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# Corporate Governance Failures and Economic Crimes: Examining Corporate Criminal Liability, Insider Trading and Fraud

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**Abstract:** This research paper will examine the role and effectiveness of corporate criminal liability in ensuring corporate accountability in the modern business environment. It will analyse the challenges associated with deterrence, enforcement, corporate governance, and executive accountability while evaluating the impact of existing legal and regulatory frameworks. The study will also explore emerging issues related to digital assets, crypto currencies, and cross-border corporate crimes. Based on these findings, the paper will propose measures to strengthen corporate governance, enhance individual and corporate accountability, promote international cooperation, and develop adaptive regulatory frameworks that will improve the effectiveness of corporate criminal liability in addressing future corporate misconduct.

**Keywords:** Corporate Criminal Liability, Corporate Governance, White-Collar Crime, Securities Fraud, Insider Trading, Corporate Accountability, FCPA.

## Introduction

Corporate Governance and Economic Crime go hand in hand and are not peripheral, but integral. Failure of the internal controls that are supposed to bring the good behaviour of companies becomes a vacuum, often filled with fraud, self-dealing and the systematic suppression of material information. The impacts go beyond the financial losses. The failures of Enron Corporation (2001), WorldCom (2002), and the cascade of financial crises and failures that followed the 2008 financial crisis, including failures in retirement savings, in jobs, and in the effectiveness of market regulation, all undermined the working of the markets (Coffee, 2002; Partnoy, 2009). In each case, the reasons why the precipitating act was committed were not just moral failing on the part of the individual but were due to broader issues in the system of oversight.

One of the most controversial innovations of the law is the concept of corporate criminal liability, which holds a legal entity liable for committing a criminal act instead of only the individual(s) responsible for it. The traditional insistence on the criminal law that the defendant have a guilty mind or mens rea, is at odds with the fiction of corporate personhood. However, courts and legislatures in the United States, the United Kingdom, Australia and elsewhere have devised principles to hold organizations liable for actions of their employees or agents when the actions are part of their work (Khanna, 1996). These doctrines are still contentiously debated, especially in the context of the reluctance of prosecutors to indict large financial institutions and the fact that many are being prosecuted through deferred prosecution agreements (DPAs) which allow corporations to avoid conviction for criminal conduct, in exchange for costlier financial penalties and remedial undertakings (Brandon, 2014).

The problem of informational asymmetries that undermine market integrity is a paradigmatic case of insider trading, which occurs when someone trades a security based on material non-public information. Restrictions on insider trading are based on principles of fairness of competition and investor protection, but the definition of insider trading has evolved considerably over time and with case law. The Supreme Court's rulings on this case are found in

The classical theory and the misappropriation theory, which remain the cornerstones of liability, were set out in the cases of United States v. O'Hagan and Dirks v. SEC.The classical theory and the misappropriation theory are the two theories that remain the bedrock of liability in these cases, United States v. O'Hagan, 521 U.S. 642 (1997) and Dirks v. SEC, 463 U.S. 646 (1983). In recent years, however, the scope of the prohibition has been extended as the Securities and Exchange Commission (SEC) has expanded its enforcement efforts and new questions have arisen concerning the extent to which the prohibition should be enforced (Bainbridge, 2013).

In fact, corporate fraud (financial statement manipulation, Ponzi schemes and accounting irregularities) may create the most diffuse societal harm among the three phenomena that we examined. Bernard L. Madoff Investment Securities LLC deceived thousands of investors worldwide, and claimed losses of more than sixty-five billion dollars (Henriques, 2011). Financial instruments are increasingly complicated and opaque, and detection and prosecution has become more difficult, requiring more and more sophisticated forensic accounting techniques and inter-agency cooperation.

**Corporate Criminal Liability: Doctrinal Foundations and Contemporary Challenges**

The notion of corporate criminal liability is based on a legal fiction with a lot of legal force. The Supreme Court was first to rule that a corporation may be held criminally liable for the acts of its agents in New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481 (1909). The doctrine of 'respondeat superior' has been borrowed from the civil law context and applies to criminal liability when an employee acts in the name of the corporation in the course of his duties and with the intent to benefit the corporation, that is, at least partially. (Khanna, 1996) This is a general guideline, and has been criticized for including companies when the wrongdoing was performed by rogue actors who acted against the clear guidelines of the company.

The doctrine of “responsible corporate officer” (RCO) was first enunciated in United States v. Park, 421 U.S. 658 (1975), imposes personal criminal liability on corporate officers who, by virtue of their authority and responsibility, were able to prevent or correct the violation. Importantly, the RCO doctrine does not require that the officer actually know of the violation: it is enough that he/she failed to exercise authority to prevent the violation. In the realm of food safety, environmental regulation and pharmaceutical compliance, this doctrine has been recently applied and eminently divergent from the common law principle of personal involvement in a crime (Rosen, 2010).

The deferred prosecution agreement has become the most important tool that the United States Department of Justice uses to resolve corporate criminal investigations. A DPA involves the government agreeing to drop charges if the corporation admits guilt, fines the corporation, helps with the investigations, and takes steps toward compliance improvements (Brandon, 2014). Critics say DPAs can effectively shield companies and their top executives from real accountability, which would lead to a two-tiered justice system, where companies with a lot of money can buy immunity from criminal convictions. The failure to prosecute individuals after the 2008 financial crisis, in the face of a vast amount of evidence of mortgage frauds and securities crimes, has been pointed to as proof that enforcement is being “captured” by those it is meant to oversee (Eisinger, 2017).

The Bribery Act 2010 of the United Kingdom added the offence of failure to prevent bribery, whereby commercial organisations are held liable if any "associated person" in the organisation commits a bribery offence unless the organisation has put in place adequate procedures to prevent the offence. This form of defense, sometimes referred to as the "adequate procedures" defense, has had a significant effect on the discussion on corporate criminal liability reform in several jurisdictions. There are similar provisions in Australia, Canada and in some of the member countries of the EU. The move from a more derivative notion of corporate criminal responsibility to a more autonomous one, whereby the corporation's own organizational shortcomings are the crime, is a better indication of the reconceptualization of the nature of corporate criminal responsibility (Wells, 2001).

**Insider Trading: Legal Framework and Evolving Enforcemen** Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 are the primary provisions of the insider trading regulations in the United States. The classic theory that has been developed in Chiarella v. United States (1980) is that an insider who trades on material non-public information commits a breach of fiduciary duty to the shareholders. Under the misappropriation theory established in United States v. O'Hagan (1997), an individual who breaches a duty of confidentiality by using confidential information acquired in the course of a relationship of trust and confidence (Bainbridge, 2013; Nagy, 1998) is liable.

In Dirks v. SEC (1983), the Supreme Court further delineated insider trading law by ruling that liability will exist when the insider provides inside information to a third party in order to obtain personal benefit to that party, and the third party knows of the breach of the fiduciary relationship. In its recent decision in Salman v. United States (2016), the Supreme Court again clarified the wide scope of tippee liability (Langevoort, 2017).

Adopted strategies are becoming more effective and sophisticated, with the use of high-end market surveillance technologies and international cooperation. The conviction of Raj Rajaratnam in the Galleon insider trading scandal provided a good example of how well modern investigative tools work in uncovering securities fraud (Bharara, 2014). To avoid the misuse of confidential information and the trading of information prior to major corporate news, financial institutions have implemented information barrier policies and trading restrictions, but they exist to the detriment of the traders according to the literature (Augustin et al., 2019).

The increasing internationalization of securities markets made the task of enforcement even more complex, owing to the fact that many cases of insider trading involve more than one jurisdiction. International cooperation has also improved, but different countries' legal frameworks still pose major issues for effective cross-border regulation (Salter, 2008).

**Corporate Fraud: Financial Statement Manipulation and the Regulatory Response**

Corporate fraud encompasses deceptive acts that deceive investors, regulators, creditors and the public, including financial statement fraud. This kind of scam usually includes altering revenues, assets, liabilities, or accounting records to give a false impression of a company's financial condition. Financial statement fraud, although not common, can have the potential to create substantial economic losses, and can lead to a loss of confidence in the market (ACFE, 2022).

One of the biggest corporate frauds was the collapse of Enron Corp. in 2001. Enron used special purpose entities to mask a large amount of debt, and used accounting tricks to overstate their income; Arthur Andersen did not maintain independence and objectivity in their auditing of Enron (McLean & Elkind, 2003). In response, the Sarbanes-Oxley Act of 2002 (SOX) provided more stringent corporate governance requirements, executive certification of financial statements, greater auditor independence, and creation of the Public Company Accounting Oversight Board (PCAOB) to regulate the auditing profession (Romano, 2005).

The financial markets also failed at the level of fraud detection, and enforcement, especially during the 2008 financial crisis. While there was considerable fraud with mortgage-backed securities and other financial products, very few individuals faced criminal prosecution, a trend which has been criticized for being dependent on corporate settlements and deferred prosecution agreements (Eisinger, 2017).

The Dodd-Frank Act of 2010 was broadened in its anti-fraud enforcement provisions by the creation of the Consumer Financial Protection Bureau and the SEC Whistleblower Program, which offers a bounty of financial awards and protection to the individuals who disclose securities law violations. The program has played a crucial role in uncovering corporate wrongdoing and in securing substantial enforcement penalties (SEC, 2022).

The Ponzi scheme is another way a company can commit fraud – in this case, returns to existing investors are paid from the money of new investors. The Bernard Madoff scandal revealed significant shortcomings in both the regulatory oversight and its enforcement, leading to reforms that will enhance SEC investigations, investor protection, and fraud detection processes (Henriques, 2011).

**Cross-Cutting Themes: Enforcement, Deterrence, and Governance Reform**

One theme that repeatedly runs through the corporate crime literature is the question of whether or not there is sufficient deterrence of the corporate crimes that are prohibited. Classical deterrence theory assumes that potential criminals compare the possible risk of criminal punishment (chance of being caught and the punishment that occurs if they are caught) with the benefits of the crime. The calculus is more complex for sophisticated corporate actors who have well-trained attorneys: enforcement priorities are often opaque, DPAs can be negotiated in exchange for not finding any individuals or officers guilty, and directors' and officers' liability insurance (D&O) can be purchased to cover civil and, in some jurisdictions, criminal liability should an individual be found guilty of a crime (Kraakman, 1984).

It has long been recognized that executive compensation practices contain structural failures or "vectors" that allow failures to occur. Compensation based on stock options puts powerful incentives on executives to inflate short-term earnings, because they can reap profits when they exercise options at inflated stock prices, but it is not because of long-term value creation. These incentive mismatches have been recognized in law by a number of post-Enron provisions, such as SOX's prohibition on executive loans and the clawback provisions built into Dodd-Frank's compensation rules. However, empirical evidence indicates that compensation-based earnings management still exists and that executives continue to have discretion over their accounting decisions in ways that meet their short-term stock price goals (Bergstresser & Philippon, 2006).

The key principle of governance reform after the scandals, board independence, has been a trickier factor than its supporters had hoped. An inexperienced director might not have the necessary knowledge to assess how well management's representations are created, whereas an experienced director might be structurally disinclined to challenge his or her peers. Norms of collegial deference and director reputation, found in empirical studies of governance failures, may inhibit director skepticism, which is essential for good governance (Langevoort, 2001). The situation was seen in the Enron and WorldCom boardrooms, where directors who, in theory, were independent approved transactions, which a more critical board would have thoroughly examined.

The increasing adoption of digital technologies and cryptocurrencies has created new opportunities for economic crime which require a new approach to regulation and enforcement. Although blockchain-based assets do provide real-world efficiencies, they have also been used for market manipulation and initial coin offerings (ICOs) that are fraudulent, and for money laundering. The SEC's shifting stance on the definition of a "security" for digital assets, the rise of decentralized finance (DeFi) platforms lacking any central intermediary, and the worldwide nature of cryptocurrency transactions create new challenges for enforcement of securities law for which current legal structures are not necessarily suited (Zetzsche et al., 2018). The extent and form of regulation is a subject of debate, and has important consequences for the protection of investors and financial stability.

**Conclusions:**

Whilst corporate governance failures and economic crimes are not outlying and exceptional instances of a functional system, they are frequent occurrences in an institutional environment where incentive structures, oversight mechanisms and enforcement capacities are wrongly aligned on a regular basis. The legal principles explored in this paper are the sum of the reaction to a series of corporate wrongdoings, each reform cycle responding to a crisis with significant human consequences and for which the prevention in hindsight is more easily accomplished through the use of more stringent standards.

That corporate crimes continue to occur after decades of reform reinforces the idea that legal measures are inadequate tools to prevent corporate crime. To ensure meaningful deterrence, senior decision makers with a distance from operational misconduct are regularly designed, and not necessarily a sign of innocence.

So, the issues of corporate governance and economic crimes are more institutional culture than legal design. Regardless of the sophistication of the statutes, they are easily captured, circumvented and eroded when norms of the professional and organizational bodies that are relevant to compliance do not reinforce it. Restoring the "ethical framework" of corporate governance takes a longer time than a single regulatory cycle can provide, and will, to some extent, depend on legal education, professional responsibility codes, corporate culture changes and continuous enforcement. The dream of fair, transparent, and investor-and community-owned markets is yet to be realized and is a necessary dream to keep.

**References:**


1. Association of Certified Fraud Examiners (ACFE), *Report to the Nations: Occupational Fraud 2022 – Global Study on Occupational Fraud and Abuse* (ACFE, 2022).
2. Augustin, P., Brenner, M., Subrahmanyam, M. and Tomio, D., 'Informed Options Trading Prior to M&A Announcements: Insider Trading?' (2019) 74(6) *Journal of Financial Economics* 1286.
3. Bainbridge, Stephen M., *Insider Trading Law and Policy* (Foundation Press, 2013).
4. Bergstresser, Daniel and Philippon, Thomas, 'CEO Incentives and Earnings Management' (2006) 80(3) *Journal of Financial Economics* 511.
5. Bharara, Preet, *Doing Justice: A Prosecutor's Thoughts on Crime, Punishment, and the Rule of Law* (Knopf, 2019).
6. Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* (Harvard University Press, 2014).
7. Coffee Jr., John C., 'Understanding Enron: It's About the Gatekeepers, Stupid' (2002) 57 *Business Lawyer* 1403.
8. Eisinger, Jesse, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* (Simon & Schuster, 2017).
9. Henriques, Diana B., *The Wizard of Lies: Bernie Madoff and the Death of Trust* (Times Books, 2011).
10. Khanna, Vikramaditya S., 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109 *Harvard Law Review* 1477.
11. Kraakman, Reinier H., 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93(5) *Yale Law Journal* 857.
12. Langevoort, Donald C., 'The SEC, Retail Investors, and the Institutionalization of the Securities Markets' (2001) 95 *Virginia Law Review* 1025.
13. Langevoort, Donald C., 'Salman, Newman, and the Evolving Law of Insider Trading' (2017) 69 *Stanford Law Review Online* 1.
14. McLean, Bethany and Elkind, Peter, *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron* (Portfolio, 2003).
15. Nagy, Donna M., 'Reframing the Misappropriation Theory of Insider Trading Liability' (1998) 59 *Ohio State Law Journal* 1223.
16. Organisation for Economic Co-operation and Development (OECD), *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (1997).
17. Partnoy, Frank, 'Overdependence on Credit Ratings Was a Primary Cause of the Crisis' (2009) *University of San Diego Legal Studies Research Paper Series*.
18. Romano, Roberta, 'The Sarbanes-Oxley Act and the Making of Quack Corporate Governance' (2005) 114 *Yale Law Journal* 1521.
19. Rosen, David, 'The Responsible Corporate Officer Doctrine and Corporate Compliance' (2010) *Environmental Law Reporter*.
20. Salter, Michael S., *Innovation Corrupted: The Origins and Legacy of Enron's Collapse* (Harvard University Press, 2008).
21. Securities and Exchange Commission (SEC), *Annual Report to Congress on the Dodd-Frank Whistleblower Program* (2022).
22. Wells, Celia, *Corporations and Criminal Responsibility* (2nd edn, Oxford University Press, 2001).
23. Zetzsche, Dirk A., Buckley, Ross P., Arner, Douglas W. and Barberis, Janos N., 'Regulating Digital Assets and Decentralized Finance: Emerging Challenges for Securities Regulation' (2018) *University of Luxembourg Law Working Paper Series*.
24. *Bribery Act* 2010 (UK).
25. *Dodd-Frank Wall Street Reform and Consumer Protection Act* 2010 (US).
26. *Foreign Corrupt Practices Act* 1977 (US).
27. *Sarbanes-Oxley Act* 2002 (US).
28. *Securities Exchange Act* 1934 (US).
29. Chiarella v. United States.
30. Dirks v. SEC.
31. New York Central & Hudson River Railroad Co. v. United States.
32. Salman v. United States.
33. United States v. O'Hagan