Deterring Corporate Crime: Effective Principles for Corporate Enforcement

**Sponsored by:** NYU Program on Corporate Compliance and Enforcement
American Law Institute

**Faculty Organizer:** Jennifer Arlen, Norma Z. Paige Professor of Law, NYU School of Law and Co-Director, NYU Program on Corporate Compliance and Enforcement

**Conference Motivation**
To be effective, corporate criminal and civil enforcement must deter wrongdoing by corporations and the employees operating within them. To do this, criminal and civil liability ideally should ensure that crime does not pay: individual and corporate sanctions ensure that neither firms nor individual wrongdoers expect to benefit from corporate crime and securities fraud. In the case of publicly held firms, corporate liability also should encourage firms to help deter wrongs and sanction wrongdoers. Accordingly, in addition to the retributive concerns, corporate liability should be structured to encourage effective corporate compliance, reporting, cooperation, and whistleblowing. This requires a sophisticated blend of criminal and civil liability aimed at corporations and individuals that punishes wrongdoing while rewarding good behavior. It also may require a complex blend of sanctions, including structural reforms that operate as a form of firm-specific regulation.

The Department of Justice, individual U.S. Attorney Offices, and the Securities and Exchange Commission have each developed policies designed in part to achieve these aims, as well as others. These policies have evolved across time and also differ across offices. They also converge in some ways and differ in others policies proposed by academics studying the area.

**Conference Goal:**
The goal of the conference is to bring together academics, enforcement officials, defense lawyers to discuss criminal and SEC enforcement policy for individuals and firms. The goal is to identify the central goals of enforcement and consider how enforcement policy can best be structured to achieve these goals, with a view toward encouraging potential convergence on what principles might govern the most important issue concerning enforcement of white collar crimes (including securities fraud). These include the appropriate scope and content of corporate criminal liability (including oversight liability imposed on parent firms), appropriate mandates to impose through D/NPAs, the appropriate scope of individual liability (including the use of oversight liability and debarment to reach senior officers), liability for securities fraud, FCPA liability (focusing on the application to overseas defendants and parent firms) and principles to govern government interaction with private investigations (either internal investigations of firms or external by qui tam relators).

**Conference Structure: Invitation only; Chatham House Rules (no press)**
The conference is a 1.5 day, invitation only, conference involving academics, enforcement officials, defense lawyers, in-house lawyers. Each session will involve a panel of experts who will discuss specific proposals and issues guided by a moderator who will encourage the panelists to determine central points of convergence and disagreement, with a view towards identifying the factors that should be most important in making particular enforcement decisions. The panelists will present their views which will be followed by a discussion with the audience, who are encouraged to be active participants, both in asking questions and suggesting solutions.
Conference Program
New York University
Lester Pollack Conference Room
245 Sullivan Street (9th Floor)

Chatham House Rules
Participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.

Friday April 4, 2014
8:20-8:45: Breakfast and Registration
8:45-9:00 Opening Remarks

9:00-9:30 Corporate and Individual Criminal Liability: Theory and Evidence
• Brandon Garrett, Empirical Analysis of Corporate Criminal Enforcement (12)
• Jennifer Arlen, Structuring Corporate and Individual Liability to Deter Corporate Crime

9:30-10:50 Corporate Enforcement: Deciding Whether to Prosecute or Grant Leniency/DPA
What factors should determine whether a firm is indicted, convicted or gets leniency (including a DPA or NPA)? The US Manual lists many relevant criteria, but which should be determinative? What goals should guide the decision? Should DPAs ever be granted firms that detected wrongdoing and failed to report it? Should full cooperation be a necessary condition for a DPA or NPA? What should that entail? What factors should determine a prosecutor's decision to accept a plea? When should enforcement fall on subsidiaries instead of parent firms, and vice versa? What role should collateral consequences or the fear of the Arthur Andersen effect play?

9:30-10:20 Panel discussion (5 panelists) (50 min.)
Moderator: Reinier Kraakman, Harvard Law School
Denis J. McInerney, former Deputy Assistant Attorney General, Criminal Division, Dept. of Justice
Bonnie Jonas, Deputy Chief of the Criminal Division and Assistant United States Attorney, U.S. Attorney’s Office for the Southern District of New York
Judge Jed Rakoff, U.S. District Judge, Southern District of New York
Lanny Breuer, Partner, Covington & Burling; former Assistant Attorney General for the Criminal Division, Dept. of Justice
Eric Grossman, General Counsel, Morgan Stanley

10:20-10:50 Questions/Discussion with Conference Participants (30 minutes)

10:50-11:05 Coffee break

11:05-12:30 Non-Monetary Corporate Sanctions: Appropriate use and content of structural reforms and monitorships
This panel will discuss (1) what goals and specific factors should determine the decision of whether to impose a structural reform, such as a compliance program or monitorship, (2) what considerations should govern the nature of the compliance program imposed (including whether it should conform to
the Sentencing Guidelines, (3) what types of structural reforms should not be used, (4) when is external oversight (such as a monitorship) warranted, and (5) what can enforcement officials do to ensure that the compliance programs imposed are effective.

11:05-12:00 Panel Moderator: Jennifer Arlen, NYU School of Law
Jeff Knox, Chief, Fraud Section Criminal Division, Department of Justice
Judge John Gleeson, U.S. District Judge, Eastern District of New York
Mark Mendelsohn, Partner, Paul, Weiss, Rifkind, Wharton & Garrison; former deputy chief of the Fraud Section of the Criminal Division, Dept. of Justice
Mark Califano, Senior Vice President and Managing Counsel, American Express
Cindy Alexander, former economist, Department of Justice

12:00-12:30 Questions and Discussion (30 minutes)*

12:30-2:15 Lunch
Keynote Speaker Preet Bharara, United States Attorney for the Southern District of New York, Lipton Hall in D’Agostino, New York University

2:20-3:45 Individual Liability: Appropriate Form, Scope and Reach
How do prosecutors and enforcement officials approach individual liability and how should they approach it? When should prosecutors proceed against individuals? Which ones? What sanctions are appropriate? To what extent and when should prosecutors and civil enforcement authorities sanction senior executives for oversight failures. To what extent should enforcement authorities make greater (or lesser) use of debarment and clawbacks on the one hand and consent decrees (with neither admit nor deny) on the other.

2:20-3:15 Panel Moderator: Dan Richman, Columbia Law School
Mythili Raman, former Acting Assistant Attorney General, Criminal Division, Department of Justice
Andrew Ceresney, Director, Division of Enforcement, Securities and Exchange Commission
Judge Gerard Lynch, U.S. Court of Appeals for the Second Circuit
Scott Muller, Davis Polk and Wardwell, New York
Sam Buell, Professor of Law, Duke Law School

3:15-3:45 Questions and Discussion

3:45-4:00 Coffee Break

4:00-5:45 Securities and Financial Fraud Enforcement
This panel will consider three topics: 1) corporate liability: When should firms be subject to formal enforcement action for securities fraud, accounting fraud or insider trading? Should they ever get complete leniency if they fail to self-report? Is Neither Admit nor Deny Appropriate? How should collateral consequences and civil liability affect the enforcement decision? What is the existing SEC practice concerning individual and corporate liability? 2) Individual liability of senior officials: What approach should be used when it appears senior officers are responsible for the wrong but cannot be charged? What is the appropriate reach of liability for oversight failures? Should it be limited to situations where it appears the officer knew about the wrong? What test for “reasonable” oversight
should be employed—conformity with compliance programs imposed on other firms through DPAs, compliance with the Sentencing Guidelines, or other measures. 3) Standards to govern debarment.

4:00–4:15 Securities and Financial Fraud Enforcement
   • Michael Klausner, Empirical Analysis of Securities Fraud Enforcement Actions (12)

4:15–5:10 Panel Moderator: Michael Klausner
   George Canellos, Global Head, Litigation Department, Milbank, Tweed; former Director, Division of Enforcement, Securities and Exchange Commission
   Daniel Alter, General Counsel for the NYS Department of Financial Services
   Judge Raymond Lohier, U.S. Court of Appeals for the Second Circuit
   Robert Khuzami, Partner, Kirkland and Ellis; former Director of Enforcement, Securities and Exchange Commission.
   Steve Cutler, Executive Vice President and General Counsel, J.P. Morgan Chase & Co.; former Director of Enforcement, Securities and Exchange Commission.

5:10–5:40 Questions and Discussion

5:40–6:00 Reception

6:00–8:00 Dinner
   • Keynote Speaker: Leslie Caldwell, nominated Assistant Attorney General, Criminal Division, Dept. of Justice

Day 2 Saturday April 5, 2014

8:30–9:00 Breakfast

9:00–10:40 Foreign Corrupt Practices Act: Extending Liability Beyond Borders and Beyond Corporate Veils
This panel will examine existing enforcement policy relating to the FCPA and then will discuss optimal enforcement policy in a context distinguished by the possibility of enforcement actions in multiple countries. The panel will focus on four issues: (1) When should parent firms be sanctioned (or subject to D/NPAs) for bribes by subsidiaries and what considerations should govern the choice between leniency, D/NPA, and conviction (including collateral consequence); (2) when, if ever, is it appropriate to sanction a firm without imposing criminal liability on the individuals responsible; (3) when should liability be imposed on individuals living and bribing overseas; and (4) when should individual liability be imposed on senior executives of either the subsidiary or the parent for knowing failures to disclose suspected wrongdoing on the firm’s books and records or for oversight failures.

9:00–9:15 Steve Choi, Empirical Evidence on FCPA Enforcement

9:15–10:10 Panel Moderator: Kevin Davis, Professor of Law, NYU School of Law
   Matthew Queler, Assistant Chief, FCPA Unit, Fraud Section, Criminal Division, DOJ
   Charles Cain, Deputy Chief, FCPA Unit, Securities and Exchange Commission
   Bruce Yannett, Partner, Debevoise & Plimpton, New York
   Andrew Weissmann, fellow, New York University School of Law; former General Counsel, Federal Bureau of Investigations
Bradford A. Berenson, Vice Pres. & Sr. Counsel, Litigation & Legal Policy, General Electric Company

10:10-10:40 Questions and discussion

10:40-10:55 Coffee Break

10:55-12:30 Private Investigation of Public Wrongs: Self-Reporting and Whistleblowing
Investigations of public wrongs increasingly are conducted by private parties acting on behalf of firms seeking to investigate their own employees and potential whistleblowers who increasingly conduct private investigations prior to blowing the whistle. The panelists will first consider how the new whistleblowing provisions and Qui Tam actions affect the design of firms’ compliance systems (e.g., whether to have an internal whistleblower program), and also the decision to self-investigate and self-report. The panel then will consider the implications of private investigations for employees’ rights and the principles that prosecutors should consider when integrating with an on-going private investigation.

10:55-11:10 David Engstrom, Stanford Law School, empirical analysis of Qui Tam

11:10-12:00 Moderator: Julie O’Sullivan, Georgetown Law School

Michael Granston, Director Commercial Litigation Branch, Fraud Section, Civil Division, Dept of Justice

Sheila Cheston, CVP and General Counsel, Northrop Grumman Corp.

Judge Valerie Caproni, U.S. District Court, Southern District of New York; former General Counsel, Federal Bureau of Investigations

Jules Kroll, Founder, K2 Intelligence

Miriam Baer, Associate Professor of Law, Brooklyn Law School; former assistant general counsel for compliance, Verizon Corp.

12:00-12:30 Questions and Discussion

End of Conference

Acknowledgements

Conference Advisory Board:
• Professor Michael Klausner, Stanford Law School
• Professor Dan Richman, Columbia Law School
• Professor Julie O’Sullivan, Georgetown Law School
• Scott Muller, Partner, Davis Polk and Wardwell
• Bruce Yannett, Partner, Debevoise and Plimpton
• Professor Samuel Buell, Duke Law School
• Professor Miriam Baer, Brooklyn Law School
• Professor David Engstrom, Stanford Law School
• Professor Brandon Garrett, University of Virginia School of Law
• Professor Geoffrey Miller, New York University School of Law
• Andrew Weissman
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• American Law Institute

Food at the Conference
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Administrative Assistance
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