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Lectured by

Jennifer H. Arlen '86
Norma Z. Paige Professor of Law

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Materials on Enforcement

Spring 2015

Purposes of Corporate Criminal Liability

Corporate criminal liability: theory and evidence *Jennifer Arlen*

(based on Chapter published in the RESEARCH HANDBOOK ON CRIMINAL LAW (Keith Hylton and Alon Harel, ed.).

In order to understand and assess both the legal rules governing corporate criminal liability (Part C *infra*) and the justifications for and nature of existing federal enforcement practice (Part D *infra*) we must first address the questions, why do we hold corporations liable and why (and when) should this liability be criminal?

Classic accounts identify multiple reasons for imposing criminal liability on those who have committed crimes, including general deterrence, specific deterrence, retribution, and rehabilitation. These goals have relatively straight forward implications for individual liability for crimes committed in the business context. Specifically, the government can deter individually from committing intentional crimes completely by threatening individual wrongdoers with a sanction that ensures that crime does not pay—even when the individual committing the crime is following orders. If the government always detected all crimes, it could deter crime absolutely by imposing a sanction on individual wrongdoers equal to the benefit to the individual wrongdoer of committing the crime. In reality, the government is able to detect and effectively sanction only a fraction of the crimes that occur. Accordingly, in order to ensure that wrongdoer do not expect to benefit from the crime, the sanction imposed must be sufficiently large that the expected sanction—adjusted for the probability of detection—equals or exceeds the expected benefit of crime: Pf > benefit, where P, the probability of sanction, is less than 1. This implies that the optimal sanction (monetary or non-monetary) must impose costs that are greater than or equal to the benefit of the crime to the wrongdoer divided by the probability of sanction (b/P) (Becker 1968).[1] Thus, where a wrongdoer faces only a 25% chance of being caught and convicted, the criminal sanction will not deter him unless it equals or exceeds four times the benefit to him of the crime. This analysis helps explain why sanctions imposed on individuals who commit corporate crimes need to be so high, because the benefit of corporate crimes to wrongdoers is often so high and the probability that corporate crimes will be detected and effectively prosecuted is so low.

This deterrence analysis does not justify corporate criminal liability, however. We often speak as though corporations are people—and recognize them legally as such—yet corporations they are not people. They cannot act except through their individual agents. They do not have any genuine intent

[1] Scholars discussing optimal deterrence in the purely individual crime context (street crimes) have challenged this rational actor approach on the grounds that criminals often are not in a rational frame of mind when they commit crimes, and thus are not optimally deterred by the threat of sanctions. This criticism may well be valid when applied to crimes of passion or crimes committed by addicts or the insane. Yet it does not seem valid in the corporate context (Block, Nold, and Sidak, 1981 (finding that increasing the probability or magnitude of the criminal sanction decreases the probability of antitrust violations); Paternoster and Simpson, 1996). First, unlike most street crimes, corporate crimes generally are committed by people who are employed by a firm, often at a managerial level. The previous business success of most corporate criminals suggests that they are able to make deliberative decisions. Many perpetrators of corporate crimes serve in jobs in which they regularly compare immediate costs/gains against future uncertain rewards/costs (Baer, 2008b, p. 313). Moreover, unlike violent crimes, corporate crimes generally are not committed in the heat of passion, but are committed in a context where deliberation is possible: during the course of the business day, often over an extended period of time, by individuals who have full control of their mental faculties. Finally, perpetrators of corporate crimes are more vulnerable to sanctions. They often have substantial wealth and a valuable reputation that they could lose if convicted. Moreover, they have families who would be hurt. Finally, evidence suggests that corporate crimes are not committed by people living outside the law, but instead are committed by people who succumbed to financial temptation or career pressures (Paternoster and Simpson, 1996, p. 550; Sutherland, 1949 (criminal sanctions can deter corporate crime because managers are well integrated into communities and churches and thus are especially vulnerable to the reputational cost of criminal conviction)).

(separate from that of the individuals who claim to act for them). For these reasons, and others, courts originally concluded that corporations could not be held criminally liable for crimes of those working for them (Khanna 1996). Moreover, given that all corporate crimes are committed by (and induced by) natural persons, there might seem to be little need for corporate liability if we are able to use individual liability to deter corporate criminal behavior. While the preceding analysis suggests that we cannot deter corporate crime unless impose criminal liability on the individual responsible for corporate crimes, closer analysis reveals that we individual liability has important limitations that are best addressed by also imposing (or threatening to impose) criminal liability on corporations whose employees commit crimes. The justifications for corporate liability depend on the type of firm, however, and the differential justifications leads to quite different result concerning how corporate liability should be structured.

1. Crimes by Owner-Managers of Closely-Held Firms

Corporate crimes can be divided into two categories. The first is crimes where individual wrongdoers are truly acting on behalf of the firm, in that the individual committing (or orchestrating) the crime only benefits if the firm benefits, both in the short- and long-run, and also fully suffers any liability costs (including those imposed on the firm) proportionate with his share of the benefit. The second category is crimes committed for private benefit, often at the long-run expense of the firm.

Crimes by owner-managers of closely-held firms generally fall into the first category. Owner-managers tend to commit or induce corporate crimes to increase the firm's profits and benefit from the crime only through the effect of the crime on the value of their shares. In these situations, the individual responsible for the crime benefits only when the firm obtains a long run benefit from the crime, even after all sanctions are imposed.

Strict corporate criminal liability imposed for all crimes committed by corporate employees can be a very effective deterrent in this situation as long as liability is sufficiently high to ensure that shareholders do not expect to benefit from corporate wrongdoing. Corporate liability is an important supplement to individual liability because often owner-managers are too distant from a crime to be prosecuted personally even though they structured corporate operations in ways that they knew would result in their employees violating that law, for example by illegally disposing of hazardous substances. Even when the owner-managers cannot be prosecuted, corporate liability can directly deter such crimes so long as sanctions are sufficiently high to ensure that corporate owner-mangers do not obtain an expected benefit from crime. Accordingly, in this context, the state can optimally deter crime by imposing strict *respondeat superior* liability on the firm for crimes by its owner managers, which ensures that neither the firm nor its owners benefit from any crime for which the social benefit of crime is less than the social cost of the crime. Moreover, in the case of firms with very few owners (which describes most of the firms convicted of federal crimes), the state should not offer the firm leniency in order to induce firms to help detect or investigate crimes because leniency will not produce genuine corporate investigations and cooperation: controlling owner-managers will sacrifice the firm rather than let the firm turn over evidence that might result in the individual being convicted and jailed.

2. Crimes by Employees of Publicly-Held Firms

Crimes committed "by" publicly held firms –specifically by their employees (including managers)—present a very different picture. The story is quite different when crimes are committed by employees who are not controlling owners and managers of the firm, as is the case with managers and other employees of publicly-held firms. Like other corporate criminals, managers and other employees of publicly held firms do not commit crimes unless they expect to benefit from doing so. Yet unlike owners of closely-held firms, employees of publicly-held firms are not primarily seeking a benefit for the *firm*. Indeed, they can benefit from crimes even when the firm (and its shareholders) do not.

All corporate crimes –at least all those that potentially subject a firm to *respondeat superior liability*—benefit the firm, generally by increasing profits (e.g., through ill-gotten sales) or reducing costs (e.g., through insufficient compliance or cost-reducing environmental violations). Yet this benefit is not what *directly* motivates employee wrongdoers. After all, employees and managers bear the risk of individual criminal conviction and yet rarely own a substantial share of a publicly-held firm and thus do not directly share in any benefits conferred on the firm by crime. Instead, individual wrongdoers who commit corporate crimes do so because they are seeking the additional compensation, job security, or promotion that they expect to obtain by committing an undetected crime that benefits the firm.

The divergence between individual and corporate benefits is important because it reveals that the government cannot rely entirely on corporate sanctions to eliminate publicly-held firm employees' incentives to commit corporate crimes. Employees who obtain a promotion or avoid termination through a profit-enhancing crime will continue to benefit from their crime in the long run, even if the crime is eventually detected and the firm is sanctioned, as long as their role remains undetected (or they otherwise remain unsanctioned) (Arlen and Carney 1992; *see* Karpoff et al. 2008a).[2] Thus, we cannot deter crime by large firms unless individuals are held liable.

Nevertheless, we cannot deter such crimes *only* by holding individuals liable. Individual liability will not be effective unless firms also are held liable because crimes committed by employees (especially managers) of publicly held firms can confer such enormous benefits on them –for example, by yielding twenty years of a multi-million dollar salary. Moreover, absent corporate liability, these wrongdoers often could proceed with impunity, confident that the crime would not be detected or that they would not be held responsible. Crimes by large firms are incredibly difficult to detect because the actions that constitute the crime (e.g., issuing misleading financial statements) often appear to be identical to lawful activity (e.g., issuing accidentally incorrect financial statements). Moreover, most involve actions by many people rendering it difficult to identify those truly responsible. Accordingly, if we are to deter corporate crime, we need to reduce the benefit of crime and increase the risk to individuals of the crime being detected and their being sanctions. Publicly-held firms are able to accomplish all of these goals. And the threat of *properly structured* corporate liability is the best way to get them to do so.

3. How Publicly-Held Firms Can Deter Crime

Corporations can be powerful allies in the war against corporate crime, if they so choose. They can affect (1) the benefit individuals obtain from a crime, as well as the *ex ante* direct costs of committing the crime, (2) the likelihood that the crime will be detected and the wrongdoer sanctioned for his crimes, and (3) the magnitude of the sanction imposed. Moreover, firms often can intervene to prevent crime and enhance its probability of sanction more effectively than can the state acting alone.

Corporate prevention: Corporations can deter crime by reducing the direct benefit to employees of committing crime or making crimes more costly to commit. Corporations can reduce the expected benefit of corporate crime by structuring their compensation and promotion policies to ensure that employees faced with poor short-run results do not feel compelled to seek illegal profits in order to save their jobs. For example, many corporate crimes (such as securities fraud) confer apparent short-run benefits on the

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[2] Thus, crimes by publicly-held firms are best characterized as an agency cost (Arlen and Carney 1992; Macey 1991; Paternoster and Simpson 1996, p. 550). Consistent with the hypothesis that crimes by publicly-held firms generally are agency costs that benefit individual wrongdoers, not shareholders, empirical evidence finds that corporate crime is more likely the lower is management's percentage ownership stake in the firm (Alexander and Cohen 1999). Crime also is more likely the larger the firm (Alexander and Cohen 1996), the weaker the firm's internal controls (Baysinger 1991), and the greater the emphasis on short-term financial measures in setting compensation (Hill et al. 1992); *see also* Arlen and Carney 1992 (true securities fraud benefits managers at the expense of the firm's shareholders).

firm, and yet harm the firm in the long-run (Macey, 1991; Arlen and Carney, 1992; Arlen and Kraakman, 1997). Compensation policies that tie employee rewards to short-run results encourage such crimes because employees can benefit from committing such crimes (and can leave before the firm suffers any long-run costs). By contrast, firms that tie employee welfare to long-run performance measures deter such crimes that impose a long-run cost on the firm, even if there is a short run benefit.[3] When it is socially costly to invest in the resources needed to detect and sanction corporate crime, it often will be more socially cost-effective for the firm to restructure its compensation policies to reduce employees' incentives to commit crime, rather than to rely entirely on *ex post* sanctions (Arlen and Kraakman, 1997).

Corporations can make it harder for its employees to commit crimes through policies that increase the number of people the perpetrator would need to involve to accomplish the crime. Firms also can increase the cost of crime by creating a genuine corporate culture of legal compliance that imposes either direct psychological costs on those who commit crimes or increases the likelihood that fellow employees will report suspected wrongdoing (Tyler and Blader, 2005, p. 1153; Conley and O'Barr, 1997).

Of course, firms have little reason to spend money to deter crime unless they profit from doing so. Accordingly, in order to induce firms to intervene to reduce the expected benefit of crime and make it more costly to commit, government authorities must hold them liable (including civilly liable) with liability set at the level that will induce optimal prevention measures. This liability need not (and probably should not) be criminal (Arlen and Kraakman, 1997).

Corporate Policing. Corporations also can deter crime by implementing policing measures that increase the probability that the government detects crimes, identifies the individual wrongdoers, and obtains sufficient evidence to sanction them. Policing deters by increasing the expected cost to individuals of government sanctions for crime, Pf (Arlen, 1994).[4] Firms can intervene in a variety of ways to increase the probability that wrongdoers are criminally sanctioned. They can adopt *ex ante* monitoring programs (compliance programs) designed to both detect crime and collect evidence to obtain a conviction (Arlen, 1994; Arlen and Kraakman, 1997). They also can intervene *ex post*, after a wrong is committed, to investigate suspicious activities, report detected crimes, and cooperate with the government effort to identify and convict the individual wrongdoers (Arlen and Kraakman, 1997).

The social costs of enforcement often are lower when firms assist the state by undertaking corporate policing because firms generally are the lowest marginal cost providers of many types of *ex ante* and *ex post* policing. Large corporations can monitor for crime more effectively and at lower marginal cost than can the state. Firms, in the daily course of operations, already collect and assess massive amounts of information regarding their own operations. As much of its existing information can be used to detect wrongdoing, the marginal cost to the firm of adopting an optimal compliance program often is lower than the marginal cost to the state of a similar program (Arlen, 1994, pp. 839-40). Corporations also are better able to analyze the information obtained because they have expertise concerning their own operations. They can use this expertise to identify areas of opportunity for crime and distinguish normal activities from activities associated with criminal conduct.[5]

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3 Studies show that employees (including officers) are more likely to commit certain crimes when their firms focus on short-term financial returns when evaluating the performance of a division or individual (Hill, et al., 1992, finding that EPA and OSHA violations are more likely when top managers focus on rate of return criteria in evaluating division performance; Cohen and Simpson, 1997; *see also* Smith, et al., 2007). To further exacerbate the problem, employees whose compensation is based on short-term results, and not long-term share value, obtain the full benefit of any boost in apparent profits linked to their crime, without sharing the long-run cost to the firm of any eventual sanction imposed on the firm.

4 Corporate actions that affect the probability that crimes are detected and individuals wrongdoers are convicted, P, are hereinafter referred to as policing measures (Arlen and Kraakman, 1997).

5 One reason corporate policing is needed is that government enforcers detect few corporate crimes (or at least few corporate frauds) on their own. Information on corporate wrongdoing tends to arise from within the firm (Dyck, et al., 2010, p.

In addition, firms often can intervene *ex post* to investigate suspected wrongdoing more cost-effectively than can the state on its own.[6] First, whereas the state must spend resources to determine who to interview, firms know their own chains of authority and have better information on the character of their employees (Arlen and Kraakman, 1997, pp. 691-93, 699; *see* Buell, 2007).[7] Thus, they can more cost-effectively determine who to speak with and can better identify the individuals responsible for crimes. Firms also know their own operations and are better able to distinguish legitimate from illegitimate activities. Finally, firms often can obtain evidence of wrongdoing (including documents, emails, and employee interviews) at lower cost than the state because they know where to look, what to look for, and can access information and employees (*e.g.*, foreign-based employees) more effectively than can the state (Arlen and Kraakman, 1997).

Corporate Liability: Corporate compliance programs and investigations are extremely expensive, however, both directly and when they cause the firm to have to abandon activities that were profitable (albeit criminal). Thus, we cannot rely on firms to actively undertake such measures absent proper motivation. Corporate criminal liability can be structured to provide this motivation—especially when it is imposed for failure to adopt effective compliance programs, self-report and cooperate detection (and accompanied by civil respondeat superior liability) (Arlen & Kraakman 1997).

Thus, corporate liability is an important weapon in the war against corporate crime, but it is not used to directly punish wrongdoers when crimes are committed "by" publicly-held firms (Macey, 1991; Arlen & Carney 1992; Arlen, 1994). Instead, it serves an instrumental purpose to induce firms to take much needed actions to prevent crimes and to help detect them and obtain the evidence needed to sanction wrongdoers. Moreover, since corporate liability serves instrumental goals, it should be properly structured to achieve those goals. There is no reason to impose criminal liability on publicly-held firms whenever their employees commit a crime if doing so would deter the primary purpose of liability: which is to induce firms to adopt the compliance programs and effect the ex post investigations (and self-reporting) needed to detect wrongdoing and obtain the evidence needed to convict individual wrongdoers. There also is little reason to impose corporate liability if the government is not going to use any evidence obtained to convict the individuals responsible for crimes (Arlen 1994; Arlen & Kraakman 1997).

2214 (finding that 20% of detected frauds were brought to light by the firm or its employees)).

[6] For a discussion of why this may not be the case, *see* Baer, 2009, p. 988.

[7] Identifying the perpetrators of corporate crimes can be particularly difficult because corporate crimes often involve actions by many people. Moreover, the person ultimately responsible for causing the crime to be committed often is not the person who committed the physical act that constitutes the crime.

Summary of Organizational Sentencing Guidelines

The Organizational Guidelines provide that the judge should impose a criminal fine on the firm that falls within the "minimum of the guideline fine range" and the "maximum of the guidelines fine range," except in exceptional situations. The minimum and maximum fines are determined by multiplying the "base fine" associated with the offense by the minimum and maximum fine "multipliers," respectively.[8]

The Organizational Guidelines provide that the base fine is the greatest of (1) an amount set forth in the Offense Level Table; (2) the pecuniary gain to the firm from the crime; or (3) the pecuniary loss from the offense, to the extent that the loss was caused intentionally, knowingly, or recklessly (by the employee committing the offense).[9] This base fine is then multiplied by the minimum and maximum multipliers to determine the fine range.

The minimum and maximum multipliers are obtained by calculating the firm's "culpability score." The culpability score is based on a set of factors that go beyond corporate culpability in the sense of corporate shareholder culpability. Instead, culpability is based largely on whether senior management is complicit in the crime or alternatively is attempting to deter corporate wrongdoing by undertaking effective corporate policing. Specifically, in determining the culpability score, each firm starts with 5 points. Points are then added to the culpability score if crime was committed or condoned by anyone within the high-level personnel of the firm or a unit of the firm (if the unit is large), or if tolerance of the offense by substantial authority personnel was pervasive throughout the firm or unit. The number of points added in this situation ranges from 1 to 5 depending on the size of the firm. Firms with 5,000 employees or more have 5 points added to their culpability score in this situation.[10] Points also are added if the firm has a prior history of the offense, violated an order in committing the offense, or obstructed justice.[11]

It is worth noting that for most important crimes, firms with more than 200 employees can expect to start with a culpability score of at least 8. This is because firms with 200 or more employees have 3–5 points added to the base score of 5 if high-level personnel committed the crime or tolerance of the crime by supervisory personnel was pervasive[12] and high-level personnel is broadly defined. It includes anyone who sets "policy" for or "controls" either the firm or the unit affected by the crime (if the unit had 200 or more employees). Supervisory personnel is defined even more broadly. When one considers crimes such as securities fraud, health care fraud, and money laundering, most of these crimes require (or involve) the participation of someone with a considerable degree of authority who can speak for the firm. Thus, many important crimes are likely to trigger the culpability score enhancements that push the unmitigated culpability score over 8.

Firms can obtain a reduction in their culpability score if they adopt an effective compliance program, self-report detected wrongdoing promptly, fully cooperate with the government's investigation, and/or accept responsibility, at least in some circumstances. A firm that satisfies all of the policing duties imposed by the Guidelines can obtain an 8 point reduction in its culpability score. Thus, a large firm (5,000 or more employees) that starts with a culpability score of 10 as a result of managerial complicity in the crime can use policing to get its culpability score reduced to 2. A firm that starts with a culpability score of 5 ends up with an effective score of zero. Firms that adopted an effective compliance program prior to the violation being detected can get a 3 point reduction in the culpability score, provided that they satisfy the other requirements needed to obtain mitigation for monitoring. Firms that self-report promptly, fully cooperate, and accept responsibility are eligible for a 5 point reduction, if they satisfy the other

[8] ORGANIZATIONAL GUIDELINES § 8C2.7.

[9] *Id.* at § 8C2.4.

[10] *Id.* § 8C2.5(a)–(b).

[11] *Id.* § 8C2.5(c)–(e).

[12] *Id.* § 8C2.5(b)(3)

requirements for mitigation. Firms that only fully cooperate and accept responsibility get a 2 point reduction in the culpability score.[13]

The culpability score is important because it determines the minimum and maximum fine multiplier (which is multiplied by the base fine to determine the range of fines to be imposed on the firm). Firms with a culpability score of 10 or more are subject to a fine that is two to four times their base fine (and then other sanctions may be imposed as well). Firms with a culpability score of 5 are subject to a minimum multiplier of 1 and a maximum multiplier of 2. Firms with a culpability score of 0 or less are subject to a minimum multiplier of .05 and a maximum multiplier of .2, implying that, under the Guidelines, each firm faces a criminal fine even if it faithfully satisfies every policing duty.[14]

Analysis of the Organizational Sentencing Guidelines[15]

These tables show how the guidelines affect the expected sanction of a firm, depending on its initial culpability score. Examine this and think about which firms would start with which culpability score. Consider whether you think the correct firms are being given the most mitigation. What would you advise a large firm with a prior history to do given these guidelines.

Table One
Effect of Self-Reporting, Cooperating and Accepting Responsibility (5 pt)

Culpability Score	Unmitigated Multiplier (Min-Max)	Mitigated Culpability Score	Mitigated Minimum Multiplier	Mitigated Maximum Multiplier	Reduction Minimum Multiplier	Reduction Maximum Multiplier
14	2.00–4.00	9	1.80	3.60	10%	10%
13	2.00–4.00	8	1.60	3.20	20%	20%
12	2.00–4.00	7	1.40	2.80	30%	30%
11	2.00–4.00	6	1.20	2.40	40%	40%
10	2.00–4.00	5	1.00	2.00	50%	50%
9	1.80–3.60	4	0.80	1.60	56%	56%
8	1.60–3.20	3	0.60	1.20	63%	63%
7	1.40–2.80	2	0.40	0.80	71%	71%
6	1.20–2.40	1	0.20	0.40	83%	83%
5	1.00–2.00	0	0.05	0.20	95%	90%
4	0.80–1.60	-1	0.05	0.20	94%	88%
3	0.60–1.20	-2	0.05	0.20	92%	83%
2	0.40–0.80	-3	0.05	0.20	88%	75%
1	0.20–0.40	-4	0.05	0.20	75%	50%
0	0.05–0.20	-5	0.05	0.20	0%	0%

13 *Id.* § 8C2.5(b), (f)–(g).

14 *Id.* § 8C2.6.

15 Based on an article by me forthcoming in a symposium in the Miami Law Review.

Table Two
Marginal Benefit of Self-Reporting (3 pt)

Culpability Score	Unmitigated Multiplier (Min-Max)	Mitigated Culpability Score	Mitigated Minimum Multiplier	Mitigated Maximum Multiplier	Reduction Minimum Multiplier	Reduction Maximum Multiplier
14	2.00–4.00	11	2.00	4.00	0%	0%
13	2.00–4.00	10	2.00	4.00	0%	0%
12	2.00–4.00	9	1.80	3.60	10%	10%
11	2.00–4.00	8	1.60	3.20	20%	20%
10	2.00–4.00	7	1.40	2.80	30%	30%
9	1.80–3.60	6	1.20	2.40	33%	33%
8	1.60–3.20	5	1.00	2.00	38%	38%
7	1.40–2.80	4	0.80	1.60	43%	43%
6	1.20–2.40	3	0.60	1.20	50%	50%
5	1.00–2.00	2	0.40	0.80	60%	60%
4	0.80–1.60	1	0.20	0.40	75%	75%
3	0.60–1.20	0	0.05	0.20	92%	83%
2	0.40–0.80	-1	0.05	0.20	88%	75%
1	0.20–0.40	-2	0.05	0.20	75%	50%
0	0.05–0.20	-3	0.05	0.20	0%	0%

Table Three Effect of Cooperating and Accepting Responsibility (2 pt)

Culpability Score	Unmitigated Multiplier (Min-Max)	Mitigated Culpability Score	Mitigated Minimum Multiplier	Mitigated Maximum Multiplier	Reduction Minimum Multiplier	Reduction Maximum Multiplier
14	2.00–4.00	12	2.00	4.00	0%	0%
13	2.00–4.00	11	2.00	4.00	0%	0%
12	2.00–4.00	10	2.00	4.00	0%	0%
11	2.00–4.00	9	1.80	3.60	10%	10%
10	2.00–4.00	8	1.60	3.20	20%	20%
9	1.80–3.60	7	1.40	2.80	22%	22%
8	1.60–3.20	6	1.20	2.40	25%	25%
7	1.40–2.80	5	1.00	2.00	29%	29%
6	1.20–2.40	4	0.80	1.60	33%	33%
5	1.00–2.00	3	0.60	1.20	40%	40%
4	0.80–1.60	2	0.40	0.80	50%	50%
3	0.60–1.20	1	0.20	0.40	67%	67%
2	0.40–0.80	0	0.05	0.20	88%	75%
1	0.20–0.40	-1	0.05	0.20	75%	50%
0	0.05–0.20	-2	0.05	0.20	0%	0%

Impact on Corporate Fine of an Effective Compliance Program (3pt)

Culpability Score	Unmitigated Multiplier (Min-Max)	Mitigated Culpability Score	Mitigated Multiplier	Reduction Minimum Multiplier	Reduction Maximum Multiplier
14	2.00–4.00	11	2.00–4.00	0%	0%
13	2.00–4.00	10	2.00–4.00	0%	0%
12	2.00–4.00	9	1.80–3.60	10%	10%
11	2.00–4.00	8	1.60–3.20	20%	20%
10	2.00–4.00	7	1.40–2.80	30%	30%
9	1.80–3.60	6	1.20–2.40	33%	33%
8	1.60–3.20	5	1.00–2.00	38%	38%
7	1.40–2.80	4	0.80–1.60	43%	43%
6	1.20–2.40	3	0.60–1.20	50%	50%
5	1.00–2.00	2	0.40–0.80	60%	60%
4	0.80–1.60	1	0.20–0.40	75%	75%
3	0.60–1.20	0	0.05–0.20	92%	83%
2	0.40–0.80	-1	0.05–0.20	88%	75%
1	0.20–0.40	-2	0.05–0.20	75%	50%
0	0.05–0.20	-3	0.05–0.20	0%	0%

Standard of Review for Pretrial Diversion Agreements

UNITED STATES v. HSBC BANK USA, N.A. and HSBC Holdings PLC, Defendants.

MEMORANDUM AND ORDER

JOHN GLEESON, District Judge.

On December 11, 2012 the government filed an Information charging HSBC Bank USA, N.A. ("HSBC Bank USA") with violations of the Bank Secrecy Act ("BSA"), 31 U.S.C. § 5311 *et. seq.,* including, *inter alia,* willfully failing to maintain an effective anti-money laundering ("AML") program. *See* Information, ECF No. 3–1. The Information also charges HSBC Holdings plc ("HSBC Holdings") with willfully facilitating financial transactions on behalf of sanctioned entities in violation of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1702 & 1705, and the Trading with the Enemy Act ("TWEA"), 50 U.S.C.App. §§ 3, 5, 16. *See id.*

On the same day the government filed the Information, it also filed a Deferred Prosecution Agreement ("DPA"), a Statement of Facts, and a Corporate Compliance Monitor agreement. The government filed these documents as exhibits to a letter application requesting that the Court hold the case in abeyance for five years in accordance with the terms of the DPA and exclude that time pursuant to 18 U.S.C. § 3161(h)(2) from the 70–day period within which trial must otherwise commence.[1] Gov't Letter, Dec. 11, 2012, ECF No. 3. The DPA provides that if HSBC Bank USA and HSBC Holdings (collectively, "HSBC") comply with its terms and provisions, the government will seek to dismiss the Information after five years.

On December 20, 2012 the parties appeared before the Court for a status conference. At the conference, I indicated that this Court has authority to accept or reject the DPA pursuant to Federal Rule of Criminal Procedure ("Fed. R.Crim.P.") 11(c)(1)(A) and United States Sentencing Guideline ("U.S.S.G.") § 6B1.2.[2] Accordingly, I inquired as to whether, under the rubric of U.S.S.G. § 6B1.2, the DPA adequately reflects the seriousness of the offense behavior and why accepting the DPA would yield a result consistent with the goals of our federal sentencing scheme. I granted the parties leave to respond to these queries in writing.

For the reasons set forth herein, I approve the DPA pursuant to the Court's supervisory power and grant the parties' application to place the case in abeyance for five years pursuant to the Speedy Trial Act. The Court will maintain supervisory power over the implementation of the DPA and directs the government to file quarterly reports with the Court while the case is pending.

A. *The Authority of the Court*

1. *Fed.R.Crim.P. 11(c)(1)(A) and U.S.S.G. § 6B1.2*

In their written submissions to the Court, the parties contest the applicability of Fed.R.Crim.P. 11(c)(1)(A) and U.S.S.G. § 6B1.2 to the DPA.[3] Gov't Mem. in Supp. DPA 2 n. 1, ECF No. 14; Defs.' Letter in Supp. DPA 1–2, ECF No. 15. The parties assert that these provisions apply to cases where a defendant pleads guilty or *nolo contendere* to a charged (or lesser-included) offense and the plea agreement provides that the government will not bring, or will move to dismiss, other criminalcharges. Gov't Mem. in Supp. DPA 2 n. 1; Defs.' Letter in Supp. DPA 2. They submit that this scenario is not presently before the Court because HSBC has not agreed to plead guilty. Rather, HSBC has entered into an agreement to defer prosecution, whereby the government agrees to dismiss the Information if HSBC complies with the terms and provisions of the DPA. Gov't Mem. in Supp. DPA 2 n. 1; Defs.' Letter in Supp. DPA 2.

The parties have a sound textual basis for their position. Fed.R.Crim.P. 11(c)(1)(A) states:

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney ... may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or *nolo contendere* to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges

The parties have not reached a plea agreement within the meaning of Fed.R.Civ.P. 11(c)(1)(A). HSBC has not agreed to plead guilty or *nolo contendere* to any of the charged offenses; it entered pleas of not guilty at the arraignment and expects that the charges will eventually be dismissed. Minute Entry, Dec. 20, 2012, ECF No. 13. Nor has the government agreed to dismiss other charges in exchange for a plea of guilty. Accordingly, neither Fed.R.Crim.P. 11(c)(1)(A) nor U.S.S.G. § 6B1.2 is applicable here.[4]

2. *The Speedy Trial Act*

The parties assert that 18 U.S.C. § 3161(h)(2) of the Speedy Trial Act "provides the applicable legal standard for the Court's review, as it requires the Court's approval for the exclusion of time." Defs.' Letter in Supp. DPA 2; *see also* Gov't Mem. in Supp. DPA 2 n. 1 ("In connection with a DPA, once a defendant has made an appearance and the speedy trial clock has begun to run, as it has here, the Court has the authority to determine whether to grant or deny a speedy trial waiver ....). Pursuant to 18 U.S.C. § 3161(h)(2), "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct" "shall be excluded ... in computing the time within which the trial of any such offense must commence." As HSBC observes, "subsection (h)(2) does not itself set forth a standard for the exclusion of time in the deferred prosecution context." Defs.' Letter in Supp. DPA 2. HSBC argues, however, that "subsection (h)(7), the Act's catch-all provision, provides that time should be excluded if the interests of justice served by the exclusion outweigh the best interests of the defendant and the public in a speedy trial." *Id.* (citing 18 U.S.C. § 3161(h) (7)).

I disagree with HSBC's assertion that the standard for excluding time pursuant to 18 U.S.C. § 3161(h)(2) is the ends-of-justice balancing inquiry articulated by 18 U.S.C. § 3161(h)(7). In *Zedner v. United States*, the Supreme Court explained:

[T]he [Speedy Trial] Act recognizes that criminal cases vary widely and that there are valid reasons for greater delay in particular cases. To provide the necessary flexibility, the Act includes a long and detailed list of periods of delay that are excluded in computing the time within which trial must start. See § 3161(h). For example, the Act excludes "delay resulting from other proceedings concerning the defendant," § 3161(h) ([1]), "delay resulting from the absence or unavailability of the defendant or an essential witness," § 3161(h)(3)(A), "delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial," § 3161(h)(4), and "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted," § 3161(h) ([6]).

Much of the Act's flexibility is furnished by § 3161(h) ([7]), which governs ends-of-justice continuances.... This provision permits a district court to grant a continuance and to exclude the resulting delay if the court, after considering certain factors, makes on-therecord findings that the ends of justice served by granting the continuance outweigh the public's and defendant's interests in a speedy trial. This provision gives the district court discretion—within limits and subject to specific procedures—to accommodate limited delays for case-specific needs.

547 U.S. 489, 497–99, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006). The Court's interpretation makes clear that 18 U.S.C. § 3161(h)(7) is not a "catch-all provision;" rather, it describes one specific type of exclusion—*i.e.*, when the ends of justice served by the exclusion outweigh the best interests of the public—permitted by the Speedy Trial Act.[5] This interpretation accords with a straightforward reading of the provision, which nowhere suggests that this balancing inquiry applies to the myriad other types of exclusion enumerated in 18 U.S.C. § 3161(h).

Returning then to 18 U.S.C. § 3161(h)(2), the exclusion applies to that "delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." Thus, under a plain reading of this provision, a court is to exclude the delay occasioned by a deferred prosecution agreement, but only upon approval of the agreement by the court. This interpretation is buttressed by the legislative history of the provision. The Report of the Senate Judiciary Committee on the Speedy Trial Act states that this provision "assures that the court will be involved in the decision to divert and that the procedure will not be used by prosecutors and defense counsel to avoid the speedy trial time limits." S. REP. NO. 93–1021, at 37 (1974).

The Speedy Trial Act is silent as to the standard the court should employ when evaluating whether to grant "approval" to a deferred prosecution agreement under 18 U.S.C. § 3161(h)(2). Case law on this point is barren both in the Second Circuit and in other Circuits. However, the Report of the Senate Judiciary Committee suggests that such approval is grounded in a concern, to put it bluntly, that parties will collude to circumvent the speedy trial clock. S. REP. NO. 93–1021, at 37. 18 U.S.C. § 3161(h)(2) appears to instruct courts to consider whether a deferred prosecution agreement is truly about diversion and not simply a vehicle for fending off a looming trial date.

The DPA at issue here is, without a doubt, about diverting HSBC from criminal prosecution. But approving the exclusion of delay during the deferral of prosecution is not synonymous with approving the deferral of prosecution itself. As I discuss in greater detail below, the parties erroneously assume that the Court lacks authority to consider the latter question, and therefore need only decide the former. They are wrong. As such, the question of whether to exclude the duration of the DPA from the speedy trial clock hinges on a determination of whether the Court approves the DPA.

3. *The Court's Supervisory Power*

This Court has authority to approve or reject the DPA pursuant to its supervisory power. "The supervisory power ... permits federal courts to supervise 'the administration of criminal justice' among the parties before the bar." *** *Bank of Nova Scotia v. United States,* 487 U.S. 250, 264, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988) (Scalia, J., concurring) ("[E]very United States court has an inherent supervisory authority over the proceedings conducted before it...."). The courts have wielded this authority substantively, that is, to provide a remedy for the violation of a recognized right of a criminal defendant.*** They have also wielded this authority to fashion "civilized standards of procedure and evidence" applicable to federal criminal proceedings. ***

One of the primary purposes of the supervisory power is to protect the integrity of judicial proceedings. *** Justice Louis

Brandeis eloquently articulated this distinct duty to uphold judicial integrity:

> The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. The maxim of unclean hands comes from courts of equity. But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.
>
> ... The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress.... It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.... The court protects itself.

Olmstead v. United States, 277 U.S. 438, 483–85, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting), overruled by *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), and *Berger v. New York,* 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). Justice Brandeis's words have since resonated throughout the Supreme Court's supervisory power jurisprudence. *See Elkins,* 364 U.S. at 223 (stating that federal courts will not be "accomplices in the willful disobedience of a Constitution they are sworn to uphold"); *Mesarosh v. United States,* 352 U.S. 1, 14, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956) ("This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted."); *McNabb,* 318 U.S. at 347 ("We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement.").

Both parties assert that the Court lacks any inherent authority over the approval or implementation of the DPA. They argue that the Court's authority is limited to deciding, in the present, whether to invoke an exclusion of time under the Speedy Trial Act and, in the distant future, whether to dismiss the charges against HSBC. *** I conclude that the Court's authority in this setting is not nearly as cabined as the parties contend it is.

The government has absolute discretion to decide not to prosecute. *ICC v. Brotherhood of Locomotive Engineers,* 482 U.S. 270, 283, 107 S.Ct. 2360, 96 L.Ed.2d 222 (1987) ("[I]t is entirely clear that the refusal to prosecute cannot be the subject of judicial review."). Even a formal, written agreement to that effect, which is often referred to as a "non-prosecution agreement," is not the business of the courts.[6] In addition, the government has near-absolute power under Fed.R.Crim.P. 48(a) to extinguish a case that it has brought.*** In my view, if the government were now moving to dismiss this case, it would be an abuse of discretion to deny that motion.

The government has chosen neither of those paths. Rather, it has built into the DPA with HSBC a criminal prosecution that will remain pending (assuming all goes well) for at least five years. ** Just as a non-prosecution agreement is perceived as a public relations benefit to a company,[7] perhaps the filing and maintenance of criminal charges was intended to produce a public relations benefit for the government.[8] But for whatever reason or reasons, the contracting parties have chosen to implicate the Court in their resolution of this matter. There is nothing wrong with that, but a pending federal criminal case is not window dressing. Nor is the Court, to borrow a famous phrase, a potted plant.[9] By placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority.

***6** The courts "are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement." *McNabb,* 318 U.S. at 347. The inherent supervisory power serves to ensure that the courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety. "The court protects itself." *Olmstead,* 277 U.S. at 485. The parties have asked the Court to lend precisely such a judicial imprimatur to the DPA, by arranging for its implementation within the confines of a pending case. The Court will therefore exercise its supervisory authority over the DPA.

I recognize that the exercise of supervisory power in this context is novel. In the typical supervisory power case, the defendant raises a purported impropriety in the federal criminal proceeding and seeks the court's redress of that impropriety. *** In the deferred prosecution context, the defendant is presented with the opportunity for diversion from the criminal proceeding altogether. For obvious reasons, a defendant in these circumstances is less likely to raise a purported impropriety with the process, let alone seek the court's aid in redressing it, given the risk of derailing the deferral of prosecution.

Nevertheless, it is easy to imagine circumstances in which a deferred prosecution agreement, or the implementation of such an agreement, so transgresses the bounds of lawfulness or propriety as to warrant judicial intervention to protect the integrity of the Court. For example, the DPA, like all such agreements, requires HSBC to "continue to cooperate fully with the [government] in any and all investigations." DPA ¶ 6. Recent history is replete with instances where the requirements of such cooperation have been alleged and/or held to violate a company's attorney-client privilege and work product protections,[10] or its employees' Fifth[11] or Sixth Amendment rights.[12] The DPA also contemplates, in the event of a breach by HSBC, an explanation and remedial action, which the government will consider in determining whether to prosecute the pending charges and/or bring new ones. DPA ¶¶ 16–17. What if, for example, the "remediation" is an offer to fund an endowed chair at the United States Attorney's *alma mater?* Or consider a situation where the current monitor needs to be replaced. *See* Gov't Letter, June 5, 2013, ECF No. 22 (advising the Court of the selection of an independent compliance monitor). What if the replacement's only qualification for the position is that he or she is an intimate acquaintance of the prosecutor proposing the appointment? *See* DPA ¶ 10 ("The Department may also propose the names of qualified Monitor candidates for consideration.").

I do not intend to catalog all of the possible situations that might implicate the Court's supervisory power in this case. I couldn't even if I wanted to; the exercise would amount to looking through a glass, darkly, at five years of potential future developments in the case. What I can say with certainty is that by placing the DPA on the Court's radar screen in the form of a pending criminal matter, the parties have submitted to far more judicial authority than they claim exists.

B. *Approval of the DPA*

I approve the DPA. However, for the reasons set forth above, my approval is subject to a continued monitoring of its execution and implementation.

In approving the DPA, I am as mindful of the limits of the supervisory power as I am of its existence. For the most part, "when supervisory powers have been invoked the Court has been faced with intentional illegal conduct." *Payner,* 447 U.S. at 746 (Marshall, J., dissenting). My review of the DPA, and my knowledge of the actions that have been taken pursuant to the DPA thus far, reveal no impropriety that implicates the integrity of the Court and therefore warrants the rejection of the agreement.

I am aware of the heavy public criticism of the DPA. *See, e.g.* Editorial, *Too Big to Indict,* N.Y. TIMES, Dec. 11, 2012; Jesse Singal, *HSBC Report Should Result in Prosecutions, Not Just Fines, Say Critics,* THE DAILY BEAST, July 18, 2012; Matt Taibbi, *Gangster Bankers: Too Big to Jail,* ROLLING STONE, Feb. 14, 2013. Indeed, I have received unsolicited input from members of the public urging me to reject the DPA. *See* ECF Nos. 16, 17, 18, 21. These criticisms boil down to the argument that the government should seek to hold HSBC criminally liable, rather than to divert HSBC from the criminal process. But even if I were to reject the DPA, I would have no power to compel the government to prosecute the pending charges against HSBC to adjudication. To the contrary, as mentioned above, if the government moved under Fed.R.Crim.P. 48(a) to dismiss the Information, it would be an abuse of discretion not to grant that motion.

Significant deference is owed the Executive Branch in matters pertaining to prosecutorial discretion. The Executive Branch alone is vested with the power to decide whether or not to prosecute. *** The decision whether to seek a criminal conviction implicates a complex of factors that "do not lend themselves to resolution by the judiciary." *** The Supreme Court has observed that a prosecutor's broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the government's enforcement priorities, and the case's relationship to the government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern.

Wayte v. United States, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). With respect to cases of corporate misconduct, prosecutors must consider such factors as the nature and seriousness of the conduct, the pervasiveness of the conduct within the company, and the company's reaction to its own misconduct. They must also consider the ripple effects a conviction might have on innocent parties, such as employees (present and former) and shareholders. I have no doubt resource allocations concerns within the Department of Justice ("DOJ") play a legitimate role as well. Judges (even, and perhaps especially, judges who themselves once exercised prosecutorial discretion) need to be mindful that they have no business exercising that discretion and, as an institutional matter, are not equipped to do so.

I observed many years ago that although the Supreme Court's language in *Wayte* addressed "the decision of *whether* to prosecute, it is equally applicable to the decision of how aggressively to prosecute, and specifically to whether an arguably reasonable sentence bargain is appropriate." John Gleeson, *Sentence Bargaining Under the Guidelines,* 8 FED. SENT'G REP. 314, 315 (1996) ("[T]he judicial policing of sentence bargaining is unrealistic. The prosecutor may defend a plea agreement by reference to an office policy on such cases, but the probation officer may conclude that the AUSA is simply too lazy to try the case, or overly intimidated by the defense attorney. The probation officer may be right, but courts have no business engaging in that inquiry and have no ability to do so."). I add here that this language is just as applicable to the decision to enter into a deferred prosecution agreement.

Bearing in mind the appropriate degree of deference that is owed to the Executive Branch, the decision to approve the DPA is easy, for it accomplishes a great deal.

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C. *The Court Retains Supervisory Power over the Implementation of the DPA*

As long as the government asks the Court to keep this criminal case on its docket, the Court retains the authority to ensure that the implementation of the DPA remains within the bounds of lawfulness and respects the integrity of this Court. Accordingly, the parties are directed to file quarterly reports with the Court to keep it apprised of all significant developments in the implementation of the DPA. Doubts about whether a development is significant should be resolved in favor of inclusion. The Court will notify the parties if, in its view, hearings or other appearances are necessary or appropriate.

So ordered.

Footnotes omitted

UNITED STATES OF AMERICA v. FOKKER SERVICES B.V., Defendant.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

February 5, 2015, Filed February 5, 2015, Decided

[Ed: citations to criminal information and factual statement omitted]

Judge: RICHARD J. LEON, United States District Judge.

MEMORANDUM OPINION

On June 5, 2014, the United States ("the Government") filed an Information charging Fokker Services B.V. ("Fokker Services") with one count of Conspiracy to Unlawfully Export U.S.-Origin Goods and Services to Iran, Sudan, and Burma. *See* Information ("Info.") [Dkt. #1]; *see* *18 U.S.C. § 371* (conspiracy to commit offense against the United States); *50 U.S.C. § 1705* (International Emergency Economic Powers Act). The conspiracy, which spanned a five-year period of time from 2005 to 2010, included over 1100 separate illegal shipments of parts and components used in aircraft aviation and navigation systems and other aircraft systems that were subject to export control for national security and/or anti-terrorism reasons. Before the Court now is a Joint Consent Motion for Exclusion of Time Under the Speedy Trial Act ("STA Mot.") Upon consideration of the parties' pleadings, argument, relevant law, and the entire record therein, the motion is DENIED.

BACKGROUND

Fokker Services is a Dutch aerospace services provider and subsidiary of Fokker Technologies Holding B.V., a Dutch manufacturing and technical services company. Info. ¶ 1. Fokker Services serves operators and owners of aircraft manufactured by Fokker Services' predecessor, Fokker Aircraft, B.V. Info, ¶ 3. It provides "logistical support, component maintenance, repair and overhaul, technical services, and aircraft maintenance and modification." *Id*. Fokker Services uses aircraft parts manufactured throughout the world, including in the United States. *Id*.

Fokker Services' United States activities are subject to United States laws and oversight by the Department of Treasury's Office of Foreign Assets Control ("OFAC"), which administers and enforces economic and trade sanctions against certain foreign countries, as well as the Department of Commerce's Bureau of Industry and Security ("BIS"). Among those regulations with which Fokker Services' U.S. activities must comply are the economic sanctions the Government has established with respect to Iran, Iranian Transaction Regulations, *31 C.F.R. Part 560*[1]; Burma, Burmese Sanctions Regulations, 31 C.F.R. Part 537; and Sudan, Sudanese Sanctions Regulations, 31 C.F.R. Part 538.

The Iranian and Sudanese sanctions prohibit, among other things, the unlicensed exportation or re-exportation, directly or indirectly, of any goods, technology, or services from the United States or any U.S. person to Iran or Sudan. *Id*. §§ 538.205, 560.204. The Iranian sanctions also prohibit the re-exportation from a third country to Iran of any goods, technology, or services that had been exported from the United States. *Id*. § 560.205. The Burmese sanctions prohibit new investment in Burma and the exportation or re-exportation of financial services to Burma from the United States or any U.S. person. *Id*. § 537.202, 537.204. The sanctions against all three countries further prohibit transactions by U.S. people or within the United States to evade or avoid the sanctions' prohibitions. *Id*. §§ 537.206, 538.211, 560.203. Fokker Services historically has worked with eleven Iranian customers, including five Iranian military customers (*e.g*., its Army, Navy, and Air Force), four Sudanese customers, and four Burmese customers.

The Information charges Fokker Services with violating U.S. export laws from 2005 until 2010 "by engaging in illegal transactions involving the export and re-export of aircraft parts, technology, and services to U.S.-

sanctioned countries, specifically, Iran, Burma, and Sudan . . ., without first obtaining a license from OFAC." Specifically, Fokker Services is charged with "knowingly initiating, either directly or indirectly, 1,153 shipments of aircraft spare, repaired, or exchanged parts, or a combination thereof" with a U.S. nexus[2] to customers the company knew to be located in sanctioned countries

The Information charges a scheme of deliberate conduct to evade the sanctions and detection by U.S. companies and authorities. According to the Information, Fokker Services withheld or falsified tail numbers, or falsely indicated parts were to be used as "stock parts" when reporting to U.S. or U.K. companies so as to conceal its customers' affiliations with U.S.-sanctioned countries. It tracked U.S. companies' attention to export controls and directed business to those companies that were not vigilant regarding compliance. The company deleted references to Iran in materials sent to U.S. subsidiaries and repair shops, and removed fields relating to ultimate end-user information from an internal parts-tracking database. In addition, Fokker Services directed employees to hide activities and documents related to Iranian transactions from U.S. Federal Aviation Administration inspectors. Info. ¶ 21e. Although Fokker Services did briefly suspend operations with Iran in 2008, it quickly resumed business with Iranian commercial customers. This business with Iran continued in spite of advice to senior management from an export compliance manager and in-house counsel in 2009 that no U.S.-origin **[*6]** parts could be shipped to IranThe Information seeks forfeiture of $21 million.

On the same day that it filed the Information, the Government filed a Deferred Prosecution Agreement ("DPA") and attendant Factual Statement ("FS"), along with its Motion to Exclude Time Under the Speedy Trial Act, STA Mot. The Factual Statement sheds additional light on the circumstances surrounding and following the alleged actions here. The majority of illegal conduct at issue involved Iranian customers. Gross revenue from shipments in violation of U.S. export laws totaled approximately $21 million. The Factual Statement makes clear that certain policies and practices were carried out with the knowledge and approval of senior management. As early as 2002, Fokker Services was aware of U.S. export laws regarding Iran, because it applied for a license from OFAC to re-export U.S.-originated traffic control systems to Iran; the license was denied in 2004.

In 2007, management organized a working group to evaluate export compliance policies, particularly regarding Iran. The working group explicitly recognized the prohibitions put into place by American sanctions. *Id.* In 2008, Dutch customs authorities detained two packages of parts and warned Fokker Services it could not defend the company if it encountered problems with United States authorities regarding export compliance. Despite this knowledge and warning, Fokker Services continued to do business with its Iranian civilian customers, though ceased business with Iranian military customers. With respect to U.S. sanctions in particular, Fokker Services decided it would comply with U.S. export laws "only to the extent it was bound by the terms of any end-user statements [it] had signed with U.S. companies." Members of the management team, including the president of the company, were aware of this decision.

In 2010, however, the company changed course. On June 23 of that year, Fokker Services provided BIS and OFAC an initial notice of disclosure of transactions implicating U.S. regulations, which it has supplemented with additional submissions. The company hired an outside law firm to conduct an internal investigation and has cooperated with U.S. law enforcement and regulatory authorities.

According to the Factual Statement, Fokker Services has undertaken some voluntary steps to enhance its compliance programs, which now is subject to regular audits. It stopped all new business with U.S.-sanctioned countries and fulfilled its pre-existing contractual obligations only to the extent transactions complied with U.S. law. After investigating the conduct of its employees, Fokker Services fired its president, demoted or reassigned the duties of certain personnel, and trained employees in U.S. export controls and economic sanctions. In the meantime, it has adopted a new compliance program with officers who report to the highest levels of management, including one officer who reports to Fokker Services' parent company, and has revised its written compliance materials. The company's electronic systems now allow employees to determine if a part previously has been used in an embargoed country. Employees can report potential violations anonymously and are trained in compliance. The company incorporated language into its contracts indicating it will not export or re-export in violation of U.S. or certain other laws and requires all customers to sign end-user agreements. Finally, Fokker services terminated its relationship with sanctioned banks and closed its Iranian office presence.

The United States government and Fokker Services have entered into an agreement whereby Fokker Services accepts and acknowledges responsibility for its conduct in violation of U.S. export laws, and the United States agrees to dismiss with prejudice the charges against Fokker Services if the company complies with all terms of the agreement for a period of eighteen months. Pursuant to the DPA, Fokker Services agrees to pay the United States $10.5 million dollars, , continue to cooperate with United States authorities and agencies regarding the conduct at issue, implement its new compliance program and policies, , and, of course, comply with U.S. export laws. Upon successful completion of the eighteen-month agreement term, the United States agrees it will not prosecute Fokker Services or other members of its corporate family for acts within the scope of or related to the investigation and Factual Statement, unless relating to a transaction Fokker Services failed to disclose.

ANALYSIS

The DPA was filed before this Court in conjunction with a motion to exclude time under the Speedy Trial Act, *18 U.S.C. § 3161*. STA Mot.; STA Mot., Ex. A. The Speedy Trial Act calls for a trial to begin within 70 days of the filing of an information or indictment. *18 U.S.C. § 3161(c)(1)*. However, when calculating the time in which a trial on a charged offense must commence, the Act excludes certain periods of delay. *Id. § 3161(h)*. Relevant here, the statute excludes "[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct." *Id. § 3161(h)(2)*. The plain language of the statute calls for court approval, and it is this approval the parties now seek. *See United States v. HSBC Bank USA, N.A., No. 12-CR-763, 2013 WL 3306161, at *3 (E.D.N.Y. July 1, 2013)* ("[U]nder a plain reading of this provision, a court is to exclude the delay occasioned by a deferred prosecution agreement, but only upon approval of the agreement by the court.").

Both of the parties argue, not surprisingly, that the Court's role is extremely limited in these circumstances. Govt.'s Supplemental Mem. in Supp. of Deferred Prosecution Agreement **[*11]** Reached with Fokker Services B.V. at 10-15 ("Govt.'s 7/18 Mem.") [Dkt. #11]; Fokker Servs. B.V.'s Mem. in Supp. of the Deferred Prosecution Agreement with the Govt, at 2-4 ("Fokker Servs.' 7/18 Mem.") [Dkt. #12]. They essentially request the Court to serve as a rubber stamp unless there is an indication that (a) the defendant did not enter into the agreement willingly and knowingly, Govt.'s 7/18 Mem. at 10, or (b) the agreement was designed solely to circumvent Speedy Trial Act limits, Govt.'s 7/18 Mem. at 12; Fokker Servs.' 7/18 Mem. at 2-3. Unfortunately for the parties, the Court's role is not quite so restricted.

My fellow District Judge in the Eastern District of New York, Judge John Gleeson, addressed this very issue last year, and I agree with his well-reasoned conclusion that a District Court has the authority "to approve or reject the DPA pursuant to its supervisory power." *HSBC, 2013 WL 3306161, at *4*; *see also United States v. WakeMed*, No. 5:12-CR-398-BO, 2013 WL 501784 (E.D.N.C. Feb. 8, 2013) (approving a DPA after holding two hearings, considering the wrongful conduct and agreed upon terms, and "weighing the seriousness of defendant's offense against the potential harm to innocent parties that could result should this prosecution go forward"). Indeed, it is that "supervisory power **[*12]** . . . [that] permits federal courts to supervise the administration of criminal justice among the parties before the bar." **** One of the purposes of the Court's supervisory powers, of course, is to protect the integrity of the judicial process. *See* Payner, 447 U.S. at 735 n.8; *see also* HSBC, 2013 ("The inherent supervisory power serves to ensure that the courts do not lend a judicial imprimatur to any aspect of a criminal proceeding that smacks of lawlessness or impropriety."). Indeed, Justice Louis Brandeis himself addressed the responsibility of the court to uphold the integrity of the judicial process by denying legal redress in appropriate situations in order to maintain respect for law and private confidence in the administration of justice. *See* Olmstead v. United States, 277 U.S. 438, 483-85 (1928) (Brandeis, J., dissenting).

The Government, of course, has the clear authority *not* to prosecute a case. *See* I.C.C. v. Bhd. of Locomotive Engineers, 482 U.S. 270, 283 (1987). Indeed, this Court would have no role here if the Government had chosen not to charge Fokker Services with any criminal conduct—even if such a decision was the result of a non-prosecution **[*13]** agreement. But the Government *has* charged Fokker Services with criminal activity. And it does not propose to dismiss the case at this point; rather, under the proposed resolution, this criminal case would remain on this Court's docket for the duration of the agreement's term. DPA ¶ 4.

The parties are, in essence, requesting the Court to lend its judicial imprimatur to their DPA. In effect, the Court itself would "become [an] instrument[] of law enforcement." McNabb v. United States, 318 U.S. 332, 347 (1943). The parties also seek to retain the possibility of using the full range of the Court's powers in the future should Fokker Services fail to comply with the agreed upon terms. To put it bluntly, the Court is thus being asked to serve as the leverage over the head of the company.

When, as here, the mechanism chosen by the parties to resolve charged criminal activity requires Court approval, it is this Court's duty to consider carefully whether that approval should be given. "By placing a criminal matter on the docket of a federal court, the parties have subjected their DPA to the legitimate exercise of that court's authority." HSBC, 2013 WL 3306161, at *5.

I do not undertake this review lightly. I am well aware, and agree completely, that our supervisory powers are to be exercised "sparingly," United States v. Jones, *** and I fully recognize that this is not a typical case for the use of such powers. The defendant has signed onto the DPA and is not seeking redress for any impropriety it has identified. *See* United States v. Johnson, 221 F.3d (2d Cir. 2000) (describing the contexts in which supervisory powers generally are exercised). But the Court must consider the public as well as the defendant. After all, the integrity of judicial proceedings would be compromised by giving the Court's stamp of approval to either overly-lenient prosecutorial action, or overly-zealous prosecutorial conduct.

Here, Fokker Services is charged with a five-year conspiracy to violate and evade United States export laws for the benefit, largely, of Iran and its military during the post-9/11 world when we were engaged in a two-front War against terror in the Middle East. These voluminous violations during that period were knowing and willful, and were orchestrated at the highest levels of the company. The company brought in $21 million in revenue from these illegal transactions of parts that were being excluded from sale to these particular countries for national security and anti-terrorism reasons. Indeed, **[*15]** the majority of Fokker Services' illegal conduct involved sales of aviation and avionic parts to Iran.

Notwithstanding this egregious conduct over a sustained period of time, the Government has agreed to dismiss the Information if Fokker Services pays a fine of $10.5 million, cooperates with the Government, implements its compliance program, and complies with U.S. export laws for only eighteen months. As such, even when combined with penalties it must pay to other U.S. regulatory agencies as part of a global settlement on these issues,[3] the Government is not requiring Fokker Services to pay as its fine a penny more than the $21 million in revenue it collected from its illegal transactions.

If that is not surprising enough, under the DPA no individuals are being prosecuted for their conduct at issue here, and a number of the employees who were directly involved in the transactions are being allowed to remain with the company. Although Fokker Services did ultimately hire a new president, the other employees who engaged in this conduct simply "received training . . . [and] were removed from decision-making positions or demoted, or had some of their duties reassigned." *Id.*;. Finally, the DPA does not call for an independent monitor, or for any periodic reports to be made to either this Court or the Government verifying the company's compliance with U.S. law over this very brief 18-month period. As such, the Court is being left to rely solely on the self-reporting of Fokker Services. One can only imagine how a company with such a long track record of deceit and illegal behavior ever convinced the Department of Justice to agree to that!

The parties, not surprisingly, argue that Fokker Services' voluntary self-disclosure of the conduct at issue, cooperation and remediation efforts, and precarious financial condition support the Government's position that the current DPA appropriately punishes Fokker Services while allowing for company rehabilitation. I disagree.

While I do not discount Fokker Services' cooperation and voluntary disclosure[4] or, for that matter, its precarious financial situation,[5] after looking at the DPA in its totality, I cannot help but conclude that the DPA presented here is grossly disproportionate to the gravity of Fokker Services' conduct in a post-9/11 world. In my judgment, it would undermine the public's confidence in the administration of justice and promote disrespect for the law for it to see a defendant prosecuted so anemically for engaging in such egregious conduct for such a sustained period of time and for the benefit of one of our country's worst enemies. Surely one would expect, at a minimum, a fine that exceeded the amount of revenue generated, a probationary period longer than 18 months, and a monitor trusted by the Court to verify for it and the Government both that this rogue company truly is on the path to complete compliance. As such, the Court concludes that this agreement does not constitute an appropriate exercise of prosecutorial discretion and I cannot approve it in its current form. To be clear, however, I am not ordering or advising the Government, or the defendant, to undertake **8]** or refrain from undertaking any particular action—I am merely declining to approve the document before me. I remain open to considering a modified version in the future should the parties agree to different terms and present such an agreement for my approval.

CONCLUSION

Thus, for all the foregoing reasons, the parties' Joint Consent Motion for Exclusion of Time Under the Speedy Trial is hereby DENIED. An appropriate order shall accompany this Memorandum Opinion.

/s/ Richard J. Leon

RICHARD J. LEON

United States District Judge

Prosecuting Beyond the Rule of Law:
Corporate Mandates Imposed Through Pretrial Diversion Agreements

Jennifer Arlen[*]

Corporations in the U.S. face a greater broader threat of corporate criminal sanction than in any other country. Not only are firms potentially criminally liable for a broader range of activities, but prosecutors now assert the right to use pretrial diversion agreements to require firms to alter their internal structure and business practices. Moreover, prosecutors currently impose mandates with little if any oversight from the Department of Justice or the judiciary.

The central claim of this article is that the DOJ's policy of empowering individual prosecutors' offices to impose new legal duties on firms, enforced through a regulatory form of liability, pushes federal corporate criminal enforcement beyond the rule of law. At its most foundational, the rule of law requires that government actor's exercise their power over others for the public's good; they should not be free to serve personal aims or exercise authority to achieve personal conceptions of the public interest. Government actors can exercise discretion consistent with the rule of law, but only when they are constrained either in the scope of authority they can exercise or through oversight of their decisions to ensure they serve public interests. Prosecutors' authority over mandates is not adequately subject to either constraints as prosecutors can use pretrial diversion to impose new duties on firms –without legislative or regulatory approval—with no genuine external oversight to ensure those duties are imposed consistent with the public interest.

1. INTRODUCTION

Corporate criminal enforcement practice has been fundamentally changed by the Department of Justice (DOJ)'s embrace of pretrial diversion agreements (PDAs) that impose governance mandates on firms with detected wrongdoing. Today, corporate criminal enforcement against publicly held firms does not occur through formal conviction, but instead through pretrial diversion agreements (PDAs) with prosecutors.[1]

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[*] Norma Z. Paige Professor of Law, New York University School of Law and Director, NYU Program on Corporate Compliance and Enforcement. This paper was prepared for a conference at Stanford University's Hoover Institution on "Unseparated Powers? The Role for Executive Authority and Discretion under the Rule of Law." I thank the Hoover Institution for generous support, other conference participants for their helpful feedback,. I also would like to thank the following for their helpful comments and discussion: Rachel Barkow, Miriam Baer, Marcel Kahan, Jeffrey Knox, Allan Meltzer, Geoffrey Miller, Daniel Richman, Edward Rubin, Kenneth Scott, and Jeremy Waldron. Finally, I would like to thank two excellent research assistant, Cristina Vasile and Jerry Goldsmith.

[1] See Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, Section 1, *in* RESEARCH HANDBOOK ON CRIMINAL LAW (Keith Hylton and Alon Harel, eds.) (2012) (providing evidence on corporate criminal convictions of publicly held firms as compared with sanctions imposed through PDAs). By contrast, prior to 1999 publicly held firms regularly were convicted of crimes, although less frequently than they are now subject to PDAs. Cindy R. Alexander, Jennifer Arlen, and Mark A. Cohen, *Regulating*

These agreements can, and do, impose significant monetary sanctions on firms. But in addition, indeed usually, prosecutors use these PDA to impose forward-looking mandates—new duties—that require firms to undertake a variety of corporate governance reforms, and other actions. These new duties come with a threat: the risk of enhanced sanction for the original crime (with guaranteed conviction) should the firm breach. Thus, mandates in effect empower prosecutors to act as firm-specific regulators with the right to impose a more regulatory form of sanction—liability that is not tied to a concomitant crime.[2]

The central claim of this article is that the DOJ's policy of empowering individual prosecutors' offices to impose new legal duties on firms, without either genuine ex ante constraints on their scope of authority to create and impose firm-specific mandates, or effective internal or external oversight of these mandates, pushes federal corporate criminal enforcement beyond the rule of law. The DOJ's apparent faith in the legitimacy of existing enforcement practice appears to rest on two premises. First, that these are consensual agreements, and thus fall outside the normal scope of external review. And second, that they are simply another exercise of this prosecutorial enforcement discretion. This article shows that neither argument holds. These agreements are genuine exercises of government authority which must conform to the rule of law. And as currently imposed, PDA mandates fall outside the rule of law, even if we accept the view that traditional enforcement discretion to convict firms and individuals operates within the rule of law.[3]

The rule of law is open to a variety of interpretations. At its most basic, the rule of law is the legal principle that the legal duties, rights, and potential liability of individuals in a nation should be governed by "law," and not by arbitrary and unconstrained decisions of individual government actors. In turn, all members of society, including government actors, should be bound to act in accordance with "law." At its most foundational level, then, the rule of law seeks to ensure that government actors asserting government authority to affect the liberty and property interests of others should be required exercise this authority for the public's good—as defined by duly-elected authorities or their delegates. They should not be enabled to intentionally use this power either to serve personal aims or to achieve personal conceptions of the public interest.[4] This constraint is binding on all

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Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms, 42 J. LAW AND ECON. 393 (1999) (on average 20[22] publicly held firms plead guilty each year between 1989 and 1996).

[2] For a detailed discussion of this view of PDA mandates see Jennifer Arlen and Marcel Kahan, *Corporate Governance Regulation Through Nonprosecution*.

[3] This discussion of more traditional constraints on discretion is not intended as an endorsement of our current levels of oversight. Rather, the central claim here is that even these quite loose efforts to constrain discretion do not adequately apply to the use of PDAs to impose corporate governance mandates.

[4] Oxford English Dictionary; see generally KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1977) (examining how to bring discretion within the rule of law); see also Edward L. Rubin, *Discretion and Its Discontents*, 72 CHICAGO-KENT L. REV. 1299 (1997).

exercises of government authority—including when the threat of formal enforcement is used to induce parties to accept voluntary agreements.[5]

The challenge for a society committed to the rule of law is how to grant government actors needed discretion to serve the public, without giving them authority that can easily be used for personal or arbitrary aims and not in the public's interest. Broadly speaking, the U.S. has tended to rely on separation of powers to serve this goal. Government authority to create duties, interpret their scope, and impose them on citizens is divided between three branches of government, the legislature, judiciary, and executive. No actor in one branch can create and impose duties to serve a personal aim or personal view of the public good, as duty creation, scope-delineation, and enforcement requires actions by actors in the other branches. Yet separation of powers not the only mechanism that is available to achieve conformity with the rule of law. Modern states allocate considerable discretion to create duties, interpret and impose them to actors within the executive branch, such as agencies. Thus authority can be exercised within the rule of law.[6]

Societies use two different, interacting, mechanisms to constrain discretion in order to keep it within the rule of law.[7] The first concerns the scope of authority granted. Government authority to impinge on the rights of individuals involves three separate exercises of authority: authority to create duties, define them, and impose them. Modern societies restrict the scope of authority granted to any given individual involved in this process—so that no individual actor has authority to create his own legal duties, interpret their scope, and enforcement—in order to deter abuse. The required limitation on the scope of authority can be achieved by spreading authority across branches of government. But in some cases it can be achieved by restricting authority of actors within a given branch, as long as the second avenue of constraint can operate effectively. The second mechanism for ensuring that authority is exercised for the public good is oversight. Limitations on authority are not effective if the government actor has sole authority to determine whether he complied with the limitations placed on him. Oversight is needed—informed by standards set by others—to ensure that power is used to serve public, and not private purposes, within the limits imposed on each actors' authority. This oversight often is most effective when allocated to a different branch of government. But oversight can be effectively imposed—and in some cases more effectively imposed—by actors in a different division of the same branch.

These two mechanisms for constraining discretion interact to seek to ensure government actors do not use their authority to serve purely private ends or private

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[5] See infra Section 3.2.

[6] See Davis, supra note 4.

[7] This discussion of how societies that permit discretion constrain it is not intended as an endorsement of current levels of discretion. The aim is to show the different vectors along which discretion is constrained to serve public aims and establish that DPA mandates do not fall within either the mechanisms that traditionally constrain enforcement or those that constrain an alternative form of discretion that is more similar to PDA mandates, agency rule-making.

conceptions of public ends. The greater the ex ante constraint on an actor's authority—particularly, the more the actor is constrained to enforce duties whose limits are determined by others—the less need for external oversight (though oversight is needed to ensure the actor acts within the authority granted). The more authority is asserted to create duties and enforce them the more ex ante and ex post external oversight is needed. While the precise constraints needed to satisfy the rule of law is hotly contested and beyond the scope of this article, what is clear is that government discretion is presumptively outside the rule of law when the actor faces little or no constraints on either dimension: when the actor is free to create and impose new duties with little if any ex ante or ex post oversight over whether this authority is used to serve the public good. Authority to impose individual-specific duties—that can vary widely across similarly situated persons, is particularly suspect.

Employing this framework, we can now evaluate PDA mandates from a rule of law perspective. The DOJ has tended to proceed as if PDA mandates are simply another facet of standard enforcement authority, and thus do not require special procedures or external intervention. This article shows the contrary. Even if we assume, for arguments sake, the traditional enforcement authority to formally convict individuals (through trials or pleas) and to impose traditional sanctions—such as monetary sanctions, prison, restitution and remediation sanctions—comports with requirements for the rule of law,[8] such a finding would not be sufficient to validate PDA mandates. As compared with traditional enforcement, PDA mandates are less constrained both in terms of the scope of authority employed and the level of oversight involved. The combined weakness of these constraints pulls existing practice outside the rule of law.[9]

We find the contrary: prosecutors imposing PDA mandates exercise an entirely different form of authority than they exercise when they seek to convict and impose prison and fines on firms and individuals who commit crimes. They also are subject to an entirely different form of –and considerably less—oversight. Consider first the scope of authority exercised. Prosecutors asserting traditional enforcement authority exercise authority to legal duties adopted by others, with the scope of those duties properly interpreted by others (courts). They do not have authority to create new duties governing either the population

[8] Arguments can be made challenging various facets of existing traditional enforcement authority from a rule of law perspective. E.g., Davis, supra note . In order to focus on the rule of law issues raised by mandates imposed through deferred and nonprosecution agreements, this article assumes that traditional enforcement imposes sufficient constraints along both dimensions to bring the structure of the discretion granted within the rule of law. It then examines whether PDA mandates go beyond this discretion.

[9] This article focuses on mandates imposed through PDAs. Many of the arguments here would apply, with somewhat less force, to the use of guilty pleas, formal regulatory enforcement actions, or agreements conditioned on a waiver of regulatory enforcement, to impose mandates that impose new duties on individuals whose scope is not determined ex ante (e.g., through the Organizational Sentencing Guidelines) and whose appropriateness is not subject to effective oversight ex ante or ex post. For insightful analysis of the challenges presented by regulators' use of enforcement authority to impose mandates see, e.g., Rachel Barkow and Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 UNIV. CHI. LEGAL FORUM 29; also Zachary Price, Waiving Rules of Law (concluding that authorities should only be able to use discretion waive enforcement in return for substitute condition to impose less onerous condition); see also Richard, Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7-8 (1988).

in general or specific individuals. Nor do they have authority to impose any sanction they want. Sanctions are governed by statute, informed by the Organizational Sentencing Guidelines; moreover, they can only recommend the sanction, judges have authority to set them. In addition, when prosecutors assert the authority they do have to convict a defendant, in theory they are subject to external oversight. Grand juries are often involved in indictment. Federal judges at the trial and appellate levels have authority to determine that the indictment is predicated on an invalid theory of the legal duties imposed on the defendant.[10] In addition, at the sanctioning stage, federal prosecutors are constrained in the traditional sanctions they can impose by oversight of sentencing by trial court judges (and in theory appellant judges).

By contrast, prosecutors who impose mandates through PDAs assert authority to create new duties to govern select firms going forward that are not imposed by statute or regulation on other firms,[11] not just enforce existing duties. Indeed, they often assert authority to create the duty and determine its scope and intervene to enforce it should the defendant breach. Many of these duties go beyond any duty imposed by statute. Moreover, prosecutors regularly impose duties that go beyond mandates approved by the Organizational Sentencing Guidelines.[12] The Organizational Guidelines validates the use of sentencing to require a firm to adhere to the Effective Compliance Program duty set forth in the Guidelines. But this duty is skeletal. It does not include many of the detailed provisions found in many mandates. Nor can the Organizational Guidelines be used to support mandates that alter board structure, management operations, or that restrict business practices. Thus, prosecutors are using PDAs to push beyond the "scope of authority constraints" normally imposed on enforcement, to create new legal duties; and they are employing a particularly troubling form of legal duty: defendant-specific duties.

More striking, prosecutors imposing mandates through PDAs assert authority to create and impose the new legal duties that individually deem best. The DOJ does not provide any genuine guidance or place any limitations on the compliance, corporate governance, and business dealings mandates that can be imposed.[13] Nor has the DOJ or special procedures to govern their use. Moreover, the DOJ is resisting efforts to bring PDA mandates under increased external oversight, for example from courts.

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[10] While judges appear not to exercise their oversight as often as perhaps they should, it does exist in theory.

[11] DOJ avoids formally creating new duties that impose new criminal liability by writing PDAs so that violation of the duty subjects the defendant to criminal conviction for the original crime. But since the defendant would avoid that conviction but for the violation, and conviction of firms is so rare, these duties are effectively enforced by the threat of criminal sanction.

[12] United States Sentencing Commission, Federal Sentencing Guidelines, §8C2.5 (f)-(g) (2014).

[13] The DOJ provides skeletal guidance on compliance programs, but many mandates go beyond the guidance provided. See U.S. Att'y Manual 9-28.800, Corporate Compliance Programs, *available at* http://www.justice.gov/opa/ documents/ corp-charging-guidelines.pdf . Moreover, it provides no genuine guidance on when more intrusive corporate governance reforms should be imposed and what limits should be placed on their use. There are some restrictions, but they are not relevant to these mandates. See infra note.

In addition, PDAs are not subject to the same level of oversight as traditional enforcement authority. PDAs often are free from judicial oversight. Non-prosecution agreements generally are not even filed in court and thus may fall outside court jurisdiction altogether. The Organizational Sentencing Guidelines also do not apply to NPAs. Deferred prosecution agreements are filed in court, but the DOJ's official position is that judges have little to no authority to second-guess either the decision to impose a PDA, the choice between a DPA or NPA, or the form of mandate imposed (unless the sanction violates the constitution).[14] While some courts have asserted some jurisdiction, to date they have not asserted authority to examine specific mandates imposed to determine whether they comply with existing law or policy.[15]

Thus, prosecutors cannot rest a claim that their imposition of PDA mandates is within the rule of law on a claim that we accept that enforcement discretion conforms to the rule of law.[16] Prosecutorial discretion to impose PDA mandates bears little-to-no resemblance to traditional enforcement authority in either the scope of authority asserted or the degree of oversight provided. Indeed, prosecutors are acting more like regulatory rule-making authorities—who are empowered to great new duties—than traditional enforcement.

Nor can PDA mandates claim legitimacy on the grounds that we accept executive branch authority to impose duties through agencies. Administrative agencies are empowered by Congress to create new duties whose breach can be punished; prosecutors are not. Second, PDA mandates have none of the procedural safeguards that are employed to ensure agencies use their discretion to serve legitimate public aims. These include public notice and comment, the need to justify and standardize duties imposed, and external oversight by both judges and, in some cases, the Office of Information and Regulatory Affairs (OIRA). In addition, agency rule-making involves a more presumptively valid form

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[14] NPAs need not be filed with the court, and thus judges tend to play no role at all with NPAs. DPAs are filed with the court, but at present the DOJ claims that judges have little authority to oversee them (mostly limited to making sure they are not violating the defendant's speedy trial right). Even Gleeson's HSBC decision recognizes the weakest oversight. And even with some oversight, judges would be hard pressed to exercise it because the DOJ has never clearly stated the goal of corporate criminal liability, so judges cannot easily determine when a DPA serves or is an affront to that goal.

[15] The DOJ asserts that court authority to oversee DPAs is restricted to ensuring that the prosecutor is not abusing the system in seeking a waiver of the Speedy Trial requirement. It does not recognize court authority to examine specific mandates imposed to determine whether they comply with existing law or policy. Brief in Sarentech. By contrast, Judge John Gleason, in a very thoughtful opinion, concludes that judges do have broader oversight authority. Yet even he narrowly restricted this authority. It would appear to only reach the most egregious abuses that violate fundamental rights like due process. See HSBC…XXX Gleason opinion.

[16] Many of the concerns raised here also apply to duties imposed through agency enforcement actions, although not with the same force. First, many agencies assert more oversight over enforcement and the Commission on top views itself as having authority to determine that enforcement may or may not impose certain mandates. In addition, most agencies impose mandates through formal enforcement actions that require court approval, the SEC has recently employed both DPAs and NPAs. While the scope of this oversight is constrained, see Citi (2nd Circuit 2014), there is a greater right of oversight than with NPAs. see text accompanying notes __-__ infra.

of duty creation—duties that attach to all persons engaged in a particular activity. This is consistent with conceptions of the rule of law that disfavor the imposition of legal duties that apply to one person and not another similarly situated person.

Accordingly, the DOJ's current approach to PDA mandates is inconsistent with the rule of law. Prosecutors' are not adequately constrained through either limits on their authority to create mandates or through external oversight of the mandates imposed. While it is tempting to resort to judicial review as the solution, judicial review of mandates is not sufficient. First, the concern remains with the scope and form of authority being exercised by prosecutors. Second, the judges cannot easily exercise effective oversight absent a plausible measure of legitimacy. To the extent the DOJ is committed to the rule of law, is should pursue one of two additional courses of actions. The first would be to constrain prosecutors to impose only those mandates that are clearly authorized by statute, agency regulations or the Organizational Guidelines. Alternatively, work with agencies—with the benefit of the information and sunshine associated with this process--to develop and promulgate mandates to be imposed on wrongdoers, and guidelines to govern their use, coupled with a right of judicial oversight.

This article will proceed as follows. Section 2 presents current federal enforcement practice focusing on the use of DPAs to impose mandates and its justifications. Section 3 outlines the central requirements of the rule of law, explains why these agreements must be brought within the rule of law, even though they are consensual, and then identifies the mechanisms used to keep executive branch discretion within the rule of law. Section 4 evaluates and rejects the claim that PDA mandates are simply exercises of enforcement discretion and are no more or less invalid than prosecutorial authority to impose fines, prison, restitution through conviction. Section 5 discusses measures that might be used to enable prosecutors to impose PDA mandates consistent with the rule of law. Section 6 concludes.

2. PROSECUTORS AS FIRM-SPECIFIC REGULATORS

Corporate criminal liability has undergone a dramatic transformation over the last several decades. While formally corporations remain potentially criminally liable for all employee crimes, since 1999 the DOJ has officially adopted a duty-based approach under which both the decision whether to impose criminal liability and the magnitude of sanctions imposed depends on whether the firm satisfied implicit duties to adopt and maintain an effective compliance program, self-report and cooperate (hereinafter corporate policing).[17] In 2003, the DOJ adopted guidelines that did more than simply make corporate liability duty based. Instead, the DOJ encouraged prosecutors to impose mandates on firms governing both corporate policing and internal and external oversight of policing.

[17] Arlen and Kraakman, supra note 25(explaining the nature of duty-based liability); see Jennifer Arlen and Marcel Kahan, *Corporate Governance Regulation Through NonProsecution* (working paper) (discussing how modern corporate criminal enforcement is consistent with a duty-based approach to corporate criminal enforcement).

Specifically, the DOJ adopted a policy favoring liability imposed through pretrial diversion agreements (PDAs). The agreements are use impose both monetary sanctions for past misconduct (and inadequate policing) as well as mandates that impose new legal duties on firms that can be enforced even if no future crime occurs.[18]

This section examines this transformation of corporate criminal enforcement policy. The first part examines the evolution in federal criminal enforcement policy, from strict corporate criminal liability to a de facto duty-based regime effectuated through pretrial diversion agreements. It then discusses the DOJ's decision to use these agreements to intervene directly in the internal affairs of firms, by imposing firm specific mandates. The second part explains why, from a deterrence perspective, both the use of duty-based liability and the imposition of mandates is consistent with optimal deterrence in the right circumstances. Nevertheless, this is not sufficient to justify current enforcement practice. In addition, and among other considerations,[19] the mandates must be imposed consistent with the rule of law.[20]

2.1. Transformation of U.S. Corporate Criminal Enforcement Practice

Federal enforcement practice governing large corporations has undergone a dramatic transformation over the last several decades, both in the form of liability and the type of sanctions that are imposed. Under U.S. law, corporations can be held strictly

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[18] For a discussion of the nature of these mandates, the structural differences between PDAs and duty-based corporate criminal liability, and the limited situations where the imposition of these mandates is consistent with optimal deterrence see Jennifer Arlen and Marcel Kahan, *Corporate Governance Regulation Through NonProsecution* (working paper).

Prosecutors also are encouraged to impose mandates on firms subject to guilty pleas. This article focuses on mandates imposed through PDAs because the rule of law concerns are greater with PDAs than with pleas for several reasons. First, the Organizational Sentencing Guidelines do not even apply officially in an advisory way to PDAs. Second, and more important, guilty pleas are subject to official court oversight. By contrast, and as is discussed later, the DOJ does not recognize that courts have a role in determining the content of PDAs and indeed in the case of NPAs courts appear not to even have jurisdiction.

[19] This article addresses the rule of law issues presented by these mandates. It does not consider the important question of whether the DOJ is implementing mandates—or encouraging prosecutors to implement them—in a way that is consistent with optimal deterrence. For a evaluation of this question see Arlen and Kahan, supra note.

[20] This article focuses on mandates imposed on firms through PDAs. These are not the only situations where prosecutors or regulatory enforcement officials can create and impose criminalized duties that were not created by legislatures or rule-making authorities and apply to only select individuals. For example, many of the structural reforms imposed by Elliot Spitzer's office were in effect crime-contingent, prosecutor/enforcement official created duties governing select firms of whole industries. In addition, civil settlements with regulators often impose extensive mandates through measures such as Corporate Integrity Agreements. Corporate guilty pleas also often include mandates. Finally, increasingly judges and prosecutors impose crime-contingent mandates on individuals in the form of requirements to attend drug or alcohol treatment and anger management programs. Some or all of these practices may raise many of the rule of law concerns discussed here, as well as other related rule of law concerns. See Rachel Barkow, *The Prosecutor as Regulatory Agency*, 177 in PROSECUTOR IN THE BOARDROOM: USING CRMINAL LAW TO REGULATE CORPORATE CONDUCT (Anthony Barkow and Rachel Barkow eds, 2011) (discussing issues that arise when state prosecutors act as regulators).

criminally liable for employees' crimes committed in the scope of employment with some intent to benefit the firm through the doctrine of *respondeat superior*.[21] Under *respondeat superior*, criminal liability is strict in that the firm can be held criminally liable even if the firm instructed employees not to commit any crimes,[22] and adopted an effective compliance program designed to deter crime.[23]

Prior to the late 1990s, *respondeat superior* not only was the de jure rule governing potential corporate criminal liability, but was also the rule imposed in practice.[24]

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[21] See *New York Cent. and Hudson River R.R. Co. v. United States.*, 212 U.S. 481, 493 (1909).

Technically, the firm is only liable when the employee acted to benefit the firm. Yet benefit requirement does little to restrict the scope of liability because it is satisfied if the employee intended to benefit the firm, even incidentally, even when his primary goal was to benefit himself. The real effect of the benefit requirement is to "insulate the corporation from criminal liability for actions of its agents which may be *inimical* to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation." Automated Medical Laboratories [], 770 F.2d XX, 407 (4th Cir. 1945). Moreover, in determining benefit courts look at benefit to the corporation independent from the effect on shareholders. Thus courts impose respondeat superior liability on firms for securities frauds designed to conceal negative information even though when this liability is imposed the firm's shares are primarily held by people who are victims of the fraud and have been injured by both the fraud and the reputational impact of the revelation of the truth. *See* Jennifer H. Arlen and William J. Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence*, 1992 U. ILL. L. REV. 691, 729-30 (1992).

[22] *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied* 409 U.S. 1125 (1973).

[23] *E.g.*, *United States v. Basic Constr. Co.*, 711 F.2d 570, 573 (4th Cir. 1983); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989); *United States v. Potter*, 463 F.3d 9 (1st Cir. 2006); United States v. Ionia Mgmt. S.A., 555 F.3d 303 (2d Cir. 2009); accord US Attorney's Manuel, Section 9-28.800 ("The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of *respondeat superior.").*

The individual employees who committed the crime also are criminally liable for crimes committed with the requisite mens rea even if they acted on behalf of the firm and were following instructions.

[24] To be precise, in most areas corporate liability was formally governed by respondeat superior prior to the promulgation of the Holder memo in 1999. Memorandum from Eric Holder, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (June 16, 1999) [hereinafter Holder Memo]. Nevertheless, even prior to the Holder memo, some divisions of the Department of Justice, such as the Antitrust Division, had already formally modified respondeat superior by adopting a leniency program to reward firms that self-reported wrongdoing.

Although the de jure criminal liability was strict, the 1991 Organizational Sentencing Guidelines ensured that criminal sanctions were duty-based. Under Organizational Guidelines corporations are eligible for fine mitigation if they have an effective compliance program, self-report and/or cooperate. Organizational Sentencing Guidelines, Chapter 8. The Organizational Guidelines did not effect an optimal duty-based regime, however, because the amount of mitigation granted was not sufficient to induce firms to adopt effective compliance programs when these were expensive or to self-report. Jennifer Arlen, *The Failure of the Organizational Sentencing Guidelines*, 66 U. MIAMI L. REV. 321 (2012) (symposium issue). One reason is that firms still are convicted and convicted firms may be subject to ruinous collateral penalties. Id.; *see* Miriam H. Baer, *Governing Corporate Governance*, 50 B.C. L. REV. 949 (2009) (discussing these penalties). In addition, the Organizational Guidelines perversely grant proportionately less mitigation for compliance programs and self-reporting to large firms than small ones (all else equal) even though these activities are particularly needed when firms are large. Id.

Prosecutors regularly convicted both closely held and publicly held firms for their employees' crimes, even if the firm had tried to deter the crime.[25] Indeed, many prosecutors treated the corporation as the wrongdoer, convicting the firm but not the employees who committed the crime.[26]

Since the late 1990s, however, the DOJ no longer holds publicly held firms with detected wrongdoing strictly criminally liable for their employees' crimes through respondeat superior. Instead, corporate liability—especially for larger firms—more closely resembles what Reinier Kraakman and I have previously labeled "duty-based composite liability."[27] Composite liability combined duty-based criminal liability with residual "civil" *respondeat superior*. Criminal liability is duty-based to the extent that firms are subject to an ex ante duty to adopt effective corporate policing –adopt an effective compliance program, self-report and cooperate—and are formally criminally liable for their employees' crimes only if they violate these duties. Liability is "composite"—a blend of duty-based criminal liability and non-duty based 'civil" liability—when firms that satisfy all their policing duties avoid formal criminal conviction[28] but nevertheless are subject to sanction, as discussed below.[29]

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[25] While the vast majority of convicted corporations were closely held. Mark Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990*, 71 B.U.L. REV. 247 (1991), during this period publicly held firms regularly plead guilty to federal crimes. Cindy R. Alexander, Jennifer Arlen, and Mark A. Cohen, *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J. LAW AND ECON. 393 (1999) (on average 20[22] publicly held firms plead guilty each year between 1989 and 1996). Publicly held firms convicted prior to the Holder Memo include General Electric, Twentieth Century Fox, Disney, Emerson Electric, Waste Management, Boeing, Texaco, Baxter International, Borden, Shell Pipeline, Exxon, ATandT Microelectronic, Mitsubishi, Nynex, Chevron, Archer Daniels, Rocketdyne, Warner Lambert, Hyundai Motors of America, Samsung America, Daiwa Bank, and Bristol-Myers Squibb.

[26] Mark Cohen, *Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts*, *1988-1990*, 71 B.U.L. REV. 247, 268 (1991) (between 1988 and 1990, individual codefendants were *not* convicted in 35% of the federal cases in which an organization was sentenced for a non-antitrust crime); *see* Leonard Orland, *The Transformation of Corporate Criminal Law*, 1592 1 BROOKLYN J. CORP., FIN. AND COMM. L. 197, 201 (PLI Corp. Law and Practice, Course Handbook Series No. 1592) (2007) (observing that corporate executives were rarely convicted prior to 1960).

[27] Jennifer Arlen and Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997) (showing that composite duty-based liability can induce firms to adopt optimal compliance programs); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (showing duty-based liability can induce optimal corporate monitoring).

[28] As defined by Arlen and Kraakman, supra note 27, duty-based composite liability includes the situation where compliance with all policing duties only reduces formal criminal liability but does not eliminate it altogether.

[29] See Arlen and Kraakman, supra note 25 (describing duty-based corporate criminal liability). Arlen, *supra* note **Error! Bookmark not defined.**. The imposition of substantial sanctions on firms, even if they satisfied their policing duties, is consistent with optimal duty-based liability provides that the sanctions are set at the level needed to induce optimal prevention and also are sufficiently smaller than the sanction that would be imposed on the firm if it did not comply (and got convicted of the crime) to ensure that the firm faces lower expected costs if it polices effectively. Arlen and Kraakman, supra note 25**Error! Bookmark not defined.**; Arlen, *supra* note **Error! Bookmark not defined.**; but see. Andrew Weissmann, *A New*

The DOJ unilaterally created a quasi-composite liability regime by issuing guidelines to prosecutors stating that firms should not be automatically subject to liability through respondeat superior, but instead prosecutors should a variety of factors peculiar to corporate defendants in determining whether to prosecute the firm for its employees' crime—including whether the firm had and maintained an effective compliance program, self-reported, and agreed to fully cooperate.[30] This policy approximates[31] duty-based liability to the extent the DOJ in effect views firms as subject to an ex ante duty to adopt effective policing, the breach of which triggers a heightened risk of criminal conviction[32] and heightened sanctions.[33]

Although firms that police can avoid formal conviction, they do not avoid sanction. The DOJ encourages prosecutors to use pretrial diversion agreements (PDA) to to simultaneously exempt a firm from prosecution and sanction it.[34] PDAs are agreements

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Approach to Corporate Criminal Liability, 44 AMER. CRIM. L. REV. 1319, 1320 (2007) (arguing that firms that engage in effective policing (e.g., compliance programs) should not be sanctioned for their employees' crimes). To induce optimal compliance programs, this sanction must be duty-based, in that the sanction imposed on firms exempt from prosecution should be much higher if they did not adopt an effective compliance program than if they did. Arlen, *supra* note **Error! Bookmark not defined.**; Arlen and Kraakman, supra note 25**Error! Bookmark not defined.**.

[30] The first general guidelines were issued by then-Deputy Attorney General Eric Holder in 1999. The "Holder memo" detailed factors prosecutors should consider in deciding whether to indict a firm. Memorandum from Eric Holder, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (June 16, 1999) [hereinafter Holder Memo]. The current guidelines are contained in Principles of Federal Prosecution of Business Organizations, § 9-28.300 of the United States Attorneys Manual (USAM).

[31] The policy only approximates a duty-based regime because prosecutors are instructed to consider nine factors when determining whether to prosecute, many of which will favor conviction even if the firm undertakes optimal policing. See Arlen and Kahan, supra note .

[32] Consistent with this policy, prosecutors appear to be more likely to decline formal prosecution and reduce monetary sanctions imposed when a firm satisfied important policing duties such as self-reporting or providing genuine and full cooperation. Prosecutors also consider the collateral consequences to innocent parties of conviction and remedial measures taken by the firm in deciding whether to defer prosecution. General Accounting Office, *Preliminary Observations on the Department of Justice's Use and Oversight of Deferred Prosecution and Non-Prosecution Agreements*, GAO-09-636T (June 25, 2009). Nevertheless, cooperation and even self-reporting do not guarantee nonconviction, especially when collateral consequences are low. See Garrett, Globalized Prosecutions (finding that cooperating firms can be convicted and that convicted publicly held firms include a disproportionate number of foreign firms).

[33] See supra note [discussing the Organizational Sentencing Guidelines].

[34] Since 2003, prosecutors have increasingly used pretrial diversion agreements (PDAs) to retain jurisdiction over, and impose sanctions on, firms that avoid formal indictment and/or conviction. Pre-trial diversion agreements were used prior to 2003, most prominently in the 1994 DPA with Prudential. Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, 237TH ANN. INST. SEC. REG. 815, 818 (PLI Corp. Law and Practice, Course Handbook Series No. B-1517, 2005). Nevertheless, the Thompson memo was an official endorsement of these agreements and dramatically increased their use. *See* Memorandum from Larry D. Thompson, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (Jan. 20, 2003) [hereinafter Thompson memo]. In the entire period prior to 2002, prosecutors negotiated only 18 DPAs. *See* Garrett, *supra* note 1. By contrast, prosecutors at main justice negotiated at least 163 in the 7 years between 2003 and 2010 (Table 1). Also DPAs issued after the Thompson memo are more likely to impose firm-specific crime-contingent policing duties and monitors.

executed between a prosecutor's office and a firm under which the prosecutor agree not to proceed criminally against the firm if the firm satisfied certain conditions. They can take two forms: deferred prosecution agreements (DPA) and nonprosecution agreements (NPA). Under a DPA, which is filed with the court, the prosecutor files a criminal information but agrees not to seek conviction so long as the firm satisfies the terms of the agreement. Under an NPA, which is generally just a contract, the prosecutor agrees not to indict or file a criminal information against the firm so long as it satisfies the agreement.

PDAs both impose liability on the firm for its past conduct and, in most cases, create new bases for liability by creating new, firm-specific, legal duties, often accompanied by enhanced oversight of the firm. Prosecutors use PDAs to impose "fines" on the firm, even though technically the firm was not convicted. Prosecutors also use PDAs to impose other "criminal" monetary sanctions, including restitution, and also use them to enforce the firm's obligations to pay monetary sanctions to other government agencies and the obligation to pay sanctions of the firm's (often overseas) subsidiary.

In addition, federal prosecutors regularly employ PDAs to impose firm-specific mandates on firms governing corporate governance.[35] The USAM and prior DOJ policy memos encourage the imposition of mandates when the prosecutor determines that the firm's compliance program is deficient. Firms that breach a PDA risk prosecution for, and nearly-guaranteed conviction of, the original crime, since these agreements generally require firms to agree to a statement of facts in effect admitting that the firm's employees committed the crime.[36] Firms also agree to waive the statute of limitations applicable to the crime, and to fully cooperate with the prosecutors' investigation.

Many of the mandates imposed by PDAs in effect create and impose new legal duties on firms for the duration of the PDA. These new duties include those governing (1) the structure and extent of the firm's compliance program (policing duties); (2) corporate governance reforms, such as those pertaining to the structure and composition of the board

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See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 323 (2007); Spivack and Raman, *supra* note **Error! Bookmark not defined.**, 166–67; *see also* Baer, supra note **Error! Bookmark not defined.**, at 969–70.

35 Although this article focuses on federal prosecutors, the use of criminal and civil agreements to achieve firm-specific or industry-wide regulation is not restricted to federal prosecutors. Some state attorneys general, most notably Elliot Spitzer, have aggressively used police power to achieve regulation by agreement. For an excellent discussion of the exercise of this authority in the states see Rachel E. Barkow, The Prosecutor as Regulatory Agency, 177, in PROSECUTOR IN THE BOARDROOM: USING CRMINAL LAW TO REGULATE CORPORATE CONDUCT (Anthony Barkow and Rachel Barkow eds. 2011) (when prosecutors regulate they challenge separation of powers).

36 Agreement terminations and subsequent convictions do occur. For example, in 2008 the DOJ concluded that Aibel Group "failed to meet its obligations" under its PDA and revoked its PDA with the firm. The firm pleaded guilty to charges of conspiracy to violate the Foreign Corrupt Practices Act and to a substantive violation of the anti-bribery provisions of the FCPA. Aibel was required to pay a $4.2 million fine and serve two years on organization probation. Press Release, Department of Justice, Aibel Group Ltd. Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines (Nov. 21, 2008), http://www.justice.gov/opa/pr/2008/ November/08-crm-1041.html.

and managerial oversight committees; (3) internal and external oversight of policing ("meta-policing" duties),[37] and (4) restrictions to business practice.[38]

Most PDAs require firms to adopt a prosecutor-approved compliance program with firms subject to on-going reporting on their compliance with this duty as well as the threat of immediate sanction for breach. Some mandates simply require a firm already subject to a compliance program duty to comply with that duty. But even here the actual mandates generally create and impose a new legal duty on the firm: a duty created and imposed by the prosecutor, to which other firms are not subject, and to which this firm would not be subject unless a crime occurred. Most statutes and regulations requiring firms to adopt a "reasonable" or "effective" compliance program do not specify the form the program should take.[39] Instead, the board has discretion to determine what structure and level of

[37] See Arlen and Kahan, supra note 3 (defining meta-policing).

[38] Mandates also can be included in corporate guilty pleas. Much of the discussion in this article on mandates in PDAs is similarly applicable to corporate plea agreements that impose firm-specific crime-contingent duties, although those mandates are included i*n pleas that require judicial approval. The Organizational Sentencing Guidelines, while advisory, also are more likely to exert some constraining force on guilty pleas.

[39] A few statutes, such as the books and records provisions and effective compliance provisions of the FCPA, and the Suspicious Activity Report provisions and Know Your Customer provisions of the Patriot Act impose duties on firms to adopt a compliance program to detect a particular wrong or ensure accurate reporting and criminalize the willful failure to satisfy these duties. Foreign Corrupt Practices Act, 15 U.S.C. §78m(b)(2)(A)-(B) (2012); USA Patriot Act, 31 U.S.C. 5318(g), (l) (2014); see. Sarbanes-Oxley Act, 15 U.S.C. § 7262 (2012); *see also* 31 U.S.C. §5318(h) (2014) (discussing compliance requirements for financial institutions to guard against money laundering). But most such mandates do not specify the precise form that the compliance program should take, unlike many PDAs. The Organizational Sentencing Guidelines can be seen as in effect impose such a duty ex ante on all firms, in that the Organizational Guidelines subject any firm caught committing a crime to enhanced sanctions if the firm did not satisfy its duty under the guidelines to have an effective compliance program. Yet, unlike PDA mandates, that provision is enforceable only if a crime occurs. Thus, a firm that does not expect wrongdoing to be detected can ignore these without peril, Arlen and Kahan, supra note 2; accord Arlen, supra note [19][Miami] (showing that the large firms have weak incentives to undertake the compliance needed to comply with the Guidelines). Moreover the Organizational Guidelines provide only skeletal requirements on structure and no guidance on investment level required for effective compliance. Thus, directors have nearly complete discretion to determine the number of employees, magnitude of expenditures, the types of information to be collected, precise placement of the program (and Chief Compliance Officer) within the organization, and the chain of reporting authority within the firm.

By contrast, many PDAs do more than require firms to adhere to the compliance duties to which all firms are subject. First, prosecutors often require levels of investment in compliance that go beyond any mandates imposed by statute or by regulators. Second, prosecutors often impose mandates on the type of information to be collected going forward, lines of reporting authority, structure of the compliance program, and even, in some cases, identify of the independent directors. These are new firm-specific, crime-contingent policing duties created by individual prosecutors to govern this particular firm. Thus, prosecutors who impose mandates through DPAs/NPAs are not simply enforcing the law (duties) fashioned by democratically elected institutions (Congress) or institutions (agencies) to whom Congress delegated rule making authority (subject to a host of constraints (like notice and comment). They are making up their own duties without any of the normal constraints imposed on either the exercise of enforcement discretion or rule-making discretion. The ability to impose these duties is not specifically authorized by or constrained by statute (the ability to impose them falls under authority granted to impose corporate probation in theory, but as currently interpreted probation does not appear to impose any particular constraints on what prosecutors can do). The investment constitutes effective compliance.[40] Boards generally can implement the program they consider effective or reasonable in good faith, with little risk of intervention absent evidence of wrongdoing.[41] By contrast, many PDAs require firms to adopt compliance programs with specific features; these often are not mandated by statue or regulation. Some of these mandates simply require the firm to adopt a compliance program that satisfies the requirements of the Organizational Sentencing Guidelines definition of effective compliance. Yet even these impose a new duty as the firm would not otherwise be required to do this. Moreover, prosecutors use their ability to determine whether the firm has complied to limit the board's discretion to determine what measures as required to comply with the Guidelines. Beyond this, and most important, many PDAs require firms to adopt compliance programs with quite features that are not otherwise mandated by federal law. For example, For example, many PDA compliance program mandates specify to whom the Chief Compliance Officer reports, his position within the firm, the information to be collected, and the type and frequency of employee training to be done. PDA compliance mandates also may require the collection of particular forms of information, or mandate an internal whistleblowing program. Others in effect mandate dramatic increases in investment in compliance—requiring investment that other firms are not required to make.[42]

Prosecutors also use PDAs to intervene in matters beyond compliance. PDAs often mandate internal corporate governance changes, such as requiring the appointment of specific independent directors,[43] the addition of new committees to the board,[44] the

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types of duties imposed fall outside the constraints of the sentencing guidelines (which authorize compliance program mandates but do not provide any provisions governing altering internal management structure or other mandates). See Arlen and Kahan, supra note .

[40] Moreover, even the Organizational Sentencing Guidelines, which has a full subsection outlining the basic requirements for an effective compliance program, provides only skeletal requirements. The directors have nearly complete discretion to determine the number of employees, magnitude of expenditures, the types of information to be collected, precise placement of the program (and Chief Compliance Officer) within the organization, and the chain of reporting authority within the firm.

[41] Some statutes do impose duties on firms to have effective or reasonable compliance programs and impose criminal liability on firms that "willfully" violate these duties. Yet in practice, prosecutors do not intervene to impose liability unless they find evidence of wrongdoing by the firm or its subsidiaries. As for the DOJ's enforcement policy, it imposes policing duties enforced by "crime-contingent" liability: prosecutors can only sanction the firm for failure to police if they detect an actionable substantive crime. The occurrence of the crime is what triggers prosecutorial oversight.

[42] As part of the process leading up to the PDA, firms often materially alter and dramatically increase their expenditures on compliance in order to obtain leniency. For example, HSBC increased expenditures over 10-fold. These increases may well exceed the level of investment requires to comply with the duty to have a "reasonable" or "effective" compliance program—certainly as interpreted by the relevant regulatory agencies. The scope of the "voluntary" action will often reflect the prosecutor's view of what is needed (or the outside lawyer's expectation of what prosecutors are likely to require). PDAs then transform these "voluntary" actions into an enforceable duty by requiring the firm to continue these activities and investment for the life of the PDA.

[43] For example, CA Technologies, Inc. was required to appoint three new independent directors to the board, including former SEC Commissioner Laura Unger.

creation of new senior management committees,[45] and mandating that the CEO not be allowed to serve as Chairman of the Board and the CEO.[46] Finally, many PDAs, particularly in more recent years, either require or cite with approval the termination of senior managers responsible for the wrong. PDAs also contain mandates altering business practices. For example restricting the firms from offering certain services to the public or prohibiting them from entering into certain contracts with outsiders that are legal, albeit prone to abuse.

Table Three[47]
Policing Mandates Impose through PDAs, 2003-12

	Total PDAs	Compliance Program Mandates	Monitors
2003-12	220	175 (80%)	85 (39%)
2010-12	95	81 (85%)	33 (35%)

Finally, PDAs often impose mandates designed to increase oversight by both independent actors within the firm and also outsiders of management's attention to compliance.[48] Almost all PDAs that impose compliance mandates also impose some form of mandate designed to enhance oversight of management's attention to compliance. Some rely on internal oversight—for example, creating additional management or board committees with independent directors. Others impose mandates that increase external oversight, requiring regularly reporting to prosecutors and other federal authorities on the firms compliance activities and grant prosecutors the right to impose criminal liability for detected violations of the mandated duties, even if nonwillful.[49] Beyond this, a substantial

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44 For example, the DPA for Monsanto required the board to create a new committee to oversee the appointment of all foreign agents and to evaluate all joint ventures; the DPA for General Reinsurance required a new Complex Transaction Committee with power to reject any proposed transactions.

45 Merrill Lynch and Co. was required to create a special structured products committee of senior management to review all complex financial transactions with a third party. Other PDAs that requires additional management or board committees include Deutche Bank (2010); Friedman's Inc (2005); Bank of New York (2005).

46 See Aibel Group (2007) DPA.

47 See Arlen and Kahan, supra note 2 .

48 See Arlen and Kahan, supra note 2 (describing meta-policing).

49 PDAs gives prosecutors the right to terminate the agreement and file criminal charges for the original crime should the prosecutor decide that the firm failed to satisfy its obligations under the agreement, which is generally guaranteed to produce a conviction because DPAs generally require a firm to agree to a statement of facts under which the firm in effect admits it committed the crime. .*Accord* Garrett, *supra* note 1, at 857, 928. These terminations and subsequent convictions do occur. For example, in 2008 the DOJ concluded that Aibel Group "failed to meet its obligations" under its DPA and revoked its DPA with the firm. The firm pleaded guilty to charges of conspiracy to violate the Foreign Corrupt Practices Act and to a substantive violation of the anti-bribery provisions of the FCPA. Aibel was required to pay a $4.2 million fine and serve two years on organization probation. Press Release, Department of Justice, Aibel Group Ltd.

number of PDAs require firms to hire an outside monitor with authority to audit the firm to ensure its compliance with the duties imposed by the agreement, as interpreted by the monitor, and, to seek out evidence of wrongdoing.[50]

To understand the breadth of the mandates that can be imposed it is instructive to consider the Bristol-Myers Squibb (BMS) DPA for alleged securities fraud violations. Under the agreement, BMS agreed to adopt a *specified* compliance program; mandate that certain employees undergo a training program covering specified topics; separate the positions of Chairman of the Board and CEO; require the Chairman to participate in preparatory meetings held by senior management prior to BMS's quarterly conference calls for analysts; require the Chairman, CEO and General Counsel to monitor these calls; appoint an additional outside director, approved by the U.S. attorney's office, to the board; hire and pay for a prosecutor-approved corporate monitor with authority to oversee compliance with the agreement and with federal law and report to management and the prosecutor's office; and, finally, require the CEO, CFO and the firm to make specific reports to the Chairman of the board, the Chief Compliance Officer, the monitor, and the SEC relating to sales, earnings, budgeting and projections, or other matters.[51]

More recently, in 2012, Moneygram International signed a DPA that, among other measures, required it to (i) create an independent Compliance and Ethics Committee of the board with direct oversight over both the CCO and the compliance program, (ii) restructure executive compensation to both require that executives be ineligible for bonuses unless

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Pleads Guilty to Foreign Bribery and Agrees to Pay $4.2 Million in Criminal Fines (Nov. 21, 2008), http://www.justice.gov/opa/pr/2008/ November/08-crm-1041.html.

[50] See *infra*…. For a detailed discussion of the monitoring provisions of these agreements *see* Khanna and Dickinson, *supra* note **Error! Bookmark not defined.**, at 1724 (discussing corporate monitor provisions in DPAs).

[51] Bristol-Myers Squibb DPA, *reprinted* in KATHLEEN BRICKEY, CORPORATE AND WHITE COLLAR CRIME: SELECTED STATUTES, GUIDELINES AND DOCUMENTS 153–80 (2011–12). In addition, BMS agreed to waive the attorney client privilege. The Bristol-Myer Squibb DPA also included an extraordinary restitution award, requiring BMS to endow a chair in business ethics at Seton Hall Law School—the alma mater of Christopher Christie, the U.S. Attorney supervising the case. Interview with Mary Jo White, 19 CORP. CRIME REP. 48 (Dec. 12, 2005); *see also* Christopher J. Christie and Robert M Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myers Squibb Co.*, 43 AM. CRIM. L. REV. 1043, 1052–53 (2006). We do not focus on the issues of waiver, extraordinary restitution, or efforts to prohibit a firm from honoring its contractual obligations to pay its employees' attorneys' fees because the DOJ has intervened to prohibit or curtail such abuses. *See.* U.S. Att'y Manual 9-28.710–720 (prosecutors generally should not require firms to waive their attorney-client privilege but can require them to produce all the facts concerning the crime, including those gained by the General Counsel); Memorandum from Mark Filip to Holders of the U.S. Attorneys' Manual Re: Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and "Extraordinary Restitution" (May 14, 2008) ("[P]lea agreements, deferred prosecution agreements, and non-prosecution agreements should not include terms requiring the defendants to pay funds to charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to reduce the harm caused by the defendant's criminal conduct."). It also now discourages prosecutors from interfering with corporate payments of employees' legal fees. Principles of Federal Prosecution of Business Organizations, Memorandum from Mark R. Filip, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Aug. 28, 2008).

they have a passing score on their compliance activities and allow "claw back" of the bonuses earned by executives who contributed to compliance failures, (iii) adopt an Anti-fraud Alert System that requires "the maximum number of transactions feasible;" (iv) verify the accuracy of sender and receiver biographical information; (v) appoint a compliance officer for each country with a high risk of fraud or money laundering; (vi) provide a detailed report to the DOJ every 90 days concerning specific facts from every outlet with at least 10 customer complaints and every agent or outlet terminated for suspected fraud or money laundering, and (vii) accept and pay for a monitor with broad authority.

Accordingly, prosecutors are using PDAs to reach beyond traditional enforcement of existing duties to create and impose new legal duties. PDA mandates also expand the scope a federal prosecutorial oversight over internal corporate governance through the form of liability imposed. By contrast with duty-based criminal liability, which only sanctions firms for policing neglects if a crime occurs, PDAs give federal prosecutors authority to sanction firms that breach their PDA-imposed policing duties even if a crime does not occur. This gives prosecutors considerably more on-going authority to both define the duty and to enforce violations.[52]

2.2. Optimal Enforcement Policy

While many valid criticisms can be, and have been, levied against the DOJ's current policy,[53] it is important to recognize that three core features of current practice are consistent with—and indeed promote—optimal deterrence of corporate crime: (1) the imposition of liability directly on the firm for its employees wrongdoing (even when individuals are sanctioned),[54] (2) the use of duty-based liability,[55] and (3) the imposition of policing and meta-policing mandates on firms with detected wrongdoing under the right circumstances.[56] Thus, any concerns raised by PDAs are not best addressed by eliminating their use altogether. As PDA mandates generally are imposed on large firms—usually publicly held—this part focuses on optimal deterrence of crimes by large firms.

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52 Id.

53 E.g., Arlen and Kahan, supra note 2; Garrett, supra note (XXX); Cunningham, supra note ( ); Arlen, supra note .

54 For a more in-depth discussion of why corporate liability generally is an essential supplement to individual liability see Jennifer Arlen, *Corporate Criminal Liability: Theory and Evidence*, Section 3 and 4, *in* RESEARCH HANDBOOK ON CRIMINAL LAW (Keith Hylton and Alon Harel, eds.) (2012) and Arlen and Kraakman, supra note. For additional perspectives see A. Mitchell Polinsky and Steven Shavell, *Should Employees Be Subject to Fines and Imprisonment Given the Existence of Corporate Liability*, 13 INT'L REV. L. AND ECON. 239 (1993); see also Lewis Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CALIF. L. REV. 1345 (1982); Alan Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231 (1984).

55 See Jenifer Arlen, Potentially Perverse Effect, supra note ; Arlen and Kraakman, supra note 25 ; Arlen, supra note , at Section 5.

56 See Arlen and Kahan, supra note 2 (determining the circumstances under which PDA-imposed policing mandates promote optimal deterrence).

Corporate crimes[57] by large firms are not committed (or even induced by) the shareholders who bear the cost of corporate liability.[58] Instead, they are committed by managers or other employees for their own benefit.[59] Federal enforcement authorities thus can best deter crime by imposing liability directly on the individuals who commit the crime.[60] Nevertheless, individual liability alone is not sufficient. Federal prosecutors cannot optimally deter crime by publicly held firms within enlisting firms' aid in deterring corporate crime.[61] Individual liability often will be insufficiently effective absent corporate assistance because the probability that the wrong will be detected[62] and the individual wrongdoer identified often is too low[63] and the potential benefit of the wrong too high, absent corporate assistance.[64] Thus, optimally deterrence of corporate crime also generally requires ex ante interventions designed to make crime less attractive. These measures include interventions to reduce the ex ante benefit of crime, increase the ex post sanction, and, particularly important, increase the probability that the government can detect and sanction wrongdoers.[65] While the government can engage in many of these activities, in fact firms generally are better able to provide many of the interventions needed.

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[57] Throughout this article, corporate crime is defined as a crime committed by an employee of the firm in the scope of employment with some ostensible benefit to the firm in the short run.

[58] Indeed, in many cases the shareholders may not even obtain a long run benefit from the crime, net of the expected liability costs entailed. See Cindy R. Alexander and Mark A. Cohen, *Why Do Corporations Become Criminals? Ownership, Hidden Actions, and Crime as an Agency Cost,* 5 J. CORP. FIN. 1 (1999) (evidence that the incidence of corporate crime by publicly-held firms is higher the lower the stock ownership of directors and senior officers is consistent with agency cost hypothesis); *see also* Jennifer Arlen and William Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence,* 1992 U. ILL. L. REV. 691 (securities fraud is an agency cost arising in the shadow of a managerial last period; Mark S. Beasley, *An Empirical Analysis of the Relationship Between Board of Director Composition and Financial Statement Fraud*, 71 ACCT. REV. 443 (1996) (explaining that directors of firms committing audit fraud and other financial disclosure violations own proportionately less stock than directors of non-offending firms).

[59] This discussion focuses on the type of corporate crimes that cause direct social harm, such as securities fraud and environmental harms. These crimes generally require the act of individuals who know that they are committing the illegal act—with the food and drug laws being an exception.

[60] See Arlen, *supra* note **Error! Bookmark not defined.**; Jonathan Macey, Agency Theory and the Criminal Liability of Corporations, 71 B.U. L. Rev. 315 (Symposium 1991); Arlen, supra note **Error! Bookmark not defined.**, at 194 n. 39 (discussing why corporate crime can be treated as the product of self-interested rational decisionmaking even if many street crimes are not). By contrast, in the case of closely-held firms, *respondeat superior* liability can optimally deter crimes induced by owner-managers as these managers tend to commit crimes to increase long-run profits and thus are deterred by liability that ensures that firms do not obtains a long-run benefit from crime. Arlen, supra note [Hylton Chapter], at (discussing corporate liability for closely held firms).

[61] See supra note 54.

[62] Arlen, supra note [Hylton Chapter] (providing a more complete analysis). Policing is particularly important given evidence that, holding constant the expected sanction, the probability of enforcement often matters more than sanction magnitude.

[63] Arlen and Kraakman, supra note ; see Alexander Dyck, Adair Morse, and Luigi Zingales, *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213 (2010) (providing evidence that most corporate frauds are not detected by the government).

[64] See Arlen, supra note [Hylton Chapter].

[65] Arlen and Kraakman, supra note ; see Arlen, supra note [JLS].

Specifically, they are the least cost provider of "policing" measures that increase the probability that wrongdoers will be sanctioned by increasing the probability that wrongdoing is detected, wrongdoers identified, and that evidence of wrongdoing is available.[66] They also are better able to implement "prevention measures" that reduce the direct benefit and increase the direct cost of crime. Firms control the compensation and promotion policies that translate corporate benefits from crime into private gains to wrongdoers. They also control how difficult it is to use the firm's resources to commit crimes.[67] Thus, to effectively deter crimes by publicly-held firms, enforcement authorities must induce corporations to adopt effective compliance programs, to self-report, and to cooperate with federal enforcement authorities, in addition to implementing prevention measures.[68]

Corporate liability can be structured to induce optimal corporate policing and prevention. Yet the government cannot achieve these goals by using respondeat superior to hold firms strictly liable for their employees' crimes subject to a fixed fine. Because corporate policing increases the probability wrongdoing is detected and the firm is sanctioned, firms held strictly liable will not police optimally because doing only enhances their expected liability for crimes caused. In order to induce corporate policing, enforcement authorities must ensure that firms benefit from these activities. The most effective way to do this is to impose "duty-based" corporate liability.[69] Specifically, enforcement authorities should announce both that firms must comply with certain policing duties—e.g., to adopt an effective compliance program, promptly report detected wrongdoing and cooperate fully—and that firms that satisfy these duties will avoid formal

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[66] Arlen and Kraakman, supra note 25**Error! Bookmark not defined.**. Firms are the least cost providers of many policing measures. They can incorporate compliance programs into their day-to-day operations in order to both provide managers and directors with information needed to improve productivity and detect crime. They also often are better able to investigate many suspected wrongs to evaluate whether a crime occurred and identify wrongdoers, especially when wrongdoing occurs overseas. Arlen and Kraakman, supra note 25**Error! Bookmark not defined.**; see Arlen supra note **Error! Bookmark not defined.**.

[67] Prevention efforts are defined in Arlen and Kraakman as measured that make it less likely for wrongdoing to occur to start with; they differ from policing measures which make it more likely that is detected and sanctioned. For example, firms can prevent crime by reducing employees' incentives to commit crime by altering compensation and promotion policies. They also can adopt policies that make crimes more difficult and expensive to commit. Arlen and Kraakman, supra note 25**Error! Bookmark not defined.**.

[68] Arlen, supra note (providing a more detailed discussion of this conclusion); Arlen and Kraakman, supra note 25**Error! Bookmark not defined.**.

[69] Id. Duty-based liability is needed to induce optimal policing because non-duty based liability with a fixed fine cannot induce both optimal policing and prevention because, under this regime, a firm that helps the government detect crime hurts itself by increasing its own expected liability. Arlen, supra note **Error! Bookmark not defined.**, at 174-7 (showing that respondeat superior with a fixed fine sufficient to induce optimal policing always provides suboptimal incentives to spend resources on corporate policing). In theory, strict corporate liability is efficient if the fine rises and falls with the probability of sanction, Arlen and Kraaman, supra note; see Louis Kaplow and Steven Shavell, *Optimal Law Enforcement with Self-Reporting Behavior*, 102 J. POL. ECON. 583 (1994) (showing that individuals can be induced to self-report by reducing the sanction commensurate to counteract the liability enhancing effect of self-reporting on the probability of sanction). But this regime is impracticable and has never been implemented. Arlen and Kraakman, supra note 25.

conviction for any detected crimes (and face dramatically lower monetary sanctions as well).[70] Current federal enforcement practice, which enables prosecutors to use PDAs to exempt firms with effective policing from conviction (and to impose sanctions below those provided in the Organizational Sentencing Guidelines),[71] can be employed to induce optimal policing and prevention through appropriate use a leniency and monetary sanction enhancements for breach of individual policing duties.[72]

The conclusion that duty-based corporate liability can induce both optimal corporate prevention and policing entirely through policing duties imposed on all firms ex ante and properly structured monetary sanctions has implications for PDA mandates. PDA mandates are unnecessary and suboptimal when the firm can be expected to respond optimally to monetary sanctions; in this case monetary sanctions suffice to induce optimal corporate policing. Nevertheless, PDA mandates are vital for optimal deterrence when the firm does not respond optimally to monetary sanctions. Specifically, PDA mandates may be essential when firms will not undertake optimal policing even when optimal duty-based liability is imposed because managers' policing decisions are afflicted by agency costs. In this situation, properly structured PDA mandates are an optimal supplement to duty-based composite liability.[73]

2.3. Prosecutorial Discretion to Impose Mandates

The DOJ embrace of PDAs to reward firms that satisfied their policing duties thus is potentially consistent with optimal deterrence; as could be federal prosecutors' use of PDAs to impose mandates on some firms.[74] Nevertheless, the fact that the existing liability regime potentially promote optimal deterrence does not mean that it is justified in practice. Whether this practice is justified depends on two additional considerations. The first is whether it is implemented consistent with the requirements of optimal deterrence.[75] The second, is whether mandates are imposed in conformance with the rule of law. The latter issue is the focus of this article.

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[70] Arlen and Kraakman, supra note 25 ; see Arlen, supra note [jls]. For an extensive discussion of why individual liability alone generally will not provide firms the necessary incentives, see Arlen, supra note [Hylton].

[71] Enforcement authorities cannot induce optimal policing by large firms if they apply the Organizational Sentencing Guidelines because the sanction reduction is to low and convicted firms can be subject to collateral consequences, like debarment. See Arlen, supra note [Miami] (showing that the Organizational Guidelines provide large firms the lowest policing incentives).

[72] Arlen and Kraakman, supra note 25.

[73] Arlen and Kahan, supra note 2(showing that, when properly employed, duty-based composite liability with monetary sanctions is superior to using PDA mandates when firms are solvent and managed to maximize firm profits).

[74] For a full analysis of when PDA mandates are optimally imposed see Arlen and Kahan, supra note.

[75] For a full analysis of this issue see Arlen and Kahan, supra note. The DOJ's policy favoring discretion without adequate guidance regarding mandates renders it unlikely that the actual mandates imposed are consistent with optimal deterrence, especially when imposed by prosecutors who do not have extensive experience with these cases.

PDA mandates warrant special consideration to determine whether they comport with the rule of law because of the degree of discretionary authority implicated. As previously noted, prosecutors who impose PDAs often create new duties. Moreover, individual prosecutors enjoy considerable discretion to determine what duties they want to impose and when. Generally, no statute or regulation formally constrains prosecutors authority to fashion and impose a mandates. In addition, the DOJ has resisted calls to publish guidelines on the forms (and magnitude) of compliance programs and the corporate governance reforms that are appropriately imposed through a PDA.[76] Unlike other areas, judicial review does not operate to constrain discretion to impose most mandates. NPAs are not filed in court and therefore avoid judicial review altogether. DPAs are filed in court, but the scope of judicial review is seriously constrained. Prosecutors are, in effect, left with largely unfettered discretion to impose the mandates they consider appropriate, without having to defend the mandates as serving public aims in most circumstances. This gives prosecutors considerably more on-going authority to both define firm's policing duties and to enforce violations. The question arises, does existing practice governing mandates conform to the rule of law.

3. Government Authority, Consensual Agreements, and the Rule of Law

PDA mandates introduce a different form of liability regime that fundamentally alters the timing, conditions precedent to, and structure of firms' policing duties and the legal powers exercised by prosecutors. Under current practice, they also fundamentally expand prosecutorial discretion, allowing prosecutors to create and enforce new duties with little if any ex ante guidance and oversight and little genuine ex post constraints. Prosecutors enjoy such broad discretion in large part because the DOJ grants prosecutors the same broad discretion when imposing PDA mandates they enjoy when making other enforcement decisions.[77] Moreover, Main Justice has provided little in the way of clear policy statements concerning either when to impose mandates or specifically want to include to guide or constrain prosecutors.

This section examines the issue of whether these mandates plausibly implicate rule of law concerns and, if so, what requirements must be met to ensure the mandates are imposed consistent with the rule of law. The section first discusses the central requirements of the rule of law, which require that government actors operate within

[76] Laurence Cunningham, *Deferred Prosecutions and Corporate Governance: An Integrated Approach to Investigation and Reform*, 66 FLA. L. REV 1 (2014) citing Letter from Brian A. Benczkowski, Principal Deputy Assistant Attorney General, U.S. Dept. of Justice, to John Conyers Jr., Chairman, House Comm. On the Judiciary (May 15, 2008).

[77] In the federal system, prosecutorial discretion does vary depending on the type of crime. The DOJ has granted centralized oversight of particular crimes to specialized divisions within the DOJ. Thus the fraud division oversees and has final approval authority over all pleas and PDAs imposed for violations of the Foreign Corrupt Practices Act. The Antitrust Division, Tax Division and Environmental Divisions exercise ultimate authority over antitrust, tax, and environmental cases respectively. Nevertheless, many federal crimes fall outside these areas; the mandates imposed are determined by the individual U.S. Attorney's offices.

constraints. The section next examines the claim that these mandates do not implicate rule of law concerns because they represent consensual agreements between the parties. It concludes these agreements must conform to the rule of law because they involve the exercise of governmental power. The final part identifies the mechanisms that we traditionally have used to bring the exercise of government authority within the rule of law.

3.1. The Rule of Law

Government actors must be given power and discretion to exercise authority over citizens to promote social welfare. In a society ruled by law, and not by men, this authority cannot be absolute or arbitrary. It must be exercised within the rule of law. Although the rule of law is defined in a variety of way, at its core, the rule of law requires that citizens' legal duties, rights, and potential liability be governed by law, adopted by legitimate state actors. Government actors who define these duties or enforcement must be bound to exercise their authority in accordance with "law," and should not be free to use their authority over others to serve either their own aims or a personal interpretation of public aims.[78]

A core minimum requirement required for conformity with the rule of law is that no individual government actor, with power to circumscribe the rights and duties of others, should be free to unilaterally establish the principles that define those duties, determine the proper interpretation of those duties (and whether they are legitimate exercises of power, and decide when and how to enforce the duties imposed). This division is needed to ensure that legal duties and their enforcement are both motivated to serve the public good and, even when well-motivated, serve a legitimate conception of the public good. Relatedly, this division helps to ensure that the laws, interpretation and enforcement authority that governs one person also governs others. For this is what helps transform state police power from an exercise of tyranny and individual will to a genuine exercise of law.[79]

Societies use a variety of mechanisms to divide authority over duty-creation, duty definition/interpretation, and enforcement to ensure that people's rights are not determined solely (or largely) by the will of one individual (or set of individuals). The most obvious is the separation of powers in the U.S. Constitution. Because actors within each branch of government will inevitably feel beholden to whoever is on top, there would be an inevitable risk of tyranny in any system that ostensibly divided up authority over rule-making, rule interpretation and enforcement between lower level government actors, while leaving one person (e.g., a monarch) with ultimate authority over all of them. To prevent this, the U.S. Constitution ostensibly divides the power to create and impose legal duties

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78 See generally, Davis, supra note 3 (discussing the rule of law); see also Rubin, supra note .

79 As Jeremy Waldron explains, "Rule of law is a multi-faceted ideal, but most conceptions give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences, their own ideology or their individual sense of right and wrong." Predictability is also an important value. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 5 (2008-2009)

on others, interpret their scope, and enforce them between the three independent branches of government, the legislature, the judiciary, and the executive. Moreover, recognizing the considerable power wielded by those with authority to adopt rules that limit the liberty of others, the legislature was divided in two and constrained by Presidential veto, the Constitution itself, and the courts. Legislators' ability to use their authority to pursue of personal aims is further limited by the fact that they do not have authority to interpret and impose the legal requirements they adopt. The executive enforces the laws, based on his interpretation of the scope of the duties imposed. The judiciary has ultimate authority to eventually interpret the statutory requirements in cases brought before them—an authority which can be used to mute legislatures' ability to hide private illegitimate aims in legislation.[80]

Commitment to the rule of law also has implications for other exercises of government authority—in particular, the exercise of authority by unelected government actors, operating within the executive branch, to create, impose, and interpret new legal duties. Notwithstanding our core commitment to separation of powers, the U.S. and most modern societies have allowed a considerable amount of duty-creation to occur outside the legislature. Modern societies necessarily must delegate broad authority to unelected government actors to exercise discretion in ways that no only define existing duties but also create news ones because Congress has neither the time, expertise, nor the ability to adopt all the rules and regulations needed to govern a complex modern society.[81] Thus, authority that traditionally resides in the legislature and judiciary to both create duties and determine their proper, must be exercised in numerous instances by those operating within the executive branch, such as administrative agencies and enforcement officials.

While modern societies often must concentrate more power within an individual branch of government that strict adherence to separation of powers would support, this delegation of authority can and must be structured consistent with the rule of law. As previously explained, commitment to the rule of law requires that this discretion be constrained to ensure that legal duties are adopted and applied consistent with the public interest. Oversight is needed both to ensure that the unelected actors who act to restrict the rights of others have proper legal authority to do so and exercise their authority properly in service of the public's interest. Individuals granted authority face manifold temptations to use this discretion to serve private, and not public, ends. Power presents opportunity to

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[80] See Jonathan Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223 (1986); Jonathan R. Macey and Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 Vand. L. Rev. 647 (1992).

[81] This discussion builds on the analysis of discretionary justice in Davis, supra note 3 . Modern democracies do not, and cannot, embrace a conception of the rule of law that provides that citizen's freedoms can only be circumscribed by legal duties set forth in statutes adopted by elected legislatures, and specified with sufficient precision that each citizen knows exactly what is expected of him, and each enforcement authority's determinations are pre-determined by law. See Davis, supra note 3, at 29-38 (critiquing the "extravagant version of the rule of law, under which individuals' rights should be determined by known principles and rules announced clearly in advance and new legal duties must be imposed by those duly empowered to do so (e.g., elected officials or, in some cases, courts); see also see Rubin, supra note .

pursue personal goals such as money, extra time, or political ambition. It also presents a temptation to pursue a vision of the public good that has no basis in legal legitimacy—to pursue a personal, idiosyncratic view of public aims that has no claim to be a goal of the polity as a whole. Because individuals always face temptations to serve their own interests and not those of society—or to serve society's interests in a way undesired by society—a foundational requirement of the rule of law is that unelected government actors should not be free to exercise unconstrained discretionary authority to create and enforce legal duties that limit the rights of others unconstrained ex ante or ex post by others with authority to act in the public interest.[82]

3.2. Do Consensual Agreements Implicate the Rule of Law

PDA mandates are imposed as a result of, and through, consensual agreements between prosecutors and corporations. Indeed, while DPAs are consensual agreements that are filed with the court, NPAs are contracts, which generally are not filed with the court. Given the consensual nature of these agreements—and thus of the mandates imposed—we must address the threshold issue of whether these mandates fall outside the constraints placed by the rule of law on the exercise of government authority because they are simply voluntary agreements, and not exercises of government power.[83]

The claim that these consensual agreements should be treated as such is not without appeal. After all, the government does not coerce firms into agreeing to these mandates. Firms are free to object. While it is tempting to question the voluntariness of these agreements because firms enter into them under threat of indictment,[84] the fact that the firm might face serious consequences to rejecting the deal does not render the agreement involuntary. Indeed, there is no unlawful duress even if the firm might be driven out of business by an indictment. Duress involves an illegitimate threat of force of obtain an agreement. A threat to impose a sanction the law allows does not produce duress of the sort that vitiates consent.

Nevertheless, PDAs involve the use of government authority—whether they are done as deferred or non-prosecution agreements. Unlike private contracting parties who

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[82] As Joseph Raz explains, "The law inevitably creates a great danger of arbitrary power—the Rule of Law is designed to minimize the dangers created by the law itself… Thus, the Rule of Law is a negative virtue.. the evil which is avoided is evil which could only have been caused by the law itself." Joseph Raz, *The Rule of Law and Virtue*, 223-4, in Joseph Raz, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979).

[83] Cunningham, supra note 76, at 41 (the current practice concerning DPAs implicitly assumes that they are pure contracts to be governed primarily by contract law). A similar claim was made by the Securities and Exchange Commission and Citibank in contesting Judge Jed Rakoff's claim that judicial review over their agreement was warranted and necessary. See SEC v. Citigroup Global Markets, Inc., 827 F.Supp.2d 328 (S.D.N.Y. Nov. 28, 2011), reversed 752 F.3d 285 (2nd Cir., June 4, 2014).

[84] See Richard Epstein, Deferred Prosecution Agreements on Trial: Lessons from the Law of Unconstitutional Conditions, 40-41, in PROSECUTOR IN THE BOARDROOM: USING CRMINAL LAW TO REGULATE CORPORATE CONDUCT (Anthony Barkow and Rachel Barkow eds, 2011) (discussing prosecutors' ability to obtain onerous terms by threatening ruinous indictment).

only have the bargaining power that they create, prosecutors' bargaining power is granted to them by the state. Both the prosecutor's authority to enter into the agreement—and his ability to persuade corporations to accept the terms offers—derives from the power of the state. Prosecutors recognize that these are exercises of enforcement authority in their approach to breach. When breach occurs, prosecutors do not seek classic contract remedies such as damages or specific performance; instead they invoke their police power, seeking the right to sanction the firm for the original wrong.[85] Thus, both the threats he makes when negotiating, and the terms he seeks, must be legitimate exercises of authority.[86]

Given that PDA mandates are an exercise of government power, the authority to impose them must be constrained to ensure it is exercised consistent with the rule of law. [87] At a minimum, prosecutors' use of this power must be constrained to ensure that they only use the authority that they have been granted, that they do not use their power their own purposes. Also, authority used for public aims should be grounded in some legitimately-derived conception of public aims. For example, there is little doubt that a prosecutor who enters into an NPA with a firm that included a term requiring the firm to build the prosecutor—or a friend of the prosecutor—a house would be operating outside the rule of law. The agreement would be voluntary. The prosecutor would be employing a legitimate threat: to indict the firm for a crime it did commit. What makes this agreement invalid is the use of state power—or the *threat* to use state power—to achieve a non-public aim. Similarly, an NPA that required a firm to not provide health insurance to cover abortions would be inconsistent with the rule of law, even if the prosecutor believed he was acting in the public interest. The prosecutor does not have legitimate authority to determine what is in the public interest on this topic. His use of the threat of government sanction to achieve a conception of the public good that he is not legitimately authorized to pursue is an abuse

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85 See Cunningham, supra note 76, at 43-44. Moreover, court oversight of breach differs as well. When corporations allege that a prosecutor is violating a PDA by seeking indictment following a disagreement between the prosecutor and firm over whether the firm has complied with a PDA, courts have not treated the agreements as contracts, binding on both sides, but instead have deferred to prosecutorial discretion over whether the government has a right to indict. See id., discussing Stolt-Nielsen, S.A. v. United Stages, 442 F.3d 177, 183 (3rd Cir., 2006), cert. denied 549 U.S. 1015 (2006).

86 See also Epstein, supra note 84, at 48-49 (state's exercise of its monopoly power in the bargaining process must be constrained). Relatedly, Richard Epstein thus has argued that although the government can always ask for waivers of constitutional rights, it cannot use its power to grant or deny governmental benefits to coerce someone into giving up a Constitutional right. This involves the invalid exercise of the monopoly power of the state to induce people to relinquish liberties granted them in the Constitution—liberties the government could not otherwise get them to relinquish. Richard, Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 7-8 (1988).

PDA agreements implicate a similar concern with the use of government monopoly power to induce consent to conditions that perhaps the state could not otherwise impose. See also Zachary Price, Waiving Rules of Law (concluding that authorities should only be able to use discretion waive enforcement in return for substitute condition to impose less onerous condition). Yet here we also are concerned with the use of PDAs to induce conditions that could perhaps be imposed by a court following conviction, through a process that does not adequately constrain discretion.

87 The argument that follows that PDA mandates must be imposed consistent with the rule of law also applies to other uses of government authority to induce consensual agreements, including pleas.

of authority. It falls outside the principle that government actors must also be constrained by law—including the laws and principles governing the scope of their authority.

The need for constraint extends beyond mandates that are serving personal aims to those that ostensibly are aimed at deterring corporate crime. It might seem that these are automatically legitimate exercises of prosecutorial authority and thus necessarily are consistent with the rule of law, absent any additional constraints. Yet this is not the case. Commitment to the rule of law implies that the legal system must ensure that this exercise of prosecutorial authority is within the rule of law: that prosecutorial discretion to impose mandates to deter crime is indeed plausibly aimed at achieving this goal, involves prosecutorial intervention in matters that prosecutors over which prosecutors have legitimate authority, is designed to achieve public conceptions of the public good, and finally involves a non-arbitrary exercise of the police power. Thus, the use of prosecutorial discretion to impose mandates designed to deter future crimes is not patently invalid, but it must be exercised consistent with the rule of law.

3.3. Discretionary Authority within the Rule of Law

The conclusion that prosecutors' use of PDAs to impose mandates on firms must conform to the rule of law presents two key questions: (1) What is required to bring this form of enforcement authority within the rule of law and (2) Does the current exercise of this authority conform to the rule of law? To address these issues it is useful to first consider how legal systems bring discretion within the rule of law in the substantial range of areas where it is advisable to grant government authorities within a single branch—often the executive branch—broad discretionary authority.[88]

A central goal of the rule of law is to ensure that government actors do not use government power to serve their own aims but instead use it to serve the public-interest as determined by a legitimate authority. Commitment to the rule of law implies that no

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[88] This discussion builds on discussions of discretion by Ronald Dworkin, Robert Rubin, Kenneth Culp Davis, and Jeremy Waldron. In discussing judicial discretion, Ronald Dworkn distinguishes between weak and strong discretion. Under weak discretion, the actor (in his discussion, the judge) has discretion to exercise judgment in making a decision affecting people's rights—judgment that may not be reviewable by others—but this discretion must be within standards set by external authority. These standards may arise from the language of the statute, its purpose, or the broader principles internal to the legal system, but they constrain the decision-maker to exercise judgment to enforce a legal duty or serve a policy goal established by others. Under strong discretion the actor is not bound by standard set by the external authority. Dworkin, Taking Rights Seriously, 31, 81-130; Ronald Dworkin, Law's Empire, 176-275; see generally Edward L Rubin, *Discretion and Its Discontents*, 72 CHICAGO-KENT L. REV. 1299 (1997) (discussing Dworkin and others conception of discretion). Indeed, according to Dworkin, when correctly deployed, these external principles constrain weak discretion, yielding a definitive result. See Rubin, supra note , at 1303 (discussing Taking Rights Seriously).

Rubin in discussing discretion focuses on the different forms of controlling discretion—distinguishing between control through instructions stated in advance and control through oversight of the person's activities. In addition, he distinguishes between instructions on specific conduct and the policies to be achieved; instructions also can be disaggregated depending on whether they related to the substance of the decision or the process to be used. Rubin, supra, at 1303-05.

individual government actor should have unilateral authority to control the legal rights of others. Achieving this goal requires that we constrain discretion.

Legal systems—and organizations—employ two mechanisms to constrain discretion, which are depicted in Figure One. One set of constraints is imposed through restrictions on the scope of the decision-maker's authority. The other set is imposed through requirements governing the degree to which the decision-maker can act unilaterally or instead is required to obtain either *ex ante* permission or is subject to *ex post* review. The degree of constraint imposed by external oversight depends on a variety of factors, including the scope of the decision-maker's power to substitute his judgment for that of the actor and the clarity of the standards governing both the review process and the public goal to be achieved. These two mechanisms often interact. Rule of law concerns are reduced when both are employed. Discretion is presumptively invalid to the extent that neither is effectively employed.

Authority operates as an important constraint on governmental authority. Government power over others implicates three distinct actions (and in turn forms of authority): (1) the creation of the legal duty; (2) the interpretation of the scope of the duty; and (3) the decision of when and how to enforce. Government power is more vulnerable to abuse when a single actor has authority to create duties, define their legitimacy and determine when and how to enforce such duties. Such a system is designed to ensure the duties created and imposed serve the public interest. To prevent such abuses, legal systems commonly divide up these three types of authority: separating authority to create duties, from the task of interpretation, and in turn from enforcement power. This separation may be accomplished by dividing authority between independent branches of government. It also can be accomplished (though to a lesser degree), by dividing authority to adopt new rules, interpret them, and determine enforcement across different divisions of an individual agency.

Congress often grants discretion to administrative agencies to adopt regulations—legal duties—that constrain the rights of others. Yet ordinarily these grants of authority are constrained. In some cases, Congress cabins the scope of authority granted by narrowing the scope of authority. Congress can do this by specifying a policy goal to be achieved or by detailing the type of duty to be imposed. For example, Section 16b of the Securities and Exchange Act of 1934 specifies precisely who is subject to the duty (specific insiders), the conduct which can be sanctioned (buying/selling securities within a 6 month period), and the sanction that can be imposed.[89] In other cases, Congress grants to unelected administrative agencies both discretionary authority to create new legal duties and also broad discretion to define the public interest in that area.[90] This grant of discretion to create new legal duties may or may not be limited by policy statements in the legislative history.

[89] 15 U.S.C. 78p.

[90] E.g., Securities and Exchange Act of 1934 Section 14a; Section 14e. For an extensive of why this broad delegation of discretion is important to effective regulation see Davis, supra note 3, at 36-41. For discussions of when agency authority to adopt duties falls outside the rule of law see, e.g., id.; see also

The authority to create duties is a particularly broad form of authority. This authority is broadest when Congress also grants considerable authority to the decision-maker to define the central policy objectives the duties are meant to serve and determine the best way to achieve them. Thus, when discretion is granted to an individual actor (or to those outside the legislature) to exercise this form of authority, it is particularly important that the authority be constrained through the other mechanisms: oversight by others designed to ensure law is not used, or misused, to serve a particular individual's personal aims or conception of the public good.

Figure One
Forms of Discretion to Create/Enforce a Legal Duty

Scope of authority / Supervision/ External Oversight Of Decision	Authority to Enforce Duties Created by Other Government Authorities	Authority to Create Legal Duties to serve Specific Goal Announced by Another Branch	Authority to Create Legal Duties to serve Broad General Objective
External (and Internal) Oversight of Actor	1 Prosecutor's decision to prosecute and impose fines or jail	4 Regulatory rulemaking Probation imposing addiction treatment	7
Oversight by Actor within Same Agency	2 Enforcement of FCPA actions	**5**	8 Regulatory rulemaking (within scope of authority granted)
No Genuine Substantive Review By Others	3 Prosecutor's decision not to prosecute	6	9 DPA Mandates for many crimes

An important tool for constraining authority to create duties is to ensure that those empowered to create duties do not also have unilateral authority to determine the proper interpretation of those duties and when they can be imposed. Authority over the three components of law creation and enforcement is most effectively constrained when it is divided between different branches of government. But it also can be constrained, albeit less effectively, when authority is divided between different divisions or functions of a single branch. Independent agencies use authority structures to increase accountability and reduce potential for abuse by allocating authority to propose, review, and promulgate rules to one aspect of an agency, authority to interpret rules to another (Administrative Law Judges) and authority over enforcement policy and practice to a third division within the agency (e.g., the DOJ). This division of authority within the agency helps reduce the risk that individuals within the agency create legal duties and impose sanctions that are designed to serve personal goals or individual conceptions of the public good.

Rachel Barkow and Peter W. Huber, *A Tale of Two Agencies: A Comparative Analysis of FCC and DOJ Review of Telecommunications Mergers*, 2000 UNIV. CHI. LEGAL FORUM 29; Rubin, supra note.

Constraints also can be placed on each individual aspect of the exercise of legal authority. Specifically, in addition to allocating authority to create, interpret, and enforce laws across multiple persons, government actor's authority within each of these categories can be constrained. These constraints can take two main forms. The first is the promulgation of clear policy objectives, guidelines, or rules governing decisions that the actor is required to act within. The second is to divide authority over different aspects of the task—for example, the decision to indict, settle or impose the sanction—across different divisions within the branch of government. For example, in the case of formal enforcement through conviction or pleas, prosecutors' and judges' discretion to pursue their own conception of the public good is constrained, to some degree, by the U.S. Sentencing Guidelines. The guidelines set forth the appropriate factors to be considered in sentencing, the effect these factors should have on sentencing, and require prosecutors and judges to justify their recommendations and decisions in light of these factors. Similarly, three strikes laws directly constrain judges' sentencing discretion in some cases. Policies and laws dictating police practice in spousal abuse cases as an example of guidelines and rules employed to constrain enforcement discretion.

Discretion also can be constrained along a second dimension: the degree to which others have authority to determine whether the government actor has exercised discretion consistent with the authority granted. This oversight can be delegated to a different branch of government, as with judicial review. This review is more commonly accomplished through judicial review by a federal judge to ensure that enforcement properly falls within the externally-adopted legal duty or a newly created duty falls within the authority granted and conforms to mandates processes. Judicial review is effective to the degree to which the actor's duties—and limitations on their authority—are sufficiently clearly delineated that the judge can readily determine when the decision-maker is acting within his authority. Judicial oversight to ensure that this power is used for public aims is more or less effective depending on the degree to which judges have sufficient expertise to identify those aims and determine the policies that reasonably serve them.

Judicial review may not be the most effective form of oversight of broad duty-creation authority on issues that fall outside judicial expertise.[91] Yet judicial review is not the only form of external oversight. External oversight can take a variety of forms. For example, the requirements that agencies engage in public rulemaking, with public notice and comment, is designed to introduce citizen oversight—and in turn the threat of Congressional intervention—to discourage agencies from using rule-making power to serve either personal aims or those out of line with Congress's wishes.[92]

Oversight also can be provided by the branch of government exercising the discretion. For example, most agencies with authority to impose legal duties require review by multiple layers of decision-makers before a rule is adopted. Some require the vote of a 5-person commission. In addition, the executive branch constrains rule-making by

[91] See Davis, supra note 3 (discussing limitations of judicial review).
[92] See XXX [chck Ferejohn; RB]

subjecting many new duties to review by the Office of Information and Regulatory Affairs (OIRA). Enforcement decisions also can be constrained through rules requiring supervisory approval of certain enforcement decisions and the imposition of certain sanctions. Internal oversight is not a panacea. It is unlike to reduce abuses of authority at the highest reaches of the branch of government making the decision. But it can be used to ensure that many decision-makers below the highest levels exercise discretion to use public aims and not personal aims or invalid public aims.

These two mechanisms for constraining discretion are not independent of each other but instead interact. Oversight often is better able to cabin abuse when allocated to external actors, but external oversight is only effective when clear ex ante constraints are placed on the scope of the decision-maker's authority, including constraints emanating from a clear statement of the policy objectives to be achieved and the appropriate methods for achieving it. In turn, the broader the authority to impose duties—and to determine how best to achieve policy objectives—the more important it is to ensure that multiple actors have genuine authority to—and an obligation to— oversee the decision, ideally through a combination of ex ante guidelines and ex post oversight of individual decisions.

Examining Figure One we see that discretion expands as we move from left to right on the figure and from top to bottom. While no individual quadrant of the figure is necessarily free from rule of law concerns,[93] it is apparent that movements towards the bottom right hand quadrant involve a broadening of both the scope of authority and a reduction in the level of oversight. This increases rule of law concerns by allowing individual actors authority to create duties, interpret them and enforce them with little if any external oversight to ensure that the actors uses the power given him serve the public, instead of his own aims, or no legitimate aims at all.

Thus we see that, in order for the exercise of governmental power over others to fall within the rule of law the state—and its agents—must ensure that the power granted to individuals is genuinely exercised for public aims. The duties which are legal imposed on others, and the decision over when and what sanctions should be imposed, should not depend solely on the beliefs and preferences of a single individual (or single office). This requires, as we have seen, that constraints be placed on the authority granted to any individual actor to limit the rights of others in the name of the state. The actor can be constrained through careful delineation of the scope of authority he is to exercise—for example, limiting him to imposing duties and resulting sanctions that are both determined by others. Alternatively, or more usually in addition, the actor can be constrained through oversight, either within his own branch or from a separate branch. What the state should not permit is the grant to one government actor of authority to create and interpret duties to

[93] Indeed, thoughtful arguments have been made challenging the legitimacy of many forms of discretion currently exercised by unelected rulemaking and enforcement authorities violate the rule of law (or related justice considerations). E.g., Davis, supra note 3 ; Rubin, supra note ; Barkow and Huber, supra note ; see also Barkow, supra note .

govern others without genuine oversight over whether the duties imposed genuinely serve the public interest and are imposed in an equitable way across different subjects.

4. PDA Mandates: Authority Beyond Traditional Constraints

Guided by the preceding analysis, we can now evaluate the DOJ's approach to PDA mandates. The implicit—and in some cases explicit—assumption underlying the DOJ's view that no genuine additional oversight of PDA mandates is needed is that existing enforcement policy relating to prosecutorial discretion to impose fines and prison terms conforms to the rule of law. As such, it would seem PDA mandates should also conform to the rule of law as they are simply an exercise of traditional enforcement discretion. This Section evaluates this position. This Section evaluates this claim. It first accepts the initial premise, for sake of argument, that prosecutors' current authority to pursue formal conviction through trial or guilty plea—and to see traditional sanctions such as prison, fines, restitution to victims, or even drug treatment—conforms to the rule of law. This Section then shows that the constraints that operate to bring this broad discretion within the rule of law do not similarly apply to PDA mandates. Thus, these mandates cannot be justified as simply a standard exercise of enforcement authority.

4.1. Traditional Enforcement Discretion

In this part we consider traditional prosecutorial authority to formally convict people for crimes and seek sanctions, such as prison, fines, restitution, remediation, and, in some cases, treatment. Federal prosecutors—in particular the ninety-three appointed United States Attorneys (USAs)—have enormous discretion to determine what criminal prosecutions (and civil cases) they want to bring for most offenses.[94] There are exceptions. In the corporate area, specialized divisions within Main Justice assert authority over enforcement actions involving Antitrust, Tax, Environmental, FCPA and certain other crimes. But otherwise Main Justice leaves the USAs free to decide when to prosecute and

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[94] USAM 9-2.001 The statutory duty to prosecute for all offenses against the United States (28 U.S.C. § 547) carries with it the authority necessary to perform this duty. The USA is invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority.

The authority, discretionary power, and responsibilities of the United States Attorney with relation to criminal matters encompass without limitation by enumeration the following:

A. Investigating suspected or alleged offenses against the United States, see USAM 9-2.010;

B. Causing investigations to be conducted by the appropriate federal law enforcement agencies, see USAM 9-2.010;

C. Declining prosecution, see USAM 9-2.020;

D. Authorizing prosecution, see USAM 9-2.030;

E. Determining the manner of prosecuting and deciding trial related questions;

F. Recommending whether to appeal or not to appeal from an adverse ruling or decision, see USAM 9-2.170;

G. Dismissing prosecutions, see USAM 9-2.050; and

H. Handling civil matters related thereto which are under the supervision of the Criminal Division.

what sanctions to recommend with little ex ante guidance from or ex post review by Main Justice.[95] Notwithstanding this broad discretion, USAs are not free to use their authority to pursue their own aims determine the legal duties that govern individuals and the sanctions that should be imposed. Their discretion is constrained using both mechanisms identified above. The authority to sanction others—as distinct from authority not to convict—is constrained ex ante by a narrow grant of authority to enforcing duties created by others, as opposed to determining legal duties. And they generally are subject to external oversight, and some internal oversight. Thus, authority to impose formal conviction generally falls in the first quadrant of Figure One, or in some cases quadrant two, subject to constraints along both dimensions previously identified.

4.1.1. Scope of Enforcement Authority: Enforce but not Create Legal Duties

The central task of a prosecutor exercising traditional enforcement authority[96] is to identify individuals who have violated the law, identify and convict those worthy of sanction, and seek appropriate sanctions. While prosecutors enjoy considerable discretion when exercising this authority, as discussed in more detail below, the scope of this authority is nevertheless relatively cabined. Previously we identified three types of authority: (1) Authority to create/impose legal duties, (2) to interpret them and determine their validity, and (3) to enforce them. Traditional enforcement authority only involves the latter form—with shades of the middle form (when prosecutors interpret the law). But it does not involve the more intrusive form of authority: the right to determine the duties to which others are subject and breach at their peril.

Prosecutors have authority to pursue individuals for violating duties imposed on them by government actors outside the prosecutors' office, specifically, Congress and regulatory authorities. These actors tend to specify the policy goals to be achieved, and the duties to be imposed, including the elements required for conviction. Thus, prosecutors generally cannot use traditional enforcement authority to pursue personal aims—or personal views of public aims—by creating and imposing new legal duties on individuals or groups. They cannot go beyond the restrictions on people's rights imposed by others.

Of course, while in theory prosecutors are not law creators, many statutes are notoriously—and indeed even purposely—vague, and thus subject to multiple interpretations.[97] Nevertheless, these statutes still impose ex ante constraints: prosecutors

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[95] The lack of oversight is, in many ways ironic, since the DOJ does not even undertake the level of monitoring and oversight to ensure that prosecutors comply with the law through the adoption of an internal compliance program that it insists is vital to the proper functioning of corporations. For a discussion of why the DOJ, just like other organizations, would benefit from a compliance program, see Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV 2089 (2010).

[96] Throughout this section the term "traditional enforcement authority" is used to refer to authority to seek formal conviction and impose traditional penalties. This term thus excludes PDAs. It also excludes civil enforcers use of enforcement waivers to negotiate deals that impose mandates. See Zachary Price,

[97] For a discussion of the breadth of many federal criminal statutes and the benefits of the resulting expansive discretion exercised by enforcement authorities to determine what conduct is illegal, see Samuel Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008)

are not free to impose either any duties they please or any duties that they think would serve the overall deterrence objective of the statute. In addition, they are constrained in their ability to employ broad interpretations to create new duties from two directions. First, they are constrained by Congress and regulators. While an isolated aggressive interpretation may not get the attention of Congress or regulators, a prosecutor who adopts an expansive interpretation of a statute as a policy recognizes that if he goes beyond the scope of his authority, the implicated law-making authority may intervene to rewrite the statute or rule. While this is more likely with regulatory rules and statutes, it nevertheless provides a small constraint. This constraint is unlikely to operate when broad enforcement interpretations proceed in an ad hoc fashion, however, as neither Congress nor regulators is likely to gear-up the complex and politically-fraught rule/law-making process to correct isolated instances of improper enforcement. Yet this is not the only constraint. In addition, and more important, they are constrained by judicial oversight, as in fact judges, and not prosecutors, enjoy formal legitimate authority to determine the appropriate interpretation of legal duties created by judges and regulators. We discuss return to this constraint below, when we consider the role of oversight.

Finally, prosecutors who formally convict a defendant also are not free to impose any sanction they deem to be appropriate. The scope of their authority to seek sanctions is constrained. First, Congress, and not the federal prosecutor, determines the maximum punishment for the crime.[98] While Congress's tendency to impose harsh sentences often effectively removes any legislatively-adopted limits on the potential sentences,[99] many statutes do have maximum sentences. Moreover, statutes providing for fines all impose genuine per-count maximums. Finally, statutes do tend to limit the form of sanction. Standard forms include prison, monetary penalties (fines, restitution, remediation), non-monetary sanctions that remedy the harm caused, adverse publicity and probation. Statutorily specified sanctions do not include broad authority to determine and impose whatever measures the prosecutor believes the defendant could take—out in the world—to avoid violating the law again.

In addition, prosecutors' authority to impose sanctions is restricted by two additional constraints on authority. First, prosecutors are not free to impose sentences unilaterally. Instead, federal judges are granted authority to determine the sentence to be imposed. Moreover, while judges often are inclined to heed prosecutors' recommendations, judges' willingness to heed—and prosecutors' ability to legitimately recommend—a sanction faces an additional constraint: the federal Sentencing Guidelines.

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[98] Congress determines maximum punishments both directly, by through provisions dictating the minimum and maximum penalty for each count of the crime, and indirectly, through statutes governing sentences to be imposed on defendants who have prior convictions.

[99] For an insightful discussion of the U.S. tendency towards harsh statutes and enforcement see David Garland, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (describing the changes in social organization and political influences that led the U.S. and U.K. to embrace an unusually harsh criminal justice system); see also Bryan Stevenson, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION (2014) .

The federal Sentencing Guidelines specify the considerations that should govern sanctions, and the effect on the penalty that should be produced by these considerations should get. Indeed, they provide a formula that judges (and prosecutors) should use to calculate the minimum and maximum sanction that a defendant should receive. The Guidelines operate to constrain the sanctions a prosecutor is able to impose through formal conviction. Although the Sentencing Guidelines are advisory post-Booker, many (if not most) judges prefer to conform to the Guidelines when sentencing a defendant convicted of a crime. Thus, the Guidelines operate as an ex ante constraint on prosecutors' authority to impose punishment by providing an external, presumptively valid, alternative view on the appropriate sanction.[100]

4.1.2. Oversight of Enforcement Authority

Prosecutors' ability to convict people also is constrained along the other dimension of constraint: external (and in some case internal) oversight. Oversight is more effective along those dimensions where party exercising oversight can employ an externally-derived statement of the proper scope of authority to determine whether the prosecutor is indeed using his authority in the public interest, as determined by legitimate authorities.

As previously noted, federal prosecutors seeking formal conviction have discretion to sanction individuals for violating duties created by others, but they do not have authority to determine the legal duties to which citizens are subject; the statutes and regulations define these duties. The constraint imposed by the limitation on the prosecutors' authority to create duties is only effective if the prosecutor does not have full authority to determine whether he is correctly interpreting the law. This is the role of oversight, both internal and external.

Prosecutors' decisions to formally charge and convict defendants are subject to oversight from several external parties in order to ensure they do not misuse their authority to enforce duties established by others to create and impose their own legal duties through illegitimate interpretations of existing law.[101] Oversight also helps ensure that there is

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[100] See Joshua B. Fischman and Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 JOURNAL OF LEGAL STUDIES 405 (2011) (identifying factors determining judicial conformity to the Guidelines post-Booker); cf. Cindy R. Alexander, Jennifer Arlen, and Mark Cohen, *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms,* 42 J. L. AND ECON. 393 (1999) (showing that after the adoption of the Organizational Guidelines fines imposed increased both in cases constrained by the Guidelines and in cases that were not constrained; moreover, there was no significant difference in total sanctions imposed in constrained and unconstrained cases). The prosecutor may succeed when the deviation conforms to policy goals but is less likely to succeed with recommended deviations –particularly upwards—that are motivated by personal goals or a personal view of justice.

[101] Ex ante constraint imposed through limitations on the scope of authority and external oversight are particularly important because there is little effective ex post internal intervention to genuinely sanction prosecutors who cross the line. Although judges and state boards are supposed to exercise oversight over and punish prosecutors who abuse the discretion given them, in fact they rarely do so effectively. See Rachel Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089 (2010)

sufficient valid evidence that the defendant actually did the wrongful conduct the prosecutor claims he did.[102] Oversight of prosecutors' claims about the duties the law imposes, and the sufficiency of the evidence, occurs both ex ante and ex post. Some ex ante oversight is provided through the oversight of the charging decision by either a Grand Jury or a judge. In addition, trial and appellate judges have authority to determine that the prosecutor's interpretation of the statute or rule is invalid. This authority limits prosecutors' ability to impose his own view of legal duties on others.

Prosecutors' discretion is less constrained when the defendant enters a guilty plea.[103] Nevertheless, even here the prosecutor is not free to exercise discretion to the point of determining that a particular defendant owes a legal duty that is not imposed on others by existing laws—at least in theory. First, the prosecutor in charging the defendant and then entering the plea is required to articulate a statute or rule that the defendant violated and present the evidence that supports that conclusion. In addition, the prosecutor (or his/her office) is not the sole arbiter of whether the prosecutor satisfied this standard. A guilty plea is only valid when approved by a trial judge who reviews both the defendants' decision-making—is the defendant competent, was the decision voluntary, and did the defendant exercise knowing and intelligent decision-making—and also, in theory, whether the indictment or charges are facially valid.[104] Of course, we know that this oversight is not always effective in practice.[105] Yet what is important to this analysis is that claims that the plea bargaining system is consistent with the rule of law rest on the belief that prosecutorial authority is, or can be, constrained by both ex ante limits on the legal duties the prosecutor can enforce and external oversight by judges over whether the prosecutor is conforming to the law. An enforcement practice without these constraints could not predicate a claim to legitimacy on a comparison with plea agreements.

(prosecutors' offices should incorporate compliance programs into their own organizations to ensure that prosecutors conform to the law).

[102] See generally Kadish, Schulhofer, Steiker and Barkow, supra note , at 1125.

[103] Is this part we do not consider prosecutors' use of pleas to impose mandates as this can implicate many of the same issues, though not all, as DPAs that impose mandates. In theory, mandates through pleas should be subject to more oversight by judges and would be formally governed by the Sentencing Guidelines. Nevertheless, to the extent prosecutors are using pleas to impose mandates that reach into corporate governance reforms, these also raise rule of law concerns.

[104] Rule 11, Federal Rules of Criminal Procedure grants trail judges authority to oversee and/or reject a guilty plea. See generally Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part 1*, 76 COLUM. L. REV. 1059 (1976)

[105] There is a rich literature on concerns that our current plea bargaining system may fail to conform to the rule of law through the combined effect of over-burdened, over-eager and sometimes politically-motivated prosecutors, under-lawyered and otherwise vulnerable defendants, and time-constrained judges. E.g., Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L. J. 1979, 1987-90 (1992) (discussing why pursuit of personal goals, rather than social benefit, by prosecutors and defense attorneys may produce plea agreements that do not promote justice); see also Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998) (discussing changes to the plea bargaining process that would promote justice); Stephen J. Schulhofer, Criminal Justice Discretion as a Regulatory System, 17 J. Legal Stud. 43, 57-59 (1988)(monitoring of poor representation is weaker when defendants plea than when they go to trial).; see generally, Kadish, Schulhofer, Steiker and Barkow, supra note , at 1146-48.

4.1.3. Remediation, Traditional Probation, and Drug Treatment

To elucidate the role of authority limitations and oversight in bringing prosecutorial discretion within the rule of law, it is useful to examine how these to mechanisms operate to constrain prosecutors' authority to use traditional sanctioning authority, imposed through formal conviction, to impose new duties. Specifically, long before prosecutors started using PDAs or pleas to impose broad structural reforms on corporations—which is the focus of this paper—they used their enforcement authority to impose mandates on firms and individuals that were not precisely defined by statute. These include remediation, restitution, probation, and, in appropriate cases, drug treatment.

Prosecutors can use restitution and remediation orders to impose sanctions whose maximuml limitations are not specified ex ante in the statute. Nevertheless, prosecutorial discretion to determine the content of these orders is constrained. First, prosecutors' have legitimate authority to impose remediation is constrained by the requirement that remediation remedy the harm caused by the original offense. Remediation is defined by actions needed to remedy the harm caused by the offense and to eliminate the risk that the instant offense will cause future harm.[106] Thus, the prosecutor must identify the harm and link the mandated conduct to redressing that harm or making sure the offense (e.g., contaminated soil) does not cause new harm. Remediation, as defined by the Organizational Sentencing Guidelines, does not extend to measures that impose new duties on the defendant in order to prevent future crimes. Restitution also is defined by the past bad conduct. It is explicitly tied to paying victims—or in the environmental area, organizations that represent their interests—for harms they suffered. Thus, while there is no precise cap on the magnitude of restitution or remediation, prosecutors' legitimate authority to impose restitution or remediation generally is constrained by the scope of the crime itself and by judicial oversight.[107]

4.2. Are PDA Mandates Subject to Traditional Enforcement Constraints?

Although federal enforcement authorities tend to treat PDA mandates as a standard exercise of enforcement authority, they are not. Prosecutors' use of PDA mandates to

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[106] According to the Organizational Sentencing Guidelines, "To the extent not addressed under §8B1.1 (Restitution - Organizations), a remedial order imposed as a condition of probation may require the organization to remedy the harm caused by the offense and to eliminate or reduce the risk that the *instant offense* will cause future harm**."** United States Sentencing Commission, Federal Sentencing Guidelines, §8B1.2 (2014).

[107] Prosecutors do enjoy authority to impose mandates that govern future behavior beyond simply correcting the past. Of particular interest, prosecutors can seek to require drug offender to seek drug treatment. This in effect imposes a legal duty on those individuals to which others are not subject. Nevertheless, this authority also is constrained. Prosecutors can only impose this mandate on those they lawfully could convict: conviction could lead to loss of freedom (jail), which is a sanction of similar form (and arguably worse magnitude) than the treatment imposed. In addition, while prosecutors treat treatment as a way to deter future bad conduct, they do not have broad authority over the form deterrence could take. For example, they could seek drug treatment but could not require that the defendant attend church regularly. Finally, in the end, the prosecutor is not free to impose this mandate but can only do so if a judge approves.

impose corporate governance reforms or to restrict the firm's permissible lines of business differ from traditional enforcement authority both as to the scope of authority exercised and the degree of oversight. Prosecutors who impose mandates through PDAs do not simply enforce legal duties created by others. Instead, they create new legal duties to govern future conduct of specific firms—duties that are not imposed by statute or regulation on other firms.[108] PDA mandates thus push prosecutors' beyond the traditional legitimate scope of their authority to enforce duties created by others—specifically legislatures or regulators. In addition, whereas prosecutors are subject to external oversight when they pursue a formal conviction, they may not be subject to external oversight when they impose a mandate through a PDA. Even where there is oversight, they may not be subject to any oversight over the content of the mandates imposed. Thus, unlike traditional enforcement authority, prosecutors' authority to impose mandates is not subject to the stronger constraints imposed in quadrants 1-3 of Figure One. Instead, prosecutors often operate in quadrant 9 (or potentially quadrant 8)—creating duties with little genuine oversight.

4.2.1 Scope of Authority: Duty-Creation vs. Sanction Imposition

While prosecutors often prefer to view PDA mandates as sanctions, many are more accurately viewed as a form of regulation by prosecutors.[109] PDA mandates create a new duty if, prior to the PDA, the firm could not be convicted for failure to satisfy a duty imposed by the PDA, but after the PDA it could be.[110] Prosecutors who impose PDA mandates go beyond the scope of authority legitimately granted to them when they create new legal duties that go beyond the authority granted to them by statute and/or the Organizational Sentencing Guidelines to constrain future behavior to induce conformity

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[108] The DOJ avoids formally creating new duties that impose new criminal liability by writing PDAs so that violation of the duty subjects the defendant to criminal conviction for the original crime. But since the defendant would avoid that conviction but for the violation, and conviction of firms is so rare, these duties are effectively enforced by the threat of criminal sanction.[]

[109] E.g., Garrett, supra note ; Arlen, supra note [Barkow book]; Barkow, supra note 21; Arlen and Kahan, supra note 2.

[110] Throughout this article, prosecutors are viewed as creating a new duty if, prior to the PDA, the firm could not be convicted for failure to satisfy that duty, but after the PDA it could be. This is the test because, once the PDA is signed, the firm no longer faces CL for the original crime so imposing it for violation of the mandate is in effect imposing a new duty enforced by the threat of a criminal sanction that otherwise would not be imposed. For example, the mandate imposed on BMS by then-US Attorney Christopher Christie to contribute $3 million to his alma mater Seton Hall Law School is a new duty. Prior to the mandate, no prosecutor evaluating BMS's behavior could have thought BMS had a duty to make such a contribution and thus neither the decision to prosecutor nor the fines imposed in a plea could have been predicated on the fact BMS had not done so. Yet after the DPA, BMS could have faced conviction and enhanced sanctions if it failed to make this contribution.

This article does not address the important, but distinct, issue of whether in adopting statutes allowing prosecutors to impose corporate probation, accompanied by specific mandates, Congress did grant to the DOJ the authority to adopt new duties governing firms going forward—duties that go beyond the legal requirements existing at the time of the crime.

with the law. Prosecutors who go beyond these grants of authority create substantial conflicts with the rule of law.

As previously discussed, prosecutors use PDAs to impose four types of new duties: (1) compliance mandates; (2) corporate governance reforms; (3) changes to business practices; and (4) requirements for increased external oversight (e.g., monitors). This part focuses on the first three types of duties.

Consider first PDA mandates that require the firm to adopt an Effective Compliance program. These mandates can fall squarely within prosecutorial enforcement authority. For example, a prosecutor who imposes a duty on a firm to satisfy the compliance program mandate of the Foreign Corrupt Practices Act is not creating a new legal duty. But a prosecutor who requires a firm to adopt a prosecutor-designed compliance program does impose a new legal duty. In many areas firms are not formally subject to a legal duty to have an "effective" compliance program that conforms to federal standards. While firms are expected to have one—and face additional sanctions if they do not[111]—in many areas firms that do not have an effective or reasonable compliance program do not breach a duty imposed by Congress or an agency. Accordingly, a prosecutor who imposes a mandate requiring that the firm adopt an effective compliance mandate does impose a new legal duty.

Of course, while all compliance program mandates involve the imposition of a new legal duty on the firm, not all are properly viewed as the imposition of a new prosecutor-created duty. And it is the assertion of authority by the prosecutor to define the scope of the firm's future duties, and not their imposition, that implicates rule of law concerns. Prosecutors' traditional enforcement authority does include authority to issue a probation order that requires the firm to "develop and submit to the court an effective compliance and ethics program consistent with §8B2.1 (Effective Compliance and Ethics Program)." It also may require various measures that serve to increase external oversight of the firm's compliance with the law.[112] Mandates that require the firm to adopt an effective compliance program that is consistent with §8B2.1, and no more, involve the prosecutorial imposition of a duty (with court approval) that was created and defined by others.

Yet most PDA compliance mandates do not simply impose the compliance duty defined by others. Most in fact create and impose new legal duties that alter the firm's internal corporate governance. The definition of "Effective Compliance Program" in the

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[111] See Organizational Sentencing Guidelines, supra note.

[112] (4) The organization shall notify the court or probation officer immediately upon learning of (A) any material adverse change in its business or financial condition or prospects, or (B) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.(5) The organization shall submit to: (A) a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises by the probation officer or experts engaged by the court; and (B) interrogation of knowledgeable individuals within the organization. Compensation to and costs of any experts engaged by the court shall be paid by the organization.(6) The organization shall make periodic payments, as specified by the court, in the following priority: (A) restitution; (B) fine; and (C) any other monetary sanction.

Guidelines is remarkably spare. A prosecutor requiring compliance with the guidelines could require the firm to have a program, appoint a compliance officer, adopt an ethics training and related activities. But the Guidelines say nothing specific about the information that is to be collected. Nor do they impose any requirements on board structure or management structure. Nevertheless, despite this lack of clear guidance or specificity by the Guidelines a substantial number of PDAs impose mandates that require the firm to maintain a particular level of staffing or expenditures for its compliance program. Other mandates specify the precise information to be collected. These mandates involve the creation of new duties and not the enforcement of duties imposed by others.

In addition, many PDAs impose corporate governance mandates that reach beyond the firm's compliance program and alter the internal governance structure of the firm in other ways. These include mandates that require the firm to add independent directors to the board (a few identify the specific director), alter board committees, alter management committees, and require separation of the positions of Chairman of the Board and CEO. There is nothing the language of §8B2.1 of the Organizational Guidelines, to support the view that the Organizational Sentencing Guidelines provide prosecutors' with authority to impose mandates to add particular independent directors to the board, specify board and management committees, and other corporate governance reforms. Instead, these mandates create and impose a new legal duty on a firm beyond those imposed by Congress or regulators and beyond the sanctions duly authorized for past conduct. Prosecutors use these types of PDA provisions to engage in de facto firm-specific regulation.[113]

Prosecutors' use of PDAs to create new legal duties governing corporate governance is particularly troubling from a rule of law perspective. While prosecutors' creation of new legal duties itself raises substantive rule of law questions, the type of duties imposed is particularly troubling. As noted many PDAs include mandates governing internal corporate governance—beyond compliance. Corporate governance is an issue that Congress has generally treated as properly regulated by the states. Thus, both the form of authority asserted—the right to create new duties—and the area over which it is asserted—corporate governance—appear to fall outside the scope of legitimate prosecutorial authority. Prosecutors also create and impose new duties when they impose mandates that restrict the scope of the firm's business operations going forward. KPMG was precluded from offering particular prepackaged tax products; Stryker Orthopedics, Zimmer Holdings, and Wright Medical were each subject to restrictions—not otherwise imposed on firms—in their ability to compensate and/or use medical consultants. These mandates do not correct or remedy past violations. Nor are they compliance mandates sanctioned by the Organizational Guidelines.[114] Instead, they involve an effort by prosecutors to deter future unlawful conduct, not through the mechanism Congress allocated to prosecutors (e.g.,

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[113] Arlen and Kahan, supra note 2 .

[114] See Barkow, Prosecutors as Regulatory Agency, supra note 21, at 177-180 (prosecutors go beyond the mandates approved by the Organizational Guidelines when they impose mandates that restrict operations going forward or impose mandates beyond compliance; this regulation by prosecutors challenges separation of power).

fines) but instead through direct regulation, a form of intervention properly allocated to regulators.

PDA mandates also implicate rule of law concerns in the type of duty-creating authority that is asserted. As previously noted, one desiderata of the rule of law is that the legal duties to which people are subject be similar, and not random. Prosecutors' assertion of authority to create new legal duties governing the internal operation of firms is particularly troubling when the authority asserted is the right to impose firm-specific duties that can vary substantially between individuals for no reason beyond the preferences of the prosecutor.

4.2.2. Effective Judicial Review of PDA Mandates?

Broad authority to adopt duties might not violate the rule of law if it is subject to effective external oversight against a standard that ensures that authority is exercised in the public interest. Yet PDA mandates are not subject to effective external oversight.

As previously discussed, when prosecutors seek a formal conviction on the grounds that a defendant owed a legal duty and violated this duty, the prosecutors' determination that the legal duty existed is subject to external review. A defendant can challenge the prosecutors' interpretation of the duties that law imposed on him. The defendant also can obtain judicial review of the appropriateness of any sanction imposed. Judges conducting both forms of review can resort to external standards: the criminal statute in the former case and the Sentencing Guidelines in the latter.

By contrast, prosecutorial discretion to interpret their own authority to impose the PDA mandates that they deem to be appropriate is not constrained by effective external oversight—for example by judges. First, some PDAs— specifically NPAs— are not filed in court and thus are not subject to judicial review.[115] Second, even when prosecutors' use DPAs, which are filed in court, it is not clear whether judges have authority to review the content of the DPA. According to the DOJ, judicial review of a DPA should be restricted to determining whether the prosecutor is using the PDA to circumvent the Speedy Trial Act.[116] According to the DOJ, judges to not have authority to second-guess either the decision to impose a PDA, the choice between a DPA or NPA, or the form of mandate imposed (unless the sanction violates the constitution).[117] The content of the PDA is outside his discretion. While recently a several district judges have concluded that judges have some limited, supervisory authority over DPAs, judges have tended to assert a very

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115 Nor are NPAs governed by the Organizational Sentencing Guidelines.

116 Prosecutors file DPAs in court to obtain a tolling of the Speedy Trial Act. Speedy Trial Act, 18 U.S.C. § 3161(h)(2).

117 NPAs need not be filed with the court, and thus judges tend to play no role at all with NPAs. DPAs are filed with the court, but at present the DOJ claims that judges have little authority to oversee them (mostly limited to making sure they are not violating the defendant's speedy trial right). Even Gleeson's HSBC decision recognizes the weakest oversight. And even with some oversight, judges would be hard pressed to exercise it because the DOJ has never clearly stated the goal of corporate criminal liability, so judges cannot easily determine when a DPA serves or is an affront to that goal.

limited right of oversight.[118] The leading opinion, the HSBC Opinion,[119] indicates that review is limited to issues such as ensuring that the agreement does not include prohibited terms, such as extraordinary restitution provisions prohibited by the U.S. Attorneys Manual.[120] Judges have not asserted the right to evaluate the legitimacy of mandates imposing compliance programs, corporate governance reforms, and restrictions on business practices to determine whether these are within the scope of legitimate prosecutorial authority or imposed in the public interest.[121] Thus, courts generally leave the content of the mandates imposed by PDAs to be determined by the parties (provided the mandate does not violate either a Constitutional right or explicit DOJ policy).

Finally, judicial oversight is not an effective constraint on PDA mandates because, in the current environment, it is unclear how judges could simultaneously recognize prosecutors' authority to impose these mandates and bring them into compliance with the rule of law. The problem is that if prosecutors have authority to create new duties, judges have little ability to exercise more stringent oversight over the content of mandates beyond simply substituting their view of the public good for that of the prosecutor. Judicial review requires some external standard for the court to apply. Often the standard is provided by a statute or rule. In the case of sentencing, it is provided by the advisory Organizational Sentencing Guidelines. Yet the mandates imposed by prosecutors impose duties that go beyond those imposed by Congress or regulators, and differ from the sanctions those bodies specify for crimes. Similarly, many of these mandates are not delineated in the Organizational Sentencing Guidelines either. A judge seeking to evaluate these mandates would not have a clear source of legal authority to turn to.

To see the challenge it is useful to compare judicial review of legal duties imposed through PDA mandates with judicial review of legal created through agency rule-making both in terms of the authority asserted and the potential for judicial review. Agency rule-making generally follows an explicit grant of authority in a statute. This grant of authority often specifies not only the general and specific objectives, but also may constrain the way

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118 See HSBC Order, supra note ; see also U.S. v. Credit Suisse AG, WL 4894467*1 (D.D.C Dec. 16, 2009); Fokker, supra note .

119 See Memorandum and Order, U.S. v. HSBC Bank, US, WL 3306161*3 (Judge Gleason) (EDNY, July 1, 2013) (discussing the government position)(hereinafter HSBC Order).

120 For example, in HSBC Judge Gleason specifically identified mandates that require extraordinary restitution and waiver of the attorney client privilege as a condition of cooperation as the type of mandates that could be invalidated. These two mandates would both be directly contrary to DOJ policy as set forth in the US Attorney's Manual. Yet the US Attorney's manual imposes few constraints beyond this on the content of mandates. Judge Gleason's opinion expresses the view that courts have little basis for prohibiting mandates that are not invalid under either the constitution or DOJ policy. HSBC, supra note ; but compare with Fokker, supra note

121 The DOJ asserts that court authority to oversee DPAs is restricted to ensuring that the prosecutor is not abusing the system in seeking a waiver of the Speedy Trial requirement. It does not recognize court authority to examine specific mandates imposed to determine whether they comply with existing law or policy. Brief in Sarentech. By contrast, Judge John Gleason, in a very thoughtful opinion, concludes that judges do have broader oversight authority. Yet even he narrowly restricted this authority. It would appear to only reach the most egregious abuses that violate fundamental rights like due process. See HSBC Order, supra note .

these objectives are to be achieved. In other cases, the grant of authority specifies general and specific objectives (e.g., promote well- functioning securities markets by adopting rules to regulate proxies), where the objectives are set forth in the statute and/or legislative history. This grant of authority not only cabins the proper exercise of authority but also provides judges with a basis for evaluating whether the legal duties imposed are a proper exercise of government authority.

The DOJ is significantly responsible for this impediment to judicial review. While the DOJ has asserted authority for its prosecutors to impose PDA mandates—and in fact encouraged them to do so—it has not adopted clear guidelines governing when mandates should be imposed and what form of mandates are appropriate. Nor, beyond a few isolated instances—such as mandates requiring extraordinary restitution—has it placed limits on prosecutorial authority to impose mandates. Judges seeking to assert oversight are left with the choice to invalidate all mandates going beyond the guidelines or instead leave all mandates regulating corporate compliance, governance and business practices related to the crime untouched. The DOJ's inaction in crafting reasonably responsible guidelines for its prosecutors put judges in an unenviable all-or-nothing situation and undermines their ability to perform their vital role. Here, the DOJ is the least cost avoider, and could substantially decrease rule of law concerns by employing procedures and oversight more in line with the appropriate exercise of the duty-creating authority they are asserting.

4.2.3. Availability of Other Forms of Effective Oversight?

Of course, judicial review is not the only form—or even necessarily always the best form— of oversight.[122] In some cases, effective oversight may be plausible through institutions within the branch of government asserting authority. In others, it may occur through involvement of the public and the political process.

For example, many agencies that have authority to create new duties through rule-making employ both internal constraint and external constraints imposed by Congress to bring duty-creation by the executive within the rule of law. Many agencies are structured to limit the ability of a single individual to use the discretion to further their political agenda—as with the federal agencies headed by a 5 person commission from different political parties. In addition, many agencies recognize their obligation to supervise discretion by adopting policy goals that are supposed to guide rule-making and enforcement. Finally, the legal duties imposed by many agencies are subject to review by OIRA, an authority within the executive branch that does not answer to the head of the agency adopting the duty.

Oversight also can occur through notice and comment. Congress adopted the Administrative Procedures Act to constrain the exercise of agency rulemaking through public notice of, and a right to participate in agency rulemaking, and procedural requirements designed to ensure that rules are not arbitrary and capricious or person-

[122] See Davis, supra note 3 , discussing the limits of judicial review as a constraint on administrative authority and other mechanisms that can be used legitimately to bring discretion within the rule of law.

specific. Public notice and pressure for standardization of duties is designed to use the combination of sunshine and the requirement that the agency adopt rules of broader application is intended to constrain discretion and ensure that rules serve public goals and not the particular political aims of particular regulators. Public notice gains particular effect when combined with Congresses power over the purse, which can and is used to increase authority over agencies pursuing policies Congress doesn't favor.[123]

PDA mandates are not subject to effective oversight through either avenue. In light of the enormous power and economic consequences implicated by prosecutorial authority to impose PDA mandates, the DOJ could plausibly conclude that it would be appropriate to adopt genuine guidelines governing the use of mandates—and types that should be imposed—and to exercise more centralized oversight of PDAs imposing new legal duties through mandates. Yet it has not.[124]

Except for specialized area such as antitrust, tax, FCPA, and antifraud and money laundering, individual U.S. Attorneys' Offices are free to make their own decisions about when to impose a mandate and what form it should take, without ex ante supervision. They are not required to seek approval of mandates from Main Justice, even when mandates are imposed on a multi-national firm, outside of a few select areas (such as the FCPA). Nor are they are not required to standardize the type of mandates imposed (across crimes, industries or otherwise) or provide clear justifications for the mandates imposed in an effort to constrain arbitrariness.

Nor does the DOJ provide clear guidance to govern the type of mandates imposed. [125] The DOJ has some general guidelines governing the nature of an effective compliance program, particularly in the FCPA area. But these guidelines provide no guidance on the degree to which it is appropriate for prosecutors to not only require the firm to employ a compliance program structure consistence with the guidelines, but to push for increases in investment in the program. Nor does the DOJ provide any genuine guidance on the appropriateness of corporate governance reforms that go beyond compliance programs. The DOJ also provides little effective ex post oversight. In rare cases, where a mandate garnered considerable negative media attention—e.g., Chris Christie's BMS DPA imposing a mandate to contribute $3million to his alma mater, Seton Hall Law School—authorities in Main Justice have intervened, ex post, to limit the use to such mandates going forward. But intervention has not occurred in mandates in response to mandates that do not garner national media attention.

Of course, within those specialized divisions with authority over crimes such as such as the FCPA, money laundering and antitrust, there does appear to be more standardization of the duties created and internal oversight. But even here, standardization

[123] [add cite]

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[125] The USAM suggests that mandates should be considered when the firm did not have an effective compliance program, the manual provides no real guidance about what other factors are relevant to the decision to impose mandates and no real guidance beyond this in terms of what types of mandates are legitimate.

occurs without the constraining benefits associated with standardization of duty-creating authority in other situations. In contrast with agency rule-making, where standardization of duty-creation is accompanied by public notice and comment,[126] prosecutors who create new mandates are not required to seek public notice and comment, even when the relevant division is developing mandates that it expects to impose on other firms. Indeed, the DOJ not only permits prosecutors to create duties in private (with input only from the defendant) but also permits prosecutors to impose PDAs that are not publicly records. The lack of notice and comment removes an important mechanism for oversight of executive authority to define legal duties. Indeed, the combination of ostensibly firm-specific duty creation and no notice and comment in effect shields duty-creation through PDAs from the public scrutiny that normally attends rule-making, and in turn reduces the likelihood of Congressional oversight.[127]

Thus, prosecutors cannot rest a claim that their imposition of PDA mandates is within the rule of law on a claim that enforcement discretion conforms to the rule of law. Prosecutorial discretion to impose PDA mandates is not subjects to the constraints that arguably operate to keep traditional enforcement discretion within the rule of law, either in terms of the scope of authority asserted or the degree of oversight provided. These mandates involve the exercise by prosecutors of a presumptively invalid form of authority: the authority to create duties. And prosecutors are subject to less right of oversight by third parties when they use PDAs to create and enforce new duties than when they exercise traditional enforcement power. Indeed, this authority is more akin to regulatory rule-making authority than enforcement.

Yet course, prosecutors cannot predicate a claim that PDA mandates are legitimate on our acceptance of executive branch rule-making through administrative agencies.[128] Administrative agencies are empowered by Congress to create new duties whose breach can be punished; prosecutors are not. Second, PDA mandates have none of the procedural safeguards that are employed to ensure agencies use their discretion to serve legitimate public aims. These include public notice and comment and the need to justify and standardize duties imposed. Indeed, the DOJ not only permits prosecutors to create duties in private (with input only from the defendant) but also permits prosecutors to impose PDAs that are not publicly recorded. Moreover, agency rule-making is subject to external oversight by both judges and often the Office of Information and Regulatory Affairs (OIRA). By contrast, judges have no or little oversight authority over PDA mandates.

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[126] This input both provides important information and operates as a political constraint on agencies' adoption of rules that serve private interests or conception of the public good.

[127] Barkow and Huber, supra note , at 69.

[128] Many of the concerns raised here also apply to duties imposed through agency enforcement actions, although not with the same force. First, many agencies assert more oversight over enforcement and the Commission on top views itself as having authority to determine that enforcement may or may not impose certain mandates. In addition, most agencies impose mandates through formal enforcement actions that require court approval, the SEC has recently employed both DPAs and NPAs. While the scope of this oversight is constrained, see Citi (2nd Circuit 2014), there is a greater right of oversight than with NPAs. see text accompanying notes __-__ infra.

Finally, agency rule-making involves a more presumptively valid form of duty creation—duties that attach to all persons engaged in a particular activity. This is consistent with conceptions of the rule of law that disfavor the imposition of legal duties that apply to one person and not another similarly situated person.

5. Bringing PDA Mandates Within the Rule of Law

Accordingly, the DOJ's current approach to PDA mandates is inconsistent with the rule of law. Prosecutors' are not adequately constrained through either limits on their authority to create mandates or through external oversight of the mandates imposed. Individual prosecutors have far too much discretion to create and impose new duties that often fall outside a reasonable interpretation of prosecutors' sanctioning authority. These duties regularly govern matters over which prosecutors' have little expertise—e.g., corporate governance--and which Congress has treated as the proper province of others, e.g., the states or the SEC.[129] Moreover, the DOJ's own approach to these mandates has exacerbated the problem. The DOJ has steadfastly resisted calls for it to provide prosecutors with clearer ex ante guidance appropriate mandates, or even effective guidance on the types of corporate governance reforms prosecutors should avoid. Deferring to prosecutorial discretion, the DOJ has left prosecutors free to let many flowers bloom. But discretion to create and impose new duties is not an area where this discretion is appropriate. The current approach to PDAs violates the rule of law by granting prosecutors' far too much discretion, over a form of authority that they generally should not be exercising—duty creation—with little if any oversight to ensure that discretion is employed to serve public aims.

In the U.S., tend to view separation of powers that the mechanism to use to ensure discretion is exercised consistent with the rule of law. Consistent with this view, some have called for increased judicial review.[130] Judicial review over PDAs should be a component of any effort to bring PDA mandates into conformity with the rule of law. Yet judicial review of mandates is not sufficient. First, the concern remains with the scope and form of authority being exercised by prosecutors. Second, the judges cannot easily exercise effective oversight absent a plausible standard to use when evaluating what mandates are appropriate. At present, no such standard exists. Judicial review of mandates that would either take the form of (1) eliminating all mandates not expressly authorized in the Organizational Guidelines (or imposed with consent of regulators), (2) approving all mandates, or (3) approving those mandates that the judge, with no expertise in this area, determines are reasonable. None of these options provides the form of oversight and constraint likely to both bring mandates under the rule of law and render them effective.

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[129] See Arlen, supra note [Barkow book] (prosecutors generally do not have sufficient expertise to impose these mandates and the adjudicatory process employed is far less likely than agency authority to lead to informed expert decision-making concerning mandates).

[130] See Garrett, supra note.

Separation of powers, of course, is only one means for ensuring that discretionary governmental authority is exercised consistent with the rule of law. It is not an end in and of itself. Nor is it the only means to the end: rule of law. PDA mandates involves an issue—like many of the issues that we delegate to agencies—where it is important that duty-creation authority be exercised by experts. This argues for leaving duty-creation authority within the executive branch.[131] The challenge is to determine both which actors in the executive branch should be granted this discretion—agencies or the DOJ—and how to employ the constraints available—the ability to place constraints on the scope of duty-creation authority exercised and to allocate oversight authority—to bring this discretion under the rule of law. While the precise framework for bringing mandates within the rule of law is beyond the scope of this article, we can identify some useful principles.

At present, prosecutors enjoy considerable freedom to impose any mandates that have a plausible claim to be likely to deter crime in the future. This is a tremendous degree of discretion. PDA mandates could be brought into better conformity with the rule of law—and at the same time improved in terms of their impact—if constraints were placed on the scope of the DOJ's authority to impose mandates. In particular, the scope of authority to impose mandates should be delineated by the core policy justification for mandates. In previous work with Marcel Kahan, we determined that mandates are justified in some cases, but only when the firm is plagued by agency costs directly affecting corporate policing: only when there is evidence that management is not appropriately attending to compliance to serve their aims and the board does not exercise effective oversight. Evidence that management has not attended to compliance because they did not think it was important to do so is not sufficient. That problem is best address through clear articulation of what is required to have optimal compliance ex ante coupled with serious monetary sanction enhancements sufficient to ensure management wants to comply. By contrast, management that is motivated by personal concerns to have weak compliance (or commit crimes) will not adopt effective compliance even if the firm faces serious liability.[132] Articulating the goal of mandates enables us to determine the proper scope of authority that should be granted. Mandates should be permitted that require firms to conform to the Effective Compliance Program provisions of the Organizational Sentencing Guidelines and other compliance duties. When agency costs are high, authority should be granted to impose more specific mandates concerning compliance. In addition, mandates that reduce agency costs would appear valid—specifically, that increase board oversight over compliance, require reporting to outside authorities of add a monitor.[133] But the policy justification for mandates should place many presumptively off limits: including those separating the Chairman of the Board and CEO, specifying the precise identify of outside directors, and that alter management structure in a way that does not precisely reduce agency costs.

[131] See Davis, supra note (providing a more detailed discussion of when discretion to adopt rules often needs to be exercised by agencies and others in the executive branch).

[132] Arlen and Kahan, supra note.

[133] Arlen and Kahan, supra note.

Second, since the authority to impose mandates is an authority to create new duties—duties that affect fundamental rights and can have enormous economic consequences for firms at the core of our economy—the full authority to determine what duties concerning compliance should be created is not granted to individual prosecutors. Duty-creation must be constrained to serve the public interest—and to conform to the rule of law in terms of equity across persons. This suggests that we should evaluate whether to place authority over the creation of these duties with the relevant regulatory agencies and ask them to adopt more standardized mandate guidelines to govern compliance programs to govern their area of expertise. Alternatively or in addition the DOJ could considerably reduce, or even eliminate, the rule of law concerns by working with regulatory agencies to encourage them to adopt rules—through formal rule-making procedures—delineating the appropriate mandates to be imposed on wrongdoers, and guidelines to govern their use, coupled with a right of judicial oversight.

Interventions to bring PDA mandates within the rule of law by channeling mandate-creation through a more appropriate, and constrained, rule-creation process that incorporates the information acquisition and public input of agency rule-making would additional benefits beyond the rule of law. PDA mandates have tremendous potential to promote public welfare if, but only if, they are designed to optimally deter crime. Individual prosecutors cannot be relied on to individually identify and employ an optimal approach to mandates through adjudication. They generally will not have either the personal expertise or incentives to do so. And the adjudicatory process itself will not aid them, as it is aimed at resolving a particular dispute. It is not designed to obtain information from a broad range of individuals on the appropriate solution to a problem.[134] Requiring the DOJ to treat duty-creation through PDAs as an exercise of a more regulatory rule-making form of authority, with all the constraints entailed, would not only promote the rule of law, but help provide duty-creators with broader expert input, from parties beyond the participants in the case, into what are mandates are appropriate in what circumstances.[135]

Finally, and related, additional oversight over mandates is required. At a minimum, the DOJ should adopt clearer guidance for prosecutors concerning the policy

[134] Barkow and Huber, supra note , at 59; see David L. Shapiro, *The Choice of Rulemaking and Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 930 (1965).

[135] Standardization of mandates also could provide allocative efficiency benefits. PDA mandates govern activities that have a material effect on the firm's operations. Many compliance programs are extraordinarily expensive both directly and through their effect on firm productivity. For example, HSBC recently announced that its mandated compliance program, which increased annual expenditures on compliance from $24 million to more than $240 million in 2011 produced a 5% reduction in profits[]. JP Morgan was required to dramatically increase its expenditures on compliance, and now employs over 8,000 people in this area []. Yet it recently announced that it is laying off thousands in other areas. Neither these costs nor their consequences are necessarily contrary to social welfare. But concerns arise if mandates with material consequences are not imposed consistently across similar firms with similar wrongs, as the resulting differential costs could distort the industry, favoring firms that objectively are not superior.

justifications for mandates, the factors that should determine their use, and clear guidelines on the degree to which prosecutors should impose compliance mandates and governance reforms that go beyond the Organizational Guidelines, and what constraints should be placed on this authority. The guidelines are important not only for their ex ante value, but because precise Guidelines would render any oversight provided by judicial review more effective.

6. Conclusion

Corporate crime caused billions of dollars of harm and corrupts state power at home and abroad. Deterring these wrongs is of paramount importance. We need to grant prosecutors considerable authority to impose enormous sanctions in order to do so. Moreover, prosecutors also need authority to go beyond monetary sanctions. Federal authorities cannot optimally deter large firms without the ability to use their enforcement power to impose mandates that improve both compliance and internal and external oversight over the management's attention to compliance.[136]

Yet, while prosecutorial authority to impose mandates through PDAs is important to our ability to deter corporate crime, this authority must be granted and exercised in conformity with the rule of law. At present, it is not. The rule of law requires that government actors not be allowed to use state power to use their authority to serve their own aims (or their own interpretation of public aims). Commitment to the rule of law thus precludes the grant to individual government actors of authority to create duties, interpret them and enforce them largely free from any effective oversight, internal or external. Yet this is just the scope of authority and discretion currently exercised by prosecutors who use PDAs to impose mandates. Many use their discretion in a limited way. But the fact that individual prosecutors often are circumspect is not sufficient. Conformity with the rule of law requires constraints on those who create and enforce new duties.

Of course, any effort to bring PDAs into better conformity with the rule of law is not cost-free. Intervention by other branches of government, and by centralized authority within the DOJ, cannot be assumed to lead to optimal enforcement power. Genuine public-regarding and innovative enforcement policy will rarely come from the center. Congress is plagued by effective rent-seeking and the public political theater of corporate crime. It has tended to appease the latter through tough sounding laws and professed commitment to enforcement while appeasing the latter through under-funding of enforcement and strategic avoidance of certain forms of intervention.[137] Many administrative agencies also are subject to capture or have structures, such as 5 person politically-divided Commissions, that deter aggressive action. Main Justice itself tends to be more vulnerable to political pressures. Thus, reasons exist to worry that enhanced

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[136] Arlen and Kahan, supra note.

[137] See Dan Richman, *Corporate Headhunting*, 8 HARVARD LAW AND POLICY REVIEW (forthcoming) (discussing Congress's practice of approving increased funding for enforcement that it later does not appropriate).

oversight may increase the role of political pressures and reduce corporate enforcement.[138] Many innovative and arguable welfare-enhancing uses of PDA mandates may never see the light of day in a system that increases oversight, even if efforts to bring PDA mandates within the rule of law are structured to limit the adverse consequences of increased centralized oversight. Yet in the end, the rule of law is not there to protect us from the rare, public-regarding visionary. It is there to protect us from normal people with everyday aims facing inevitable temptations to use their authority improperly. The impediments placed on the rare visionary may be a small price to pay for the greater (and more frequently implicated) benefit of increased safeguards from potential abuse.

[138] See Dan Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999).

9-28.000 United States Attorneys Manual
PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS

9-28.200 General Considerations of Corporate Liability

General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.

Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed further below. In doing so, prosecutors should be aware of the public benefits that can flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry, and thus an indictment can provide a unique opportunity for deterrence on a broad scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm—e.g., environmental crimes or sweeping financial frauds—may be committed by a business entity, and there may therefore be a substantial federal interest in indicting a corporation under such circumstances.

In certain instances, it may be appropriate, upon consideration of the factors set forth herein, to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation. These agreements are discussed further in USAM 9-28.1000. Likewise, civil and regulatory alternatives may be appropriate in certain cases, as discussed in USAM 9-28.1100.

Where a decision is made to charge a corporation, it does not necessarily follow that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.

Corporations are "legal persons," capable of suing and being sued, and capable of committing crimes. Under the doctrine of respondeat superior, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent's actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should not limit their focus solely to individuals or the corporation, but should consider both as potential targets.

Agents may act for mixed reasons—both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. ****

9-28.300Factors to Be Considered

General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. See USAM 9-27.220 et seq. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. See id. However, due to the nature of the corporate "person," some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (see USAM 9-28.400);
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management (see USAM 9-28.500);
3. the corporation's history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it (see USAM 9-28.600);
4. the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see USAM 9-28.700);
5. the existence and effectiveness of the corporation's pre-existing compliance program (see USAM 9-28.800);
6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies (see USAM 9-28.900);
7. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution (see USAM 9-28.1000);
8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
9. the adequacy of remedies such as civil or regulatory enforcement actions (see USAM 9-28.1100).

[Ed numbering added]

Comment: The factors listed in this section are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Some of these factors may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. In addition, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their thoughtful and pragmatic judgment in applying and balancing these factors, so as to achieve a fair and just outcome and promote respect for the law.

In making a decision to charge a corporation, the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following statements of principles that summarize the considerations they should weigh and the practices they should follow in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities—are adequately met, taking into account the special nature of the corporate "person."

9-28.400 Special Policy Concerns

General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal misconduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, tax, and criminal law enforcement policies. In applying these Principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required by the facts presented.

Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. See USAM 9-27.230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government's investigation of their own and others' wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation's pre-indictment conduct, e.g., voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation's business. With this in mind, the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, Environmental and Natural Resources, and National Security Divisions, as appropriate.

9-28.500Pervasiveness of Wrongdoing Within the Corporation

General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees, or by all the employees in a particular role within the corporation, or was condoned by upper management. On the other hand, it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

Comment: Of these factors, the most important is the role and conduct of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

> Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority ... who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. USSG § 8C2.5, cmt. (n. 4).

9-28.600 The Corporation's Past History

General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges and how best to resolve cases.

Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the misconduct in spite of the warnings or enforcement actions taken against it. The corporate structure itself (e.g., the creation or existence of subsidiaries or operating divisions) is not dispositive in this analysis, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates may be considered, if germane. See USSG § 8C2.5(c), cmt. (n. 6).

9-28.700The Value of Cooperation

General Principle: In determining whether to charge a corporation and how to resolve corporate criminal cases, the corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.

Cooperation is a potential mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (e.g., suborning perjury or false statements, or refusing to comply with lawful discovery requests). Thus, failure to cooperate, in and of itself, does not support or require the filing of charges with respect to a corporation any more than with respect to an individual.

Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously.

This dynamic—i.e., the difficulty of determining what happened, where the evidence is, and which individuals took or promoted putatively illegal corporate actions—can have negative consequences for both the government and the corporation that is the subject or target of a government investigation. More specifically, because of corporate attribution principles concerning actions of corporate officers and employees (see, e.g., supra section II), uncertainty about exactly who authorized or directed apparent corporate misconduct can inure to the detriment of a corporation. For example, it may not matter under the law which of several possible executives or leaders in a chain of command approved of or authorized criminal conduct; however, that information if known might bear on the propriety of a particular disposition short of indictment of the corporation. It may not be in the interest of a corporation or the government for a charging decision to be made in the absence of such information, which might occur if, for example, a statute of limitations were relevant and authorization by any one of the officials were enough to justify a charge under the law. Moreover, and at a minimum, a protracted government investigation of such an issue could, as a collateral consequence, disrupt the corporation's business operations or even depress its stock price.

For these reasons and more, cooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government—and ultimately shareholders, employees, and other often blameless victims—by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes. With cooperation by the corporation, the government may be able to reduce tangible losses, limit damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation by enabling the government to focus its investigative resources in a manner that will not unduly disrupt the corporation's legitimate business operations. In addition, and critically, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.

9-28.710 Attorney-Client and Work Product Protections

The attorney-client privilege and the attorney work product protection serve an extremely important function in the American legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under the law. See Upjohn v. United States, 449 U.S. 383, 389 (1981). As the Supreme Court has stated, "[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Id. The value of promoting a corporation's ability to seek frank and comprehensive legal advice is particularly important in the contemporary global business environment, where corporations often face complex and dynamic legal and regulatory obligations imposed by the federal government and also by states and foreign governments. The work product doctrine serves similarly important goals.

For these reasons, waiving the attorney-client and work product protections has never been a prerequisite under the Department's prosecution guidelines for a corporation to be viewed as cooperative. Nonetheless, a wide range of commentators and members of the American legal community and criminal justice system have asserted that the Department's policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection. Everyone agrees that a corporation may freely waive its own privileges if it chooses to do so; indeed, such waivers occur routinely when corporations are victimized by their employees or others, conduct an internal investigation, and then disclose the details of the investigation to law enforcement officials in an effort to seek prosecution of the offenders. However, the contention, from a broad array of voices, is that the Department's position on attorney-client privilege and work product protection waivers has promoted an environment in which those protections are being unfairly eroded to the detriment of all.

The Department understands that the attorney-client privilege and attorney work product protection are essential and long- recognized components of the American legal system. What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review. In addition, while a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so. The critical factor is whether the corporation has provided the facts about the events, as explained further herein.

9-28.720 Cooperation: Disclosing the Relevant Facts

Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys.

Thus, when the government investigates potential corporate wrongdoing, it seeks the relevant facts. For example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it? In this respect, the investigation of a corporation differs little from the investigation of an individual. In both cases, the government needs to know the facts to achieve a just and fair outcome. The party under investigation may choose to cooperate by disclosing the facts, and the government may give credit for the party's disclosures. If a corporation wishes to receive credit for such cooperation, which then can be considered with all other cooperative efforts and circumstances in evaluating how fairly to proceed, then the corporation, like any person, must disclose the relevant facts of which it has knowledge.[FN2]

(a) Disclosing the Relevant Facts—Facts Gathered Through Internal Investigation

Individuals and corporations often obtain knowledge of facts in different ways. An individual knows the facts of his or others' misconduct through his own experience and perceptions. A corporation is an artificial construct that cannot, by definition, have personal knowledge of the facts. Some of those facts may be reflected in documentary or electronic media like emails, transaction or accounting documents, and other records. Often, the corporation gathers facts through an internal investigation. Exactly how and by whom the facts are gathered is for the corporation to decide. Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact- gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel. Whichever process the corporation selects, the government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—not whether the corporation discloses attorney-client or work product materials. Accordingly, a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney- client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected.[FN3] On this point the Report of the House Judiciary Committee, submitted in connection with the attorney-client privilege bill passed by the House of Representatives (H.R. 3013), comports with the approach required here:

> [A]n ... attorney of the United States may base cooperation credit on the facts that are disclosed, but is prohibited from basing cooperation credit upon whether or not the materials are protected by attorney-client privilege or attorney work product. As a result, an entity that voluntarily discloses should receive the same amount of cooperation credit for disclosing facts that happen to be contained in materials not protected by attorney-client privilege or attorney work product as it would receive for disclosing identical facts that are contained in materials protected by attorney-client privilege or attorney work product. There should be no differentials in an assessment of cooperation (i.e., neither a credit nor a penalty) based upon whether or not the materials disclosed are protected by attorney-client privilege or attorney work product. H.R. Rep. No. 110-445 at 4 (2007).

In short, so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive privilege or work product protection in the process.[FN4] Likewise, a corporation that does not disclose the relevant facts about the alleged misconduct—for whatever reason—typically should not be entitled to receive credit for cooperation.

Two final and related points bear noting about the disclosure of facts, although they should be obvious. First, the government cannot compel, and the corporation has no obligation to make, such disclosures (although the government can obviously compel the disclosure of certain records and witness testimony through subpoenas). Second, a corporation's failure to provide relevant information does not mean the corporation will be indicted. It simply means that the corporation will not be entitled to mitigating credit for that cooperation. Whether the corporation faces charges will turn, as it does in any case, on the sufficiency of the evidence, the likelihood of success at trial, and all of the other factors identified in Section III above. If there is insufficient evidence to warrant indictment, after appropriate investigation has been completed, or if the other factors weigh against indictment, then the corporation should not be indicted, irrespective of whether it has earned cooperation credit. The converse is also true: The government may charge even the most cooperative corporation pursuant to these Principles if, in weighing and balancing the factors described herein, the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort to cooperate cannot necessarily absolve a corporation that has, for example, engaged in an egregious, orchestrated, and widespread fraud. Cooperation is a relevant potential mitigating factor, but it alone is not dispositive.

(b) Legal Advice and Attorney Work Product

Separate from (and usually preceding) the fact-gathering process in an internal investigation, a corporation, through its officers, employees, directors, or others, may have consulted with corporate counsel regarding or in a manner that concerns the legal implications of the putative misconduct at issue. Communications of this sort, which are both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege. Such communications can naturally have a salutary effect on corporate behavior—facilitating, for example, a corporation's effort to comply with complex and evolving legal and regulatory regimes.[FN5] Except as noted in subparagraphs (b)(i) and (b)(ii) below, a corporation need not disclose and prosecutors may not request the disclosure of such communications as a condition for the corporation's eligibility to receive cooperation credit.

Likewise, non-factual or core attorney work product—for example, an attorney's mental impressions or legal theories—lies at the core of the attorney work product doctrine. A corporation need not disclose, and prosecutors may not request, the disclosure of such attorney work product as a condition for the corporation's eligibility to receive cooperation credit.

(i) Advice of Counsel Defense in the Instant Context

Occasionally a corporation or one of its employees may assert an advice-of-counsel defense, based upon communications with in- house or outside counsel that took place prior to or contemporaneously with the underlying conduct at issue. In such situations, the defendant must tender a legitimate factual basis to support the assertion of the advice-of-counsel defense. See, e.g., Pitt v. Dist. of Columbia, 491 F.3d 494, 504-05 (D.C. Cir. 2007); United States v. Wenger, 427 F.3d 840, 853-54 (10th Cir. 2005); United States v. Cheek, 3 F.3d 1057, 1061-62 (7th Cir.

1993). The Department cannot fairly be asked to discharge its responsibility to the public to investigate alleged corporate crime, or to temper what would otherwise be the appropriate course of prosecutive action, by simply accepting on faith an otherwise unproven assertion that an attorney—perhaps even an unnamed attorney—approved potentially unlawful practices. Accordingly, where an advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it.

(ii) Communications in Furtherance of a Crime or Fraud

Communications between a corporation (through its officers, employees, directors, or agents) and corporate counsel that are made in furtherance of a crime or fraud are, under settled precedent, outside the scope and protection of the attorney- client privilege. See United States v. Zolin, 491 U.S. 554, 563 (1989); United States v. BDO Seidman, LLP, 492 F.3d 806, 818 (7th Cir. 2007). As a result, the Department may properly request such communications if they in fact exist.

9-28.730Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation has engaged in conduct intended to impede the investigation. Examples of such conduct could include: inappropriate directions to employees or their counsel, such as directions not to be truthful or to conceal relevant facts; making representations or submissions that contain misleading assertions or material omissions; and incomplete or delayed production of records.

In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action. This prohibition is not meant to prevent a prosecutor from asking questions about an attorney's representation of a corporation or its employees, officers, or directors, where otherwise appropriate under the law.[FN6] Neither is it intended to limit the otherwise applicable reach of criminal obstruction of justice statutes such as 18 U.S.C. § 1503. If the payment of attorney fees were used in a manner that would otherwise constitute criminal obstruction of justice—for example, if fees were advanced on the condition that an employee adhere to a version of the facts that the corporation and the employee knew to be false—these Principles would not (and could not) render inapplicable such criminal prohibitions.

Similarly, the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements. Of course, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired. Corporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate.

Finally, it may on occasion be appropriate for the government to consider whether the corporation has shared with others sensitive information about the investigation that the government provided to the corporation. In appropriate situations, as it does with individuals, the government may properly request that, if a corporation wishes to receive credit for cooperation, the information provided by the government to the corporation not be transmitted to others—for example, where the disclosure of such information could lead to flight by individual subjects, destruction of evidence, or dissipation or concealment of assets.

9-28.740 Offering Cooperation: No Entitlement to Immunity

A corporation's offer of cooperation or cooperation itself does not automatically entitle it to immunity from prosecution or a favorable resolution of its case. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents. Thus, a corporation's willingness to cooperate is not determinative; that factor, while relevant, needs to be considered in conjunction with all other factors.

9-28.750 Qualifying for Immunity, Amnesty, or Reduced Sanctions Through Voluntary Disclosures

In conjunction with regulatory agencies and other executive branch departments, the Department encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities. Some agencies, such as the Securities and Exchange Commission and the Environmental Protection Agency, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division has a policy of offering amnesty only to the first corporation to agree to cooperate. Moreover, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

9-28.760 Oversight Concerning Demands for Waivers of Attorney-Client Privilege or Work Product Protection By Corporations Contrary to This Policy

The Department underscores its commitment to attorney practices that are consistent with Department policies like those set forth herein concerning cooperation credit and due respect for the attorney-client privilege and work product protection. Counsel for corporations who believe that prosecutors are violating such guidance are encouraged to raise their concerns with supervisors, including the appropriate United States Attorney or Assistant Attorney General. Like any other allegation of attorney misconduct, such allegations are subject to potential investigation through established mechanisms.

9-28.800 Corporate Compliance Programs

General Principle: Compliance programs are established by corporate management to prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents. In addition, the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

Comment: The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of respondeat superior. See United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983) ("[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if ... such acts were against corporate policy or express instructions."). As explained in United States v. Potter, 463 F.3d 9 (1st Cir. 2006), a corporation cannot "avoid liability by adopting abstract rules" that forbid its agents from engaging in illegal acts, because "[e]ven a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents." Id. at 25-26. See also United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972) (noting that a corporation "could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks"); United States v. Beusch, 596 F.2d 871, 878 (9th Cir. 1979) ("[A] corporation may be liable for acts of its employees done contrary to express instructions and policies, but ...the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation.").

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formulaic requirements regarding corporate compliance programs. The fundamental questions any prosecutor should ask are: Is the corporation's compliance program well designed? Is the program being applied earnestly and in good faith? Does the corporation's compliance program work? In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned.[FN7] Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law. See, e.g., In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968-70 (Del. Ch. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a "paper program" or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. Prosecutors also should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation's employees and agents or to mitigate charges or sanctions against the corporation.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program's design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist United States Attorneys' Offices in finding the appropriate agency office(s) for such consultation.

9-28.900 Restitution and Remediation

General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as improving an existing compliance program or disciplining wrongdoers, in determining whether to charge the corporation and how to resolve corporate criminal cases.

Comment: In determining whether or not to prosecute a corporation, the government may consider whether the corporation has taken meaningful remedial measures. A corporation's response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated.

Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined wrongdoers, once those employees are identified by the corporation as culpable for the misconduct. Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. Although corporations need to be fair to their employees, they must also be committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. Prosecutors should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its acceptance of responsibility and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider as to appropriate disposition of a case.

9-28.1000 Collateral Consequences

General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases.

Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federally funded programs such as health care programs. Determining whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, and is a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the relevance of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity. Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing, and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

On the other hand, where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims.[FN8] Ultimately, the appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law.

9-28.1100 Other Civil or Regulatory Alternatives

General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution—e.g., civil or regulatory enforcement actions—the prosecutor may consider all relevant factors, including:

the sanctions available under the alternative means of disposition;

the likelihood that an effective sanction will be imposed; and

the effect of non-criminal disposition on federal law enforcement interests.

Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to a serious violation, a pattern of wrongdoing, or prior non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied through civil or regulatory actions. In determining whether a federal criminal resolution is appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority's interest; the regulatory authority's ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority's enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. See USAM 9-27.240, 9-27.250.

9-28.1200 Selecting Charges

General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor at least presumptively should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant's misconduct and that is likely to result in a sustainable conviction.

Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require "a faithful and honest application of the Sentencing Guidelines" and an "individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime." See USAM 9-27.300. In making this determination, "it is appropriate that the attorney for the government consider, inter alia, such factors as the [advisory] sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range ...is proportional to the seriousness of the defendant's conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation." Id.

9-28.1300 Plea Agreements with Corporations

General Principle: In negotiating plea agreements with corporations, as with individuals, prosecutors should generally seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. See USAM 9-27.400-530. This means, inter alia, that the corporation should generally be required to plead guilty to the most serious, readily provable offense charged. In addition, any negotiated departures or recommended variances from the advisory Sentencing Guidelines must be justifiable under the Guidelines or 18 U.S.C. § 3553 and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later "proclaim lack of culpability or even complete innocence." See USAM 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate "person" and that ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters or corporate monitors. See USSG §§ 8B1.1, 8C2.1, et seq. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate.

Where the corporation was engaged in fraud against the government (e.g., contracting fraud), a prosecutor may not negotiate away an agency's right to debar or delist the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals as outlined herein. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. See USAM 9-28.800.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is entirely truthful. To do so, the prosecutor may request that the corporation make appropriate disclosures of relevant factual information and documents, make employees and agents available for debriefing, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible personnel are identified and, if appropriate, prosecuted. See generally USAM 9-28.700. In taking such steps, Department prosecutors should recognize that attorney-client communications are often essential to a corporation's efforts to comply with complex regulatory and legal regimes, and that, as discussed at length above, cooperation is not measured by the waiver of attorney-client privilege and work product protection, but rather is measured by the disclosure of facts and other considerations identified herein such as making witnesses available for interviews and assisting in the interpretation of complex documents or business records.

These Principles provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

FN 1. While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.

FN 2. There are other dimensions of cooperation beyond the mere disclosure of facts, of course. These can include, for example, providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records. This section of the Principles focuses solely on the disclosure of facts and the privilege issues that may be implicated thereby.

FN 3. By way of example, corporate personnel are typically interviewed during an internal investigation. If the interviews are conducted by counsel for the corporation, certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product. To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers' interviews. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews, unless the identical information has otherwise been provided—as well as relevant non-privileged evidence such as accounting and business records and emails between non-attorney employees or agents.

FN 4. In assessing the timeliness of a corporation's disclosures, prosecutors should apply a standard of reasonableness in light of the totality of circumstances.

FN 5. These privileged communications are not necessarily limited to those that occur contemporaneously with the underlying misconduct. They would include, for instance, legal advice provided by corporate counsel in an internal investigation report. Again, the key measure of cooperation is the disclosure of factual information known to the corporation, not the disclosure of legal advice or theories rendered in connection with the conduct at issue (subject to the two exceptions noted in USAM 9-28.720(b)(i-ii)).

FN 6. Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys' fees are paid, sometimes arise in the course of an investigation under certain circumstances—to take one example, to assess conflict-of-interest issues. Such questions can be appropriate and this guidance is not intended to prohibit such limited inquiries.

FN 7. For a detailed review of these and other factors concerning corporate compliance programs, see USSG § 8B2.1.

FN 8. Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. See USAM 9-27.641.