Corporate Criminal Enforcement: Using Corporate Liability to Induce Corporate Policing

Jennifer Arlen
Norma Z. Paige Professor of Law
Director, Program on Corporate Compliance & Enforcement
NYU School of Law

Central Questions
Assuming that countries want to deter corruption:

• Must Corporations Face Criminal Liable 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)

Solution:

1. Reduce Benefit of crime
2. Increase Risk of Conviction

- Employees ignore sanctions if unlikely 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 Vitally Important**
- **Bribery Offers Significant Benefits**
  - Bribes $\Rightarrow$ Success Overseas $\Rightarrow$ 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

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 Liability 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 (e.g., 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):**
  - \( S < \text{Fine} \times \text{Probability Gov’t Detects on Own} \)

*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 widespread 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

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<td>– Firms with Effective Compliance Will Not</td>
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<td>• Self-Report</td>
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<th>• Inadequate Internal Deterrence</th>
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<td>– Firms Compensation Will Not Need to Deter Corruption if Firms with Effective Compliance Retain Corrupt Profits</td>
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<th>• Increased Enforcement Costs</th>
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<td>– Gov’t needs to specify ex ante what counts as effective compliance.</td>
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