The New Gatekeepers: Private Firms as Public Enforcers

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THE NEW GATEKEEPERS:
PRIVATE FIRMS AS PUBLIC ENFORCERS

Rory Van Loo*

The world’s largest businesses must routinely police other businesses. By public mandate, Facebook reviews app developers’ privacy safeguards, Citibank audits call centers for deceptive sales practices, and Exxon reviews offshore oil platforms’ environmental standards. Scholars have devoted significant attention to how policy makers deploy other private enforcers, such as certification bodies, accountants, lawyers, and other periphery “gatekeepers.” However, the literature has yet to explore the emerging regulatory conscription of large firms at the center of the economy.

This Article examines the rise of the enforcer-firm through case studies of the industries that are home to the most valuable companies: technology, banking, oil, and pharmaceuticals. Over the past two decades, administrative agencies have used legal rules, guidance documents, and court orders to mandate that private firms in these and other industries perform the duties of a public regulator. More specifically, firms must write rules in their contracts that reserve the right to inspect third parties. When they find violations, they must pressure or punish the wrongdoer.

This new form of governance has important intellectual and policy implications. It imposes more of a public duty on private firms and gives resource-strapped regulators promising tools. If designed poorly, however, the enforcer-firm will create an expansive area of unaccountable authority. Any comprehensive account of the firm or regulation must give a prominent role to the administrative state’s newest gatekeepers.

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Introduction

In 2018, Facebook Chairman and CEO Mark Zuckerberg faced senators on national television regarding conduct that prompted the Federal Trade Commission (FTC) to seek its largest ever fine.¹ The main issue was not what

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¹ Cecilie Kang, A Facebook Settlement With the F.T.C. Could Run Into the Billions, N.Y. Times, Feb. 15, 2019, at B6.
Facebook did directly to its users. Instead, the hearing focused on the social network’s failure to restrain third parties. Most notably, the political consulting firm Cambridge Analytica accessed millions of users’ accounts in an effort to support election candidates. Before Zuckerberg’s Senate testimony, the FTC had already sued Facebook, Google, and Amazon to force them to monitor third parties. These enforcement actions cited incidents of app developers violating users’ privacy and exploiting children through in-app video game purchases that sometimes reached in the thousands of dollars. In other words, the FTC is requiring large technology companies to act in ways traditionally associated with public regulators—by policing other businesses for legal violations.

Over time policy makers have enlisted a large array of private actors in their quest for optimal regulatory design. Scholarship on the private role in public governance has focused on third-party enforcers whose main function is to provide a support service. Those enforcers include self-regulatory organizations formed by industry and independent auditors mandated by regulators.

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5 Bamberger, supra note 4, at 452–58 (identifying a “third-party monitor model” in the context of a larger trend toward regulatory delegation to private parties); Freeman, supra note 4, at 635, 644. As another example, in policing stock exchanges, the Securities and Exchange Commission (SEC) relies heavily on self-regulatory organizations to monitor wrongdoing and propose rules. Jennifer M. Pacella, If the Shoe of the SEC Doesn’t Fit: Self-Regulatory Organizations and Absolute Immunity, 58 Wayne L. Rev. 201, 202 (2012) (“Self-regulatory organizations (SROs) have consistently been deemed to ‘stand in the shoes’ of the [SEC] by carrying out delegated, regulatory functions in interpreting and monitoring the securities laws . . . ”). Courts can also order third-party auditors. See
corporate law strand of this enforcement literature emphasizes a network of "gatekeepers," such as lawyers, accountants, and certifiers who guard against compliance and governance failures.\(^6\) For instance, before releasing annual reports a publicly traded company must obtain the signoff of a certified accountant.\(^7\) In these more familiar private enforcement contexts, the private "cops on the beat" are ancillary actors rather than core market participants.\(^9\)

This Article demonstrates how policymakers have enlisted a new class of more powerful third-party enforcers: the businesses at the heart of the economy. The ten largest American companies by valuation operate in information technology, finance, oil, and pharmaceuticals.\(^10\) A regulator has put large firms

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\(^6\) See John C. Coffee, Jr., Gatekeepers: The Professions and Corporate Governance (2006) (chronicling the evolution of auditors, attorneys, securities analysts, and credit-rating agencies in guarding against corporate governance failures); Assaf Hamdani, Gatekeeper Liability, 77 S. Cal. L. Rev. 53, 107 (2003) (discussing the need to expand gatekeeper liability in the wake of the Enron fraud scandal); Reinier H. Kraakman, Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy, 2 J.L. Econ. & Org. 53, 54 (1986) (contrasting whistleblowers with gatekeepers, which are third parties who can "prevent misconduct by withholding support.") [hereinafter Kraakman, Gatekeepers]. Although the term has a mostly external connotation, Kraakman first used the term to refer to internal actors. Reinier H. Kraakman, Corporate Liability Strategies and the Costs of Legal Controls, 93 Yale L.J. 857, 868 (1984) (describing the important role of internal gatekeepers, such as lawyers and accountants, in corporate regulation) [hereinafter Kraakman, Corporate Liability].

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

\(^8\) Kraakman, Gatekeepers, supra note 6, at 53 n.1 (attributing to Jeremy Bentham the “cop on the beat” metaphor and using it to describe gatekeepers).

\(^9\) The literature has also extensively analyzed self-regulation as part of a broader new governance that arose in recent decades. Administrative agencies now pursue collaborative and responsive models of public governance designed to encourage the business sector to self-regulate. See, e.g., Ian Ayres & John Braithwaite, Responsive Regulation: Transcending the Deregulation Debate (1992); Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. Rev. 1, 4 (1997). Additionally, large businesses have undertaken a dramatic increase in the number of compliance departments to police the firm from within. See, e.g., Sean J. Griffith, Corporate Governance in an Era of Compliance, 57 Wm. & Mary L. Rev. 2075, 2077 (2016) (“American corporations have witnessed the dawn of a new era: the era of compliance.”); Kimberly D. Krawiec, Organizational Misconduct: Beyond the Principal-Agent Model, 32 Fla. St. U. L. Rev. 571, 572 (2005) (demonstrating a legal system shift toward duty-based organizational liability, which inquires into whether organizations have compliance systems to deter wrongdoing); Veronica Root, Coordinating Compliance Incentives, 102 Cornell L. Rev. 1003, 1004 (2017) (“Compliance is king, and its subjects—regulators, prosecutors, courts, corporations, and academics—are quick to tout its power and potential for good.”). This important and nascent literature on corporate compliance has remained focused on the firm’s role in overseeing internal operations.

\(^10\) Fortune 500 List, Fortune (updated Mar. 29, 2018), http://fortune.com/fortune500/list/filtered?sortBy=mktval (identifying the ten most valuable American companies as Apple, Alphabet, Microsoft, Amazon, Berkshire Hathaway, Facebook, JPMorgan Chase, Johnson & Johnson, Exxon Mobile, and Bank of America). One of these companies, Berkshire Hathaway, is a conglomerate operating in diverse industries, including finance, while Johnson & Johnson sells pharmaceuticals in addition to consumer goods. Berkshire Hathaway, Fortune (updated Mar. 29, 2018), https://fortune.com/fortune500/2018/berkshire-hathaway/Johnson
in each of these industries on notice about their responsibilities for third-party oversight.\(^{11}\) In addition to the example of the FTC, the Environmental Protection Agency (EPA) requires BP Oil and other energy companies to audit offshore oil platform operators for environmental compliance.\(^{12}\) The Food and Drug Administration (FDA) expects Pfizer and other drug companies to ensure suppliers and third-party labs follow the agency’s health and safety guidelines.\(^{13}\) The Consumer Financial Protection Bureau (CFPB) orders financial institutions, such as American Express, to monitor independent debt collectors and call centers for deceptive practices.\(^{14}\)

The widespread conscription of businesses as enforcers—also called “enforcer-firms” below—shares characteristics with but differs meaningfully from prior iterations of third-party regulation. For instance, the FTC’s original court order required Facebook to hire a third-party auditor to certify Facebook’s compliance.\(^{15}\) In that arrangement, refusing to sign off on Facebook’s biennial reports to the FTC constituted the auditor’s main sanction.\(^{16}\) Facebook could, however, respond by bringing its business elsewhere.\(^{17}\) That ability to retaliate weakens traditional gatekeepers’ power and independence.\(^{18}\)

In contrast, the enforcer-firm is usually the client—or at least a crucial business partner—to the third parties it regulates. Its main sanction is to cease doing business with those third parties, which can prove devastating.\(^{19}\) The client

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\(^{11}\) See infra Part II


\(^{15}\) Decision and Order at 3–4, In the Matter of Facebook, Inc., No. 092-3184 (F.T.C. July 27, 2012), http://www.ftc.gov/sites/default/files/docs/cases/2012/08/120810facebookdo.pdf. (“Respondent shall obtain initial and biennial assessments and reports . . . . from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession.”).

\(^{16}\) See id at 6.

\(^{17}\) The consent order does not prevent such a response. See id.

\(^{18}\) See Joel S. Demski, Corporate Conflicts of Interest, 17 J. Econ. Persp. 51, 57 (2003) (summarizing arguments that “the very idea of auditor independence under current arrangements is a myth . . . .”).

\(^{19}\) That sanction is particularly effective in concentrated industries such as tech, in which the loss
relationship that weakens traditional gatekeepers thus strengthens the enforcer.

In short, regulators have begun relying on third-party enforcement by the real gatekeepers of the economy: the firms that control access to markets.

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

However, if designed well, the enforcer-firm offers some hope for improving upon prior regulatory models’ accountability. Because enforcer-firms often sell directly to consumers they may prove more responsive to public concerns when compared to traditional gatekeepers, which interact most closely with regulated entities. And because the enforcer-firm is itself a prime target of public regulation, it would be easier for an administrative agency to oversee it than to add a whole new category of firms as required for oversight of traditional gatekeepers. None of this should be taken as an endorsement of the enforcer-firm, which is too new and understudied to yield strong normative conclusions. However, an openness to the upsides of the enforcer-firm responds to the critique that administrative law scholars have too often portrayed private actors as an intrusion into legitimacy, which prevents “imagining the means by which

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20 See supra note 4 and accompanying text.

21 To the extent scholars have discussed mandated third-party governance it has been in passing or in narrower contexts such as in criminal or international law. See, e.g., Larry Catá Backer, Surveillance and Control: Privatizing and Nationalizing Corporate Monitoring After Sarbanes-Oxley, 2004 Mich. St. L. Rev. 327, 433–34 (2004) (referencing how the Bank Secrecy Act, which requires banks to monitor customers for money laundering and other suspicious transactions, causes a larger number of businesses to become “part of the network of the state’s eyes and ears.”); John Braithwaite, Responsive Regulation and Developing Economies, 34 World Dev. 884, 889–90 (2006) (exploring how domestic firms can serve as a means of reaching foreign actors). Additionally, scholars have recognized ways in which some businesses voluntarily regulate other firms, even if in response to legal liability. See infra Part I.A.


23 See, e.g., Coffee, supra note 6, at 13–18 (describing shortcomings with oversight of gatekeepers).

24 See infra Part IV.B.
private actors might contribute to accountability."25

Mandated third-party governance also speaks to vibrant corporate law inquiries. Scholars have paid considerable attention to the duties of directors and officers, personal liability for corporate wrongdoing, and organizational structure.26 Conscripted enforcement shapes each of these areas and pushes against depictions of the firm emphasizing its private nature. Those depictions are rooted in the influential metaphor—sometimes described as the most dominant theory of the firm—that the firm is a “nexus of contracts” among owners, managers, laborers, suppliers, and customers.27 The firm remains exceedingly private. But by directing businesses to write enforcement-oriented contract clauses and monitor external relationships for legal violations, as a descriptive matter the state is pushing the firm toward a larger public role.28

That insight is relevant beyond theory and institutional design. In the highest legislative circles and boardrooms, debates are unfolding about what duties corporations owe to society, with some taking particular aim at the idea that shareholders should come above all other stakeholders.29 Conscripted enforcement marks a significant uptick in federal regulatory involvement in the firm by imposing more of an affirmative public duty to act.30 Cast against the backdrop of the firm as public enforcer, calls for business leaders to do more for society appear less disconnected from reality than would be the case under a largely private conception of the firm.31

The Article is structured as follows. Part I provides an overview of the well-studied ways that private entities serve as enforcers. Part II offers four case studies of how regulators have implemented mandated enforcement of third parties in some of the largest U.S. industries: the FTC and technology, the CFPB and banking, the EPA and oil, and the FDA and pharmaceuticals. Part III


28 Infra Part III.A.


30 Infra Part III.D.

examines how mandated enforcement alters the firm’s contracts, relationships, and governance. It also explores shifts in liability at the personal and entity level, which could influence organizational structure. Part IV concludes by considering implications for the effectiveness and accountability of the administrative state.

I. TRADITIONAL FORMS OF THIRD-PARTY ENFORCEMENT

A decades-long debate in both corporate and administrative law scholarship concerns “how best to tap the private interests of enterprise participants to serve the public interest.”32 Historically, the starting point was the hope that firms would self-regulate—if not for market incentives, then to avoid legal punishment for wrongdoing.33 Although scholars recognize the heterogeneity of external private enforcers,34 they have stopped short of examining the emerging importance of how large firms are required to oversee third parties. I now turn to those prior narratives of third-party private regulation.

A. Independent Enforcement

The origins of businesses influencing other businesses for the public benefit lie in markets, rather than government. To see the public-private connection, it is instructive to first consider how the administrative state functions. Regulators have significant discretion in choosing which policymaking tools to deploy.35 Their most prominent tools include writing legal rules and filing lawsuits.36 However, as I have shown elsewhere, public regulators devote fewer resources to these legal functions than to monitoring businesses through on-site inspections and remote information collection.37 When monitoring activities detect wrongdoing, the monitors—EPA inspectors, bank examiners, and others—can respond in many ways outside the court system. Responses range from informally requesting that businesses change behavior to mandating the suspension of business activities.38 Private third-party enforcement has analogs to each of these main policymaking functions, but especially to monitoring.

Independent of any legal influence, firms monitor other firms solely out of self-interest. For instance, when land is the collateral for a loan, banks may inspect the property periodically to ensure that the borrowing firm is not

32 Kraakman, Corporate Liability, supra note 6, at 857; sources supra note 22.
33 See Kraakman, Gatekeepers, supra note 6 at 56.
34 See, e.g., Freeman, supra note
36 Id. at 1384 (providing an overview of policy tools).
38 Id. at 373–75.
releasing hazardous chemicals or otherwise damaging that collateral. The prospect of reducing costs motivates such monitoring, but the monitoring advances public interest. These financial interests can push external parties to “constrain fundamental managerial decisions even in the ordinary course of business.”

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

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

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

B. Encouraged Enforcement

Although one motivation for voluntary regulation is to forestall public

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40 See Frederick Tung, Leverage in the Board Room: The Unsung Influence of Private Lenders in Corporate Governance, 57 UCLA L. Rev. 115, 120 (2009).
42 Id.
45 See, e.g., Light, supra note 25, at 139 (footnote omitted).
oversight, the examples thus far cover situations in which private regulation occurs independent of existing legal influence. Policymakers sometimes wish to intervene but are reluctant to act paternalistically by forcing a private party to act. Without mandating private enforcement, policymakers can still influence private parties to regulate voluntarily. For instance, if the law imposes vicarious liability on the pharmaceutical company for violations by its ingredient supplier, the pharmaceutical company may be motivated to audit the supplier’s production process even though auditing is not required.

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

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

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

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47 See, e.g., Birdthistle & Henderson, supra note 41, at 14–15 (discussing the NYSE).
51 See id.
52 See Van Loo, supra note 50, at 1269.
54 See, e.g., id. at 216. Attorneys have monetary incentives to initiate lawsuits as well, which plays an important role in some enforcement areas. See Stephen J. Choi & A.C. Pritchard, SEC Investigations and Securities Class Actions: An Empirical Comparison, 13 J. Empirical Legal Stud. 27, 28 (2016).
Scholars have also highlighted the instrumental role that contracts play in voluntary enforcement.\textsuperscript{57} In particular, businesses enter into second-order agreements voluntarily in response to or in the absence of regulation.\textsuperscript{58} Those agreements result from private bargaining and serve to limit a firm’s risks of incurring legal liability, such as from common law torts.\textsuperscript{59} Many oil companies, for instance, have hired third-party inspectors for their offshore oil platforms.\textsuperscript{60} Discretionary inspections help not only to minimize legal violations, but also to receive lower penalties per federal organizational sentencing guidelines.\textsuperscript{61} Without directly mandating enforcement, policymakers have many options to motivate businesses to monitor other businesses.

\subsection*{C. Mandated Enforcement}

The law can require enforcers rather than merely encouraging them. “Corporate governance is often about gatekeeping,”\textsuperscript{62} which Reiner Kraakman defines as situations in which a corporation must obtain the support of attorneys, accountants, and others before taking certain actions.\textsuperscript{63} Instead of allowing an oil company to decide whether to hire a third-party inspection service, for instance, the regulator may instead write a rule requiring certification from an accredited third-party inspector.\textsuperscript{64} Thereafter, oil companies would no longer have the option of lowering costs by refusing to hire a third party. Statutes and court orders compel businesses in diverse industries to hire third-party monitors.\textsuperscript{65} Scholars believe that more of this “regulation by third-party verification” could help to solve the problem of under-resourced public regulators.\textsuperscript{66}

It is important to note that any individual gatekeeper may have only partial ability to prevent wrongdoing. A private auditor might refuse to provide the necessary approval for a fraudulent securities transaction, thus driving away one

\begin{itemize}
\item \textsuperscript{57} Jody Freeman, The Contracting State, 28 Fla. St. U. L. Rev. 155, 155 (2000).
\item \textsuperscript{58} Vandenbergh, supra note 39, at 2030-31.
\item \textsuperscript{59} Id. at 2033 & n.14.
\item \textsuperscript{60} See, e.g., Mark A. Cohen et al., Deepwater Drilling: Law, Policy, and Economics of Firm Organization and Safety, 64 Vand. L. Rev. 1853, 1896 (2011).
\item \textsuperscript{62} Mark J. Roe, Delaware’s Competition, 117 Harv. L. Rev. 588, 622 (2003).
\item \textsuperscript{63} Kraakman, Corporate Liability, supra note 6, at 868 & n.28.
\item \textsuperscript{64} See Douglas C. Michael, Federal Agency Use of Audited Self-Regulation as a Regulatory Technique, 47 Admin L. Rev. 171, 173 (1995).
\item \textsuperscript{65} See id. at 17Root, supra note 5, at 529–30.
\item \textsuperscript{66} McAllister, supra note 22, at 5.
\end{itemize}
potential buyer who sees the non-approval as a “red flag.” However, without a requirement that the auditor disclose its findings, the securities seller may go to another auditor and attempt to obtain approval anew.

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

In light of gatekeepers’ prominent regulatory role, many scholars have explored how the law should hold them accountable. In 2001, this issue resurfaced when Enron, believed to be one of the most successful U.S. companies, suddenly collapsed, destroying billions of dollars in shareholder value and costing thousands of employees their retirement savings. The swift downfall “stunned Wall Street” because Enron executives, alongside Arthur Andersen, one of the leading auditing firms, made hundreds of millions of dollars in losses look like a multibillion-dollar profit.

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

These diverse private actors—whether independent, encouraged, or mandated—operate in parallel not only to one another, but also to business self-

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67 Kraakman, Gatekeepers, supra note 6, at 58.
68 Id.
71 See Hamdani, supra note 6, at 107–08.
73 Id. at 357, 369.
76 Id. at § 404(b), 116 Stat. at 789.
regulation and public regulatory oversight. For this reason, regulation should be thought of in aggregate terms, in light of the mix of public and private actors. These actors form a regulatory ecosystem, sometimes called “nodal governance,” with many players supporting and monitoring one another.

D. What Is Missing

Despite widespread recognition of the pervasiveness and heterogeneity of private enforcement, missing from these discussions is an examination of mandates that explicitly direct regulated entities to serve as enforcers. Instead, the focus has been on encouraging or mandating that other private parties help enforce the law against regulated entities. In the rare instances when scholars mention mandated third-party governance, it is in passing or in narrow contexts, such as criminal statutory requirements that banks identify money laundering transactions.

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

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

II. Case Studies

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77 Freeman, supra note 4, at 549.
78 Burris et al., supra note 46, at 25; see also Zachary D. Clopton, Redundant Public-Private Enforcement, 69 Vand. L. Rev. 285, 297 (2016).
79 See supra note 21.
81 See supra notes 35–39 and accompanying text.
82 See infra Part IV.
The ten largest companies operate in four main industries: information technology, banking, pharmaceuticals, and oil. This Part considers how regulators handle the largest companies in each industry. The industries with the ten largest companies were chosen because the power and reach of the world’s most valuable companies enable them to exert influence on a broader swath of the economy than would smaller companies. Additionally, when a prominent company is subject to an enforcement action, its competitors adjust accordingly. These case studies demonstrate how administrative agencies, after receiving authority from Congress, have delegated some of that authority to the largest regulated entities.

A. The FTC and Big Tech

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

The enforcement order left Facebook’s responsibilities vague, but required the submission of auditor reports. However, in the 2018 report, its auditor, PricewaterhouseCoopers, summarized Facebook’s requirements imposed on app developers by referring to Facebook’s publicly available policies. Facebook also submitted to the FTC a mandatory follow-up report on what it had done to comply with each part of the commitment. The report detailed an

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83 See Fortune 500 List, supra note 10.
84 Griffith, supra note 9, at 2090.
87 In the Matter of Facebook, Inc., supra note Error! Bookmark not defined., at 5–6. Facebook has treated app developers as similar to service providers. See infra note 94 and accompanying text. Additionally, the FTC’s other agreements have signaled a broader expectation for regulated entities’ oversight of third parties. See, e.g., In the Matter of Lenovo Inc., supra note 85.
88 Id.
apparently extensive oversight program for third parties. Facebook might send questionnaires to service providers to determine their security and privacy practices. Depending on the answers to those questions, or merely the nature of the data shared, Facebook would initiate more targeted security audits. Those audits, which are sometimes conducted by Facebook and sometimes by a security firm, “assess [...] compliance with Facebook’s security guidelines.” Facebook uses these audits to determine, for instance, whether an app developer complied with users’ requests to delete their personal data.

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

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

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

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91 Id.
92 Id.
93 Id. at 10.
94 Facebook Platform Policy, supra note 89. App developers may be subject to Facebook audits of their apps, systems, and records. Id.
95 See Steinmetz, supra note 2.
98 Id.
99 Id.
100 Id. at *1, *11.
With respect to this original purchase, Amazon did not make it clear enough that in-app purchases would be possible. Amazon’s description of the apps, available below the purchase button, included such information. However, Amazon imbedded the information in a long description of the app below the purchase button and displayed it in smaller font. A federal court agreed with the FTC that the notice of in-app purchases “was not conspicuous.”

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

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

B. The CFPB and Big Banks

Like banking regulators focused on financial stability, the CFPB could pursue its consumer protection mission by bringing enforcement actions directly against third-party service providers. Instead, it has required banks to govern

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101 Id. at *1.
102 Id. at *1–*2.
103 Id. at *2.
104 Id. at *2–*3, *10.
105 Id. at *10.
106 Id. at *2.
107 Id., at *4–5.
108 Id. at *2.
109 Id. at *2, *4.
111 Id.
112 Id.
113 12 U.S.C. §§ 1863, 1867(c) (2012) (granting third-party oversight to the Federal Reserve, the Federal Deposit Insurance Corporation, and other prudential regulators over third-party services, such
third parties, including call centers, debt collectors, software developers, and real estate lawyers.\textsuperscript{114} The agency has brought such actions against each of the four largest banks—JP Morgan Chase, Wells Fargo, Bank of America, and Citibank.\textsuperscript{115}

The bureau’s third-party enforcement policy began with its first enforcement action. Capital One, one of the largest credit card issuers, contracted with an independent call center which routed card holders with low credit scores—also known as subprime borrowers—to different sales representatives when they called Capital One.\textsuperscript{116} Those representatives talking with subprime cardholders had a Capital One script for how to sell additional payment protection products, but they frequently veered from the script.\textsuperscript{117} Some representatives inaccurately described the add-on products as free, even though consumers collectively paid about $140 million over a two-year period for the products.\textsuperscript{118} They also often implied that the products were not optional.\textsuperscript{119}

The CFPB found that the call center’s employees engaged in deceptive acts and practices in violation of federal law.\textsuperscript{120} Although the bureau found no fault with the script Capital One provided to the call center, it argued that “the Bank’s compliance monitoring, service provider management and quality assurance resulted in ineffective oversight which failed to prevent, identify, or correct the improper sales practices.”\textsuperscript{121} The settlement required Capital One to submit to the CFPB for pre-approval a written internal policy for implementing heightened third-party oversight.\textsuperscript{122} Among other requirements, Capital One would conduct as accounting and computation, that a bank “causes to be performed for itself”)\textsuperscript{12} U.S.C. § 5514(e) (granting similar oversight authority to the CFPB over institutions offering consumer financial services).

\begin{itemize}
  \item \textsuperscript{116} Stipulation and Consent Order at 3–4, In the Matter of Capital One Bank, (USA) N.A., CFPB No. 2012-CFPB-0001 (July 16, 2012).
  \item \textsuperscript{117} Id. at 4.
  \item \textsuperscript{118} Id. at 5–6.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id. at 8.
  \item \textsuperscript{121} Id. at 4.
  \item \textsuperscript{122} Id. at 22–23 (requiring also that any subsequent changes to this policy must obtain CFPB
“periodic onsite audit reviews … of the Bank Service Provider’s controls, performance, and information systems” and retain the right to exit the contract in the face of service provider noncompliance. Capital One also paid $25 million in penalties, but was “prohibited from seeking or accepting indemnification . . . from any third party.” These indemnification-piercing stipulations provide greater motivation for the enforcer-firm to do a thorough job of monitoring and addresses the problem that many firms merely “window-dress” their compliance efforts without making a true effort.

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

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

Several years later, the CFPB went after an even larger target for its failure to oversee third parties: Citibank, one of the four largest U.S. banks. Presumably aware of the Capital One enforcement action, Citibank went further than simply providing a script by also reviewing recorded telemarketer approval.

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123 Id.
124 Id. at 21.
126 American Express Consent Order, supra note 14, at 3–4 (alleging misrepresentation related to credit scores).
127 Id. at 5.
128 Id. at 4.
129 Id. at 17–19 (requiring consumer protection compliance review).
130 Id. at 19.
The telemarketing firm knew, however, which calls would be later reviewed for legal compliance and used a misleading sales script only for calls that it knew would not be reviewed. Consequently, the CFPB ordered Citibank to adopt third-party oversight reforms and pay a $35 million penalty. The Citibank action illustrates how having an oversight system in place is not enough—the oversight must produce results.

A rare case that went to trial also produced more details about what a third-party governance setup might entail. In that case, the court order required the British multi-national bank HSBC to audit samples of contracts between third-party service providers and customers, to ensure that those documents comply with the law and that “only fees and costs that are lawful, reasonable and actually incurred are charged to borrowers.” Banks are also expected to oversee the processes and compliance departments of third-parties.

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

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

C. The EPA and Big Oil

The 2010 Deepwater Horizon oil spill, which discharged billions of gallons of oil into the Gulf of Mexico in one of the worst environmental disasters in U.S.

133” CFPP-Citibank Consent Order, supra note 115, at 12-13. It hired a private third party to monitor compliance. Id.

134” Id.

135” Id. at 26–30, 45.


137” Id.


The New Gatekeepers

history, heavily shaped offshore oil regulation. BP Oil owned much of the rights to the well’s oil, but in a straightforward sense, the problem began with the Deepwater Horizon offshore drilling platform, owned by Transocean, a Swiss company. As the platform began to sink, it ruptured the pipe connecting it to the well below, thereby causing the oil to discharge from the well thousands of feet underwater at the ocean floor.

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

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

Nonetheless, the EPA and the underlying law still placed the bulk of the

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141 The ownership rights came in the form of a lease, and two other companies also had lessee ownership rights in the well, Anadarko and MOEX. Id. at 94.
143 See Deepwater Report, supra note 140, at 2; Global 500, Fortune, https://fortune.com/global500/2019; supra notes 131 to 135 and accompanying text.
144 supra notes 131 to 134 and accompanying text (discussing Citibank).
responsibility on BP, which wound up paying close to $20 billion in regulatory enforcement actions, compared to $1.4 billion for Transocean.\textsuperscript{148} Policy foundations for this allocation can be seen in an early judicial opinion on Deepwater Horizon liability. Finding the Clean Water Act’s specific liability language to be unclear, the court relied on larger policy purpose, saying it was “designed to place[] a major part of the financial burden for achieving and maintaining clean water upon those who would profit by the use of our navigable waters and adjacent areas and who pollute same . . . .”\textsuperscript{149} Those who profit most are more likely to be valuable companies, giving them more resources to devote to monitoring.

Environmental regulators do not only rely on the imposition of liability, which by itself has led to extensive voluntary monitoring of firms by firms.\textsuperscript{150} Following the Deepwater Horizon incident, new regulations required offshore oil operators to ensure that their contractors comply with environmental standards.\textsuperscript{151} Regulators have expanded on those basic requirements through lawsuits. In its Deepwater Horizon settlement, BP agreed to extensive improvement of its third-party oversight, “including provisions related to contractor oversight.”\textsuperscript{152} Those stipulated provisions include the creation of Contract Governance Boards for both drilling and cementing operations, as well as audits of contractors.\textsuperscript{153} The settlement required the BP board to oversee those improvements, as well as their ongoing execution.\textsuperscript{154} These BP oversight measures are separate from the various audits that private third parties other than BP must also undertake of BP’s contracts.\textsuperscript{155} It is BP’s responsibility to ensure that its contractors complete those independent audits.\textsuperscript{156}

Transocean’s settlement imposed no explicit ongoing third-party monitoring responsibilities on Transocean.\textsuperscript{157} The settlement referenced regulations

\textsuperscript{148} See EPA Enforcement Actions, supra note 145.
\textsuperscript{150} See Vandenbergh, supra note 39, at 2041 (showing pervasive second-order agreements).
\textsuperscript{153} Id. at app. 4, at 25.
\textsuperscript{154} See id.
\textsuperscript{155} Id. at app. 6, at 6–7.
\textsuperscript{156} See id.
\textsuperscript{157} Partial Consent Decree Between the United States of America & Defendants Triton Asset
imposing broad safety management responsibilities, which include evaluation of all contractors to ensure they operate according to safe environmental management practices. But the referenced regulations have numerous other requirements unrelated to third parties, and thus it would be a stretch to see this as mandated third-party monitoring. Still, the existence of those regulations means that Transocean must, like BP, oversee all third parties with which it contracts.

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

Even when the EPA is less directive, as it was with Exxon, once the agreement is in place imposing such clear responsibility for the acts of third parties, government inspectors can fault the company if its contractor oversight capabilities are found to be insufficient. Additionally, companies generally look to the larger body of a regulator’s enforcement actions in deciding how to implement internal systems. Thus, by mandating regular oversight of third


Id. at 16 (requiring a management system that “complies with Operators’ Safety and Environmental Management System (‘SEMS’)”); 30 C.F.R. § 250.1914(c)(1) (2013).


Id. at 110.

The settlement did, however, order Exxon’s contractors to take affirmative actions, such as preserving records. See Consent Decree at 80, United States v. Exxon Mobil Corp., No. 4:17-cv-3302 (S.D. Tex. June 6, 2018) [hereinafter 2018 Exxon Mobil Consent Decree], https://www.epa.gov/sites/production/files/2018-06/documents/exxonmobilcorp-cd.pdf.

Id. at 10.

See id. at 75.

Id. at 66–67.

See, e.g., Daniel J. Solove & Woodrow Hartzog, The FTC and the New Common Law of
parties in some cases explicitly, the EPA can create industry-wide standards. Either way, the largest oil companies—including their biggest contractors—have been subject to direct mandates to oversee third parties involved in both onshore and offshore oil activities.

D. The FDA and Big Pharma

Pharmaceutical companies manufacture drugs but contract with other companies for “processing, packaging, holding, or testing.”\textsuperscript{167} The FDA has the most explicit third-party monitoring expectations of the four case studies. Rulemaking, guidance statements, and warning letters have communicated its policy.

One FDA rule states that in every pharmaceutical company there “shall be a quality control unit . . . responsible for approving or rejecting drug products manufactured, processed, packed, or held under contract by another company.”\textsuperscript{168} Monitoring the output is not, however, enough. The company must also directly monitor inputs used by the contractor, including ingredients and materials.\textsuperscript{169} After specifying the contractor’s internal compliance systems, the manufacturer should conduct audits.\textsuperscript{170} Thus, the pharmaceutical company must oversee contractors’ organizational processes, inputs and outputs.

The FDA places responsibility for third-party activities at the top of the regulated entity. In its formal rules on liability for tainted products, the agency states that it “regards extramural facilities as an extension of the manufacturer’s own facility.”\textsuperscript{171} It reiterated this point in its post-inspection warning letters.\textsuperscript{172} In other words, the pharmaceutical company is responsible for the third-party contractor’s activities as if they were one company. In guidance documents, the agency clarified that it was addressing “the relationship between owners and contract facilities.”\textsuperscript{173}

Contractual arrangements cannot shield pharmaceutical companies from liability. In one warning letter, the FDA told Pfizer, the largest pharmaceutical


\textsuperscript{168} 21 C.F.R. § 211.22(a) (2019).

\textsuperscript{169} FDA Drug Contract Guidance, supra note 167, at 5.

\textsuperscript{170} Id. at 4.

\textsuperscript{171} 21 C.F.R. § 200.10(b) (2019).


\textsuperscript{173} FDA Drug Contract Guidance, supra note 167, at 2.
company in the world,\textsuperscript{174} “You are responsible for the quality of combination products you produce as a contract facility, regardless of agreements in place with [your customer] or with any of your suppliers.”\textsuperscript{175}

The FDA does not, however, rely solely on Pfizer to regulate the company’s independent contractors. The FDA still routinely inspects and brings enforcement actions directly against those third parties. For instance, in one warning letter to an independent manufacturer, the FDA wrote, “You and your customer, Pfizer, have a quality agreement regarding the manufacture of drug products. You are responsible for the quality of drugs you produce as a contract facility, regardless of agreements in place . . . .”\textsuperscript{176}

Pfizer implemented the FDA’s organizational advice into its internal processes. It routinely monitors suppliers through audits, inspections, and review of systems.\textsuperscript{177} Supplier agreements reflect these review procedures, and when Pfizer recognizes a violation, it can de-list the offender from its list of “qualified” suppliers or can report violations to the FDA.\textsuperscript{178}

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In summary, federal regulators have established an expectation that today’s largest companies regulate independent contractual parties for legal violations. Through direct enforcement actions or industry-wide mandates, the FTC, CFPB, EPA, and FDA have required the most valuable companies to monitor and punish third-party business wrongdoers. They serve as a new breed of gatekeepers because the regulated entities must now decide whether to give the third parties market access based on regulatory considerations.\textsuperscript{179}

Though focused on a subset of industries and companies to manage scope, these case studies are part of a broader sphere of regulatory activity. These four regulators alone have jurisdiction over other large parts of the economy. The FTC, for instance, oversees retailers and other industries in addition to big

\begin{flushright}
\textsuperscript{178}Id. at 12.
\textsuperscript{179}On the prior iterations of gatekeepers, see Kraakman, Gatekeepers, supra note 6, at 54.
\end{flushright}
technology, and the FDA regulates food and supplement manufacturers.\textsuperscript{180} Additionally, other regulators deploy third-party mandated governance beyond these four industries. The Interstate Commerce Commission, for instance, obligates trucking operators to monitor contractual parties for roadway safety compliance.\textsuperscript{181} A number of other federal and state laws similarly require companies to play some regulatory oversight role with respect to third-party businesses, including health care providers ensuring business associates safeguard health data.\textsuperscript{182} Even if the regulatory state conscripted only the five largest companies it would mean a substantial extension of regulatory resources.\textsuperscript{183} But mandated enforcement is widespread enough to prompt a broader inquiry into the implications for the firm’s evolving place in society.

III. EXPANDING THE PUBLIC INFLUENCE ON THE FIRM

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

The firm has a decidedly private core, as implicated by its prominent description as a nexus of contracts.\textsuperscript{184} Because the firm’s contractual foundations are necessarily incomplete, corporate law fills in the gaps to reflect the parties’ intents.\textsuperscript{185} Some scholars have proposed giving greater weight in corporate governance to a broader set of social issues, including employee rights or a cleaner environment, and demonstrated how managers have discretion under the business judgment rule to pursue these goals.\textsuperscript{186} Nonetheless, most

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\textsuperscript{181} The Interstate Commerce Commission, for instance, mandates that companies inspect leased equipment. 49 C.F.R. § 376.11 (2018).

\textsuperscript{182} See, e.g., 45 C.F.R. § 164.504 (2018) (providing HIPAA governance requirements); Neb. Rev. Stat. Ann. § 87-808 (West 2018) (mandating that companies “shall require by contract that the service provider implement and maintain reasonable security procedures and practices”).

\textsuperscript{183} See infra Section IV.A. (comparing the sizes of administrative agency and firm personnel).

\textsuperscript{184} Supra note 27 and accompanying text.


\textsuperscript{186} See, e.g., Margaret M. Blair & Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247, 299–301 (1999); Lisa M. Fairfax, Doing Well While Doing Good: Reassessing the Scope of Directors’ Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries, 59 Wash. & Lee L. Rev. 409, 438–40 (2002); Marleen A. O’Connor, The Human Capital Era: Reconceptualizing Corporate Law To Facilitate Labor-Management
commentators and judges see the primary goal of corporate law as advancing shareholder value.\(^{187}\)

By some accounts, the depiction of the firm as a contractually-based private entity helped advance the notion that government intervention in those private agreements is “unnatural.”\(^{188}\) That line of reasoning views the firm’s “market-oriented nature” as serving “to dismiss the notion that the corporation owes anything to the state.”\(^{189}\) Of course, the firm and its directors cannot pursue profit illegally. Under Delaware law, for instance, the firm’s articles of incorporation cannot limit a director’s personal liability when the director commits a “knowing violation of law.”\(^{190}\) Thus, the firm is private at its core, but public statutes define the limits. The rest of this Part illustrates how mandated governance constitutes a considerable expansion of that public side.

### A. Conscripting the Firm as Regulator

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

1. Writing Rules

Mandated enforcement puts the firm in a rulemaking role by compelling it to write regulatory contractual clauses.\(^{191}\) Firms’ written contracts serve as a principal vehicle for implementing third-party governance. For example, in its FTC settlement, Facebook agreed to require “service providers, by contract, to implement and maintain appropriate privacy protections” for any data obtained from Facebook.\(^{192}\) When the company later submitted its required compliance report, Facebook explained that it had implemented its third-party oversight

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\(^{191}\) By analogy, Congress delegates to agencies. Bamberger, supra note 4, at 381.

\(^{192}\) Decision and Order at 5–6, In re Facebook, Inc., No. C-4365 (F.T.C. July 27, 2012) \)}
through its contracts. In particular, it developed a “Contract Policy” so that agreements with third parties operate through Facebook’s “pre-approved standard contract templates.” Facebook’s legal department “reviews contracts that deviate from the pre-approved templates to help ensure that contracts with applicable service providers contain the required privacy protections.” The case of Facebook embodies a broader theme of regulator-mandated contract clauses.

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

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

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

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194 Id.
195 Id.
198 BP Consent Decree, supra note 152, at App. 6-8.
199 On second-order voluntary contracts, see Vandenbergh, supra note 39.
200 This assumes, of course, that the contract is valid, and a meaningful remedy is crucial for any legal enforcement.
202 See id. at 563–65 (providing results on how businesses use contracts).
203 See id. at 566 (describing the nature of remedies for firms’ contractual schemes).
204 See supra Section I.A.
order contractual clauses, inserted voluntarily in response to laws, still retain the autonomy of contracting parties and therefore a heavy private component. Conversely, conscripted enforcement contracts impose more thoroughly public obligations because businesses do not write them voluntarily.

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

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

In contrast, mandated enforcement can benefit parties not involved in the contract. These mandates require Facebook, Citibank, and Pfizer to protect consumers by governing service providers and suppliers. Exxon and BP must ensure that contractors safeguard the environment for the benefit of the public. Granted, one or both of the contractual parties also arguably benefit from these requirements, by preserving their reputation and strengthening industry standards. Also, consumer-oriented protections benefit a party that will

205 See Vandenbergh, supra note 39.
210 See, e.g., id (providing an example of disclosure).
211 Supra Part II.
212 Supra Section II.C.
ultimately contract with the enforcer-firm—Facebook’s users, or Citibank’s customers. The benefits to the contracting parties are less immediate and less definite, however—nor do they motivate the clause.

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

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

2. Enforcing Law

Mandated third-party governance also compels large firms to enforce the law. In his testimony in front of the Senate, Zuckerberg was asked by one senator why the company had not more closely monitored app developers and held them accountable for violating Facebook’s privacy policies. Zuckerberg responded, “Before, we’d thought that when developers told us that they weren’t going to sell data, [that was] a good representation. But one of the big lessons that we’ve learned here is that clearly, we cannot just take developers’ word for it. We need to go and enforce them.”

214 See supra Sections II.A–B.
216 See Bamberger, supra note 4, at 380–81 (identifying regulatory limits and complexity).
218 Facebook Platform Policy, supra note 89.
As mentioned above, federal regulators use ongoing monitoring as their main enforcement tool, rather than simply bringing formal lawsuits. The FDA and EPA conduct routine on-site inspections of laboratories and manufacturing facilities, for instance, and the CFPB visits banks to examine their records. When the federal monitors—typically called inspectors or examiners—detect wrongdoing, they often handle the problem directly without involving lawyers.

Mandated enforcement also emphasizes monitoring. As part of its consent order, Facebook now informs developers it may “audit” their app to ensure compliance. Capital One must conduct “periodic onsite audit reviews” of service providers. Pharmaceutical companies are expected to reserve the right “to audit its contractor’s facilities for compliance . . . .” Exxon is required by court order to review subcontractor monitoring data. Thus, by public mandate firms must undertake one of the core functions of the modern public regulator.

In implementing regulatory monitoring, private firms face similar challenges as public regulators long have. For instance, Volkswagen fooled regulators for years into thinking its cars met emissions standards through software that recognized when an emissions test was occurring and hid actual emissions levels. Similarly, Citibank had an oversight regime that included reviewing call centers’ phone conversations, but call center employees figured out which calls would be audited and only veered from the mandated script on unmonitored calls. Businesses now have incentives to evade the enforcer-firm’s detection as they long have had for public regulatory policing.

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

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220 See supra Section I.A; see also Van Loo, supra note 37, at 412.
221 See, e.g., Van Loo, supra note 37, at 382, 391 n.138, 411.
222 Id.
223 Facebook Platform Policy, supra note 94; Facebook Compliance Report, supra note Error! Bookmark not defined., at 9.
224 Capital One Bank, supra note Error! Bookmark not defined., at 23.
226 Exxon Mobil, supra note 160, at 110.
228 CFPB-Citibank Consent Order, supra note 115, at 12–13.
230 See Griffith, supra note 9, at 2089.
231 See FTC-Facebook Consent Decree, supra note 15, at 5–6.
Enforcement must come with some kind of sanction. One pervasive regulatory sanction is the ability to block access to the market, often through the revocation of a permit or license. This gives regulators a potentially ruinous enforcement sanction, even if they rarely use it.

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

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

B. Shaping Corporate Governance

Much of corporate law addresses the duties owed by officers and directors. In public corporations, the shareholders do not exert day-to-day control, but rely instead on the board of directors and the officers of the corporation to run the business. Fiduciary law is one of the main ways that

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235 A charter from the OCC is necessary to become a national bank. Before anyone can start a national bank in the United States, the OCC considers factors such as the reputation of the board members, the business plan, and the financial profile. See Barr et al., supra note 233, at 165.

236 See, e.g., Consent Order at 7–8, JP Morgan Chase Bank, N.A. No. 2013-CFPB-0007 (Consumer Fin. Protection Bureau Sept. 18, 2013) (requiring contracts with service providers at a minimum to include “right to terminate the contract if the [service provider] materially fails to comply with the terms specified in the contract . . . .”).

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


shareholders can hold officers and directors liable if they manage the corporation in a way contrary to shareholders’ interests. Other civil lawsuits may also be brought against business leaders. This section looks at the implications of third-party mandates for personal liability and the corporate governance principles that such liability seeks to promote.

In an influential case, *In re Caremark*, the Delaware Chancery Court observed that “a director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may . . . render a director liable for losses . . . .” Subsequent rulings have reinforced directors’ fiduciary duty to ensure the corporation has reporting systems and controls that enable them to monitor risks. But the bar is high for such liability. Directors do not violate their fiduciary duty simply by overseeing a company with objectively poor compliance systems, unless plaintiffs show that the directors’ oversight of those systems was subjectively reckless or grossly negligent.

How does third-party mandated governance alter board members’ duties to shareholders? Shareholders tested that issue through a suit against Capital One. Pointing to the CFPB’s aforementioned enforcement action, shareholders first alleged that the board inadequately monitored the call centers. The court noted that, under Delaware law, to establish a breach of fiduciary duty in monitoring third parties plaintiffs must show that the board operated in bad faith. Because Capital One had controls in place for call centers, the court found that the plaintiffs did not plead sufficient facts to show “a sustained or systematic failure of [the] board to exercise oversight’” or that “the board utterly failed to implement any reporting or information system or controls.” The court ultimately dismissed the suit on summary judgment because the plaintiffs did not put forth facts showing that the directors “consciously chose not to remedy the misconduct.” State law may eventually

240 Id. § 10:1.
244 Stone, 911 A.2d at 369, 372–73.
246 Id. at 785.
247 Id. (citing Stone, 911 A.2d at 370).
248 Id. (quoting Stone, 911 A.2d at 369–70) (internal quotations omitted). Indeed, the court made clear that if the call center employees had taken independent action to subvert Capital One’s controls, it would free the board from a claim for inadequate oversight. Id. at 786.
249 In re Capital One Derivative S’holder Litig., 979 F. Supp. 2d 682, 701 (E.D. Va. 2013). The shareholders alleged the board should have acted more specifically to oversee the call centers after
catch up, but the Capital One shareholder suit demonstrates how state corporate law imposes lower duties than regulators do upon the board with regard to third parties.\(^{250}\)

Despite the lack of a strong influence on directors’ state law liability, mandated third-party regulation could still alter corporate governance. By specifying actions the board must take in the wake of settlements, administrative agencies are dictating concrete board duties. In its settlement with Citibank, for instance, the CFPB required the board to form a sub-committee focused on compliance, and for that sub-committee to meet monthly, take minutes, and submit quarterly reports to the CFPB’s regional director on the bank’s progress overseeing third parties.\(^{251}\) Regulators’ detailed instructions put responsibility at the top of the corporation for the ongoing oversight of third parties, leaving little room for the board to claim ignorance.\(^{252}\)

Although regulators are unlikely to prosecute officers and directors for third-party mandates, and insurance would normally shield individuals from paying anyway, the mandates move business leaders toward personal liability for the acts of third parties under various statutes.\(^{253}\) For example, the Federal Trade Commission Act holds individuals liable for a corporation’s deceptive acts if the individual possessed authority to control the acts and knew or should have known about them.\(^{254}\) Since many settlement agreements and guidance documents require the board of directors or officers to oversee third-party compliance and to receive reports,\(^{255}\) regulators are essentially ordering them to have control and knowledge. Some regulators, including the CFPB and FTC, have pursued actions against individuals for failed supervision of third parties.\(^{256}\)

Individuals within the firm thus may in the future face greater personal liability receiving red flags, such as awareness of enforcement actions for call center misconduct. Id. at 697–98.

\(^{250}\) The fiduciary duty imposes a generally low bar under the common law. See Kelli A. Alces, Debunking the Corporate Fiduciary Myth, 35 J. Corp. L. 239, 254 (2009).

\(^{251}\) CFPB-Citibank Consent Order, supra note 115, at 32–34.


\(^{253}\) The policy guidance and enforcement actions establishing third-party governance mentioned in Part II do not focus on sanctions for individuals. See, e.g., FDA Drug Contract Guidance, supra note 167; CFPB Bulletin, supra note 138. In practice, prosecutorial norms and insurance policies shield directors in all but the most egregious instances. Kraakman, Corporate Liability, supra note 6, at 859.

\(^{254}\) Fed. Trade Comm’n v. IAB Mktg. Assocs., LP, 746 F.3d 1228, 1233 (11th Cir. 2014).

\(^{255}\) See supra note 251 and accompanying text.

for the acts of third parties as a result of current mandates to monitor and influence those third parties.

More broadly, the mandates may still influence board members’ conduct even if personal sanctions are unlikely. Enforcement actions against firms drove the explosion in many large corporations’ compliance departments, which now often rival the legal department in size and influence. These large compliance departments often retain some formal relationship with the board. The emergence of specific requirements for third-party oversight could similarly shape industry norms for the board’s oversight of other external companies.

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

C. Altering Entity Liability and Structure

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

Mandated third-party governance could change large companies’ organizational structures. In recent decades, many businesses have outsourced activities previously conducted in-house. Diverse considerations drive the


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

259 See, e.g., Hansmann & Kraakman, supra note 187, at 439–40.

260 See supra Part II.

261 See, e.g., Penncro Assocs., Inc. v. Sprint Spectrum, L.P., 499 F.3d 1151, 1152 (10th Cir. 2007) (explaining how Sprint began outsourcing its collection services).
decision to outsource, but one factor is lessening the risks of legal violations.\textsuperscript{264} The third-party service provider typically contractually shields the outsourcing firm from lawsuits.\textsuperscript{265} For instance, a debt collector indemnified cell phone carrier Sprint from “all claims, damages, losses, liabilities, costs, expenses and reasonable attorney’s fees” related to its collection services.\textsuperscript{266} Courts have demonstrated disdain for efforts to outsource liability. One described the practice as facilitating companies’ “ostrich-like” self-blinding, while another chastised the company for using a “telemarketers-gone-rogue” defense.\textsuperscript{267} Indemnification clauses are nonetheless usually enforced.\textsuperscript{268}

Third-party mandates could make outsourcing less attractive if they remove some of these legal protections. Regulations clearly prevent many of the largest companies from delegating away liability for public prosecution.\textsuperscript{269} That fact alone may influence the corporate arrangements seen today.\textsuperscript{270} Outsourcing still could remain attractive, however, if it shields the firm from private lawsuits. Agency law provides a primary avenue for private parties holding firms liable for the acts of third parties. The more a business controls the acts of another, the more likely courts will find the business to be the principal liable for an agent’s acts.\textsuperscript{271} Various other statutes also provide a private right of action against companies for acts by third parties they control, such as for unfair and deceptive acts committed against consumers.\textsuperscript{272} The more Verizon controls the acts of the telemarketer, for instance, the easier it is for a customer harmed by the telemarketer to sue Verizon, rather than the telemarketer.

The legal consequences of control might make outsourcing risky if firms

\textsuperscript{264} Douglas Brown & Scott Wilson, The Black Book of Outsourcing: How to Manage the Changes, Challenges, and Opportunities (2005).
\textsuperscript{266} Penncro Assocs., Inc., 499 F.3d at 1156 (indemnifying Sprint against claims for work performed by the service provider).
\textsuperscript{268} Indemnity rules are industry-specific and thus vary. See, e.g., Roberts v. Williams-McWilliams Co., 648 F.2d 255, 264 (5th Cir. 1981); Michael D. Scott, Scott on Outsourcing Law and Practice § 3.03[H], at 3–56 (2009). Vandenbergh, supra note 39, at 2044.
\textsuperscript{269} The FDA, for instance, states in its guidance document on third-party contracts, “It is important to note that quality agreements cannot be used to delegate statutory or regulatory responsibilities to comply with [Current Good Manufacturing Practice].” See Drug Contract Guidance, supra note 167, at 6. Environmental and consumer financial protection laws have similar limitations on delegation. See supra Parts II.B. & II.C.
\textsuperscript{271} Cox & Hazen, supra note 239, § 1:24, at 119–20.
must actively supervise third parties. Many third-party regulation mandates closely map those considered by courts in determining control. In analyzing whether a third party, such as a telemarketer, is an agent, courts cite activities such as monitoring and editing the script used by telemarketers as demonstrating control.\textsuperscript{273} Yet regulators mandate monitoring or auditing of third parties.\textsuperscript{274} Indeed, third-party mandates often explicitly require the implementation of “controls” over third parties.\textsuperscript{275} It follows that conscripted enforcement may move the firm into a position of control sufficient for courts to hold the firm liable for the acts of third parties. In other words, the new gatekeepers may prompt a resurgence of respondeat superior.

There are other reasons besides liability to outsource, such as specialization.\textsuperscript{276} However, the additional risk of liability possibly imposed by third-party mandates might change the outsourcing calculus. Purchasing the service provider would not necessarily impose more liability. In \textit{United States v. Bestfoods}, the EPA sued a parent company under common law liability for the cleanup costs of hazardous waste disposed of by a subsidiary.\textsuperscript{277} The Court reasoned that something more than ownership control was needed to hold the parent liable under the common law.\textsuperscript{278} Direct involvement by the parent company in the wrongdoing is needed.\textsuperscript{279}

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

Thus, mandated third-party governance may cause businesses to either purchase the third-party service provider or develop a new service provider as a subsidiary to facilitate more effective monitoring. This assumes that the firm believes more effective monitoring would decrease the likelihood that the service provider will engage in wrongdoing. Pervasive mandated enforcement could thereby influence firms’ organizational structures.

\textsuperscript{274} See supra Part II.
\textsuperscript{276} See, e.g., Paul A. Samuelson & William D. Nordhaus, Macroeconomics 32 (16th ed., 1998). The outsourcing could also protect against reputational harm.
\textsuperscript{278} Id. at 61–62.
\textsuperscript{279} Northbound Grp., Inc. v. Norvax, Inc., 795 F.3d 647, 651 (7th Cir. 2015).
D. Strengthening the Public Duty

Conscripted enforcement informs debates about what duties businesses owe to society. Firms must refrain from violating laws, but they usually do not need to take any particular action to benefit the public.\(^{280}\) A strong norm discourages “unwarranted ‘social’ obligations on private enterprise.”\(^{281}\)

Industry-specific exceptions do exist, however. Utilities and common carriers must offer cable, Internet, electricity, and gas services at comparable prices even to unprofitable customers, such as inhabitants of rural communities.\(^{282}\) Under the Community Reinvestment Act, banks must extend credit in underserved neighborhoods.\(^{283}\) Disparate state and federal laws oblige hospitals not to exclude patients.\(^{284}\)

Unlike banks’ and utilities’ requirements to help some sector of the public, third-party mandated governance is not limited to companies offering essential services or serving as common carriers.\(^{285}\) It thus reaches a broader swath of the economy.\(^{286}\) Additionally, those essential services providers can fulfill the mandated public act by offering their core product—even for compensation.\(^{287}\) In contrast, conscripted enforcement requires a public action other than offering the firm’s core product, and without compensation, thus bringing the firm further outside its sphere of private enterprise.

Third-party mandates differ from the drastic growth in mandated internal compliance. Compliance departments have until now largely been seen as internally focused.\(^{288}\) Conversely, third-party mandates are externally focused. That distinction matters because mandating internally focused compliance departments can be seen as merely a new mechanism for requiring the firm to do what it was always expected to do—regulate itself.

\(^{280}\) See Cox & Hazen, supra note 239, at § 10:1.
\(^{286}\) Supra Part II.
\(^{287}\) To satisfy the Community Reinvestment Act, for instance, banks can make loans to small businesses. See, e.g., Michael S. Barr, Credit Where It Counts: The Community Reinvestment Act and Its Critics, 80 N.Y.U. L. Rev. 513, 523–26 (2005).
\(^{288}\) See, e.g., Griffith, supra note 9, at 2082, 2108 (portraying compliance department as “internal” and “intrafirm”); Krawiec, supra note 9, at 572 (discussing “internal compliance structures”); Root, supra note 9, at 1004–05 (describing compliance departments as focusing on the firms within which they sit).
Although different in fundamental ways, conscripted enforcement is part of a broader shift that includes compliance departments, community reinvestment requirements, and the SEC’s expanded substantive corporate law authority through the Sarbanes-Oxley Act. These and related developments have over time marked greater federal intervention into corporate governance and operations.

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

IV. EXPANDING THE PRIVATE BRANCH OF THE REGULATORY STATE

The central preoccupation of administrative law is the accountability of unelected bureaucrats. Accountability is largely achieved by providing mechanisms for participation, such as judicial review and notice-and-comment rulemaking. The effectiveness of administrative decisions is also crucial to administrative law. Scholars have already extended those normative projects to the growth in private governance. While it is not feasible to connect mandated enforcement to all of those rich conversations, this Part begins to map

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290 See Barkow, Rachel E., The Prosecutor as Regulatory Agency, in Prosecutors in the Boardroom: Using Criminal Law To Regulate Corporate Conduct 177, 177 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); Coglianese & Lazer, supra note 4, at 691; Griffith, supra note 9, at 2088–89; Roe, supra note 62, at 591; Vandenbergh, supra note 43, at 916. Broadening this class of activities to include enforcing laws against individuals and criminal and national security law would expand the array of examples. See, e.g., Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (imposing reporting requirements on employers for undocumented workers); supra note 21 (mentioning examples such as bank reporting of money laundering).

291 See, e.g., Bainbridge, supra note 80, at 591–92; Romano, supra note 289, at 1529.


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

295 See, e.g., Ayres & Braithwaite, supra note 9, at 101–32; Freeman, supra note 9, at 2.
the project of integrating the enforcer-firm into the regulatory state.

A. Effectiveness of the Enforcer-Firm

Ultimately, the central question in corporate regulation is what set of incentives would best deter wrongdoing. The law can influence those incentives chiefly by adjusting the severity of the penalty or the likelihood of detection. Studies of deterrence alternatives have remained inconclusive, in part because it is difficult to know what would have happened in the alternative. It is nonetheless valuable to recognize the regulatory options available and tradeoffs involved.

This Article identifies a new option now available that could greatly increase detection. By pushing large companies to play an external oversight role, policymakers have created a potentially massive expansion of the administrative state’s personnel and authority. The firm’s compliance department plays a major role in enforcement. In many public corporations today, the compliance group has grown to rival the legal department in terms of size and influence. At Goldman Sachs, the number of people in compliance more than tripled between 2004 and 2016, to about 950. But the CFPB has only 416 personnel in its monitoring group to conduct examinations of Goldman Sachs, Citibank, and many other large banks. As another example, Facebook recently hired thousands of new compliance reviewers, while its main regulator, the FTC, has only 1,100 employees total. Thus, adding even a fraction of large companies’ legal and compliance departments would dramatically increase the regulatory workforce.

Furthermore, the reach of this workforce is expansive. The enforcer-firm governs call centers, mortgage servicers, software providers, app developers, platform operators, materials manufacturers, and scientific labs, among others. One scholarly proposal calls for regulators to leverage the potential for

298 Part II provided several examples of this. See, e.g., supra note 121 and accompanying text.
299 Griffith, supra note 9, at 2077.
300 Sean J. Griffith et al., The Changing Face of Corporate Compliance and Corporate Governance, 21 Fordham J. Corp. & Fin. L. 1, 37 (2016). Other large financial institutions have seen similar growth. Id. at 36–37, 39.
301 Van Loo, supra note 37, at app.A at 436.
303 See supra Part II (reviewing the targets of conscripted enforcement).
banks to better deter other banks from risky behavior, which would elevate the enforcer-firm to a governance role even with respect to large contractual partners. A similar configuration is imaginable in other industries in which the largest firms transact. Facebook, for instance, allows Amazon, Netflix, and Microsoft to access user data, including the ability to read private messages. The addition of peer-to-peer enforcement would increase an already wide-ranging enforcement mechanism.

Whether observers see this expansion as beneficial or harmful depends partly on whether they view current public regulatory resource levels as adequate. Beyond that question of resources, a number of tradeoffs should be weighed in assessing the value of the enforcer-firm in comparison to other options.

Mandated enforcement could address a major concern about regulation: incompetence. A common critique is that bureaucrats have insufficient skills to keep up with the private sector. Observers mention regulators’ predicted inability to understand complex algorithms, for instance, as a counterpoint to calls for public regulation of Amazon, Facebook, and other tech giants. Additionally, since traditional private third-party enforcers do not produce the product subject to regulation, they are less familiar with the intricacies of fast-moving, technical industries—and firms may be reluctant to provide competitively sensitive information. Shifting that responsibility for comprehension onto today’s largest companies delivers a monitor better situated to keep pace.

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

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306 See infra note 316 and accompanying text.
309 Even if the third-party inspector hires former employees who worked in the industry, given the rapid pace of innovation that prior experience would soon become outdated. See Van Loo, supra note 37, at 405–06 (analyzing the challenges of third-party inspection regimes).
310 See, e.g., Samuelson & William D. Nordhaus, supra note 276, at 32.
Nonetheless, regulatory understanding exists along a spectrum. Given large firms' resources, talent, and expertise, they may bring greater competence to regulation compared to alternatives.

The second major factor weighing in favor of the enforcer-firm is efficiency. A chief criticism of regulation is that it increases transaction costs, which makes society worse off by reducing the overall output of markets.\textsuperscript{312} In highly fragmented industries, the regulator faces greater difficulty monitoring all entities than in a concentrated industry with a small number of large businesses.\textsuperscript{313} There are costs to establishing communications, traveling to the site of so many businesses, and understanding institutional idiosyncrasies. Unlike administrative agencies and third-party inspectors, the client already is in contact with its counterparties and already has a baseline level of expertise, meaning that it does not need to invest in developing those capabilities. The enforcer-firm can thereby lower the cost of information transfer by adding that transfer onto its existing information exchanges.\textsuperscript{314}

This expanded authority also comes with regulatory challenges. First, some of the information needed for monitoring may be sensitive. Contractual counterparties are sometimes current or future competitors, in that the firm may later decide to internalize the outsourced work—a possibility that mandated governance could accelerate.\textsuperscript{315} Amazon is notorious for hiring outside businesses—whether cloud computing providers, small clothing manufacturers, or shipping companies—and then ultimately deciding to take those products or services in-house after having had the chance to study them closely.\textsuperscript{316} That threat may cause service providers to avoid sharing monitoring information with the enforcer-firm. If the monitor is instead an administrative agency or private inspection firm, the privacy risks are less concerning because the monitor would not be a potential competitor.\textsuperscript{317} Given that information is the “lifeblood” of

\textsuperscript{312} On the importance of transaction costs in regulatory analyses, see, e.g., Freeman, supra note 4, at 573 n.108; Sidney A. Shapiro, Outsourcing Government Regulation, 53 Duke L.J. 389, 390 (2003).

\textsuperscript{313} Nicholas R. Parrillo, Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries, 36 Yale J. on Reg. 165, 209 (2019) (“When regulated entities are numerous, detection tends to be less probable . . . .”); cf. Kevin M. Stack & Michael P. Vandenbergh, The One Percent Problem, 111 Colum. L. Rev. 1385, 1393–94 (2011) (“Given economies of scale, it is often the case that with small-percentage contributors the costs of regulation exceed the benefits.”).

\textsuperscript{314} Cf. Judge, supra note 39, at 1262 (discussing the informational advantages that bank have in influencing risk-taking by other banks).

\textsuperscript{315} See supra Part III.C. (explaining how the liability implications of mandated enforcement may make it more attractive to bring third-party services in house).

\textsuperscript{316} Julie Creswell, Amazon the Brand-Buster, N.Y. Times, June 24, 2018, at BU1; Jay Greene & Laura Stevens, How Amazon Wins, Wall Street J., June 2, 2018, at B1-B2.

\textsuperscript{317} Granted, the revolving door between industry and agencies means that competitors of the service provider could still hire employees who had gained knowledge from monitoring. See, e.g., David Zaring, Against Being Against the Revolving Door, 2013 U. Ill. L. Rev. 507, 511–12 (2013).
effective governance, if sensitive information is necessary for monitoring, a public option or third-party monitor may prove more effective or at least necessary as a complement to the enforcer-firm.

Another risk is that dispersed regulators create problems with overlapping jurisdiction. There is some evidence that administrative agencies with overlapping jurisdiction are less likely to act because each has less individual pressure to act or may assume another will do so. By analogy, the public regulator, the firm, and the service provider have overlapping jurisdiction. As a result, each may assume someone else is paying adequate attention. Strategic shirking is also possible, since the multiple businesses working with any given service provider may realize they can benefit from other businesses’ monitoring of that same service provider without incurring the costs of rigorous monitoring.

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

Finally, unlike public regulators and traditional gatekeepers, the enforcer-firm’s sanction depends on its market power. The enforcer-firm’s main sanction is exit: if the service provider does not satisfy the firm’s regulatory expectations, the firm can stop doing business with the service provider. That punishment still allows the service provider to do business with other firms. If the service provider serves a large number of clients, as many do, exit becomes less harmful. Over time, the typical enforcer-firm may wield more substantial sanction power as industries become more concentrated. Nonetheless, the

320 On multiple businesses working with the same service provider, see, e.g., Brown & Wilson, supra note 264, at 47.
321 Krawiec, supra note 125, at 487 (discussing the “cosmetic” window-dressing by firms through compliance departments that do not necessarily prohibit wrongdoing).
323 Id.
324 Brown & Wilson, supra note 264, at 47.
325 James W. Brock, Economic Power, Henry Simons, and a Lost Antitrust Vision of Economic
strength of the firm’s enforcement mechanism increases with the firm’s market size. That relationship indicates that policy makers may need to become more involved as the enforcer-firm’s market power diminishes with respect to the service provider.\footnote{326}

Part of the problem with assessing these costs and benefits is that the largest firms remain untested as external regulators. In contrast, research demonstrates that public regulators’ monitoring promotes compliance. In one study, increasing the frequency of EPA inspections lowered pollution from factories by about three percent.\footnote{327} Policymakers would benefit from similar research on whether counterparty enforcement brings benefits and with what institutional design.\footnote{328} A crucial variable in any such analysis is the potentially substantial costs imposed on business, particularly in light of the corporate governance arguments emphasizing efficiency.\footnote{329}

In theory, large firms’ greater efficiency and expertise potentially make them superior to other public and private enforcement actors. As empiricists begin to study this regulatory model, it is important to consider the comparison group. There are sufficient examples of public regulators, private third-party monitors, and self-regulation failing.\footnote{330} The real comparison thus may not be between public monitors and enforcer-firm, or between the enforcer-firm and the old gatekeepers. Even if the evidence suggests that ongoing agency oversight of service providers is superior to the enforcer-firm, industry lobbying may block

\footnote{326 Size is not the only determinant here, as the supply of the service provider’s skills matters as well. Some technology providers, for instance, have greater power than many traditional providers because there are fewer of them. Cf. Jason D. Krieser et al., Outsourcing: Law and Business § 11.02(3)(e) (2019).


328 The case studies of the FTC, CFPB, EPA, and FDA indicated key design tradeoffs, including whether to (a) explicitly instruct the board of directors to oversee third-party enforcement, (b) regulate the service provider directly in addition to the enforcer-firm, and (c) scrutinize the firm’s enforcement model. Supra Part II.

329 See, e.g., Stephen M. Bainbridge, Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship, 82 Cornell L. Rev. 856, 857– (1997) (portraying proposals arguing against shareholder primacy as opposed to law and economics models of human behavior); Fisch, supra note 187, at 646 (discussing the relationship between shareholder primacy and efficiency).

330 See, e.g., Policy Shock: Recalibrating Risk and Regulation after Oil Spills, Nuclear Accidents and Financial Crises (Edward J. Balleisen et al., eds., 2017) (summarizing the relationship between regulation and crises).}
congressional allocation of adequate resources.\textsuperscript{331} In short, the real-world question may simply be whether the firm as a regulator, despite all of its imperfections, is better than no direct oversight.

\textbf{B. Accountability of the Enforcer-Firm}

A central administrative law concern about prior generations of privatization is that they “insulate” the government from accountability because the public has limited visibility or interaction with the private entity.\textsuperscript{332} The delegation of regulatory responsibilities to large firms can similarly insulate agencies from accountability. It is therefore worthwhile to consider how the public can ensure that enforcer-firms are promoting compliance without compromising agency independence. Three potential responses would be through courts, nongovernmental actors, and agencies.

Judicial review provides a check against industry capture of bureaucrats.\textsuperscript{333} Enforcer-firms can write monitoring contracts or make enforcement decisions free from accountability mechanisms that apply only to government, such as the Administrative Procedure Act\textsuperscript{334} and the Freedom of Information Act.\textsuperscript{335} In the absence of a clear statutory mechanism for review, some scholars have proposed leveraging constitutional law to hold private actors accountable.\textsuperscript{336} One proposal would have courts hold delegations unconstitutional if the agency imposes inadequate constraints on the private actor.\textsuperscript{337}

Solutions relying on the nondelegation doctrine seem unlikely. Congress must only provide “an intelligible principle” within lawful bounds,\textsuperscript{338} a lenient standard that has traditionally proved highly tolerant of government delegations to private parties.\textsuperscript{339} However, courts have occasionally indicated hostility for

\textsuperscript{331} The problem of interest groups influencing legislators has long occupied scholars. See, e.g., George J. Stigler, The Citizen and the State: Essays on Regulation (1975).
\textsuperscript{332} See Freeman, supra note 57, at 175–76 (“The obstacles to third party vindication seem particularly objectionable from an administrative law perspective because the government appears to insulate itself from accountability by relying on private providers.”).
\textsuperscript{333} Executive review plays a related anti-capture function. Michael A. Livermore & Richard L. Revesz, Regulatory Review, Capture, and Agency Inaction, 101 Geo. L.J. 1337 (2013) (discussing centralized review and defining capture as “situations where organized interest groups successfully act to vindicate their goals through government policy at the expense of the public interest.”).
\textsuperscript{335} Freedom of Information Act (FOIA), 5 U.S.C. § 552(b) (2018) (requiring federal agencies provide applicants with existing written information unless exempted).
\textsuperscript{337} On viewing administrative agency reliance on private actors as delegation, see, e.g., Metzger, supra note 4, at 1370.
\textsuperscript{338} See Hampton & Co. v. United States, 276 U.S. 394, 409 (1928).
\textsuperscript{339} See Freeman, supra note 4, at 589–90 (reviewing cases upholding privatization); David M.
“empowering private parties to wield regulatory authority”\textsuperscript{340} and indicated the need “to subject private delegations to a more searching scrutiny than their public counterparts.”\textsuperscript{341} Most prominently, in \textit{Department of Transportation v. Association of American Railroads} the Supreme Court avoided ruling on the nondelegation issue by holding that Amtrak was a government actor, but in a concurring opinion Justice Alito observed that “handing off regulatory power to a private entity is legislative delegation in its most obnoxious form.”\textsuperscript{342} It is thus not inconceivable that the nondelegation doctrine might at some point gain relevance to the enforcer-firm.

Others have explored imposing constitutional constraints on businesses as state actors under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{343} The most relevant tests for a state actor seem immediately applicable to the enforcer-firm—“joint participation” sufficient for interdependence, a sufficient “nexus” between the private and public actor, and performance of a “public function” traditionally exclusively reserved for the state.\textsuperscript{344} However, courts have consistently found that private companies failed these tests, even when involved in activities with a heavy public component, such as operating electric utilities and nursing homes.\textsuperscript{345} Self-regulatory organizations like the Financial Industry Regulatory Authority (FINRA), which is congressionally authorized to protect investors, present a closer case but courts still do not usually see them as state actors.\textsuperscript{346}

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\textsuperscript{341} See \textit{Tex. Boll Weevil Eradication Found., Inc. v. Lewellen}, 952 S.W.2d 454, 469 (Tex. 1997) (“[W]e believe it axiomatic that courts should subject private delegations to a more searching scrutiny than their public counterparts.”).


\textsuperscript{345} See id. at 358 (finding that a public utility with a monopoly is not a public actor): \textit{Blum v. Yaretsky}, 457 U.S. 991, 1010-12 (1982) (holding that nursing home decision to provide Medicaid patients with less care was not state action despite heavy regulations, licensing, and mandatory reassessment of Medicaid patients).

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

Nongovernmental actors present another possibility for holding the enforcer-firm accountable. For some perspective, it is instructive to consider again how the regulatory architecture differs between enforcer-firms and more traditional private enforcement models. When lawyers, accountants, and auditors serve as gatekeepers, the entity they are regulating is the one paying their bills. That client relationship makes it easier for the firm to capture the gatekeeper—in the sense of influencing it to enforce lightly—because the gatekeeper has financial interests in keeping the client happy. With the enforcer-firm, however, the gatekeeper pays the service provider’s bills—perhaps indirectly, as in the case of Amazon and Facebook, by providing some crucial access to users. If “the client is king,” the old gatekeepers are subjects, while the new gatekeepers are royalty. Enforcer-firms should thus prove inherently more resistant to capture, and more independent, than hired monitors.

Moreover, in contrast to the old gatekeepers, the enforcer-firm deals directly with consumers. As a result, some enforcer-firms’ employees will have more of a natural affinity for consumers, and thus potentially some of the groups needing protection from the laws to be enforced. Also, consumers have a means of directly affecting most enforcer-firms, by taking their business elsewhere. That direct relationship enables a form of advocacy that has proven effective in promoting large business compliance in other contexts. It also at least partly addresses some of the concerns in the literature that the old gatekeepers “are biased away from the public interest simply because close affinity with the client

347 See supra Part III.D. (distinguishing the enforcer-firm from utilities).
348 See Freeman, supra note 4, at 591.
349 See Kraakman, Corporate Liability, supra note 6, at 892 (discussing gatekeepers’ profit motives).
351 See supra Part II.
352 Wilson Hunter, Independent or Adrift at Sea: How the Concept of Independence Has Warped American Legal Ethics, 34 J. Leg. Prof. 367, 367 (2010).
353 See, e.g., Vanderbergh, supra note 43, at 917 (“This Article focuses principally on the role of consumer preferences. Environmental NGOs often shape or activate these consumer preferences and seek to convert them into credible threats of boycotts or negative public relations campaigns.”).
renders the desired independence psychologically impossible.”

There are many shortcomings with relying on markets to hold private firms accountable. A customer can easily choose another coffee shop or store, but it is harder for a consumer to switch banks or social networks. There may not be many other options for digital products, and if there are it would take time to learn a new interface and all of one’s pictures, posts, and contacts may not be readily portable to the new system. Indeed, when consumers have little choice the enforcer-firm may care less than traditional gatekeepers about reputation, and thus worry less about the public shaming aspect of violations. Thus, one consideration for whether to mandate enforcement may simply be the ease of exit: the more easily consumers can switch to competitors, the greater the accountability enforcer-firms offer.

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

For the public to hold the conscripted enforcer accountable based on that information, however, they must also be able to assess its efficacy, which may prove difficult except in cases of extreme failure. Behavioral law and economics has demonstrated how consumers ineffectively weigh various shrouded attributes in a product, such as the warranty or fees. It cannot be ruled out that

354 See Demski, supra note 18, at 57.
355 Among other reasons, bank offerings are complex to compare, and it is time-consuming to switch due to various automatic payments and linked accounts. See Rory Van Loo, Making Innovation More Competitive: The Case of Fintech, 65 UCLA L. Rev. 232, 244–45 (2018) (discussing switching difficulties in financial and digital markets).
357 The accounting firm that served Enron wound up closing, for instance, although it was able to open in a new form. See, e.g., Coffee, supra note 6, at 10-12.
361 For an example of a regulator releasing such information, see infra note 365 and accompanying text.
362 See, e.g., Bar-Gill supra note Error! Bookmark not defined., at 5–6 (reviewing behavioral
some kind of independent grading scale, akin to restaurant health scores, could facilitate consumer-driven accountability. Still, in many industries, including banking and technology, consumers rarely switch because the time and costs of doing so are prohibitive.\textsuperscript{363} Given challenges related to information, decision making, and switching, consumer spending and advocacy likely provide limited accountability for the enforcer-firm—albeit more than they do for alternative private enforcers.

These legal and nongovernmental shortcomings underscore the importance of a public entity monitoring the firm’s enforcement activities.\textsuperscript{364} The CFPB provides one such model because it routinely checks whether financial institutions are overseeing third parties. For instance, as part of its routine examinations the CFPB found that credit reporting agencies engaged in “insufficient ongoing monitoring, or re-vetting” of third-party furnishers of credit data.\textsuperscript{365} With that message delivered industry-wide, credit agencies adjusted their internal processes enough that two years later the CFPB concluded, “In recent follow-up reviews, we determined that these policies and procedures have improved.”\textsuperscript{366} Improvements included “monitoring for furnishers that do not comply” and enforcement mechanisms such as “ceasing to accept data from furnishers.”\textsuperscript{367} The CFPB thus not only examines enforcer-firms’ monitoring, but also communicates some of its findings to the public.

Agency oversight represents another area in which the enforcer-firm has inherent advantages over other private enforcers. In the traditional model of the private inspector, accountant, self-regulatory organization, or auditor, agency oversight of the private enforcer would require interacting with a new group of entities. Those interactions would necessitate devoting agency resources to communicating with, understanding, and prosecuting new institutions. In contrast, the agency already oversees the enforcer-firm, and thus could smoothly layer onto the agency’s existing regulatory operations. Regulatory oversight of the enforcer-firm thus offers greater efficiency and is more likely to occur than

\textsuperscript{363} See, e.g., Barbara van Schewick, Network Neutrality and Quality of Service: What a Nondiscrimination Rule Should Look Like, 67 Stan. L. Rev. 1, 92–94 (2015) (reviewing the literature and concluding that even small barriers can keep consumers from switching).

\textsuperscript{364} See, e.g., Metzger supra note 4, at 1374 (“Under the approach advocated here, the crucial constitutional question is whether adequate accountability mechanisms exist by which to ensure that private exercises of government power comport with constitutional requirements.”).


\textsuperscript{366} Id.

\textsuperscript{367} Id.
oversight of many traditional gatekeepers.\footnote{368}

This is not meant to be an exhaustive list of the risks and upsides of mandated enforcement. Additional risks include the possibility that the state relies too much on self-serving firms to regulate, thereby diminishing agencies’ expertise or prompting Congress to allocate suboptimal resources. Another possibility is a perverse incentive for regulators to prefer concentrated industries with large companies because they wield more powerful sanctions,\footnote{369} thus putting mandated enforcement in tension with antitrust.\footnote{370} Nor is the case clear that society benefits from having the enforcer-firm regulate, rather than solely a well-resourced administrative agency. These and other effectiveness and accountability implications are ripe for systematic study.

Overall, as a regulatory tool, conscripted regulators offer a number of potential advantages over prior privatization models. They offer the possibility of greater efficiency, expertise, and affinity with consumers. Designed poorly, however, they risk creating a vast sphere of regulatory decisions out of public sight and unlikely to be judicially reviewed. A crucial design mechanism is ensuring that a public entity watches the gatekeepers.

\textbf{CONCLUSION}

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

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

Shareholders remain the greatest beneficiary of the firm, and administrative

\footnote{368} The challenge would then become one situated at the core of administrative law, how to hold the agency accountable. As the FTC’s oversight of Facebook demonstrates, merely having a public entity involved is insufficient. See supra notes 86–94, and accompanying text (explaining how the FTC allowed Facebook great autonomy in submitting compliance reports regarding oversight of third parties).

\footnote{369} On the relationship between size and sanction, see supra note 325 and accompanying text.

\footnote{370} Antitrust is also implicated to the extent that firms are motivated to purchase third parties rather than regulate them, or to use their monitoring access to obtain competitively sensitive information that allows them to duplicate services in-house. See supra Part III.C.
agencies are still the most important regulators. However, any account of either the firm or regulation is incomplete without recognizing that the frontier of enforcement lies in large businesses serving as gatekeepers for some of society’s most important laws.

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