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A 'VICTIMLESS' CRIME? HOW THE INTERPLAY OF THE DEMAND REQUIREMENT AND THE GOVERNMENT'S FIGHT AGAINST CORRUPTION IS INJURING SHAREHOLDERS

PREFACE

The public and scholarly debate on corruption is largely focused on the damage that is done to a local economy and the public trust in the jurisdiction where the bribe is made.¹ This discourse has focused on the human cost and the financial waste that result from corrupt payments to public officials.² While this discussion is undoubtedly one worth having, one constituency whose interests are also detrimentally affected by acts of international corruption is the shareholders of publicly held U.S. companies.³ When a corporate entity is investigated and punished, large financial penalties, a decline in stock value and the loss of goodwill are common consequences.⁴ Shareholders' woes are compounded by the fact that bribery is commonplace in many emerging markets, yet American businesses and individuals are forced to deal with an unprecedented wave of corruption enforcement activity.⁵ While public corporations are investigated and prose-

¹ See e.g., Cyavash Nasir Ahmadi, Note, *Regulating the Regulators: A Solution to Foreign Corrupt Practices Act Woes*, 11 J. INT'L BUS. & L. 351, 363-67 (2012) (discussing "social, political and economic costs of corruption"); Moiz A. Shirazi, *The Impact of Corruption on International Trade*, 40 DENV. J. INT'L L. & POL'Y 435, 435-46 (2012) (examining economic cost of corruption on emerging market economies); Elizabeth Spahn, *Nobody Gets Hurt?*, 41 GEO. J. INT'L L. 861, 869 (2010) (noting that bribery causes the "public interest [to be] subordinated to private individual gain"); Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA. L. & BUS. REV. 145, 177 (2011) ("[R]unaway corruption [in developing countries] undermines critical governing institutions, fuels public resentment, exacerbates socioeconomic inequality, [and] creates massive economic distortions . . ."); see also ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, *The Rationale for Fighting Corruption*, CLEANGOVBIZ, <http://www.oecd.org/cleangovbiz/49693613.pdf> (last visited, March 6, 2014) (outlining economic costs of corruption).

² See sources cited *supra* note 1.

³ See discussion *infra* Part III.B.

⁴ See U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *Restoring Balance Proposed Amendments to the Foreign Corrupt Practices Act 2-3* (October 2010) (addressing increased penalties under Foreign Corrupt Practices Act); see also *infra* Part III.B (discussing cases alleging harm done to corporation as a result of bribery investigation).

⁵ See RICHARD N. DEAN & PAUL B. STEPHAN, *DOING BUSINESS IN EMERGING MARKETS: A TRANSACTIONAL COURSE 11* (Robert E. Clark et al. eds., 2010) (discussing question of why corruption persists in many emerging economies). Dean and Stephan argue that endemic corruption

cuted at home, their shareholders have been largely unsuccessful in their attempts to hold corporate decision makers accountable for their involvement in international corruption schemes.⁶

I. INTRODUCTION

In today's international marketplace, deals are done across national boundaries, oceans and cultural differences.⁷ U.S. companies are continuously seeking to expand their operations across the globe which inevitably leads to a host of legal issues both at home and abroad.⁸ Among the most frequently encountered dilemmas is the widespread use of corrupt business practices in international commercial transactions.⁹

in transitioning and emerging economies is due to a lack of public and legal institutions capable of dealing with the challenges of a market economy as well as undertrained and poorly compensated public servants. *Id.* Although many transitioning economies are seeking to liberalize, "the public [in these countries has] come to expect public officials to be corrupt." *Id.* at 10. In the context of a multinational enterprise (MNE) doing business in a developing country, an underpaid local official may be in a position where he or she is deciding the fate of a multi-million dollar investment. *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 420 (Vicki Been et al. eds., 2d ed. 2010). This leads to a dynamic in which the official is in a position to demand a payment of money or a gift in return for a favorable exercise of discretion. *Id.* When a public official in a developing country is vested with such significant power and is operating in an environment of little to no oversight, coupled with a society that tolerates corrupt payoffs as a common occurrence in the transaction of business, demands for payments, favors, or gifts become routine. *Id.* *See also* discussion *infra* Part II.B (noting enhanced regulatory and punitive crackdown on international bribery schemes).

⁶ *See* discussion *infra* Part III (overviewing pleading standards for derivative actions and noting effect on FCPA shareholder suits). A current example of these types of shareholder derivative actions is *Cottrell v. Duke*, 737 F.3d 1238 (8th Cir. 2013), in which dissatisfied shareholders of Wal-Mart Stores, Inc. are seeking financial redress for their directors' alleged misdeeds in relation to a widespread and sophisticated bribery scheme in Mexico. *Id.* The Eighth Circuit recently vacated a stay that the District Court had put in place, thereby allowing the shareholders' suit to proceed. *Id.* at 1249-50. Given the scrutiny that Wal-Mart has received for these alleged acts, with extensive coverage in the New York Times, *see* Archive of Articles Regarding Wal-Mart, Inc., NEW YORK TIMES,

http://topics.nytimes.com/top/news/business/companies/wal_mart_stores_inc/index.html (last visited Mar. 13, 2014). It will be interesting to see whether this case will fall in line with the pattern of unsuccessful shareholder actions that are the subject of this note, or provide the plaintiffs with some form of relief.

⁷ *See* CHOW & SCHOENBAUM, *supra* note 5, at 10, 12 (discussing growth of cross-border business transactions since World War II and accompanying cultural challenges).

⁸ *See id.* at 4 (noting transformation of legal profession as it pertains to counseling MNEs doing business internationally).

⁹ *See* THE WORLD BANK, *The Cost of Corruption*, NEWS & BROADCAST, Apr. 8, 2004, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187~menuPK:34457~pagePK:34370~piPK:34424~theSitePK:4607,00.html>. Total corrupt payments across the globe amount to over \$1 trillion each year according to the World Bank. *Id.* *See also*

The Foreign Corrupt Practices Act (“FCPA” or “the Act”) prohibits American businesses from corruptly conducting their international dealings.¹⁰ Since its inception in 1977, the FCPA has evolved to become a centerpiece of U.S. anti-bribery policy, as well as an important component of the international fight against corruption.¹¹ This note analyzes the effect of the Act’s evolution on shareholder derivative actions which follow government investigations of publicly traded U.S. corporations. The analysis attempts to point out that corporate entities and their respective shareholders are victimized by their decision makers’ failure to adequately protect the corporation in today’s anti-corruption enforcement environment.

Part I of this article discusses the legislative history of the Act and explains its substantive provisions.¹² Part II focuses on the recent history of the FCPA and how the trajectory points to an increase in the quantity and vigor of enforcement actions.¹³ Part III.A gives a brief overview of the pleading requirements in a shareholder derivative action, which play a central role in determining whether the merits of an FCPA shareholder action will ever see the light of day.¹⁴ Part III.B then goes on to discuss the most recent shareholder derivative actions which have sought to hold corporate officers accountable for their failure to comply with the current FCPA framework.¹⁵ Part IV critiques the application of the Rule 23.1 pleading standard in FCPA derivative actions, and argues that this procedural rule goes beyond its intended utility by deciding the outcome of derivative actions which seek judicial recourse for directorial fiduciary violations.¹⁶

MCDERMOTT, WILL & EMERY, DISTRIBUTION IN CHINA - LEGAL ISSUES 5 (2013) (noting widespread corruption in China). For instance, “[i]n the health sector, bribery has become so common that the Ministry of Health has issued draft guidelines that may require both patients and doctors to sign a mutual non-bribery agreement before hospitalization.” *Id.*; see also sources cited *supra* note 5 (discussing environment in many developing countries, conducive to extensive use of corrupt business practices).

¹⁰ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78(m)(b),(d)(1), (g)-(h), 78dd-1, 78dd-2, 78dd-3, 78ff (2006).

¹¹ See *infra* notes 56-62 and accompanying text (discussing increased focus on combating international bribery as a matter of U.S. and international policy).

¹² See *infra* Part I (noting political basis of the Act and substantive provisions intended to achieve end result).

¹³ See *infra* Part II (discussing authorities’ increased focus on FCPA enforcement and how courts have interpreted Act broadly).

¹⁴ See *infra* Part III.A (explaining “demand” requirement in shareholder derivative litigation).

¹⁵ See *infra* Part III.B (summarizing most recent case law regarding shareholder derivative actions following FCPA investigations).

¹⁶ See *infra* Part IV (analyzing patterns in unsuccessful shareholder derivative actions following FCPA violations).

A. *The Politics of the Foreign Corrupt Practices Act*

The Foreign Corrupt Practices Act was a legislative effort to combat international bribery by imposing a heightened ethical standard on American companies and individuals doing business abroad.¹⁷ Triggering passage of the Act was a Securities and Exchange Commission (SEC) report¹⁸ which exposed the rampant nature of international bribery at a time when “Watergate” still weighed heavily on the American political consciousness.¹⁹ The report exposed more than 400 businesses, including 117 Fortune 500 companies, who had admitted to making questionable payments totaling over \$300 million.²⁰

Congress was particularly concerned about the possible ripple effects of a culture of foreign bribery in which U.S. businesses were actively engaged.²¹ Aside from being viewed as “counter to the moral expectations and values of the American public,” the practice of bribing foreign government officials negatively affected domestic business, because non-corrupt U.S. companies were excluded from commercial opportunities that were given to others willing to bribe.²² Congressional denunciation further argued that the practice of international bribery weakened “public confidence in the integrity of the free market system . . . [while] short-circuit[ing] the marketplace by directing business to those companies too inefficient to compete in terms of price, quality or service, or too lazy to

¹⁷ See S. REP. NO. 95-114, at 4 (1977) (“A strong antibribery law is urgently needed to bring these corrupt practices to a halt and to restore public confidence in the integrity of the American business system.”); see also Thomas McSorley, *Foreign Corrupt Practices Act*, 48 AM. CRIM. L. REV. 749, 750 (2011) (stating that FCPA sought to restore “public confidence” in American business dealings overseas); Ahmadi, *supra* note 1, at 351 (positing that FCPA was a political response to series of bribery scandals).

¹⁸ SEC. & EXCH. COMM’N., 94TH CONG., REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES 1 (1976), available at www.sec.gov/spotlight/fcpa/sec-report-questionable-illegal-corporate-payments-practices-1976.pdf.

¹⁹ See *United States v. Castle*, 925 F.2d 831, 834 (5th Cir. 1991) (noting legislative intent to limit “negative domestic effects” after revelations of widespread foreign bribery); see also S. REP. NO. 95-114, at 3 (1977) (“The image of American democracy abroad has been tarnished. Confidence in the financial integrity of our corporations has been impaired. The efficient functioning of our capital markets has been hampered.”).

²⁰ See H.R. REP. NO. 95-640, at 4 (1977); see also Sam Singer, Comment, *The Foreign Corrupt Practices Act in the Private Equity Era: Extracting a Hidden Element*, 23 EMORY INT’L L. REV. 273, 273-74 (2009) (discussing findings of report and its political implications).

²¹ See H.R. REP. NO. 95-640, at 4-5 (1977) (discussing detrimental effects of corrupt payments on various sectors of the political economy).

²² See *id.* at 5 (“[I]n many cases the resulting adverse competitive affects [*sic*] are entirely domestic . . . [P]ayments have been made not to ‘outcompete’ foreign competitors, but rather to gain an edge over other U.S. manufacturers”).

engage in honest salesmanship.”²³ Finally, the prevalence of international bribery by American companies had chilling ramifications on U.S. foreign policy objectives because it allowed anti-American factions in the target-country to “drive a wedge” between their government’s relations with the United States.²⁴

B. *Structure and Purpose of the FCPA*

The Act imposes both criminal and civil penalties on U.S. business entities and individuals who bribe foreign government officials for the purpose of obtaining or retaining business.²⁵ The purpose of the FCPA was to prohibit U.S. corporations from using the instrumentalities of interstate commerce to corruptly pay off foreign government agents in their official capacities.²⁶ The Act utilizes a two-pronged approach to combat foreign bribery, by (a) implementing substantive anti-bribery provisions, and (b) imposing accounting and bookkeeping rules on certain U.S. companies.²⁷ The SEC is responsible for all civil enforcement actions, whereas the Department of Justice (DOJ) handles investigations and prosecutions of alleged criminal violations of the Act.²⁸

i) Anti-Bribery Provisions

The Act’s anti-bribery provisions lay out the elementary framework of what constitutes an illegal payment to a foreign official.²⁹ Unlike the accounting provisions, which only apply to “issuers,” the anti-bribery

²³ *Id.* at 4.

²⁴ *See id.* at 5 (discussing foreign policy problems created by culture of corporate bribery in overseas business dealings).

²⁵ *See* JEROLD A. FRIEDLAND, *UNDERSTANDING INTERNATIONAL BUSINESS AND FINANCIAL TRANSACTIONS* 177 (3d. ed. 2010) (outlining purpose and history of the Act).

²⁶ H.R. REP. NO. 95-640, at 5 (1977) (indicating purpose of FCPA).

²⁷ *See* FRIEDLAND, *supra* note 25, at 178 (outlining Act’s approach to combating corrupt foreign business practices).

²⁸ *See* Sharifa G. Hunter, Note, *A Comparative Analysis of the Foreign Corrupt Practices Act and the U.K. Bribery Act, and the Practical Implications of Both on International Business*, 18 ILSA J. INT’L & COMP. L. 89, 92-93 (2011) (describing division of enforcement responsibilities under the Act). The Federal Bureau of Investigation (“FBI”) generally investigates allegations of bribery and passes its findings along to the Fraud Section of DOJ’s Criminal Division. Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 160 (2010). The DOJ Criminal Division in Washington, D.C. is required to give its express permission before any FCPA prosecution can take place. *Id.* Investigations of civil violations are conducted by the SEC’s Division of Enforcement. *Id.*

²⁹ *See* McSorley, *supra* note 17, at 757-66 (explaining anti-bribery provisions).

provisions cover a greater number of parties as they apply to “issuers,”³⁰ “domestic concerns,”³¹ and individuals.³² A violation of the Act’s anti-bribery provisions requires that a covered party 1) makes use of the means of interstate commerce; 2) corruptly; 3) in furtherance of a payment or promise to pay; 4) money or anything of value; 5) to any foreign official, foreign political party, foreign political party official, foreign candidate for office, or any person of whom one knows will pass on any portion of the payment to one of the foregoing (intermediaries); 6) for the purpose of influencing an act of such person in his or her official capacity; 7) to obtain or retain business.³³

ii) Accounting Controls

Commissioner J. Thomas Rosch of the Federal Trade Commission once stated: “If the anti-bribery provisions are the heart of the FCPA, then the accounting provisions are its mind.”³⁴ The accounting rules are intended to ensure honest and diligent bookkeeping for the purpose of providing transactional transparency.³⁵ The idea behind the imposition of an affirmative obligation to accurately and meticulously record transactional activity was that it would make corrupt payments more difficult to conceal while at the same time encouraging intra-corporate due diligence.³⁶

Any publicly traded company that is required to comply with Sections 12 and 15(d) of the Securities and Exchange Act as an “issuer” of securities is subject to the Act’s accounting rules.³⁷ The statute specifically

³⁰ 15 U.S.C. § 78dd-1 (2006) (prohibiting corrupt practices by issuers).

³¹ 15 U.S.C. § 78dd-2 (2006). A “domestic concern” is defined as “any individual who is a citizen, national, or resident of the United States; and . . . any corporation . . . which has its principal place of business in the United States, or which is organized under the laws of a State of the United States . . .” 15 U.S.C. §§ 78dd-2(h)(1)(A)-(B) (2006).

³² 15 U.S.C. § 78dd-3 (2006).

³³ 15 U.S.C. § 78dd-1(a) (1998).

³⁴ J. Thomas Rosch, Commissioner, U.S. Enforcement of the Foreign Corrupt Practices Act of 1977: Some Observations and Thoughts, Address before the Forum for EU-US Legal-Economic Affairs, 2012 WL 4328247, at *1 (Sep. 13, 2012).

³⁵ 15 U.S.C. § 78m(b) (2012); *see also* FRIEDLAND, *supra* note 25, at 178 (describing FCPA’s accounting provisions); H.R. REP. NO. 94-831, at 10 (1977) (“the issuer’s records should reflect transactions in conformity with accepted methods of recording economic events and effectively prevent off-the-books slush funds and payments of bribes”).

³⁶ *See* Rosch, *supra* note 34, at *1 (explaining legislative intent behind FCPA accounting provisions); WALLACE L. TIMMENY & ROBERT B. VON MEHREN, PRACTICING LAW INSTITUTE, FOREIGN CORRUPT PRACTICES ACT THREE YEARS AFTER PASSAGE 32-35 (1981) (evaluating arguments for and against implied materiality and scienter requirements in accounting provisions).

³⁷ H.R. REP. NO. 94-831, at 10 (1977).

provides that “[e]very issuer . . . shall make and keep books, records, and accounts, which in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.”³⁸ In addition, the accounting provisions specifically prohibit the knowing failure to implement internal accounting controls as well as the knowing falsification of records.³⁹

The record-keeping provisions apply to any U.S. issuer regardless of its level of direct involvement in foreign business operations.⁴⁰ The Fifty Percent Plus One Rule states that even an issuer which does not engage in any foreign business dealings of its own, may be liable for violating the accounting rules if it owns a majority of a domestic or foreign subsidiary’s outstanding stock, and the subsidiary is found to be in violation of the provisions.⁴¹

II. THE MATURATION OF A ‘PAPER TIGER’ – THE ACT’S HISTORICAL EVOLUTION AND TODAY’S ENFORCEMENT ENVIRONMENT

A. *The 1988 and 1998 Amendments*

The first amendment to the FCPA came in 1988 as part of the Omnibus Trade and Competitiveness Act.⁴² By 1988, the Act had been on the books for over a decade, yet had only provided the basis for twenty-three enforcement actions.⁴³ In an effort to transform the “paper tiger” into an enforcement vehicle, capable of deterring corporate bribery, both criminal

³⁸ 15 U.S.C. § 78m(b)(2)(A) (2006).

³⁹ 15 U.S.C. § 78m(b)(5) (2006). The wording of this provision was part of a 1988 amendment to the Act, which has been criticized as weakening the record keeping provisions because it requires proof of a scienter element (“knowingly”) as a predicate for criminal liability. See Bruce W. Klaw, *A New Strategy for Preventing Bribery and Extortion in International Business Transactions*, 49 HARV. J. ON LEGIS. 303, 313 (2012) (discussing context and purpose of 1988 amendments).

⁴⁰ 15 U.S.C. § 78m(b)(2) (2006).

⁴¹ See 15 U.S.C. § 78m(b)(6) (2012) (“[W]here an issuer . . . holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer’s circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2)”); see also Ahmadi, *supra* note 1, at 362 (discussing the Fifty Percent Plus One rule).

⁴² Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107 (1988) (codified at 15 U.S.C. § 78dd-1 (1998)).

⁴³ See Klaw, *supra* note 39, at 311 (citing small number of enforcement actions taken under FCPA in first decade).

and civil penalties under the Act were enhanced.⁴⁴ Maximum criminal fines for corporate entities were doubled, while the fine ceiling for individual persons was increased tenfold.⁴⁵

The 1988 amendment however, also added two affirmative defenses and an exemption to the Act, which were intended to mitigate the harsh effects of the criminalization of every questionable payment made to a foreign official.⁴⁶ The affirmative defenses included (1) the local law defense, which decriminalized the giving of a bribe, if the payment in question was expressly authorized by the written laws of the host country; and (2) the “reasonable . . . bona fide expenditure” defense, which allowed reasonable expenditures related to “the promotion . . . of products . . . or the execution . . . of a contract with a foreign government.”⁴⁷ Finally, the routine governmental action exception – known as the “grease” payment exception for its purpose of greasing the operational systems of public administrative institutions – provides that payments made for the purpose of “expedit[ing] or secur[ing]” the performance of routine public functions are exempt from the Act’s anti-bribery provisions.⁴⁸ This exception however, was intended to be narrowly construed to apply to payments which facilitate a foreign official’s non-discretionary, obligatory actions.⁴⁹ Any payment which acts

⁴⁴ See H.R. REP. NO. 95-640, at 20 (1977) (describing the Act as potentially incapable of deterring acts of bribery); see also 15 U.S.C. § 78dd-2(g)(1)(A) (1998) (allowing for fines of up to \$2 million for violation of Act by “domestic concern”).

⁴⁵ See Klaw, *supra* note 39, at 311-12 (describing increase in maximum possible fines under the Act).

⁴⁶ See CRIMINAL DIV. U.S. DEP’T OF JUSTICE & ENFORCEMENT DIV. U.S. SEC. & EXCH. COMM’N, *A Resource Guide To The U.S. Foreign Corrupt Practices Act*, 3 (Nov. 4, 2012), available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> (addressing affirmative defenses as part of 1988 amendment). Passage of the affirmative defenses was motivated in part by the fact that certain small payments or gifts were part of the legal and cultural norm in other parts of the world. See Kyle P. Sheahen, *I’m Not Going to Disneyland: Illusory Affirmative Defenses Under the Foreign Corrupt Practices Act*, 28 WIS. INT’L L.J. 464, 469 (2010) (stating certain unlawful payments under Act were “customary and legal” elsewhere in world); see also Matt A. Vega, *The Sarbanes-Oxley Act and the Culture of Bribery: Expanding the Scope of Private Whistleblower Suits to Overseas Employees*, 46 HARV. J. ON LEGIS. 425, 447 (2009) (“[G]iving expensive gifts for . . . certain holidays, birthdays, and weddings, are an expected part of Japanese business culture. Balancing these conflicting legal and cultural rules can be challenging, especially for companies doing business in several countries.”); *infra* Part II.C.ii (evaluating narrow judicial interpretation of affirmative defenses).

⁴⁷ 15 U.S.C. § 78dd-3(c) (1998); see also *infra* Part II.C.ii (explaining affirmative defenses in greater detail).

⁴⁸ 15 U.S.C. § 78dd-3(b) (1998).

⁴⁹ See *United States v. Kay*, 359 F.3d 738, 745 (5th Cir. 2004) (noting legislative intent that grease payment exception outlines “very limited categories of permissible payments”). Interestingly however, the addition of the grease payment exception in the context of the Act’s historical evolution has been interpreted as “strongly support[ing] the conclusion that the [government] must bear the burden of negating the ‘facilitating’ payments exception.” S.E.C. v. Jackson, 908

to induce the official to take a discretionary action in favor of the payor is not covered by the grease payment exception.⁵⁰

The 1998 Amendment was borne out of congressional concern for the disadvantage at which U.S. businesses were placed as a result of being subject to the FCPA.⁵¹ Many international competitors were not required to comply with anti-corruption laws in their home countries, which prompted Congress to seek to even the playing field by enlisting the help of the Organization for Economic Cooperation and Development (“OECD”).⁵² Several years of negotiations resulted in the creation of the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”), which was incorporated into U.S. law through the 1998 amendment.⁵³

As he signed the 1998 amendment into law, President Clinton issued a signing statement in which he outlined his hopes for increased international cooperation in the fight against bribery:

The United States has led the effort to curb international bribery Since the enactment[of the FCPA], U.S. businesses have faced criminal penalties if they engaged in business-related bribery of foreign public officials. Foreign competitors, however did not have similar restrictions and could engage in this corrupt activity without fear of penalty As a result, U.S. companies have had to compete on an uneven playing field, resulting in losses of international contracts estimated at \$30 billion per year. The OECD Convention . . . is designed to change all that. Under the Convention, our major competitors will be obligated to criminalize the bribery of foreign public officials in international business transactions.⁵⁴

F. Supp. 2d 834, 857 (S.D. Tex. 2012). The *Jackson* court reasoned that the negation of the grease payment exception by the plaintiff was a prerequisite to showing that the defendant acted “corruptly,” a required element of FCPA liability. *Id.*

⁵⁰ See *Jackson*, 908 F. Supp. 2d at 857 (analyzing legislative history of grease payment exception).

⁵¹ See CRIMINAL DIV. U.S. DEP’T OF JUSTICE & ENFORCEMENT DIV. U.S. SEC. & EXCH. COMM’N, *supra* note 46, at 3 (noting Congress’s “request” for negotiation of international agreement criminalizing foreign bribery).

⁵² *Id.*

⁵³ See Vega, *supra* note 46, at 437 (explaining 1998 Amendment).

⁵⁴ President William J. Clinton, Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998 (Nov. 10, 1998), (transcript available at www.presidency.ucsb.edu/ws/?pid=55254).

As of this writing, forty states, including several of the United States' most vital trading partners in Europe and South America are party to the OECD Convention.⁵⁵

The 1998 amendment gave the FCPA increased extra-territorial reach, allowing U.S. authorities to scrutinize the conduct of non-U.S. citizens acting within the jurisdiction of the United States.⁵⁶ Therefore the amendment allowed DOJ and the SEC to investigate any party acting within the territorial jurisdiction of the United States regardless of the party's nationality.⁵⁷

B. *The New-Found Vigor of FCPA Enforcement*

Policy prioritization, collateral legislative developments, and increased international cooperation have resulted in expanded FCPA enforcement and the concomitant imposition of stiffer penalties.⁵⁸ Both DOJ and the SEC have made enforcement of the Act a top investigative and prosecutorial priority.⁵⁹ As Attorney General, Eric Holder stated: "it is

⁵⁵ See ORG. ECON. COOPERATION & DEVELOPMENT, COUNTRY REPORTS ON THE IMPLEMENTATION OF THE OECD ANTI-BRIBERY CONVENTION, available at <http://www.oecd.org/daf/ briberyininternationalbusiness/countryreports ontheimplementationofthe oecdanti-briberyconvention.htm> (last visited March 6, 2014) (listing OECD Convention's member states); see also U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, FOREIGN TRADE, TOP TEN COUNTRIES WITH WHICH THE U.S. TRADES, available at <http://www.census.gov/foreign-trade/top/dst/current/balance.html> (listing top ten U.S. trading partners in 2012 as of November 2012) (last visited March 6, 2014). Seven of the United States' top ten trading partners are parties to the OECD Convention. See *supra* U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, FOREIGN TRADE.

⁵⁶ See *United States v. Jeong*, 624 F.3d 706, 711 (5th Cir. 2010) (affirming conviction of South Korean national for bribing U.S. public officials). Interestingly, a South Korean court had already convicted the defendant in *Jeong* for the same underlying offense. *Id.* at 708. In affirming the conviction, the *Jeong* court ruled that the OECD Convention did not prohibit two signatories from prosecuting the same offense. *Id.* at 711. See also Vega, *supra* note 46, at 437 (explaining how 1998 Amendment allows authorities to investigate foreign individuals and business entities).

⁵⁷ See 15 U.S.C. § 78dd-3(a) (1998) (prohibiting "any person . . . while in the territory of the United States" from violating anti-bribery provisions); see also Vega, *supra* note 46, at 437 (explaining jurisdictional enhancement under FCPA's 1998 amendment).

⁵⁸ See Press Release, Sec. & Exch. Comm'n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), available at www.sec.gov/news/press/2008/2008-294.htm; Press Release, Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine (Mar. 1, 2010) available at www.justice.gov/opa/pr/2010/March/10-crm-209.html; see also Tarun & Tomczak, *supra* note 28, at 161 ("In 1994, the then largest DOJ corporate fine in an FCPA prosecution was . . . \$24.8 million In December 2008, the Fraud Section, in conjunction with German authorities and the SEC, obtained record anti-corruption penalties totaling approximately \$1.6 billion from Siemens AG and three of its foreign subsidiaries.").

⁵⁹ See Bethany Hengsbach, *Foreign Corrupt Practices Act Compliance: Issues for Public and Private Companies, Leasing Lawyers on Cooperating with Government Investigations*, Navi-

with purpose and urgency that we . . . chart a way forward that will make our efforts to fight corruption more effective.”⁶⁰ Since 2010, the SEC has pursued fifty-one FCPA enforcement actions while DOJ has filed seventy-two such actions against businesses and individuals over the same time period.⁶¹ The Obama Administration’s aggressive anti-corruption policy has led not only to an increase in the quantity of investigations and prosecutions, but also to the employment of innovative investigative techniques.⁶² The growing number of investigations backed by a tough enforcement policy has led some of the world’s largest MNEs to diligently balance the risks and rewards of entering into lucrative transactions and business relationships.⁶³

Legislative developments have also greatly simplified the investigative process and added to the enforcement tools at the SEC and DOJ’s disposal. Chief among such developments is the “Dodd-Frank Wall Street Reform and Consumer Protection Act” (“Dodd-Frank”), which implements a whistleblower incentive scheme to encourage disclosure of federal securi-

gating Reporting Rules, and Implementing Compliance Programs, 2011 WL 2117934, at 1 (May 2011) (discussing recent developments in FCPA enforcement); Roger Witten, Jennifer Morrissey & Orlando Vidal, *The FCPA: How Global Energy Companies Can Protect Themselves*, 2011 Emerging Issues 5691 (2011) (“Under the Obama administration, federal investigators have pledged increased vigor in FCPA enforcement efforts.”); *see also* Ahmadi, *supra* note 1, at 362 (discussing “more aggressive stance” of federal investigators and prosecutors regarding foreign bribery). In 2010, the SEC created a specialized FCPA unit, and the Department of Justice enlisted increased assistance from the FBI while adding staff to keep up with the volume of investigations and prosecutions it was pursuing. *See* U.S. SEC. & EXCH. COMM’N, *SEC Enforcement Actions: FCPA Cases*, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last visited March 7, 2014) (announcing establishment of specialized FCPA unit); Witten, Morrissey & Vidal, *supra* (describing recent enforcement trends).

⁶⁰ *See* Attorney General Eric Holder, Address at the Opening Plenary of the VI Ministerial Global Forum on Fighting Corruption and Safeguarding Integrity (Nov. 7, 2009) (transcript available at <http://www.justice.gov/ag/speeches/2009/ag-speech-091107.html>).

⁶¹ *See* U.S. SEC. & EXCH. COMM’N, *FCPA Actions Brought By The SEC*, <http://www.sec.gov/spotlight/fcpa/fcpa-enf-acts-chart.pdf> (last visited Nov. 4, 2013); U.S. DEP’T OF JUSTICE, *FCPA and Related Enforcement Actions: Alphabetical List*, <http://www.justice.gov/criminal/fraud/fcpa/cases/a.html> (last visited Nov. 4, 2013) (listing DOJ enforcement actions taken under the Act).

⁶² *See* Witten, Morrissey & Vidal, *supra* note 59 (discussing changed nature of FCPA enforcement).

⁶³ *See* Philip Urofsky & Danforth Newcomb, FCPA DIGEST, *Recent Trends and Patterns in the Enforcement of the Foreign Corrupt Practices Act*, at 1 (Mar. 2009) (“More important than the size of the penalty are the multi-year trends of increasing numbers of enforcement investigations and enforcement actions against both corporations and individuals, which have been accompanied by expansive assertions of jurisdiction by the U.S. enforcement authorities The increased risk of investigation . . . has resulted in increased sensitivity to FCPA concerns”), available at <http://www.shearman.com/~media/Files/Old-Site-Files/LT030509FCPADigestRecentTrendsandPatternsinFCPAEnforcement.pdf>.

ties law violations including the FCPA.⁶⁴ Under Dodd-Frank, whistleblowers may be entitled to financial compensation for “successful enforcement” based on “original information.”⁶⁵ Conversely, whistleblower incentives under Dodd-Frank have been criticized as ineffective because the most valuable whistleblowers in an international corruption case will likely be foreign nationals, who are not protected against retaliation in their home countries.⁶⁶ One federal court has explicitly rejected an extra-territorial application of Dodd-Frank’s whistleblower protection scheme, thereby leaving many valuable informants without an incentive to come forward.⁶⁷

The Sarbanes Oxley Act of 2002 (“SOX”) has also done its part to expand potential liability under the FCPA.⁶⁸ SOX requires issuers to evaluate and report on the “effectiveness” of their internal controls, which by nature implicates compliance with the FCPA’s bookkeeping provisions.⁶⁹ For instance, an issuer’s CEO, or similarly situated officer is required to certify that she carries the responsibility “for establishing and maintaining internal controls” and “evaluat[ing] the effectiveness” thereof.⁷⁰ Moreover,

⁶⁴ See 15 U.S.C. §§ 78u-6, 78u-7 (2010) (defining concepts of “whistleblower” and potential “awards”); see also Justin Blount & Spencer Markel, *The End of the Internal Compliance World as We Know It, Or an Enhancement of the Effectiveness of Securities Law Enforcement? Bounty Hunting under the Dodd-Frank Act’s Whistleblower Provisions*, 17 FORDHAM J. CORP. & FIN. L. 1023, 1039 (2012) (observing Dodd-Frank whistleblower provisions may result in “race” to disclose securities violations to authorities). Particularly with respect to FCPA violations, the race between the company and the whistleblower “may alter the dynamics of determining when and if a company should self-disclose” because self-reporting may be a mitigating factor in a potential enforcement action. *Id.*

⁶⁵ 15 U.S.C. § 78u-6(b)(1) (2010).

⁶⁶ See Patrick Collins, Lee Stein & Caryn Trombino, THE THIRD ANNUAL NATIONAL INSTITUTE ON THE FOREIGN CORRUPT PRACTICES ACT, *Consider the Source: How Weak Whistleblower Protection Outside the United States Threatens to Reduce the Impact of the Dodd-Frank Reward Among Foreign Nationals*, at 1, 5 (2010), available at http://www.perkinscoie.com/files/upload/10_25Article.pdf (discussing issues presented by foreign nationals who act as whistleblowers in FCPA cases).

⁶⁷ See *Asadi v. G.E. Energy (USA), LLC*, No. 4:12-345, 2012 WL 2522599, at *5 (S.D. Tex. June 28, 2012) (disallowing whistleblower protection where “majority of events giving rise to . . . suit occurred in . . . foreign country.”).

⁶⁸ See Klaw, *supra* note 39, at 316-17 (describing Sarbanes Oxley Act’s effects on potential liability under FCPA). For instance, SOX increases potential penalties for certain violations of the Securities and Exchange Act (including FCPA bookkeeping controls) from ten to twenty years in prison. *Id.* at 316.

⁶⁹ See 15 U.S.C. § 7241(a)(4)(C)-(D) (2002); see also ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 236 (3d ed. 2009) (“The enactment of the Sarbanes-Oxley Act of 2002 in the wake of corporate scandals has tried to enhance monitoring by directors and a firm’s internal controls to avoid illegal activities.”).

⁷⁰ See 15 U.S.C. §§ 7241(a)(4)(A) & (C) (2002); ROBERT W. TARUN, THE FOREIGN CORRUPT PRACTICES ACT HANDBOOK: A PRACTICAL GUIDE FOR MULTINATIONAL GENERAL COUNSEL, TRANSACTIONAL LAWYERS AND WHITE COLLAR CRIMINAL PRACTITIONERS 72 (2d

“signing officers” are required to report to their audit committees, “any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer’s internal controls.”⁷¹ Accordingly, Dodd-Frank and SOX have contributed to an environment in which multinational corporations must be vigilant about every detail of their overseas operations.⁷²

Finally, anti-corruption enforcement is on the rise abroad, as many countries have enacted legislation, imposed regulations and advanced novel policies to combat foreign bribery.⁷³ In 2011, twenty states, including the governments of Russia, China and the United Kingdom, took action to combat domestic and international bribery.⁷⁴ Russia, a country whose businesses were found to be among the most likely to bribe, joined the OECD Convention after criminalizing foreign bribery at the domestic level.⁷⁵

While the OECD Convention laid the groundwork for national legislative reforms, the UN also took an active role by adopting the United Nations Convention against Corruption (“UNCAC”).⁷⁶ With UNCAC, the UN sought to create an instrument that focused on bribery prevention and criminalization, as well as the coordination of efforts to enforce anti-corruption measures at an international level.⁷⁷ The UN Convention is intended as “a binding instrument of international law for the global combatting of corruption.”⁷⁸ As of December 24, 2012, one hundred sixty five states are party to the UN Convention.⁷⁹

ed. 2012) (“Foreign Corrupt Practices Act investigations frequently trigger reporting or disclosure responsibilities and certification issues for publicly held companies and their CEOs and CFOs.”).

⁷¹ 15 U.S.C. § 7241(a)(5) (2002).

⁷² See TARUN, *supra* note 70, at 73 (discussing reasons for intra-corporate due diligence).

⁷³ See Leslie A. Benton, Melissa T. Bruijneel, Mikhail Reider-Gordon & Anne Takher, *Anti-Corruption*, 46 INT’L LAW 353, 363-73 (2012) (summarizing anti-corruption actions taken by foreign governments and international organizations in 2011).

⁷⁴ See *id.* at 366-70 (summarizing domestic anti-bribery legislation around the world).

⁷⁵ *Id.* at 371, 73; See also THE ECONOMIST, *Grease My Palm: Bribery and Corruption Have Become Endemic*, ECONOMIST (Nov. 27, 2008), available at <http://www.economist.com/node/12628030> (“The size of the corruption market [in Russia] is estimated to be close to \$300 billion, equivalent to 20% of Russia’s GDP.”).

⁷⁶ See UN OFFICE ON DRUGS AND CRIME, *United Nations Convention against Corruption* (2013), available at <http://www.unodc.org/unodc/en/treaties/CAC/> (describing UN Convention’s background and adoption process).

⁷⁷ See JOHANNA BEATE WYSLUCH, *THE UN CONVENTION AGAINST CORRUPTION AND DEVELOPMENT COOPERATION - CORRUPTION PREVENTION BY MORE EFFICIENT LAW ENFORCEMENT?*, at 5 (2007), available at <http://www2.gtz.de/dokumente/bib/07-0876.pdf> (examining UNCAC objectives).

⁷⁸ *Id.* at 6.

⁷⁹ See UN OFFICE ON DRUGS AND CRIME, *UNCAC Signature and Ratification Status as of 27 September 2013* (2013), available at <http://www.unodc.org/images/treaties/UNCAC/Status->

C. *Extensive Scope of Liability under the FCPA*

Since its inception, courts have interpreted the Act broadly to create a broad scope of liability, capable of punishing even miniscule misconduct and individuals unrelated to the underlying bribe.⁸⁰ In particular, the flexible definition of a “foreign official,” the imposition of a system of vicarious liability, and the practical unavailability of the Act’s affirmative defenses make it difficult to avoid liability once investigated.⁸¹

i) The Broad Definition of a “Foreign Official” and the all-Encompassing “Instrumentality”

Unlike the UK Bribery Act, which criminalizes corrupt payments to governmental and non-governmental officials alike, the FCPA only covers bribes that are made to “foreign officials” in their “official capacity.”⁸² A “foreign official” is defined as:

any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality, or for or on behalf of any such public international organization.⁸³

Prosecutors have successfully given the phrase a broad meaning to include employees of state-owned enterprises, due to their functional capacity within an “instrumentality” of the foreign government.⁸⁴ This construction has been criticized by commentators and hotly contested in the courts, as defendants have argued that employees of state-owned business-

Map/UNCAC_Status_Map_Current_Large.jpg (noting status of worldwide signatories).

⁸⁰ See Singer, *supra* note 20, at 281-82 (examining vicarious liability under FCPA); Sheahen, *supra* note 46, at 464 (explaining how mere acts of “civility” may expose individual to liability under FCPA).

⁸¹ See discussion *infra* Part II.C.i-iii; see also *United States v. Kay*, 513 F.3d 432, 446 (5th Cir. 2007) (dismissing vagueness challenge to FCPA’s prohibition of bribing to obtain or retain business). The court rejected the defendant’s argument that the payments were made for the purpose of securing lower tax obligations, and therefore were not made for the purpose of “obtaining or retaining” business. *Id.* at 441-43.

⁸² See 15 U.S.C. § 78dd-1(a)(1)(A)(i) (1998); see also Hunter, *supra* note 28, at 96-98 (comparing FCPA and UK Bribery Act).

⁸³ 15 U.S.C. § 78dd-1(f)(1)(A) (1998).

⁸⁴ See Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under the FCPA, Who is a Foreign Official Anyway?*, 63 BUS. LAW. 1243, 1250 (2008) (analyzing DOJ and SEC’s “broad” definition of a “foreign official”).

es engage in strictly commercial conduct and therefore do not qualify as public officials.⁸⁵

The Foreign Sovereign Immunities Act (“FSIA”) likewise uses the phrase “agencies or instrumentalities” of a government for the purpose of defining a “foreign state.”⁸⁶ In *Dole Food Co. v. Patrickson*,⁸⁷ the Supreme Court was asked to decide whether an indirect subsidiary of the Israeli government could be considered an instrumentality of the state. The Court held that the subsidiary was not an instrumentality of the government because the state only held an “indirect” ownership stake in the company.⁸⁸ Thus, to qualify as an instrumentality of a foreign government under the FSIA, the sovereign must directly own a majority share of the entity in question, without any intervening corporate layers.⁸⁹ Analyzing the corporate structure of a state-owned business entity prior to making blanket assertions concerning its connection to a foreign government is in accord with the act of state doctrine and traditional notions of judicial restraint in the foreign policy arena.⁹⁰

⁸⁵ See cases cited *infra* note 90 (taking up issue of state-owned enterprises as “instrumentalities” of foreign governments); see also Stephen Hagenbuch, Comment, *Taming “Instrumentality”: The FCPA’s Legislative History Requires Proof of Government Control*, 2012 U. CHI. LEGAL F. 351, 352 (2012) (arguing interpretation of “instrumentality” which includes employees of companies is “problematic”); see also Cohen, Holland & Wolf, *supra* note 83, at 1250 (noting lack of guidance from DOJ and SEC regarding term “instrumentalities”). The American Law Institute (“ALI”) has also taken up the issue of defining the extent of what may be considered within the realm of a state’s official functions. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 66 (1965) (“The immunity of a foreign state . . . extends to . . . a corporation created under [the foreign state’s] laws and exercising functions comparable to those of an agency of the state.”). Thus, according to the ALI, an employee of a business entity may be covered by sovereign immunity, provided the company exhibits some characteristics comparable to those of a governmental institution. *Id.* The ALI’s definition appears to be in line with the legislative intent of the Act because it only regulates corrupt payments made to individuals operating in at least a quasi-public capacity. See *supra* text accompanying note 81 (distinguishing FCPA from UK Bribery Act in that former only covers official action).

⁸⁶ Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(a) (2006).

⁸⁷ 538 U.S. 468, 474 (2003).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (noting centrality of President’s role in conducting foreign relations as inherent principle of constitutional law). In *Curtiss-Wright*, the Supreme Court made a clear statement in support of a certain level of exclusivity of executive prerogatives on matters relating to foreign relations, describing the President as the “sole organ of the federal government in the field of international relations.” *Id.* at 320. In its emphatic statement of presidential power over the nation’s international relations, the Court limited Congress’s oversight role, and implicitly noted its own resistance to interfere with the executive as it conducts the external relations of the country. *Id.* at 321-22; see also Ronald D. Lee, Note, *Jurisdiction over Foreign States for Acts of their Instrumentalities: A Model for Attributing Liability*, 94 YALE L.J. 394, 403-04 (1984) (noting potential negative foreign policy implications of expansive assertions of jurisdiction over foreign government instrumentalities).

Although it is unclear whether a state-owned business entity's corporate structure has any effect on the company's status as an FCPA instrumentality, courts have been receptive to an all-encompassing view of the concept of a "foreign official."⁹¹ Despite more restrained constructions of an "instrumentality" under the FSIA, courts continue to rely on the flexible nature of the phrase to impose liability under the FCPA. In *United States v. Aguilar*,⁹² the court rejected the defendant's contention that Congress refused to include payments to employees of state-owned businesses under the FCPA. The *Aguilar* court based its holding on the absence of an express legislative exclusion of employees of state-owned businesses, while admitting that the legislative history on this point was "inconclusive."⁹³ *Aguilar* indicates a sense of judicial accommodation to increasingly aggressive enforcement of the FCPA, even in cases where the status of the law is ambiguous at best.⁹⁴

ii) Illusive Affirmative Defenses

The FCPA contains two affirmative defenses: (1) the local law defense, and (2) the promotional expenses defense.⁹⁵ Although intended to rectify some of the disadvantages faced by American companies in their international ventures, the affirmative defenses have been criticized as woefully ineffective in achieving their stated objectives.⁹⁶ The local law

Lee argues that in the context of a sovereign immunities analysis, courts should exercise an appropriate level of judicial restraint in "piercing a veil created by a foreign sovereign" due to an ambiguous state of the law and the potential for political repercussions. *Id.* at 403-04.

⁹¹ See *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1120 (C.D. Cal. 2011) (holding employees of state-owned electric utility company were foreign officials under FCPA); *United States v. Carson*, No. SACR 09-00077-JVS, 2011 WL 5101701, at *6 (C.D. Cal. May 18, 2011) (holding state-owned companies may be considered "instrumentalities" under FCPA). *Aguilar* and *Carson* appear to be in line with the FSIA definition of "instrumentalities" in terms of their focus on ownership as opposed to control of the entity. See GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 268 (Vicki Been et al. eds., 5th ed. 2011) (noting FSIA's requirement of ownership of the entity as opposed to control). The importance of state-ownership distinguishes the FSIA and the FCPA from antitrust, securities regulation, and environmental regimes that "focus on control in corporate contexts." *Id.*; see also *Sec. & Exch. Comm'n v. Straub*, 921 F. Supp. 2d 244, 265 (S.D.N.Y. Feb. 8, 2013) (holding defendant need not be aware of official's identity). The *Straub* court justifiably reasoned that, in light of the Act's prohibition of corrupt payments by "any person", including an independent agent or intermediary, it was not necessary for the defendant to have direct awareness of the final recipient's identity. *Straub*, 921 F. Supp. 2d. at 15.

⁹² 783 F. Supp. 2d at 1119.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c) (1998).

⁹⁶ See Irina Sivachenko, Note, *Corporate Victims of "Victimless Crime": How the FCPA's*

defense provides that a defendant is protected from FCPA liability if the “written laws . . . of the foreign official’s . . . country” expressly permit the scrutinized payment or transaction.⁹⁷ The absence of a written law prohibiting a payment is insufficient to insulate a party from liability under the local law defense.⁹⁸ Because virtually every country has enacted legislation or taken a policy position denouncing official bribery, successful invocation of the local law defense is difficult.⁹⁹

Second, the promotional expense defense shields a defendant from FCPA liability if the “payment . . . was a reasonable and bona fide expenditure . . . and was directly related to the promotion . . . of products or services; or the execution or performance of a contract with a foreign government.”¹⁰⁰ In theory, this defense removes the payment of costs pertaining to the legitimate promotion of products from the scope of actionable conduct.¹⁰¹ However, one commentator has labeled this defense a “riddle” because it only permits “reasonable bona fide expenditure[s]” which are non-corrupt to begin with.¹⁰²

iii) Vicarious Liability

The FCPA imposes a system of vicarious liability, which seeks to punish a principal for the wrongful acts of its agent.¹⁰³ One scholar identi-

Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance, 54 B.C. L. REV. 393, 409 (2013) (criticizing affirmative defenses as “impos[ing] few restrictions on the FCPA’s expansive reach”). Sivachenko suggests the addition of a corporate compliance defense as a means of incentivizing compliance with the Act. *Id.* at 410; *see also* Sheahen, *supra* note 46, at 489 (arguing affirmative defenses “have provided little meaningful protection” to defendants).

⁹⁷ 15 U.S.C. § 78dd-1(c)(1) (1998). The local law defense is an affirmative defense that places the burden of proof of its applicability on the defendant. *See* Sheahen, *supra* note 46, at 468.

⁹⁸ H.R. REP. NO. 100-576, at 922 (1988).

⁹⁹ *See* Benton, Bruijneel, Reider-Gordon & Takher *supra* note 72 and accompanying text (discussing international trend of accession to OECD Convention).

¹⁰⁰ 15 U.S.C. § 78dd-1(c)(2)(A)-(B) (1998).

¹⁰¹ *See* Sheahen, *supra* note 46, at 478 (explaining purpose of promotional expense defense).

¹⁰² *See id.* (citing Professor Richard Cassin’s characterization of bona fide expenditure defense).

¹⁰³ *See* 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3) (1998); *see also* H.R. REP. NO. 95-640, at 12 (1977) (noting omission of vicarious liability regime would result in “massive loophole.”); *see also* STURAT H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 59 (2d ed. 2010) (“The most overlooked of all the compliance considerations relative to the FCPA . . . is the conduct of third parties acting on behalf of an individual or entity.”); Singer, *supra* note 20, at 281 (mentioning congressional intent to install vicarious liability regime into FCPA); David Isaak, *FCPA Compliance - Navigating the Minefield of Intermediaries*, 17 WTR CURRENTS: INT’L TRADE L.J. 22, 22-23 (2008) (noting international business deal-

fied three distinct contextual theories under which FCPA liability may attach vicariously.¹⁰⁴ First, liability may be triggered when a person makes a payment to a third party with the knowledge or awareness that the third party will corruptly pass it on to a foreign official.¹⁰⁵ Second, an entity may be liable when it authorizes a third party to make a corrupt payment to a foreign official on its behalf.¹⁰⁶ Third, a principal may be exposed for the acts of its alter-egos under a corporate veil piercing theory.¹⁰⁷

In addition, a fourth form of vicarious liability may occur in merger and acquisition transactions.¹⁰⁸ If an acquiring company fails to conduct a diligent pre or post-closing investigation it may become the subject of an FCPA investigation for the corrupt acts of a target entity.¹⁰⁹ There are three possible scenarios in which a merger transaction can result in an FCPA violation: 1) the transaction itself may trigger the Act, for example by way of a corrupt payment to obtain the necessary approval; 2) the successor may be exposed for the target's prior practices; and 3) the target's continued use of bribes may implicate the successor.¹¹⁰

Concerns about the liberal use of vicarious liability theories in M&A transactions are only exacerbated by the fact that businesses appear to be regenerating their appetites for corporate mergers after the global economic crisis of 2008.¹¹¹ The broad application of vicarious liability theories, capable of covering virtually every corner of the international

ings often include intermediaries which may trigger liability for U.S. principals).

¹⁰⁴ See Singer, *supra* note 20, at 281 (describing vicarious liability theories under FCPA).

¹⁰⁵ *Id.*; see also Isaak, *supra* note 102, at 22 (stating that most high profile FCPA actions involve wrongful acts of intermediaries).

¹⁰⁶ See Singer, *supra* note 20, at 282 (explaining vicarious liability under FCPA as a result of third party actions).

¹⁰⁷ See *id.* (addressing intra-corporate relations as grounds for liability under veil-piercing theory).

¹⁰⁸ See *infra* notes 109-111 and accompanying text (discussing FCPA liability resulting from merger and acquisition transactions).

¹⁰⁹ See Lucinda A. Low & Thomas R. Best, *Addressing FCPA Risk in Mergers and Acquisitions: At What Price Safety?*, 1737 PLI/Corp 1023, 1025 (2009) (identifying mergers and acquisitions as area in receipt of significant attention).

¹¹⁰ See Low & Best, *supra* note 109, at 1028; see also Wesley C. Fredericks Jr., *International M&A Deals: Awareness of Differences as the Key to Success*, 2012 WL 1199545, at *1 (2012) ("[T]he FCPA will generally apply to actions by the overseas target company prior to its acquisition, such that actions undertaken by the overseas entity prior to the closing of a transaction could very well result in liability to the US acquirer.").

¹¹¹ See GRANT THORNTON INTERNATIONAL BUSINESS REPORT, CROSS-BORDER MERGERS AND ACQUISITIONS: BUILDING MOMENTUM 3 (2012), available at http://www.gta.co.bw/publications/international_business/publications/IBR2012-MA-report.pdf (noting increasing cross-border mergers and acquisitions despite current global economic challenges). United States companies remain "near the top" of international rankings with respect to their level of M&A activity. *Id.*

transactional marketplace, therefore creates an environment in which a corporate principal may be at the mercy of a third party's business ethics standards.¹¹²

D. Judicial Prevention of Private FCPA Enforcement

In *Lamb v. Phillip Morris, Inc.*,¹¹³ the Sixth Circuit held that the FCPA does not contain a private right of action.¹¹⁴ *Lamb* involved a group of domestic tobacco growers who alleged that certain "donations" made in the course of Phillip Morris's international dealings violated the FCPA and depressed tobacco prices in the United States.¹¹⁵ The plaintiffs argued that a private right of action should be inferred from the wording of the statute given the absence of an express remedy for private parties.¹¹⁶ The court analyzed the legislative history of the Act and concluded that private plaintiffs were not the "intended beneficiaries."¹¹⁷ Rather, the FCPA "was . . . designed to protect the integrity of American foreign policy and domestic markets."¹¹⁸

Lamb generated significant scholarly discussion, much of which argues that the Act should be redrafted or reinterpreted to allow for a private right of action.¹¹⁹ Brett Witter argues that the mere fact that the Act

¹¹² See CHOW & SCHOENBAUM, *supra* note 5, at 297. Corporate principals often utilize "non-establishment forms" of business such as foreign sales agents or distributorship agreements with independent businesses in the target country in order to achieve greater penetration of international markets. See *id.* However, these arrangements are precisely the type of "middleman" relationships that often lead to violations of the Act. See PRICEWATERHOUSECOOPERS, THE FOREIGN CORRUPT PRACTICES ACT AND ITS IMPACT ON THE ENERGY INDUSTRY, ENERGY BOARD NETWORK ROUNDTABLE UPDATE 2-3 (2008), available at http://www.pwc.com/us/en/foreign-corrupt-practices-act/assets/energy_board_network_roundtable.pdf. Therefore, the American principal is in a position where it must go to great lengths to vet the foreign agent and ensure compliance with the FCPA prior to doing business with the foreign entity. See *id.* at 3-4 (addressing necessity for due diligence investigations).

¹¹³ 915 F.2d 1024 (6th Cir. 1990).

¹¹⁴ See *id.* at 1029-30 (dismissing plaintiff's claim under FCPA); see also *J.S. Serv. Ctr. Corp. v. General Electric Technical Servs. Co.*, 937 F. Supp. 216, 227 (S.D.N.Y. 1996) (reaffirming proposition that FCPA does not contain private right of action). The *J.S. Service Center* court dismissed the plaintiff's argument for an implied private right of action under the Act as an "unconvincing [and] fanciful" reading of the statute. *Id.*

¹¹⁵ *Lamb*, 915 F.2d at 1025.

¹¹⁶ See *id.* at 1028.

¹¹⁷ *Id.* at 1029.

¹¹⁸ See *id.* (reasoning that FCPA's law enforcement considerations illustrate intent to favor government over private enforcement).

¹¹⁹ See Gideon Mark, *Private FCPA Enforcement*, 49 AM. BUS. L.J. 419, 486 (2012) (arguing that FCPA should be amended to include a private right of action); Daniel Pines, Comment,

gives the DOJ and SEC enforcement prerogatives should not be interpreted as giving the government exclusive enforcement authority.¹²⁰ Daniel Pines proposes amending the FCPA to allow for a private cause of action in cases where a competitor is harmed by a covered party's violation of the Act.¹²¹ *Lamb* goes a long way in constricting the FCPA's ability to remedy harms done to interested parties within the United States by acts of international bribery.¹²²

Eighteen months prior to *Lamb* however, the issue of private FCPA enforcement was taken up in the context of a shareholder derivative suit.¹²³ In *Shields v. Erickson*,¹²⁴ shareholders filed suit against 18 officers and directors of a corporation for a host of "wrongful acts" including violations of the FCPA. The *Shields* court dismissed the action on the same grounds that would later justify the Sixth Circuit's holding in *Lamb*, namely that the Foreign Corrupt Practices Act did not contain a private right of action.¹²⁵

III. FCPA SHAREHOLDER DERIVATIVE ACTIONS

A. *The Shareholder Derivative Suit and Rule 23.1*

Of the combined one-hundred -twenty-three enforcement actions taken by DOJ and the SEC since 2010, a great majority have been against corporations, most of which are publicly traded in the United States.¹²⁶ The negative publicity, loss of goodwill and severity of financial penalties often lead dissatisfied shareholders to seek redress by way of derivative actions and shareholder class action suits.¹²⁷ However, while managers and

Amending the Foreign Corrupt Practices Act to Include a Private Right of Action, 82 CALIF. L. REV. 185, 216 (1994) (proposing private right of action to rectify some of FCPA's flaws.); see also Brett Witter, Note, *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990): *The Sixth Circuit Gets Sheepish on Foreign Corrupt Practices Act Enforcement*, 5 TRANSNAT'L LAW. 533, 560 (1992) (criticizing *Lamb* as having been "an incorrect decision").

¹²⁰ Witter, *supra* note 119, at 551. Witter cites the Advisers Act of 1940 which contained the same language regarding the SEC's discretion to prosecute, however, the Commission's authority was held not to be exclusive. *Id.*

¹²¹ See Pines, *supra* note 119, at 216-17 (outlining proposed amendment to Act).

¹²² See *supra* Part I.A (noting congressional discussions on detrimental effects of foreign bribery).

¹²³ *Shields v. Erickson*, 710 F. Supp. 686, 688 (N.D. Ill. 1989).

¹²⁴ 710 F. Supp. at 688.

¹²⁵ *Id.*

¹²⁶ See sources cited *supra* note 61 (noting recent enforcement actions).

¹²⁷ See JESSIE H. CHOPER, JOHN C. COFFEE, JR., & RONALD J. GILSON, CASES AND MATERIALS ON CORPORATIONS 825 (Vicki Been et al. eds., 7th ed. 2008) ("The shareholders' derivative suit was created by equity courts to permit a shareholder to vindicate wrongs done to the corporation as a whole that management, because of either self-interest or neglect, would not

directors are increasingly exposed to liability under the FCPA, shareholders are often left to foot the bill because their attempts to hold board members accountable have fallen on deaf ears.¹²⁸ Procedural rules governing derivative actions are among the main reasons why shareholder efforts to hold their boards accountable for FCPA violations have gone largely unheeded in recent years.¹²⁹

Rule 23.1 of the Federal Rules of Civil Procedure spells out the pleading requirements for corporate derivative litigation.¹³⁰ The rule is among the most widely discussed rules of civil procedure, and it has been the subject of intense academic criticism for many years.¹³¹ Rule 23.1 states that a shareholder must “state with particularity: any effort by the plaintiff to obtain the desired action from the directors . . . and . . . the reasons for not . . . making the effort.”¹³² Rule 23.1 has become known as the codification of the “demand rule” because of its objective of encouraging shareholders to exhaust internal remedies before seeking redress from the courts.¹³³

remedy.”).

¹²⁸ See cases discussed *infra* Part III.B (observing dismissal of shareholder derivative actions seeking director liability).

¹²⁹ See FED. R. CIV. P. 23.1(b) (setting pleading requirement for derivative actions). Most states have enacted provisions that are almost identical to Rule 23.1 of the Federal Rules of Civil Procedure for corporate derivative litigation. See Matthew L. Mustokoff, *Shareholder Discovery, The PSLRA and SLUSA In Parallel Securities and Derivative Actions*, 35 No. 2 SEC. REG. L.J. Art. 2 (2007) (noting Rule 23.1 and its “state court counterparts . . . codify the . . . ‘demand’ requirement”).

¹³⁰ FED. R. CIV. P. 23.1(b).

¹³¹ See Kurt A. Goehre, Comment, *Is the Demand Requirement Obsolete? How the United Kingdom Modernized Its Shareholder Derivative Procedure and What the United States Can Learn from It*, 28 WIS. INT’L L.J. 140, 142 (2010) (criticizing demand requirement as “leav[ing] shareholders without recourse” when directors violate fiduciary obligations). Goehre endorses the approach taken by the United Kingdom under the “Companies Act” which directs judges to assess the merits of a shareholder derivative claim. *Id.* at 142-43. Under this procedure, “more modern, flexible and accessible criteria for determining whether a shareholder can pursue an action” allow for a more equitable and efficient resolution to derivative actions. *Id.* at 142; see also David P. Curtin, *Demand of Directors in a Shareholder Derivative Suit When the Board Has Approved the Wrong*, 26 B.C. L. REV. 441, 442 (1985), available at <http://lawdigitalcommons.bc.edu/bclr/vol26/iss2/4> (criticizing Rule 23.1 as placing “unreasonable burden” on shareholders in derivative action). Curtin argues that the demand requirement should be waived in cases where the board has participated or authorized the transaction giving rise to the derivative litigation. *Id.*; see also Justice Jack B. Jacobs, *The Vanishing Substance-Procedure Distinction in Contemporary Corporate Litigation: An Essay*, 41 SUFFOLK U. L. REV. 1, 7 (2007) (explaining how Rule 23.1 influences substantive aspects of corporate litigation, although purely procedural safeguard).

¹³² FED. R. CIV. P. 23.1(b).

¹³³ See PINTO & BRANSON, *supra* note 69, at 478 (“Demand is the means whereby the board of directors . . . has an opportunity to manage litigation in the corporation’s name or on its behalf.”).

Under Delaware law the demand rule requires the plaintiff to (1) make a pre-suit demand on the corporation's board to bring suit on the corporation's behalf; or (2) show that such a demand would have been futile, in which case demand is excused.¹³⁴ Demand futility is analyzed under the test set forth by the Delaware Supreme Court in *Aronson v. Lewis*,¹³⁵ which examines whether a shareholder has pled particularized facts which raise a reasonable doubt as to either (1) the board's disinterestedness and independence in considering the demand; or (2) that the challenged transaction was otherwise the product of a valid exercise of business judgment. If a plaintiff has not made a demand and the derivative action fails the demand futility test, the suit will be dismissed and the shareholder will be left without recourse.¹³⁶

The derivative suit generally alleges a breach of a fiduciary duty that the defendant owed the corporation as an entity.¹³⁷ Although corporate

¹³⁴ See *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 120 (Del. Ch. 2009) (discussing demand requirement and legal standard for demand excusal).

¹³⁵ 473 A.2d 805, 814 (Del. 1984) (outlining demand futility test).

¹³⁶ See *id.* at 818 (reversing chancery court's denial of motion to dismiss because demand futility not established). In a similar context under a forum non conveniens inquiry, the Texas Supreme Court sharply criticized the use of pleading formalities to insulate defendants from liability due to a choice of forum deficiency in the plaintiff's complaint. See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring) (decrying dismissal of warranted lawsuits due to forum non conveniens). Justice Doggett strongly condemned the use of forum non conveniens as a means of "kill[ing] the litigation altogether," and thereby protecting defendants from being answerable for their alleged misconduct. *Id.* at 682. Dismissal under forum non conveniens generally "end[s] the litigation" and the "plaintiffs leave the courtroom without having had their case resolved on the merits." *Id.* at 683.

¹³⁷ See *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) ("Corporate officers and directors . . . stand in a fiduciary relation to the corporation and its stockholders."); see also Jessica Erickson, *Corporate Misconduct and the Perfect Storm of Shareholder Litigation*, 84 NOTRE DAME L. REV. 75, 87 (2008) ("[D]erivative suits are . . . premised on fiduciary duty violations."). The underlying issue in a derivative action is whether the fiduciary "failed to meet the demanding standards that Delaware law imposes on him—the highest degree of loyalty, care, and good faith for the sole benefit of the shareholders[.]" *Ryan v. Gifford*, 935 A.2d 258, 270-71 (Del. Ch. 2007). The idea that common law fiduciary obligations act as the primary means of promoting sound corporate governance has been criticized as inadequate and unworkable. See Celia R. Taylor, *The Inadequacy of Fiduciary Doctrine: Why Corporate Managers Have Little to Fear and What Might Be Done About It*, 85 OR. L. REV. 993, 994 (2006) (arguing corporate fiduciary obligations are insufficient to properly regulate directorial conduct and limit malfeasance). Taylor argues that fiduciary duties, as currently imposed on corporate decision makers, are incapable of inducing any form of meaningful corporate compliance. *Id.* Directors and officers are in a position to conduct the affairs of the company with "virtual impunity" because "courts will not often . . . second-guess their managerial decisions." *Id.* at 994-95. Corporate fiduciary obligations are based on the "trusteeship strategy," which has become the governance model of choice in the United States for solving corporate agency problems. See REINIER KRAAKMAN, JOHN ARMOUR, PAUL DAVIES, LUCA ENRIQUES, HENRY B. HANSMANN, GÉRARD HERTIG, KLAUS J. HOPT, HIDEKI KANDA, & EDWARD B. ROCK, *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 65 (2d ed. 2009) (describing United States as "originator" and "most

fiduciaries are bound by an obligation to exercise due care, numerous states have enacted legislation enabling corporations to shield directors from personal liability for breaching the duty of care by incorporating an exculpation provision in the certificate of incorporation.¹³⁸ Due to the “widespread adoption” of exculpation clauses, the derivative plaintiff is required to rely on one of the four areas of misconduct which Section 102(b)(7) excludes from its scope: breaches of the duty of loyalty, intentional misconduct or knowing violations of law, actions done in bad faith, or transactions involving improper personal benefits.¹³⁹ Further complicating the matter is the fact that derivative suits, by nature, are brought against directors in their individual capacities on behalf of the corporation.¹⁴⁰ As a result, any recovery is returned to the company treasury and not paid out to the shareholders directly.¹⁴¹

B. Shareholder Derivative Actions in Response to FCPA Violations Since 2011

As *Lamb* and *Shields* effectively foreclosed the possibility of an implied private right of enforcement under the Act, shareholders of issuers who have been subjected to FCPA scrutiny have continued to seek redress through shareholder derivative actions and securities fraud class actions.¹⁴² With an eye towards the increasingly aggressive nature and frequency of FCPA prosecutions, issuers are more vulnerable than ever to be scrutinized

enthusiastic proponent” of trusteeship strategy). The trusteeship strategy requires corporate boards to be staffed with “independent” directors who are not beholden to management interests at the expense of other corporate constituencies, and act as fiduciaries to the corporate entity. *See id.* at 64. This approach has led to a corporate governance structure in which directors are principally motivated by “ethical and reputational concerns.” *Id.* at 65. This may help explain Taylor’s characterization of the fiduciary doctrine as having “little effect” on directorial behavior. Taylor, *supra*, at 995.

¹³⁸ *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2014) (allowing exculpation provision in certificate of incorporation for breaches of duty of care). The statute however, specifically excludes “acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law” from exculpation. *Id.*

¹³⁹ *Id.*; *see also* Erickson, *supra* note 137, at 89 (stating derivative plaintiff cannot rely on breach of duty of care as grounds for recovery).

¹⁴⁰ *See* CHOPER, COFFEE, & GILSON, *supra* note 127, at 826 (explaining nature and purpose of shareholder derivative suit); *see also* Erickson, *supra* note 137, at 82 (noting similarities and differences between shareholder derivative suits and securities class actions).

¹⁴¹ *See* CHOPER, COFFEE, & GILSON, *supra* note 127, at 826 (describing mechanics of shareholder derivative litigation).

¹⁴² *See* Amy Deen Westbrook, *Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations*, 73 OHIO ST. L.J. 1217, 1218 (2012) (noting rise in collateral shareholder litigation coinciding with increased FCPA enforcement).

at home for their business ventures abroad.¹⁴³ However, while the DOJ and SEC aggressively hold global businesses accountable for their acts of overseas bribery, their shareholders have enjoyed little to no success in their efforts to recoup what was lost as a result of one or more FCPA violations.¹⁴⁴

i) Strong v. Taylor

In *Strong*, a shareholder of Tidewater, Inc. (“Tidewater”) brought a derivative action against officers and members of the board after the company was forced to pay over \$15 million to settle multiple matters relating to violations of the FCPA and other securities laws.¹⁴⁵ The underlying issue concerned a wholly owned subsidiary of Tidewater, Tidewater Marine International, Inc., which allegedly committed multiple violations of the Act in its dealings in Nigeria and Azerbaijan.¹⁴⁶ The plaintiff alleged that the defendants breached their fiduciary duties by knowingly or recklessly disregarding multiple corrupt payments made by the company’s employees, subsequently recording them as “legitimate expenses,” and failing to maintain adequate internal FCPA compliance mechanisms.¹⁴⁷ In particular, the complaint stated that the defendants made a deliberate calculation to allow the bribes because the likely fines would not outweigh the value of the business that was generated by the payments in question.¹⁴⁸ As a result, the company suffered significant damages to its goodwill and reputation, in

¹⁴³ See Witten, Morrissey & Vidal, *supra* note 59 (discussing how increased FCPA enforcement affects international energy companies).

¹⁴⁴ See Emily Jane Fox, *Wal-Mart Expands Foreign Corruption Probe*, CNN MONEY (Nov. 15, 2012, 9:09 AM), http://money.cnn.com/2012/11/15/news/companies/walmart-investigation/index.html?hpt=hp_c3 (noting fall in company stock price in wake of foreign corruption probe); see also Westbrook, *supra* note 142, at 1218 (discussing “limited success” of FCPA shareholder litigation). Although some shareholder derivative actions that have followed an FCPA investigation have resulted in settlement, not one has been fully litigated. *Id.* at 1228. But see Brian Grow, *Bribery Investigations Spark Shareholder Suits*, REUTERS (Nov. 1, 2010, 2:46 PM) <http://www.reuters.com/article/2010/11/01/us-bribery-lawsuits-idUSTRE6A04CO20101101> (reporting rise in shareholder litigation as result of increased FCPA enforcement). Grow reported on a “Reuters Legal [A]nalysis,” which found that a significant amount of shareholder actions triggered by FCPA actions resulted in settlements; however, this may be due to defendants’ fear of facing sympathetic juries who may be inclined to return even larger verdicts. *Id.* According to Grow, none of the twenty-four complaints filed in 2010 have even reached the motion-to-dismiss stage. *Id.* Therefore, the likelihood of a settlement does not appear to be due to judicial willingness to accommodate the shareholders’ plight, but rather, courts have taken the opposite approach and barred most derivative actions from surviving a motion to dismiss. See *id.*

¹⁴⁵ *Strong v. Taylor*, 877 F. Supp. 2d 433, 439-40 (E.D. La. 2012).

¹⁴⁶ *Id.* at 439.

¹⁴⁷ *Id.* at 440.

¹⁴⁸ *Id.* at 447.

addition to the financial penalties paid to the government.¹⁴⁹

Because the plaintiff had not made a pre-suit demand on the board, the Rule 23.1 demand requirement was triggered, and the plaintiff was required to plead futility in order to proceed with the action.¹⁵⁰ In its discussion about the various ways to achieve excusal of the demand requirement, the court stated that the plaintiff failed to meet the first prong of the *Aronson* test because, although “there [were] several areas . . . that may implicate the interest of [the] board,” the complaint failed to show a “material” interest held by a majority of the board.¹⁵¹ The court then applied what is known as the *Rales*¹⁵² test, which excuses demand as futile in an oversight failure claim where there was a “substantial likelihood” of personal liability for the directors who consider the demand.¹⁵³ The court stated the standard to plead demand futility in an oversight failure claim as follows:

To have a substantial likelihood of director liability on an oversight claim, ‘a plaintiff must plead the existence of facts suggesting that the board knew that internal controls were inadequate, that the inadequacies could leave room for illegal or materially harmful behavior, and that the board chose to do nothing about the control deficiencies that it knew existed.’¹⁵⁴

The outcome under *Rales* was not much different, as the court dismissed the plaintiff’s assertions as “completely conclusory,” reasoning that the defendants’ conduct was not sufficiently “egregious” to produce a substantial likelihood of personal liability.¹⁵⁵ The case was ultimately dis-

¹⁴⁹ *Id.*

¹⁵⁰ *Strong*, 877 F. Supp. 2d at 442.

¹⁵¹ *Id.* at 444-45.

¹⁵² See *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993) (discussing “substantial likelihood” of liability standard in relation to impartial demand consideration).

¹⁵³ *Strong*, 877 F. Supp. 2d at 447.

¹⁵⁴ *Id.* at 449 (quoting *Desimone v. Barrows*, 924 A.2d 908, 940 (Del. 2007)); see also *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996) (outlining directorial oversight duties). “A director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system . . . exists, and that failure to do so under some circumstances may . . . render a director liable . . .” *Id.* at 970.

¹⁵⁵ *Id.* at 447-48. In another case, the Delaware Chancery Court had occasion to analyze an oversight failure claim in the context of shareholder allegations of bribery relating to a joint venture in Kuwait. See *In re Dow Chem. Co. Derivative Litig.*, No. 4349-CC, 2010 WL 66769, at *5 (Del. Ch. Jan. 11, 2010). *Dow* endorsed application of the *Rales* test when the allegations are of “board inaction” relating to bribery. *Id.* at *6 n. 5. The court then accepted the plaintiffs’ factual allegation that bribes may have been paid in Kuwait as sufficient to survive a motion to dismiss. *Id.* at *13. However, because the complaint failed to allege that the board had any “cause for suspicion” with respect to the payment of bribes, their allegations were “simply too attenuated” to

missed.¹⁵⁶

ii) Freuler v. Parker

In *Freuler*, a shareholder filed suit against several officers and directors of Parker Drilling Company (the company) alleging that the defendants failed to adequately oversee their corporate compliance program, and authorized a number of payments in violation of the FCPA.¹⁵⁷ In particular, it was alleged that the defendants caused the company to operate in high corruption risk areas, including Kazakhstan and Nigeria, and that they “knew” of and “authorized” a system of official bribery.¹⁵⁸ The plaintiff sought to establish multiple counts of directorial fiduciary violations against each individual defendant.¹⁵⁹

The court began its analysis by imposing the Rule 23.1 hurdle, stating that the “plaintiff must meet stringent requirements of factual particularity” to satisfy the pleading standard.¹⁶⁰ Because the plaintiff did not make a pre-suit demand, the court required the plaintiff to plead demand futility for a majority of the defendants by alleging specific violations of the Act by each director named in the complaint.¹⁶¹ The defendants argued that the complaint charged every defendant with knowledge of the purported wrong, based simply on the fact that the wrong had occurred, and that this allegation failed to meet the particularity standard.¹⁶² Furthermore, the

support an oversight failure claim. *Id.* Accordingly, *Dow* falls in line with its corollary cases in federal court protecting directors charged with abdicating their oversight duties in the context of international bribery schemes. TARUN, *supra* note 70, at 72 (describing *Dow* as a “significant decision favorable to directors” facing oversight failure claims). *But see* Gabriela Jara, *Following on the Foreign Corrupt Practices Act: The Dynamic Shareholder Derivative Suit*, 63 DUKE L.J. 199, 212 (2013) (citing *Strong*’s application of *Rales* test as a “distort[ion of] the demand futility analysis”). Jara notes that “courts outside of Delaware insist on trying to fit the FCPA-related [oversight failure] claims into the traditional self-dealing paradigm of loyalty violations.” *Id.* at 216. A demand futility analysis however, is not limited to self-dealing transactions; the standard may also be met by a showing of a “substantial likelihood of liability for failing to oversee the violation.” *Id.* at 217; *see also In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996) (“[A] director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system . . . exists, and that failure to do so under some circumstances may . . . render a director liable”).

¹⁵⁶ *Strong*, 877 F. Supp. 2d at 454.

¹⁵⁷ *Freuler v. Parker*, 803 F. Supp. 2d 630, 633 (S.D. Tex. 2011).

¹⁵⁸ *Id.* at 641. According to the complaint, the company also suffered the loss of goodwill and damage to its reputation, in addition to over \$20 million in internal investigative costs. *Id.*

¹⁵⁹ *See id.* at 648 (charging five counts of breach of fiduciary duty owed to company).

¹⁶⁰ *Id.* at 638.

¹⁶¹ *Id.*

¹⁶² *See Freuler*, 803 F. Supp. 2d at 648 (reciting defendant’s argument that complaint lacked requisite particularity).

defendants contended that it was improper under Delaware law to impute one director's knowledge of wrongdoing upon the other individuals sitting on the board with him for the purposes of demand excusal.¹⁶³

The court agreed with the defendants, holding that the plaintiff had not met the "enhanced pleading requirements" to excuse the failure to make a demand.¹⁶⁴ The court stated that the complaint lacked sufficient factual allegations of each individual's role within the bribery scheme.¹⁶⁵ Accordingly, the case was dismissed.¹⁶⁶

iii) *Holt v. Golden*

In *Holt*, a group of shareholders sued derivatively on behalf of Smith & Wesson Holding Corp., a firearms manufacturer, alleging members of the board and company officers breached their duty of care by failing to maintain effective FCPA controls.¹⁶⁷ The action was based on the hiring and subsequent promotion of an individual by the name of Amaro Goncalves to the rank of Vice President of law enforcement, international, and U.S. government sales.¹⁶⁸ Goncalves was indicted in 2009 for violating and conspiring to violate the FCPA.¹⁶⁹

The plaintiffs argued that the board failed to properly exercise its duty of care by allowing Goncalves to be hired, rise up through the corporate ranks, and engage in numerous acts of bribery, which culminated in his indictment.¹⁷⁰ Although the court dismissed the action on issue preclusion grounds, it noted that it would have dismissed the case due to insufficient

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 652.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Holt v. Golden*, 880 F. Supp. 2d 199, 201 (D. Mass. 2012).

¹⁶⁸ *Id.* at 201-02. The individual's name was Amaro Goncalves and in 2006 he was able to generate \$20 million in government business alone. *Id.* at 201. His dealings included the sale of over 73,000 firearms to the Afghan government, and in 2006, the company's overall international sales grew by over fifty-eight percent. *Id.* The fact that firearms dealings with Afghan governmental bodies might catch the attention of FCPA enforcement institutions is hardly surprising in light of the fact that Afghanistan was ranked last in the world by Transparency International's 2012 Corruption Perceptions Index (CPI), in a tie with North Korea and Somalia. See TRANSPARENCY INTERNATIONAL, *Corruption Perceptions Index 2012* (2012), available at <http://www.transparency.org/cpi2012/results> (ranking 176 states around world according to perception of corruption of their governmental institutions).

¹⁶⁹ *Holt*, 880 F. Supp. 2d at 202. The government dropped the charges against Goncalves in early 2012 citing resource constraints, and unfavorable evidentiary rulings. See Gov't Mot. Dismiss, United States v. Amaro Goncalves, Criminal No. 09-335 at 1 (Feb. 21, 2012) (stating reasons for dismissal).

¹⁷⁰ *Holt*, 880 F. Supp. 2d at 202.

particularity under Rule 23.1.¹⁷¹ Because the plaintiffs had not made a pre-suit demand, the court stated that the enhanced pleading standard applied to establish futility.¹⁷² Dismissal was justified, according to the court because the complaint merely alleged a temporal coincidence between the expansion of international sales and the subsequent indictment of Goncalves.¹⁷³

iv) Moradi v. Adelson

In February 2011, Las Vegas Sands Corporation (LVS) was investigated by the SEC and DOJ, for “possible FCPA violations.”¹⁷⁴ Following the revelation of the investigations, three separate shareholder derivative actions were filed and later consolidated, charging the LVS board with breach of fiduciary duty for operating in foreign markets with high corruption risks, yet failing to install internal corporate controls commensurate to such risks.¹⁷⁵ However, at the time of filing these derivative actions, LVS had created a Special Litigation Committee (SLC) to investigate the shareholders’ allegations.¹⁷⁶

On August 27, 2012, the court granted the defendants’ motion to stay the proceedings pending the findings of the SLC, although, the plaintiffs had raised doubts about the disinterestedness of the committee, as three of its members were defendants in the action.¹⁷⁷ The court reasoned that because the SLC was expending a significant amount of company resources that would be further strained by a concurrent lawsuit, as well as the “complexity of the investigation,” a stay of the proceeding was warranted.¹⁷⁸ Approximately six months later, LVS disclosed that there had been “likely violations of the books and records and internal controls provisions of the FCPA,” in its annual 10-K filing.¹⁷⁹

¹⁷¹ *Id.* at 203.

¹⁷² *Id.*

¹⁷³ *Id.* at 204.

¹⁷⁴ Moradi v. Adelson, No. 2:11-cv-00490-MMD-RJJ, 2012 WL 3687576, at *1 (D. Nev. Aug 27, 2012).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at *2-3.

¹⁷⁸ *Id.* at *3.

¹⁷⁹ LAS VEGAS SANDS CORP., *Annual Report Pursuant to Section 13 or 15(D) of the Securities Exchange Act of 1934* (Mar. 1, 2013), available at <http://investor.lasvegassands.com/secfiling.cfm?filingID=1193125-13-87854>.

IV. ANALYSIS

Corporate decision makers apparently do not have to fear personal monetary liability for their negligence, willful blindness, or even express authorization of international bribery schemes that result in immense quantifiable and non-quantifiable losses.¹⁸⁰ While U.S. authorities are cracking down on foreign corruption at an unprecedented pace, it appears as though one's only hope is to stay out of the crosshairs of an FCPA investigation altogether, because defenses are difficult to impossible to mount.¹⁸¹ Yet, while the government rushes from one enforcement success to another, shareholders have been left empty-handed with no directorial accountability to them.¹⁸²

Since 2010, not a single shareholder derivative suit following an FCPA violation has been successfully litigated.¹⁸³ At the same time, however, American corporations and their decision makers are as vulnerable as ever to federal investigation and/or prosecution under the Act.¹⁸⁴ In light of expanded investigatory activity, the fact that corporate decision makers are not held personally accountable for the losses which their actions incur, flies in the face of basic principles of equity.¹⁸⁵ While the shareholders of a publicly traded corporation are its owners, and thus have a direct interest in

¹⁸⁰ See Daniel J. Grimm, *The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and its Consequences*, 7 N.Y.U. J.L. & BUS. 247, 293 (2010) ("Uncovering the FCPA problems of a target entity prior to closing a transaction is now viewed as key to avoiding a parade of horrors, including costly government investigations and the potential for a dramatic downward swing in the market value or stock price of the assets recently purchased.") (internal quotations omitted); see also cases cited *supra* Part III.B.

¹⁸¹ See Sheahan, *supra* note 46, at 465 (characterizing nature of FCPA affirmative defenses as "hollow" and "illusory" in practice); see also Part II.B *supra* (discussing increased enforcement activity).

¹⁸² See cases cited *supra* Part III.B. Aside from aggressively prosecuting FCPA violations in the courtroom, the DOJ also makes frequent use of deferred prosecution agreements ("DPAs") and non-prosecution agreements ("NPAs") as part of its FCPA enforcement strategy. See also Mark, *supra* note 119, at 434. DPAs and NPAs involve an agreement by the investigated party to pay a fine and to institute corporate oversight reforms in return for the government's promise not to prosecute. *Id.* Corporate DPA and NPA payments totaled a whopping \$7.6 billion for 2010 and 2011 combined, as "record-breaking" enforcement of the FCPA was among the major contributors to this staggering number. GIBSON DUNN, LLP, *2011 Year-End Update on Corporate Deferred Prosecution and Non-Prosecution Agreements*, at 2 (Jan. 4, 2012), available at <http://gibsondunn.com/publications/Documents/2011YearEndUpdate-CorporateDeferredProsecution-NonProsecutionAgreements.pdf>.

¹⁸³ See cases cited *supra* Part III.B (observing pattern of dismissal of FCPA shareholder derivative actions).

¹⁸⁴ See *supra* Part II.B & C (observing trend of increased anti-bribery enforcement efforts).

¹⁸⁵ See *supra* Part II.B & C (describing more aggressive nature and improved means of enforcement).

the company's success, they are also, by nature, the most attenuated from the corrupt payments that their boards either failed to prevent, or even expressly or implicitly authorized.¹⁸⁶ Every time a shareholder derivative action following an FCPA penalty is thrown out before the merits of the suit are debated, the corporation as an entity and therefore its shareholders incur the loss, not the directors or officers who caused or were complicit in the underlying wrongful act.¹⁸⁷

The patterns emerging from a holistic view of recent FCPA shareholder derivative actions indicate that procedural hurdles insulate defending boards from being answerable for their alleged violations of the Act.¹⁸⁸ In *Strong v. Taylor*, the court accepted "as truth" the fact that corrupt payments were made and later recorded as "legitimate" expenses by one of the defendants, yet refused to allow the plaintiff's case to move forward.¹⁸⁹ It would appear, however, that such a knowing violation of law coupled with allegations that the defendants were willfully blind to a multitude of questionable payments should constitute sufficient particularity to survive the pleading stage due to a "substantial likelihood" of director liability.¹⁹⁰

The fact that corporate executives are required to exercise extraordinary care in their overseas business ventures is not surprising when viewed in the context of today's anti-corruption landscape.¹⁹¹ It is not merely the increased focus of U.S. regulators and prosecutors on FCPA enforcement, but also collateral developments in the form of new federal securities laws and international anti-corruption efforts that make today's international marketplace legally hazardous.¹⁹² Dodd-Frank and SOX share,

¹⁸⁶ See CHOPER, COFFEE, & GILSON, *supra* note 127, at 55 ("management of the regular business affairs of the corporation is ordinarily vested in the board of directors . . . shareholders generally have very little direct power over the regular affairs of the corporation."); see also *supra* Part III.B (evaluating shareholder allegations of director and officer misconduct under FCPA).

¹⁸⁷ See *supra* Part III.B (discussing allegations of harm done to corporations due to FCPA investigations and fines).

¹⁸⁸ See *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 683 (Tex. 1990) (Doggett, J., concurring) (criticizing procedural rules, such as forum non conveniens, that result in cases not being decided on merits); see also cases cited *supra* Part III.B (dismissing cases without discussing merits of shareholder allegations).

¹⁸⁹ *Strong v. Taylor*, 877 F. Supp. 2d 433, 445 (E.D. La. 2012).

¹⁹⁰ See discussion Part III.B *supra*; see also *supra* notes 152155 and accompanying text (applying *Rules* test to determine demand futility based on "substantial likelihood" of director liability).

¹⁹¹ See TARUN, *supra* note 70, at 67 ("[a] responsible multinational board of directors must today focus on anti-bribery risks, issues, policies, and compliance"); see also discussion Part II.B *supra* (examining recent spike in FCPA enforcement).

¹⁹² See discussion *supra* Part II.B (noting that SOX and Dodd-Frank are federal securities legislation that ease process of FCPA investigations).

as one of their core principles the disclosure of violations of securities laws.¹⁹³ Because the FCPA is by nature a regulatory statute which applies to issuers of securities, any violation thereof falls within the scope of what Dodd-Frank and SOX sought to prevent by increasing the likelihood of exposure.¹⁹⁴ Thus, with Dodd-Frank's whistleblower protection and incentive scheme and SOX' effort to strengthen internal corporate oversight mechanisms, exposure of FCPA violations becomes more likely, which logically increases the probability of investigation.¹⁹⁵

It appears counterintuitive that even as SOX obligates corporate decision-makers to take an active role in overseeing their company's activities, shareholders are still unable to establish basic pleading predicates for judicial review of alleged violations of these duties.¹⁹⁶ Where the government successfully extracts immense financial penalties from publicly traded companies for, at times widespread, systematic and continuous acts of corruption, it would appear that judicial inquiry into the effectiveness of corporate oversight mechanisms would be in order in a subsequent derivative action.¹⁹⁷ Although the investigation of an alleged international bribery scheme after a signing officer certifies the effectiveness of the issuer's internal controls does not in and of itself constitute a violation of an affirmative duty under federal securities law, shareholders should be entitled to a discussion of what produced the investigation.¹⁹⁸ However, as long as Rule 23.1 acts as a technical barrier to a full-fledged judicial inquiry into the defendants' compliance with their fiduciary obligations, shareholders will remain constrained in their efforts to vindicate the harm done to the corporation.¹⁹⁹

Enhanced disclosure obligations derived from domestic legislative developments are merely one element of the increased risk of FCPA scruti-

¹⁹³ See PINTO & BRANSON, *supra* note 69, at 138 ("[SOX] deals with . . . increased disclosure . . . in the securities business"); Blount & Markel, *supra* note 64, at 1039 (evaluating possibility of race to disclose securities violations between company and whistleblowers).

¹⁹⁴ See BLOUNT & MARKEL, *supra* note 64, at 1039 (specifying FCPA violations as triggering possible need to self-report).

¹⁹⁵ See *id.* (analyzing self-reporting obligations); and PINTO & BRANSON, *supra* note 69, at 137-38 (evaluating objectives of SOX).

¹⁹⁶ See Klaw, *supra* note 39 at 316-17 (discussing how SOX affects liability under FCPA); *supra* notes 69-73 and accompanying text (discussing oversight obligations of certain corporate officers under SOX).

¹⁹⁷ See cases cited *supra* Part III.B (observing procedural rules of shareholder litigation preventing judicial inquiry into merits of alleged fiduciary violations).

¹⁹⁸ See cases discussed *supra* Part III.B (noting demand requirement and its effect on FCPA shareholder derivative litigation).

¹⁹⁹ See Curtin, *supra* note 131, at 457 (noting relaxation of demand requirement would be "more fair" to derivative plaintiffs); Goehre, *supra* note 131, at 142 & 152 (characterizing derivative procedure as complex and inadequate to safeguard shareholder interests).

ny.²⁰⁰ As the United States and the OECD are joined by an increasing number of willing partners in the global fight against bribery, U.S. enforcement authorities are able to tap into an expanded well of information related to corrupt payments by its businesses abroad.²⁰¹ Furthermore, with the Fifth Circuit's holding in *Jeong*, any prosecution of a covered entity that takes place in a foreign court will not bar U.S. authorities from taking action for the same underlying wrongful act, thereby not violating constitutional protections against double jeopardy.²⁰² Accordingly, U.S. regulatory and prosecutorial bodies not only act with an enhanced mandate to weed out corporate corruption, but they also enjoy a much wider array of avenues to be put on notice of wrongdoing both domestically and internationally.²⁰³

The pattern of unsuccessful FCPA derivative litigation is a prime example of how a procedural hurdle may have significant effects, not only on the substantive elements of a lawsuit (mainly because the substantive aspects are not litigated) but on anti-corruption efforts as a whole.²⁰⁴ Former Delaware Chancery Court Judge, Jack B. Jacobs, noted that although Rule 23.1 was intended to protect corporate decision makers from strike suits by overzealous attorneys looking to cash in on a court-awarded fee, it created – perhaps unexpectedly – a situation in which substantive aspects of the law were of essence at the pleading stage.²⁰⁵ A corollary to Justice Jacobs' observation that Rule 23.1 is overstepping its bounds as a procedural safeguard may be stated as follows: Rule 23.1 acts as a tool to insulate corporate fiduciaries from having to answer for violations of their duties, the facts of which have already been established by an extensive government investigation and the subsequent agreement to pay an exorbitant fine as a consequence of violating the FCPA.²⁰⁶

²⁰⁰ See Part II.B *supra* (discussing international anti-bribery enforcement collaboration).

²⁰¹ See Part II.B *supra* (analyzing international efforts to streamline anti-corruption enforcement).

²⁰² See *Jeong*, 624 F.3d at 712 (“Double jeopardy . . . does not attach when separate sovereigns prosecute the same offense . . .”).

²⁰³ See Andrew S. Boutros & Markus Funk, *Carbon Copy Prosecutions: A Growing Anti-Corruption Phenomenon in a Shrinking World*, 2012 U. CHI. LEGAL F. 259, 271 (2013) (“[A] single improper payment can trigger liability not only in the US under the FCPA and in the country where the bribe took place, but in every jurisdiction that claims a codified interest in putting an end to foreign bribery by those that carry on a business . . . within its territories.”); see also *supra* Part II.B (discussing increased political commitment and international efforts to fight international bribery).

²⁰⁴ See Jacobs, *supra* note 131, at 4 (characterizing Rule 23.1 as example of how procedural rule has “blurred the substance-procedure distinction”).

²⁰⁵ See *id.* at 4-5 (“to answer a procedural question – how to plead demand futility – a court would have to determine whether a doctrine of substantive law – the business judgment rule – would or would not apply to protect the complained of board action.”).

²⁰⁶ See *id.* (observing Delaware Supreme Court's justification for demand requirement). Ja-

In Delaware, the knowing violation of an affirmative legal duty is among the specifically enumerated wrongful acts that may not be excluded in an exculpation provision in the corporate charter.²⁰⁷ It follows that the knowing omission or violation of an affirmative legal duty, in and of itself constitutes a breach of fiduciary duty.²⁰⁸ However, a procedural rule, and not a substantive argument in defense of the defendant's actions, tends to decide the outcome of most FCPA shareholder derivative actions; many of which allege precisely the type of knowing violation of law which corporate statutes and jurisprudence seek to prevent.²⁰⁹

Procedural rules are intended to "prescribe the mechanics of litigation," not to control the outcome of the dispute itself.²¹⁰ In *Strong*, the corporation was subjected to an immense penalty for its failure to comply with, or properly take into account the aggressive nature of FCPA enforcement, yet Rule 23.1 prevented any type of judicial inquiry, and therefore, any accountability for the alleged misconduct.²¹¹ Based on the fact that a pecuniary corporate loss was already established in the form of the fine that was paid, in addition to allegations of other immeasurable losses, the action in *Strong* would not appear to fall under the category of the type of meritless strike suit which Rule 23.1 was intended to prevent.²¹²

When shareholders sue their directors alleging fiduciary breaches for violations of the Act, they are seeking redress on behalf of the corporation as a third party that was harmed by their decision makers' and employees' failure to comply with the FCPA.²¹³ As third party victims of corrupt foreign business practices, shareholders are among the groups of individuals whom commentators have sought to address by discussing a private right of action under the Act.²¹⁴ Aside from enabling third parties to seek

cobs notes: "The Supreme Court grounded the demand requirement upon a substantive rationale – that the statutory power of a corporate board to 'manage the business and affairs of the corporation' included the power to bring, or refuse to bring, a lawsuit on the corporation's behalf." *Id.*; see also *supra* note 180 (discussing DPAs and NPAs).

²⁰⁷ See *supra* note 137 and accompanying text (noting § 102(b)(7) and allowance of limited exculpation provisions).

²⁰⁸ See *South v. Baker*, 62 A.3d 1, 6 (Del. Ch. 2012) ("[D]irectors can be held liable . . . for knowingly causing or consciously permitting the corporation to violate positive law.").

²⁰⁹ See cases discussed *supra* Part III.B.

²¹⁰ See *Jacobs*, *supra* note 131, at 1 (describing basic distinctive characteristics between substantive and procedural rules of law).

²¹¹ *Strong v. Taylor*, 877 F. Supp. 2d 433, 439-40 (E.D. La. 2012).

²¹² *Id.* at 440 (discussing various allegations in complaint).

²¹³ See *Westbrook*, *supra* note 142, at 1226 (explaining legal concept of shareholder derivative action in context of FCPA violation).

²¹⁴ See *id.* at 1224 (characterizing collateral shareholder litigation following FCPA investigations as "de facto emergence of private actions"); Mark, *supra* note 119, at 419 (arguing for private right of action under the Act).

redress for the harms they suffer as a result of corrupt payment schemes, a private right of action, it is argued, would “enhance deterrence of foreign bribery.”²¹⁵

One commentator has described shareholder derivative and class action suits as a “de facto emergence of private actions” under the FCPA.²¹⁶ Although FCPA shareholder derivative litigation contains several of the characteristics of a private right of action – mainly private parties seeking redress for harms they suffered as a result of violations of codified law – to characterize these suits as a disguised private action presupposes at least the possibility of success on the merits.²¹⁷ However, given the outcome patterns of these cases, such an assumption would be generous at best.²¹⁸

With the flood of shareholder litigation following governmental bribery investigations of American companies, a judicial reinterpretation of pleading formalities could provide a similar deterrent effect with respect to corrupt international business practices.²¹⁹ Although incorporation of a private right of action may induce enhanced directorial attentiveness to the Act, the same would likely be achieved by relaxing of the demand futility standard and allowing shareholders to be heard on the merits of their alleged breaches of fiduciary duties. Corporate decision makers would have a direct financial incentive to ensure their subordinates’ compliance because of the financial ramifications of personal liability derived from a fiduciary violation.²²⁰

V. CONCLUSION

What emerges from the failed lawsuits seeking accountability for reckless or knowing failures to comply with the FCPA are boards of directors attempting to navigate a corporation through a high risk enforcement

²¹⁵ See Mark, *supra* note 119, at 505 (concluding that recognition of private right of action under FCPA would render numerous benefits).

²¹⁶ See Westbrook, *supra* note 142, at 1224 (analogizing shareholder suits to private right of action under the Act).

²¹⁷ See *id.* (analyzing shareholder litigation following FCPA scrutiny in context of private right of action).

²¹⁸ See *supra* Part III.B (noting pattern of unsuccessful shareholder derivative suits due to corporate law pleading rules).

²¹⁹ See Goehre, *supra* note 131, at 167 (endorsing enhanced judicial discretion as opposed to adherence to demand futility in shareholder derivative litigation); see also cases discussed *supra* Part III.A (explaining shareholder derivative pleading requirement and demand futility under Rule 23.1).

²²⁰ See CHOPER, COFFEE, & GILSON, *supra* note 127, at 920 (discussing issue of litigation expenses for corporate managers).

environment, but who have no personal incentive aside from their basic fiduciary obligations to ensure compliance. The continued failure of courts to hold directors personally liable for their acquiescence or approval of their company's systematic acts of bribery prevents directors from having a personal pecuniary interest in at least not giving their expressed approval to overseas bribery schemes. Effectively tying FCPA compliance to the possibility of personal liability through shareholder derivative litigation may do the trick in terms of inducing directorial attentiveness to the Act and efficiently fighting global corruption.

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