

H O N O R A B L E M E N T I O N

THE NEW GATEKEEPERS: PRIVATE FIRMS AS PUBLIC ENFORCERS

by Rory Van Loo

Rory Van Loo is an Associate Professor of Law at Boston University and an Affiliated Fellow at the Yale Law School Information Society Project.

The world's largest businesses must routinely police other businesses. By public mandate, Facebook monitors app developers' privacy safeguards, Citibank audits call centers for deceptive sales practices, and Exxon reviews offshore oil platforms' environmental standards. Scholars have devoted significant attention to how policymakers deploy other private-sector enforcers, such as certification bodies, accountants, lawyers, and other periphery "gatekeepers." However, the literature has paid insufficient attention to the emerging regulatory conscription of large firms at the center of the economy. This Article examines the rise of the enforcer-firm through case studies of the industries that are home to the most valuable companies in technology, banking, oil, and pharmaceuticals. Over the past two decades, administrative agencies have used legal rules, guidance documents, and court orders to mandate that private firms in these and other industries perform the duties of a public regulator. More specifically, firms must write rules in their contracts

that reserve the right to inspect third parties. When they find violations, they must pressure or punish the wrongdoer. For example, the U.S. Environmental Protection Agency—along with the U.S. Department of Justice—requires BP Oil and other energy companies to audit offshore oil platform operators for environmental compliance, and include certain provisions in any new contract with a drilling rig, including requiring the rig to join an industry safety group. This form of governance has important intellectual and policy implications. It imposes more of a public duty on the firm, alters corporate governance, and may even reshape business organizations. It also gives resource-strapped regulators promising tools and presents the possibility of greater efficiency, expertise, and responsiveness to consumers. If designed poorly, however, the enforcer-firm will create an expansive area of unaccountable authority. Any comprehensive account of the firm or regulation must give a prominent role to the administrative state's newest gatekeepers.

Editors' Note: This abstract is adapted from Rory Van Loo, The New Gatekeepers: Private Firms as Public Enforcers, 106 VA. L. REV. 467 (2020), and is used with permission.