
PRIORITIZING PROCESS: EMPOWERING THE CORPORATE ETHICS AND COMPLIANCE FUNCTION

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The Ethics and Compliance function is gaining traction within corporations. Companies must determine how to best facilitate performance within this function. A debate continues among business professionals, scholars, and regulators over the optimal structures and best methods for reporting Ethics and Compliance issues. One key sticking point is whether certain high-level management functions should be unified in a single position or divided among several positions. This issue has resulted in siloed and ineffective approaches to Ethics and Compliance.

In order to improve Ethics and Compliance functions, corporations must go beyond their focus on reporting structures. Corporations should broaden their perspective and consider informational processes that foster clearer communication, facilitate information flow, and integrate the senior managers' Ethics and Compliance efforts across their organizations. By adopting a process-oriented focus, corporations will gain insight into how the Ethics and Compliance function can better protect them from Federal Corrupt Practices Act violations, regardless of the reporting structures they adopt.

This Article seeks to examine the relationship between structure, process, and compliance failures in the Federal Corrupt Practices Act Context. First it offers contrasting case studies from ADM, Wal-Mart, and Halliburton to highlight the comparative importance of effective informational gathering and decision-making processes over structural reporting lines. Second, this Article puts the comparison in the context of the structural debate over Ethics and Compliance reporting which helps to illuminate the justifications each company may have had for their reporting structure. Third, this Article discusses the role that a process-oriented approach should play for effective Ethics and Compliance. Finally, it applies the first step of the

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process-oriented approach to the three companies and analyzes how process is essential for accomplishing successful Ethics and Compliance.

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I. INTRODUCTION

As the Ethics and Compliance (“E&C”) function gains traction within corporations, a debate continues over which operating structures and reporting hierarchies best facilitate its performance. Business professionals, scholars, and regulators disagree over the optimal structures and best methods for reporting E&C issues within companies. A key sticking point—one that has resulted in siloed and hence ineffective approaches to E&C—is whether certain high-level management functions should be unified in a single position or divided among several positions. Structuralists—those who believe that effective governance is a function of a corporation’s formal reporting structure—divide on whether the same person should simultaneously serve as the Chief Ethics and Compliance Officer (“CECO”) or Chief Compliance Officer (“CCO”) and the General Counsel (“GC”). Some argue that these positions should be split, insisting that the E&C function should be led by a dedicated CECO or CCO whose sole responsibility is overseeing the organization’s E&C program. Others advocate for a dual-responsibility role in which the E&C function is assigned solely to the organiza-

tion's GC or to a subordinate working within the GC's office. A significant plurality of companies appears to follow this second approach.¹ In any case, structuralists seek to improve E&C efficacy by shuffling responsibilities or adjusting reporting hierarchies within the corporation. They nevertheless pay comparatively little attention to how information flows to the managers holding those positions or how those managers use that information once they receive it.

The shortcomings of the structuralist approach, and the acute risk it poses to effective E&C, is disturbingly clear in the Federal Corrupt Practices Act ("FCPA") enforcement context. Government enforcement of the FCPA has drastically risen since 2000, with over 530 enforcement actions brought.² This is dramatically different from the combined fifty SEC and DOJ enforcement actions brought between the FCPA's inception in 1977 and 1999.³ The FCPA—which generally prohibits bribing foreign officials in connection with obtaining or retaining business, establishes accounting standards, and applies to prohibited conduct anywhere in the world—carries significant financial penalties for wrongdoers.⁴ For example, in 2018 the U.S. government collected almost \$2.9 billion from entities charged with FCPA violations.⁵

The FCPA has spurred changes in corporate compliance efforts and generated guidance from the DOJ and the SEC, the two agencies jointly responsible for enforcing the Act.⁶ It is clear that an effective program incorporates FCPA best practices. On November 29, 2017, the DOJ announced its "FCPA Corporate Enforcement Policy."⁷ The policy is meant to provide guidance to prosecutors on how to resolve corporate FCPA cases. It is consistent with the Sentencing Guidelines for Organizations that provides reduced penalties for organizations

1. According to a recent study, the E&C function reports to the GC in slightly more than 40% of the companies surveyed. This is in contrast to 29% of respondents directly reporting to the CEO. See PRICEWATERHOUSECOOPERS, MOVING BEYOND THE BASELINE: LEVERAGING THE COMPLIANCE FUNCTION TO GAIN A COMPETITIVE EDGE, 2015 STATE OF COMPLIANCE SURVEY 12–13 (2015).

2. See *DOJ and SEC Enforcement Actions Per Year*, STAN. L. SCH.: FOREIGN CORRUPT PRACTICES ACT CLEARINGHOUSE, <http://fcpa.stanford.edu/statistics-analytics.html> (last visited May 10, 2019) [<https://perma.cc/6T65-NQCG>].

3. See *id.*

4. *Foreign Corrupt Practices Act*, SEC, <https://www.sec.gov/spotlight/foreign-corrupt-practices-act.shtml> (last modified Feb. 2, 2017) [<https://perma.cc/F6YM-W3UK>].

5. Richard L. Cassin, *2018 FCPA Enforcement Index*, THE FCPA BLOG (Jan. 2, 2019, 7:28 AM) <http://www.fcpablog.com/blog/2019/1/2/2018-fcpa-enforcement-index.html>. See also Richard Levick, *The Foreign Corrupt Practices Act at 40: No Shortage of Challenges*, FORBES (May 16, 2017, 12:31 PM), <https://www.forbes.com/sites/richardlevick/2017/05/16/the-foreign-corrupt-practices-act-at-40-no-shortage-of-challenges/> [<https://perma.cc/3ARP-GVJ2>] (noting the government collected over \$2.4 billion in penalties in 2016).

6. The necessity of an "Effective Compliance and Ethics Program" directly comes from the United States Sentencing Commission. The Commission provides guidelines for what is an effective program. See U.S. SENTENCING GUIDELINES MANUAL ch. 8 (U.S. SENTENCING COMM'N 2004).

7. DOJ, 9-47.120 (3)C., FCPA CORPORATE ENFORCEMENT POLICY: TIMELY AND APPROPRIATE REMEDIATION IN FCPA MATTERS (2017); Alan R. Friedman et al., *DOJ Criminal Division Announces FCPA Corporate Enforcement Policy Provides Nonbinding Guidance for All Criminal Cases*, KRAMER LEVIN (Mar. 9, 2018), <https://www.kramerlevin.com/en/perspectives-search/doj-criminal-division-announces-fcpa-corporate-enforcement-policy-provides-non-binding-guidance-for-all-criminal-cases.html> [hereinafter DOJ Criminal Division Announcement].

that voluntarily self-disclose FCPA misconduct.⁸ The sentence mitigation is significant, qualifying companies can receive “a 50% reduction off the low end of U.S. Sentencing Guidelines fine range, except in cases of a criminal recidivist.”⁹ Section (3)c of the DOJ’s FCPA Corporate Enforcement Policy which covers “Timely and Appropriate Remediation of FCPA Matters” explicitly looks to the E&C reporting structure.¹⁰ One of the listed criteria for whether a company has implemented an effective E&C program may include “[t]he reporting structure of any compliance personnel employed or contracted by the company.”¹¹ Against the backdrop of increased FCPA enforcement actions, corporations have begun to place a heavier emphasis on the importance of E&C programs within the organization, with particular attention to reporting structure.

FCPA enforcement’s emphasis on structure reveals the more general hurdle to effective E&C: each structural variation suffers from informational deficiencies that leave decision makers with knowledge gaps. Decision makers can best fill these gaps by acknowledging and addressing the informational holes inherent in their organization’s chosen structure. Thus, debates over optimal E&C structures are necessarily incomplete because they ignore an aspect of the problem of even greater importance: the process by which CECOs/CCOs gain informational autonomy. Processes that secure informational autonomy empower the CECO/CCO to gather better information therefore helping them to oversee, prevent, and/or correct E&C issues. Moreover, the right informational autonomy processes provide the CECO/CCO with a meaningful, not merely cosmetic, “seat at the table” because it gives them the resources necessary to effectively perform their role.

In this Article, I suggest corporations go beyond their focus on reporting structures. Instead, I urge them to broaden their perspective and consider informational processes that foster clearer communication, facilitate information flow, and integrate the senior managers’ E&C efforts across their organizations. To do so, I critically assess alleged FCPA violations against three American corporations, each of which has paid or is expected to pay significant fines in settlements with the SEC and/or DOJ as a result of alleged FCPA bribery violations. The first, Archer Daniels Midland Company (“ADM”), was accused of obtaining value-added tax (“VAT”) refunds by paying approximately \$22 million to Ukrainian third-party vendors, who then passed the payments to the Ukrainian

8. See FCPA CORPORATE ENFORCEMENT POLICY, *supra* note 7.

9. See DOJ Criminal Division Announcement, *supra* note 7.

10. *Id.*

11. *Id.*

government.¹² The second, Wal-Mart, allegedly made “hundreds of suspect payments totaling more than \$24 million”¹³ to Mexican officials. The third, the Halliburton Company, settled a case in which the SEC accused the company of bribing an Angolan business to serve as a local content provider in accordance with local laws for foreign corporations.¹⁴ The company, however, performed no services for Halliburton.¹⁵ Instead, it acted as a placeholder to meet the local content requirements.¹⁶

The E&C structures adopted by each of the companies differ in significant ways from the others. ADM’s compliance department reported to the GC.¹⁷ In contrast, Wal-Mart had regional reporting to the regional CEOs across the globe.¹⁸ In 2005, the positions were shared by the same person, but that changed in 2014.¹⁹ Currently, the position is split and both the GC and Global CECO are Executive Vice Presidents.²⁰ Finally, Halliburton’s compliance department did not report to the GC and instead reported directly to the board.²¹ As I explain, something other than structure permitted the three companies’ alleged illicit conduct. Consequently, the companies’ E&C structures are unlikely to reduce the risk of similar FCPA violations in the future. Rather, the situations exhibit acute informational process failures. A process-oriented focus allows unique insight into how the E&C function can better protect corporations like ADM, Wal-Mart and Halliburton from future FCPA (and other compliance) failures, regardless of the reporting structures they adopt. The animating intuition here is simple: effective E&C requires that CECOs/CCOs have informational autonomy, which they can secure through access to independent information gathering channels. In addition, organizational processes must provide CECOs/CCOs with a meaningful voice within the corporation’s management structure.

12. Press Release, DOJ, ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act (Dec. 20, 2013), <https://www.justice.gov/opa/pr/adm-subsidiary-pleads-guilty-conspiracy-violate-foreign-corrupt-practices-act> [https://perma.cc/X5B7-7BZZ].

13. David Barstow, *Wal-Mart Hushed Up a Vast Mexican Bribery Case*, N.Y. TIMES (Apr. 21, 2012), <http://www.nytimes.com/2012/04/22/business/at-wal-mart-in-mexico-a-bribe-inquiry-silenced.html> [https://perma.cc/Q766-A4M2].

14. Halliburton Co., Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Exchange Act Release No. 81222, 2017 WL 3188364 ¶ 2 (July 27, 2017) [hereinafter *In the Matter of Halliburton Company and Jeannot Lorenz*].

15. *Id.* ¶ 19.

16. *Id.* ¶ 3.

17. *ADM Announces Retirements, Organizational Changes*, ADM (Mar. 6, 2012), <https://www.adm.com/news/news-releases/adm-announces-retirements-organizational-changes> [https://perma.cc/2S7U-XLZZ].

18. Matt Kelly, *Walmart Outlines Compliance Reforms (Part I)*, COMPLIANCE WEEK (Apr. 23, 2014), <https://web.archive.org/web/20140427020105/http://www.complianceweek.com/walmart-outlines-compliance-reforms-part-i/article/343986>.

19. *Id.*

20. John Dudovskiy, *Walmart Leadership and Walmart Organizational Structure*, RESEARCH METHODOLOGY (Mar. 29, 2016), <https://research-methodology.net/walmart-leadership-and-walmart-organizational-structure> [https://perma.cc/VX8X-ZN5H]; *Leadership: Executive Management*, WALMART, <https://corporate.walmart.com/our-story/leadership> [https://perma.cc/GD9X-MK45] (last visited May 10, 2019).

21. Thomas Fox, *Who Does Your Chief Compliance Officer Report To?*, FCPA BLOG (June 14, 2010, 6:02 AM), <http://www.fcpablog.com/blog/2010/6/14/who-does-your-chief-compliance-officer-report-to.html> [https://perma.cc/FKD2-FSJD].

This Article is part of a broader project on the role that intra-organizational information management processes plays in corporate governance. It extends to a new context insight I have developed in my prior work.²² These insights about informational autonomy and monitoring have equal if not greater purchase in the E&C context, where fresh thinking and novel approaches are needed.

This Article seeks to examine the relationship between structure, process, and compliance failures in the FCPA context. Part II offers contrasting case studies from ADM, Wal-Mart, and Halliburton to highlight the comparative importance of effective informational gathering and decision-making processes over structural reporting lines. Part III then puts the comparison in the context of the structural debate over E&C reporting which helps to illuminate the justifications each company may have had for their reporting structure. Going beyond structure, Part IV discusses the role that a process-oriented approach should play for effective E&C. Part V applies the first step of the process-oriented approach to the three companies and analyzes how process is essential for accomplishing successful E&C. Part VI concludes.

II. RECENT COMPLIANCE FAILURES ILLUSTRATE STRUCTURE'S INADEQUACY

Over the last decade there have been many companies subject to SEC and DOJ investigations.²³ In some instances, these investigations have led to multi-million-dollar settlements for alleged FCPA violations.²⁴ Three of these investigations illustrate how companies that operate under different compliance structures ended up with similar informational failures—failures that contributed to the alleged FCPA violations.²⁵ The first examines a company where the GC oversaw E&C.²⁶ ADM's structure did not detect or prevent the extensive illicit payments in a timely manner.²⁷ The second company, Wal-Mart, maintained a global ethics office, had regional GCs that often served as the E&C officers, who then reported to the regional CEOs. By 2005, the company had an Executive Vice President of Legal Compliance and Ethics.²⁸ Finally, the last company, Halliburton, explicitly separated the role of GC and CECO and ensured the CECO had a reporting line that did not include the legal department.²⁹ Despite these efforts, Halliburton found itself under investigation for payments that violated the FCPA.³⁰

22. In two prior articles, I developed my Process Oriented Approach to board decision-making and effective information gathering processes. See generally Nicola Faith Sharpe, *Process over Structure: An Organizational Behavior Approach to Improving Corporate Boards*, 85 S. CAL. L. REV. 261 (2012) [hereinafter Sharpe, *Process Over Structure*]; Nicola Faith Sharpe, *Questioning Authority: The Critical Link Between Board Power and Process*, 38 J. CORP. L. 1 (2012) [hereinafter Sharpe, *Questioning Authority*].

23. See discussion *infra* Part II.

24. See discussion *infra* Part II.

25. See discussion *infra* Part II.

26. See discussion *infra* Section II.A.

27. See discussion *infra* Section II.A.

28. See discussion *infra* Section II.B.

29. See discussion *infra* Section II.C.

30. See discussion *infra* Section II.C.

A. Archer Daniels Midland Company

On December 20, 2013, ADM's Ukrainian subsidiary agreed to pay over \$17 million in criminal fines.³¹ The subsidiary pled guilty to "charges that it paid bribes through vendors to Ukrainian government officials to obtain value-added tax (VAT) refunds in violation of the Foreign Corrupt Practices Act (FCPA)."³² On the same date, the company also paid \$36.5 million to settle charges with the SEC for FCPA violations.³³

According to the DOJ, ADM "failed to implement sufficient policies and procedures to prevent the bribe payments."³⁴ The DOJ entered into a nonprosecution agreement ("NPA") with ADM due to its "failure to implement an adequate system of internal financial controls to address the making of improper payments both in Ukraine."³⁵ The DOJ stated that from 2002 to 2008, two of ADM's subsidiaries paid approximately \$22 million to third-party vendors.³⁶ The vendors passed on most of the payments to Ukrainian government officials who then provided the ADM subsidiaries with VAT refunds of more than \$100 million.³⁷ The ADM subsidiaries' resultant benefit was around \$41 million.³⁸ According to the SEC's complaint against ADM, the subsidiaries disguised the bribe as payments to third parties for "export-related services and insurance premiums."³⁹ The payments took place over several years, where they went "unchecked" by ADM.⁴⁰ The bribery controls, which the SEC alleged were insufficient, neither detected nor deterred the bribes.⁴¹ The European subsidiaries "created inaccurately described reserves in their books and records, manipulated commodities contracts that were kept open for an extended period of time, structured payments to avoid detection, and created fictitious insurance contracts to hide from ADM and others the payments to third-parties to secure VAT refunds in Ukraine."⁴²

ADM's tax executives were alerted to the practices as early as July 2002 when executives from one of the subsidiaries, ACTI Hamburg, discussed the practices during business meetings in Decatur, Illinois.⁴³ The Hamburg team stated that they obtained VAT refunds by paying local charities 30% of the VAT

31. Bruce Zagaris, *Transnational Corruption and Asset Forfeiture*, 30 INT'L ENFORCEMENT L. REP. 108, 110 (2014).

32. Press Release, DOJ, ADM Subsidiary Pleads Guilty to Conspiracy to Violate the Foreign Corrupt Practices Act (Dec. 20, 2013), <https://www.justice.gov/opa/pr/adm-subsidiary-pleads-guilty-conspiracy-violate-foreign-corrupt-practices-act> [<https://perma.cc/X5B7-7BZZ>].

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Complaint at 2, SEC v. Archer-Daniels-Midland Co., No. 2:13-cv-02279 (C.D. Ill. Dec. 20, 2013) [hereinafter Complaint, SEC].

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 5.

amount.⁴⁴ Several months later, the ADM tax executives sent an email asking an international tax organization whether the payments were legal.⁴⁵ They also forwarded that email to two more of ADM's tax executives along with a note expressing concerns that the subsidiary was "getting screwed by someone."⁴⁶ Between 2002 and 2008 the payments continued.⁴⁷ When ADM asked questions about the VAT refunds, the subsidiaries characterized the payments as charitable donations or required depreciation on the VAT.⁴⁸

Over the relevant timeframe, ADM executives received emails expressing concerns that the two subsidiaries had made "potentially illegal 'donations'" in exchange for the VAT refunds.⁴⁹ The subsidiaries communicated with ADM during in-person meetings, telephone calls, and emails.⁵⁰ Despite being contacted about the concerning payments, ADM executives did not "implement sufficient anti-bribery compliance policies and procedures to prevent corrupt payments."⁵¹

There was a clear risk for corruption and bribery in the Ukraine. Each year, Transparency International releases its Corruption Perceptions Index—a ranking and score for the public sector corruption in a number of countries.⁵² Ukraine consistently ranks very low on their list.⁵³ The subsidiaries were aware of the problems surrounding the VAT. For instance, one of ADM Hamburg's executives stated that "it is a fight every year" to obtain the refund.⁵⁴ The problem extended beyond ADM. Many U.S. companies have found themselves short their VAT.⁵⁵ According to U.S.-Ukraine Business Council president, Morgan Williams, the Ukrainian government has at times owed more than \$1 billion in VAT

44. *Id.* at 5–6.

45. *Id.*

46. *Id.* at 6.

47. *Id.* at 8.

48. Complaint at 3, *United States v. Alfred C. Toepfer Int'l (Ukraine) Ltd.*, No. 13-CR-20062, (C.D. Ill. Dec. 20, 2013) [hereinafter *Complaint, Toepfer*].

49. Press Release, DOJ, *supra* note 12.

50. Complaint, *Toepfer*, *supra* note 48, at 2.

51. Press Release, DOJ, *supra* note 12.

52. *Corruption Perceptions Index: Overview*, TRANSPARENCY INT'L, <https://www.transparency.org/research/cpi> (last visited Feb. 18, 2019) [<https://perma.cc/UAB2-NDLZ>].

53. *Corruption Perceptions Index 2008*, TRANSPARENCY INT'L, https://www.transparency.org/research/cpi/cpi_2008/0 (last visited May 10, 2019) [<https://perma.cc/J6A3-BK8D>] (Ukraine ranked 134 out of 180); *Corruption Perceptions Index 2007*, TRANSPARENCY INT'L, https://www.transparency.org/research/cpi/cpi_2007/0 (last visited May 10, 2019) [<https://perma.cc/89R7-Z9FD>] (Ukraine ranked 118 out of 179); *Corruption Perceptions Index 2006*, TRANSPARENCY INT'L, https://www.transparency.org/research/cpi/cpi_2006/0 (last visited May 10, 2019) [<https://perma.cc/DR9Q-VSF2>] (Ukraine ranked 99 out of 163); *Corruption Perceptions Index 2005*, TRANSPARENCY INT'L, https://www.transparency.org/research/cpi/cpi_2005/0 (last visited May 10, 2019) [<https://perma.cc/N726-GDBG>] (Ukraine ranked 107 out of 158); *Corruption Perceptions Index 2004*, TRANSPARENCY INT'L, https://www.transparency.org/research/cpi/cpi_2004/0 (last visited May 10, 2019) [<https://perma.cc/T5VQ-ZMYK>] (Ukraine ranked 122 out of 145); *Corruption Perceptions Index 2003*, TRANSPARENCY INT'L, https://www.transparency.org/research/cpi/cpi_2003/0 (last visited May 10, 2019) [<https://perma.cc/UY55-PURM>] (Ukraine ranked 106 out of 133); *Corruption Perceptions Index 2002*, TRANSPARENCY INT'L, https://www.transparency.org/research/cpi/cpi_2002/0 (last visited May 10, 2019) [<https://perma.cc/48C4-P2XT>] (Ukraine ranked 85 out of 102).

54. Complaint, SEC, *supra* note 39, at 6.

55. Jamila Trindle, *Culture of Corruption*, FOREIGN POL'Y (Apr. 3, 2014, 3:00 PM), <https://foreignpolicy.com/2014/04/03/culture-of-corruption> [<https://perma.cc/MQ9K-FZTG>].

refunds to U.S. companies.⁵⁶ Moreover, it was common knowledge that VAT refunds often went to those that paid bribes.⁵⁷ A 2013 report on the Ukraine from the Office of the U.S. Trade Representative noted that since 2010 the Ukrainian government “has continued to . . . distribute VAT refunds in an arbitrary fashion that appears to favor companies connected to the government or *those that pay bribes*.”⁵⁸ The report also mentioned that “delays in the payment of VAT . . . refunds to exporters have been a problem” and that the delays are “an important cost factor for many foreign companies.”⁵⁹ When Ukraine did distribute a refund, the manner of distribution was not transparent.⁶⁰ The IMF specifically listed Ukraine tax rebate corruption as something Ukraine’s government must fix in order to obtain loans from the IMF.⁶¹

Despite multiple red flags signaling VAT refunds as a high-risk area in a high-risk country, ADM did not have the type of cross-functional information gathering processes or integrated communication that would helped to detect and deter bribery—what organizational behavior literature calls an organic structure with decentralized communication.⁶² ADM’s structure followed the first model of E&C reporting—the GC was in charge.⁶³ David Smith was named Executive Vice President, Secretary and General Counsel in 2003.⁶⁴ His responsibilities included overseeing the Office of Compliance and Ethics until he retired in 2012.⁶⁵ As of their 2012 annual report, ADM did not have a separate Ethics and/or Compliance officer position listed as an executive officer.⁶⁶ The company did not create a separate E&C function until it brought on Ben Bard in January 2014.⁶⁷

B. Wal-Mart

A second alleged failure further suggests FCPA violations are more closely tied to breakdowns in information gathering processes and the lack of an effective decision-making process than to flaws in a particular reporting structure. In April 2012, a *New York Times* story revealed for the first time an alleged widespread bribery scandal at Wal-Mart’s Mexican subsidiary, Wal-Mart de Mexico

56. *Id.*

57. *Id.*

58. OFFICE OF THE U.S. TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS: UKRAINE (2013) (emphasis added), <https://ustr.gov/sites/default/files/2013%20NTE%20Ukraine%20Final.pdf> [<https://perma.cc/VF29-ZVQQ>].

59. *Id.*

60. *Id.*

61. Trindle, *supra* note 55.

62. Herman Vantrappen & Frederic Wirtz, *When to Decentralize Decision Making, and When Not To*, HARV. BUS. REV. (Dec. 26, 2017), <https://hbr.org/2017/12/when-to-decentralize-decision-making-and-when-not-to>.

63. For a description of the two models, see discussion *supra* Part II.

64. *ADM Announces Retirements, Organizational Changes*, ADM (Mar. 6, 2012), <https://www.adm.com/news/news-releases/adm-announces-retirements-organizational-changes> [<https://perma.cc/2S7U-XLZZ>].

65. *Id.*

66. ARCHER DANIELS MIDLAND COMPANY, ANNUAL REPORT 111 (2012).

67. ARCHER DANIELS MIDLAND COMPANY, ANNUAL REPORT 111 (2013).

(“Walmex”).⁶⁸ The first bribe was allegedly paid on September 12, 2003.⁶⁹ The bribes came to light in September 2005 when a former Wal-Mart executive, Sergio Cicero Zapata, sent then-GC of Walmart International, Maritza I. Munich, an email alerting her that Walmex had bribed foreign officials.⁷⁰ The former executive provided “names, dates and bribe amounts” for the bribes that were paid to obtain permits to build stores throughout Mexico.⁷¹ An internal investigation uncovered suspected bribes in excess of \$24 million.⁷² Instead of expanding the investigation as the lead investigator recommended, Wal-Mart’s Bentonville, Arkansas leadership decided to end the investigation.⁷³ Not only did Wal-Mart stop the investigation, the company did not notify Mexican or American authorities.⁷⁴ It did not discipline the Mexican subsidiary’s leaders, and ultimately promoted one to Vice President of Wal-Mart in 2008.⁷⁵

Munich, the initial recipient of the email, immediately hired a Mexico City lawyer to meet with Cicero.⁷⁶ Munich flew in for the third of these meetings.⁷⁷ Cicero implicated many of Walmex’s executives, including himself, but primarily placed the blame on the CEO, Eduardo Castro-Wright.⁷⁸ He said the CEO encouraged the bribery because they allowed the company to expand more quickly, which it did.⁷⁹ The bribes were an open secret. The gestores, who received the bribes and then facilitated the payoffs to Mexican officials, submitted invoices containing codes that detailed the illegal activity.⁸⁰ Walmex, however, intentionally kept the U.S. headquarters ignorant of the illicit payments.⁸¹ Munich made sure she kept senior management informed and sent details of the investigation to them.⁸² During the investigation, Castro-Wright was promoted to lead all of the U.S. Wal-Mart stores.⁸³

Following Munich’s updates, Wal-Mart reached out to the firm of Willkie Farr & Gallagher to conduct an investigation into the potential FCPA violations.⁸⁴ The firm recommended a detailed inquiry that could take as long as four

68. Barstow, *supra* note 13.

69. David Barstow & Alejandra Xanic von Bertrab, *How Wal-Mart Used Payoffs to Get Its Way in Mexico*, N.Y. TIMES (Dec. 17, 2012) <https://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html> [<https://perma.cc/96SS-8HXS>].

70. Barstow, *supra* note 13.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

months.⁸⁵ Instead of turning to an independent, third-party for an in-depth investigation, the company's leadership rejected Willkie Farr's proposal and decided to pursue a short, internally supervised inquiry—one that would take weeks, not months.⁸⁶ If the shorter internal inquiry found the allegations to be credible, leadership agreed to "consider a full investigation."⁸⁷

The lead investigator was Ronald Halter, who had spent twenty-one years with the FBI.⁸⁸ Halter confirmed 441 payments to gestores between 2003 and 2005 when the payments stopped.⁸⁹ He found that records of the bribes were "scrubbed" from audits and reports sent to Wal-Mart's Bentonville headquarters.⁹⁰ Another discovery indicated that the bribes were made throughout Mexico.⁹¹ Halter's December 2005 report to Wal-Mart's executive team detailed the evidence that included "the hundreds of gestor payments, . . . the rewritten audits, the evasive response from Walmex executives, the donations for permits, the evidence gestores were still being used."⁹² Halter offered a plan for a full investigation, including questioning Castor-Wright about the alleged bribes.⁹³

Wal-Mart's CEO criticized Halter's internal investigation as being too aggressive.⁹⁴ In response to the perceived "law-enforcement" approach to investigations, the company developed a new protocol that would give more control to the units under investigation.⁹⁵ It was only a matter of days after the criticism that Wal-Mart's legal department transferred the investigation and related files to the Walmex's GC—the individual that allegedly authorized the illegal payments.⁹⁶ Unsurprisingly, his report exonerated Walmex's executives.⁹⁷ His report noted the executives he interviewed did not "mention[] having ordered or given bribes to government authorities."⁹⁸ Another former FBI investigator served as Wal-Mart's director of corporate investigations.⁹⁹ He told his boss that the GC's report was "[t]ruly lacking."¹⁰⁰ The company's leadership ignored the red flags and accepted the report.¹⁰¹

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

Wal-Mart has spent an estimated \$900 million on legal fees and the compliance overhaul that followed news of the scandal.¹⁰² In 2017, the company set aside \$300 million for the settlement.¹⁰³ According to news coverage, Wal-Mart did not want to admit to fault as part of the settlement which caused a multi-year standoff.¹⁰⁴ In June 2019, the standoff came to end when the company finally agreed to the SEC's order.¹⁰⁵ To settle the charges, Wal-Mart consented to pay over \$144 million to the SEC and another approximately \$138 million to settle the DOJ's criminal charges.¹⁰⁶

The risk of corruption in Mexico is well-known and quite high.¹⁰⁷ Transparency International's 2011 report shows that Mexico has the worst corruption rating of any OECD nation.¹⁰⁸ In fact, Mexico did not have an anticorruption law until 2012 after the *New York Times* published the story about Wal-Mart's alleged bribery.¹⁰⁹ During the years of the alleged bribes, Wal-Mart maintained a global ethics office.¹¹⁰ The office and hotline were there so that employees could "make confidential and anonymous complaints regarding potential violations of our statement of ethics, including violations related to financial or accounting matters."¹¹¹ Thomas D. Hyde was their Executive Vice President of Legal Compliance Ethics and their Corporate Secretary from June 2005 to August 2010.¹¹² The company's January 1, 2005, Statement of Ethics provides for reporting of accounting issues to go through the Ethics Hotline, which would eventually forward the concerns to the Internal Audit Department.¹¹³ Prior to the scandal, each region had a legal department who reported to the CEO of the region, not Wal-Mart International.¹¹⁴

In the wake of the scandal, Wal-Mart redesigned its compliance structure.¹¹⁵ Under the leadership of their Executive Vice President and Global Chief

102. Tom Schoenberg, *Walmart Deadlocked with U.S. Over Bribery Probe*, BLOOMBERG BUS. (Aug. 2, 2018, 3:00 AM), <https://www.bloomberg.com/news/articles/2018-08-02/walmart-is-said-to-be-deadlocked-with-u-s-over-bribery-probe>.

103. *Id.*

104. *Id.*

105. Press Release, SEC, *Walmart Charged with FCPA Violations* (June 20, 2019), <https://www.sec.gov/news/press-release/2019-102>.

106. *Id.*

107. *Wal-Mart Bribery Allegations Put Focus on Mexican Middlemen Used to Grease Bureaucratic Wheels*, CBS NEWS (Apr. 24, 2012), <https://www.cbsnews.com/news/wal-mart-bribery-allegations-put-focus-on-mexican-middlemen-used-to-grease-bureaucratic-wheels>.

108. *Id.*

109. Ivan Castano, *Mexico Launches Anti-Corruption Law as Wal-Mart Scandal Worries Government*, FORBES (Apr. 27, 2012, 2:15 AM), <https://www.forbes.com/sites/ivancastano/2012/04/27/mexico-launches-anti-corruption-law-as-wal-mart-scandal-worries-government>.

110. WALMART, 2005 ANNUAL REPORT 52 (2005); WALMART, 2009 ANNUAL REPORT 54 (2009).

111. WALMART, 2005 ANNUAL REPORT 52 (2005).

112. *Executive Profile: Thomas D. Hyde*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/people/person.asp?personId=186594&privcapId=283024> (last visited May 10, 2019).

113. WAL-MART, NO. PD-10, STATEMENT OF ETHICS 6 (rev. 2005).

114. *Wal-Mart Overhauls Compliance Department amid Bribery Probe*, REUTERS: WEALTH (Oct. 24, 2012), <https://www.reuters.com/article/us-walmart-compliance-idUSBRE89N1IR20121024>.

115. Michael A. McGrail, *Corporate Governance and Compliance*, 2015 ABA RECENT DEV. PUB. UTIL. COMM. & TRANSP. INDUSTRIES 81, 83 (2015).

Ethics and Compliance Officer, Jay Jorgensen the company made extensive changes to the structure of their compliance function.¹¹⁶ The new structure separates the corporation's legal and compliance functions in all of its international markets.¹¹⁷ It also planned to merge its ethics program with its compliance program.¹¹⁸ Prior to Jorgensen's 2014 overhaul, Wal-Mart did have individual chief compliance officers for each country in which they operated,¹¹⁹ however, they usually were the GC as well.¹²⁰ Jorgensen feels strongly that the structure matters, and that E&C should be independent from the legal department.¹²¹

116. See WALMART, 2017 ANNUAL REPORT 55 (2017).

117. *Id.*

118. *Id.* at 62. Ethics and compliance, while inherently related, often perform separate roles within a corporation. This Article assumes Ethics and Compliance are a combined entity. This is not always the case. There is also a growing body of literature emphasizing the differences between corporate compliance and ethics and the possibility of separating them into distinct entities. SEC. INDUS. & FIN. MKTS. ASS'N, THE EVOLVING ROLE OF COMPLIANCE 27 (2013) (describing the difference between the related fields of compliance, which focuses on following the letter of the law, and ethics, which aims to promote a responsible firm culture starting with the tone at the top). Traditionally, E&C programs have been lumped together, although there is a growing movement to separate them in the hopes that it will better promote both the goal of following the law, and the goal of creating a company culture that proactively seeks to act in a socially responsible way. *Id.* The primary goal of separate compliance and ethics departments is that such a system allows for ethics to play a more important role, rather than incentivizing companies to do the bare minimum required to comply with the law. Maurice E. Stucke, *In Search of Effective Ethics & Compliance Programs*, 39 J. CORP. L. 769, 788 (2014) (noting that combined E&C departments encourage "check-the-box" thinking as opposed to fostering good corporate citizens, which is the intent of the guidelines). This problem is compounded by the fact that there are presently very few outside incentives for companies to have a robust ethics program. Joan T.A. Gabel et al., *Letter vs. Spirit: The Evolution of Compliance into Ethics*, 46 AM. BUS. L.J. 453, 486 (2009) (stating that "only compliance and the efforts to prevent legal misconduct receive prosecutorial and sentencing attention"). Separate E&C programs, however, also create unique challenges. See generally Gates Garrity-Rokous & Harold F. Baker, *Solving Ethical "Decoupling": A Programmatic Approach to Ensuring Both Compliance and Ethics*, 48 U. TOL. L. REV. 453 (2017). Separate E&C departments also have the potential to create a disconnect between, "the goals of the integrity program and the overall goals of the organization." *Id.* at 457. For example, "it is easier to educate a sales force on how to best make daily choices between profits and prior customer commitments . . . if a company sets forth customer loyalty as a corporate value. Conversely, employees quickly detect values that appear to have no place in a company's mission." *Id.* While the law appears to desire compliance and ethics, in the current state of corporate law, "only compliance and the efforts to prevent legal misconduct receive prosecutorial and sentencing attention." Gabel et al., *supra*, at 486 (describing the need for a system that promotes ethical conduct in corporations that encourages them to operate as corporate citizens that demonstrate socially responsible conduct). As a result, "the managements of too many companies aim for what they perceive as minimally required when it comes to compliance/ethics—in essence, they aim for the bottom. A major flaw in this thinking is that—quite apart from the question of what good corporate citizens should be doing on their own without the threat of enforcement—the fact is that minimalistic, check-the-box compliance/ethics programs do not even satisfy the intent of the Guidelines." Stucke, *supra*, at 788 (explaining that effective ethics programs facilitate good behavior, while effective compliance programs merely set a baseline expectation for corporate governance). Corporate compliance and ethics programs that are combined, "can lead not just to ineffective programs (and a waste of resources)" but also to "counter-productive programs." David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317, 359–60 (2016). The debate over whether they should be combined or separated is beyond the scope of this Article.

119. Matt Kelly, *Walmart Outlines Compliance Reforms (Part I)*, COMPLIANCE WK.: THE BIG PICTURE (Apr. 23, 2014), <https://web.archive.org/web/20140427020105/http://www.complianceweek.com/walmart-outlines-compliance-reforms-part-i/article/343986>.

120. *Id.*

121. *Id.*

The tenants of the program include an approach where each country has a leader, who in turn reports to a regional leader, who reports to the global leader, who reports to Wal-Mart's headquarters in Bentonville, Arkansas.¹²² Another core feature of the program is that the company has decided on fourteen core compliance responsibilities, each of which has a subject matter expert.¹²³

C. *Halliburton Company*

A third example illustrates that even in companies where the two roles, GC and CECO are separate and independent, companies still suffer from information silos and limited transparency, particularly when it concerns their foreign subsidiaries. On July 27, 2017, the SEC issued a Cease-and-Desist order against the Halliburton Company.¹²⁴ The order detailed the settlement between Halliburton and the SEC. According to the Order, Halliburton violated the books and records provision of the FCPA through paying \$3.7 million in bribes to an Angolan company, who Halliburton wanted to "fulfill their local content obligations."¹²⁵ Halliburton ultimately saw approximately \$15 million in profit and was awarded multiple lucrative subcontracts.¹²⁶

Angola is known for its widespread corruption.¹²⁷ Authorities rarely prosecute bribery offenses, despite the country's Probity Law which criminalizes both active and passive bribery.¹²⁸ Against this backdrop, the Halliburton Company allegedly paid \$3.7 million in bribes to an Angolan company, who Halliburton wanted to "fulfill their local content obligations."¹²⁹ Halliburton's oil-field services contracts were made with Angola's state-oil company, Sonangol.¹³⁰ Sonangol had local content requirements stipulating that foreign companies such as Halliburton work with a local Angolan company.¹³¹ To meet this requirement, Jeannot Lorenz, a Vice President in charge of Halliburton's local content in Angola, ultimately entered into two contracts with the local company for reasons other than those stated in the contract.¹³² In their Cease-and Desist order, the SEC alleged that he entered into them to bribe the local Angolan company "in violation of [Halliburton's] own internal accounting controls."¹³³

122. *Id.*

123. *Id.*

124. In the Matter of Halliburton Company and Jeannot Lorenz, *supra* note 14, ¶ 2.

125. *Id.* ¶ 2.

126. Press Release, SEC, Halliburton Paying \$29.2 Million to Settle FCPA Violations (Jul. 27, 2017) (available at <https://www.sec.gov/news/press-release/2017-133> [<https://perma.cc/Q9ZW-598G>]).

127. *Angola Corruption Report*, GAN BUS. ANTI-CORRUPTION PORTAL, <https://www.business-anti-corruption.com/country-profiles/angola/> (last updated Aug. 2016) [<https://perma.cc/F5M8-BPFF>].

128. *Id.*

129. In the Matter of Halliburton Company and Jeannot Lorenz, *supra* note 14.

130. Justina Vasquez, *Halliburton to Settle SEC Allegations over Angola Payments*, WALL ST. J. (July 27, 2017, 3:19 PM), <https://www.wsj.com/articles/halliburton-to-settle-sec-allegations-over-angola-payments-1501183172>.

131. *Id.*

132. In the Matter of Halliburton Company and Jeannot Lorenz, *supra* note 14.

133. *Id.*

These internal accounting controls were meant to prevent bribes of the type Lorenz caused Halliburton to pay. To meet the local content provider requirement, Lorenz sought to work with a business owner who was both a friend of a Sonangol official and a former Halliburton employee.¹³⁴ At first, Lorenz tried to retain the former employee's local Angola company as a commercial agent,¹³⁵ however, Halliburton subjected any new commercial agent to in-depth due diligence and a long review process.¹³⁶ To circumvent the lengthy process, Lorenz next suggested that Halliburton forego their internally mandated competitive bidding process and "directly outsource some of Halliburton's in-house functions to the Angolan company."¹³⁷ Nevertheless, Halliburton's internal protocols required a competitive bidding process—a process the company conducted over several months.¹³⁸ Due to length of the process, Lorenz sought to show "good faith" to the local Angolan company.¹³⁹ To do this he began paying the company in July 2009, three months before Halliburton issued its initial request for quotes.¹⁴⁰ The payments were issued under an "Interim Consulting Agreement" that ultimately paid the Angolan company \$45,000 per month.¹⁴¹ Lorenz did not include his "good faith" justification in the agreement.¹⁴² Instead, the agreement detailed false descriptions of the Angolan company's scope or work.¹⁴³ Lorenz also lied to others at Halliburton leading them to believe that the local company "had already provided and would continue to provide actual services under the consulting agreement."¹⁴⁴ Services were never provided.¹⁴⁵

Lorenz's preferred local company had the worst bid when the bids were reviewed.¹⁴⁶ Despite the noncompetitive bid, Halliburton believed it had to move forward with the preferred company in order to honor their commitment.¹⁴⁷ The preferred local company refused to negotiate on the price and demanded at least \$250,000 per month above cost.¹⁴⁸ To work around this problem and complete the deal with the local Angolan company, Lorenz suggested a real estate lease proposal instead of an outsourced services contract as originally discussed.¹⁴⁹

Lorenz's process of suggesting a provider—such as the preferred local company—and then suggesting a need that provider could meet was contrary to Halliburton's internal control procedures.¹⁵⁰ These procedures require that the

134. *Id.*

135. *Id.* ¶ 9.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* ¶¶ 10, 11.

142. *Id.* ¶ 11.

143. *Id.*

144. *Id.*

145. *Id.* ¶ 17.

146. *Id.* ¶ 14.

147. *Id.*

148. *Id.* ¶ 15.

149. *Id.*

150. *Id.* ¶ 16.

company first determine their need—such as real estate space—and then seek a provider.¹⁵¹ Lorenz switched the order and did so without a competitive bidding process.¹⁵² Halliburton’s internal accounting controls also included a review process of high value transactions in high-risk countries.¹⁵³ The reviewers could not identify “any legitimate reason” to pay the preferred company over \$13 million.¹⁵⁴ To put this in context, this amount exceeded Halliburton’s Angolan real estate department’s entire budget.¹⁵⁵ Under time pressure to find a local content provider, Halliburton’s senior executives permitted the contract, a 2010 “Real Estate Management Agreement” to move forward despite the burdensome and costly terms.¹⁵⁶ Due to the lack of information justifying the contracts, Halliburton’s internal audit team did not review the transactions, but did note that there was inadequate information to justify the preferred company as the single source.¹⁵⁷

The improprieties came to light in December 2010 when an anonymous email informed Halliburton that employees had violated the company’s internal code and the FCPA through the use of a local Angolan company.¹⁵⁸ Halliburton opened an internal investigation into possible violations of the FCPA in Angola as a result.¹⁵⁹

Halliburton, unlike Wal-Mart and ADM, had a direct reporting structure.¹⁶⁰ At the 2010 *Compliance Week* Annual Conference, Susan Ponce, Halliburton’s Senior Vice President and Chief Ethics and Compliance Officer, stated that she “reports directly to the company’s Board of Directors, advising both the Audit Committee and the full Board on all matters relating to legal and compliance issues.”¹⁶¹ Ponce went on to state that Halliburton adopted this structure “to leave no doubt that the CECO has direct, independent and unfettered access to our Board and support from Board members and our senior executives.”¹⁶² Although Halliburton had a direct reporting structure, the company’s compliance department suffered from similar information deficits as a result of opaque transactions by foreign subsidiaries.

151. *Id.*

152. *Id.*

153. *Id.* ¶ 18.

154. *Id.*

155. *Id.*

156. *Id.* ¶¶ 18, 19.

157. *Id.* ¶ 21.

158. *Halliburton Company*, TRACE INT’L, <https://www.traceinternational.org/TraceCompendium/Detail/374?type=1> (last visited May 10, 2019) [<https://perma.cc/9VCY-UC4S>].

159. Angela Gonzalez, *Halliburton Probing Its Angola Dealings*, WALL ST. J. (Oct. 24, 2011, 12:38 PM), <https://www.wsj.com/articles/SB10001424052970204644504576651171722498408>.

160. Fox, *supra* note 21; *see infra* Sections IV.A, IV.B.

161. Fox, *supra* note 21.

162. *Id.*

III. STRUCTURAL FOCUS

General agency guidance, repeated regulatory focus, and remedial measures have used reporting structure as a means by which investigating agencies measure whether a company has an effective E&C program. Moreover, the business world has engaged in an ongoing debate over the most appropriate E&C reporting structure within corporations.¹⁶³ According to the United States Sentencing Guidelines for Organizations, an organization with an effective E&C program “shall exercise due diligence to prevent and detect criminal conduct” and “otherwise promote an organizational culture that encourages ethical conduct.”¹⁶⁴

The legal approach to “how” to design an effective program has revolved around structural arguments. When the U.S. Sentencing Commission revised Chapter Eight, it amended the definition of an effective program.¹⁶⁵ The new definition clarified that a program can still be considered effective when a senior employee was part of the alleged violation if, among other things, the person in charge of compliance has a direct reporting obligation to the board of director’s audit committee or other governing authority.¹⁶⁶ This matter was the subject of debate at the 2010 *Compliance Week* Annual Conference.¹⁶⁷ Representatives from the U.S. Sentencing Commission expressed their belief that the, at the time proposed, 2010 Amendments to the U.S. Sentencing Commission Guidelines did not require that the compliance officer exist separate from the GC, but could report to the Board of Directors through the GC.¹⁶⁸ In contrast, the Assistant Attorney General of the DOJ’s Criminal Division, expressed the opposite view, “suggesting that the CCO should not have to report through a GC but should report directly to the Board.”¹⁶⁹

This debate over organizational design, which questions where the E&C function should be housed within an organization’s structure, is ongoing and emphasized by the regulatory bodies.¹⁷⁰ As noted in the introduction, the DOJ has highlighted “[t]he reporting structure of any compliance personnel employed or contracted by the company” as one consideration when considering the efficacy

163. *Uncovering High-Yield Investments in Ethics & Compliance: LRN Releases Comprehensive Analysis of E&C Program Impact*, CISION PR NEWSWIRE (May 19, 2014, 9:00 AM), <https://www.prnewswire.com/news-releases/uncovering-high-yield-investments-in-ethics—compliance-lrn-releases-comprehensive-analysis-of-ec-program-impact-259787271.html> [<https://perma.cc/PT4G-SPZ9>] (“A common industry debate focuses on the most appropriate reporting structure for ethics & compliance officers.”).

164. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(1)–(2) (U.S. SENTENCING COMM’N 2016), <https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8> [<https://perma.cc/9BDJ-4AR4>].

165. *Id.*

166. *Id.* § 8C2.5(f)(3)(C)(i).

167. *See generally* Fox, *supra* note 21.

168. *Id.*

169. *Id.*

170. Robert C. Bird & Stephen Kim Park, *The Domains of Corporate Counsel in an Era of Compliance*, 53 AM. BUS. L.J. 203, 204, 207 (2016).

of an E&C program.¹⁷¹ In February 2017, the DOJ issued a new guide to evaluating corporate compliance programs.¹⁷² Notably, the guide's sample topics all appear in the 2012 FCPA Guide and can also be found in the Sentencing Guidelines for Organizations.¹⁷³

There are two commonly discussed E&C reporting structures. The first is one in which either the top E&C person is under the supervision of the GC or where the GC and top ethics professional are one and the same.¹⁷⁴ ADM is an example of this, and Wal-Mart's structure at the time of the Mexican bribery does this at the country level.¹⁷⁵ In contrast, the other approach separates the E&C function from the GC, leaving it as a standalone department, like Halliburton did.¹⁷⁶ The reporting structure of the standalone department varies from corporation to corporation. In many organizations, the reporting line goes directly to the board of directors; in others it goes to the CEO or even COO.¹⁷⁷

ADM, Wal-Mart, and Halliburton's structures each find support among regulators and scholars. Proponents of combining E&C responsibilities with those of the GC argue that separating the functions is duplicative.¹⁷⁸ At the core of this argument is the idea that the primary role of E&C starts with compliance with the law. Since the legal department is tasked with identifying applicable law and how the company will follow it, some have argued that compliance should report to the GC.¹⁷⁹ Because many of an organization's compliance areas would need to consult with the legal department, it facilitates this more smoothly.¹⁸⁰ Moreover, splitting the position can lead to confusion about who is in charge of

171. See FCPA CORPORATE ENFORCEMENT POLICY, *supra* note 7.

172. DOJ, EVALUATION OF CORP. COMPLIANCE PROGRAMS, CRIM. DIVISION: FRAUD SEC., <https://www.justice.gov/criminal-fraud/page/file/937501/download> (last visited May 10, 2019) [<https://perma.cc/J87X-CBRT>].

173. U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(1)–(2) (U.S. SENTENCING COMM'N 2004). Specifically, the guidelines require the organization “(1) exercise due diligence to prevent and detect criminal conduct; and (2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.” As part of fulfilling these requirements, the organization must establish standards and procedures to prevent and detect criminal conduct, as well as monitoring, detecting, and training employees on ethics and compliance issues. See DOJ, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 56–62 (2012), <https://www.documentcloud.org/documents/515229-a-resource-guide-to-the-u-s-foreign-corrupt.html> [<https://perma.cc/7YNY-JYRJ>].

174. Bird & Park, *supra* note 170, at 204–06.

175. See *supra* Section II.A.

176. Bird & Park, *supra* note 170, 205.

177. Joseph A. Gerard & Curt M. Weber, *Compliance and Corporate Governance: Theoretical Analysis of the Effectiveness of Compliance Based on Locus of Functional Responsibility*, 8 INT'L J. GLOBAL BUS. 15, 18–21 (2015).

178. Varun Mehta, *GC vs. CCO: The Big Debate*, CORP. COUNS. (Mar. 26, 2014, 2:27 PM), <https://www.law.com/corpocounsel/almID/1202648483244/GC-vs-CCO-The-Big-Debate> [<https://perma.cc/YP72-MHNT>].

179. Ben W. Heineman, Jr., *The Chief Compliance Officer Debate: Focus on Function Not Form*, ABA: BUS. L. TODAY (Sept. 19, 2018), https://www.americanbar.org/groups/business_law/publications/blt/2016/07/06_heineman [<https://perma.cc/86X2-PQAL>] (“I believe the CCO should report to the GC because the legal department is responsible for the foundational task of determining what the law is.”).

180. Gerard & Weber, *supra* note 177, at 19.

risk and can lead to less cooperation when managing risk.¹⁸¹ It can also cause power struggles between the two departments.¹⁸²

Two leading business scholars have identified even more pressing concerns. Separating the functions, they argue, will leave compliance as a standalone, departmental, isolated function.¹⁸³ Keeping E&C in legal, they argue, allows it to be well-integrated in the organization's structure.¹⁸⁴

For those who support the opposite view, the same argument— isolation— is often mentioned as one of the disadvantages of combining the two roles. Outside of senior executives, most employees have little interaction with the legal department.¹⁸⁵ Many employees find the legal department intimidating and the prospect of reporting a violation to a lawyer even more so.¹⁸⁶ Thus, when the functions are combined, some worry that E&C will be isolated from the broader organization. In other words, employees will not seek guidance from E&C.

Additional concerns include the conflict inherent when the GC wears two hats. Acting as both GC and CECO creates tension between the GC's attorney-client privilege obligations and the CECO's self-reporting responsibilities favored by the sentencing guidelines.¹⁸⁷ According to some critics of a combined position, the conflict between the compliance officer's "proper fiduciary conduct" and GC's legal obligations to be a zealous advocate and maintain confidentiality are irreconcilable.¹⁸⁸ Moreover, the central focus of the two roles differ strongly. The role of a compliance officer is not simply to prevent misconduct from occurring, but to search, uncover, and even investigate potential misconduct.¹⁸⁹ Stated differently, the GC creates programs to prevent wrongdoing and compliance probes to find wrongdoing that has occurred despite the programs.¹⁹⁰ Finally, the GC's role is best characterized as reactive to the corporation's problems.¹⁹¹ In contrast, compliance is best approached proactively.¹⁹²

Not only should E&C be proactive, it should adopt a holistic approach to examining the organization's challenges from inside and out.¹⁹³ Those that support a structure where E&C is independent from the GC believe that the CECO's

181. Bird & Park, *supra* note 170, at 204; Mehta, *supra* note 177.

182. Bird & Park, *supra* note 170, at 204–06.

183. *Id.* at 208.

184. *Id.* at 207–08.

185. Gerard & Weber, *supra* note 177, at 19.

186. *Id.*

187. Amy E. Hutchens, *Wearing Two Hats: In-House Counsel and Compliance Officer*, ACC DOCKET, Nov. 2011, at 66, 70–72 ("Few in-house attorneys will feel comfortable defending an organization against allegations of wrongdoing or non-compliance, while, at the same time, advising the executive leadership to self-report the same misconduct, particularly when the self-reporting is not mandatory.").

188. John B. McNeece IV, *The Ethical Conflicts of the Hybrid General Counsel and Chief Compliance Officer*, 25 GEO. J. LEGAL ETHICS 677, 677–78 (2012).

189. Zane Gilmer, *The Rocky Relationship Between the General Counsel and the Corporate Compliance Officer*, 41 LITIG. 13, 13–14 (2014).

190. McNeece, *supra* note 188, at 678.

191. *Id.* at 688.

192. *Id.*

193. *Id.*

responsibilities go beyond legal compliance.¹⁹⁴ These responsibilities encompass the ethical culture of the organization which is a critical component of compliance.¹⁹⁵ In other words, the compliance officer should “act as both the moral conscience of the firm and be responsible for a firm’s ethical culture.”¹⁹⁶ Approaching compliance from a legal perspective reduces the role that intangibles, such as culture, play in influencing an employee’s behavior.¹⁹⁷ Another advantage of a standalone department is that the reporting structure signals that E&C are top priorities for that corporation. For instance, when the department reports to the CEO or another c-suite officer, it places a high-level, very visible executive at the head of the reporting structure.¹⁹⁸ The disadvantage of this structure, however, is that the response to the compliance concerns are determined by the same executive who may choose to ignore the information, selectively respond to concerns, or even suppress information about violations.¹⁹⁹ Thus, the efficacy of E&C is largely subject to the executive’s preferences.

More and more government agencies are either directly or indirectly expressing their preference that the GC should not function as the CECO. For instance, in recent Corporate Integrity Agreements between health care providers and the Office of Inspector General of the U.S. Department of Health and Human Services (“OIG”), the OIG has stated, “[t]he Compliance Officer shall not be or be subordinate to the General Counsel or Chief Financial Officer.”²⁰⁰ The Sentencing Commission’s revisions reflect the DOJ’s apparent preference for direct reporting lines when entering into deferred prosecution and NPAs with corporations settling criminal charges.²⁰¹ Agreements with corporate monitors frequently specify that the head of compliance have a direct reporting line to the Board or one of its subcommittees.²⁰² In fact, in twenty-one of the thirty-one DOJ agreements with corporations, the head compliance employee must have such a direct reporting line.²⁰³

Despite the agencies’ clear preference, a significant number of corporations continue to have a combined position or require the CECO to report to the GC.²⁰⁴ A 2014 Price Waterhouse Coopers’ (“PWC”) State of Compliance Survey of 1,056 respondents found that for a majority (54%) the person responsible for compliance also served another function within the organization, most often the

194. Patrick Gnazzo, *The GC and the CECO: Partners at the Table*, CORP. COUNS. (June 11, 2014, 11:05 AM), <https://www.law.com/corpcounsel/almID/1202658954975>.

195. *Id.*

196. Bird & Park, *supra* note 170, at 205.

197. *Id.* at 205–06.

198. Gerard & Weber, *supra* note 177, at 18.

199. *Id.*

200. Hutchens, *supra* note 187, at 68.

201. Ryan McConnell et al., *Take it to the Board: There’s No Perfect Org Chart-But Compliance Officers Need a Direct Line to Directors*, AM. LAW., Jan. 1, 2012, at 15.

202. *Id.* at 14–15.

203. *Id.* at 15.

204. See PRICEWATERHOUSECOOPERS, WHAT IT MEANS TO BE A “CHIEF” COMPLIANCE OFFICER: TODAY’S CHALLENGES, TOMORROW’S OPPORTUNITIES 2 (2014).

GC.²⁰⁵ In fact, PWC's 2016 State of Compliance Study found that the most common structure was for E&C to report to the legal department, and the numbers were 5% higher than the 2015 figure.²⁰⁶

The enforcement agencies contribute to the structural emphasis with their specific guidance regarding reporting structure and focus on structure in NPAs and DPAs. In 2012, the DOJ's criminal division and the SEC's Enforcement Division published *A Resource Guide to the U.S. Foreign Corrupt Practices Act*. They described it as "an unprecedented undertaking by DOJ and SEC to provide the public with detailed information about our FCPA enforcement approach and priorities."²⁰⁷ In the guide, the agencies define autonomy structurally without adequate emphasis on process. They state that "[a]equate autonomy generally includes direct access to an organization's governing authority such as the board of directors and committees of the board of directors (e.g. the audit committee)."²⁰⁸ This access is meaningless unless those tasked with organizational FCPA compliance have access to processes that will yield substantive information.

Given its frequent guidance, the government can easily prioritize process by articulating, as critical to an effective E&C program, the three elements of effective information gathering identified below. These three elements—multiple information gathering channels, fostering organic organizational communication, and cultivating channel richness—are of particular importance to deterring and detecting FCPA violations.

IV. PROCESS ORIENTED APPROACH TO EFFECTIVE E&C

Information and information processes have long been recognized as a critical component of effective corporate decision-making.²⁰⁹ Over thirty years ago, the *American Bankers Association Banking Journal* published an article stating that "compliance officer[s] must establish ways of gathering information and communicating it to the staff."²¹⁰ Information gathering channels are necessary to ensuring an effective decision-making processes—a process that is necessary for E&C to work.²¹¹

205. *See id.* at 10.

206. *See* PRICEWATERHOUSECOOPERS, PWC STATE OF COMPLIANCE STUDY 2016: LAYING A STRATEGIC FOUNDATION FOR STRONG COMPLIANCE RISK MANAGEMENT 14 (2016) (noting that reporting to the legal department "occurs in 36% of companies, up 5 points from 2015").

207. CRIM. DIV. DOJ & ENFORCEMENT DIV. SEC, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT (2012).

208. *Id.* at 58.

209. *See generally* Sharpe, *Process Over Structure*, *supra* note 22; Sharpe, *Questioning Authority*, *supra* note 22.

210. Phillips G. Gay, Jr., *Better Compliance Through Organization*, 1987 A.B.A. SEC. COMPLIANCE. REP. 44, 46.

211. Sharpe, *Questioning Authority*, *supra* note 22, at 26–27.

Foreign subsidiaries are the most frequent transgressors of the FCPA.²¹² Organizations are more prone to silos when they are large, geographically dispersed, and have departments clearly demarcated by functional responsibilities. At Wal-Mart for instance, a corporation with twenty-seven international locations,²¹³ as well as departments divided by function—human resources, marketing, etc.²¹⁴—the process by which personnel communicate, exchange and gather information, as well as interact with others across the globe is more integral to successful FCPA adherence than is the E&C reporting structure. The Process Oriented Approach has five steps: (1) Identification; (2) Analysis; (3) Choice of Response; (4) Approval; and (5) Implementation.²¹⁵ An organization that utilizes this approach is far more likely to have a successful E&C function regardless of the reporting structure it employs.

A. Identification

Identification is the first step and plays a gate-keeping role for the scope of the corporate opportunities and challenges under consideration.²¹⁶ The searcher is the gate-keeper. Her biases, which are in part a function of her goals and experiences, influence the search.²¹⁷ Identifying the problem and/or opportunity is intertwined with information gathering. The manner in which she gathers information and how she obtains it shapes the information available to the decision maker.²¹⁸ At its core, the information identification step is a process by itself—a process that involves a series of decisions by the information gatherer which ultimately determines the universe of possibilities she can identify.²¹⁹

Of course, information gathering involves not only searching for but obtaining the information. Often times it is the information obtained or lack thereof that fatally flaws any decisions. Information accessibility is of paramount importance.²²⁰ The more time and effort involved in searching for high quality information, the more likely it is that the information seeker will passively accept

212. See *SEC Enforcement Actions: FCPA Cases*, SEC, <https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last modified May 13, 2019).

213. *Location Facts*, WALMART, <https://corporate.walmart.com/our-story/our-locations> (last visited May 10, 2019).

214. Jessica Lombardo, *Walmart: Organizational Structure & Organizational Culture*, PANMORE INST. (Feb. 15, 2019), <http://panmore.com/walmart-organizational-structure-organizational-culture>.

215. For a description of the Process Oriented Approach, see Sharpe, *Questioning Authority*, *supra* note 22, at 23. For an illustration of a systematic decision-making process, see JOHN R. SCHERMERHORN, JR. ET AL., ORGANIZATIONAL BEHAVIOR 196–97 (12th ed. 2011) (writing that systematic decision-making involves: (1) recognizing and defining problem/opportunity, (2) identifying and analyzing other courses of action, (3) choosing best/preferred course of action, (4) implementing preferred option, and (5) evaluating the results and following up).

216. Sharpe, *Questioning Authority*, *supra* note 22, at 23.

217. *Id.* (citing RICHARD M. CYERT & JAMES G. MARCH, A BEHAVIORAL THEORY OF THE FIRM 169 (2d ed. 1992)).

218. *Id.* (citing CYERT & MARCH, *supra* note 217, at 10).

219. *Id.*

220. ANDREW J. DUBRIN, FUNDAMENTALS OF ORGANIZATIONAL BEHAVIOR 96 (4th ed. 2007).

more easily gathered lower quality information.²²¹ In other words, low hanging fruit is more attractive. The quality of the information she seeks and receives determines the quality of decision she is able to make.²²²

In addition to the information seekers biases and limitations, the quality of the information E&C receives is shaped by the biases of those communicating the information, including self-interest bias, status-quo bias, and confirmation bias.²²³ For instance, often E&C receives information from managers and employees lower in the organizational hierarchy than they are. This is called upward information flow, where information comes from a lower organizational level to higher ones.²²⁴ Upward information flow commonly suffers from several problems.²²⁵ Employees tend to filter information when communicating upward.²²⁶ In many instances, confirmation bias limits the information communicated to what the boss wants to hear.²²⁷ This can leave E&C with an incomplete and inaccurate picture of the situation, thus diminishing decision-making quality by limiting the problems that are identified. The three tools identified below help to mitigate various biases' impact and improve the information gathering process.

1. *Multiple Information Channels*

The first is that there should be more than one information channel. Importantly, information should be gathered from several sources in addition to the unit or person under investigation. In the absence of an investigation, information should be gathered from several levels of the organizational hierarchy and from employees with different functionality within a particular unit. For instance, learning about a contract from legal, sales, accounting and a third-party to the contract can provide a variety of perspectives that offer a more complete picture of the transaction. If dealing with a foreign subsidiary, at least one of the sources should be an expert on local laws, customs, and practices.

221. *Id.*

222. *Id.*

223. Sharpe, *Questioning Authority*, *supra* note 22, at 23–24, 48.

224. SCHERMERHORN, JR. ET AL., *supra* note 215, at 253.

225. *Id.*

226. *Id.* at 253, 255.

227. *Id.* at 255 (explaining that the reasons for this can vary from “fear of retribution for bringing bad news, an unwillingness to identify personal mistakes, or just a general desire to please”).

2. *Organic Communication*

There are two primary organizational structures—mechanistic and organic—that signal the degree of centralization and informal or flexible communication within the organization.²²⁸ Mechanistic structures are more bureaucratic.²²⁹ Some would even say they are “synonymous with the term *bureaucracy*.”²³⁰ A mechanistic structure is known for hierarchy, vertical communication, and “heavy reliance on rules, policies, and procedures.”²³¹ They tend to have centralized communications and have formal communication channels.²³² Centralized communications systems, sometimes called vertical organizations, are structured so that decision-making power is consolidated in a smaller group of people as you move up the organizational hierarchy.²³³ Organizations whose communication tends to be restricted to formal communication channels typically route information through the lines on an organizational chart.²³⁴

On the other hand, organic structures have decentralized systems and are more flexible or informal.²³⁵ Decentralized communications systems are communications structured around division managers that share information between each other.²³⁶ Organic structures have high levels of individual autonomy and employ fluid and flexible communication.²³⁷ They are “laid out like a network.”²³⁸ In business organizations that utilize a decentralized communication network, division managers have the advantage of being able to use their local knowledge of their specific business component in a way that is most suitable to them.²³⁹ Decentralized communication systems rely upon the sharing of information between equally specialized employees in order to achieve common goals, while centralized systems reduce institutional agility and the ability to adapt to local conditions.²⁴⁰ Here, information is shared at lower levels and freely flows between multiple levels—visually this is seen as a circle with multiple pathways exchanging information. There is delegation to lower levels of management and shared responsibility. Communication is both formal and informal and is not limited by defined reporting structures. As one scholar has noted, “when coordination becomes very important, division managers recognize their

228. Mason A. Carpenter et al., *PRINCIPLES OF MANAGEMENT* 375–77 (2013), available at <https://resources.saylor.org/wwwresources/archived/site/wp-content/uploads/2013/06/Principles%20of%20Management%20NEW.pdf>.

229. *Id.*

230. DUBRIN, *supra* note 220, at 315.

231. *Id.*

232. Carpenter et al., *supra* note 228, at 375–77.

233. Ricardo Alonso et al., *When Does Coordination Require Centralization?*, 98 AM. ECON. R. 145, 145 (2008).

234. SCHERMERHORN, JR. ET AL., *supra* note 215, at 251.

235. Carpenter et al., *supra* note 228, at 375–77.

236. Alonso et al., *supra* note 233, at 145.

237. Carpenter et al., *supra* note 228, at 375–77.

238. DUBRIN, *supra* note 220, at 315.

239. Wouter Dessein, *Authority and Communication in Organizations*, 69 R. ECON. STUDIES 811, 811 (2002).

240. Wouter Dessein & Tano Santos, *Adaptive Organizations*, 114 J. POL. ECON. 956, 958 (2006).

interdependence and communicate and coordinate very well under decentralization.”²⁴¹ In the information age, where communication is inexpensive and instantaneous, decentralized communication allows employees at various levels of the organization to “share knowledge directly through many different channels.”²⁴²

3. *Channel Richness*

Organizational behavioral scholars use the term “channel richness” to convey “the capacity of a channel to convey information.”²⁴³ The richest channels are those that include personal, two-way communication.²⁴⁴ These channels are essential for high quality and complex information to flow. Examples of rich channels include face-to-face communications, telephone conversations, tours or visits to the location, and group meetings.²⁴⁵ In contrast, the least rich channels are considered email and written memos or documents.²⁴⁶ Channel richness researchers have studied the connection between communication channels and organizational structure.²⁴⁷ Unsurprisingly, empirical studies indicate that in most organizations information flows along “the formal reporting and advisory channels dictated by a particular structure.”²⁴⁸ Each organizational structure carries with it a specific set of deficiencies and presents barriers that reduce a decision makers information processing abilities.²⁴⁹ Managers who actively seek information beyond the limits of their organization’s structure are better able to ensure effective organizational performance.²⁵⁰ In the E&C context, it is insufficient to merely rely on the information that is transmitted through formal lines. Information processes that seek relevant information through rich channels is critical to effective E&C.

B. *Analysis*

Once a problem or opportunity has been identified, decision makers then analyze it.²⁵¹ Like identification, analysis relies heavily on information.²⁵² The decision maker is once again in a position of gate keeper. She must decide which information is used to conduct the analysis, and then she must interpret the results of her analysis.²⁵³

241. Alonso et al., *supra* note 233, at 147.

242. THOMAS W. MALONE, MAKING THE DECISION TO DECENTRALIZE (2004), available at <https://www.scribd.com/document/267498530/Making-the-Decision-to-Decentralize-HBS-Working-Knowledge>.

243. SCHERMERHORN, JR. ET AL., *supra* note 215, at 252.

244. *Id.*

245. J. Michael Whitfield, et. al., *The Effects of Organization Design on Media Richness in Multinational Enterprises*, 10 MGMT. COMM. Q., no. 2, Nov. 1996, at 209, 213.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Sharpe, *Questioning Authority*, *supra* note 22, at 24.

252. *Id.*

253. *Id.*

In the E&C context, if the information is obtained from units or personnel that have engaged in questionable conduct, there is a high probability that the information used to analyze the possible violation is incomplete, inaccurate, or misleading.

It is critical that the decision maker have “boots on the ground” and the ability to gather information first hand.²⁵⁴ It is also important that the decision maker operate separate from the possible problem. In other words, a manager should not be charged with investigating her own unit since “[p]eople are unlikely to pass information up if it will be harmful to themselves or their peers.”²⁵⁵ As noted above, E&C works best when it is proactive, not reactive.²⁵⁶ When E&C is merely a passive recipient of information that departments send as part of a pro forma requirement, the opportunity to identify ongoing challenges are limited.

C. *Choice of Response*

Once a problem has been identified and analyzed, the decision maker must then choose how to respond.²⁵⁷ When the units under investigation control the information they provide to E&C, the units may provide only information that minimizes/ignores bad behavior. Through their biased selection and transmission, the unit has determined what responses or course of action is appropriate. In other words, “control of information [has] clear effects on decision-making outcomes.”²⁵⁸ It is critical that E&C decision makers diversify their methods of obtaining information so that they have a better chance of choosing an appropriate response to the problem.

D. *Approval*

Approval is next. This step involves signing off on the chosen response.²⁵⁹

E. *Implementation*

Finally, the approved decision is carried out.²⁶⁰ In this final step, the decision is operationalized.²⁶¹ This is where integration with units under investigation are critical. To the extent that these units are to carry out the actions and they were not well integrated into the decision-making process, there is tremendous room for “lack-of-participation error” due to the fact that the “persons whose

254. *Id.* at 25.

255. PAMELA S. TOLBERT & RICHARD H. HALL, ORGANIZATIONS: STRUCTURES, PROCESSES, AND OUTCOMES 128 (10th ed. 2009).

256. *See generally* McNeece, *supra* note 188.

257. Sharpe, *Questioning Authority*, *supra* note 22, at 25.

258. TOLBERT & HALL, *supra* note 255, at 119.

259. Sharpe, *Questioning Authority*, *supra* note 22, at 25.

260. *Id.* at 26.

261. SCHERMERHORN, JR. ET AL., *supra* note 215, at 197.

support is necessary for eventual implementation” has not contributed to and committed to the resolution.²⁶²

V. PRIORITIZING PROCESS

ADM, Wal-Mart, and Halliburton each adopted different E&C reporting structures believing that their chosen structure provided for the best E&C outcomes.²⁶³ Despite significant variations in their structure, the three companies experienced a compliance failure leading to alleged FCPA violations and material monetary penalties. The failures of these three companies each reflect flaws with the process, not the structure. Unsurprisingly, each company’s failures originate with the first step of the decision-making process—information gathering. Optimizing the first step increases compliance quality the most. This can be done through using multiple information channels, adopting a more decentralized system of communication and information flow, and increasing channel richness.

A. Multiple Information Gathering Channels

ADM, Wal-Mart, and Halliburton relied on their foreign subsidiaries as their exclusive source of information, at times relying on a single individual.²⁶⁴ ADM’s tax executives were suspicious of the subsidiaries’ documentation of charity payments related to the VAT.²⁶⁵ The executives went so far as to wonder whether the donations were “potentially illegal.”²⁶⁶ Their source of information was limited to the subsidiaries involved and they accepted the subsidiaries’ answer that the payments were donations or a required VAT depreciation.²⁶⁷

Prior to the first notification of the scandal, Wal-Mart also allowed their Mexican subsidiary to function with tremendous autonomy. The bribes had been going on for three years before Cicero blew the whistle.²⁶⁸ The bribes were documented through the gestores’ invoices, yet Wal-Mart’s U.S. headquarters remained ignorant of the illegal practice because the subsidiary kept them in the dark.²⁶⁹ Wal-Mart compounded the problem of a limited, and even worse, strongly biased information channel, during the initial internal investigation that followed Cicero’s email.²⁷⁰ The company did not proceed with the independent, detailed investigation suggested by Willkie Farr and went on to transfer control of the internal investigation to one of the attorneys in Mexico that was implicated in the bribery scheme.²⁷¹ As discussed, a single information channel runs a high

262. *Id.*

263. See discussion *supra* Part II.

264. See *supra* Part II.

265. Complaint, SEC, *supra* note 39, at 6.

266. *Id.* at 7.

267. Complaint, Toepfer, *supra* note 48, at 3.

268. Barstow, *supra* note 13.

269. *Id.*

270. See discussion *supra* Section II.B.

271. See discussion *supra* Section II.B.

risk of providing incomplete information.²⁷² This risk increases when the source is under investigation for the alleged wrongdoing.

Halliburton was the subject of another multi-million dollar fine because the company allowed its Angolan operation to function with limited oversight and relied exclusively on Lorenz's communications.²⁷³ As the SEC Order details, Halliburton's "internal audit did not examine the agreements with the local Angolan company" because they could not justify the contracts with the limited information they had.²⁷⁴ Nevertheless, Halliburton moved forward with the preferred local Angolan provider based on little more than Lorenz's recommendation that Halliburton use them.²⁷⁵

Ukraine, Mexico, and Angola were all known corruption risks.²⁷⁶ Despite the widespread knowledge of the risks involved, each corporation failed to institute adequate processes to fact check information that came from their subsidiaries. Had the companies utilized additional information channels, the illicit payments may have been detected sooner or prevented all together. For instance, had Halliburton gone beyond Lorenz there is a greater likelihood that the company would have discovered the impropriety and forgone the Angolan business opportunity or sought one of their other providers. Similarly, had Wal-Mart used additional sources to audit the payment records, the gestores irregularities may have come to light much sooner. ADM would also have benefited from pushing harder to gather information from additional sources so that their tax people and executives could better understand the suspicious charity payments associated with the VAT.

B. *Organic Communication*

In *Fundamentals of Organizational Behavior*, Andrew J. DuBrin defines an organic structure as "[a]n organization laid out like a network, emphasizing horizontal specialization, extensive use of personal coordination, extensive communication among members and loose rules, policies and procedures."²⁷⁷ Ultimately a combination of informal relationships and communication channels can help the dissemination of useful information and allow companies to find opportunities to grow.²⁷⁸ Supplemented with decentralization, an organization can feel more democratic.²⁷⁹ Arguably, this provides managers in other departments the authority and incentive they need to seek information from different units and subsidiaries.

At ADM, the Ukraine subsidiary was decentralized in the sense that it had a tremendous amount of autonomy, however, communication was both formal

272. See discussion *supra* Subsection IV.A.1.

273. See discussion *supra* Section II.C.

274. In the Matter of Halliburton Company and Jeannot Lorenz, *supra* note 14, ¶ 21.

275. See discussion *supra* Section II.C.

276. See discussion *supra* Part II.

277. DUBRIN, *supra* note 220, at 411.

278. *Id.* at 316.

279. *Id.* at 317.

and reporting was centralized.²⁸⁰ ADM's tax experts did not push back enough to get the information it needed to understand the charitable contributions related to the VAT.²⁸¹ Due to the formal and bureaucratic nature of the organization, organic communications did not occur nor did executives engage in cross-functional communications with other departments, such as compliance, that might help them to better understand the VAT refunds.

Wal-Mart Mexico had similar autonomy. Unfortunately, this did not translate into cross-functional information flow between the subsidiary and headquarters.²⁸² The Mexican subsidiary deleted bribery records from their accounting documents so that Wal-Mart's headquarters remained ignorant.²⁸³ The bribery was far reaching and frequent—441 payments to *gestores* all over Mexico.²⁸⁴ While the subsidiary reported to headquarters, there does not appear to have been regular informal communication between the U.S. teams and Walmex's employees. Documents found during the course of the investigation reveal that Walmex's most senior executives were complicit in the alleged bribery scheme.²⁸⁵ When the Walmex 2004 internal audit flagged higher payments to the *gestores*, the concern was not about the illegal activity but that they were dependent on too few *gestores*.²⁸⁶ To solve this, Walmex diversified the number of intermediaries and removed any reference to the "facilitation payments" from reports that went to the company's Arkansas headquarters.²⁸⁷ This is one example among many the investigation found that Wal-Mart's reporting structure was centralized.

The CEO exercised tremendous control over the investigation.²⁸⁸ While the CEO's actions, which transferred the investigation to the subsidiary itself, could be seen as an attempt at decentralization, it was not the type of decentralization that empowered other units within the organization. Specifically, the internal investigation team, E&C as well as the U.S. GC, did not independently have access to communication channels that would have allowed for communication between and across the departments, and with Walmex.

Finally, Halliburton also lacked organic communications that facilitated information gathering throughout the organization and fostered informal communication. Their internal controls required at least two levels of approval—procurement and accounting—however, the approvals were granted despite significant deviation from standard protocol without justification.²⁸⁹ Neither approval level readily went beyond the information they were given. When the

280. See discussion *supra* Section II.A.

281. See discussion *supra* Section II.A.

282. See discussion *supra* Section II.B.

283. Barstow, *supra* note 13.

284. *Id.*

285. Cottrell v. Duke, 829 F.3d 983, 987 (8th Cir. 2016).

286. *Id.*

287. *Id.*

288. Barstow, *supra* note 13.

289. *Accounting Controls, Procedures & Records*, HALLIBURTON, <https://www.halliburton.com/en-US/about-us/corporate-governance/code-of-business-conduct/accounting-controls-procedures-records.html> (last

competitive bidding process yielded a winner with the least competitive bid, procurement should have been empowered and comfortable looking for a better explanation. Similarly, when accounting lacked the information to properly evaluate a red flag transaction, they should have been in a position where they knew people that they could quickly and comfortably contact to find out more about the payments and contracts. Instead, they blindly accepted it. This is an excellent illustration of how a particular reporting structure without robust information gathering mechanisms is hollow.

C. Channel Richness

As discussed, “[c]ommunication channel richness refers to the extent to which media have the ability to overcome different frames of reference, clarify ambiguous issues, and thus facilitate understanding between communicating individuals.”²⁹⁰ Oral communications are the “richest” way to transfer information.²⁹¹ It is a real time, personal connection between the sender and receiver that establishes trust and forges a relationship between the two.²⁹² In addition, decisions are expedited because there is real time feedback and follow-up.²⁹³

ADM had some in-person communications, but as concerns about the VAT surfaced, the tax executives expressed them through email to the subsidiaries.²⁹⁴ Before Cicero’s email, Walmex accounted for the bribes as legal fees.²⁹⁵ According to documents in the internal investigation, the subsidiary’s top executives both knew about the illicit payments and worked to conceal them from U.S. headquarters.²⁹⁶ Again, the standard means of communication involved written reports. Finally, Halliburton’s internal controls had checks at the procurement level and the accounting level.²⁹⁷ At both points in the process, the reviewers found the cost of the local preferred company to be unjustified.²⁹⁸ The lack of information was so significant that the audit team did not review the transaction, yet

visited May 10, 2019); Thomas Fox, *The Halliburton FCPA Enforcement Action - Lessons for Chief Compliance Officers on Internal Controls Failures*, JD SUPRA (Oct. 16, 2017), <https://www.jdsupra.com/legalnews/the-halliburton-fcpa-enforcement-action-90178>.

290. Alice M. Johnson & Albert L. Lederer, *The Effect of Communication Frequency and Channel Richness on the Convergence between Chief Executive and Chief Information Officers*, 22 J. OF MGMT. & INFO. SYS. 227, 30 (2005).

291. *Channels of Business Communication*, LUMEN LEARNING, <https://courses.lumenlearning.com/wm-principlesofmanagement/chapter/channels-of-business-communication/> (last visited May 10, 2019).

292. *Id.*

293. *Id.*

294. Complaint, Toepfer, *supra* note 48, at 3.

295. Peter Cohan, *Did Wal-Mart de Mexico Perfect the Art of Bribery?*, FORBES (Apr. 21, 2012, 5:15 PM), <https://www.forbes.com/sites/petercohan/2012/04/21/did-wal-mart-de-mexico-perfect-the-art-of-bribery/>.

296. Nivedita Bhattacharjee, *Wal-Mart Silenced Mexican Bribe Inquiry*, REUTERS (April 21, 2012, 9:04 PM), <https://www.reuters.com/article/us-walmart-mexico/wal-mart-silenced-mexican-bribe-inquiry-idUSBRE83K0I720120422>.

297. *Accounting Controls*, *supra* note 289; Fox, *supra* note 289.

298. In the Matter of Halliburton Company and Jeannot Lorenz, *supra* note 14, ¶¶ 18, 21.

it appears that they accepted the written transmissions and the senior executives approved the transaction.²⁹⁹

In all three instances, the routine and regular process of information gathering did not go above and beyond written documentation when questionable transactions were detected. High risk areas would benefit tremendously from the richest communication channels.

VI. CONCLUSION

E&C personnel need to have an effective information gathering process for successful FCPA compliance. While the agencies responsible for FCPA enforcement have provided unprecedented guidance on how corporations should structure their FCPA compliance programs, they have provided relatively little guidance on the process. This Article rejects the agencies' structural myopia. Without a supplemental and robust information gathering process, every structure leaves key decision makers with inherent knowledge deficiencies and informational blind spots. For E&C to be effective, particularly regarding FCPA violations which take place abroad, E&C must have a robust information gathering process. E&C personnel cannot detect and deter FCPA violations unless they have better mechanisms with which to gather information. Through the lens of organizational behavior theory, this Article identifies three tools that bolster the information gathering process—multiple information gathering channels, organic organizational communications, and channel richness. These three tools should be explicitly incorporated into the DOJ and SEC's guidance on what constitutes an effective FCPA compliance program, and, more generally, an effective E&C program. Hopefully these suggestions will stimulate discussion as well as an institutional shift toward prioritizing process.

299. *Id.* ¶ 18.

