in part to a belief that standard corporate fiduciary duties might dissuade managers of social enterprises from making decisions that place social goals above maximizing shareholder wealth.⁹⁹ However, while this belief is popular, it stems from an overly narrow understanding of the law. The business judgment rule provides ample flexibility to corporate managers to make any socially driven decision they desire. All they must do is act in due care, in good faith, and stay free of conflicts of interest.¹⁰⁰ At the outermost limits of this framework, the only showing that directors are ever required to make is that there is some plausible justification for why a given decision is in the best short-term or long-term interests of the firm (e.g., that it promotes good will or satisfies a consumer demand).¹⁰¹

This formula is simple and easy to demonstrate, and it explains why, I believe, no court to date has overruled a business decision solely on the grounds that it puts purpose ahead of profits.¹⁰² The U.S. Supreme Court recently affirmed this view in saying that “[w]hile it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so.”¹⁰³ Moreover, firms outside of the corporate domain have even more flexibility. Private and closely held firms, for example, often find

⁹⁸ See *id.*

⁹⁹ See, e.g., Mark A. Underberg, *Benefit Corporations vs. “Regular” Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 13, 2012), <http://corpgov.law.harvard.edu/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/>.

¹⁰⁰ Yockey, *Social Enterprise Law*, *supra* note 88, at 787.

¹⁰¹ *Id.*

¹⁰² See, e.g., Larry Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 NOTRE DAME L. REV. 1431, 1470-71 (2006) (discussing two cases where the complaint against management was dismissed due to plausible justification); see also Underberg, *supra* note 99. Note, however, that Delaware case law holds that directors owe a duty to maximize short-term returns for shareholders in a sale or change-of-control scenario. *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173, 182 (Del. 1986). Yet even so, Delaware courts also allow directors of target companies to execute a range of takeover defenses to preserve the corporation’s long-term business plan, including in situations where doing so is in contravention of shareholder preferences. Christopher M. Bruner, *Conceptions of Corporate Purpose in Post-Crisis Financial Firms*, 36 SEATTLE U. L. REV. 527, 531 (2013).

¹⁰³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2771 (2014).

it easy to elevate non-financial interests over profits since ownership and management generally share the same goals and consist of the same people.¹⁰⁴

A better justification for the PBC focuses on its role in disrupting norms and expectations. Surpassing the CSR debate, the form puts, in Chief Justice Strine's words, "actual power behind the idea that corporations should be governed not simply for the best interests of stockholders."¹⁰⁵ PBCs do this first by filling an important market gap and helping social enterprises attract interest from pro-social investors, employees, and consumers.¹⁰⁶ Beyond that, though, they send powerful signals that can reshape societal attitudes and beliefs. Under an expressive theory of law, just as the FCPA expresses the view that bribery is morally wrong, PBC statutes reinforce the value of integrating social and financial concerns in business management.¹⁰⁷ At the same time, by carving out their own space in the market, PBCs offer a unique focal point for facilitating an ecosystem and collaborative network capable of supporting the growing number of active social entrepreneurs.¹⁰⁸ Social enterprises and the statutes they inspire thus epitomize the true spirit of entrepreneurialism: they challenge the status quo by "revolutioniz[ing] the economic structure from within."¹⁰⁹

¹⁰⁴ See, e.g., Alan J. Meese & Nathan B. Oman, *Hobby Lobby, Corporate Law, and the Theory of the Firm: Why For-Profit Corporations Are RFRA Persons*, 127 HARV. L. REV. F. 273, 277-79 (2014) (discussing shareholders using closely-held corporations "as a conduit for their religious beliefs").

¹⁰⁵ Strine, Jr., *supra* note 72, at 242.

¹⁰⁶ Though not without controversy, some view PBCs and other social enterprises as better alternatives to charitable non-profits since the latter are frequently seen as less professional and less sophisticated than for-profit companies. See Anne-Claire Pache & Filipe Santos, *Inside the Hybrid Organization: Selective Coupling as a Response to Competing Institutional Logics*, 56 ACAD. MGMT. J. 972, 984 tbl.3 (2013).

¹⁰⁷ Yockey, *Compliance Case*, *supra* note 62, at 29-30.

¹⁰⁸ See Yockey, *Social Enterprise Law*, *supra* note 88, at 807-09.

¹⁰⁹ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM & DEMOCRACY 83 (2d ed. 1947) ("The opening up of new markets, foreign or domestic, and the organizational development from the craft shop and factory to such concerns as U.S. Steel illustrate the same process of industrial mutation — if I may use that biological term — that incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism. It is what capitalism consists in and what every capitalist concern has got to live in.").

B. PBCs and Anti-Corruption Compliance

The PBC's origins and designs in social enterprise create an opportunity for the form to play a powerful role in shaping values-based anti-corruption compliance. It is difficult for values to take root in a firm without a strong expression of organizational ethics and ideals. The more complex, varied, or inconsistent those values appear to be, the harder it will be for agents to discern them — let alone internalize them. The PBC mitigates this risk by coming off the rack with a clear sense of mission.¹¹⁰ The legal form of association chosen by its controllers carries an express obligation to advance a social purpose. Directors are required to balance the financial interests of shareholders and the corporation against an express public benefit. Profits still remain important, but they are qualified by the firm's external mission to facilitate positive social contributions. This design has several positive practical implications for curbing corruption risks.

1. Primacy of Mission

When considered alongside the limits of the rational actor model of compliance, the traction of corporate profit-maximizing norms suggests that if the risk of detection is low and the potential gain from bribery is high, many agents will be tempted to make a corrupt payoff if it might increase shareholder wealth. This reflects the “growth at any cost” mentality that often affects corporate behavior.¹¹¹

The calculus shifts in a PBC, however, in ways that align with values-driven compliance strategies. Whereas the traditional economic view of compliance encourages firms to monitor agents for violations and threaten sanctions against anyone who commits a breach, a values-based model places greater reliance on social, psychological, and moral insights. For the FCPA and its counterparts, that means emphasizing the benefits of clean business practices and urging agents to remain cognizant of the personal costs that corrupt practices pose to their co-workers, the communities where they work, and their own sense of security. This approach tracks the PBC framework, where, far from painting decisions solely in economic terms, the form encourages agents to filter everything they do through a mission of public benefit. The social enterprise paradigm of which it is a part is defined by an

¹¹⁰ Havard defines mission as “our specific way of being, thinking, and acting all our days.” ALEXANDRE HAVARD, *VIRTUOUS LEADERSHIP: AN AGENDA FOR PERSONAL EXCELLENCE* 21 (2d ed. 2014). It refers to the principles that give agents a sense of duty, identity, and focus.

¹¹¹ Kelly & White, *supra* note 90, at 25.

objective to positively influence society, the environment, the market, competitors, and industry institutions.¹¹² The PBC's corporate governance architecture accordingly reinforces the value of balancing social and financial concerns by tattooing that normative agenda on every aspect of operations.

It is difficult, for example, to ignore the social consequences of corruption when one is legally obligated to provide a public report on social performance or faces the threat of a benefit enforcement proceeding.¹¹³ These systems create an organic incentive for people working in a PBC to "stay ahead of the curve when it comes to the social impact of various phenomena."¹¹⁴ Agents are bound to assess the social context of their activities since that context is what drives their firm's corporate purpose and its strategy for growth.¹¹⁵ At the very least, assuming the PBC form will require them to engage in a dialogue about how their actions affect these inputs.¹¹⁶

To illustrate in the corruption context, imagine an agent who is asked by a local foreign official to pay a \$500 bribe to obtain Internet access for her company's office in South America. In the face of short-term capital pressures or policies that permit "grease" payments, the possibility that she will pay the bribe increases. In the process, though, she may become conditioned to tacitly accept or rationalize the role of side payments in doing business, finding it easier to justify borderline transactions in the future. She may also struggle when responding to

¹¹² Andrew J. Hoffman et al., *Hybrid Organizations as Agents of Positive Social Change*, in USING A POSITIVE LENS TO EXPLORE SOCIAL CHANGE AND ORGANIZATIONS: BUILDING A THEORETICAL AND RESEARCH FOUNDATION 131, 133 (Karen Golden-Biddle & Jane E. Dutton eds., 2012); Wendy Stubbs, *Investigation of Emerging Sustainable Business Models: The Case of B Corps in Australia* 4 (July 11, 2014) (unpublished manuscript) (on file with author) (citing Nardia Haigh & Andrew J. Hoffman, *Hybrid Organizations: The Next Chapter of Sustainable Business*, 41 ORGANIZATIONAL DYNAMICS 126 (2012)).

¹¹³ Yockey, *Compliance Case*, *supra* note 62, at 30.

¹¹⁴ Bright B. Simons, *What Makes Social Entrepreneurs Different*, HARV. BUS. REV. BLOG (Jan. 11, 2013), <http://blogs.hbr.org/2013/01/what-makes-social-entrepreneur/>.

¹¹⁵ PBCs and other social enterprises do not object to making money per se, and they do not perceive financial and social objectives as incompatible. Rather, these business models seek to make both profits and a positive social impact, with financial growth often seen as a way to maximize their impact potential. Julie Battilana et al., *In Search of the Hybrid Ideal*, 10 STAN. SOC. INNOVATION REV. 51, 52 (2012); Stubbs, *supra* note 112, at 4.

¹¹⁶ Hiller, *supra* note 12, at 299 ("Managers and directors in a [PBC] will be required to internalize and institutionalize a commitment to monitor the impact of its business on society, consider the import of their actions more broadly, and make tough ethical decisions between conflicting interests.").

less-overt bribe requests or ambiguities that do not fit within an objective catalogue of permissible and impermissible acts.

On the other hand, if the agent is instead taught to prioritize doing good and to see it as the expected company norm — something that the PBC’s mandatory mission invites her to do — then hopefully she will consider the prudence of her behavior within this larger framework. The organization’s uniquely social mission will nudge her toward assessing how the effects of corruption might contradict that mission, prompting her to consider wider sustainability issues, such as the risk of placing colleagues in danger or contributing to a system that undermines education or national security, when framing every decision. It may also compel a review of supplier and third-party relationships to ensure that those actors are aligned with PBC values and working in safe, ethical ways within their respective communities.¹¹⁷ For example, PBC managers and employees will presumably take greater care in checking whether actors in their supply chains present any risk of involvement with the use of conflict minerals, human trafficking, or excessive environmental pollution.

This dynamic is important given that company codes of conduct rarely improve compliance unless agents understand the reasoning that animates them.¹¹⁸ Agents need to know the rationale behind the rules they are asked to obey.¹¹⁹ If they do not, the risk increases that they will set compliance aside when external pressures such as peer influence, a desire for short-term rewards, or sheer complexity enter the mix. The PBC form provides a ready-made answer to the “why obey” question through every aspect of its public-interest purpose, duty, and enforcement requirements.

2. Signaling

Social science research further finds that people tend to adjust their behavior in keeping with the actions and beliefs of those around them.¹²⁰ Agents surrounded by honest people who value compliance and ethics for their own sake are more likely to exhibit the same

¹¹⁷ Stubbs, *supra* note 112, at 9 (quoting a hybrid organization in Australia that evaluates whether its relationship with partners in its supply chain compromise the organization’s values).

¹¹⁸ Gary R. Weaver, *Encouraging Ethics in Organizations: A Review of Some Key Research Findings*, 51 AM. CRIM. L. REV. 293, 299-300 (2014).

¹¹⁹ See HAVARD, *supra* note 110, at 143.

¹²⁰ Carson, *supra* note 38, at 36-37.

propensity.¹²¹ They are also less likely to find willing assistance from other agents to commit corrupt acts.¹²² The hard part, of course, is working out whether agents possess good character or not. For positive values to bolster compliance, it helps when founders and managers exhibit those values when they join so that they can set the “tone at the top” and promote the desired culture.¹²³

Organizing as a PBC assists in this regard by sending important signals to the market. Potential agents and investors looking for cues about what a firm values will see in the PBC form that social, financial, and substantiality goals stand in a synergistic relationship.¹²⁴ Choosing the form *ex ante* also “provides an entrepreneur with a shorthand way of conveying her basic organizational philosophy” and “reduces confusion about what the firm stands for to both internal and external stakeholders.”¹²⁵ This will likely attract people who share the same social and moral values, helping to minimize resistance to socially motivated decisions whenever social and profit goals appear in tension.¹²⁶ Consistent with expressive theories of law, the collective identity of the firm — the *esprit de corps* — will be one that defaults toward prioritizing social mission over the potential short-term gains from bribery, and actions to that effect should be uncontroversial.¹²⁷

An analogy that comes to mind is the way in which Las Vegas casinos are built today. Most of the mega-casinos along the Las Vegas Strip

¹²¹ *Id.*; see John M. Bradley, *Empowering Employees to Prevent Fraud in Nonprofit Organizations*, 13 CARDOZO PUB. L. POL'Y & ETHICS J. 711, 729 (2014) (“[R]esearchers found that when the participants [in a study] perceived that others in their organization or profession would see the issue as ethically problematic, the participants themselves were more likely to be aware of and consider the ethical issues involved.”).

¹²² Carson, *supra* note 38, at 36.

¹²³ Miller, *Compliance Function*, *supra* note 48, at 7.

¹²⁴ See Yockey, *Compliance Case*, *supra* note 62, at 29.

¹²⁵ Hans Rawhouser et al., *Benefit Corporation Legislation and the Emergence of a Social Hybrid Category*, 57 CAL. MGMT. REV. 13, 24-25 (2015).

¹²⁶ Pache & Santos, *supra* note 106, at 995 (“When institutional conflict on goal is unavoidable, organizations may be able to thrive by crafting a strong identity that focuses the attention of their members on convergent means, while recruiting members free from any institutional attachments at the source of the goal conflict.”).

¹²⁷ Yockey, *Compliance Case*, *supra* note 62, at 30; Stubbs, *supra* note 112, at 10 (quoting one non-Delaware PBC executive: “And I think maybe longer-term, helping to power a collective community around challenging a new way of doing business and perhaps because we are already on that journey, we feel a heightened level of responsibility to share that with other businesses in the community that are sort of in tune towards that but don’t necessarily have the confidence, or know that you can actually do business in that way and really you don’t need to bend your values and that there are the people alongside you doing business in that way”).

follow the same basic layout and floor plan. While each offers attractions other than gambling — including restaurants, shops, and theaters — consumers will find it difficult to reach them without passing through the gaming floor.¹²⁸ The gaming floor remains the hub; the nucleus. The reason is obvious. Everything of interest to the non-gaming consumer is located in a place that requires her to pass by slot machines and card tables, hopefully causing her to stop and play along the way. Because make no mistake, gaming is the casino's mission and purpose, and its influence can be felt on every other activity.

The PBC form is similarly distinctive in that a specific values-set radiates from its core. While shareholder profits are important for economic survival, the PBC's statutory mission to facilitate positive social good acts as governing environmental influence on anyone in or joining the firm who is tempted to act corruptly. There is obviously still a need for monitoring, training, transparency, advisory boards, and internal and external audits, and the threat of sanctions should remain a "hard" tool of last resort. Managers and agents will also need to live and abide by the ethical values that PBCs espouse in order to preserve their credibility and influence.¹²⁹ But, ultimately, choice of form becomes an important symbolic reminder to do the right thing, as well as a positive, unifying starting point from which to build out other compliance measures. It provides the framework to incorporate sustainability into principal business operations. One manager of a non-Delaware PBC sums this up nicely: "whenever we sort of come across something, we think oh well, we should or shouldn't do that because we're a [benefit corporation]. So I feel like it is holding us to . . . do the right thing . . ." ¹³⁰ In this way, form activates self-motivation.

¹²⁸ See, e.g., *Property Map*, BELLAGIO LAS VEGAS, <http://www.bellagio.com/files/property-map/PropertyMap.pdf>.

¹²⁹ Strine, Jr., *supra* note 72, at 249 ("If [PBCs'] commitment to social responsibility is simply a greenwashed cloak for a desire to squeeze out profits for themselves and stockholders by feigning but not actually having a sincere regard for other corporate constituencies, the benefit corporation movement will quickly lose credibility among socially responsible investors and policymakers.").

¹³⁰ Stubbs, *supra* note 112, at 12, 14 (another non-Delaware PBC manager adds that the form creates "a very strong . . . ethical decision-making culture throughout the business"). Others add that formal social accountability measures help keep their organizations on mission, holding to their true commitment and seeking exemplary best practices in ways that provide systemic social benefits. Bill Saporito, *Making Good, Plus a Profit*, TIME (Mar. 23, 2015), <http://time.com/3741863/making-good-plus-a-profit/>.

CONCLUSION

The ever-changing risk of corruption compels the constant search for new ideas. One place to look is the role of organizational form, design, and purpose. As a prominent commentator notes, “Almost nothing in economics is more important than thinking through how companies should be managed and for what ends.”¹³¹ Of course, not every firm will or should organize as a PBC. This brief essay is not meant to catalogue the form’s many pros, cons, and practical challenges.¹³² But there are important lessons that all entrepreneurs and businesses can draw from the PBC experiment.

Increasing acceptance of the PBC’s legitimacy shows that not every company needs to answer questions about organizational purpose in the same way. The PBC’s very existence highlights a trend toward all firms becoming more pluralistic. It also provides a proving ground for the idea that businesses can be managed to serve the best interests of their employees, consumers, communities, and society — and this includes taking steps to weigh and mitigate the social harms of corruption. The PBC’s primacy of social mission offers a strong foundation for instilling a culture capable of warding off the temptations to bribe and steal that can so easily develop with less defining views of corporate purpose.

¹³¹ Martin Wolf, *Opportunist Shareholders Must Embrace Commitment*, FIN. TIMES (Aug. 26, 2014), <http://www.ft.com/intl/cms/s/0/6aa87b9a-2d05-11e4-911b-00144feabdc0.html#axzz3kQEehkch>.

¹³² For a global assessment of the issues raised by PBCs and social enterprise, see generally Yockey, *Social Enterprise Law*, *supra* note 88.