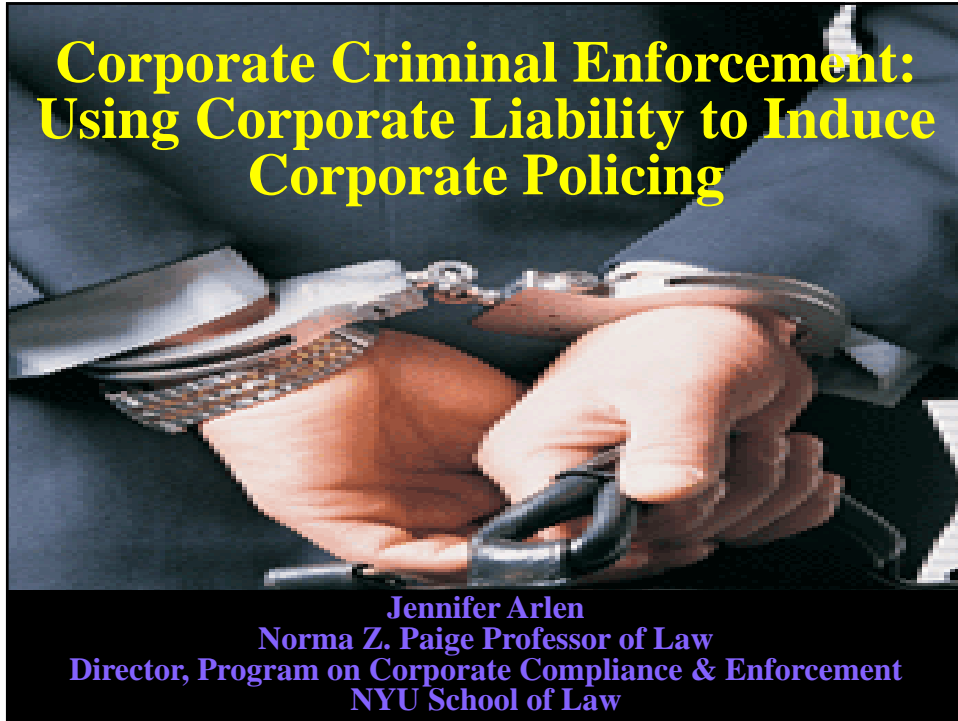


# Corporate Criminal Enforcement: Using Corporate Liability to Induce Corporate Policing



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## Central Questions

**Assuming that countries want to deter corruption:**

- **Must Corporations Face Criminal Liability for Bribes by Employees?**
- **How should liability be structured?**
  - Strict liability (senior managers vs employees)
  - Compliance Defense
  - Focus on Self-reporting and Cooperation

## Joint Corporate and Individual Liability

### Corporate Crime

- **Corporate Crimes are Committed by Individuals When They Benefit from Doing So:**
  - Employees often are motivated to cross the line by compensation, promotion, retention policies that reward good results and punish under-performance
  - Corporate Control of Employees is Imperfect
- **Individuals Should be Held Liable**
  - Threat of termination is not enough
    - People who fear job loss if they do *not* bribe will not be deterred by threatened termination if there is a chance they will not get caught
  - **Bribe payers and bribe recipients should be liable**

## Why Individual Liability Is Not Enough

- **Individuals are not deterred if they do not expect to be caught**
  - People ignore low probability events
- **Individual Liability Alone Won't Deter**
  - **Benefit of crime is large**
  - **Probability of detection small**
    - Corporate crimes hard to detect
    - Hard to know who is responsible
    - Hard to prove intent (where required)

## Why Individual Liability Is Not Enough

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**Solution:**

- (1) Reduce Benefit of crime
- (2) Increase Risk of Conviction

- **Employee** ... **more likely to be caught**

## Important Role for Corporations

- **Control Benefit to Employees of Bribery**
  - Can alter promotion, compensation, retention to reduce incentives to commit crime
- **Increase Employees' Risk Criminal Punishment**
  - Effective Compliance Program that Detects
  - Investigate Suspected Wrongdoing
  - Self-reporting
  - Cooperation

## Goals of Corporate Liability

- **Induce Firms to Reduce Benefit of Bribery**
  - Compensation Reform
- **Induce Measures that Deter Bribery**
  - Compliance Procedures
- **Incentivize Firms to Help Prosecutors**
  - Detect Misconduct
  - Investigate to Obtain Evidence
  - Self-report
  - Cooperate to Provide Evidence to Government

## **Inducing Self-Reporting & Cooperation**

- **Self-Reporting/Cooperation Vitaly Important**
- **Bribery Offers Significant Benefits**
  - Bribes => Success Overseas => Bonuses and Good Career
- **Absent Self-Reporting, Threat of Criminal Liability Does Not Deter**
  - Low Risk of Detection by Government
  - People view low probability = zero probability
- **Corporation Well Positioned to Detect and Obtain Evidence**
  - **Self-reporting & Cooperation Creates Real Threat**

## **Implications for Corporate Liability**

- **Government Cannot Deter Effectively Absent Corporate Liability**
- **Corporate Liability Must Be Structured so that Firms Are Better Off if They Help the Government Detect Crime by**
  - Adopting Effective Compliance
  - Investigating
  - Self Reporting
  - Cooperating

## Standard Liability Regimes

- Firm is Not Liable At All
- Firm is Liable only If Senior Manager in Directing Mind Committed the Crime
- Firm is Liable for Wrongdoing by All Employees in Scope of Employment
- Firm Liable If Not Adopt & Maintain Effective Compliance Program

## Standard Liability Regimes

- None of These Regimes Induce Self-Reporting because Self-Reporting Does Not Benefit the Firm
- **If No Liability:** No Reason to Self-Report
- **If Automatically Criminally Liable** for either Crime or Ineffective Compliance then Liability is a Reason to **NOT** self-report
- Firm should keep quiet, hope the government does not detect, and later cooperate if its beneficial

## Additional Concern for Regimes with Compliance Defense or Directing Mind Liability

- **Both Types of Regimes Fail to Hold Firms Liable for Many Crimes**
  - Directing Mind: Crimes by Regular Employees (eg Sales)
  - Crimes Committed Notwithstanding Effective Compliance
- **Absent Liability: Firms Keep Benefit of These Crimes**
- **Incentive to Structure Employees Incentives to Encourage “Outcomes” at any Cost**
  - While Singing the Song of Compliance

## Self-reporting Must Affect Corporate Liability

- **Government Must Ensure that Firms Are Better Off if Self-Report & Fully Cooperate**
  - Must affect form of resolution and sanctions
- **Benefit Must be Large**
  - Liability if Report: Guaranteed Sanction
  - Liability if Not Report: Fine is Discounted by Probability Government Will Detect on its Own
- **Formal: Need Sanction if self-report (S):**
  - $S < \text{Fine} * \text{Probability Gov't Detects on Own}$   
*If P is 25% S must be 1/4 of the criminal fine*

## Duties with Multi-Step Liability

- **Criminal Liability with High Fine + Monitor**
  - Detect but not self-report, refused to fully cooperate
  - Not Detect, Ineffective Compliance, not cooperate
- **DPA with Monitor**
  - Not detect; Ineffective Compliance; Cooperates
  - Effective Compliance; Not Cooperate
- **D/NPA with no monitor**
  - Full Cooperation; Not Detect; Ineffective Compliance;
- **Disgorgement Only (= benefit crime)**
  - self-reported, fully cooperated, good compliance

## Conclusion

- **Corporate Liability is needed to deter crime**
- **Liability Must be Structured So Firms Are Better Off if They Self-report & Cooperate**
- **Corporations Should Not be Held Strictly Liable for Bribery or Ineffective Compliance**
- **Self-reporting (& Cooperation) Should Insulate Firm From Collateral Penalties, Largest Sanctions and Monitors**
  - Failure to Report Detected Wrongdoing Should Lead to Enhanced Sanctions, Monitors etc.



**Questions**

**Extra Slides**

## Optimal Approach

- **Impose “Corporate Policing” Duties on Firms**
  - Adopt Effective Compliance Program
  - Investigate & Respond to Detected Misconduct
  - Self-report Detected Misconduct
  - Fully Cooperate by Providing Evidence on Individuals’ Misconduct
- **Structure Punishment to Reward Corporate Policing**

Self-reporting, cooperation, compliance should affect

  - Form of sanction: criminal, DPA/NPA, declination, Civil
  - Imposition of Outside Monitor
  - Magnitude Financial Penalty
  - Whether Collateral penalty Imposed

*Must Guarantee Better Outcome if Self-report than if only Cooperate*
- **Firms Must Always Disgorge All Profits from Crime**

## Comparison with US System

- **No duty to self-report or cooperate (usually)**
- **Too much discretion: Little guaranteed benefit for self-reporting relative to full cooperation**
  - Firms that detect wide-spread wrongdoing likely to get a DPA or NPA if they fully cooperate whether or not they self-report
    - If cooperation is important to prosecutor and conviction would trigger collateral penalties
- **Fine Reduction (25% => 50%) not large enough to encourage self-reporting of hidden misconduct**
- **Individual Liability Still Needs to be Enhanced**

## Disadvantages of Complete Compliance Defense

- **No Self-Reporting or Cooperation**
  - Firms with Effective Compliance Will Not
    - Self-Report
    - Fully Cooperate
- **Inadequate Internal Deterrence**
  - Firms Compensation Will Not Need to Deter Corruption if Firms with Effective Compliance Retain Corrupt Profits
- **Increased Enforcement Costs**
  - Gov't needs to specify ex ante what counts as effective compliance.