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Clickbait Compliance and Transnational Corruption

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Cover Page Footnote

For helpful comments and conversations, I thank Miriam Baer, Jeffrey Boles, Vince Buccola, Cary Coglianese, Brian Feinstein, Brandon Garrett, David Hess, Bill Laufer, Sarah Light, Phil Nichols, Veronica Root Martinez, Amy Sepinwall, Gui Siqueira, Andy Spalding, Kevin Werbach, and David Zaring. For thoughtful questions and suggestions, I thank audiences at the Academy of Legal Studies in Business Annual Conference and the Symposium on Supranational Responses to Corruption organized by the American Society of International Law, the World Bank's Office of Suspension and Debarment, and the Organization for Economic Co-operation and Development's Anti-Corruption Division. The content of this Article does not reflect the views of my employer.

CLICKBAIT COMPLIANCE AND TRANSNATIONAL CORRUPTION

William R. Heaston*

Abstract

In the corporate compliance and anti-corruption domains, international standard-setting is in vogue. Recent years have witnessed a flurry of new compliance standards authored by the International Organization for Standardization (ISO), the world's leading private standard-setter. ISO claims to offer a more effective way to address transnational corruption risks and related compliance challenges, one that boasts the approval of a global committee of technical experts and enticingly purports to accord with international "best practices." A number of companies and governments around the world have taken the bait, with many adopting or giving legal effect to ISO's anti-bribery standard (ISO 37001) in particular.

This Article argues that, despite the theoretical allure of this nascent wave of standard-setting, ISO's compliance standards are fraught with pitfalls that call into question their practical utility. In effect, companies and governments that adopt them are investing in clickbait compliance, a superficially attractive set of compliance recommendations that overpromise and are likely to underdeliver in many respects. First, a conceptual analysis of ISO 37001 illustrates that such standards are unlikely to function as desired ("clickbait functions"). Second, an examination of ISO's growing presence in the burgeoning field of compliance reveals that supposed connections or synergies between the organization's new standards and compliance-related laws, practices, and trends do not meaningfully exist and may not fully materialize ("clickbait connections"). The Article concludes by discussing how ISO's disjointed, siloed organizational system exacerbates these issues

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before proposing systemic reforms that would promote a more evidence-based approach to ISO compliance, an approach that may curtail—but will certainly not eliminate — “clickbait” concerns.

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INTRODUCTION

Compliance failures and corruption scandals are perennial problems in business and government. The past six years alone have witnessed some of the largest corporate resolutions in the history of transnational anti-bribery enforcement.¹ In 2020, Airbus and Goldman Sachs settled foreign bribery charges for astronomical sums of \$3.9 billion and \$2.9 billion, respectively.² In December 2019, Swedish telecom giant Ericsson paid more than \$1 billion in fines to U.S. authorities for bribing foreign public officials in at least five countries over 17 years.³ And in December 2016, Brazilian construction conglomerate Odebrecht agreed to pay U.S., Brazilian, and Swiss authorities up to a record-breaking \$4.5 billion in penalties for engaging “in a massive and unparalleled bribery and bid-rigging scheme.”⁴

The Odebrecht scandal is particularly notable for a couple of reasons. First, as virtually every commentator has noted, the sheer magnitude of the scandal was unprecedented.⁵ For more than 15 years, Odebrecht systematically bribed public officials in a dozen countries to secure lucrative contracts and political influence.⁶ This scheme implicated several high-ranking politicians throughout Latin America (including four former presidents), and it ultimately took a similarly unprecedented and sweeping investigation (“Operation Car Wash”) to unravel the “vast and extraordinarily intricate web of corruption.”⁷ Second, as far fewer have noted, Brazilian enforcement officials chose to employ a seemingly novel tool in this unprecedented corruption case, requiring Odebrecht to obtain “ISO 37001

¹ See Harry Cassin, *What's New on the FCPA Top Ten List?*, FCPA BLOG (May 26, 2021), <https://fcpublog.com/2021/05/26/whats-new-on-the-fcpa-top-ten-list/> (listing major anti-bribery enforcement actions). Admittedly, corruption and compliance failures come in various forms; bribery is but one particularly prominent manifestation. See MICHAEL JOHNSTON, SYNDROMES OF CORRUPTION, at x (2005) (stressing that corruption is a broader concept than bribery); Veronica Root, *The Compliance Process*, 94 IND. L.J. 203, 205 n.1 (2019) (noting that compliance failures encompass a wide array of behaviors).

² Press Release, U.S. Dep’t of Just., Airbus Agrees to Pay Over \$3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case (Jan. 31, 2020), <https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case>; Press Release, U.S. Dep’t Just., Goldman Sachs Resolves Foreign Bribery Case and Agrees to Pay Over \$2.9 Billion (Oct. 22, 2020), <https://www.justice.gov/usao-edny/pr/goldman-sachs-resolves-foreign-bribery-case-and-agrees-pay-over-29-billion>.

³ Press Release, U.S. Dep’t of Just., Ericsson Agrees to Pay Over \$1 Billion to Resolve FCPA Case (Dec. 6, 2019), <https://www.justice.gov/opa/pr/ericsson-agrees-pay-over-1-billion-resolve-fcpa-case>.

⁴ Press Release, U.S. Dep’t of Just., Odebrecht and Braskem Plead Guilty and Agree to Pay at Least \$3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History (Dec. 21, 2016), <https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penalties-resolve>.

⁵ See, e.g., Jonathan Watts, *Operation Car Wash: Is this the Biggest Corruption Scandal in History?*, GUARDIAN (June 1, 2017, 12:30 AM), <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history> (labeling it “the biggest corruption scandal in the history of Brazil”).

⁶ *Id.*

⁷ See *id.*

certification” in a July 2018 leniency agreement.⁸ Almost three years later, the company—now doing business as Novonor—did just that, proclaiming that its new certification marked “a milestone in [its] transformation[.]”⁹ But was it?

Launched in October 2016 by the International Organization for Standardization (ISO), ISO 37001 is a voluntary anti-bribery management systems standard that outlines measures firms and governments can implement to “prevent, detect and address bribery.”¹⁰ This standard, which a technical committee of experts from 37 countries and eight international organizations developed over the course of multiple years, purports to represent a “global consensus on anti-bribery good practices” that can help organizations “promote an ethical business culture.”¹¹ Most notably, ISO 37001 gives entities the option of undergoing a third-party audit by an accredited certification body and, upon passing the audit, marketing themselves as “ISO 37001-certified.”¹² For these reasons, among others, ISO has claimed that the standard represents a “powerful new tool to combat bribery.”¹³

While compliance systems and voluntary standard-setting have long been prominent mechanisms of anti-corruption policy,¹⁴ ISO 37001 is a peculiar kind of voluntary compliance standard. Its peculiarity partly stems from ISO’s hyper-technical orientation—the global standard-setter is traditionally known for standardizing things like freight containers and screw

⁸ TYLER MCBRIEN, PRINCETON UNIV., *DEVELOPING A MANAGEMENT STANDARD TO PREVENT BRIBERY: ISO 37001 OFFERS A NEW APPROACH, 2012–2019*, at 14 (2020); Worth MacMurray, *How Did the Public Sector Use ISO 37001 in 2018? Creatively!*, RESILIENCE POST (Feb. 6, 2019), <https://resiliencepost.com/2019/02/06/how-did-the-private-sector-used-iso-37001-in-2018-creatively/> [<https://perma.cc/Y38Y-Q4XD>].

⁹ *Former Odebrecht Companies, now Novonor, Awarded with ISO Anti-Bribery Management Certificate*, NOVONOR (June 23, 2021), <https://www.nossocompromisso.com/en/noticias/former-odebrecht-companies-now-novonor-awarded-with-iso-anti-bribery-management-certificate/> [<https://perma.cc/9864-5W8Z>].

¹⁰ *ISO 37001: Anti-Bribery Management Systems*, ISO, <https://www.iso.org/iso-37001-anti-bribery-management.html> (last visited Oct. 27, 2022).

¹¹ See MCBRIEN, *supra* note 8, at 1; Elizabeth Gasiorowski-Denis, *ISO Publishes Powerful New Tool to Combat Bribery*, ISO (Oct. 14, 2016), <https://www.iso.org/news/2016/10/Ref2125.html>; Maria Lazarte, *Progress on Anti-Bribery Standard*, ISO (May 27, 2015), <https://www.iso.org/news/2015/05/Ref1967.html>.

¹² See MCBRIEN, *supra* note 8, at 8.

¹³ Gasiorowski-Denis, *supra* note 11.

¹⁴ See Steven A. Lauer & Joseph E. Murphy, *Compliance and Ethics Programs: What Lawyers Need to Know to Understand the Development of this Field*, 75 BUS. LAW. 2541, 2543–44 (2020) (discussing the history of compliance systems and noting that anti-bribery has been emphasized since their inception). Collective action initiatives are a noteworthy example of voluntary standard-setting in the anti-corruption domain. See, e.g., COLLECTIVE ACTION: INNOVATIVE STRATEGIES TO PREVENT CORRUPTION (Mark Pieth ed., 2012); Elizabeth Dávid-Barrett, *Business Unusual: Collective Action Against Bribery in International Business*, 71 CRIME L. & SOC. CHANGE 151, 151–52 (2019); Alina Mungiu-Pippidi, *Controlling Corruption through Collective Action*, 24 J. DEMOCRACY 101, 103 (2013); Djordjija Petkoski, Danielle E. Warren, & William S. Laufer, *Collective Strategies in Fighting Corruption: Some Intuitions and Counter Intuitions*, 88 J. BUS. ETHICS 815, 816–18 (2009).

threads, not anything remotely related to bribery or compliance.¹⁵ It also stems from ISO's particular organizational structure—from the transnational committees of experts that develop its standards to its disaggregated accreditation and third-party certification systems.¹⁶ Despite these various idiosyncrasies, ISO's entry onto the anti-bribery compliance scene has largely eluded scholarly scrutiny.¹⁷ Such inattention is problematic, and it needs to be rectified for three reasons.

First, while uptake was initially slow, there are indications that ISO 37001 is becoming more popular around the world.¹⁸ A number of firms and governments, particularly in developing countries where corruption has historically posed considerable challenges, have implemented the standard.¹⁹

¹⁵ See *infra* Part I.C.1 (discussing the history and work of ISO).

¹⁶ See *infra* Part II.A (describing these structural features).

¹⁷ With the exception of a few blog posts and short articles. See *infra* notes 116–18 (collecting sources).

¹⁸ Compare Henry Cutter, *ISO's Anti-Bribery Standard Gets Slow Adoption*, WALL ST. J. (Oct. 18, 2017, 12:44 PM), [https://www.wsj.com/articles/isos-anti-bribery-standard-gets-slow-adoption-1508345061?tesla=y, with Worth MacMurray, ISO 37001 Continues to Gain Global Momentum, FCPA BLOG \(Jan. 17, 2023, 7:48 AM\), https://fcpublog.com/2023/01/17/iso-37001-continues-to-gain-global-momentum/](https://www.wsj.com/articles/isos-anti-bribery-standard-gets-slow-adoption-1508345061?tesla=y, with Worth MacMurray, ISO 37001 Continues to Gain Global Momentum, FCPA BLOG (Jan. 17, 2023, 7:48 AM), https://fcpublog.com/2023/01/17/iso-37001-continues-to-gain-global-momentum/). There is not a central database tracking firms that are ISO 37001-certified. MCBRIEN, *supra* note 8, at 13. However, one recent survey indicated that 548 firms in 52 countries had obtained certification by the end of 2019. *Id.*; see also 09. *ISO Survey of Certifications to Management Systems – Full Results*, ISO, <https://www.iso.org/committee/54998.html?t=KomURwikWDLiuB1P1c7SjLMLEAgXOA7emZHKGWyn8f3KQUTU3m287NxnPA3Dluxm&view=documents#section-isodocuments-top> (last visited Jan. 22, 2023) (choose “Explanatory note and overview on ISO Survey 2021 results”) (2021 ISO survey indicating 2,896 ISO 37001 certificates had been issued across 7,982 sites); Emmanuel Moyne & Nathan Morin, *Are You Willing to Be ISO 37001 Certified?*, INT’L BAR ASS’N (Oct. 29, 2021), <https://www.ibanet.org/iso-37001-abm-certification> (noting that the standard “is increasing in popularity”).

¹⁹ See, e.g., *Angola's Aenergy is First African Business to Receive Anti-Bribery Certificate*, APO GRP. AFR. NEWSROOM (Apr. 11, 2019), <https://www.africa-newsroom.com/press/media/angolas-aenergy-is-first-african-business-to-receive-antibribery-certificate?lang=en&display=image> (Angola); *First Time in Armenia: VivaCell-MTS Gets Certificate on Compliance to ISO 37001 and ISO 19600 Standards*, ARKA TELECOM (Nov. 13, 2018), http://telecom.arka.am/en/news/telecom/first_time_in_armenia_vivacell_mts_gets_certificate_on_compliance_to_iso_37001_and_iso_19600_standar/ (Armenia); *Nobel Oil Services Obtains Certificate in Oil and Gas Industry in South Caucasus*, MENAFN (Apr. 12, 2019, 3:27 AM), <https://menafn.com/1098380139/Nobel-Oil-Services-obtains-certificate-in-oil-and-gas-industry-in-South-Caucasus> (Azerbaijan); *Estre Ambiental First in Brazil's Waste Management Industry to Receive International Certification for Internal Controls and Integrity Policies*, PR NEWswire (Dec. 6, 2017, 3:42 PM), <https://www.prnewswire.com/news-releases/estre-ambiental-first-in-brazils-waste-management-industry-to-receive-international-certification-for-internal-controls-and-integrity-policies-300568036.html> (Brazil); Maurice Alal, *Kebs Develops New System to Fight Bribery*, THE STAR (Aug. 30, 2019, 12:00 AM), <https://www.the-star.co.ke/counties/nyanza/2019-08-30-kebs-develops-new-system-to-fight-bribery/> (Kenya); *Kyrgyzstan to Apply International Standards for Combating Bribery*, AKIPRESS (Feb. 28, 2018 10:53 AM), https://akipress.com/news:602927:Kyrgyzstan_to_apply_international_standards_for_combating_bribery/ (Kyrgyzstan); *Public Services Agency becomes First Institution of Moldova Accredited with Anti-Bribery Certificate*, GOV'T REPUBLIC MOLD. (Nov. 15, 2018, 4:50 PM), <https://gov.md/en/content/public-services-agency-becomes-first-institution-moldova-accredited-anti-bribery-certificate> (Moldova); *Anti-Bribery Management System Introduced in Mongolia*, AKIPRESS (Feb. 24, 2018, 2:10 PM), https://akipress.com/news:602759:Anti-bribery_management_system_introduced_in_mongolia/ (Mongolia); *Yuyu Pharma Receives ISO 37001 Anti-Bribery Management System Certification*, KOR. HERALD (Sept. 9, 2021, 10:30 PM), <http://www.koreaherald.com/view.php?ud=20210909001045> (South Korea); *Intertek & Dubai Quality Group Underline Importance of Anti-Bribery Management Systems*, INTERTEK (Mar. 17, 2019), <https://www.intertek.com/news/2019/03-17-anti-bribery-management->

Among the firms that have either obtained or expressed interest in certification are multinational corporations that have recently faced major anti-bribery enforcement actions, such as Novonor (Odebrecht), Microsoft, and Walmart.²⁰ In addition, prominent global anti-corruption actors have been encouraging ISO 37001 certification. For instance, the United Nations Industrial Development Organization jointly published a handbook with ISO in 2021 to “promot[e] the implementation of ISO 37001.”²¹ And the United States Government, known in the anti-corruption space for its robust enforcement of the Foreign Corrupt Practices Act (FCPA),²² recently expressed enthusiasm after the Peruvian Government announced that its Executive Council and Permanent Supreme Judicial Chamber had obtained ISO 37001 certification in September 2021.²³ These developments show that ISO 37001 warrants more than a cursory glance. With more and more companies and governments turning to the standard to address their corruption concerns, more sustained attention is needed to assess the desirability of this trend.

Second, ISO 37001 is just the beginning. In addition to anti-bribery, ISO has recently released and is currently developing a host of standards in related areas, such as compliance management (ISO 37301), whistleblowing management (ISO 37002), organizational governance (e.g., ISO 37000), corporate governance (ISO 37007), and internal investigations (ISO 37008).²⁴ These standards demonstrate that ISO 37001 is not some one-off anomaly; more accurately, it is the vanguard in an emergent phenomenon of

systems/ (United Arab Emirates); *see also*, e.g., JOSEPH T. WELLS, INTERNATIONAL FRAUD HANDBOOK 269, 284–85, 300, 308 (2018) (indicating that ISO 37001 is “commonly used” in Brazil, Peru, the United Arab Emirates, and India).

²⁰ *See supra* notes 4–9 and accompanying text (discussing Odebrecht); Cutter, *supra* note 18 (discussing Microsoft and Walmart’s interest in ISO 37001).

²¹ *New ISO-UNIDO Handbook for Preventing and Combating Bribery in Organizations*, U.N. INDUS. DEV. ORG., <https://hub.unido.org/news/new-iso-unido-handbook-preventing-and-combating-bribery-organizations> [<https://perma.cc/P7E4-QQ7Q>] (last visited Oct. 24, 2022).

²² Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended in 15 U.S.C. § 78dd (2018)). *See generally* Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT’L L. 907, 909–16 (2010) (discussing the rise of FCPA enforcement).

²³ *The United States Supports Peru in Obtaining the ISO 37001-Anti-Bribery Management System Certification*, U.S. EMBASSY IN PERU (Sept. 17, 2021), <https://pe.usembassy.gov/the-united-states-contributes-to-peru-iso-37001-anti-bribery-management-system-certification/> [<https://perma.cc/35ZD-P98K>]. Notably, the U.K. Government has also stated that “certifications or validations against ‘independently-verified anti-bribery standards [such as ISO 37001] maintained by industrial sector associations or multilateral bodies’” may help organizations qualify for an affirmative defense should they run afoul of the U.K. Bribery Act. Hui Chen, *The Use and Measurement of Compliance Programs in the Legal and Regulatory Domains*, in MEASURING COMPLIANCE 25, 47 (Melissa Rorie & Benjamin van Rooij eds., 2022) (quoting U.K. MINISTRY OF JUST., THE BRIBERY ACT 2010 GUIDANCE 31 cmt. 6.4 (2011), <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>).

²⁴ *See ISO/TC 309: Governance of Organizations – Projects*, ISO, <https://committee.iso.org/sites/tc309/home/projects.html> (last visited Oct. 24, 2022). Some of these standards, such as in the area of organizational governance, are designed to provide general guidance rather than a set of auditable criteria for third-party certifiers to assess. *ISO 37000 – The First Ever International Benchmark for Good Governance*, ISO, https://committee.iso.org/ISO_37000_Governance (last visited Oct. 24, 2022).

international compliance (and governance) standard-setting.²⁵ Compliance, which generally refers to organizational efforts to promote adherence with external and internal rules of behavior,²⁶ is an especially salient concern for firms and regulators today.²⁷ As one scholar colorfully put it, recent years have ushered in “the dawn of a new era: the era of compliance.”²⁸ It is important to assess whether ISO’s nascent wave of compliance standards stands to advance or undermine this burgeoning compliance agenda.

Third, ISO 37001 and its progeny’s idiosyncrasies raise important considerations for compliance theory and practice. These include the merits and limitations of using a transnational team of technical experts to craft international compliance standards; the use of accreditors and third-party certifiers in the compliance process; the efficacy of a management systems-oriented approach to compliance; and the legal implications and quasi-legal effect of private certification standards.²⁹ As to the last-mentioned consideration, it is notable that some governments have recently given ISO 37001 legal weight in negotiated settlement agreements.³⁰ Such tactics problematize traditional distinctions of public versus private, mandatory versus voluntary, and hard versus soft law in ways that merit scholarly attention.³¹

Together, these three sets of motivations drive this Article, which provides the first substantive work of scholarship analyzing ISO’s foray into the anti-corruption and corporate compliance domains. It argues that, despite these international standards’ theoretical allure, they are fraught with pitfalls

²⁵ This Article focuses on corporate compliance, particularly anti-bribery compliance, rather than corporate governance. That said, distinctions between the two concepts have no bearing on the account presented here. See generally Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2107 (2016) (distinguishing corporate compliance from corporate governance).

²⁶ See Benjamin van Rooij & D. Daniel Sokol, *Introduction: Compliance as the Interaction between Rules and Behavior*, in THE CAMBRIDGE HANDBOOK OF COMPLIANCE 1, 1 (Benjamin van Rooij & D. Daniel Sokol eds., 2021) (defining compliance broadly “as the interaction between rules and behavior”); Root, *supra* note 1, at 205 (defining compliance as “a firm’s effort to ensure that it and its agents adhere to legal and regulatory requirements, industry practice, and the firm’s own internal policies and norms”).

²⁷ See William S. Laufer, *A Very Special Regulatory Milestone*, 20 U. PA. J. BUS. L. 392, 392–94 (2018) (remarking on the unprecedented levels of compliance-related expenditures today); Geoffrey Parsons Miller, *Compliance: Past, Present and Future*, 48 U. TOL. L. REV. 437, 437 (2017) (“Compliance . . . is coming of age as a field of legal practice, as a subject taught in law schools, and as a field of research and analysis by academics and thoughtful practitioners.”); Veronica Root, *Coordinating Compliance Incentives*, 102 CORNELL L. REV. 1003, 1004 (2017) (“Compliance is king, and its subjects . . . are quick to tout its power and potential for good.”).

²⁸ Griffith, *supra* note 25, at 2077.

²⁹ See MCBRIEN, *supra* note 8, at 3–5 (discussing the challenges of ISO); Chen, *supra* note 23, at 47–48.

³⁰ See MCBRIEN, *supra* note 8, at 14 (observing that prosecutors in Brazil, Denmark, and Singapore have required companies to obtain ISO 37001 certification as a condition of settlement); MacMurray, *supra* note 8 (same).

³¹ See Tim Bartley, *Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards*, 12 THEORETICAL INQUIRIES L. 517, 525 (2011) (observing that private standards can overlap with legal rules); William W. Bratton, *Private Standards, Public Governance: A New Look at the Financial Accounting Standards Board*, 48 B.C. L. REV. 5, 5–6 (2007) (“Legal theory has long taught that a clear line divides neither public from private law nor the public from the private sector.”).

that call into question their practical utility. Essentially, companies and governments that adopt the standards are investing in a *clickbait compliance* regime, one that offers superficially attractive compliance solutions that are likely to overpromise and underdeliver in many respects.³²

First, the standards are unlikely to function as supposed (“clickbait functions”). A conceptual analysis of ISO 37001 illustrates this well: The standard aims to help organizations better *systematize* their anti-bribery programs, but the systematic nature of this process is questionable and will likely produce underwhelming results; the standard aims to help organizations *symbolize* their moral commitments to the global anti-corruption enterprise, but there are significant risks that organizations will implement it in a superficial or “merely symbolic” fashion; and the standard aims to credibly *signal* information about certified entities’ anti-bribery programs, but it is susceptible to misleading or “false signaling” behaviors that may hamper its informational value.³³ Second, and more generally, the standards are unlikely to complement compliance-related laws or trends in ways that meaningfully advance broader compliance agendas (“clickbait connections”).³⁴ These criticisms do not mean that well-intentioned organizations will never find the standards helpful, but they do cast doubt on the multiple supposed benefits of an ISO approach to compliance as a general matter.

Thus, this Article provides a skeptical take on ISO’s compliance standards, one that principally aims to make firms, regulators, and scholars better aware of their limitations. That said, skepticism does not necessarily preclude improvement. While the status quo rightly raises doubts about the value of ISO 37001 and related compliance standards, it may also be the case that the ISO system could be modified to mitigate some of these concerns.³⁵ In this spirit, the Article concludes by discussing the merits of implementing a mandatory information disclosure and feedback regime within the ISO ecosystem.³⁶ This regime would require ISO-certified organizations to disclose compliance-related data and information to ISO national standard-setting bodies and central ISO, and it would also require ISO experts at both levels to evaluate this data and provide timely feedback. If implemented, this proposal would transform ISO from a hodgepodge of “compliance silos” to a series of evidence-based “compliance networks” predicated upon regular information dissemination, more sophisticated compliance program evaluation, and more meaningful learning about which compliance measures

³² “Clickbait” pertains to content that entices audiences with promises or expectations “of dubious value” and then fails to deliver on them. Emily Hillhouse, *Clickbait: The Good, the Bad and the Ugly*, PLATFORM MAG. (Nov. 20, 2018, 8:10 AM), <https://platformmagazine.org/2018/11/20/clickbait-the-good-the-bad-and-the-ugly/> (quoting Merriam-Webster).

³³ See *infra* Part II.B–C.

³⁴ See *infra* Part III.

³⁵ See *infra* Part IV.A–B.

³⁶ See *infra* Part IV.

tend to work or falter in given settings. These developments would not eliminate all of the overpromise-and-underdeliver (i.e., “clickbait”) concerns raised in this Article, nor would they be without drawbacks, limitations, and obstacles. But this proposal would provide a better basis for evaluating ISO’s compliance standards in practice, and it may also help interested entities obtain more meaningful benefits from implementing them.

The remainder of the Article is structured as follows. Part I provides background on the global anti-corruption regime and the emergence of ISO as a new player within that regime. Part II analyzes ISO 37001, identifying its core structural features and functions and then demonstrating how they promote “clickbait compliance.” Part III steps back from ISO 37001 to analyze ISO-related clickbait concerns in the context of the growing field of compliance more broadly, observing three major facets of contemporary compliance that ISO’s new compliance standards appear to complement—compliance law, the social responsibility agenda, and emphases on testing and data analytics—before critiquing notions of complementarity and potential synergy. Finally, Part IV describes the mandatory disclosure and feedback system that ISO could implement to improve its anti-corruption and compliance standard-setting.

I. THE “STANDARDIZATION” OF ANTI-CORRUPTION COMPLIANCE

Before discussing ISO 37001 and the rise of ISO compliance standards, some stage-setting is in order. To that end, this Part will describe how anti-corruption became a phenomenon of such widespread interest and institutionalization that it now constitutes a “global regime.” It will then highlight the prominent role of private standard-setting within this regime, which reflects widespread interest in better harmonizing anti-corruption compliance. Finally, the discussion will turn to ISO’s emergence as a prospective harmonizer or “standardizer” of anti-corruption compliance, describing the organization’s idiosyncratic features and then introducing the ISO 37001 anti-bribery standard.

A. *The Global Anti-Corruption Regime*

One would be hard-pressed to find a place in the world where corruption has all the trappings of a legitimate social norm.³⁷ Indeed, it is axiomatic that even in contexts where corruption is common, its pervasiveness is neither a reliable nor justifiable proxy for its acceptability.³⁸

³⁷ See Thomas W. Dunfee & Thomas J. Donaldson, *Untangling the Corruption Knot: Global Bribery Viewed Through the Lens of Integrative Social Contracts Theory*, in *THE BLACKWELL GUIDE TO BUSINESS ETHICS* 61, 68–74 (Norman E. Bowie ed., 2002) (arguing that bribery violates microsocial norms of appropriateness, lacks the necessary features of an authentic social norm, and violates “hypernorms” or universal moral standards).

³⁸ See *id.* at 69 (“The mythology is that bribery is accepted where it flourishes. This image is badly distorted [T]here is a surprising amount of agreement that bribery is unethical.”) (emphasis omitted);

Simply put, corruption is unquestionably wrongful and widely condemned.³⁹ This has led some scholars to posit the existence of a “general anti-bribery norm” or “global anti-corruption norm.”⁴⁰ These assertions certainly capture the thrust of the contemporary anti-corruption movement.⁴¹ However, this abstract conception of an overarching anti-corruption norm fails to convey the multitude of actors and mechanisms at play, the diversity of their efforts, and the linkages between them.

A better conception—and one that is currently in vogue—is that of a “global anti-corruption regime.” Here, *regime* is not meant to stand for the proposition that there is some sort of centralized, overarching anti-corruption authority.⁴² Instead, a regime can be thought of as a “multilateral ‘concurrence’ on functionally useful behavior.”⁴³ Such a concurrence exists in the anti-corruption context in the form of a “complex ensemble of legal instruments and enforcement practices.”⁴⁴ These instruments and practices give structure and coherence to the global regime in various ways—through shared obligations and expectations articulated in international treaties; through coordinated and collaborative enforcement efforts between regulators in different countries; and through the global diffusion of legal mechanisms, such as the widespread adoption of transnational bribery laws and the increased use of negotiated settlements to resolve corporate enforcement actions.⁴⁵

David Hess & Thomas W. Dunfee, *Fighting Corruption: The C² Principles (Combating Corruption)*, 33 CORNELL INT’L L.J. 593, 595 (2000) (observing that a paradox of corruption is that it is “universally disapproved yet universally prevalent”).

³⁹ See JOHN T. NOONAN, JR., BRIBES: THE INTELLECTUAL HISTORY OF A MORAL IDEA 702–04 (1984); Philip M. Nichols, *The Good Bribe*, 49 U.C. DAVIS L. REV. 647, 682 (2015) (“Both ancient and modern moral norms, from all corners of the world, condemn bribery.”).

⁴⁰ See, e.g., Julia Y. Lee, *Money Norms*, 49 LOY. U. CHI. L.J. 57, 112 (2017); Jennifer McCoy & Heather Heckel, *The Emergence of a Global Anti-Corruption Norm*, 38 INT’L POL. 65, 65 (2001). This Article uses the terms “corruption” and “bribery” interchangeably, although it recognizes that greater nuance (on which this Article does not turn) exists. See JOHNSTON, *supra* note 1, at x.

⁴¹ See Duane Windsor & Kathleen A. Getz, *Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed Motives and Diverse Values*, 33 CORNELL INT’L L.J. 731, 735, 762 (2000) (“A global anti-corruption regime does involve, in part, what can plausibly be deemed a [universal] moral principle, namely that bribery and extortion are ethically unacceptable . . .”).

⁴² Duane Windsor, *The Development of International Business Norms*, 14 BUS. ETHICS Q. 729, 741–42 (2004).

⁴³ *Id.* at 741.

⁴⁴ KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 3 (2019).

⁴⁵ See, e.g., Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW & CONTEMP. PROBS. 193, 197, 212 (2017); Rachel Brewster & Christine Dryden, *Building Multilateral Anticorruption Enforcement: Analogies Between International Trade & Anti-Bribery Law*, 57 VA. J. INT’L L. 221, 261–62 (2018); Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1793 (2011); Philip M. Nichols, *The Business Case for Complying with Bribery Laws*, 49 AM. BUS. L.J. 325, 352, 362 (2012); Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 702–03 (2020); see also Client Memorandum from Paul, Weiss, Rifkind, Wharton & Garrison LLP on FCPA Enforcement and Anti-Corruption Developments: 2021 Year in Review, at 27–31 (Jan. 19, 2022) (discussing “significant strides” made by numerous countries in the area of anti-corruption law in recent years).

Notably, this regime structure lacks clear contours.⁴⁶ It is best viewed as a capacious and flexible construct, one that encompasses a vast array of actors and instruments spanning the local, regional, national, and international levels as well as the public, private, and civil society sectors.⁴⁷ The spectrum spanning these dimensions is a wide one: from multilateral treaties to local ordinances; from voluntary pacts involving major multinational corporations to small-scale initiatives driven by local citizens and advocacy groups; and everything in between.⁴⁸ Such ubiquity and eclecticism are the hallmarks of contemporary anti-corruption policy.

But this was not always the case. For most of the twentieth century, anti-corruption—particularly in the area of transnational bribery—lacked the attention it now commands. The first laws prohibiting the bribery of foreign officials, the most notable of which was the U.S. FCPA, did not appear until the late 1970s.⁴⁹ Even then, it took decades for these laws to be enforced in any significant way.⁵⁰

It was not until the 1990s that transnational anti-corruption efforts became more pronounced and a global regime began to take shape.⁵¹ Legal developments primarily drove the emergence of this fledgling regime structure, with countries enacting “a flurry of international treaties against corruption” from the mid-1990s through the 2000s.⁵² One of the most

⁴⁶ See CECILY ROSE, INTERNATIONAL ANTI-CORRUPTION NORMS 10 (2015) (noting the “fragmented character of the international anti-corruption field”).

⁴⁷ See Philip M. Nichols & Diana C. Robertson, *Thoughts on the Control of Bribery*, in THINKING ABOUT BRIBERY 239, 248–50 (Philip M. Nichols & Diana C. Robertson eds., 2017) (discussing anti-corruption efforts spanning multiple geographical levels of analysis); DAVIS, *supra* note 44, at 248 n.14 (“[T]he anti-bribery regime also includes norms that emanate from and bind private actors as opposed to only states and interstate organizations.”).

⁴⁸ See, e.g., U.N. Convention against Corruption art. 50, *opened for signature* Dec. 9, 2003, 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005) (example of multilateral treaty); Bryane Michael & Stephen Mendes, *Anti-Corruption Law in Local Government: Legal Issues Related to Ordinance-Design and Municipal-Level Anti-Corruption Agencies in Macedonia*, 54 INT’L J.L. & MGMT. 26 (2012) (example of local ordinance); Dávid-Barrett, *supra* note 14, at 153 (describing the Partnering Against Corruption Initiative, an example of a company-driven voluntary pact); *About I Paid a Bribe*, I PAID A BRIBE, <http://ipaidabribe.com/about-us#gsc.tab=0> (last visited Nov. 1, 2022) (describing I Paid a Bribe, a website that lets citizens in cities across India report local corruption).

⁴⁹ Philip M. Nichols, *The Neomercantilist Fallacy and the Contextual Reality of the Foreign Corrupt Practices Act*, 53 HARV. J. ON LEGIS. 203, 208 (2016).

⁵⁰ See Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 VA. L. REV. 1611, 1646–47 (2017) (“For all of the drama . . . that led up to the passage of the FCPA, the follow-through was silent.”).

⁵¹ See MICHAEL JOHNSTON & SCOTT A. FRITZEN, THE CONUNDRUM OF CORRUPTION 3 (2021) (“Over the past 30 years, corruption . . . has vaulted from obscurity to a place near the top of the international policy agenda.”).

⁵² Roger P. Alford, *A Broken Windows Theory of International Corruption*, 73 OHIO ST. L.J. 1253, 1254–55 (2012); see also Philip M. Nichols et al., *Corruption as a Pan-Cultural Phenomenon: An Empirical Study in Countries at Opposite Ends of the Former Soviet Empire*, 39 TEX. INT’L L.J. 215, 216–17, 221 (2004) (observing that “[a]nti-corruption regimes share several structural characteristics” and stressing that they are fundamentally “legal constructs” that “require [the] criminalization of corrupt behavior”). Of course, these legal developments were driven by a host of extra-legal considerations. See Rachel Brewster, *The Domestic and International Enforcement of the OECD Anti-Bribery Convention*, 15 CHI. J. INT’L L. 84, 95 (2014) (acknowledging ethical, social, and economic justifications for passing anti-corruption measures).

influential of these was the 1997 OECD Anti-Bribery Convention, which led many countries to proscribe transnational bribery and, as a result, laid the foundations for an era of heightened anti-bribery (particularly FCPA) enforcement.⁵³ Indeed, the “enforcement of foreign anti-corruption laws has accelerated dramatically” since the turn of the century, a trend that has played a pivotal role in the maturation of the global anti-corruption regime.⁵⁴

Notwithstanding the importance of these developments, the anti-corruption “norm cascade” of the past three decades has extended beyond the legal domain.⁵⁵ Non-state and non-legal actors and initiatives have been pivotal to the spread of anti-corruption norms and strategies.⁵⁶ Civil society, for example, has long been central to the development of the global anti-corruption regime, with many international nonprofits (e.g., Transparency International, Global Integrity, Global Witness) playing starring roles in disseminating knowledge and exerting pressure on firms and governments to implement anti-corruption reforms.⁵⁷ Perhaps even more notable has been the evolving role of the private sector. In recent years, firms have increasingly engaged in a variety of voluntary anti-corruption initiatives—on an independent basis, in conjunction with other firms, and through partnerships with actors in other sectors.⁵⁸ These initiatives have contributed significantly to transnational efforts to address corruption, and they demonstrate the heightened prominence of *private governance* within the global anti-corruption regime.⁵⁹

B. A Plethora of Standards

The rise of private governance is not unique to anti-corruption. This phenomenon spans many areas, illustrating widespread recognition of the need to supplement state-centric regulation with alternative regulatory

⁵³ See Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Nov. 21, 1997, 37 I.L.M. 1; Brewster, *supra* note 50, at 1617 (arguing that “the conclusion of the OECD Convention permitted U.S. prosecutors to dramatically increase enforcement of the [FCPA]” because it lessened “the competitive costs [of anti-bribery enforcement] to U.S. companies”).

⁵⁴ Sean J. Griffith & Thomas H. Lee, *Toward an Interest Group Theory of Foreign Anti-Corruption Laws*, 2019 U. ILL. L. REV. 1227, 1230. The enactment and enforcement of new transnational bribery laws in the U.K., Germany, France, and Brazil over the past few years are excellent illustrations of the global regime’s continuing development. See *id.* However, it must be noted that, in many OECD countries, underenforcement of laws on the books remains an ongoing concern. *Id.*; Brewster, *supra* note 52, at 84.

⁵⁵ Kenneth W. Abbott, *Rule-Making in the WTO: Lessons from the Case of Bribery and Corruption*, 4 J. INT’L ECON. L. 275, 276–78 (2001).

⁵⁶ See Susan Rose-Ackerman, *International Actors and the Promises and Pitfalls of Anti-Corruption Reform*, 34 U. PA. J. INT’L L. 447, 452–54 (2013).

⁵⁷ See *id.* at 452–53.

⁵⁸ See David-Barrett, *supra* note 14, at 152 (“[A] curious phenomenon has emerged: many government and business actors, operating in contexts where corruption is rife, engage in *voluntary* and *collective* action against bribery in international business.”) (emphasis in original).

⁵⁹ See generally NICHOLAS LORD, REGULATING CORPORATE BRIBERY IN INTERNATIONAL BUSINESS 142–45 (2014) (listing numerous self-regulatory arrangements designed to mitigate transnational bribery risks).

approaches to address complex social problems.⁶⁰ These approaches contemplate, to varying degrees and in different ways, a more active role for private actors in the regulation of their own behavior.⁶¹

The complexities of corruption would seem to present an ideal setting for such approaches.⁶² First, corruption is an inherently secretive enterprise, and non-governmental actors are often better equipped to detect its occurrence. This logic underpins the existence of corporate compliance programs, which governments mandate or encourage in order to shift investigatory costs to corporate actors who have a comparative advantage in detecting misconduct.⁶³ Second, corruption can compromise government enforcement, especially in places where it is endemic. This issue has contributed to heightened firm participation in voluntary anti-corruption initiatives.⁶⁴ These governance arrangements are often called “collective action initiatives” because they are designed to counter the collective action problem that institutionalized corruption frequently presents, wherein firms standing to benefit overall from a corruption-free business environment nonetheless choose to pay bribes out of fear of losing business to bribe-paying competitors.⁶⁵ Collective action initiatives attempt to address this problem by establishing compliance standards for their members and then policing their adherence to them, making up for deficiencies in regulatory oversight.⁶⁶

An important point to appreciate about private governance, whether in the anti-corruption domain or otherwise, is the prominent role of standard-

⁶⁰ See Saule T. Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, 35 BROOK. J. INT’L L. 665, 672–73 (2010) (“Relying on the government as the sole source of regulation applicable to complex systems . . . suffers from the important built-in handicaps of informational asymmetry and expertise deficit.”). See generally GRAEME AULD, *CONSTRUCTING PRIVATE GOVERNANCE* (2014) (examining the rise of private governance in numerous areas); David Vogel, *Private Global Business Regulation*, 11 ANN. REV. POL. SCI. 261 (2008) (same).

⁶¹ For an excellent overview of the panoply of alternative regulatory strategies as well as relevant scholarship, see Sarah E. Light, *The Law of the Corporation as Environmental Law*, 71 STAN. L. REV. 137, 142 n.17, 153–55 (2019).

⁶² Indeed, some anti-corruption scholars have touted these alternative or “New Governance” regulatory approaches in their work. See, e.g., David Hess & Cristie L. Ford, *Corporate Corruption and Reform Undertakings: A New Approach to an Old Problem*, 41 CORNELL INT’L L.J. 307 (2008) (embracing the New Governance paradigm); Joseph W. Yockey, *Choosing Governance in the FCPA Reform Debate*, 38 J. CORP. L. 325 (2013) (same). But see Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 1005–09 (2009) (questioning the value and practicality of a New Governance approach to corporate compliance).

⁶³ See W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 965–66 (2019) (discussing prosecutors’ expertise and information deficits vis-à-vis corporate actors); see also Arlen & Buell, *supra* note 45, at 702–03 (discussing corporations’ comparative advantage in obtaining evidence of misconduct).

⁶⁴ See David-Barrett, *supra* note 14, at 152.

⁶⁵ See Philip M. Nichols, *Corruption as an Assurance Problem*, 19 AM. U. INT’L L. REV. 1307, 1310–11 (2004) (discussing this problem); Anna Persson et al., *Why Anticorruption Reforms Fail—Systemic Corruption as a Collective Action Problem*, 26 GOVERNANCE 449, 456–58 (2013) (same); see also Elizabeth K. Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT’L L. 861, 900 (2010) (“It is not easy to stay clean when others cheat.”).

⁶⁶ David-Barrett, *supra* note 14, at 167; see also sources *supra* note 14 and accompanying text (collecting authorities on collective action).

setting.⁶⁷ Standards are instruments developed by private actors that prescribe certain expectations *ex ante* and then provide some basis for assessing conformity with them *ex post*.⁶⁸ They essentially serve a two-part function: as “a guide for behavior and for judging behavior.”⁶⁹ While implementation and membership are voluntary, adherence to a private standard becomes obligatory once it has been implemented or joined.⁷⁰ The force of this obligation usually lacks formal legal bite, but other sources of informal pressure (e.g., peer, reputational, or economic) exist to induce compliance.⁷¹ These pressures can make compliance mandatory in a *de facto*, even if not in a *de jure*, sense.⁷²

Private standards are ubiquitous.⁷³ They are used to address any number of problems, from esoteric technical issues in engineering and finance to politically contentious issues like climate change.⁷⁴ Given their ubiquity, it should come as no surprise that standards and standard-setting initiatives pervade the global anti-corruption regime. These standards are too numerous and diverse to comprehensively examine. However, suffice it to say that they are an eclectic mix.⁷⁵ They include codes of conduct developed by firms, industries, governments, and civil society (e.g., Transparency International’s Business Principles on Combating Bribery; the International Chamber of

⁶⁷ Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT’L L. 501, 501 (2009).

⁶⁸ See Tim Büthe & Walter Mattli, *International Standards and Standard-Setting Bodies*, in THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT 440, 440 (David Coen et al. eds., 2010) (stating that standards “prescribe the behavior or characteristics of people or inanimate objects”); *Standard*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining a standard as “[a] criterion for measuring acceptability, quality, or accuracy”). This Article conceptualizes standards as private governance instruments rather than in a broader sense encompassing public/governmental standards or jurisprudential standards. See, e.g., Cary Coglianese & Gabriel Scheffler, *Private Standards and the Benzene Case: A Teaching Guide*, 71 ADMIN. L. REV. 353, 354, 363 (2019) (distinguishing private standard-setting from public regulation).

⁶⁹ Kenneth W. Abbott & Duncan Snidal, *International ‘Standards’ and International Governance*, 8 J. EUR. PUB. POL’Y 345, 345 (2001) (emphasis omitted).

⁷⁰ Fabrizio Cafaggi, *The Many Features of Transnational Private Rule-Making: Unexplored Relationships Between Custom, Jura Mercatorum and Global Private Regulation*, 36 U. PA. J. INT’L L. 875, 879 (2015).

⁷¹ See, e.g., Steven Bernstein, *When is Non-State Global Governance Really Governance?*, 2010 UTAH L. REV. 91, 104–11 (discussing “non-state market-driven” systems of accountability); Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT’L L. 41, 91–98 (2010) (discussing mechanisms of reputational accountability); see also Jody Freeman, *The Private Role in the Public Governance*, 75 N.Y.U. L. REV. 543, 666 (2000) (“[T]he absence of a direct government role does not mean that a regime is free of regulation or oversight.”).

⁷² See Emily S. Bremer, *American and European Perspectives on Private Standards in Public Law*, 91 TUL. L. REV. 325, 333 (2016) (“In many instances, market forces and widespread informal acceptance make standards *de facto* mandatory.”).

⁷³ Abbott & Snidal, *supra* note 69, at 345–46. See generally NILS BRUNSSON & BENGT JACOBSSON, A WORLD OF STANDARDS (2002) (illustrating their ubiquity).

⁷⁴ See, e.g., David J. Teece & Edward F. Sherry, *Standards Setting and Antitrust*, 87 MINN. L. REV. 1913, 1914–17 (2003) (“compatibility” or “interoperability” issues in the manufacturing, engineering, and tech fields); Harry I. Wolk & Patrick H. Heaston, *Toward the Harmonization of Accounting Standards: An Analytical Framework*, 27 INT’L J. ACCT. 95, 95 (1992) (accounting and finance); Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 148–52, 183–84 (2013) (environmental sustainability).

⁷⁵ Cf. Root, *supra* note 1, at 212 (“The field of compliance . . . consists of a mix of . . . standards.”).

Commerce's Rules on Combating Corruption); private certification schemes (e.g., TRACE certification); industry-specific and cross-industry company initiatives (e.g., Maritime Anti-Corruption Network; Partnering Against Corruption Initiative); multi-stakeholder initiatives predicated upon broadly framed principles and commitments (e.g., UN Global Compact); and multi-stakeholder initiatives in which standard abidance is subject to external monitoring and verification (e.g., Extractive Industries Transparency Initiative).⁷⁶ Thus, to say that standards play an important role in the contemporary anti-corruption and compliance domains would be a gross understatement.

C. The Emergence of a New Anti-Bribery Standard

Although many and varied, anti-corruption standard-setting initiatives represent a widespread interest in better harmonizing disparate actors' anti-corruption efforts.⁷⁷ Recently, this push has been championed by a relatively new player on the anti-corruption scene, the International Organization for Standardization (ISO), in the form of an international anti-bribery management systems standard (ISO 37001). Given ISO's idiosyncrasies, it is worth unpacking its makeup and evolution before turning to ISO 37001 itself.

1. ISO: The World's Standard-Setter

While private standard-setting is prevalent as a general matter, ISO standards are an *especially* pervasive form of standard-setting. Consider this Article: It was produced within an electronic file subject to standardized formatting specifications (ISO 29500); saved within a cloud storage system that conforms with information security standards (ISO 27001 and ISO 27018); and now is possibly being read on paper that conforms with international standards specifying its dimensions (ISO 216), mass (ISO 536), folding endurance (ISO 5626), and texture (ISO 8791).⁷⁸ These observations

⁷⁶ For more detailed discussion of these standards and other forms of anti-corruption standard-setting, see generally ROSE, *supra* note 46; Vera Cherepanova, *The Proliferation of International Anti-Corruption Initiatives, Standards, and Guidelines: Classification, Benefits and Shortcomings, Future Prospects*, in *THE TRANSNATIONALIZATION OF ANTI-CORRUPTION LAW* 221, 221–242 (Régis Bismuth et al. eds., 2021); Dávid-Barrett, *supra* note 14, at 153–54, 161–66; David Hess, *Enhancing the Effectiveness of the Foreign Corrupt Practices Act through Corporate Social Responsibility*, 73 OHIO ST. L.J. 1121, 1124–32 (2012); Eduard Ivanov, *In the Ocean of Anti-Corruption Compliance Standards and Guidelines: Time for Codification?*, in *THE TRANSNATIONALIZATION OF ANTI-CORRUPTION LAW* 243, 243–262, *supra*.

⁷⁷ See MARK PIETH, *HARMONISING ANTI-CORRUPTION COMPLIANCE* 2 (2011) (“[A]ll the more, the corporate world is interested in harmonising . . . compliance standards.”).

⁷⁸ *ISO/IEC 29500-1: 2016 Information Technology – Document Description and Processing Languages – Office Open XML File Formats*, ISO, <https://www.iso.org/standard/71691.html> (last visited Nov. 10, 2022); *ISO 27018: 2019 Revision*, STANDARD FUSION (Mar. 20, 2020), <https://www.standardfusion.com/blog/iso-27018-2019-revision/#:~:text=ISO; ISO 216: 2007 Writing Paper and Certain Classes of Printed Matter – Trimmed Sizes, ISO, https://www.iso.org/standard/36631.html> (last visited Nov. 10, 2022); *ISO 536: 2012 Paper and Board – Determination of Grammage*, ISO, <https://www.iso.org/standard/60352.html> (last visited Nov. 10, 2022); *ISO 5626: 1993 Paper – Determination of Folding Endurance*, ISO,

provide a window into the many technical issues that ISO covers, but it also makes ISO's recent anti-bribery and compliance pursuits seem out of place by comparison. To make sense of these pursuits, a better understanding of ISO's evolving agenda is required.

Established in 1947, ISO is an international nongovernmental organization headquartered in Geneva, Switzerland, that was created "to facilitate the [international] coordination and unification of [industrial] standards."⁷⁹ ISO is the largest developer of voluntary international standards in the world, with over 24,000 private standards published as of this writing.⁸⁰ It consists of roughly 165 members, each of which represents the national standard-setting body of a given country.⁸¹ For example, the U.S. member is the American National Standards Institute (ANSI), and the U.K. member is the British Standards Institution (BSI).⁸² Interested entities purchase and implement ISO standards through these national standard-setting bodies, which vary in their composition—some are purely nongovernmental, others are purely governmental, and others consist of a mix of representatives (e.g., from governments, trade associations, firms, and academia).⁸³ These diverse actors are brought together at ISO through their work on various *technical committees*, the internal groups charged with developing and publishing ISO standards.⁸⁴ Technical committees are so named because their standards development process hinges on the technical expertise of their members in whatever area is being considered for standardization.⁸⁵

This emphasis on technical expertise has underpinned ISO standard-setting since its inception.⁸⁶ Early on, engineers drove the ISO standard-setting process, formulating standards that resolved various "mechanical incompatibilities" by providing common systems of terminology and measurement for cement, plastics, steel, and the like.⁸⁷ By the mid-1980s, ISO standards had grown in popularity, with an increasingly global economy relying on them to facilitate international trade by standardizing technical

<https://www.iso.org/standard/11700.html> (last visited Nov. 10, 2022); *ISO 8791-1: 1986 Paper and Board — Determination of Roughness/Smoothness (Air Leak Methods)*, ISO, <https://www.iso.org/standard/16215.html> (last visited Nov. 10, 2022).

⁷⁹ Cary Coglianese, *Environmental Soft Law as a Governance Strategy*, 61 JURIMETRICS 19, 23 (2020) (alterations in original) (citation and internal quotation marks omitted).

⁸⁰ See *About Us*, ISO, <https://www.iso.org/about-us.html> (last visited Nov. 10, 2022); *International Standards and their Benefits*, GENOMSYS (Oct. 24, 2019), <https://genomsys.com/international-standard-and-its-benefits/>.

⁸¹ Coglianese, *supra* note 79, at 24.

⁸² *Id.*; *BSI United Kingdom*, ISO, <https://www.iso.org/member/2064.html> (last visited Nov. 10, 2022).

⁸³ See Coglianese, *supra* note 79, at 24.

⁸⁴ *Id.* at 23–24.

⁸⁵ See *id.* at 24.

⁸⁶ See generally CRAIG N. MURPHY & JOANNE YATES THE INTERNATIONAL ORGANIZATION FOR STANDARDIZATION (ISO): GLOBAL GOVERNANCE THROUGH VOLUNTARY CONSENSUS 11, 17–24 (2009) (summarizing ISO's organizational history).

⁸⁷ *Id.* at 18–19.

specifications for products and their component parts.⁸⁸ These trade facilitating, hyper-technical standards continue to play a major role in ISO's agenda today.⁸⁹ However, in recent years, they have been overshadowed by a different species of ISO standard, one to which thousands of firms worldwide have flocked—management system standards.⁹⁰

Management system standards came to the fore in the late 1980s with the development of ISO 9001, a quality management standard designed to improve product manufacturing systems.⁹¹ As with previous standards, the developers of ISO 9001 largely had trade and economic efficiency goals in mind.⁹² They also developed the standard in a similarly technical fashion, modeling it on a method of quality control initially devised by engineers.⁹³ At the same time, however, ISO 9001 and subsequent management system standards differ from traditional ISO standards in significant ways.

First, management system standards focus on refining managerial processes rather than on harmonizing product characteristics. This emphasis on process gives organizations more latitude to set their own goals and procedures.⁹⁴ Second, management system standards are, in a sense, as much about differentiation as standardization.⁹⁵ Relative to traditional product-related ISO standards, management system standards rely more heavily on a market-based logic whereby firms adopt them to differentiate themselves from competitors to appeal to consumers, potential business partners, and regulators.⁹⁶ Third, management system standards are less “technical” (in a scientific or engineering sense) and increasingly more civic-minded and values-oriented than traditional ISO standards.⁹⁷ This trend began with the passage of ISO 14001, a now-popular environmental management system standard, in the mid-1990s.⁹⁸ Since then, ISO's agenda has expanded into

⁸⁸ KRISTINA TAMM HALLSTRÖM & MAGNUS BOSTRÖM, TRANSNATIONAL MULTI-STAKEHOLDER STANDARDIZATION: ORGANIZING FRAGILE NON-STATE AUTHORITY 27 (2010); see Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 67 (2005) (arguing that ISO's rise was driven by a “perceived need for regulatory harmonization”). As a result, ISO standards now hold a “privileged place” in international trade law. Naomi Roht-Arriaza, *‘Soft Law’ in a ‘Hybrid’ Organization: The International Organization for Standardization*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 263, 264 (Dinah Shelton ed., 2000).

⁸⁹ See *Standards Catalogue*, ISO, <https://www.iso.org/standards-catalogue/browse-by-ics.html> (last visited Oct. 22, 2022) (listing such standards).

⁹⁰ Coglianese, *supra* note 79, at 25.

⁹¹ *Id.* at 24.

⁹² MURPHY & YATES, *supra* note 86, at 70.

⁹³ Coglianese, *supra* note 79, at 25.

⁹⁴ See Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, in THE OXFORD HANDBOOK OF REGULATION 146, 149 (Robert Baldwin et al. eds., 2012) (describing how the flexible and deferential nature of “process standards” lets firms use their superior information to regulate themselves).

⁹⁵ See Lawrence Busch, *Standards, Law, and Governance*, 25 J. RURAL SOC. SCIS. 56, 57–58 (2010).

⁹⁶ See, e.g., MCBRIEN, *supra* note 8, at 9 (noting that some early adopters of ISO 37001 did so to “capture[] a [perceived] business advantage”).

⁹⁷ See MURPHY & YATES, *supra* note 86, at 70.

⁹⁸ See Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479, 486 (1995)

other value-laden areas such as social responsibility and governance.⁹⁹ In light of this trend, it should not be too surprising that ISO went on to develop a management system standard designed to counter bribery, one of the great social ills undermining good governance today.

2. Enter ISO 37001

ISO published its voluntary anti-bribery management systems standard, ISO 37001, in October 2016.¹⁰⁰ With the publication of this standard, ISO sought “to codify disparate antibribery management guidelines and frameworks into a single, cohesive [international] standard.”¹⁰¹ This attempt to standardize global anti-bribery compliance was spearheaded by the UK’s national standard-setting organization BSI, which had previously developed its own national anti-bribery management system standard (BS 10500).¹⁰² BSI’s efforts eventually garnered widespread international support at ISO, culminating in the development and rollout of ISO 37001.¹⁰³

The overarching goals of this standard, much like any other compliance tool, are to bolster compliance with anti-corruption laws and promote ethical organizational cultures.¹⁰⁴ Pursuant to these objectives, ISO 37001 offers an auditable framework of managerial processes that organizations can adopt to mitigate bribery risks. This framework requires organizations to implement the following: “(1) an anti-bribery policy and procedures; (2) top management leadership, commitment and responsibility; (3) oversight by a compliance manager or function; (4) anti-bribery training; (5) risk assessments and due diligence on projects and business associates; (6) financial, procurement, commercial and contractual controls; (7) reporting, monitoring, investigation and review; and (8) corrective action and continual improvement.”¹⁰⁵ An exhaustive, provision-by-provision analysis of ISO 37001 will not be pursued here,¹⁰⁶ but a brief glance at a few provisions should provide a flavor of the standard and its approach to anti-bribery compliance.

The major theme that emerges after glancing at ISO 37001’s

(noting the “value-laden” nature of ISO’s environmental management systems standards). *See generally* Coglianese, *supra* note 79, at 23–31 (examining ISO 14001).

⁹⁹ *ISO/TC 309: Governance of Organizations – Projects*, *supra* note 24. *See generally* Janelle M. Diller, *Private Standardization in Public International Lawmaking*, 33 MICH. J. INT’L L. 481 (2012) (examining ISO 26000, a social responsibility guidance standard).

¹⁰⁰ Gasiorowski-Denis, *supra* note 11.

¹⁰¹ MCBRIEN, *supra* note 8, at 14.

¹⁰² *Id.* at 6.

¹⁰³ *Id.* at 7.

¹⁰⁴ *Id.* at 14; *ISO 37001: Anti-Bribery Management Systems*, *supra* note 10.

¹⁰⁵ MCBRIEN, *supra* note 8, at 7–8 (quoting Fraser Tennant, *ISO 37001: Yawner or Transformer?*, FINANCIER WORLDWIDE (Sept. 2017), <https://www.financierworldwide.com/iso-37001-yawner-or-transformer#Xp25GINKi2w>).

¹⁰⁶ For such treatments, see ALAN FIELD, *ISO 37001: AN INTRODUCTION TO ANTI-BRIBERY MANAGEMENT SYSTEMS* (2017); Joe Murphy, *The ISO 37001 Anti-Corruption Compliance Program Standard: What’s Good, What’s Bad, and Why it Matters*, SSRN (Jan. 14, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3315737.

provisions is their open-endedness. For instance, the standard contains flexible provisions that allow organizations to “determine the boundaries and applicability of the[ir] anti-bribery management system[s]”¹⁰⁷ and determine “what needs to be monitored and measured” when evaluating them.¹⁰⁸ The standard is also replete with ambiguous language, as evidenced by provisions requiring organizations to “implement procedures that . . . *empower and enable* investigators”;¹⁰⁹ “continually improve the *suitability, adequacy and effectiveness* of the anti-bribery management system”;¹¹⁰ “provide *adequate and appropriate* anti-bribery awareness and training to personnel”;¹¹¹ “give *reasonable assurance* that the anti-bribery management system can achieve its objectives”;¹¹² and “monitor the *effectiveness* of the anti-bribery management system[.]”¹¹³ On the one hand, these open-ended provisions are unsurprising given the inherently flexible nature of management system standards, a flexibility that promises many of the putative benefits of self-regulation and private governance.¹¹⁴ On the other hand, there is a risk that organizations will take advantage of this open-endedness by implementing superficial or “paper” anti-bribery management systems.¹¹⁵ This tension between apparent promises and potential concerns will animate the remainder of this Article’s analysis of ISO standard-setting.

II. CLICKBAIT COMPLIANCE AND THE ISO 37001 ANTI-BRIBERY STANDARD

Assessments of ISO 37001 tend to fall into two camps: (1) overenthusiastic accounts that stress the standard’s many promising features;¹¹⁶ and (2) pessimistic accounts that view it as problematic and even

¹⁰⁷ ANTI-BRIBERY MANAGEMENT SYSTEMS – REQUIREMENTS WITH GUIDANCE FOR USE § 4.3 (INT’L ORG. FOR STANDARDIZATION 2016) [hereinafter ISO 37001].

¹⁰⁸ *Id.* § 9.1(a).

¹⁰⁹ *Id.* § 8.10(c) (emphasis added).

¹¹⁰ *Id.* § 10.2 (emphasis added).

¹¹¹ *Id.* § 7.3 (emphasis added).

¹¹² *Id.* § 6.1(a) (emphasis added).

¹¹³ *Id.* § 6.1(c) (emphasis added).

¹¹⁴ See Cary Coglianese & Jennifer Nash, *Compliance Management Systems: Do They Make a Difference?*, in THE CAMBRIDGE HANDBOOK OF COMPLIANCE, *supra* note 26, at 571, 573 (“[M]anagement systems are tools that allow ‘every business to be its own enforcement agency—identifying, correcting, and preventing its own noncompliance.’”) (quoting Christine Parker & Vibeke Lehmann Nielsen, *Do Businesses Take Compliance Systems Seriously? An Empirical Study of the Implementation of Trade Practices Compliance Systems in Australia*, 30 MELB. U. L. REV. 441, 442 (2006)); Coglianese & Mendelson, *supra* note 94, at 149.

¹¹⁵ “Paper compliance” and “box-ticking” concerns are a common refrain in compliance discourse. See, e.g., Stavros Gadinis & Amelia Miazad, *The Hidden Power of Compliance*, 103 MINN. L. REV. 2135, 2149–50 (2019); Kimberly Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491 (2003); Maurice E. Stucke, *In Search of Effective Ethics & Compliance*, 39 J. CORP. L. 769, 788, 795, 832 (2014); Hui Chen & Eugene Soltes, *Why Compliance Programs Fail—and How to Fix Them*, HARV. BUS. REV., Mar.-Apr. 2018.

¹¹⁶ E.g., Nikolaos Doukellis & Paul M. Bourassa, *Financial Misconduct in Times of Crisis: Applying Lessons Learned from the Private Sector to Government*, CRIM. JUST., Spring 2021, at 42; Holger Gehring & Jean-Pierre Méan, *Implementing ISO 37001 to Manage Your Bribery Risks*, 13 GLOB. TRADE & CUSTOMS J. 191 (2018); Roman Tomasic, *Global Corporations, Bribery and Corrupt Practices: Anti-*

pointless.¹¹⁷ As of yet, neither extreme has supplied a conceptual and theoretical examination of the standard to justify its position.¹¹⁸ This Part provides a corrective. It first identifies three of ISO 37001's core structural features—its technocratic orientation, its international consensus framework, and its third-party certification system—that, when considered together, distinguish the standard conceptually from extant anti-corruption standards. It then analyzes three corresponding functions of the standard—systematic, symbolic, and signaling. This analysis shows that ISO 37001 is ill-equipped to perform its purported functions. In its current form, then, it essentially amounts to a form of clickbait—a seemingly attractive anti-bribery compliance tool that overpromises and is likely to underdeliver in many respects.¹¹⁹

A. Three Structural Dimensions

1. Technocratic Orientation

ISO 37001 has a peculiarly technocratic orientation that sets it apart from extant anti-corruption standards. This technocratic approach to global governance stems from the technical nature of the national standard-setting bodies that comprise ISO, each of which sends a delegation of technical experts to central ISO where they convene on various technical committees.¹²⁰ These committees employ a methodical, seven-step process to systematically

Bribery Laws and the Limits of State Action, 12 LAW & FIN. MKTS. REV. 18, 19 (2018); Kristy Grant-Hart, *Kristy Grant-Hart on ISO 37001: Yes, We Need One Standard to Rule Them All*, FCPA BLOG (Apr. 26, 2016, 2:08 PM), <https://fcpublog.com/2016/4/26/kristy-grant-hart-on-iso-37001-yes-we-need-one-standard-to-rule-them-all/>; Jay T. Jorgensen, *Increased Standardization Would Benefit the Global Anti-Corruption Effort*, TEX. LAW. (Dec. 1, 2017, 12:00 AM), <https://www.law.com/texaslawyer/2017/12/01/increased-standardization-would-benefit-the-global-anti-corruption-effort/>; Worth MacMurray, *Attention Colleges: ISO 37001 Can Help*, FCPA BLOG (Mar. 18, 2019, 1:18 PM), <https://fcpublog.com/2019/03/18/attention-colleges-iso-37001-can-help/>; Ravi Venkatesan & Leslie Benton, *How Companies Can Take a Stand Against Bribery*, HARV. BUS. REV. (Sept. 17, 2018), <https://hbr.org/2018/09/how-companies-can-take-a-stand-against-bribery>.

¹¹⁷ E.g., Hui Chen, *Toward Evidence-Based Programs: Thoughts on ISO 37001 and Certifications*, HUI CHEN ETHICS (OCT. 21, 2017), <https://huichenethics.com/2017/10/21/toward-evidence-based-programs-thoughts-on-iso-37001-and-certifications/>; Thomas Fox, *Defects in the ISO 37001 Certification*, JD SUPRA (Feb. 7, 2018), <https://www.jdsupra.com/legalnews/defects-in-the-iso-37001-certification-61879/>; *ISO 37001 is a Complete Yawner*, FCPA PROFESSOR (Oct. 24, 2016), <http://fcpaprofessor.com/iso-37001-complete-yawner/>; Matthew Stephenson, *Dear Governments: Please Don't Make Private Certification the Touchstone of an Adequate Anti-Bribery Program!!!*, GLOB. ANTI-CORRUPTION BLOG (Feb. 5, 2015), <https://globalanticorruptionblog.com/2015/02/05/dear-governments-please-dont-make-private-certification-the-touchstone-of-adequate-anti-bribery-program/>.

¹¹⁸ For a balanced account from a practitioner's perspective, see Michael Volkov, *ISO 37001: The Good, the Bad and the Ugly (Part II of V)*, CORRUPTION, CRIME & COMPLIANCE (Oct. 16, 2017), <https://blog.volkovlaw.com/2017/10/iso-37001-good-bad-ugly-part-ii-v/>.

¹¹⁹ But see *infra* Part IV (suggesting reforms that may improve ISO's compliance standards).

¹²⁰ Sijeong Lim & Aseem Prakash, *Inter-Governmental Regimes and Recruitment to Private Regimes: GATT/WTO and the ISO, 1951–2005*, 9 GLOB. POL'Y 352, 356 (2018); see also Walter Mattli & Tim Büthe, *Setting International Standards: Technological Rationality or Primacy of Power?*, 56 WORLD POL. 1, 4 (2003) (noting that experts from national standard-setting bodies are “[t]he institutional backbone” of ISO).

develop and publish ISO standards.¹²¹ The ultimate goal of this process is to “achiev[e] solutions that are ‘scientific’ or ‘technical’” in nature.¹²²

Although anti-bribery management is not really “technical” in a scientific or engineering sense, ISO 37001 is the product of essentially the same technocratic approach to standard-setting used by ISO in other areas. First, ISO/TC 309, the technical committee that developed ISO 37001, brought together anti-bribery experts from numerous national standard-setting bodies and external liaison organizations (e.g., Transparency International and the OECD).¹²³ Second, these experts developed ISO 37001 by systematically working their way through ISO’s multi-step standards development process.¹²⁴ Third, the kind of anti-bribery standard that these experts ultimately passed provides a technical, systems-driven approach to managing bribery risk. This “Plan-Do-Check-Act” approach originated in engineering and “calls for managers to develop plans, policies, and procedures for achieving” anti-bribery objectives; monitoring compliance with them; and then evaluating and adjusting them as needed.¹²⁵ Although this methodology differs in important ways from ISO’s technical standards concerning screw threads and the like, what is important to note here is that they share a common underlying focus on providing expert-driven, technical solutions.¹²⁶

2. International Consensus

Another core feature of the standard is its international consensus framework. Like all ISO standards, ISO 37001 grew out of a deliberative process designed to obtain input from a variety of actors around the world.¹²⁷ This “international, multi-stakeholder, multi-sector environment” brought together experts from national standard-setting bodies spanning 37 countries—both developed and developing—and over 20 external organizations spanning civil society, the private sector, intergovernmental organizations, and international financial institutions.¹²⁸ Together, these diverse actors reached a “global consensus,” both on the need for an

¹²¹ Panagiotis Delimatsis, *Global Standard-Setting 2.0: How the WTO Spotlights ISO and Impacts the Transnational Standard-Setting Process*, 28 DUKE J. COMP. & INT’L L. 273, 296–97 (2018). For detailed accounts of the ISO standard-setting process, see MURPHY & YATES, *supra* note 86, at 25–45; Delimatsis, *supra*, at 294–99.

¹²² MURPHY & YATES, *supra* note 86, at 2.

¹²³ See MCBRIEN, *supra* note 8, at 4 (referring to these actors as “technocrats”); *ISO/TC 309: Governance of Organizations – About*, ISO, <https://www.iso.org/committee/6266703.html> (last visited Oct. 18, 2022) (listing various liaison organizations).

¹²⁴ Delimatsis, *supra* note 121, at 294–99.

¹²⁵ Coglianese, *supra* note 79, at 25.

¹²⁶ *Id.*; Delimatsis, *supra* note 121, at 294–99.

¹²⁷ See MURPHY & YATES, *supra* note 86, at 3 (describing ISO technical committees as “multi-stakeholder bodies in which standards are negotiated”).

¹²⁸ *ISO Code of Conduct for the Technical Work*, ISO, <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100397.pdf> (last visited Nov. 11, 2022); MCBRIEN, *supra* note 8, at 1; *ISO/TC 309: Governance of Organizations – About*, *supra* note 123.

international anti-bribery management standard as well as on the structure and language of ISO 37001 itself.¹²⁹

International consensus-building is at the heart of ISO's standard-setting processes.¹³⁰ ISO has a specific definition of "consensus" in its directives, but in practical terms it is best understood as a minimum threshold whereby two-thirds of a given technical committee's members and 75 percent of any votes cast by ISO's wider membership are required to publish a given standard.¹³¹ In ISO 37001's case, only three countries voted against its publication.¹³² As such, the standard clearly represents some form of international consensus on anti-bribery management.

3. Third-Party Certification

Perhaps the most discussed structural dimension of ISO 37001 is its certifiability. Like other ISO management system standards, ISO 37001 is designed so that organizations can undergo a third-party audit certifying their compliance.¹³³ Certification is part of a broader area of what ISO terms "conformity assessment," which encompasses a wide range of mechanisms designed to ensure that technical products, processes, management systems, and services conform with the specifications of pertinent ISO standards.¹³⁴ ISO does not conduct these conformity assessments itself.¹³⁵ Instead, they are conducted by auditing bodies ranging from private companies to non-profit organizations to national standard-setting organizations.¹³⁶ In the area of management system standards, these auditing bodies are referred to as *certification bodies* or *third-party certifiers*, and the certifications that they award have become immensely popular.¹³⁷

Certification bodies operate within a two-tiered system.¹³⁸ At the international level, ISO sets standards that certification bodies must follow to

¹²⁹ Gasiorowski-Denis, *supra* note 11.

¹³⁰ Delimatsis, *supra* note 121, at 300.

¹³¹ *Id.* at 301; see also David A. Wirth, *The International Organization for Standardization: Private Voluntary Standards as Swords and Shields*, 36 B.C. ENV'T AFF. L. REV. 79, 87 (2009) ("[C]onsensus' [at ISO] generally means widespread acceptance after lengthy consultation.").

¹³² MCBRIEN, *supra* note 8, at 7.

¹³³ *Id.* at 5, 15.

¹³⁴ *Conformity Assessment*, ISO, <https://www.iso.org/conformity-assessment.html> (last visited Oct. 20, 2022).

¹³⁵ *Certification*, ISO, <https://www.iso.org/certification.html> (last visited Oct. 20, 2022).

¹³⁶ *Id.*

¹³⁷ See Barkat Ullah et al., *ISO Certification, Financial Constraints, and Firm Performance in Latin American and Caribbean Countries*, 25 GLOB. FIN. J. 203, 204 (2014) ("ISO certification has be[en] a popular managerial and strategic tool for businesses across the globe for more than a decade."). Private third-party certification in general has become a major phenomenon in the corporate arena, with B Corp certification being another prominent example. See Mark J. Loewenstein, *Benefit Corporation Law*, 85 U. CIN. L. REV. 381, 382–83 (2017).

¹³⁸ See Timothy D. Lytton & Lesley K. McAllister, *Oversight in Private Food Safety Auditing: Addressing Auditor Conflict of Interest*, 2014 WIS. L. REV. 289, 313–17, 314 fig.2; see also Lesley K. McAllister, *Harnessing Private Regulation*, 3 MICH. J. ENV'T & ADMIN. L. 291, 331 fig.1 (2014) (diagramming the certification and accreditation processes).

provide certification.¹³⁹ ISO, however, does not ensure that certification bodies comply with these standards.¹⁴⁰ Rather, this oversight is provided domestically by national accreditation bodies.¹⁴¹ National accreditation bodies “certify the certifiers,” attesting that certification bodies are qualified and impartial in their assessments.¹⁴² These accreditation bodies, for their part, are subject to international ISO standards and an international peer review system, which are designed to ensure their own competence and impartiality.¹⁴³ These two tiers of international and domestic oversight provide some semblance of structure and accountability in an otherwise highly decentralized system.¹⁴⁴ However, third-party certification and accreditation are both optional and the scope of these processes is quite variable, which may limit their capacity to provide meaningful oversight.¹⁴⁵

Turning to ISO 37001 specifically, organizations can choose whether they want to pursue certification, and they also get to choose the certification body that conducts their audit.¹⁴⁶ The certification process consists of two stages: (1) a remote document review and (2) extensive interviews and document reviews conducted onsite.¹⁴⁷ Following successful completion of both stages, an organization can announce that it is “ISO 37001-certified.”¹⁴⁸ Certification is good for three years, provided that the organization passes annual follow-up audits.¹⁴⁹ This certification process was a major draw for those who pushed for the standard’s development and publication.¹⁵⁰ However, the jury is still out regarding organizations’ interest in and acceptance of ISO 37001 certification, with more organizations in more countries pursuing certification in recent years even as survey data indicates that these certification numbers lag behind other (more established) ISO management system standards.¹⁵¹

¹³⁹ *ISO’s Committee for Conformity Assessment (CASCO)*, ISO, <https://www.iso.org/casco.html> (last visited Oct. 21, 2022).

¹⁴⁰ *Id.*

¹⁴¹ *Certification*, ISO, <https://www.iso.org/certification.html> (last visited Oct. 21, 2022).

¹⁴² MURPHY & YATES, *supra* note 86, at 48.

¹⁴³ Lytton & McAllister, *supra* note 138, at 316.

¹⁴⁴ See Delimatsis, *supra* note 121, at 295.

¹⁴⁵ Eric Lachaud, *ISO/IEC 27701 Standard: Threats and Opportunities for GDPR Certification*, 6 EUR. DATA PROT. L. REV. 194, 195, 197 (2020); see *infra* Part II.B.3 (discussing the pitfalls of ISO certification and accreditation).

¹⁴⁶ MCBRIEN, *supra* note 8, at 5, 8; see Lytton & McAllister, *supra* note 138, at 314 n.112 (observing that certification bodies are paid by the clients that they certify and flagging the potential conflict of interest that this arrangement presents).

¹⁴⁷ MCBRIEN, *supra* note 8, at 8.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 7, 9.

¹⁵¹ See *supra* notes 18–19 and accompanying text; MCBRIEN, *supra* note 8, at 13 (discussing a 2018 ISO survey that ranked ISO 37001 last out of ISO’s twelve management system standards in terms of the number of certificates issued).

B. Three Corresponding Functions

1. Systematic Function

ISO 37001's structural dimensions promote different functions, and the next three sections will examine each of these functions in turn. The discussion will start by focusing on the technocratic nature of the standard. As mentioned previously, ISO standards are developed by subject-matter experts striving to formulate technical solutions to complex technological and social problems.¹⁵² To do so, they work together in a systematic fashion to produce standards that approach these problems in a systematic way.¹⁵³ In ISO 37001's case, anti-bribery experts engaged in a methodical process culminating in the publication of a standard designed to help organizations systematically address corruption concerns.¹⁵⁴ Thus, one function of ISO 37001 is a systematic one—to systematize organizational anti-bribery programs in accordance with an expert-developed template in order to mitigate bribery risk.

ISO 37001's systematic function seems promising in a couple of respects. First, by giving organizations a step-by-step framework for managing bribery risks, the standard provides a roadmap for implementing and updating their anti-bribery compliance practices. This roadmap may give organizations, particularly those with underdeveloped compliance programs, a better sense of what they should focus on to improve their programs.¹⁵⁵ Second, ISO 37001's technocratic foundations may assure organizations that the standard consists of international anti-bribery “best practices.” The aggregation of experts' opinions, their evaluation of this input through a methodical deliberation process, and their eventual consensus on the practices listed in the standard all lend some credence to the notion that ISO 37001 offers the “best” in current anti-bribery thinking.

Alongside these potential benefits, though, are many potential downsides and limitations. First, there is the danger that ISO 37001's expert-driven foundations and systematic approach will generate unrealistic expectations. As a threshold matter, establishing whether someone is in fact an “expert” is not a straightforward task, and ISO has done little to clarify how individuals qualify as anti-bribery experts or what kinds of expertise they bring to the standard-setting process.¹⁵⁶ A related worry is that the

¹⁵² MCBRIEN, *supra* note 8, at 4.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 13–14.

¹⁵⁵ *See id.* at 14.

¹⁵⁶ *See* Brandon L. Garrett & Gregory Mitchell, *The Proficiency of Experts*, 166 U. PA. L. REV. 901, 904–05 (2018) (noting that “[e]xpertise may be acquired in many different ways” and discussing the various ways that experts have established their expertise in different areas); Hui Chen, *Testing ISO 37001*, BLOOMBERG L. (Jan. 16, 2018), <https://huichenethics.files.wordpress.com/2018/01/measuring-iso-37001.pdf> (criticizing ISO's lack of transparency regarding the types of expertise brought to bear in ISO 37001's development).

technocratic orientation of ISO 37001 may lead organizations to view it as an apolitical instrument designed to produce “the best, most rational” solutions to their corruption concerns.¹⁵⁷ Technocratic standard-setting, however, is not simply some disinterested, politically neutral exercise.¹⁵⁸ On the contrary, it is imbued with political motivations and power dynamics, either of which may be the actual driving force behind any given aspect of ISO 37001.¹⁵⁹ Finally, yet another concern is that organizations may misconstrue the meaning of ISO 37001’s claim to represent anti-bribery “best practices,” taking the term best at face value rather than recognizing that it is effectively a euphemism for *common* practices that may or may not be effective.¹⁶⁰ Together, these concerns illustrate how ISO 37001’s technocratic nature may engender unrealistic expectations of the standard and its systematic function.

Second, even though the standard is designed to help organizations systematically mitigate bribery risks, the ISO management systems template that it employs seems ill-equipped for this task. ISO 37001 contains the same jargon and is structured in the same way as other ISO management system standards.¹⁶¹ These similarities led one ISO certifier to claim that companies possessing ISO certification in another area “had likely already done 65 to 75% of the work required to comply with ISO 37001[.]”¹⁶² There is nothing wrong with organizations being able to seamlessly integrate their various ISO-certified management systems. However, if organizations are able to meet the lion’s share of ISO 37001 requirements simply by being ISO-certified in some other area, this calls into question the substantive value of

¹⁵⁷ Martin Shapiro, “Deliberative,” “Independent” Technocracy v. Democratic Politics: Will the *Globe Echo the E.U.*?, 68 LAW & CONTEMP. PROBS. 341, 354 (2005).

¹⁵⁸ See *id.* at 347.

¹⁵⁹ See Mattli & Büthe, *supra* note 120, at 13–15, 40–41 (discussing and refuting the common view that “standards are primarily a function of science and technical considerations rather than a function of” power distributions); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 729 (2010) (arguing against the tendency to view standard-setting in purely technocratic terms that downplay the significance of political and distributive considerations). For further discussion of these issues, see generally TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* (2011); see also *infra* notes 175, 182 and accompanying text (discussing BSI’s central role in the development of ISO 37001, which arguably reflects an attempt to capitalize—politically and monetarily—on the passage of the U.K. Bribery Act).

¹⁶⁰ See David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 325–26 (2006) (“[A]lthough best practices seem imbued with a sense of technocratic possibility . . . it need not necessarily be a particularly thoughtful concept. Indeed, the widespread adoption of best practices may tell us very little about the ‘bestness’ of the practice. Best practices work through copying.”); see also Baer, *supra* note 62, at 999 n.299 (“Firms take safety in practices that are widely heralded and used[,] regardless of their effectiveness.”); Paul Rose, *The Corporate Governance Industry*, 32 J. CORP. L. 887, 913 (2007) (noting the diffusion of corporate “best practices” and questioning their efficacy). So, far from representing the “best” approaches to anti-bribery compliance in a definitive or empirical sense, ISO 37001’s best practices may more accurately constitute a lowest common denominator consensus on generally accepted, high-level principles and practices. See Wirth, *supra* note 131, at 87 (“[C]oncern about the potential for the ISO process to produce modest, least-common-denominator outputs is frequently expressed.”).

¹⁶¹ See Murphy, *supra* note 106, at 26 (“I have been told that this definition or that organizational element is just how ISO works or is used everywhere else in ISO standards.”).

¹⁶² MCBRIEN, *supra* note 8, at 9.

the standard as an *anti-bribery* tool.

Even if the certifier's statement exaggerates the degree to which ISO 37001 overlaps with other ISO standards, the mere existence of overlap still raises concerns about the fit between an ISO management systems approach and the anti-bribery concerns that ISO 37001 seeks to address. That is, some aspects of the standard may only exist because they are part of the general ISO management systems template, making them irrelevant or potentially even counterproductive to bribery mitigation efforts.¹⁶³ Furthermore, although this template may provide a checklist of compliance requirements, attempting to "engineer" anti-bribery compliance solely by mechanically ticking boxes on a checklist is like trying to jam a square peg into a round hole.¹⁶⁴ Not only is it fairly *unsystematic*, it simply does not work. "Effective" compliance requires more than just "list-type criteria" of the sort laid out in ISO 37001, however necessary these might be.¹⁶⁵ Absent other cultural or behavioral modifications, the formalistic nature of ISO's management systems template may do little more than promote a rote, box-ticking approach to compliance—the very approach that compliance theorists and practitioners have long deplored.¹⁶⁶

2. Symbolic Function

As an international standard that grew out of a global multi-stakeholder consensus on anti-bribery management, ISO 37001 also serves a *symbolic function*. Symbols are images or representations that stand for something beyond their literal content or functional purpose.¹⁶⁷ As Eric Posner put it, "[a] symbol is an image that refers to a system of beliefs that are generally known," and "[s]ymbolic behavior is an agent's use of a symbol to show that he shares or rejects these beliefs."¹⁶⁸ To say that ISO 37001 has a symbolic function, then, means that it represents certain generally held values or beliefs to which actors can convey commitment by adopting the standard.¹⁶⁹ Specifically, ISO 37001 functions as a symbol insofar as adopting it represents one's support of international anti-corruption values

¹⁶³ See Murphy, *supra* note 106, at 26 (arguing against including certain language in ISO 37001 simply because it has always been included in other ISO standards and remarking that "[i]f a standard addresses the topic of bribery, then it should be designed to do [just] that" rather than "meet some other agenda").

¹⁶⁴ See Coglianese & Nash, *supra* note 114, at 584 (cautioning against "expecting too much from the mere formalization of a compliance 'system'").

¹⁶⁵ See Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs*, in RESEARCH HANDBOOK ON CORPORATE CRIME AND FINANCIAL MISDEALING 247, 259 (Jennifer Arlen ed., 2018).

¹⁶⁶ See Coglianese & Nash, *supra* note 114, at 573, 588; see also sources *supra* note 115. For discussion on more behaviorally sophisticated approaches to compliance, see Todd Haugh, *The Criminalization of Compliance*, 92 NOTRE DAME L. REV. 1215 (2017).

¹⁶⁷ Christoph Zott & Quy Nguyen Huy, *How Entrepreneurs Use Symbolic Management to Acquire Resources*, 52 ADMIN. SCI. Q. 70, 72 (2007); see also RAYMOND FIRTH, *SYMBOLS: PUBLIC AND PRIVATE* 15 (1973) ("The essence of symbolism lies in the recognition of one thing as standing for (re-presenting) another[.]").

¹⁶⁸ ERIC A. POSNER, *LAW AND SOCIAL NORMS* 112 (2000).

¹⁶⁹ See Dan L. Burk, *On the Sociology of Patenting*, 101 MINN. L. REV. 421, 434 (2016) (noting that symbols are used to convey "investment in shared social narratives and expectations").

and one's commitment to the global regime that has increasingly institutionalized these values. This symbolic or even moralistic aspect of the standard can largely be attributed to its international multi-stakeholder orientation, which certified organizations can point to as evidence of their adherence to global anti-corruption norms.

On the one hand, there is something intuitively appealing about this symbolic function. Symbolizing one's moral commitment to anti-corruption principles and "the global crusade against corruption" is, it would seem, a good thing.¹⁷⁰ Indeed, scholars elsewhere have lauded the symbolic value of other anti-corruption mechanisms.¹⁷¹ Furthermore, ISO 37001's status as an international multi-stakeholder standard arguably makes it an ideal tool for conveying one's anti-corruption commitments. First, adopting such a standard coheres with the prevailing belief that international multi-stakeholder initiatives provide a particularly promising approach to countering corruption.¹⁷² Second, adopting the standard allows organizations to demonstrate their dedication to an international consensus on anti-bribery practices and, by extension, their dedication to the norms and values underpinning the global anti-corruption regime. On both of these fronts, ISO 37001 presents an opportunity for organizations to display their commitments to combating corruption and, in so doing, potentially bolster their social legitimacy.¹⁷³

On the other hand, many considerations call into question the symbolic value of ISO 37001. First, ISO's agenda has historically been steered by a small number of members from highly industrialized countries.¹⁷⁴ In the case of ISO 37001, the UK national standard-setter BSI primarily drove its development.¹⁷⁵ ISO's organizational history of "limited participation and effective exclusion"¹⁷⁶ may detract from the standard's international multi-

¹⁷⁰ Alina Mungiu-Pippidi, *Seven Steps to Control of Corruption: The Road Map*, 147 DAEDALUS 20, 21 (2018).

¹⁷¹ See, e.g., DAN HOUGH, CORRUPTION, ANTI-CORRUPTION, AND GOVERNANCE 104 (2013) (asserting that ethics codes have a "symbolic role" in that they demonstrate one's awareness of and commitment to anti-corruption values); Steven R. Salbu, *A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery*, 33 CORNELL INT'L L.J. 657, 681 (2000) (stating that the FCPA and OECD Convention "have symbolic value" because "they heighten global awareness of corruption").

¹⁷² See Yockey, *supra* note 62, at 360–61 (discussing the benefits of collaborative anti-corruption efforts involving multiple stakeholders).

¹⁷³ See Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 23 ANN. REV. SOCIO. 479, 494 (1997) (arguing that "organizations strategically deploy legal symbols in pursuit of sociopolitical legitimacy"). Legitimacy is "the belief that authorities, institutions, and social arrangements are appropriate, proper, and just." Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCH. 375, 376 (2006).

¹⁷⁴ HALLSTRÖM & BOSTRÖM, *supra* note 88, at 31; MURPHY & YATES, *supra* note 86, at 33; Diller, *supra* note 99, at 492–93. ISO has attempted to bolster the influence of members from developing countries in recent years. See Delimatsis, *supra* note 121, at 293.

¹⁷⁵ MCBRIEN, *supra* note 8, at 6.

¹⁷⁶ Delimatsis, *supra* note 121, at 305.

stakeholder image,¹⁷⁷ raise doubts about the international consensus that it purports to represent,¹⁷⁸ and even fuel age-old imperialist critiques of global anti-corruption efforts more generally.¹⁷⁹

Second, management system standards are a major money maker for ISO as well as third-party certifiers and accreditors, potentially raising the perception that some of these standards may have been developed less for their substantive value and more for the substantial revenue that they promise actors in the ISO ecosystem.¹⁸⁰ These concerns have been exacerbated by the fact that, given the lucrative nature of ISO certification, some national standard-setting bodies (the very same bodies that develop ISO standards) now provide their own certification services.¹⁸¹ For example, BSI developed the initial national standard (BS 10500) that inspired ISO 37001, headed the technical committee that developed ISO 37001, and is now profiting from it by providing certification.¹⁸² The point here is not to criticize ISO for charging for its standards or certifiers and accreditors for charging for their services. Rather, the point is that revenue generation has become such a driving force in the ISO system that it has led to real and perceived conflict of interest concerns, potentially undercutting ISO 37001's symbolic value in the process.

Finally, the manner in which organizations implement the standard may also undermine its symbolic value. For example, organizations involved in a recent corruption scandal may turn to ISO 37001 certification to shore up their public image, leading to perceptions that the standard is little more than

¹⁷⁷ Concerns about the disproportionate influence of private sector actors and industry representatives have long called into question the extent of ISO's multi-stakeholderism. *See, e.g.,* Roht-Arriaza, *supra* note 98, at 524 ("Despite the stated goal of balance, the membership of [ISO 14001's technical committee] is heavily concentrated in large global industry and industry-related government standard-setting bodies."). *But see* MARI MORIKAWA & JASON MORRISON, PACIFIC INST., WHO DEVELOPS ISO STANDARDS? A SURVEY OF PARTICIPATION IN ISO'S INTERNATIONAL STANDARDS DEVELOPMENT PROCESS 2 (2004) ("In recent years, ISO has taken steps to improve the balance of stakeholder representation . . .").

¹⁷⁸ *See* Delimatsis, *supra* note 121, at 305–09 (discussing the persistence of representation and participation issues at ISO despite its consensus-driven framework).

¹⁷⁹ *See* Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 MINN. J. INT'L L. 155, 163–64 (2009) (examining oft-raised imperialist critiques of transnational bribery enforcement that see it as the imposition of "Global North" (developed countries') values on the "Global South" (developing countries)).

¹⁸⁰ "Clickbait" concerns would seem to loom especially large here. *See* JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 280 n.6, 585 (2000) (referring to ISO as a "model mercenary" that "generat[es] income through the global promulgation" and "commercial[] exploit[ation]" of regulatory models). *See generally* JOANNE YATES & CRAIG N. MURPHY, ENGINEERING RULES: GLOBAL STANDARD SETTING SINCE 1880, at 299–301 (2019) (describing the certification industry and the business model of ISO standard-setting).

¹⁸¹ *See* MURPHY & YATES, *supra* note 86, at 67 (noting that certification has become a major source of revenue for some ISO members, which now "resemble extremely successful multinational firms"); *see also id.* at 64–66 (discussing the blurring of boundaries between standard-setting, accreditation, and certification as well as the conflict of interest concerns that have arisen as a result).

¹⁸² MCBRIEN, *supra* note 8, at 3, 6–7; *see* CB Directory, ANAB, <http://anabdirectory.remoteauditor.com> (last visited Nov. 5, 2022) (choose "ISO 37001" under the "Standard" dropdown, then click "Search") (providing an incomplete list of certification bodies that have been accredited to issue ISO 37001 certifications).

a public relations tool.¹⁸³ In addition, while organizations can claim that adopting ISO 37001 demonstrates their adherence to an international multi-stakeholder consensus on anti-bribery management,¹⁸⁴ the open-ended nature of the standard means that one organization's implementation of the standard may look quite different from another's.¹⁸⁵ Of course, the standard was designed so that organizations could adapt it to suit their particular needs.¹⁸⁶ However, to the extent that this open-endedness gives organizations latitude to implement superficial or merely symbolic anti-bribery systems that nonetheless qualify for certification,¹⁸⁷ it undermines notions that ISO 37001 represents a meaningful international consensus on anti-bribery "best practices."¹⁸⁸ This, in turn, may hinder organizations' ability to use the standard to garner legitimacy.

3. Signaling Function

In addition to systematizing anti-bribery compliance and symbolizing firms' commitment to global anti-corruption values, ISO 37001 is also designed to reduce information asymmetries between organizations and their audiences.¹⁸⁹ In theory, the standard accomplishes this objective through its third-party certification system, which aims to provide a signal to external parties about the quality and characteristics of certified entities' anti-bribery management systems.¹⁹⁰ Here, *signal* is a term of art from information economics referring to "costly behavior that can communicate [otherwise unobservable] information about the sender when the receiver knows that

¹⁸³ See Vinit M. Desai, *Third-Party Certifications as an Organizational Performance Liability*, 44 J. MGMT. 3096, 3101 (2018) (referring to such efforts as "quality patching").

¹⁸⁴ Although the mere fact that one has adopted or is participating in an anti-corruption multi-stakeholder initiative does not mean that benefits or desirable outcomes will automatically follow. See HALLSTRÖM & BOSTRÖM, *supra* note 88, at 10 (questioning the "profoundly optimistic view" that "a number of positive synergies . . . necessarily follow the inclusion of actors representing different sectors").

¹⁸⁵ See Haitao Yin & Peter J. Schmeidler, *Why Do Standardized ISO 14001 Environmental Management Systems Lead to Heterogeneous Environmental Outcomes?*, 18 BUS. STRATEGY & ENV'T 469, 470 (2009) ("[I]t seems to be a common phenomenon that *standardized* management tools [are] implemented very differently.") (emphasis in original).

¹⁸⁶ MCBRIEN, *supra* note 8, at 5.

¹⁸⁷ "Greenwashing" is a fitting analogy here. See generally William S. Laufer, *Social Accountability and Corporate Greenwashing*, 43 J. BUS. ETHICS 253 (2003).

¹⁸⁸ As organizational sociologists have noted, symbolic behavior can too often be *merely* symbolic—lacking in substance yet, despite its superficiality, conveying an attractive outward appearance that allows organizations to garner social legitimacy, at least until this "legitimacy façade" has been exposed. Tammy L. MacLean & Michael Behnam, *The Dangers of Decoupling: The Relationship Between Compliance Programs, Legitimacy Perceptions, and Institutionalized Misconduct*, 53 ACAD. MGMT. J. 1499, 1499 (2010); see David Hess, *Ethical Infrastructures and Evidence-Based Corporate Compliance and Ethics Programs: Policy Implications from the Empirical Evidence*, 12 N.Y.U. J.L. & BUS. 317, 361–64 (2016) (reviewing relevant scholarship); Zott & Huy, *supra* note 167, at 71–74 (same).

¹⁸⁹ Indeed, many scholars have argued that the *raison d'être* of certifiable ISO management system standards is to alleviate information asymmetries between firms, their business partners, and other interested parties. See Iñaki Heras-Saizarbitoria & Olivier Boiral, *ISO 9001 and ISO 14001: Towards a Research Agenda on Management System Standards*, 15 INT'L J. MGMT. REVS. 47, 52 (2013).

¹⁹⁰ See Tim Bartley, *Certification as a Mode of Social Regulation*, in HANDBOOK ON THE POLITICS OF REGULATION 441, 445 (David Levi-Faur ed., 2011) ("[C]ertification is a solution to information asymmetries and collective action problems . . .").

only senders with a particular characteristic can afford, or are willing, to send the signal.”¹⁹¹ Signals are “costly” to the extent that they are prohibitively expensive for dishonest actors (“false signalers”) to imitate, and their costliness therefore enhances the credibility of the information that they convey.¹⁹²

Third-party certification can provide a signal for two interrelated reasons. First, it is differentially costly, meaning that “some [potential] signalers are in a better position than others to absorb the associated costs.”¹⁹³ Certification audits are time-consuming and resource-intensive, but even more so for firms lacking the characteristics that the audits seek to verify. Second, this difference in costliness creates a “separating equilibrium” that allows audiences to trust in the integrity of certification.¹⁹⁴ In other words, because an organization that lacks the characteristics required to pass a certification audit would need to implement relatively more substantial changes to be certified (and, as such, would not be able to afford the measures needed to pass the audit), external audiences can (at least theoretically) rest assured that only entities that actually possess these characteristics have obtained certification.¹⁹⁵

For these reasons, many scholars have conceptualized ISO management system certifications in economic signaling terms.¹⁹⁶ Thus, it should come as no surprise that ISO 37001 serves a *signaling function*, meaning that the standard—through its third-party certification feature—aims to provide external audiences with credible information about the quality of an organization’s anti-bribery management system. On its face, the putatively costly nature of the ISO certification and accreditation processes would seem

¹⁹¹ David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879, 882 (2003); accord Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355, 356 (1973) (seminal account). For an excellent and succinct summation of signaling theory in the corporate compliance context, see Kishanthi Parella, *Improving Human Rights Compliance in Supply Chains*, 95 NOTRE DAME L. REV. 727, 732, 764–66 (2019).

¹⁹² See Donald D. Bergh et al., *Signalling Theory and Equilibrium in Strategic Management Research: An Assessment and a Research Agenda*, 51 J. MGMT. STUD. 1334, 1338, 1354 (2014); Diego Gambetta, *Signaling*, in OXFORD HANDBOOK OF ANALYTICAL SOCIOLOGY 168, 176, 179–81 (Peter Bearman & Peter Hedström eds., 2011).

¹⁹³ Brian L. Connelly et al., *Signaling Theory: A Review and Assessment*, 37 J. MGMT. 39, 45 (2011).

¹⁹⁴ See F.H. Buckley, *Liberal Nationalism*, 48 UCLA L. REV. 221, 251 n.105 (2000) (“Signaling is costly for both [true and false signalers], but [it is] much more costly for the false signaler. When these costs exceed his expected gains from signaling, he has no incentive to signal. However, it may be otherwise for true signalers who have lower signaling costs and whose signaling gains might exceed signaling costs. Game theorists call this a *separating equilibrium*: Only the true signaler has an incentive to signal, and his signal is therefore credible.”) (emphasis in original).

¹⁹⁵ See Gambetta, *supra* note 192, at 181 (“[I]t is not the absolute cost [of signaling] per se that informs, but the cost differential between what the k signaler can afford relative to what the non-k signaler can afford. . . . Only if this difference is large enough to discriminate between the two does the signal inform well.”).

¹⁹⁶ See, e.g., Andrew A. King et al., *The Strategic Use of Decentralized Institutions: Exploring Certification with the ISO 14001 Management Standard*, 48 ACAD. MGMT. J. 1091, 1095 (2005); Ann Terlaak & Andrew A. King, *The Effect of Certification with the ISO 9000 Quality Management Standard: A Signaling Approach*, 60 J. ECON. BEHAV. & ORG. 579, 581 (2006).

to support this objective. According to the logic of signaling theory, these processes should ensure that only those entities that adopt an anti-bribery program of sufficient quality to withstand external audits are able to obtain and retain ISO 37001 certification.¹⁹⁷ If this is the case, the standard may be a useful means for conveying otherwise unobservable information about the state of an organization's anti-bribery program to interested parties. By bridging this informational divide, ISO 37001 certification could help companies convey the genuineness of their anti-bribery efforts to potential business partners and other stakeholders, and it could even help regulators pursue more efficient regulatory and monitoring strategies.¹⁹⁸

The problem, however, is that there is ample reason to question the informational value and signaling capabilities of ISO 37001. First, what it means to be "ISO 37001-certified" is ambiguous.¹⁹⁹ The standard's value as a signal hinges upon external audiences' ability to understand the information conveyed by certification, yet there is good reason to believe that external actors will struggle in this regard. In her analysis of certification marks, Jeanne Fromer observes that "[t]here can be significant mismatches between consumers' perceptions of a certification standard and the actual standard being applied."²⁰⁰ These mismatches can sometimes stem from an ignorant consumer's erroneous interpretations, but they can also be attributed to complexities or obscurities within the standard itself that are capable of leading "even the most astute consumers" astray.²⁰¹ In the context of ISO 37001, both of these sources of misunderstanding and uncertainty are probable.

Some might mistakenly think, for instance, that certification indicates that an organization has implemented a system that is in some sense especially "bribery proof."²⁰² However, bribery is always a risk regardless of an organization's certification status and, in any event, a given non-certified organization may well do a better job of mitigating this risk than a given ISO 37001-certified organization.²⁰³ As for the obscurities and idiosyncrasies of the standard itself, certain aspects of ISO 37001 may make it difficult to discern, even for sophisticated parties, what anti-bribery certification

¹⁹⁷ MCBRIEN *supra* note 8, at 5–6.

¹⁹⁸ *Id.* at 5; *see, e.g.,* McAllister, *supra* note 138, at 324–26 (observing that "third-party verification can substitute for direct compliance monitoring by a governmental agency" and thereby shift monitoring costs from resource-strapped agencies to private certifiers with more resources and greater subject-matter expertise). For an excellent discussion of third-party certification's strengths and weaknesses, *see* Lesley K. McAllister, *Regulation by Third-Party Verification*, 53 B.C. L. REV. 1 (2012).

¹⁹⁹ MCBRIEN, *supra* note 8, at 4 box1; Murphy, *supra* note 106, at 2.

²⁰⁰ Jeanne C. Fromer, *The Unregulated Certification Mark(et)*, 69 STAN. L. REV. 121, 131 (2017).

²⁰¹ *Id.* at 133.

²⁰² MCBRIEN, *supra* note 8, at 12.

²⁰³ To refute the view that ISO 37001 renders an entity "bribery proof," one does not have to look far. In 2017, the first company to obtain ISO 37001 certification faced bribery charges not long after passing its certification audit. *Id.*

signifies.²⁰⁴ For one, the standard's open-endedness paves the way for various organizations to obtain and display the same "ISO 37001-certified" stamp of approval despite having anti-bribery programs with drastically different characteristics and levels of quality.²⁰⁵ For another, loss of certification is a highly unlikely prospect—"[a]s long as a company corrects any nonconformances, it can still receive its certification."²⁰⁶ To the extent that these aspects of ISO 37001 provide openings for serial nonconformists to retain their certification or anti-bribery systems of questionable quality to obtain certification, one must question the informational value of ISO 37001 certification and what it means to be certified in the first place.

Second, there are good reasons to be skeptical of ISO 37001 certification audits and, more generally, the two-tiered system of oversight that certification and accreditation provide.²⁰⁷ For certification to provide a reliable signal, the audits must be able to prevent organizations from engaging in "false signaling," whereby they claim to possess certain certification-worthy characteristics that they in fact lack.²⁰⁸ Otherwise, organizations with virtually no substantive anti-bribery measures could nonetheless obtain the same certification as organizations with more robust programs. Certification's informational value, then, largely hinges on the work of those doing the certifying.²⁰⁹ And these audits are far from irreplaceable.

One set of concerns pertains to the knowledge base of those conducting the certification audits; it is not clear that ISO 37001 certifiers will always possess the appropriate experience or expertise.²¹⁰ Another set of concerns relates to certifiers' incentives. Given that ISO 37001 certifiers depend on the organizations that they certify for revenue, there is a natural incentive for them to "become beholden to certain businesses seeking their certification" to secure the financial benefits of an ongoing business

²⁰⁴ Cf. Wirth, *supra* note 131, at 90 (arguing, in the context of ISO 14001, that the public is likely to misapprehend the meaning of certification due to the particular nuances and idiosyncrasies of the standard); cf. also Margaret Chon, *Marks of Rectitude*, 77 *FORDHAM L. REV.* 2311, 2331 (2009) (discussing the opacity of certification standards generally).

²⁰⁵ With this flexibility, organizations can choose to certify their entire operations or just a specific unit(s), and they could even choose to self-certify instead of subjecting themselves to third-party certification audits. MCBRIEN, *supra* note 8, at 11; see Lytton & McAllister, *supra* note 138, at 298 (contrasting self-certification and third-party certification).

²⁰⁶ Coglianese, *supra* note 79, at 28. For this reason, Professor Coglianese has said that "it is not clear what [ISO] certification really means." *Id.*

²⁰⁷ Others have also criticized ISO 37001's certification and accreditation systems. See, e.g., Vera Cherepanova, *ISO 37001: Not All Certifications are Created Equal*, *FCPA BLOG* (Apr. 3, 2019, 12:18 PM), <https://fcpablog.com/2019/04/03/iso-37001-not-all-certifications-are-created-equal/>; Fox, *supra* note 116; Murphy, *supra* note 106, *passim*.

²⁰⁸ See Connelly et al., *supra* note 193, at 45.

²⁰⁹ Cf. Tracey M. Roberts, *The Rise of Rule Four Institutions: Voluntary Standards, Certification and Labeling Systems*, 40 *ECOLOGY L.Q.* 107, 153–54 (2013) ("Labels are only as valuable as the monitoring and enforcement systems that maintain the standards and segregate nonconforming goods and their suppliers.").

²¹⁰ *ISO 37001 – Who Will Certify You?*, *FCPA PROFESSOR* (Aug. 29, 2017), <https://fcpaprofessor.com/iso-37001-will-certify/>.

relationship.²¹¹ Such conflict of interest concerns have been well-documented in the context of ISO standards, and two apparent safeguards have been identified in response: (1) the adverse reputational consequences of providing certification services in a reckless or dishonest manner; and (2) the oversight provided by national accreditation bodies.²¹² The open-ended nature of ISO 37001, however, undermines both of them. The standard's flexible provisions afford certifiers ample room for leniency in their evaluations, allowing them to conduct highly deferential audits that, to accreditors and other observers, might appear unproblematic and by-the-book.²¹³ At the very least, one would hope that accreditation bodies would provide some check against certification bodies engaged in more blatant transgressions, but the infrequency of accreditation audits, their limited scope, and the fact that certification bodies need not actually be accredited in the first place all cast doubt on this proposition.²¹⁴

In addition to the questionable credibility of certification audits, the far-flung nature of ISO's certification and accreditation systems raises further concerns. In ISO's global system, certification bodies can pursue accreditation with any national accreditation body in the world, and firms can likewise hire any certification body to conduct their audits.²¹⁵ To some extent, market forces should "weed out" particularly poor or lenient certifiers and accreditors, but (particularly in light of the standard's open-endedness) many such actors may persist in various parts of the world.²¹⁶ Worst-case scenario, an organization could take advantage of ISO's far-flung system by engaging in forum-shopping, going from one accreditor or certifier to the next until one of them is willing to provide a favorable review.²¹⁷ Even assuming complete rectitude, though, this highly decentralized system of oversight virtually ensures that ISO 37001 certifications will be awarded on the basis of (1) certification audits of varying degrees of stringency (2) conducted by certification bodies subject to varying degrees of oversight by different

²¹¹ Fromer, *supra* note 200, at 154–55; *see also* Jonathan M. Barnett, *Intermediaries Revisited: Is Efficient Certification Consistent with Profit Maximization?*, 37 J. CORP. L. 475, 477 (2012) (noting that third-party intermediaries "have been alleged to engage in self-dealing, laxity, collusion, and other deviations from perfect rectitude").

²¹² *See* Lytton & McAllister, *supra* note 138, at 313–17; Jonathan M. Barnett, *Certification Drag: The Opinion Puzzle and Other Transactional Curiosities*, 33 J. CORP. L. 95, 105 (2007).

²¹³ *See* Fromer, *supra* note 200, at 160 (arguing that flexible certification standards leave room for manipulation by certifiers); *cf.* LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 14 (2016) ("[A]mbiguity gives organizations broad latitude to construct the meaning of compliance . . .").

²¹⁴ *See, e.g.,* Stephen J. Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. REV. 916, 941 (1998) (describing how some third-party certifiers have taken bribes from low-quality producers in exchange for certifying them as "high quality"); Lytton & McAllister, *supra* note 138, at 316–17 (discussing deficiencies in the accreditation system).

²¹⁵ *See* Cherepanova, *supra* note 207.

²¹⁶ MCBRIEN, *supra* note 8, at 12–13.

²¹⁷ Wirth, *supra* note 131, at 91–92.

accreditation bodies.²¹⁸ Such variability contributes to the ambiguous nature of certification and may also create conditions that are ripe for false signaling.²¹⁹

A final factor to consider in assessing ISO 37001's signaling function is the surrounding environment. Signaling theorists have stressed that the wider environment in which signaling occurs is important to take into account when evaluating a signal's informational value.²²⁰ This environment can have a significant impact on the extent to which a signal is able to reduce information asymmetries.²²¹ Any number of environmental factors could have distortive effects, undermining a signal's accuracy and integrity by contradicting or calling into question the information that the signal is attempting to convey.

With ISO 37001, the level of perceived corruption in the environment in which a certified entity is operating will likely have a significant bearing on certification's efficacy as a signal.²²² In theory, one of the benefits of ISO 37001 certification is that it can help organizations in seemingly corrupt environments convey that they take anti-corruption seriously and possess an anti-bribery management system of sufficient quality to pass muster with an external auditor.²²³ Indeed, legal scholars have long asserted that private certification and other forms of external verification may be particularly useful in contexts where corruption is endemic and the rule of law is weak.²²⁴ Recent empirical work, however, shows that corrupt contexts may undermine the credibility and trustworthiness of ISO certification.²²⁵ These findings suggest that, far from viewing ISO 37001 as a beacon of integrity in such

²¹⁸ See Paulette L. Stenzel, *Can the ISO 14000 Series Environmental Management Standards Provide a Viable Alternative to Government Regulation?*, 37 AM. BUS. L.J. 237, 286 (2000) (raising concerns of inconsistency and laxity due to ISO accreditation varying across countries).

²¹⁹ See Ann Terlaak, *Order Without Law? The Role of Certified Management Standards in Shaping Socially Desired Firm Behaviors*, 32 ACAD. MGMT. REV. 968, 979 (2007) (arguing that certifiable management standards' decentralized enforcement systems result in inconsistent enforcement practices that generate confusion about the precise meaning of certification).

²²⁰ See Connelly et al., *supra* note 193, at 55.

²²¹ *Id.*

²²² Since actual corruption levels are difficult to ascertain, perceptions of corruption are commonly used as a proxy. See Benjamin A. Olken, *Corruption Perceptions vs. Corruption Reality*, 93 J. PUB. ECON. 950, 950 (2009) (discussing scholarship to this effect); cf. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 128 (2004) (observing that concerns about the "appearance of corruption" provide a justifiable basis for campaign finance regulation in the U.S.).

²²³ See MCBRIEN, *supra* note 8, at 9 (quoting an interviewee asserting that ISO 37001 "'is a good demonstrator of integrity'").

²²⁴ See, e.g., Margaret M. Blair et al., *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325, 356–57 (2008); Nichols, *supra* note 65, at 1349.

²²⁵ See Ivan Montiel et al., *Using Private Management Standard Certification to Reduce Information Asymmetries in Corrupt Environments*, 33 STRATEGIC MGMT. J. 1103, 1103 (2012) (finding, in an analysis of ISO 14001, that "widespread corruption in the general environment can extend distrust to private certification systems, which reduces the credibility and signaling value of private certifications"). But see Barkat Ullah et al., *Can a Signal Mitigate a Dilemma? Quality Management Standards, Corruption, and Business Ethics*, SSRN (May 26, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853353 (presenting contrary findings).

settings, external audiences may be more apt to view certified organizations with skepticism due to suspicions that the certification process was corrupted in some way.²²⁶ Thus, the very settings where one would hope that anti-bribery certification would have the most utility as a signal—environments struggling with institutionalized corruption—could very well have the perverse effect of impairing ISO 37001’s informational value.

C. Upshot: Clickbait Functionality

This Part has shown that ISO 37001, for all its theoretically alluring features, is unlikely to live up to many of its desired functions. An analysis of three of these functions revealed that it essentially advances a problematic paradigm of clickbait compliance, one that promises much in terms of functionality but is unlikely to deliver in many respects. In theory, ISO 37001 should help organizations (1) implement more systematic (and thereby more “effective”) anti-bribery programs, (2) garner social legitimacy by symbolizing their anti-corruption commitments, and (3) signal to audiences that they possess credible anti-bribery systems with certain high-quality features. However, the theoretical and practical concerns raised in this Part militate against such sweeping expectations. Indeed, many of these concerns are accentuated in countries where corruption is deeply embedded, the very places where one would hope ISO 37001 would be most useful.²²⁷ While some benefits may accrue to certified organizations, it is unlikely that all or even many certified organizations will fully realize each of these functional benefits as a general matter.

These skeptical takeaways comport with recent empirical research questioning the efficacy of compliance management systems as well as scholarly commentary acknowledging the simultaneous promises and pitfalls of third-party certification standards.²²⁸ The account presented here

²²⁶ See Choi, *supra* note 214, at 941 (discussing bribery schemes involving certifiers); see also Daniel Berliner & Aseem Prakash, *Public Authority and Private Rules: How Domestic Regulatory Institutions Shape the Adoption of Global Private Regimes*, 58 INT’L STUD. Q. 793, 794 (2014) (observing that adoption rates for ISO certification standards vary considerably across firms and countries given that “not all audiences . . . find this signal to be credible”). These suspicions will likely be most pronounced where local certifiers and accreditors are used, particularly if these certifiers and accreditors are closely connected to public officials or governmental entities that are perceived to be involved in the country’s corruption problems. Such connections are commonplace in many developing countries. MURPHY & YATES, *supra* note 86, at 64–67. And, at least on some occasions, these are the very countries in which local ISO 37001 certifiers and accreditors have been used. See, e.g., MCBRIEN, *supra* note 8, at 10 (describing a Malaysian company’s decision to hire a local certifier rather than a foreign certification body largely because the latter was too expensive).

²²⁷ Such environments have the potential to exacerbate conflict of interest concerns because certification and accreditation bodies in these countries often have incestuously close ties with each other, national standard-setting bodies, and government officials who are perceived to be at the center of their countries’ corruption problems. See discussion *supra* note 226. In addition, corrupt contexts generally entail higher risks of local certifier or accreditor malfeasance (e.g., bribes-for-certificates schemes) and “merely symbolic” organizational compliance.

²²⁸ See, e.g., Coglianese & Nash, *supra* note 114, at 581–84 (reviewing empirical research on the efficacy of compliance management systems and finding that “[t]he evidence overall is limited and mixed”); Cynthia A. Williams, *Fiduciary Duties and Corporate Climate Responsibility*, 74 VAND. L. REV.

contributes to these developing bodies of scholarship by using a conceptual framework that focuses on structural features and corresponding functions to analyze an underexamined compliance standard, one that a growing number of firms and governments around the world are adopting.²²⁹ In light of this trend, this account aims to make firms and regulators better aware of the standard's limitations and risks. Beyond that, it also aims to influence ISO itself, not necessarily to encourage ISO to scrap ISO 37001 but to underscore the need for systemic improvements if it is to better fulfill its core functions and truly add value to the global anti-corruption regime—and the field of compliance more generally.²³⁰

III. CLICKBAIT IN AN ERA OF (ISO) COMPLIANCE

Transnational bribery has long been a focal point for corporate compliance initiatives, but this unidimensional focus tends to obscure an important fact: Compliance *in general*, not just anti-bribery compliance in particular, is a booming field today.²³¹ Indeed, we are in the midst of “an era of compliance,” a period of unprecedented growth in compliance-related laws, policies, and services.²³² Over the course of this era, compliance has blossomed into an increasingly distinct profession, a standalone corporate function, and a top priority for corporate officers and directors.²³³ At the same time, this era has witnessed a proliferation of new compliance instruments, with ISO's recent (and underexamined) wave of compliance standards providing a host of examples in this regard.²³⁴

This Part analyzes this emergent phenomenon of ISO standard-setting to determine whether it is likely to advance compliance's burgeoning agenda. First, it identifies apparent complements and possible synergies between these new ISO standards and three key aspects of compliance today: (1) laws, (2) social responsibility concerns, and (3) a heightened emphasis on testing and data analytics. Then, it critiques these apparent or supposed linkages, asserting that they present a host of overpromise-and-underdeliver concerns.

1875, 1877–78 (2021) (discussing promising features of third-party assurance standards before noting that such standards also have a potential dark side).

²²⁹ See generally Coglianese & Nash, *supra* note 114.

²³⁰ Thus, while this Article is skeptical of ISO 37001 and its progeny, it does not dismiss them out of hand as irredeemably unworkable. See *infra* Part IV (proposing reforms to ISO standard-setting). More realistic expectations coupled with systemic improvements could provide a worthwhile path forward.

²³¹ See Veronica Root Martinez, *The Outsized Influence of the FCPA?*, 2019 U. ILL. L. REV. 1205, 1205 (arguing that the tendency to overemphasize anti-bribery compliance may result in compliance deficiencies in other areas).

²³² Griffith, *supra* note 25, at 2077; see also Jennifer M. Pacella, *The Regulation of Lawyers in Compliance*, 95 WASH. L. REV. 947, 948, 953–63 (2020) (describing today's “compliance boom”).

²³³ James A. Fanto, *The Professionalization of Compliance: Its Progress, Impediments, and Outcomes*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 183, 184–85 (2021).

²³⁴ See *supra* note 24 and accompanying text (listing these standards).

A. Compliance and ISO Standards: Potential Complements and Synergies

1. The Legal Landscape of Compliance

Start with the observation that voluntary ISO standards, notwithstanding their status as private governance devices, have been given legal weight in a variety of ways. Government agencies frequently incorporate ISO standards by reference into their administrative regulations, effectively transforming them into legal obligations.²³⁵ Government procurement departments have mandated or expressed a preference for ISO management system certification in their contracting procedures.²³⁶ Courts have found that ISO standards can provide evidence of reasonableness and due care,²³⁷ and they—in tandem with government enforcement authorities—have also required organizations to pursue ISO management system certification as a remedial measure following regulatory violations.²³⁸ Finally, the World Trade Organization (WTO) has notably endorsed the use of technical ISO standards to facilitate compliance with its treaties.²³⁹ In this context, ISO standards effectively function as both a “sword” and a “shield”—signatories can use them as a basis for challenging other countries’ relatively more stringent domestic regulations as non-tariff barriers to trade, or they can use them to justify their own trade regulations to the extent that they comport with relevant ISO standards.²⁴⁰

²³⁵ See generally Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329 (1978) (discussing the incorporation by reference of ANSI/ISO standards); Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497 (2013) (same). These ISO standards usually cover highly technical areas in the scientific and engineering domains, but some regulations incorporate certifiable management system standards by reference as well. See, e.g., 40 C.F.R. § 53.51 (requiring ISO 9001 certification for a particular type of manufacturing facility).

²³⁶ See, e.g., Roht-Arriaza, *supra* note 88, at 273 (observing that ISO 9001 certification “has become a requirement for many government contracts”).

²³⁷ See, e.g., *Forester v. Consumer Prod. Safety Comm’n of the U.S.*, 559 F.2d 774, 794 (D.C. Cir. 1977) (finding that congruence with a “private ISO standard [provided] evidence of the reasonableness of the regulation” in question); *Bah v. Everlast Logistics, LLC*, 297 F. Supp. 3d 426, 432 (S.D.N.Y. 2018) (treating ISO certification as evidence of reasonable care in a negligence suit); *Holst v. KCI Konecranes Int’l Corp.*, 699 S.E.2d 715, 720 (S.C. Ct. App. 2010) (treating conformity with an ISO safety standard as one factor in determining reasonable care). See generally Errol E. Meidinger, “Private” Environmental Regulation, Human Rights, and Community, 7 BUFF. ENV’T L.J. 123, 130 (1999) (“[S]ubstantive legal standards are likely to be affected by certification systems over time, as private standards suffice public ones through environmental regulation, tort law, financial regulation, and other avenues.”).

²³⁸ “[A] number of courts have required [the] installation and verification of an ISO 14001-based environmental management system as part of the settlement in cases of environmental law violations, and agencies have agreed to similar settlements with polluters.” Roht-Arriaza, *supra* note 88, at 274. See, e.g., Consent Agreement and Final Order app. B at 2, 4, U.S. Dep’t of the Interior, No. HQ-2011-8006 (EAB Aug. 18, 2011) (conditioning consent agreement on obtaining ISO 14001 certification).

²³⁹ Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation*, 38 J.L. & Soc’y 20, 42 (2011); see Delimatsis, *supra* note 121, at 280 (“Article 2.5 [of the WTO’s Tariff Barriers to Trade (TBT) Agreement] incorporates a presumption of TBT compatibility for those technical regulations that are in accordance with relevant international standards and pursue a legitimate objective.”).

²⁴⁰ Wirth, *supra* note 131, at 101. For more extensive treatment of ISO standards’ interplay with international trade law, see Delimatsis, *supra* note 121; Filippo Fontanelli, *ISO and Codex Standards and*

Next, consider the legal landscape of corporate compliance today. In the wake of scandals that rocked the corporate world and the global financial system during the 2000s, governments enacted laws requiring firms to adopt internal controls and strengthen their compliance programs.²⁴¹ Some governments, such as the UK, went further by passing laws that punish organizations for “failing to prevent” misconduct, a charge that they can meet by pointing to the existence of robust compliance measures as an affirmative defense.²⁴² For their part, various courts have required corporations to implement compliance programs as part of their criminal sentences.²⁴³ Furthermore, in American corporate law, the influential Delaware courts have held that a corporate board has a good faith obligation “to implement an information and reporting system to allow the board to monitor the legal compliance of the corporation.”²⁴⁴ This fiduciary duty has solidified compliance’s place on corporate boards’ agendas, even if the liability standard that attaches is almost impossibly hard for plaintiffs to meet.²⁴⁵ Finally, prosecutors worldwide have done more than any legislature or court to shape the legal landscape of compliance. Through their use of deferred and non-prosecution agreements, this landscape has decidedly become one of settlement rather than prosecution.²⁴⁶ Scholars have long debated the merits of this now-prevailing prosecutorial strategy,²⁴⁷ but what is undisputedly clear is that these agreements have given prosecutors wide latitude to require organizations to adopt compliance programs and even implement specific

International Trade Law: What Gets Said is Not What’s Heard, 60 INT’L & COMPAR. L.Q. 895 (2011); Lim & Prakash, *supra* note 120.

²⁴¹ Coglianese & Nash, *supra* note 114, at 575; *see also* Hess, *supra* note 188, at 318–19 (discussing the enactment of the Sarbanes-Oxley Act in 2002 and the Dodd-Frank Act in 2010).

²⁴² *See* Bribery Act 2010, c. 23, § 7 (U.K.) (criminalizing the “[f]ailure of commercial organisations to prevent bribery” and establishing an “adequate procedures” defense); Liz Campbell, *Corporate Liability and the Criminalisation of Failure*, 12 LAW & FIN. MKTS. REV. 1, 7 (2018) (analyzing these developments in the U.K.). For criticism of the U.K.’s apparent openness to organizations using compliance with private anti-bribery certification standards to assert an “adequate procedures” defense, *see* Chen, *supra* note 23, and sources collected *supra* note 117.

²⁴³ *See* Philip A. Wellner, Note, *Effective Compliance Programs and Corporate Criminal Prosecutions*, 27 CARDOZO L. REV. 497, 502 n.18 (2005) (collecting and discussing criminal antitrust cases).

²⁴⁴ Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 VAND. L. REV. 2013, 2015 (2019); *accord* Stone v. Ritter, 911 A.2d 362, 365, 369–70 (Del. 2006); *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996).

²⁴⁵ Hess, *supra* note 188, at 329; Pollman, *supra* note 244, at 2025.

²⁴⁶ *See generally* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS (2014).

²⁴⁷ *Compare, e.g.*, William S. Laufer & Alan Strudler, *Corporate Crime and Making Amends*, 44 AM. CRIM. L. REV. 1307, 1317 (2007) (“Making-amends, understood as *ex ante* adopting a compliance program and *ex post* paying reparations, is an inadequate basis for excusing a firm from punishment.”), and David M. Uhlmann, *Deferred Prosecution Agreements and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 MD. L. REV. 1295, 1302 (2013) (arguing that deferred prosecution agreements “limit the punitive and deterrent value of the government’s law enforcement efforts and extinguish the societal condemnation that should accompany criminal prosecution”), with Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 203 (2016) (criticizing prosecutorial abuse of deferred prosecution agreements while submitting that such agreements “are vital to the government’s effort to deter criminal misconduct by publicly held firms”).

structural reforms overseen by external monitors.²⁴⁸

When one considers these legal aspects of compliance alongside ISO's new compliance standards, many complementarities and opportunities for synergistic integration seem possible. First, agencies could incorporate these ISO standards—as they have with many others—by reference into regulations, perhaps those covering industries or activities in which organizational misconduct has been most pronounced or worrisome. Second, governments could require organizations to obtain ISO-certified compliance, anti-bribery, or whistleblowing management systems before being able to participate in their public procurement bidding processes (or as an express condition within the public contracts themselves).²⁴⁹ Public contracting is an area of considerable corruption risk in many parts of the world, and ISO certification could conceivably help governments and companies mitigate this risk.²⁵⁰ There may even be an opportunity to capitalize on ISO standards' close relationship with the WTO, perhaps by using certification as a means of operationalizing language in the WTO's Revised Agreement on Government Procurement that obliges signatories to “prevent corrupt practices” in public procurement.²⁵¹ Third, in shareholder derivative actions, courts could consider corporations' adherence to or contravention of certifiable ISO compliance standards when assessing whether corporate directors or officers have breached their fiduciary duties.²⁵² Finally, courts and prosecutors could take ISO certification into account in criminal matters involving corporations. This has been the most commonly proposed integration of ISO compliance standards and the law, with many asserting that ISO 37001 certification should entitle corporations to more lenient treatment or even an affirmative

²⁴⁸ See Anthony S. Barkow & Rachel E. Barkow, *Introduction*, in *PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT* 1, 1–3 (Anthony S. Barkow & Rachel E. Barkow eds., 2011).

²⁴⁹ Similarly, private sector actors could contractually require business partners, their agents, and others in their supply chain to obtain ISO compliance certification. For discussion on compliance provisions in private contracts, see Jeffrey R. Boles, *The Contract as Anti-Corruption Platform for the Global Corporate Sector*, 21 U. PA. J. BUS. L. 807 *passim* (2019); Scott Killingsworth, *The Privatization of Compliance*, in *TRANSFORMING COMPLIANCE: EMERGING PARADIGMS FOR BOARDS, MANAGEMENT, COMPLIANCE OFFICERS, AND GOVERNMENT* 1, 7 & n.33 (2014).

²⁵⁰ See generally TINA SØREIDE, *CORRUPTION IN PUBLIC PROCUREMENT: CAUSES, CONSEQUENCES AND CURES* (Chr. Michelsen Inst. ed., 2002) (discussing these risks at length).

²⁵¹ I merely note this possibility given the close ties between ISO and the WTO. Further research is needed to explore the merits of this idea and what it would look like in practice. For discussion on the anti-corruption provisions in the Revised Agreement on Government Procurement, see generally Luciana Dutra de Oliveira Silveira, *Can the WTO Bring More Teeth to the Global Anticorruption Agenda?*, 53 J. WORLD TRADE 129 (2019); Chang-Fa Lo, *Making the Anti-Corruption Provisions in the New Government Procurement Agreement under the WTO Operable*, 7 TRADE L. & DEV. 21 (2015).

²⁵² See Stavros Gadinis, *International Compliance Regimes*, in *THE CORPORATE CONTRACT IN CHANGING TIMES* 319, 325–26 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019) (arguing that international standards could be used in this fashion to evaluate *Caremark* duty of good faith claims); see also Peter Molk & D. Daniel Sokol, *The Challenges of Nonprofit Governance*, 62 B.C. L. REV. 1497, 1521 (2021) (arguing that ISO compliance standards “incentivize boards . . . to take their monitoring duties seriously”); David Orozco, *Compliance by Fire Alarm: Regulatory Oversight through Information Feedback Loops*, 46 J. CORP. L. 97, 131–32 (2020) (claiming that ISO 37001 certification “allows deficiencies within a compliance system to be reported back to the firm’s board [and] top management”).

defense if they run afoul of transnational bribery law.²⁵³ Indeed, some governments, most notably Brazil in its dealings with Novonor (Odebrecht), have recently conditioned settlement agreements on the attainment of ISO certification.²⁵⁴ In sum, it appears that there is no shortage of ways to incorporate ISO's new compliance standards into contemporary compliance law.

2. The Social Responsibility Agenda

Another crucial piece of the compliance landscape is largely extra-legal in nature. It involves efforts “to instill strong ethical values and cultures within firms.”²⁵⁵ Such efforts go beyond a narrow focus on purely legal compliance by employing insights from organizational ethics to promote upstanding behavior and, increasingly, the pursuit of prosocial objectives purporting to serve the common good. This “values-based” aspect of compliance has long been acknowledged, but its prominence has risen substantially in recent years due to renewed interest in reevaluating the purpose of corporations and the reasons why they owe (or do not owe) obligations to non-shareholder constituencies.²⁵⁶ Indeed, the compliance landscape is now replete with acronyms amounting to a veritable alphabet soup of prosocial agendas—CSR (corporate social responsibility), ESG (environmental, social, and governance practices and metrics), and SRI (socially responsible investing), to name a few.²⁵⁷ Together, the popularity of these agendas demonstrates the significant degree to which talk of values, ethics, and broader societal considerations have permeated contemporary compliance practice.²⁵⁸

These values-driven and social responsibility-oriented initiatives constitute another area in which ISO standards appear to complement current compliance trends. In recent decades, ISO standard-setting has shifted from

²⁵³ See, e.g., Fernando Cevallos & Brian Mich, *ISO 37001 is Here. Will It Work?*, FCPA BLOG (Oct. 17, 2016, 12:28 PM) <https://fcpublog.com/2016/10/17/iso-37001-is-here-will-it-work/>.

²⁵⁴ See *supra* notes 4–9 and accompanying text.

²⁵⁵ Joseph W. Yockey, *The Compliance Case for Social Enterprise*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 10 (2014).

²⁵⁶ See Donald C. Langevoort, *Cultures of Compliance*, 54 AM. CRIM. L. REV. 933, 942 nn.46–47, 946 nn.72–74 (2017) (collecting authorities on values-oriented approaches to compliance). For excellent reviews of the literature on corporate purpose, see Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 TEX. L. REV. 1309 (2021); Dorothy S. Lund & Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563 (2021).

²⁵⁷ Hannah Foltz, *The Language of CSR: What Your Words Say About Your Company*, DESANTISBREINDEL (May 7, 2019), <https://www.desantisbreindel.com/insights/the-language-of-csr/>.

²⁵⁸ See Griffith, *supra* note 25, at 2124–25 (arguing that compliance requires “corporate engagement with social issues” beyond those required by law and shareholder primacy norms); David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT’L L. 334, 382, 396–97 (2011) (describing the emergence of “a new phase of corporate compliance” in which human rights, social change, and “a stakeholder-sensitive strategy” play prominent roles); see also Baer, *supra* note 62, at 958–59 (noting that compliance entails conformity with ethical norms); Veronica Root Martinez, *More Meaningful Ethics*, 2020 U. CHI. L. REV. ONLINE 53, 62 (arguing that firms should more explicitly integrate ethical considerations into their compliance programs).

a singular focus on esoteric technical issues to a more wide-ranging set of interests in value-laden areas such as environmental sustainability, social responsibility, and now governance and anti-corruption policy.²⁵⁹ This shift dovetails with recent prosocial trends in compliance in that both seek to foster “a more ‘civic’ view of the role of a corporation” within society.²⁶⁰ As such, ISO’s newest compliance-related standards would seem to present a promising set of tools for organizations seeking to enhance the prosocial and public-regarding aspects of their compliance agendas.

3. Testing and Data Analytics

A third notable trend in compliance today is the heightened emphasis placed on testing and data analytics.²⁶¹ This trend can be attributed to three different sets of actors. First, government enforcement authorities have increasingly stressed the importance of data-driven testing, risk assessments, and evaluation tools in their guidance documents.²⁶² Second, a burgeoning industry of compliance consultants has readily marketed its capabilities in these areas to potential corporate clients, many of whom have eagerly enlisted their consulting services.²⁶³ Third, compliance scholars have adamantly called for firms and regulators to employ more sophisticated data collection, measurement, and testing methodologies to better assess and empirically validate the effectiveness of compliance programs.²⁶⁴ In general, these scholars have bemoaned the lack of progress made to date on transforming corporate compliance into more of an evidence-based discipline,²⁶⁵ and many of them have provided thoughtful recommendations for rectifying this state

²⁵⁹ See Virginia Harper Ho & Stephen Kim Park, *ESG Disclosure in Comparative Perspective: Optimizing Private Ordering in Public Reporting*, 41 U. PA. J. INT’L L. 249, 254, 265 (2019) (discussing ISO’s ESG and CSR agendas).

²⁶⁰ MURPHY & YATES, *supra* note 86, at 70.

²⁶¹ See U.S. DEP’T OF JUST., CRIM. DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS *passim* (2020), <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

²⁶² See, e.g., *id.* (noting that prosecutors, in their evaluation of a corporation’s compliance program, consider whether the corporation tests various aspects of its compliance program); CRIM. DIV., U.S. DEP’T OF JUST. & ENF’T DIV., U.S. SEC. & EXCH. COMM’N, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 60, 66 (2d ed. 2020), <https://www.justice.gov/criminal-fraud/file/1292051/download> (listing risk assessments and periodic testing among the factors comprising an effective FCPA compliance program). But see Brandon L. Garrett & Gregory Mitchell, *Testing Compliance*, 83 LAW & CONTEMP. PROBS. 47, 60–64 (2020) (discussing these documents’ shortcomings, particularly their lack of specific guidance on what to test and how to test it).

²⁶³ See, e.g., *Risk Management and Monitoring*, PWC, <https://www.pwc.com/us/en/services/consulting/risk-regulatory/risk-management-monitoring/managed-monitoring-testing.html> (last visited Oct. 29, 2022). See generally Tanina Rostain, *The Emergence of ‘Law Consultants’*, 75 FORDHAM L. REV. 1397, 1404–07 (2006) (describing the rise of the compliance consulting industry).

²⁶⁴ See, e.g., Garrett & Mitchell, *supra* note 262; Hess, *supra* note 188; William S. Laufer, *The Missing Account of Progressive Corporate Criminal Law*, 14 N.Y.U. J.L. & BUS. 71 (2017); Eugene Soltes, *Evaluating the Effectiveness of Corporate Compliance Programs: Establishing a Model for Prosecutors, Courts, and Firms*, 14 N.Y.U. J.L. & BUS. 965 (2018).

²⁶⁵ See Garrett & Mitchell, *supra* note 262, at 50 (“[I]t is a pervasive problem that we lack metrics to evaluate whether compliance programs . . . actually reduce underlying violations.”); Laufer, *supra* note 264, at 81 n. 28 (“It is remarkable and yet true that systematic reviews of corporate crime deterrence research reveal no systematic evidence of effectiveness.”).

of affairs.²⁶⁶

As with other compliance trends, certain aspects of ISO's compliance standards appear to complement the general push for more measurement and testing of compliance programs. Like recent governmental guidance documents, the standards call for organizations to monitor, measure, analyze, and evaluate their compliance programs.²⁶⁷ The standards also allow for external scrutiny and verification of these operations through ISO's third-party certification system.²⁶⁸ These features, taken together, would seem to provide interested organizations with a promising framework for testing their programs and then using third-party inspection as a means to validate and improve them. In addition, William Laufer has suggested more generally that ISO's compliance standards could contribute to the development of a more "systematic compliance science."²⁶⁹ In his view, ISO standards constitute one piece of "an impressive [global] convergence . . . of models, measures, metrics, data, analytics, standards, committed compliance professionals, relevant compliance scholarship, and vast firm resources dedicated to promoting compliance and good governance[.]"²⁷⁰ This convergence would seem to present a promising opportunity for organizations to employ ISO standards in tandem with other more data-driven models and metrics, all in the service of promoting a more empirically driven and evidence-based paradigm of compliance.²⁷¹

B. Critiquing Notions of Complementarity and Synergy

1. Legalizing Standards-Based Compliance

So far, this Part has focused on the apparent complementarities and potential synergies that may exist between ISO compliance standards and various aspects of compliance law, policy, and practice. While the seemingly natural fit between ISO's standards and these areas is intuitively appealing, the remainder of this Part will demonstrate that these connections are not nearly as clear-cut or obviously beneficial as they initially appear. Here, the discussion will begin with the notion of integrating ISO compliance standards with compliance law, which would in effect give these voluntary standards a certain degree of legal bite that they would ordinarily lack. The "hardening" or "legalization" of private (soft law) standards is an interesting and understudied topic within compliance scholarship, although it is beyond the scope of this Section to comprehensively examine this phenomenon or the

²⁶⁶ See e.g., Garrett & Mitchell, *supra* note 262, at 84 (advocating for greater use of data analytics, experiments, blind tests, and random sampled audits); Soltes, *supra* note 264, at 993–1000 (discussing the promise of regression-based modeling techniques).

²⁶⁷ E.g., ISO 37001 § 9.1 (section entitled, "Monitoring, measurement, analysis and evaluation").

²⁶⁸ Certification, ISO, <https://www.iso.org/certification.html> (last visited Oct. 30, 2009).

²⁶⁹ Laufer, *supra* note 264, at 127–28.

²⁷⁰ *Id.* at 93.

²⁷¹ See *id.* at 93–95.

specific merits of each potential avenue for soft law/hard law integration.²⁷² Instead, the purpose of this Section is comparatively modest—to show that it is far from certain that beneficial synergies will necessarily result from the interplay between legal mechanisms and ISO compliance standards. Indeed, as a general matter, there are at least two concerns that cast doubt on the desirability of “legalizing” ISO standards: (1) rigidity and (2) opacity.

First, there is the risk that giving ISO compliance standards legal weight will rigidify ISO compliance in ways that undercut its underlying rationale and the expected value of adopting the standards in the first place. As Eric Orts once observed, “the motivation behind the adoption of a compliance program may mute its effect.”²⁷³ By formally requiring (e.g., in procurement regulations) or incentivizing (e.g., through a compliance defense or consideration in a fiduciary duty analysis) organizations to obtain ISO compliance certification, governments could effectively crowd out the voluntaristic and “beyond legal compliance” motivations that are supposed to lead organizations to adopt ISO compliance management systems. In so doing, legalized ISO compliance may lead organizations to rigidly focus on doing whatever is minimally required to “‘go by the book’ instead of searching for ongoing improvements,” even though continuous improvement is meant to be a hallmark of ISO standard-setting.²⁷⁴ In fact, by transforming ISO certification from a voluntary option to a more rigid legal mandate or incentive, governments may end up compelling organizations to obtain certification even when there are alternatives that may be better options for strengthening their compliance programs. These possibilities demonstrate the potential drawbacks of governmental efforts to alter ISO standards’ traditionally flexible and market-driven orientation, efforts that may not only overly rigidify ISO compliance programs but may also themselves be quite rigid and difficult to modify.²⁷⁵

Second, the notoriously opaque nature of ISO standards also problematizes notions of seamlessly and synergistically integrating ISO compliance standards with compliance law. Some sources of opacity have already been discussed, such as the manifold obscurities surrounding ISO certification and expertise, both of which raise serious concerns about prosecutors and courts relying on certification as a basis for granting

²⁷² See Cafaggi, *supra* note 239, at 47–48; see also *supra* Part III.A (outlining potential avenues of soft law/hard law integration).

²⁷³ Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1283 (1995).

²⁷⁴ Cary Coglianese & Jennifer Nash, *Environmental Management Systems and the New Policy Agenda*, in *REGULATING FROM THE INSIDE: CAN ENVIRONMENTAL MANAGEMENT SYSTEMS ACHIEVE POLICY GOALS?* 1, 9 (Cary Coglianese & Jennifer Nash eds., 2001) (citation omitted); see also Wirth, *supra* note 131, at 93 (observing that ISO standards may function as a legal “ceiling” that stifles innovation and creative problem-solving).

²⁷⁵ See Strauss, *supra* note 235, at 506 (noting that ANSI/ISO standards, once they have been incorporated into binding regulations, can be difficult to modify and therefore may remain on the books long after their relevancy has expired).

leniency.²⁷⁶ Another source of opacity is the copyright status of ISO standards, which means that the standards must be purchased before one is able to obtain their full text.²⁷⁷ This poses a problem for those interested in incorporating ISO compliance standards into mandatory regulations or referencing them in remediation agreements because these forms of legalization generate tension between “the public’s right to freely access the law and the private copyrights of standards developers.”²⁷⁸ Indeed, attempting to link copyrighted ISO compliance standards with public legal instruments in these ways would seem to “def[y] any notion of public openness and transparency.”²⁷⁹ Such opacity is concerning, not least because of the central role that transparency plays in anti-corruption efforts in particular.²⁸⁰

2. Ossifying Values-Based Compliance

Another notion to problematize is that ISO compliance standards, in light of ISO’s increasingly prosocial agenda, will necessarily complement and contribute to the popular emphases on values and social responsibility found in the corporate compliance domain. These synergies are far from certain. “CSR and ESG lack a clearly defined connection to compliance,” and recent research has generated mixed and ultimately inconclusive findings on the relationship between these constructs.²⁸¹ Furthermore, the very nature of compliance management systems casts serious doubt on the likelihood of a synergistic relationship. Management systems operate according to a different script from CSR and ESG, one that is less about prosocial behavior and stakeholderism and more about systematic prevention, rule-following, and box-ticking.²⁸² Far from bolstering values-based compliance, then, a management systems approach may actually ossify it. In fact, to the extent that a recently certified organization enjoys an uptick in socially responsible behavior or a decrease in problematic organizational behavior, these outcomes may be more attributable to the underlying values that prompted the organization to adopt the ISO compliance management system in the first

²⁷⁶ See *supra* notes 156, 199–226 and accompanying text.

²⁷⁷ See generally *Privacy and Copyright*, ISO, [https://www.iso.org/privacy-and-copyright.html#:~:text=All%20content%20on%20ISO%20Online,are%20also%20protected%20by%20copyright.\(last visited Oct. 30, 2022\)](https://www.iso.org/privacy-and-copyright.html#:~:text=All%20content%20on%20ISO%20Online,are%20also%20protected%20by%20copyright.(last%20visited%20Oct.%2030,%202022);%20Why%20Charge%20for%20Standards?); *Why Charge for Standards?*, ANSI, https://share.ansi.org/shared%20documents/ANSI%20Position%20on%20Protection%20of%20Copyright%20for%20Standards%20Referenced%20into%20Public%20Law/Why_Charge_for_Standards.pdf (last visited Jan. 20, 2023) [<https://perma.cc/M5HU-62HT>].

²⁷⁸ Emily S. Bremer, *On the Cost of Private Standards in Public Law*, 63 U. KAN. L. REV. 279, 283 (2015); see Strauss, *supra* note 235, at 503 (noting that incorporated standards “are merely identified by name and source” and are largely bereft of content).

²⁷⁹ Delimatsis, *supra* note 121, at 325.

²⁸⁰ See Frederick Schauer, *Transparency in Three Dimensions*, 2011 U. ILL. L. REV. 1339, 1349, 1352–53 (discussing the role of transparency in anti-corruption efforts).

²⁸¹ Elizabeth Pollman, *Corporate Social Responsibility, ESG, and Compliance*, in THE CAMBRIDGE HANDBOOK OF COMPLIANCE, *supra* note 26, at 662, 663.

²⁸² See Coglianese & Nash, *supra* note 114, at 571; Gerard I.J.M. Zwetsloot, *From Management Systems to Corporate Social Responsibility*, 44 J. BUS. ETHICS 201, 201, 206 (2003).

place rather than (perhaps even despite) the workings of the system itself.²⁸³

3. Impeding Evidence-Based Compliance

A final potential complementarity to consider is that between ISO compliance standards' measurement and testing requirements, on the one hand, and the heightened prominence of testing and data analytics in the compliance domain, on the other. This apparent connection, however, is superficial at best and unlikely—absent changes to the ISO system—to result in any systematic advances in evidence-based compliance science.²⁸⁴ First, ISO compliance standards replicate the failings of current governmental guidance in that they do not give any meaningful guidance regarding what organizations should measure, how they should measure it, and ultimately how they should test and validate their compliance management systems.²⁸⁵ For instance, ISO 37001 unhelpfully states that organizations could monitor their compliance performance by considering the “effectiveness of training,” “effectiveness of controls,” or “the status of [their] culture of compliance.”²⁸⁶ Conspicuously absent from this language is any indication as to how organizations might measure “effectiveness,” assess “culture,” or even begin to conceptualize these terms as an initial matter.

Second, the open-ended and deferential nature of ISO compliance standards means that organizations will likely employ a wide array of measurement and testing techniques, many of which may not be predicated on or oriented toward the development of evidence-based compliance practices. Consider again ISO 37001, which gives organizations free rein to determine “what needs to be monitored and measured;” “the methods for monitoring, measurement, analysis and evaluation[;]” “when the monitoring and measuring shall be performed;” “when the results from monitoring and measurement shall be analysed and evaluated;” and “to whom and how such information shall be reported.”²⁸⁷ Essentially, these provisions merely require an organization to have some sort of process or mechanism in place to measure and evaluate its compliance program, no matter how superficial or empirically suspect it might be.

The point here is not to make a case against organizations having the flexibility to craft their own approaches to compliance measurement and testing. Rather, the point is that the sheer level of flexibility afforded to ISO-certified organizations in this regard, coupled with the highly deferential nature of third-party certification, make it unlikely that ISO compliance standards will, in their current form, meaningfully contribute to a global

²⁸³ Coglianese, *supra* note 79, at 30; Coglianese & Nash, *supra* note 114, at 586–87.

²⁸⁴ See *infra* Part IV (proposing modifications).

²⁸⁵ Coglianese, *supra* note 79, at 26.

²⁸⁶ ISO 37001, Annex A (informative), A.19.

²⁸⁷ *Id.* § 9.1.

“compliance convergence” or answer recent calls for a more evidence-based compliance science.²⁸⁸ These standards may well impede progress in this direction, with organizations adopting them more out of hope in their effectiveness rather than on the basis of actual evidence of effectiveness.²⁸⁹

C. Upshot: Clickbait Connections

As in Part II, this Part demonstrated that certain seemingly attractive aspects of ISO standard-setting are likely to underdeliver on their apparent promise. The account here examined ISO’s compliance agenda in the context of compliance’s recent ascendancy, focusing on particular aspects of the burgeoning compliance agenda that ISO’s new standards appear to complement. While such linkages initially seemed to promise much in terms of potential synergies, further analysis casted serious doubt on these propositions. These assumed connections, in other words, likely amount to yet another form of clickbait compliance.

IV. IMPROVING ISO COMPLIANCE: FROM SILOS TO NETWORKS

Between “clickbait functions” and “clickbait connections,” this Article has presented a skeptical account of ISO’s new anti-corruption and compliance standards. However, such skepticism does not necessarily preclude improvement. This Part charts one possible path forward in this regard. It first observes how ISO’s current system exacerbates clickbait concerns by perpetuating *compliance silos* that limit the transmission and evaluation of compliance-related information. It then proposes that ISO could address these problems—and partially curb clickbait concerns in the process—by implementing a mandatory disclosure and feedback regime. This regime would harness the untapped potential of ISO’s multi-tier, expert-driven structure to create national and global *compliance networks* dedicated to a more evidence-based approach to international compliance standard-setting.

A. Exacerbating Clickbait: Compliance Silos

Although the organizations that adopt ISO standards are crucial to ISO’s viability as a global institution, there is very little linking these organizations with each other or, for that matter, most aspects of the ISO system. Decentralized, deferential governance is ISO’s *modus operandi*.²⁹⁰ Such flexibility can be beneficial to the extent that it lets organizations craft their compliance management systems in a manner that accords with their

²⁸⁸ *Contra* Laufer, *supra* note 264, at 87–96.

²⁸⁹ See Garrett & Mitchell, *supra* note 262, at 48 (criticizing “hope-based compliance”); cf. Lawrence A. Cunningham, *The Appeal and Limits of Internal Controls to Fight Fraud, Terrorism, and Other Ills*, 29 J. CORP. L. 267, 269 (2004) (“[C]ontrols are increasingly designed according to whether they can be audited, not according to whether they are likely to be effective.”).

²⁹⁰ Delimatsis, *supra* note 121, at 273.

particular needs, objectives, and constraints. However, this framework also promotes a myopic and one-dimensional focus on the preferences of individual certified organizations. This focus produces *compliance silos*, meaning that organizations are able to craft their ISO compliance measures as they see fit without participating in the dissemination or systematic evaluation of information about whether the standards actually work.²⁹¹ These silos stymie meaningful learning about compliance program effectiveness as well as meaningful appraisals of the standards themselves.²⁹² In so doing, they exacerbate concerns that ISO's new compliance standards are apt to overpromise and underdeliver.

Importantly, it is not the case that there is absolutely no sharing or evaluation of compliance-related information in the ISO ecosystem. Instead, the issue is that the information sharing requirements currently in place are minimal, open-ended, and not structured in a manner conducive to evidence-based compliance. First, consider the third-party certification system. Its mere existence implies that there must be some degree of information sharing; certifiers, after all, must be making their decisions on the basis of *some* modicum of information. However, annual certification audits tend to be quite deferential and need not involve much by way of data collection, evaluations of organizations' compliance measurement and testing methodologies, or any other empirical assessments that would help organizations improve their compliance programs.²⁹³ Furthermore, the results of these certification audits are confidential, making it difficult for other actors (i.e., other organizations, other certifiers, accreditors, or central ISO) to learn from them and improve their own compliance measures or monitoring duties.²⁹⁴

Second, consider ISO's Systematic Review process. At least every five years, ISO standards are reviewed to determine whether they are "up-to-date and globally relevant."²⁹⁵ This Systematic Review process is "currently the only systematic way for the ISO Central Secretariat" to obtain information on how a given ISO standard has been implemented, and it gives the technical committee that developed the standard an opportunity to confirm its validity, revise it, or withdraw it from circulation.²⁹⁶ Systematic Review begins with

²⁹¹ Currently, the ISO system does not require certified organizations to disclose substantive information about their compliance management systems to ISO national standard-setting bodies, central ISO, or other certified organizations. See, e.g., ISO 37001 § 9.1(f) (stating that organizations can decide "to whom and how" they will report information about their anti-bribery management systems).

²⁹² Cf. Kayvan Alikhani, *The Rise of Risk Silos: How to Unify Risk and Compliance Management*, FORBES (July 21, 2021), <https://www.forbes.com/sites/forbestechcouncil/2021/07/21/the-rise-of-risk-silos-how-to-unify-risk-and-compliance-management/?sh=2ed7af1a4f23> (discussing the related concept of "risk silos" within enterprises and the obstacles they pose to data integration and compliance generally).

²⁹³ See *supra* notes 213–15, 291 and accompanying text.

²⁹⁴ Lytton & McAllister, *supra* note 138, at 316–17.

²⁹⁵ INT'L ORG. FOR STANDARDIZATION, GUIDANCE ON THE SYSTEMATIC REVIEW PROCESS IN ISO 1, 3 (2019), <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100413.pdf>.

²⁹⁶ *Id.*

ISO's various national standard-setting bodies, which obtain input from stakeholders and experts in their respective countries about how a standard is being used.²⁹⁷ After aggregating and considering their input, the national standard-setting bodies fill out a questionnaire and cast a national vote on whether the standard should be confirmed, amended, or withdrawn.²⁹⁸ The ISO technical committee responsible for developing the standard then reviews these votes and questionnaires before making the ultimate decision about the standard's status.²⁹⁹

While this process might generate some information about how ISO's compliance standards are used, it likely will not spur any major progress toward a more evidence-based approach to compliance. The requirement for national standard-setting bodies to obtain input from national experts and stakeholders is open-ended in that this "input" may only consist of anecdotal rather than empirical evidence about the standard's use.³⁰⁰ In addition, the questionnaire that national standard-setting bodies fill out consists of general questions about how organizations have adopted the standard or whether it has been nationally adopted or incorporated into regulations.³⁰¹ None of these questions are conducive to obtaining meaningful data on how ISO compliance standards are working for the organizations that adopt them. As for the ISO technical committee, its main focus during Systematic Review is whether a standard is "relevant"—i.e., whether it is being used in at least five countries—and not whether there is any evidence of actual efficacy.³⁰² Thus, ISO's Systematic Review process is unlikely to generate the kind of systematic evidence that would foster a more evidence-based compliance science.

B. Curbing Clickbait: Compliance Networks

One solution to ISO's non-evidence-based compliance silos would be to employ the following strategy. First, there should be more frequent sharing of the right kinds of information between actors throughout the ISO system. The "right kinds of information" would include information amenable to empirical evaluation, namely data from organizations' measurement and testing of their ISO-certified compliance management systems. Second, there must be opportunities for actors in the ISO system to harness their technical expertise to systematically evaluate this information and provide feedback regarding which compliance measures work and do not work in particular contexts. This Section outlines how ISO could implement this twofold

²⁹⁷ *Id.* at 7, 13.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 7–8, 13.

³⁰⁰ *Id.* at 18–23.

³⁰¹ *Id.*

³⁰² *Id.* at 9.

strategy.³⁰³ Ultimately, this modified ISO framework would help organizations counteract troublesome information silos and potentially engage in more meaningful learning and compliance program experimentation, reducing clickbait concerns as a result.³⁰⁴

As an initial step, ISO should establish a mandatory disclosure requirement for all organizations with certified compliance management systems. To satisfy this requirement, organizations would need to report more than just descriptive information about their programs (e.g., whether they have training programs or a whistleblower hotline in place). Specifically, the mandatory disclosure regime would require organizations to report information that is susceptible to empirical evaluation, including (1) what they measure; (2) how they measure it; (3) measurement results; (4) how they evaluate the effectiveness of their compliance programs; and (5) the results of periodic compliance testing.³⁰⁵ Records from the organizations' certification audits, following appropriate redaction and anonymization, would also be disclosed. All of this information would be anonymized and reported on an annual basis to the national standard-setting body of the country in which the disclosing organization is operating. The national standard-setting body would then provide this information, along with a report summarizing and

³⁰³ One prominent compliance practitioner has suggested that an empirical examination of ISO compliance standards, specifically ISO 37001, “would be a good place to start the pursuit of evidence-based compliance” and “is too good an opportunity to be wasted.” Chen, *supra* note 156, at 2.

³⁰⁴ On these issues, see DAVIS, *supra* note 44, at 55–56 (arguing that the global anti-corruption regime has fallen short in its efforts to promote experimentalist governance); JOHNSTON & FRITZEN, *supra* note 51, at 36 (criticizing ISO for treating organizations in an “isolated yet isomorphic” fashion); Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 266–67, 272–74 (2020) (discussing information silos and the problems they present for corporate compliance). Given their emphasis on context-specific learning and experimentation, the proposed modifications to the ISO framework draw heavily upon insights from the “democratic experimentalism” and “new governance” literatures. See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); David M. Trubek & Louise G. Trubek, *New Governance and Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539 (2006); see also Light, *supra* note 61 (citing related scholarship).

³⁰⁵ This mandatory disclosure requirement mirrors Professors Garrett and Mitchell's proposal that governments should require companies to disclose information about their compliance measurement and testing efforts. Garrett & Mitchell, *supra* note 262, at 77–78; see also Griffith, *supra* note 25, at 2138–39 (advocating for disclosure-based compliance reforms). Importantly, as Garrett and Mitchell recognize, companies may be hesitant to disclose certain compliance-related information unless they have assurances that their disclosures will not be used against them in future litigation. Garrett & Mitchell, *supra* note 262, at 48 (arguing that mandated compliance disclosures should be “paired with a privilege focused on compliance validation data and a rule against use of mandated compliance reports in litigation”). For this reason, it may well be that for a “soft law” disclosure requirement from ISO to ultimately be viable, governments will first need to lay the “hard law” foundations by developing appropriately tailored rules shielding certain kinds of disclosures from use in later litigation. The merits and contours of such a policy are beyond the scope of this Article. See *id.* at 74–77 (discussing the limits and potential drawbacks of compliance-related privileges). For now, it is sufficient to note that greater information dissemination and more rigorous evaluation of compliance-related data within the ISO ecosystem, however these objectives might best be achieved (e.g., through redactions, by not requiring disclosure of particularly sensitive information such as individual instances of misconduct, etc.), are critical to learning more about how (and whether) ISO-certified compliance management systems actually work. See *id.* at 77 (outlining the kinds of disclosures that could be required).

evaluating it, to the technical committee at central ISO overseeing the pertinent standard. These recommendations would result in more frequent and meaningful reporting about compliance practices, successes, and challenges at both the national and global levels of the ISO system.

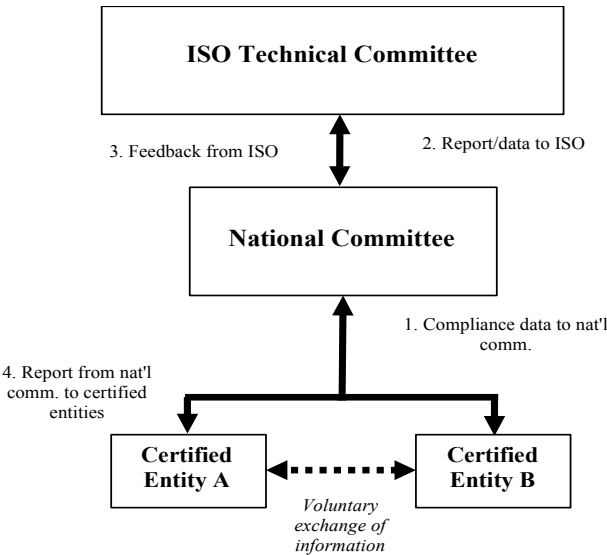
Beyond annual mandatory disclosures, steps must also be taken at the national and global levels to ensure that the information is systematically evaluated and regular feedback is provided to promote continual learning and compliance improvements. At the domestic level, national standard-setting bodies should create national committees to evaluate the use of ISO compliance standards in their countries. Such committees already exist in other areas, and they should consist of a mix of compliance experts and representatives from government, industry, and civil society.³⁰⁶ This mix of actors would ensure that the committee has the subject-matter and methodological expertise necessary to analyze compliance data and produce empirically based recommendations. It would also help spread insights about current compliance practices, challenges, and recommendations to representatives from multiple sectors. The national committees would provide an annual report to all certified organizations in their respective countries summarizing current compliance trends as well as empirical insights from compliance data collected from the past year. This system of annual disclosure and feedback would give rise to national networks dedicated to the advancement of evidence-based compliance.³⁰⁷ It may also promote greater information sharing and collective action among certified organizations.³⁰⁸

³⁰⁶ See generally INT'L ORG. FOR STANDARDIZATION, GUIDANCE FOR ISO NATIONAL STANDARDS BODIES 23–28 (2019), <https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100269.pdf> (describing the role of National Mirror Committees, which “mirror” the technical committees at central ISO, in the standards development process).

³⁰⁷ See *infra* Fig.1.

³⁰⁸ See Garrett & Mitchell, *supra* note 262, at 78–79 (promoting “compliance cartels,” or voluntary information sharing arrangements between firms); Nichols, *supra* note 65, at 1342–49 (suggesting that ISO certification could bolster anti-corruption collective action efforts).

FIGURE 1. ANNUAL DISCLOSURE AND FEEDBACK NETWORK

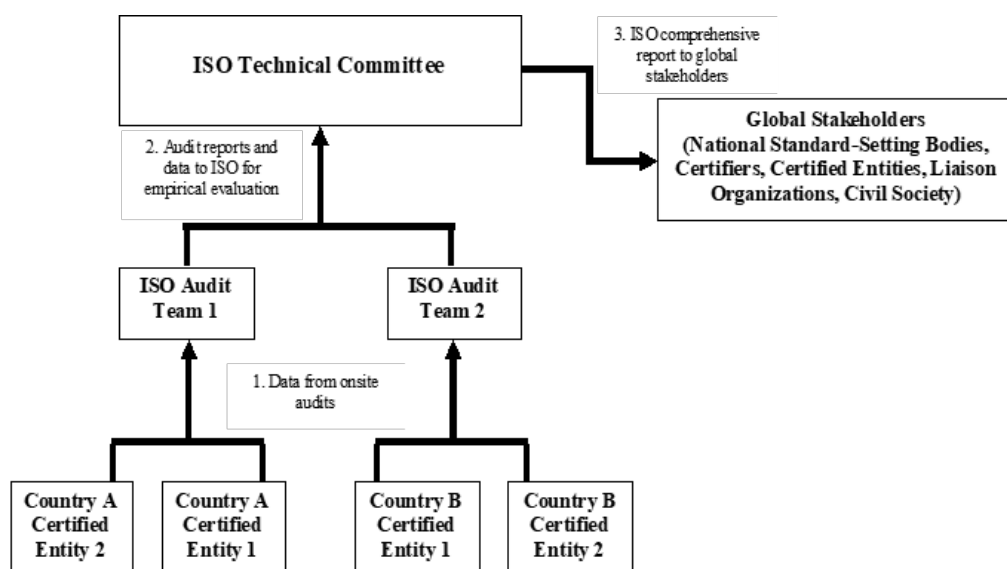


At the global level, the technical committees that developed ISO’s compliance standards should engage in two different forms of information evaluation and feedback. First, on an annual basis, they should review the annual reports submitted to them by the various national committees. The purpose of this review would be twofold: (1) to ensure that the technical committees are kept up to date on recent ISO compliance developments and (2) to identify and address any problems with the national committees’ analyses. Second, the technical committees should engage in a less regular yet more comprehensive empirical assessment of ISO’s compliance standards. This analysis could be conducted roughly every five years as part of a revamped Systematic Review process. It would span multiple countries and industries, and it would be based on data collected by teams of ISO auditors during the course of extensive onsite audits of different ISO-certified compliance management systems. The audited organizations would not have to pay for the audits, and their purpose would not be to assess conformity but rather to facilitate learning about what makes the implementation of ISO compliance standards more or less effective.

In terms of process, each audit team would be assigned to a small number of ISO-certified organizations in a given country. The teams would collect data on different features of these organizations’ compliance management systems (potential independent variables) and compliance-related outcomes (potential dependent variables). Then, they would report this data back to the relevant technical committee at central ISO, which would

analyze the data empirically to better understand where, why, and how ISO compliance management systems have proven to be more or less successful. If sample sizes are too small to conduct such analyses, at a minimum the committee could engage in qualitative inference by employing a matched case study approach to compare differences in compliance management system features among similarly situated organizations.³⁰⁹ ISO's committees would use these empirical findings to conduct a more rigorous Systematic Review of ISO compliance standards, culminating in decisions to confirm, revise, or even withdraw them from circulation. The committees would also compile these findings in a comprehensive report to be distributed for educational purposes to ISO's national standard-setting bodies, other technical committees, certified organizations, accreditors, accredited certification bodies, liaison organizations, and civil society groups. Ideally, the end result would be a global network of information dissemination, assessment, and reflection that enhances evidence-based compliance worldwide (see Figure 2).

FIGURE 2. MODIFIED SYSTEMATIC REVIEW NETWORK



³⁰⁹ See generally CARY COGLIANESE, ORG. FOR ECON. CO-OPERATION & DEV., MEASURING REGULATORY PERFORMANCE: EVALUATING THE IMPACT OF REGULATION AND REGULATORY POLICY 7, 49 (2012) (describing this approach).

C. Implications

1. For ISO Anti-Bribery and Compliance Standards

If ISO were to adopt these recommendations, over time the growth of evidence-based compliance networks may reduce some of the “clickbait functionality” concerns that ISO 37001 and its progeny raise. For instance, these compliance networks should bolster ISO 37001’s systematic function by making it more likely that organizations, as they learn more about what compliance measures work and do not work, will implement systematic approaches to mitigating bribery that are more effective and rooted in empirical evidence. Second, certified organizations’ participation in these compliance networks should enhance the symbolic value of ISO 37001 because the choice to partake in such a disclosure regime would help convey the seriousness of the organizations’ commitments to the global anti-corruption enterprise. Finally, regular information disclosure and feedback should improve the standard’s signaling function by gradually producing greater clarity about the meaning of certification and—thanks to the disclosure of redacted certification audit reports—enhancing the credibility of certification audits.

Of course, this Part’s recommendations are not a panacea. For instance, risks related to ISO’s far-flung certification system and the potential for “merely symbolic” compliance would all remain, among others. However, if adopted, these recommendations would help mitigate at least some of these concerns.

2. For Compliance Law, Policy, and Practice

A move toward evidence-based compliance networks would also create opportunities for ISO compliance standards to eschew “clickbait connections” and better complement various aspects of compliance law, policy, and practice. For instance, such networks would contribute to the recent push for more rigorous compliance measurement and testing. They might also complement the push for a more prosocial and values-based compliance agenda to the extent that they present an opportunity for organizations to participate in a global initiative dedicated to helping actors throughout the world learn about more effective approaches to compliance. Finally, to the extent that these networks produce evidence showing which aspects of ISO compliance management systems work best under particular circumstances, governments could use this information as a basis for linking the standards with compliance law. For example, such information could provide greater clarity as to what kinds of measures an ISO-certified organization should have in place before public procurement contracts are awarded or, in the event of prosecution, leniency is considered.

D. *Limitations and Obstacles*

This Part's proposal is not without stumbling blocks. First and foremost, overpromise-and-underdeliver concerns will surely persist to some extent due to lingering and potentially intractable issues regarding, *inter alia*, the meaning and consistency of certification, the expertise of certifiers and ISO technocrats, and openings for “merely symbolic” or superficial compliance.³¹⁰ For those inclined to ditch ISO standard-setting, this acknowledgement provides more than enough justification. For those who are not, however, the proposal presents a way of reforming the ISO system so that its standards are more likely to add real value to the organizations that adopt them. At a minimum, it would provide a better framework for evaluating the effectiveness or ineffectiveness of ISO's new compliance standards over time—something even skeptics (this author included) should embrace. In fact, for that reason, this proposal should be of interest to legal scholars in other areas where ISO standards hold special significance (e.g., environmental law, international trade, forensics, privacy, and administrative law).³¹¹

Second, Central ISO and some national standard-setting bodies may lack sufficient resources to implement every aspect of the proposed compliance networks. Even so, it is highly unlikely that all actors in the ISO ecosystem will find these proposals infeasible. For one, the most resource-intensive proposals would occur much less frequently than those requiring fewer resources. Indeed, routine assessments of disclosed information would occur every year whereas more extensive onsite audits would occur roughly every five years. For another, minor adjustments could be made to enhance feasibility, such as reducing the frequency of national compliance reports from an annual to a biennial basis.

Third, it will likely be difficult to determine what kinds of data to collect and what kinds of methodologies would be most appropriate for analyzing that data. These are significant concerns, but it is unlikely that they will completely thwart efforts to identify useful compliance data and assess it given recent strides in empirical compliance scholarship.³¹² Finally, one

³¹⁰ See *supra* Part II.B–C (discussing these issues at length).

³¹¹ See, e.g., Coglianese, *supra* note 79 (environmental law); Delimatsis, *supra* note 121 (international trade); Brandon L. Garrett, *The Costs and Benefits of Forensics*, 57 HOUS. L. REV. 593, 611–12 (2020) (forensics); Lachaud, *supra* note 145 (privacy); Strauss, *supra* note 235, at 553–55 (administrative law).

³¹² See Benjamin van Rooij & Melissa Rorie, *Measuring Compliance: The Challenges in Assessing and Understanding the Interaction between Law and Organizational Misconduct*, in MEASURING COMPLIANCE, *supra* note 23, at 1, 8–15 (providing an overview of different compliance measurement methodologies); Soltes, *supra* note 264, at 992–1000 (identifying different types of data and statistical approaches for evaluating the effectiveness of compliance programs). But see Donald C. Langevoort, *Caremark and Compliance: A Twenty-Year Lookback*, 90 TEMP. L. REV. 727, 730 (2018) (arguing that reliable quantitative metrics that answer the most fundamental questions about compliance remain “elusive”).

might worry about the prominent role played by national standard-setting bodies in the proposed compliance networks. These entities might not have sufficient expertise to provide meaningful feedback, and one might also question the credibility of such bodies in historically corrupt contexts. While these are valid concerns, the proposed compliance networks would give ISO committees and their auditing teams regular opportunities to check the work of the national standard-setting bodies and thereby mitigate some of these risks.

Admittedly, measurement is not everything, and attempts at empirically assessing compliance will always have drawbacks and limitations.³¹³ However, this does not mean that such efforts, whether at ISO or elsewhere, are pointless. All it means is that compliance scholars and practitioners “need to think of how best to accomplish [their] unique goals and what [methodological] trade-offs are worth making.”³¹⁴

CONCLUSION

By providing the first systematic examination of ISO’s growing compliance agenda, this Article makes three primary contributions to legal scholarship. First, it shows that the standards themselves—as illustrated by ISO 37001 in the context of transnational corruption—promise much but are unlikely to deliver on their purported functions in many respects (“clickbait functions”). Second, it examines ISO’s new agenda within the context of compliance’s ascendancy more generally, demonstrating that seemingly promising connections between ISO’s new compliance standards and compliance-related laws, practices, and trends are unlikely to materialize or automatically produce desirable synergies (“clickbait connections”). Third, it describes how ISO could curtail at least some of these “clickbait compliance” concerns by implementing a mandatory information disclosure and feedback regime, a proposal that scholars and practitioners examining ISO standards in areas outside anti-corruption and compliance should also find appealing. As ISO’s compliance agenda develops, and as more companies and governments adopt its standards, scholars and compliance professionals will need to take a closer look at their potential benefits and

³¹³ See, e.g., Bengt Holmström, *Pay for Performance and Beyond*, 107 AM. ECON. REV. 1753, 1766–68 (2017) (discussing the potential dangers of prioritizing certain tasks simply because they are measurable or relatively easy to measure); Langevoort, *supra* note 312, at 730 (“[M]easurement tools regarding ‘ethical climate’ can be helpful but leave open the question of what, precisely, to do about any dark clouds.”); Philip M. Nichols & Patricia E. Dowden, *Maximizing Stakeholder Trust as a Tool for Controlling Corruption*, 71 CRIME L. & SOC. CHANGE 171, 177 (2019) (discussing the difficulty of measuring compliance-related phenomena such as “ethical culture” and citing scholarship cautioning against attempts to “reduce to simple measures complex global phenom[en]a”).

³¹⁴ van Rooij & Rorie, *supra* note 312, at 19; see also Cary Coglianese, *Building Better Compliance*, 100 TEX. L. REV. ONLINE 192, 213 (2022) (arguing that the “key” to building better corporate compliance in the future “will be to collect data, conduct experiments, and undertake rigorous evaluations to learn what alternative interventions make a positive difference”); Langevoort, *supra* note 256, at 970 (acknowledging the limitations of compliance metrics while maintaining that such criticisms are “hardly damning”).

drawbacks as well as how (and whether) to improve them. Their viability as a compliance tool and anti-corruption strategy depends on it.