Private FCPA Enforcement

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This Article argues for recognition of a private right of action in the Foreign Corrupt Practices Act (FCPA), either judicially (on an implied basis) or legislatively (by amendment of the FCPA). The FCPA, enacted in 1977, prohibits companies and individuals from paying or promising to pay money or anything of value to foreign officials with the intent of obtaining or retaining business. The FCPA also has accounting provisions which require issuers to maintain books and records that accurately and fairly reflect their transactions and to devise and maintain an adequate system of internal accounting controls aimed at preventing and detecting FCPA violations. There is no express private right of action for violations of either the anti-bribery or the accounting provisions. In 1990 the Sixth Circuit held that there is no implied private right of action and every federal court to consider the issue since then has held in accord with that decision. This Article argues that such decisions are incorrect and Congress should amend the FCPA to create a broad express private right if courts continue to hold in accord with the Sixth Circuit and refuse to recognize an implied right. A number of significant advantages will flow from the proposed amendment, including compensation of the victims of foreign bribery, enhanced deterrence of foreign bribery, alignment of U.S. foreign anti-bribery policy with international conventions, and long-denied judicial review of the FCPA’s key provisions. A private right of action under the FCPA should be recognized for all of these reasons.

Introduction

I. A Brief History of the FCPA

II. Key Provisions of the FCPA

III. FCPA Enforcement Trends

IV. FCPA Enforcement and Collateral Civil Litigation

V. An Implied Private Right of Action Under the FCPA

A. Cort

B. Lamb

1. Class Members

2. Legislative Scheme

3. State Remedies

4. Congressional Intent
VI. Collateral Civil Litigation Theories
   A. Securities Fraud
   B. Antitrust
   C. RICO
   D. Shareholder Derivative Actions
   E. Tortious Interference/Unfair Competition

VII. An Express Private Right of Action Under the FCPA
   A. H.R. 2152
   B. Creation of an Express Private Right of Action Under the FCPA Would Yield Numerous Advantages
   C. Creation of an Express Private Right of Action Under the FCPA Would Result in no Significant Disadvantages

Conclusion

Introduction

This Article argues for recognition of a private right of action in the Foreign Corrupt Practices Act (FCPA), either judicially (on an implied basis) or legislatively (by amendment of the FCPA). The FCPA, enacted in 1977, prohibits companies and individuals from paying or promising to pay money or anything of value to foreign officials with the intent of obtaining or retaining business. The FCPA also has accounting provisions which require issuers to maintain books and records that accurately and fairly reflect their transactions and to devise and maintain an adequate system of internal accounting controls aimed at preventing and detecting FCPA violations.

There is no express private right of action for violations of either the anti-bribery or the accounting provisions. In 1990 the Sixth Circuit held in *Lamb v. Phillip Morris, Inc.* that there is no implied private right of action and every federal court to consider the issue since then has held in accord with that decision. This Article argues that such decisions are incorrect and the judiciary should recognize an implied private right of action at least for violations of the anti-bribery provisions of the FCPA. The Article further argues that Congress should amend the FCPA to create a broad express private right if courts continue to hold in accord with the Sixth Circuit and refuse to recognize an implied right.

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1 915 F.2d 1024 (6th Cir. 1990).
The Article proceeds in seven parts. Parts I-III provide an introduction to the FCPA. The original legislation and its 1988 and 1998 amendments are summarized and enforcement trends are analyzed. Enforcement during the first three decades of the FCPA was sporadic at best, but that situation has changed. In the last few years the Department of Justice (DOJ) and Securities and Exchange Commission (SEC) have significantly stepped-up enforcement and, as noted in Part IV, this trend has been a major contributing factor in the recent phenomenon of collateral civil litigation. Such litigation now frequently follows enforcement actions. The litigation is predicated on facts virtually identical to those alleged by the DOJ and SEC, but the FCPA is not cited in complaints as the basis for a damage award. Instead, plaintiffs assert alleged violations of federal securities laws, the Racketeer Influenced and Corrupt Organizations Act (RICO), antitrust laws, state laws proscribing tortious interference with prospective contractual relations or unfair competition, and other statutes. The cases are often pursued as class actions or shareholder derivative actions.

Part V examines whether the Sixth Circuit and all federal courts which subsequently relied on *Lamb* erred when they concluded there is no implied private right of action in the FCPA. This Part begins with a brief history of the implication doctrine in the United States, with a focus on the creation by the Supreme Court of the four-factor implication test in *Cort v. Ash*2 (*Cort*) and the Court’s subsequent abandonment of that test in favor of exclusive reliance on Congressional intent. This Part then analyzes the line of federal cases rejecting an implied private right of action under the FCPA, in light of the evolved implication doctrine, and concludes that the line of cases has been wrongly decided.

Part VI examines whether available theories of recovery in collateral civil litigation provide a viable alternative to a private right of action under the FCPA. This Part analyzes the recent wave of cases alleging violations of the statutes identified above and concludes that such theories fail to provide a viable alternative to a private right of action.

Part VII critiques recent proposed federal legislation to provide a limited private right of action and sets forth an alternative more expansive proposal. The recent legislation authorizes issuers, domestic concerns, and other U.S. persons to sue foreign concerns when damage is caused to domestic business. It does not authorize plaintiffs to sue U.S. companies or individuals. This Part contends that the proposed legislation is much too restrictive, and Congress should amend the FCPA to provide a broad private right of action that permits plaintiffs to sue U.S. companies and individuals, as well as foreign concerns, for violations of the FCPA’s anti-bribery provisions.

A number of significant advantages will flow from recognition of a broad private right of action. First, victims of FCPA violations will be compensated, consistent with one of the primary objectives of the civil justice system. Second, amendment of the FCPA to provide a private right of action will increase deterrence of foreign bribery, consistent with another primary objective of the civil justice system. Third, recognition of a private right of action will conform the FCPA with several international conventions that endorse such an approach, and thereby will help maximize uniform application of anti-bribery laws across borders. Fourth, private litigation will finally provide beneficial judicial review and interpretation of the FCPA. The statute was enacted 35 years ago, but there is very little case law addressing many of its most important

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elements. Private litigation will provide the judicial review that has been absent to date, and thereby furnish essential guidance to the business community.

I. A Brief History of the FCPA

The FCPA was enacted in 1977\(^3\) as a legislative response to growing concern about overseas bribery. Bribery is widely regarded as conduct that is both substantial and harmful. How substantial? Measuring bribery and other forms of corruption\(^4\) is notoriously difficult,\(^5\) in large part because corruption typically leaves no paper trail.\(^6\) Corruption is often measured by surveying relevant stakeholders.\(^7\) A frequently cited estimate\(^8\) of the extent of global bribery was provided by the World Bank Institute in 2004. Using survey data collected in 2001 and 2002, the Institute conservatively estimated that approximately $1 trillion worth of bribes was paid annually on a global basis, accounting for three percent of the world’s $30 trillion economy in

\(^5\) See, e.g., The World Bank, Six Questions on the Costs of Corruption with World Bank Institute Global Governance Director Daniel Kaufmann, (Apr. 8, 2004), http://web.worldbank.org/WSITE/EXTERNAL/NEWS/0,,print:Y~isCURL:Y~contentMDK:20190295~menuPK:34457~pagePK:34370~piPK:343472~theSitePK:4607,00.html (“[U]ntil very recently it was virtually impossible to venture an estimate of the extent of corrupt annual transactions. In fact, only a few years ago, corruption was regarded as impossible to measure. Thanks to the ‘explosion’ in measurement approaches and actual data in this field, at least it is now possible to estimate rough orders of magnitude.”).
\(^7\) Daniel R. Kaufmann, Aart Kraay & Massimo Mastruzzi, Measuring Corruption: Myths and Realities 2 (Dec. 2006), http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/six_myths_measuring_corruption.pdf. The use of surveys to measure bribery and other forms of corruption is quite common but subject to criticism on various grounds. See, e.g., Oxford Policy Management, OPM Briefing Notes – Measuring Corruption 2 (2007), http://www.opml.co.uk/sites/opml/files/bn2007-01_0.pdf (criticizing Transparency International’s periodic survey-based Bribe Payer’s Index (BPI) for, inter alia, its limited coverage and “the uncertain reliability of the sources”). The 2008 BPI, which is the most recent BPI available in 2011, surveyed 2,742 senior business executives in 26 countries and found that the four countries most likely to engage in bribery when doing business abroad, among the 22 that were ranked, were Russia, China, Mexico, and India. Transparency International, 2008 Bribe Payers’ Index 3-5 (2008), http://www.transparency.org/news_room/in_focus/2008/bpi_2008.
2002. Gross World Product more than doubled by 2010 but no updated estimate of the extent of global bribery had been published by then. Accordingly, $1 trillion remains the number that probably is most commonly cited in serious discussions of the extent of annual global bribery.

The notion that bribery and other forms of corruption are harmful also is widely accepted. A moral imperialism critique of this notion, which posits that anti-bribery efforts represent Western imperialism rather than universal norms, has waxed and waned and today is generally discredited. All major religions and ethical systems condemn bribery and other forms of corruption.

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11 This number is often cited in academic commentary about foreign bribery. See, e.g., Jacqueline L. Bonneau, Note, Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement, 49 COLUM. J. TRANSNAT’L L. 365, 367 (2011); Matt A. Vega, Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute, 31 Mich. J. Int’l L. 385, 386 (2010). Secretary of State Hillary Clinton has asserted that corruption costs Africa about $150 billion per year. The FCPA Blog, Clinton Blasts Facilitating Payments, June 13, 2011, http://www.fcpablog.com/blog/2011/6/13/clinton-blasts-facilitating-payments.html. Another commonly cited figure is that in developing and transitional economies public officials collect between $20 billion and $40 billion in bribes annually. This represents a high percentage of Official Development Assistance (ODA) received in such countries. In 2010, ODA from members of the Organization for Economic Cooperation and Development reached $128.7 billion. See Bodo Ellmers, Official Development Assistance 2010: Crash at the End of the Tunnel, Apr. 6, 2011, http://www.eurodad.org/whatsnew/articles.aspx?id=4448; Transparency International (U.K.), Corruption Data, http://transparency.org.uk/corruption-data. It also has been estimated that 15 percent of companies in industrialized countries must pay bribes to win or retain business. This figure rises to 40 percent in Asia and to 60 percent in the countries of the former Soviet Union. Transparency International (U.K.), Corruption Data, http://transparency.org.uk/corruption-data. Foreign bribery is not confined to emerging and transitional economies. In 2011 auditing firm Ernst & Young surveyed 2,365 employees of corporations in 25 European countries, split almost evenly between mature and emerging markets. The companies were stock-exchange listed, multinationals and/or employed more than 1,000 people. Sixty-two percent of the employees reported that bribery and other forms of corruption were widespread in the countries where they were based, 40 percent reported that the situation had become worse during the global economic downturn that began in 2007, and 28 percent reported that it is common practice in their sector to use bribes to win contracts. Ernst & Young, European Fraud Survey 2011, at 9-10, 24 (2011), http://www.ey.com/Publication/vwLUAssets/European_fraud_survey_2011/$FILE/EY%20EUROPEAN%20FRAUD% 20SURVEY%202011%20FINAL%20PDF%20050611.pdf.


The harm associated with corruption falls into several different but overlapping categories. First, corruption has a negative economic impact. There is a statistically significant negative association between (a) bribery and foreign investment and (b) bribery and economic growth. Conversely, there is a strong relationship between widespread corruption and systemic poverty. The World Bank has identified corruption as the “single greatest obstacle to economic and social development,” and perceives the anti-corruption battle as “central to its poverty alleviation mission.” Bribery also is economically inefficient because it distorts markets and increases transaction costs. Second, bribery undermines the democratic process. It erodes the legitimacy of government and often results in widespread distrust of political leaders and institutions. Third, foreign bribery threatens both national and international security, by impairing relations the U.S. has with other countries and destabilizing poor nations. Fourth, bribery and other forms of corruption can result in human rights violations.

YALE J. INT’L L. 257, 277-78 (1999) (“The myth that bribery is acceptable in some cultures finds no empirical support. . . . Every major religion or school of thought, including Buddhism, Christianity, Confucianism, Hinduism, Islam, Judaism, Sikhism, and Taoism, specifically condemns bribery.”).

14 See, e.g., Paolo Mauro, Corruption and Growth, 110 Q.J. ECON. 681, 705 (1995) (determining that a decrease in corruption, equivalent to one standard deviation, would increase a country’s investment rate by almost five percent and its annual GDP growth rate by almost one half of a percent).

15 Elizabeth Spahn, International Bribery: The Moral Imperialism Critiques, 18 MINN. J. INT’L L. 155, 157 (2009) (“The economists appear to have largely reached consensus that there is a significant relationship between widespread corruption and systemic poverty, particularly the role of systemic corruption in exacerbating the gap between very wealthy elites and the impoverished masses.”).


II. **Key Provisions of the FCPA**

The FCPA was enacted in 1977 as a response to some of the foregoing concerns about foreign bribery. It is both a civil statute and a criminal statute, and because it is part of the federal securities laws both the DOJ and SEC have enforcement authority. The FCPA has three primary provisions. The statute (1) prohibits companies and individuals from paying or promising to pay money or anything of value to officials of foreign governments or foreign political parties with the intent of obtaining or retaining business.\(^21\) The FCPA also has accounting provisions which require issuers to (2) maintain books and records that accurately and fairly reflect their transactions and (3) devise and maintain an adequate system of internal accounting controls aimed at preventing and detecting FCPA violations.\(^22\) While the DOJ handles all criminal actions and all civil actions against non-issuers, historically the SEC handled only civil actions against issuers.\(^23\) Unique among federal statutes, the FCPA is primarily enforced by Main Justice (DOJ headquarters), as opposed to the individual U.S. Attorneys’ offices.\(^24\) The DOJ and SEC often pursue parallel FCPA proceedings against the same issuer for both anti-bribery and books and records violations.\(^25\)

The FCPA has been amended twice since enactment, as part of the Omnibus Trade and Competitiveness Act of 1988\(^26\) and with the International Anti-Bribery and Fair Competition Act of 1998.\(^27\) The 1988 amendment made some significant changes to both the anti-bribery and accounting\(^28\) provisions of the FCPA. With regard to the anti-bribery provisions, the 1988 amendment clarified the FCPA’s exception for “grease payments.” The amendment specified that the anti-bribery provisions do not apply to any facilitating or expediting payment to a

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\(^28\) Section 13(b) of the Exchange Act was amended to provide that no criminal liability shall be imposed for violation of the accounting provisions unless a person knowingly circumvents or knowingly fails to implement a system of accurate and reasonable accounting controls.
foreign official, political party, or a party official if the purpose is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official. The 1988 amendment also set forth two affirmative defenses to a charge of violating the FCPA’s anti-bribery provisions and increased penalties for violations of the statute. Willful violations of the FCPA’s anti-bribery provisions now carry maximum criminal fines of $2 million for organizations and $250,000 for individuals (per violation) or, if greater, the alternative fine of twice the pecuniary gain. Individuals also face up to five years’ imprisonment for willful violations of the anti-bribery provisions. Such violations also carry civil penalties of up to $10,000 for organizations or individuals, per violation. These fines are not indemnifiable by an individual’s employer or principal. Willful violations of the FCPA’s accounting provisions carry even more significant penalties.

The 1998 amendments were primarily adopted to conform the FCPA to the Organization for Economic Cooperation and Development’s (OECD) new Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), which had been adopted in November 1997 and was ratified and implemented in the United States in 1998. The OECD Convention is very similar to the FCPA, but there were a few differences which necessitated the 1998 amendments. The most important effect of the 1998 amendment was that it extended the FCPA’s jurisdiction beyond U.S. borders, by removing the requirement of a territorial nexus between the proscribed bribery and the United States. Today, the FCPA’s anti-bribery provisions apply to issuers, domestic concerns, and agents acting on behalf of issuers and domestic concerns, as well as any person that violates the FCPA while in the territory of the United States. The term “domestic concern” includes any U.S. citizen, national or resident, as well as any business entity that is organized under the laws of a U.S. state or that has a principal place of business in the United States.

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29 Pub. L. No. 100-418, § 5003(a), 102 Stat. 1107, 1425 (codified, with minor changes, in 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b)).
30 Pub. L. No. 100-418, § 5003(a), 102 Stat. 1107, 1425 (codified, with minor changes, in 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b)).
31 15 U.S.C. §§ 78ff(c), 78dd-2(g), 78dd-3(e), 18 U.S.C. § 3571(b)(3), (d), (e).
33 15 U.S.C. §§ 78ff(c)(2)(A), 78dd-2(g), 78dd-3(e).
35 Willful violations of the accounting provisions carry maximum criminal fines of $25 million for organizations and $5 million for individuals, or, if greater, the alternative fine of twice the pecuniary gain. 15 U.S.C. §§ 78ff(a), 18 U.S.C. § 3571(d), (e). Individuals face up to 20 years’ imprisonment. 15 U.S.C. §§ 78ff(a). Civil penalties include disgorgement of any ill-gotten gains and penalties of up to $500,000 for organizations and $100,000 for individuals, per violation, in actions brought by the SEC. 15 U.S.C. § 78u(d)(3), (5).
The FCPA’s expansive jurisdiction is the result of both the 1998 amendment and the failure of companies to challenge the government’s broad interpretation of jurisdiction under the statute. The primary explanation for the failure by corporations to challenge the government is the strong incentive they have to cooperate fully with DOJ and SEC investigations of potential FCPA violations. Such incentives are provided by statements by the federal government that companies will receive some measure of credit for cooperation.39 Not surprisingly, then, an increasing number of FCPA enforcement actions have arisen from voluntary disclosures. While there is some dispute about the extent of this phenomenon, according to one 2011 estimate nearly 60 percent of combined corporate resolutions of FCPA enforcement actions since 2007 resulted from conduct that companies chose to voluntarily self-disclose.40

III. FCPA Enforcement Trends

The FCPA, enacted in 1977, was rarely enforced in the 1980s and 1990s. But both the DOJ and the SEC have significantly increased enforcement of the FCPA in recent years, according to several metrics.41 2010 was the most active year to date for FCPA enforcement, whether measured by the number of cases or the value of monetary penalties that were assessed.

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These Challenges, ASPATORE *1, *7 (July 2010) (concluding that categories of people and entities that are covered by the jurisdictional umbrella of the FCPA include U.S. companies and their employees, U.S. investors in a non-U.S. entity, foreign subsidiaries of U.S.-based companies, and non-U.S. companies and nationals (non-U.S. persons) who commit an act in furtherance of bribery of a foreign official while in the territory of the U.S).

39 For example, on January 13, 2010 the SEC issued its “Policy Statement Concerning Cooperation by Individuals in Investigations and Related Enforcement Actions.” SEC Rel. No. 34-61340, 75 Fed. Reg. 3122-02 (effective Jan. 19, 2010), 17 C.F.R. § 202, http://www.sec.gov/rules/policy/2010/34-61340.pdf. The Policy Statement was announced as part of a general initiative to encourage cooperation by both individuals and companies and, according to the SEC, is part of an array of tools it will employ to enforce the securities laws – including the FCPA. The Policy Statement notes the wide spectrum of ways that the SEC can reward cooperation, ranging from taking no enforcement action to pursuing reduced charges and sanctions. Id. See also Wilmer Cutler Pickering Hale and Dorr LLP, SEC’s First Non-Prosecution Agreement Exemplifies Trend Toward Soliciting Cooperation, Raises New Questions, at 1 (Jan. 11, 2011), http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=9694 (noting SEC’s recent clear message that it is committed to encouraging cooperation and that rewarding a cooperating company is an important part of its enforcement strategy).


In 2010 the DOJ brought 48 enforcement actions and the SEC brought 26 actions.\(^{42}\) By comparison, in 2004 the respective numbers were two and three.\(^{43}\) During the period 2006-10 the federal government brought more FCPA cases than it did from 1977 to 2005 combined.\(^{44}\) In 2010 the two agencies levied a total of $1.782 billion in criminal fines and disgorgement, representing a more than 70% increase over 2009.\(^{45}\) By January 2011, eight of the top ten corporate fines in FCPA history had been levied in the prior 12 months.\(^{46}\) Moreover, the number of open FCPA investigations by the DOJ and SEC increased from approximately 100 in 2008\(^{47}\) to approximately 150 in mid-2011.\(^{48}\) Most such investigations result in settlements\(^{49}\) but 2011 was expected to see a record high number of FCPA trials.\(^{50}\)

Much of the recent enforcement activity has been directed toward foreign companies. Eleven of the 21 corporations charged with FCPA violations in 2010 were foreign and these 11 companies accounted for 94 percent of the FCPA penalties imposed on corporations that year.\(^{51}\) By April 2011, eight of the ten largest FCPA penalties of all-time (each of which was $70


\(^{44}\) Zack Harmon, *Confronting the New Challenges of FCPA Compliance: Recent Trends in FCPA Enforcement and Practical Guidance for Meeting These Challenges*, ASPATORE *1*, *1* (July 2010).


Aggressive prosecution also is evidenced by the use by the DOJ and SEC of more innovative theories of liability and enforcement tools. Such innovative approaches include the following. First, whereas the SEC historically has targeted only U.S. issuers, in 2010 for the first time it prosecuted a non-issuer based on an agency theory. In November 2010 the DOJ and SEC announced settlements of $156 million with Panalpina World Transport (Holding), Ltd., a Swiss freight forwarder, and six of its customers. In this case the government alleged that Panalpina, a non-issuer, was acting as an agent of its issuer customers and had aided and abetted their FCPA violations.

Second, whereas the DOJ has commonly used deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) to resolve recent FCPA cases, in 2011 the SEC made its first use of a DPA. When such an agreement is used the DOJ and/or SEC decline to prosecute a company in exchange for an agreement to pay a large fine and, occasionally, accept significance corporate reforms. Courts only rarely review DPAs and do not review NPAs because they are not filed documents. Nevertheless, in the 21st century the use of DPAs “has evolved rapidly to the point that they are now the primary tool in DOJ’s efforts to combat corporate crime.” In 2010 the DOJ entered into 32 DPAs and NPAs and 14 of them concerned FCPA violations. In May 2011 Tenaris, S.A. entered into a DPA with both the DOJ and the SEC to settle FCPA

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53 See Department of Justice, Press Release, Oil Service Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More than $156 Million in Criminal Penalties (Nov. 4, 2010), http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.
54 An NPA differs from a DPA in several key respects. In the case of the former, no charges are brought, the agreement is not filed with the court, and there is no judicial involvement. If the company complies with the agreement the matter ends. An NPA typically contains the same type of cooperation and remediation provisions as a DPA, but does not include an admission of wrong-doing. David L. Kornblau & Gretchen Hoff Varner, DPAs in SEC Enforcement Investigations, LAW360, Sept. 15, 2009, http://www.cov.com/files/Publication/27132d2d-3695-4e63-91d4-9072f56ad076/Presentation/PublicationAttachment/ee0a6e4c-3e65-4916-b4fb-97bf5c2f32ba/Deferred%20Prosecution%20Agreements%20in%20SEC%20Enforcement%20Investigations.pdf.
56 F. Joseph Warin, Brian C. Baldrate & Trent J. Benishek, The Expanding Role of Deferred and Nonprosecution Agreements: The New Normal for Handling Corporate Misconduct, 6 (No. 3) BNA WHITE COLLAR CRIME REPORT (Feb. 11, 2011).
charges involving payments to officials of an Uzbekistan state-owned entity.\textsuperscript{58} This settlement was the first use of a DPA by the SEC pursuant to a new initiative on cooperation announced by it in 2010.\textsuperscript{59} By adopting a practice commonly used by the DOJ’s criminal division, the SEC reinforced a shift to more aggressive enforcement.\textsuperscript{60} Impetus for this shift was provided in 2009 when the SEC created a new FCPA Unit.\textsuperscript{61}

Third, the SEC recently asserted “control person” liability for the first time in an FCPA case. In July 2009 the SEC announced a settlement of FCPA allegations against nutritional and personal care products company Nature’s Sunshine Products, Inc. (NSP) relating to alleged bribe payments made for the purpose of securing non-enforcement of Brazilian import regulations. As part of the settlement NSP’s chief executive officer and former chief financial officer officers each paid a $25,000 civil penalty\textsuperscript{62} for having violated Section 20(a) the Exchange Act, which gives rise to control person liability. Section 20(a) provides that a control person is jointly and severally liable with and to the same extent as the controlled person to any person to whom the controlled person is liable, subject to certain conditions.\textsuperscript{63} According to most federal circuits which have considered the issue, to prove § 20(a) control person liability the plaintiff must establish (1) a primary violation of the securities laws and (2) control over the primary violator by the alleged controlling person.\textsuperscript{64}

Section 20(a) claims are common in private securities


\textsuperscript{61} See Robert Khuzami, Director, Division of Enforcement, Securities and Exchange Commission, Remarks before the New York City Bar: My First 100 Days as Director of Enforcement (Aug. 5, 2009), http://www.sec.gov/news/speech/2009/spch080509rk.htm (“The Foreign Corrupt Practices Act unit will focus on new and proactive approaches to identifying violations of the [FCPA].”).


\textsuperscript{63} Section 20(a) provides: “Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be jointly and severally liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.” 15 U.S.C. § 78t(a).

They are less common in SEC enforcement actions that seek to hold corporate officials liable for the actions of other individuals under their supervision, and courts disagree as to whether the SEC has authority to assert § 20(a) claims. The NSP case marked the first time that the SEC had held public company officials accountable for the actions of other individuals under their supervision, and courts disagree as to whether the SEC has authority to assert § 20(a) claims. Expanded use of control person liability theories by the SEC in FCPA cases likely will lead to future larger settlements.

Fourth, whereas the SEC never used disgorgement in an FCPA case during the first 26 year following the enactment of the statute, increasingly it has done so. The SEC first used disgorgement in an FCPA action in 2004 and since then it has used the remedy in approximately three-quarters of its FCPA-related enforcement actions. By March 2011 the SEC’s ten largest FCPA-related disgorgements (including prejudgment interest) all had occurred in 2007 or later.

Fifth, aggressive enforcement by the DOJ and SEC has been manifested by the increased level of prosecutions of individuals in FCPA cases. Cases against individuals historically have involved U.S. business managers or public figures involved personally in significant misconduct, but more recently the DOJ has pursued cases against foreign executives at foreign companies and individuals with little or no personal involvement in the foreign bribery. In 2010, 51 individuals were the subjects of FCPA enforcement actions, compared with 33 in 2009 and 24 in

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65 See, e.g., In re Nature’s Sunshine Products Sec. Litig., 486 F. Supp. 2d 1301, 1312-14 (D. Utah 2007) (holding that control person liability was properly alleged in private securities fraud action based on alleged FCPA violations).
68 See Michael G. McGovern & Steven S. Goldschmidt, Snaring ‘Control Person’ Executives in FCPA Liability, N.Y.L.J., Feb. 8, 2010 (“[G]iven that the overwhelming majority of FCPA investigations are settled short of litigation, the SEC’s apparent willingness to threaten such ‘control person’ liability likely will drive the costs of FCPA settlements even higher.”). But cf. Shearman & Sterling LLP, SEC Charges Executives with Control Person Liability Based on Corporation’s FCPA Books and Records Violations 4 (Aug. 11, 2009), http://www.shearman.com/files/Publication/b98b8a6f-49d2-4440-9479-d92cf226d399/Presentation/PublicationAttachment/3d297f7e-40cc-4603-bbb7-11254043a9ce/FCPA-081109-SEC-Charges-Executives-with-Control-Person-Liability-Based-on-Corp.pdf (suggesting that NSP case “may prove to be limited to its facts”).
2008.72 This focus continued in 2011.73 Such prosecutions likely are the key to maximizing the FCPA’s deterrent impact. The threat of prison time for corporate executives is a powerful motivation for FCPA compliance.74

A sixth significant development is the use by the federal government of sector-wide investigations. Increasingly, when the DOJ or SEC discovers links between one corrupt agent and multiple companies, this leads to investigations of the entire industry.75 Recent sector-wide investigations involved the energy and medical device industries.76

Seventh, the DOJ and SEC increasingly have used expansive jurisdictional theories to apply the FCPA to non-U.S. companies and individuals. For example, in the case involving Tenaris, S.A., which was resolved with use of a DPA in May 2011, the federal government successfully applied the novel theory that a non-U.S. company’s use of a correspondent bank account in the U.S. is sufficient to provide for territorial jurisdiction over that company under the FCPA.77

Eighth, increasingly the anti-bribery efforts of the DOJ and SEC have been internationalized, as reflected by a significant increase in multijurisdictional investigations78 and

72 Covington & Burling LLP, Significant Developments and Trends in Anti-Corruption Enforcement, at 2 (Jan. 2011), http://www.cov.com/files/Publication/5ff26ab9-61cf-46f4-ba8a-aa463a65f9fe/Presentation/PublicationAttachment/437b6d49-6ec1-4b3a-b2ad-be89b9337322/Significant%20Developments%20and%20Trends%20in%20Anti-Corruption%20Enforcement.pdf. See also Zack Harmon, Confronting the New Challenges of FCPA Compliance: Recent Trends in FCPA Enforcement and Practical Guidance for Meeting These Challenges, ASPATORE *1, *2 (July 2010) (“Over the past three years, prosecutions of individuals under the FCPA and related anti-bribery laws also have skyrocketed. . . . In addition to individual prosecutions, the government is also actively pursuing groups of individuals. . . .”).


76 See Jones Day, Trends in FCPA and International Anti-Corruption Enforcement, at 4 (Mar. 2011), http://www.jonesday.com/files/Publication/e0c435df-af29-4145-b7ce-ee50d3e9127b/Presentation/PublicationAttachment/fec3207a-11eb-45cb-b189-f4dda3b98ec0/Trends%20in%20FCPA.pdf (“The record level of recoveries in 2010 is due in large part to the success of sectorwide investigations.”).


78 See William H. Devaney, The Rise of Cross-Border Corporate Criminal Enforcement, ASPATORE *1, *5 (Jan. 2010) (noting recent increase in multijurisdictional investigations and parallel prosecutions of foreign bribery); Mark Miller, Corruption Cases Go International, NAT’L L.J., Mar. 26, 2007, at S1 (“One of the clearest trends in [FCPA] enforcement today is increased cooperation between the authorities of the United States and those of other nations—and the consequent rise of multijurisdictional investigations.”). The formal process of cooperation between countries primarily consists of Mutual Legal Assistance in Criminal Matters Treaties (MLATs), which are
cross-border information sharing. For example, SEC information requests to non-U.S. regulatory counterparts roughly doubled from 2003 to 2008 and during the period 2009-10 the SEC made almost 1,400 requests for assistance from foreign authorities. Cross-border coordination has the dual advantages of increased efficiency and a reduced risk that multinational corporations will be investigated and punished repeatedly in different countries for the same illegal bribery.

Notwithstanding the foregoing developments, there is significant evidence that the well-publicized trend of increasing FCPA enforcement has been exaggerated, and that exclusive federal enforcement of the FCPA is an inadequate solution to the pervasive problem of foreign bribery. First, companies that have committed bribery frequently are neither charged under the anti-bribery provisions of the FCPA nor barred from further business with the U.S. government. Instead, they are charged with violations of the FCPA’s accounting provisions and in many cases awarded lucrative government contracts following the resolution of their FCPA charges. Second, notwithstanding the federal government’s recent assertion that the

used by the DOJ and Memoranda of Understanding (MOUs, which are used by the SEC). The U.S. has MLATs with more than 60 countries and the SEC has signed MOUs with more than 35 of its foreign counterparts, covering most major securities markets. Claudius O. Sokenu, Jessica L. Medina & Tiffany A. Archer, Cross-Border Investigations, N.Y.L.J., Oct. 26, 2009, at S2.


Prepared Statement of Mike Koehler before Subcomm. on Crime and Drugs of the United States Subcomm. on the Judiciary, at 9-13 (Nov. 30, 2010), http://judiciary.senate.gov/pdf/10-11-30%20Koehler%20Testimony.pdf. In September 2010 the House of Representatives unanimously passed H.R. 5366, the Overseas Contractor Reform Act, which provides that a corporation found to be in violation of the FCPA’s anti-bribery provisions shall be proposed for debarment from any contract or grant awarded by the federal government within 30 days after a
aggressive prosecution of individuals is one of the cornerstones of its FCPA enforcement policy,\(^8^4\) the spike in such prosecutions in 2009 was primarily accounted for by prosecutions of 29 individuals in just two cases.\(^8^5\) Similarly, in 2010 the SEC charged individuals in a mere three FCPA enforcement actions\(^8^6\) and the DOJ prosecuted individuals in only five such actions.\(^8^7\) There have been no prosecutions of individuals in a number of recent high-profile FCPA cases, even where the DOJ asserted that members of the corporations’ legal, finance, compliance, and internal audit departments were involved in the bribery.\(^8^8\)

Third, fully two-thirds of the combined $1.7 billion in criminal fines and disgorgement levied by the DOJ and SEC in FCPA cases in 2010 was accounted for by just three matters and a mere six cases accounted for 80% ($1.36 billion) of the total.\(^8^9\) Fourth, nearly all of the misconduct giving rise to the ten largest FCPA settlements as of January 2011 occurred in the late 1990s and early 2000s.\(^9^0\) This suggests that the size of settlements with the DOJ and SEC

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will decline in future years, as the current pipeline of cases is resolved.\textsuperscript{91} Fifth, the record high number of FCPA trials expected to occur in 2011 is minimized by the fact that prior to 2011 only one corporate defendant had gone all the way to trial verdict in an FCPA case – Harris Corporation was acquitted in 1991.\textsuperscript{92} In May 2011 Lindsey Manufacturing Company became the first corporation to ever be tried and convicted of FCPA violations.\textsuperscript{93} Sixth, in many recent FCPA cases courts have imposed sentences that were less severe than what the DOJ requested or a plea bargain provided.\textsuperscript{94} 

Balanced against the substantial evidence that recent FCPA enforcement is not as aggressive as is commonly reported is the possibility that the SEC’s new whistleblower bounty program will lead to additional investigations and federal enforcement actions. As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) enacted in July 2010,\textsuperscript{95} Congress established new whistleblower bounty provisions that require the SEC to pay awards to individuals who voluntarily provide original information about a potential violation of the federal securities laws (including the FCPA) that leads to a successful SEC enforcement action resulting in monetary sanctions exceeding $1 million. Subject to various conditions, the SEC must provide cash bounties to whistleblowers of 10 to 30 percent of monetary recoveries in the SEC action and any related action brought by the DOJ or other agencies. The SEC determines the precise amount of any award within the permitted range, taking into account factors that include the significance of the information received and the level of cooperation provided.\textsuperscript{96} As of September 2010 the SEC had set aside $450 million in its new Investor

\textsuperscript{91} In the first five months of 2011, ten FCPA enforcement actions settled, resulting in a total of approximately $490 million in penalties, disgorgement, and prejudgment interest. Bethany Hengsbach, \textit{FCPA: A Mid-Year Update}, Boardmember.com, June 7, 2011, \url{http://www.boardmember.com/Article_Details.aspx?id=6346}.

\textsuperscript{92} Bruce Carton, \textit{Summer Approaches, but FCPA Already Blazing}, Securities Docket (June 15, 2011), \url{http://www.securitiesdocket.com/2011/06/15/summer-approaches-but-fcpa-already-blazing/}.


\textsuperscript{94} See Hughes Hubbard & Reed LLP, \textit{FCPA/Anti-Bribery Spring Alert 2011}, at 8 (2011), \url{http://www.hugheshubbard.com/files/upload/FCPA_Anti-Bribery_Spring_2011.pdf} (“In a string of recent cases, Judges have diverted from DOJ requests and even from plea agreements and imposed significantly lighter sentences – both in length of prison terms for individuals and size of fines for companies – than were expected.”); Claudius O. Sokenu, \textit{2010 FCPA Enforcement Year-End Review}, 43 (No. 12) BNA SEC. REG. & LAW REP. 5 (Mar. 21, 2011) (noting that in FCPA cases, “[c]ourts appear to be routinely rejecting the government’s recommendation of long prison sentences.”).


\textsuperscript{96} Dodd-Frank Act § 922. Dodd-Frank Act § 748 created an analogous bounty program with regard to the Commodity Futures Trading Commission. See Marcia Coyle, \textit{Corporate Sector Sounds the Alarm over Financial Reform’s ‘Bounty’ System}, Law.com, July 20, 2010, \url{http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202463690243}. In the pre-Dodd-Frank Act era the SEC established a rarely utilized whistleblower program that was limited to insider trading cases and restricted bounty
Protection Fund to pay for whistleblower bounties. In May 2011 the SEC issued final implementing rules for the program which, consistent with the statute itself, do not require potential whistleblowers to first report information through their companies’ internal compliance programs but do provide certain incentives intended to encourage such internal reporting. Under the new rules, which became effective in August 2011, even auditors can blow the whistle on their own audit clients and receive a major bonus for doing so.

The SEC’s new bounty program is likely to provide a significant incentive for whistleblowers to report potential FCPA violations and thereby increase the number of FCPA prosecutions by the federal government. The Dodd-Frank Act’s legislative history states that the purpose of the bounty program is to elicit high-quality tips by motivating person with insider knowledge “to come forward and assist the Government to identify and prosecute persons who have violated the securities laws.”

The staggering size of potential bounties, in combination with the new set of safeguards provided to whistleblowers by the Dodd-Frank Act suggests that this purpose might be fulfilled. The number of suspected FCPA violations called to the SEC’s attention is likely to increase, either by whistleblowers directly or by companies that choose to make a voluntary disclosure because of the high likelihood that a whistleblower will report the misconduct anyway. Some evidence suggests that the flow of high-quality tips to the SEC has

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101 For example, a whistleblower in the FCPA matter involving Halliburton Company and its former subsidiary, Kellogg Brown-Root, settled in 2009, could have received between $57.9 million and $173.7 million, based on the combined DOJ and SEC settlement. Willkie Farr & Gallagher, Client Memorandum, First Quarter of 2010 Shows Sharp Increase in FCPA Enforcement, at 5 (Apr. 15, 2010), http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C3301%5CFirst%20Quarter%20of%202010%20Shows%20Sharp%20Increase.pdf.
significantly increased. This flow of tips might lead to an increase in prosecutions, because whistleblowers are the primary source of information for federal regulators about potential FCPA violations. However, by mid-2011, one year after the enactment of the Dodd-Frank Act, there was little evidence that such tips were bearing fruit.

IV. FCPA Enforcement and Collateral Civil Litigation

Beginning in 2006 the stepped-up enforcement of the FCPA by the DOJ and SEC has sparked a corresponding increase in collateral civil litigation predicated on facts alleged by the federal government in enforcement actions. This litigation has taken seven forms: (1) suits by foreign governments, (2) shareholder derivative actions, (3) securities claims, (4) commercial actions between business partners or competitors, (5) tort claims by injured parties, (6) whistleblower complaints, and (7) suits against former employees. The expected continued

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104 See John F. Cannon & Kathleen Marcus, Big Brother is Watching, and He Pays Really Well, Law360, Mar. 30, 2011, http://www.law360.com/articles/223871/print?section=securities ("[T]he number of 'high-value' tips on fraud and other violations of securities law numbered about two dozen a year before the law. But since July [2010], the agency has sometimes been receiving one or two a day.") (quoting Thomas Sporkin, chief of the SEC's Office of Market Intelligence); T. Markus Funk, Meeting (and Exceeding) Our Obligations: Will OECD’s Anti-Bribery Convention Cause the Dodd-Frank Act’s ‘Whistleblower Bounty’ Incentives to Go Global?, 5 BNA WHITE COLLAR CRIME REPORT, Oct. 8, 2010, http://www.perkinscoie.com/files/upload/COMM_10_09_WhiteCollarCrimeReport.pdf ("Early reports, in fact, indicate that the Dodd-Frank Act is having its intended tip-generating effect."). But cf. Sarah Johnson, Can CFOs be Whistle-blowers?, CFO.com, May 13, 2011, http://www.cfo.com/printable/article.cfm/1457367 (citing Professor Geoffrey Rapp for proposition that whistleblowers will rarely be eligible to collect a bounty, because historically a miniscule number of SEC enforcement actions involved monetary penalties and the median sanction was less than the $1 million threshold). Another limiting factor is that whereas the Dodd-Frank Act’s whistleblower provisions are only triggered when public company issuers are involved, many companies targeted in FCPA enforcement actions are private. Kevin LaCroix, The D&O Diary, Developments Worth Watching on the Anti-Corruption Front, July 22, 2010, http://www.dandodiary.com/2010/07/articles/foreign-corrupt-practices-act/developments-worth-watching-on-the-anticorruption-front/ (citing Professor Mike Koehler).


107 See, e.g., Jason E. Prince, A Rose by Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions, 52 ADVOCATE 20, 20 (Mar./Apr. 2009) (“Plaintiffs are increasingly making an end-run around the FCPA’s lack of a private right of action through an array of FCPA-inspired civil suits.”). It is not always the case that FCPA collateral litigation follows DOJ or SEC investigations or enforcement actions. Sometimes the converse is true -- civil suits alleging foreign bribery spark investigations by the federal government. Jeffrey S. Johnston & Erika Tristan, The Next FCPA Battleground: Private Civil Lawsuits Following Foreign Corrupt Practices Act Settlements with U.S. Government Authorities, 4 VINSON & ELKINS SECURITIES LITIGATION INSIGHTS 6, 7 n.41 (Fall 2010), http://www.velaw.com/resources/SecuritiesLitigationInsightsFall2010.aspx.

expansion of FCPA enforcement is likely to be mirrored in a concomitant increase in additional collateral litigation.\textsuperscript{109} The next Part of this Article examines whether courts should recognize an implied private right of action in the FCPA, against the backdrop of the foregoing trends.

V. An Implied Private Right of Action Under the FCPA

The FCPA provides no express private right of action. In 1990, the Sixth Circuit held in \textit{Lamb} that the FCPA likewise provides no implied private right of action concerning violations of the FCPA’s anti-bribery provisions.\textsuperscript{110} Every federal court to consider the issue since then has held in accord with \textit{Lamb}.\textsuperscript{111} Similarly, the few federal courts to consider the issue all have held that the FCPA provides no implied private right of action concerning violations of the FCPA’s books and records provisions.\textsuperscript{112} As will be shown below, the reasoning of these decisions is highly questionable.

A. \textit{Cort}

\textit{Lamb} and its progeny typically began their analyses with a discussion of \textit{Cort}. In that case, decided in 1975, the Supreme Court set forth a four-factor test for determining whether a private right of action should be implied in a particular statute. First, is the plaintiff a member of the class for whose especial benefit that statute was enacted? Second, is there any indication of legislative intent, either explicit or implicit, either to create or deny a private remedy? Third, is it consistent with the underlying purpose of the legislative scheme to create or deny a private remedy? Fourth, is the plaintiff’s cause of action one that was traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law?\textsuperscript{113}

Four years later, in 1979, the Supreme Court effectively overruled \textit{Cort}’s four-factor approach in \textit{Touche Ross & Co. v. Redington}.\textsuperscript{114} Concluding that the central inquiry is whether

\begin{enumerate}
\item See James G. Tillen & Lauren H. Torbett, \textit{Multiplying the Risks: Parallel Civil Litigation in FCPA Investigations}, Bloomberg Law Reports (September 30, 2010), http://www.millerchevalier.com/Publications/PublishedArticles?find=41818 (“As the DOJ and SEC bring more cases, and as more companies voluntarily disclose potential FCPA violations, the trend of related civil litigation is likely to continue.”); Jason E. Prince, \textit{A Rose by Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions}, 52 ADVOCATE 20, 23 (Mar./Apr. 2009) (“As the U.S. government ramps up its FCPA enforcement efforts, the number of tag-along . . . private actions will likely correspondingly increase.”).
\item 915 F.2d at 1030.
\item \textit{Cort}, 422 U.S. at 78.
\item 442 U.S. 560 (1979).
\end{enumerate}
Congress intended to create, either expressly or by implication, a private cause of action, the Court acknowledged but declined to apply the other three factors when it held that there is no implied cause of action under Section 17(a) of the Exchange Act. A few months later the Supreme Court confirmed the new direction of its implication jurisprudence when it held in Transamerica Mortgage Advisors, Inc. v. Lewis that the Cort factors do not control the analysis and the dispositive question is whether Congress intended for the courts to imply a private cause of action.

Subsequent to Transamerica, “the Supreme Court has either ignored the Cort factors altogether, or used them only as evidence of Congressional intent. The same has been true in the lower courts.” For example, in 2008, in Stoneridge Investment Partners, LLC v. Scientific-Atlanta, the Supreme Court stated: “[I]t is settled that there is an implied cause of action only if the underlying statute can be interpreted to disclose the intent to create one.”

B. Lamb

Lamb, decided by the Sixth Circuit in 1990, was the first and most influential appellate decision to consider whether an implied right of action exists under the FCPA. While the Sixth Circuit acknowledged that its focal point was Congressional intent, it nevertheless curiously proceeded to analyze intent by applying all four Cort factors. The Sixth Circuit stated: “As guides for discerning that intent, we have relied on the four factors set out in Cort v. Ash. . . .” This was the first of the court’s several missteps. By 1990, the Supreme Court’s abandonment of the full four-factor test was already more than a decade old.

1. Class Members

The Sixth Circuit’s analysis of the other three Cort factors seems largely irrelevant in light of Touche Ross, Transamerica, and other Supreme Court cases, but it is useful to consider that analysis insofar as it has some limited applicability to the dispositive issue of Congressional intent. The first Cort factor is whether the plaintiff is a member of the class for whose especial

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115 Touche Ross, 442 U.S. at 575.
116 Section 17(a) provides that a broker-dealer is required to file certified financial statements with the SEC for the purpose of checking compliance with net capital requirements. See 15 U.S.C. § 78q(a).
118 Transamerica Mortgage Advisors, 444 U.S. at 18.
119 Susan J. Stabile, The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action, 71 NOTRE DAME L. REV. 861, 869-70 (1996). Accord James D. Gordon, Acorns and Oaks: Implied Rights of Action under the Securities Acts, 10 STAN. J.L. BUS. & FIN. 62, 76 (2004) (“Since Cort v. Ash, the Court has significantly shifted its focus to congressional intent. The Court has held that congressional intent is the ‘central inquiry,’ the ‘ultimate issue,’ the ‘dispositive question,’ and ‘determinative.’ The Court has also held that once the dispositive question of congressional intent has been determined, the other Cort factors are not relevant.”).
120 552 U.S. 148 (2008)
121 Stoneridge, 552 U.S. at 164.
122 Lamb, 915 F.2d at 1028.
123 Lamb, 915 F.2d at 1028.
benefit that statute was enacted. The Sixth Circuit answered this question in the negative, by concluding that “the FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets. . . .”124 This is not quite accurate. While foreign policy was an important consideration, it was just one of several. The overall objective of Congress in enacting the FCPA was to prohibit U.S. companies and companies listed on U.S. exchanges from paying or offering bribes to foreign government officials and political parties for the purpose of obtaining or retaining business opportunities, and to punish them for engaging in such conduct.125 This prohibition was motivated by considerations that bribery is both ethically repugnant and competitively unnecessary.126 As noted by the DOJ: “Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.”127 The foregoing considerations do not suggest that Congress did not intend to provide a private right of action. Rather, one implication is that competitors of the bribing parties were intended beneficiaries.128

2. Legislative Scheme

The second Cort factor is Congressional intent, which is discussed below. The third factor is consistency with the legislative scheme. According to the Sixth Circuit, a private right of action would “directly contravene the carefully tailored FCPA scheme presently in place.”129 Specifically, a private right of action would be inconsistent with the legislative scheme because the FCPA provides for the Attorney General to furnish timely guidance concerning the DOJ’s enforcement policy. According to the Sixth Circuit, “this legislative action clearly evinces a preference for compliance in lieu of prosecution . . . .”130

The Sixth Circuit’s application of the third Cort factor is problematic in numerous respects. To begin, the Attorney General has not furnished timely guidance concerning the DOJ’s enforcement policy. Indeed, by September 2011 it had not issued any guidance at all. The 1988 amendments required the DOJ to determine, following consultation with other agencies and a public notice and comment period, whether compliance with the FCPA would be enhanced by further clarification of the statute’s anti-bribery provisions. If the DOJ concluded such clarification was warranted, it was authorized to issue guidelines describing conduct that

124 Lamb, 915 F.2d at 1029.
129 Lamb, 915 F.2d at 1029.
130 Lamb, 915 F.2d at 1029-30.
would conform to those provisions. In addition, or in the alternative, it was authorized to identify general precautionary procedures that companies could implement voluntarily in an effort to comply with the FCPA.\textsuperscript{131} As required, the DOJ invited public comment concerning the extent to which the business community’s compliance with the FCPA would be enhanced by the issuance of guidelines.\textsuperscript{132} After the comment period closed the DOJ formerly declined on July 12, 1990 to issue guidelines. The Federal Register notice announcing the DOJ’s decision stated: “After consideration of the comments received, and after consultation with the appropriate agencies, the Attorney General has determined that no guidelines are necessary.”\textsuperscript{133} The DOJ does not appear to have reconsidered its decision in the more than two decades since then.\textsuperscript{134}

The FCPA also requires the DOJ to issue opinions in response to questions from issuers and domestic concerns as to whether specified prospective business conduct conforms with the DOJ’s enforcement policy concerning the FCPA’s anti-bribery provisions. Under the DOJ’s FCPA Opinion Procedure a rebuttable presumption of compliance with the FCPA’s anti-bribery provisions applies to conduct that the DOJ identifies as conforming to its enforcement policy.\textsuperscript{135} A DOJ opinion does not act as binding precedent with respect to any other agency, including the SEC,\textsuperscript{136} or with respect to any party that did not join in the request.\textsuperscript{137} The FCPA Opinion Procedure is rarely utilized. The DOJ issued only 56 FCPA opinions between 1977 and August 2011, an average of approximately 1.6 opinions per year,\textsuperscript{138} and the recent opinions “have

\textsuperscript{131} See 15 U.S.C. §§ 78dd-1(d), 78dd-2(e).
\textsuperscript{137} Hughes Hubbard & Reed LLP, FCPA/Anti-Bribery Spring Alert 2011, at 9 (2011), http://www.hugheshubbard.com/files/upload/FCPA_Anti-Bribery_Alt/2011 PCA Alert Spring 2011.pdf. However, in Opinion Release 08-02, the DOJ refers to one of its prior Opinion Releases as “precedent,” and in Opinion Release 10-03 it uses prior Opinion Releases as guidance. Id.
\textsuperscript{138} Gibson Dunn & Crutcher, 2011 Mid-Year FCPA Update 17 (July 11, 2011), http://gibsondunn.com/publications/pages/2011Mid-YearFCPAUpdate.aspx. A complete list of FCPA Opinion Procedure Releases by the DOJ is available at http://www.justice.gov/criminal/fraud/fcpa/opinion/. As of September 1, only one opinion had been issued in 2011. Why is this process used so infrequently? There are at least three explanations: (1) the SEC is not bound, (2) the process takes too long, and (3) an unfavorable opinion raises the FCPA profile of the requesting party. FCPA Professor, It’s Been A While . . . DOJ Issues FCPA Opinion Procedure Release, Aug. 5, 2009, http://fcpaprofessor.blogspot.com/2009/08/its-been-while-doj-issues-fcpa-opinion.html. See also Debevoise & Plimpton LLP, FCPA Opinion Release No. 11-01, 2 (No. 12) FCPA UPDATE 6 (July 2011), http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=b088cc4d-0970-4cbb-881d-
offered disappointingly little guidance.” The SEC has no process for issuing opinions concerning the FCPA and it has not issued such an opinion.

The near-complete absence of guidance from the DOJ and SEC substantially undercuts the Sixth Circuit’s assertion that the FCPA “evinces a preference for compliance in lieu of prosecution.” The aggressive pattern of FCPA enforcement described supra in detail also seriously undermines the Sixth Circuit’s assertion. While it is true that such enforcement is a 21st century phenomenon, Congress has done nothing to demonstrate that it disapproves of the sharp focus by the DOJ and SEC on FCPA enforcement or that such enforcement is contrary to its intent in enacting the statute. There have been no amendments of the FCPA since 1998. Congress held hearings on FCPA enforcement in November 2010 and June 2011, but no amendments followed.

In its discussion of the third Cort factor the Sixth Circuit also asserted that “the introduction of private plaintiffs interested solely in post-violation enforcement, rather than pre-violation compliance, most assuredly would hinder Congressional efforts to protect companies and their employees concerned about FCPA liability.” Once again, there is no basis for the Sixth Circuit’s statement. Nothing in the FCPA’s legislative record demonstrates that Congress was focused on protecting companies and their employees from FCPA liability. Rather, as indicated supra, Congress’s primary objective in enacting the FCPA was to prohibit businesses from paying or offering to pay bribes overseas for the purpose of obtaining or retaining business opportunities and to punish companies that participate in such foreign bribery.

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4a75d186f5f1 (noting that, in light of recent aggressive enforcement of the FCPA, requesting parties “hesitate to bring any but the most conservative proposals to DOJ for an opinion”).


142 See Debevoise & Plimpton LLP, House Subcommittee Holds Hearing on FCPA Reform, Judge Mukasey Testifies, 2 (No. 11) FCPA UPDATE 1 (June 2011), http://www.debevoise.com/files/Publication/027aee9f-9006-4037-8195-6da0c6a55c00/Presentation/PublicationAttachment/7508fa9a-61e6-4876-9432-8e3a4f00a44a/FCPAUpdateJune2011.pdf.

143 Lamb, 915 F.2d at 1029-30.
critics note that “the original intent of the statute . . . was to punish companies that participate in foreign bribery. . . .”

Perhaps the strongest evidence that Congress was not primarily concerned about protecting companies from FCPA liability is that nothing in the original legislation or its subsequent amendments abrogated or diluted the doctrine of respondeat superior in connection with the prosecution of foreign bribery. For more than a century, federal courts have applied a version of respondeat superior to hold corporations criminally liable for the conduct of their employees. Pursuant to the doctrine, corporations are vicariously liable for crimes committed by their employees at any level acting within the scope of their employment, even for conduct in direct violation of the corporations’ compliance policies. The continued application of this undiluted strict liability in foreign bribery cases strongly suggests that Congress was not primarily concerned about protecting corporations from FCPA liability when it enacted the FCPA, or at any point since then.

3. State Remedies

The fourth Cort factor is whether plaintiff’s cause of action is one that was traditionally relegated to state law so that it would be inappropriate to infer a cause of action based solely on federal law. Here again the Sixth Circuit’s analysis is dubious. The court stated that because federal antitrust laws have extraterritorial application, this diluted plaintiffs’ assertion that a private right of action under the FCPA constitutes the only viable mechanism for redressing violations.

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145 Application of the doctrine dates back to the Supreme Court’s decision in New York Central & Hudson River R.R. Co. v. United States, 212 U.S. 481, 492 (1909). See, e.g., United States v. Ionia Mgmt S.A., 555 F.3d 303, 310 (2d Cir. 2009) (holding that, in order to establish vicarious liability, federal government is not required to prove that corporation lacked effective policies and procedures to deter and detect criminal conduct by its employees); Michael B. Mukasey, Written Testimony at 3, U.S. House of Rep. Comm. on the Judic., Subcomm. on Crime, Terrorism and Homeland Security, The Foreign Corrupt Practices Act, June 14, 2011, http://www.fcpablog.com/blog/2011/6/14/mukasey-calls-on-congress-to-fix-the-fcpa.html (“A company may therefore be held liable for FCPA violations committed by rogue employees, agents or subsidiaries even if the company has a state-of-the-art FCPA compliance program.”); The FCPA Blog, Naked Corporate Defendants, Jan. 21, 2009, http://www.fcpablog.com/blog/2009/1/22/naked-corporate-defendants.html (“As we’ve said many times, nothing has had a greater impact on enforcement of the Foreign Corrupt Practices Act against corporations than respondeat superior, which leaves companies defenseless once employees are found to have committed violations.”). Critics of the FCPA often raise the specter of respondeat superior to argue that the statute should be amended to include an affirmative defense that would permit corporations to avoid criminal liability if the individuals responsible for the bribery circumvented the corporations’ compliance programs. See, e.g., Mukasey, supra at 3. But this risk of rogue behavior subjecting corporations to criminal liability for FCPA violations is mostly theoretical, because the DOJ rarely holds corporations accountable for the acts of single employees. See Statement of Greg Andres (Acting Deputy Assistant Attorney General, DOJ) before the Subcomm. on Crime, Terrorism and Homeland Security, House Comm. on the Judiciary, Foreign Corrupt Practices Act, at 4 (June 14, 2011), http://judiciary.house.gov/hearings/pdf/Andres06142011.pdf (“[G]enerally, the Department does not hold a corporate entity accountable for the acts of a single employee.”).
anticompetitive behavior on a global scale. Accordingly, the Sixth Circuit “attach[ed] no significance to the absence of state laws proscribing bribery of foreign officials.”

The Sixth Circuit referred specifically to the Sherman Antitrust Act, but there are few if any examples of plaintiffs asserting successful Sherman Act claims based on foreign bribery. Plaintiffs who do invoke federal antitrust laws to assert claims based on foreign bribery more commonly rely on Section 2 of the Robinson-Patman Act. As is discussed in detail infra, plaintiffs attempting to rely on that statute to assert claims based on underlying FCPA violations confront a number of major obstacles that greatly reduce their probability of success. These obstacles include (1) the very narrow construction given to the Robinson-Patman Act by the Supreme Court and lower courts, and (2) the onerous requirement of proving antitrust injury, and (3) the likely absence of extraterritorial application of the statute.

In short, contrary to the Sixth Circuit’s conclusion, federal antitrust laws do not provide a viable mechanism for redressing the anticompetitive effects of foreign bribery. Accordingly, courts should attach significance to the absence of state laws proscribing bribery of foreign officials is, insofar as the fourth Cort factor has any relevance. A private right of action in connection with foreign bribery is not at all one which was traditionally relegated to state law.

4. Congressional Intent

This leaves the second Cort factor, and the only one which matters under Supreme Court precedent. This factor is Congressional intent. The Sixth Circuit concluded that Congress intended not to provide a private right of action, because the conference report accompanying the final compromise FCPA bill made no mention of such a right. Judge Ralph B. Guy, Jr., who wrote the Lamb opinion and clearly was hostile to the implication of private rights of action, stated: “Speaking only for myself, if writing on a clean slate, I would never infer a private right of action where the legislation itself is silent in that regard.” But this view is surely incorrect – if accepted it would foreclose the implication of any private right of action.

Before reaching its conclusion concerning Congressional intent the Sixth Circuit briefly mentioned two facts concerning the FCPA’s legislative history. First, the House report issued in connection with the legislation stated: “The Committee intends that courts shall recognize a
private cause of action based on this legislation, as they have in cases involving other provisions of the Securities Exchange Act, on behalf of persons who suffer injury as a result of prohibited corporate bribery.”\textsuperscript{154} Second, while the Senate version of the FCPA bill initially included a provision that expressly conferred a private right of action under the FCPA on competitors,\textsuperscript{155} this provision was deleted.\textsuperscript{156} The Sixth Circuit summarized both facts by noting: “The availability of a private right of action apparently was never resolved (or perhaps even raised) at the conference that ultimately produced the compromise bill passed by both houses and signed into law; neither the FCPA as enacted nor the conference report mentions such a cause of action.”\textsuperscript{157}

The first fact is significant and tends to support implication of a private right of action, because in the absence of express statutory provision committee reports are the most persuasive evidence of legislative intent.\textsuperscript{158} The second fact likewise is significant and also tends to support implication. The Senate version of the FCPA bill deleted a private right of action specifically because the Senate Committee on Banking, Housing and Urban Affairs believed, in accordance with the SEC’s view,\textsuperscript{159} that the language “would have duplicated and possibly confused existing remedies available to shareholders,”\textsuperscript{160} as the SEC indicated. Accordingly, the Senate deleted the provision for a private right of action not to preclude such a right, but rather to ensure that it was available in other securities actions.\textsuperscript{161}

In summary, a strong argument can be made that a private right of action should be implied under the FCPA.\textsuperscript{162} The Sixth Circuit’s decision in \textit{Lamb}, which has served as the precedent for most of the subsequent cases finding no private right, is riddled with factual and analytical errors. But no court has disagreed with \textit{Lamb} in the more than two decades since it

\textsuperscript{155} \textsuperscript{155} See S. 3379 § 10, 94th Cong., 2d Sess., 122 Cong. Rec. 12,605, 12,607 (1976).
\textsuperscript{156} \textsuperscript{156} See S. Rep. No. 1031, 94th Cong., 2d Sess. 13 (1976).
\textsuperscript{157} \textsuperscript{157} Lamb, 915 F.2d at 1029.
\textsuperscript{158} \textsuperscript{158} See, \textit{e.g.}, ExxonMobil Corp. v. Allapattah Serv., Inc., 545 U.S. 546, 576 (2005) (“In Congress, committee reports are normally considered the authoritative explication of a statute’s text and purposes. . . . ”); Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986) (“We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee reports on the bill.”); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 548 n.11 (1982) (“The most dependable sources of legislative intent are the reports of the responsible committees.”).
\textsuperscript{159} \textsuperscript{159} Securities and Exchange Commission, 94th Cong., 2d Sess., Report to the Senate Banking, Housing and Urban Affairs Comm. on S. 3379, at 16 (1976) (noting that an FCPA provision creating a private right of action would “create confusion over whether Congress, by expressly recognizing one type of action, intended to preclude the possibility of other implied causes of action.”).
\textsuperscript{160} \textsuperscript{160} S. Rep. No. 94-1031, 94th Cong., 2d Sess. 12, 12-13 (1976).
was decided, and it seems highly unlikely that the Supreme Court, as presently constituted, will overrule the decision.163

VI. Collateral Civil Litigation Theories

As indicated, recent years have seen an explosion of FCPA collateral civil litigation. Such litigation, which typically follows the commencement of enforcement actions, is predicated on facts very similar to those alleged by the DOJ and SEC, but the FCPA is not cited in complaints as the basis for a damage award. Instead, plaintiffs assert alleged violations of federal securities laws, RICO, antitrust laws, state laws proscribing tortious interference with prospective contractual relations or unfair competition, and other statutes. The actions are typically, but not always, commenced as class actions or shareholder derivative actions.164 The next section of this Article considers whether such actions provide a viable alternative to a private right of action under the FCPA. If they do not present a viable alternative, then the argument in favor of a private right of action under the FCPA becomes much stronger.165 As will be shown, collateral civil litigation is not a viable alternative.166

A. Securities Fraud

Increased enforcement of the FCPA by the DOJ and SEC has been accompanied by a parallel increase in the number of collateral private lawsuits alleging violations of the federal securities laws.167 Most such cases have alleged violations of § 10(b) of the Exchange Act and companion SEC Rule 10b-5.168 At least a dozen cases alleging securities violations that

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163 See Alan R. Bromberg & Lewis D. Lowenfels, 6 SECURITIES FRAUD AND COMMODITIES FRAUD § 18:13 (2d ed. 2010) (“In our opinion there is little chance that the U.S. Supreme Court as presently constituted would be disposed to overrule Lamb and imply a private right of action under the FCPA.”).

164 See, e.g., Erika L Bloomquist, D&O Coverage Considerations for FCPA Claims, LAW360 (June 8, 2010), http://www.haynesboone.com/files/Publication/727809a6-fa53-49fa-80d5-1ebba1bf27b/Presentation/PublicationAttachment/bc04c5cb-334f-42d3-8adf-493a3f8754bb/D%26O%20Coverage%20Considerations%20For%20FCPA%20Claims.pdf (“The dramatic increase in FCPA enforcement actions has led to an equally dramatic increase in costly civil litigation. . . . The ‘follow-on’ lawsuits usually are brought as securities class actions filed by shareholders or derivative lawsuits filed on the company’s behalf.”).


167 See Michael P. Matthews, David W. Simon & Maksim Chester, The Rise in Litigation from FCPA Enforcement, Law360 (Feb. 9, 2009), http://www.law360.com/print_article/84660. 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. Section 10(b) makes illegal the following conduct: (1) “employ[ing] any device, scheme or artifice to defraud”; (2) “mak[ing] any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they
stemmed from underlying FCPA violations were filed between 1998 and 2011, either as stand-alone actions or as companions to derivative suits. Most of these cases were class actions filed after 2004.\textsuperscript{169}

Securities fraud class actions that allege underlying FCPA violations typically follow negative price reactions to FCPA news. A 2009 study with a database of all FCPA settlements between 2002 and 2008 found that “the majority of companies that exhibited statistically significant price reactions at the 5% level to FCPA-related news had resulting 10b-5 actions filed against them.”\textsuperscript{170}

The complaints in these actions typically allege that defendants’ public disclosures regarding potential FCPA violations and/or potential settlements with the DOJ or SEC were misleading, or are evidence of material misrepresentations or omissions in defendants’ prior public statements regarding the absence of FCPA violations, compliance with anti-bribery laws, the quality of defendants’ internal controls, the risks and costs associated with an FCPA investigation, predictions regarding the results, effects, or materiality of an FCPA investigation, and defendants’ profitability. The complaints further allege that as a consequence of the foregoing misrepresentations and omissions, the market price of defendants’ stock was artificially inflated and maintained, and plaintiff shareholders incurred losses when the stock price fell.\textsuperscript{171}

Securities fraud class action lawsuits arising from alleged FCPA violations have resulted in some major settlements.\textsuperscript{172} Such lawsuits settled for a combined total of $84.4 million

\textsuperscript{169} These statistics have two sources. The first source is a search conducted in July 2011 at the author’s request by the Stanford Law School/Cornerstone Research Securities Class Action Clearinghouse (SCAC). The author thanks Stanford Law School, the SCAC, and especially Kamal Hubbard for their research assistance. Search results are on file with the author. The second source is Shearman & Sterling LLP, \textit{FCPA Digest: Cases and Review Releases Relating to Foreign Bribes to Foreign Officials under the Foreign Corrupt Practice Act of 1977}, at 456-68 (Jan. 2011), \url{http://www.shearman.com/files/upload/FCPA-Digest-Jan-2011.pdf}.

\textsuperscript{170} Raymund Wong & Patrick Conroy, NERA Economic Consulting, \textit{FCPA Settlements: It’s a Small World After All}, at 12 (Jan. 28, 2009), \url{http://www.nera.com/extImage/Pub_FCPA_Settlements_0109_Final2.pdf}. Such price reactions are atypical. A 2011 study found that “there has been a general lack of significance in the price reaction to announcements of FCPA violations.” Patrick Conroy & Graeme Hunter, NERA Economic Consulting, \textit{Economic Analysis of Damages under the Foreign Corrupt Practices Act} 8 (May 5, 2011), \url{http://www.nera.com/67_7281.htm}. This study suggested two possible explanations: (1) given the size of the companies involved, the penalties and disgorgement imposed by the DOJ and SEC are considered de minimis by the market, and (2) the revelation of FCPA enforcement actions has had little impact on either current or future expected profits. \textit{Id}.


\textsuperscript{172} For example, securities fraud class actions based on underlying FCPA violations were filed against FARO Technologies, Inc., Willbros Group, Inc., and Titan, Inc. and settled for $6.875 million in October 2008, $10.5 million
between 2002 and 2008, accounting for seven percent of the total FCPA-related civil and regulatory settlements by public companies during that period.\textsuperscript{173} A more recent analysis, published in late 2010, found that a mix of 37 class actions and shareholder derivative suits based on FCPA violations were filed in the prior four years, and 26 of them resulted in a settlement.\textsuperscript{174}

In general, however, plaintiffs in securities fraud class actions based on FCPA violations face an uphill battle, especially since 2008, when the Ninth Circuit raised the pleading bar for FCPA-related claims under the federal securities laws. In \textit{Glazer Capital Management, LP v. Magistri (Glazer)}\textsuperscript{175} the Ninth Circuit affirmed the dismissal of a securities fraud class action based on FCPA violations because the complaint failed to adequately allege the requisite element of scienter under the Private Securities Litigation Reform Act (PSLRA).\textsuperscript{176}

To state a claim under Rule 10b-5, a plaintiff must allege six elements: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation (i.e., the economic loss must be proximately caused by the misrepresentation or omission).\textsuperscript{177} The PSLRA, enacted in 1995, imposed two distinct pleading requirements, both of which must be met in order for a complaint to survive a motion to dismiss. The complaint must specify each allegedly misleading statement, why the statement was misleading, and, if an allegation is made on information and belief, “all facts” supporting that belief with particularity.\textsuperscript{178} In addition, the complaint must, with respect to each act or omission alleged to violate the securities laws, state with particularity facts giving rise to a “strong inference” that the particular defendant acted with the requisite state

\textsuperscript{173} Raymund Wong & Patrick Conroy, NERA Economic Consulting, \textit{FCPA Settlements: It’s a Small World After All 7-10} (Jan. 28, 2009), \url{http://www.nera.com/extImage/Pub_FCPA_Settlements_0109_Final2.pdf}. More recently, securities fraud actions based on FCPA violations were filed against UTStarcom, Inc., Nature’s Sunshine Products, Inc., and Syncor International Corporation, and settled for $30 million in August 2010, $6 million in February 2010, and $15.5 million in April 2009, respectively. See Jeffrey S. Johnston & Erika Tristan, \textit{The Next FCPA Battleground: Private Civil Lawsuits Following Foreign Corrupt Practices Act Settlements with U.S. Government Authorities, 4 VINSON & ELKINS SECURITIES LITIGATION INSIGHTS 6, 10 (Fall 2010), \url{http://www.velaw.com/resources/SecuritiesLitigationInsightsFall2010.aspx}. Many of these settlements have been significantly larger than the settlements paid to the DOJ and SEC to resolve the underlying FCPA violations. \textit{Id.}

\textsuperscript{174} Raymund Wong & Patrick Conroy, NERA Economic Consulting, \textit{FCPA Settlements: It’s a Small World After All, at 5} (Jan. 28, 2009), \url{http://www.nera.com/extImage/Pub_FCPA_Settlements_0109_Final2.pdf}.

\textsuperscript{175} 549 F.3d 736 (9\textsuperscript{th} Cir. 2008).


\textsuperscript{178} \textit{See 15 U.S.C. § 78u-4(b)(1)}.
of mind. The PLSRA’s stringent pleading standard has often operated to bar securities fraud actions based on underlying FCPA violations.

In Glazer the Ninth Circuit upheld the dismissal of securities fraud claims against Invision Technologies and two senior executives because plaintiffs failed to adequately allege scienter under the PSLRA. In dismissing the action the Ninth Circuit declined to apply the “collective scienter” theory of liability that offers to plaintiffs in securities fraud actions based on FCPA violations perhaps their best hope of avoiding dismissal. Securities fraud plaintiffs typically plead corporate scienter by alleging the scienter of an individual whose actions are attributable to the corporation. In those jurisdictions which have accepted the collective scienter doctrine, however, the requisite inference of corporate scienter may arise absent allegations specific to any particular corporate employee. In Glazer, the Ninth Circuit declined to apply the doctrine and held that when pleading scienter as to a corporate defendant, the PSLRA requires plaintiff to plead scienter with respect to those individuals who actually made the false statements. This decision raised the scienter bar for FCPA-related claims under the federal securities laws. Post-Glazer, plaintiffs in such actions hoping to avoid dismissal are

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181 The notion that a corporation’s scienter is necessarily derived from its employees is well-established. See, e.g., Randall v. Loftsgaarden, 478 U.S. 647, 664 (1986); Robert Malionek & Joseph Salama, ‘Collective Scienter’: Mixed by Second Circuit in ‘Dynex’, N.Y.L.J., Aug. 22, 2008, at 4 (“At the root of the debate concerning corporate scienter is the fundamental principle that a corporation acts only through the actions of the individuals who direct its affairs. In the securities fraud context, this means the allegedly false or misleading statements must be traceable to such individuals.”); Patricia S. Abril & Ann Morales Olazábal, The Locus of Corporate Scienter, 2006 COLUM. BUS. L. REV. 81, 135 (2006) (proposing that in Section 10b-5 cases, locus of corporate scienter should be found in corporation and three categories of individuals).
182 In the aftermath of Glazer, Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190 (2d Cir. 2008), and a few other appellate decisions there is some confusion as to which federal circuits, if any, have accepted the collective scienter theory. See, e.g., Scott B. Schreiber, Andrew T. Karron & Kavita Kumar Puri, Whose Mind is it Anyway? Pleading and Proving Corporate Scienter, 42 SEC. REG. & LAW REP. 1328 at n.9 (July 12, 2010) (“Some courts of appeal have mistakenly characterized other circuits’ decisions as having proposed or approved collective scienter.”); The 10b-5 Daily, Whither Collective Scienter?, June 4, 2010, http://www.the10b-5daily.com/archives/001080.html (“There is a circuit split on the issue, with the Second Circuit and Seventh Circuit adopting the theory and the Fifth Circuit rejecting the theory.”); Heather F. Crow, Comment, Riding the Fence on Collective Scienter: Allowing Plaintiffs to Clear the PSLRA Pleading Hurdle, 71 LA. L. REV. 313, 328 (2010) (noting that Fifth Circuit and Eleventh Circuit have rejected the theory and only the Sixth Circuit has permitted it); Bradley J. Biondi, Dangerous Liaisons: Collective Scienter in SEC Enforcement Actions, 6 N.Y.U.U.J. L. & BUS. 1, 8 (2009) (“Seven circuits have rejected collective scienter. . . . Of these seven circuits, five have rejected collective scienter specifically in the context of federal securities litigation while the other two have rejected the theory in analogous contexts.”); Robert J. Malionek & Joseph M. Salama, Ninth Circuit Expands the Debate over ‘Collective Scienter,’ N.Y.L.J., Apr. 30, 2009 (noting that Second Circuit decision in Dynex left commentators “passionately disagreeing as to what the decision meant for the future of ‘collective scienter’”). See also Kevin M. O’Riordan, Note, Clear Support or Cause for Suspicion? A Critique of Collective Scienter in Securities Litigation, 91 MINN. L. REV. 1596, 1605 (2007) (“Federal district courts increasingly support collective scienter.”).
183 Glazer, 549 F.3d at 745.
required to allege that senior corporate officials who prepared the company’s allegedly false or misleading disclosures were aware of the bribery (because it was reported to them or they otherwise discovered it), and therefore knew the statements at issue were false. This may prove an insurmountable obstacle, given the surreptitious nature of most bribery.\(^\text{184}\)

### B. RICO

Plaintiffs seeking to recover for damages sustained as a result of foreign bribery also have attempted with very limited success to allege violations of federal RICO\(^\text{185}\) and its state counterparts. Federal RICO is widely regarded as the single most important piece of organized crime legislation ever enacted.\(^\text{186}\) The statute, in 18 U.S.C. § 1962(c), makes it unlawful “for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.”\(^\text{187}\) Section 1962(d) makes it unlawful for any person to conspire to violate § 1962(c).\(^\text{188}\) RICO provides a private right of action which is modeled on Section 4 of the Clayton Act.\(^\text{189}\) To plead a RICO claim under § 1962(c), the plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.\(^\text{190}\) At least 30 states have their own RICO laws which typically track the general provisions of the federal RICO statute but often are broader in scope, language and intended criminal targets.\(^\text{191}\)


\(^{189}\) Randy D. Gordon, Clarity and Confusion: RICO’s Recent Trips to the United States Supreme Court, 85 TUL. L. REV. 677, 680 (2011).


Following enactment federal RICO has been applied in numerous contexts unrelated to organized crime, one of which is foreign bribery. RICO is an increasingly popular theory for plaintiffs pursuing collateral FCPA litigation, primarily because of the prospect of treble damages. The DOJ’s Lay Person’s Guide to the FCPA specifically notes that “[c]onduct that violates the antibribery provisions of the FCPA may give rise to a private cause of action for treble damages under . . . RICO, or to actions under other federal or state laws.” However, attempted applications of RICO to foreign bribery have been almost uniformly unsuccessful. This track record in foreign corruption cases is consistent with the dismal track record of plaintiffs in other kinds of civil RICO cases. Surveys show that plaintiffs rarely prevail. For example, of 145 cases filed in the Southern District of New York from 2004 to 2007 in which the complaints asserted civil RICO claims, all 36 cases that had been resolved on the merits by 2009 resulted in judgments against plaintiffs. Thirty cases were dismissed on Rule 12(b)(6) motions to dismiss, three were dismissed by the district court sua sponte for lack of merit, and three were dismissed on summary judgment for defendants. Only five appeals of dismissals were taken and each was affirmed by the Second Circuit. As noted by the federal district court which conducted the survey, “experience bears out that overwhelmingly the RICO plaintiffs’ gilded vision of threefold damages and attorney’s fees dispels into a mirage.”

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193 See Elizabeth C. Peterson & Catherine E. Moreno, The Expanding Territorial Reach of RICO: It’s Not Just for U.S.-Based Organized Crime Anymore, BLOOMBERG LAW REPORTS (May 25, 2010), http://www.wsgr.com/publications/PDFSearch/bloomberg0510.pdf (“Although RICO was intended to reach organized crime perpetrated by the Mafia, in the four decades since its inception, RICO has been used to reach conduct as varied as municipal tax evasion, civil fraud, and even terrorism.”).


195 Gross v. Waywell, 628 F. Supp. 2d 475, 480 (S.D.N.Y. 2009). Gross v. Waywell, 628 F. Supp. 2d 475, 480 (S.D.N.Y. 2009). An earlier survey produced similar results. The survey, of 145 appellate decisions nationwide rendered from 1999 to 2001 in connection with RICO civil actions, found that plaintiffs achieved a final victory in only three such cases. Seventy percent of the cases were resolved on defendants’ motions to dismiss or for summary judgment, plaintiffs obtained a favorable verdict after a jury trial in only 9.6 percent of the cases, and only 25 percent of the judgments for plaintiffs were affirmed on appeal. Overall, plaintiffs had a “stunningly awful” final success rate of two percent. See Pamela H. Bucy, Private Justice, 76 S. CAL. L. REV. 1, 22 (2002).
Plaintiffs asserting RICO claims based on underlying FCPA violations confront a number of obstacles. RICO has strict pleading requirements, and FCPA-inspired RICO claims are frequently dismissed at the pleading stage for failure to satisfy these requirements. One specific pleading issue is whether FCPA offenses can serve as predicate acts under RICO, insofar as such offenses are not listed in 18 U.S.C. § 1691(1)(B) as predicate acts for RICO claims. Courts are divided on this issue. Plaintiffs may be able to surmount this obstacle by alleging violations of the Travel Act. The Travel Act makes it a federal offense to travel in interstate or foreign commerce or use any interstate facilities with the intent to, inter alia, promote or facilitate any unlawful activity. Foreign bribery that violates the FCPA can form the basis for a charge under the Travel Act, which is one of RICO’s enumerated predicate acts that constitute racketeering. Thus, “civil plaintiffs can use the Travel Act as a proxy for asserting a foreign bribery offense as the predicate act for RICO liability.”

Travel Act offenses are not the only predicate acts alleged by plaintiffs in FCPA-inspired RICO litigation. Some plaintiffs have alleged mail fraud and wire fraud as predicate offenses. These plaintiffs confront dual pleading burdens. First, the allegations must satisfy the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure, which requires that fraud be pleaded with particularity. Second, the allegations must satisfy the pleading standard announced by the Supreme Court in Bell Atlantic Corp. v. Twombly, and

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204 While mail fraud and wire fraud can be used as predicate offenses in FCPA-inspired RICO actions, securities fraud cannot. Section 107 of the PSLRA amended federal RICO to bar the use of securities fraud as a predicate act. The statute provides that “no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.” 18 U.S.C. § 1964(c). The Second Circuit has held that Section 107 also bars the use of securities fraud as a predicate act where plaintiff cannot bring a private securities law claim because he has alleged only an aiding and abetting claim, which is not actionable. See MLSMK v. JP Morgan Chase & Co., Docket No. 10-3040-cv, 2011 WL 2640579 (2d Cir. July 7, 2011).
That standard, now applicable in all federal civil cases, requires plaintiffs to state a claim that is plausible on its face. Application of Rule 9(b), Twombly, and Iqbal has resulted in the dismissal of numerous federal RICO actions.

Perhaps the most serious challenge faced by RICO plaintiffs in FCPA collateral litigation is that RICO rarely will have extraterritorial application. Numerous courts have so held, in both federal and state RICO cases. The decisions in such cases flow from the 2010 opinion of the Supreme Court in Morrison v. National Australia Bank (Morrison). In Morrison the Court decided whether § 10(b) provides a cause of action to foreign plaintiffs suing for misconduct in connection with purchases of securities in foreign companies traded on foreign exchanges (so-called “f-cubed” cases). This was the Court’s first decision regarding the extraterritorial reach of U.S. securities laws.

Morrison held that § 10(b) does not provide a cause of action in f-cubed cases because it applies only to “transactions in securities listed on domestic exchanges . . . and domestic transactions in other securities.” In reaching its decision the Supreme Court made clear that courts must presume a statute has no extraterritorial application unless Congress clearly expressed its affirmative intention to give the statute such an application. The Court stated: “When a statute gives no clear indication of an extraterritorial application, it has none.”

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208 Twombly, 550 U.S. at 570.
209 See, e.g., American Dental Ass’n v. CIGNA Corp., 605 F.3d 1283, 1293 (11th Cir. 2010) (“In sum, the Second Amended Complaint does not plausibly, under Twombly, or particularly, under Rule 9(b), allege a pattern of racketeering activity predicated on a scheme to commit acts of mail and wire fraud.”); Eclectic Properties East, LLC v. Marcus & Millichap Co., No. C-09-00511 RMW, 2011 WL 1375164, at *4 (N.D. Cal. Apr. 12, 2011) (dismissing RICO action after noting that “[p]laintiffs’ fraud-based RICO claims must meet both the standard articulated in Iqbal and Rule 9(b’)); Randy D. Gordon, Clarity and Confusion: RICO’s Recent Trips to the United States Supreme Court, 85 Tul. L. Rev. 677, 709 (2011) (“Courts routinely apply the rigorous Twombly/Iqbal pleading standards to RICO generally, and to the enterprise element specifically.”).
213 Morrison, 130 S. Ct. at 2877-78.
Because there was no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, the Court concluded that it did not.\(^{214}\)

RICO is silent as to its extraterritorial application.\(^{215}\) In light of this fact, a number of federal courts have applied *Morrison* and held that federal RICO has no such application\(^{216}\) unless the subject enterprise is domestic.\(^{217}\) Similarly, a Florida state court held that *Morrison* barred extraterritorial application of Florida’s RICO statute where the alleged predicate acts were FCPA violations.\(^{218}\) Given the absence of extraterritorial application of state and federal RICO, collateral RICO litigation based on predicate acts of FCPA violations has a dim future.

\(^{214}\) *Morrison*, 130 S. Ct. at 2883. Following *Morrison*, plaintiffs have asserted numerous arguments that purchases of securities on foreign exchanges still should be subject to § 10(b) claims. Lower courts rejected all of these arguments in the first post-*Morrison* year. Gareth Evans & Alex Mircheff, *Morrison & the Courts: Plaintiffs Trying Different Strategies*, 8 (No. 2) SEC. LITIG. REP. 16 (Feb. 2011); Dorothy Heyl, Federal Courts Apply ‘Morrison’ Expansively, N.Y.L.J., Nov. 19, 2010. One example of this phenomenon is the continued judicial rejection of so-called “f-squared” claims – claims brought by American plaintiffs who purchased their shares of foreign companies on foreign exchanges. See Kevin LaCroix, The D&O Diary, *Morrison Precludes F-Squared Cases, Too, Court Concludes*, July 28, 2010, [http://www.dandodiary.com/2010/07/articles/securities/litigation/morrison-precludes-fsquared-cases-too-court-concludes/] for more cases and finding no extraterritorial application of RICO in connection with claims asserted by federal government against tobacco companies; European Community v. RJR Nabisco, Inc., No. 02-CV-5771 (NGG)(VVP), 2011 WL 843957, at *7 (E.D.N.Y. Mar. 8, 2011); Cedeño v. Intech Group, Inc., 733 F. Supp.2d 471, 474 (S.D.N.Y. 2010) (applying *Morrison* and dismissing RICO claim against persons and entities associated with the government of Venezuela because the alleged enterprise and the impact of the predicate activity upon it were entirely foreign). See also Stephen R. Smerek & Jason C. Hamilton, Extraterritorial Application of United States Law After Morrison v National Australia Bank, 5 DISPUTE RES. INT’L 21, 27 (2011) (“The Second Circuit’s decision in Norex confirms the broad application of the Supreme Court’s reasoning in *Morrison*: federal courts will not apply any US laws extraterritorially without a clear, statutory expression of Congressional intent.”); William S. Dodge, *Morrison’s Effects Test*, 40 SW. L. REV. 687, 695 (2011) (“Norex, Cedeño, and European Community each involved predicate acts in the United States but no domestic enterprise and no domestic effects. Given RICO’s focus on domestic enterprises, each was properly dismissed under *Morrison*.”). In contrast, at least one court has indicated that *Morrison* does not operate to bar extraterritorial application of the Travel Act. See United States v. Carson, SA CR 09-00077 JVS, Tentative Order Denying Defendants’ Motion to Dismiss Counts 1, 11, 12, and 14 of the Indictment, at 6-11 (Aug. 12, 2011).

\(^{215}\) Poulos v. Caesars World, Inc., 379 F.3d 654, 663 (9th Cir. 2004) (“RICO itself is silent as to its extraterritorial application.”); In re Toyota Motor Corp., No. 8:10ML 02151 JVS (FMOx), 2011 WL 1485479, at *17 (C.D. Cal. Apr. 8, 2011) (same).


C. Antitrust

Plaintiffs seeking to recover for damages sustained as a result of foreign bribery also have attempted with very limited success to allege antitrust claims. Private plaintiffs may sue in federal court for violations of federal antitrust law under one of two provisions of the Clayton Act of 1914. Section 4 allows private plaintiffs to sue for money damages\(^{219}\) and Section 16 allows them to sue for injunctive relief.\(^{220}\) In the FCPA context, antitrust claims have been asserted under both the Robinson-Patman Act (RPA)\(^{221}\) and the Sherman Antitrust Act.\(^{222}\) The former claims are significantly more common.

The RPA was added to the Clayton Act in 1936 to prohibit anticompetitive pricing practices at different stages of the product distribution chain. It was enacted primarily to eliminate the competitive advantage possessed by large buyers solely because of their quantity purchasing ability.\(^{223}\) Since the 1960s the Federal Trade Commission (FTC) and the DOJ’s Antitrust Division have only rarely initiated an investigation or filed suit under the RPA.\(^{224}\) The DOJ has left civil enforcement of the RPA to the FTC and has not enforced the statute’s criminal provisions at all since the 1960s.\(^{225}\) For its part, the FTC sharply contracted its enforcement efforts beginning in 1969.\(^{226}\)

Because federal enforcement is so rare, private parties are almost always the named plaintiffs in RPA litigation.\(^{227}\) Plaintiffs allegedly injured as a result of FCPA violations have asserted claims under § 2(c) of the RPA.\(^{228}\) That section, which was originally enacted to prohibit price discrimination through rebates, has been used as a basis for actions alleging broader than federal RICO. Nevertheless, Florida state courts have looked to federal court decisions for interpretive guidance. Jacqueline Dowd, *Interpreting RICO: In Florida, the Rules are Different*, 40 U. Fla. L. Rev. 127, 128 (1988).


\(^{227}\) In general, private enforcement of the antitrust laws is significantly more common than public enforcement. There are approximately ten private federal antitrust cases for every case brought by the DOJ or FTC. Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 Vand. L. Rev. 675, 675-76 (2010).

\(^{228}\) 15 U.S.C. § 13(c).
commercial bribery. The prohibition of commercial bribery is not apparent from the language of Section 2(c). Nevertheless, the Supreme Court stated in dicta more than 50 years ago that Section 2(c) does encompass commercial bribery, and a number of appellate courts have so held.

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229 John G. Calender, The New Tag Team: Antitrust and the FCPA, Law360 (May 3, 2011), http://www.law360.com/articles/242779/print?section=securities (noting filing of lawsuits alleging that foreign bribery constitutes commercial bribery under RPA). The United States does not have a federal commercial bribery statute that criminalizes bribery in private business transactions not involving foreign officials. However, private commercial bribery is illegal under the laws of at least 35 states and violation of such a statute can constitute a Travel Act offense. Jeffrey J. Ansley, Don R. Berthiaume & Joshua C. Zive, Bribery in Foreign Commerce, Calif. Lawyer (June 2010), http://www.callawyer.com/story.cfm?id=910383&evid=1. The SEC has no authority to enforce the Travel Act. But the DOJ has used the Travel Act to essentially federalize state commercial bribery statutes and thereby prosecute companies for conduct which is not proscribed by the FCPA because it does not involve bribery of a foreign official. Under the Travel Act, the bribe recipient need not be a foreign official -- it can be anyone contemplated by the relevant state commercial bribery law. Barry J. Pollack & Laura Billings, After 30 Years of the FCPA, Will Courts Finally Get into the Act?, 34 Champion 34 (Sept./Oct. 2010), http://www.nacdl.org/public.nsf/01c1e7698280d20385256d0b00789923/d9cf553c66008696852578020054ded3?OpenDocument; DLA Piper, White Collar Alert, Is DOJ Moving Beyond the FCPA? The Anti-Corruption Net Widens to Embrace Commercial Bribery (Sept. 28, 2010), http://www.dlapiper.com/is-doj-moving-beyond-the-fcpa-the-anti-corruption-net-widens-to-embrace-commercial-bribery/ (“Because prosecutors can use the Travel Act to essentially federalize the commercial bribery statutes of any state – and almost all states have such a statute – the Travel Act is substantially broader than the FCPA and can be used to prosecute bribery of foreign private individuals.”). In 2010, four individuals associated with Nexus Technologies, Inc. were sentenced for their roles in a foreign bribery case that involved FCPA counts and parallel Travel Act charges. In 2009, Control Components, Inc., pleaded guilty to both FCPA and Travel Act violations. These are just two of an increasing number of FCPA cases involving Travel Act charges. See The FCPA Blog, We Repeat, It’s the Travel Act (May 4, 2011), http://www.fcpablog.com/blog/2011/5/4/we-repeat-its-the-travel-act.html; Wilson Sonsini Goodrich & Rosati, WSGR Alert, Department of Justice Evidences Trend Toward Combining FCPA and Travel Act Charges (Oct. 2009), http://www.wsgr.com/wsgr/Display.aspx?SectionName=publications/PDFSearch/wsgralert_travel_act.htm.

230 Keller W. Allen & Meriwether D. Williams, Commercial Bribery, Antitrust Injury and Section 2(c) of the Robinson-Patman Anti-Discrimination Act, 26 Gonz. L. Rev. 167, 177 (1990/1991). Section 2(c) is quite poorly drafted. It provides: “It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or receive, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf of, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.” 15 U.S.C. § 13(c). The statute has often proven inscrutable. See, e.g., Feesers, Inc. v. Michael Foods, Inc., 591 F.3d 191, 198, 206 n.17 (3d Cir. 2010) (“[T]his is not the first time the RPA has flummoxed the federal courts, nor, barring a repeal of the law, will it be the last.”).

231 Federal Trade Commission v. Henry Broch & Co., 363 U.S. 166, 169 n.6 (1960) (“And although not mentioned in the Committee Reports, the debates on the bill show clearly that § 2(c) was intended to proscribe other practices such as the ‘bribing’ of a seller’s broker by the broker.”). Similarly, in California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972), the Supreme Court remarked in dicta that “[b]ribery of a public purchasing agent may constitute a violation of § 2(c). . . .”

232 See, e.g., 2660 Woodley Road Joint Venture v. ITT Sheraton Corp., 369 F.3d 732, 737-38 (3d Cir. 2004); Bridges v. Maclean-Stevens Studios, Inc., 210 F.3d 6, 11 (1st Cir. 2000) (assuming without deciding that commercial bribery is actionable under § 2(c), and noting that five other circuits had so held); Harris v. Duty Free Shoppers Ltd. P’ship, 940 F.2d 1272, 1274 n.3 (9th Cir. 1991).
Private plaintiffs pursuing commercial bribery actions under the RPA have been almost uniformly unsuccessful, consistent with the general pattern in RPA litigation. A 2011 review noted that “RPA cases are few and far between; and RPA cases that survive a motion to dismiss are even fewer and farther between.”* Moreover, successful RPA plaintiffs are increasingly rare. A comprehensive study published in 2010 and covering almost three decades of data found that from 1982 to 1993, RPA cases brought by private plaintiffs were successful an average of 35 percent of the time, but this figure decreased to less than five percent for the period 2006-2010.*

Plaintiffs asserting RPA § 2(c) claims based on underlying violations of the FCPA confront at least the following obstacles. First, because the RPA often has anticompetitive effects that promote, rather than prevent, monopolistic pricing practices, the Supreme Court has given the statute a very narrow construction and repeatedly limited its reach. Lower courts have followed suit. Second, while a private plaintiff is not required to prove competitive injury to establish a § 2(c) violation, such a plaintiff must establish the requisite antitrust injury in order to have standing to sue and recover damages. This requires more than establishing the anti-competitive effect inherent in the RPA and constitutes a significant

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* See Herbert Hovenkamp, The Robinson-Patman Act and Competition: Unfinished Business, 68 ANTITRUST L.J. 125, 130 (2000) (“Very few statutes have survived such long-lived and unrelenting criticism as has been directed against the Robinson-Patman Act. It is practically accepted that the legislative history of the Robinson-Patman Act is anticompetitive and excessively concerned with the protection of small business at the expense of more efficient rivals.”); Feesers, Inc. v. Michael Foods, Inc., 591 F.3d 191, 198, 206 n.17 (3d Cir. 2010) (“The RPA places the federal courts in an inescapable Catch-22. We are asked to apply the RPA, a statute that ‘is fundamentally inconsistent with the antitrust laws’ . . . in a fashion that is ‘consistent[] with the broader policies of the antitrust laws.’”); Scott P. Perlman, Wither the Robinson-Patman Act? The Impact of the Third Circuit’s Feesers Decision (June 16, 2010), http://www.mayerbrown.com/publications/article.asp?id=9106&nid=6&print=Y (“The [Feesers] decision is part of a long-standing trend of opinions and commentary expressing hostility toward the RPA and calling for it to be repealed or narrowly construed.”).


* See, e.g., Toledo Mack Sales & Service, Inc., 530 F.3d 204, 228 n.17 (3d Cir. 2008) (stating that Seventh Circuit will narrowly interpret the RPA, even if doing so will result in elevating form over substance).

* See Federal Trade Commission v. Simplicity Pattern Co., 360 U.S. 55, 65 (1959); Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 371 n.3 (3d Cir. 1985) (“[T]he presence of an anti-competitive effect is not necessary to prove a violation of section 2(c).”)

* See Lomar Wholesale Grocery v. Dieter’s Gourmet Foods, 824 F.2d 582 (8th Cir. 1987) (holding that where private plaintiff sues under § 4 of the Clayton Act for a RPA § 2(c) violation, plaintiff must still show some specific injury it suffered as a result of the subject payments).

* 2660 Woodley Road Joint Venture v. ITT Sheraton Corp., 369 F.3d 732, 739-40 (3d Cir. 2004). To demonstrate antitrust injury, a plaintiff must show (1) an injury-in-fact (2) that has been caused by the violation and (3) that is the type of injury contemplated by the statute. Boyd v. AWB Ltd., 544 F. Supp. 2d 236, 249 (S.D.N.Y. 2008)
barrier to successful assertion of a claim for commercial bribery under the statute. Third, § 2(c) only covers payments in connection with the sale of goods. The statute does not cover bribes made to obtain service contracts.241

Fourth, the statute requires plaintiffs to prove that defendants’ conduct occurred “in commerce.”242 This jurisdictional requirement has proved insurmountable for plaintiffs in some RPA cases where the alleged unlawful payments occurred overseas between foreign corporations.243 Fifth, it is unlikely that § 2(c) of the RPA applies extraterritorially. At least one federal district court has held that Morrison precludes such application244 and, given the near unanimity with which federal courts have applied Morrison to find no extraterritorial application of RICO, it seems likely that additional courts will so hold in future RPA cases. As in the case of RICO, RPA § 2(c) contains no language indicating that Congress intended the statute to apply extraterritorially and therefore the presumption against extraterritoriality should be dispositive. Such a conclusion is consistent with the general retrenchment of civil extraterritorial jurisdiction in antitrust cases.245

Sixth, antitrust claims may be precluded to the extent that federal securities laws are applicable to underlying FCPA violations. In Credit Suisse Securities (USA) LLC v. Billing (Billing)246 the Supreme Court held that an antitrust suit challenging various alleged concerted marketing activities of initial public offerings was impliedly precluded by the federal securities laws, because antitrust laws and securities laws were clearly incompatible in the context of the case and simultaneous application of them would detrimentally affect the securities industry.247

(dissmissing RPA § 2(c) claim arising from bribery and money laundering conspiracy to achieve, maintain and exploit monopoly on wheat sold in Iraq).


243 See Rotec Indus., Inc. v. Mitsubishi Corp., 348 F.3d 1116, 1122 (9th Cir. 2003) (“The alleged unlawful payments occurred completely outside the United States between a Japanese corporation, Mitsubishi, and a Chinese corporation, CRNC. The money was to be transferred to a bank in Hong Kong. None of this activity can be considered to have occurred ‘within the flow of commerce among the several states or with foreign nations.’”).

244 Newmarket Corp. v. Innospec, Inc., Civil Action No. 3:10CV503-HEH, 2011 WL 1988073, at *4 (E.D. Va. May 20, 2011) (“In accordance with the holding of Morrison, the Court finds that § 2(c) of the Robinson-Patman Act does not apply extraterritorially.”). In this case plaintiffs argued, inter alia, that because § 2(c) does not contain language limiting its application to within the United States, it should be applied extraterritorially. As noted by the district court, “[t]his contention is the inverse of the rule that the Court articulated in Morrison.” Id.

245 See Developments in the Law—Extraterritoriality, Comity and Extraterritoriality in Antitrust Enforcement, 124 HARV. L. REV. 1269, 1272 (2011) (noting that retrenchment of civil extraterritorial jurisdiction in antitrust cases has been motivated by the principle of international comity).


Billing may operate to preclude RPA claims if the underlying bribery has given rise to claims governed by the securities laws.

D. Shareholder Derivative Actions

A fourth category of FCPA-inspired collateral litigation is shareholder derivative litigation. Shareholder derivative suits alleging underlying FCPA violations increasingly follow FCPA enforcement actions by the DOJ and SEC, and this trend is expected to continue as enforcement activity expands. At least four corporations and their boards of directors were the subjects of derivative suits filed in the first half of 2011 based on FCPA violations. Such suits have had a poor record of success, consistent with the poor track record of derivative litigation involving other kinds of claims.

Shareholder derivative litigation based on FCPA violations most commonly alleges a failure by officers and directors to monitor the corporation’s risks. This theory derives from the landmark decision of the Delaware Chancery Court in *In re Caremark International, Inc. Derivative Litigation*, in which the court established the standard for determining liability based on a director’s or officer’s failure of oversight responsibility. The standard -- “a sustained


249 See Claudius O. Sokenu, Another Record Year Brings to an End a Decade that Saw the Explosion of FCPA Prosecution – Part I, 2 FINANCIAL FRAUD LAW REPORT 291, 307 (Apr. 2010), http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP_FinancialFraudLawReport_04012010.pdf (“As the Justice Department and the [SEC] continue to aggressively investigate and prosecute FCPA violations, companies facing enforcement actions will also have to answer to their shareholders as FCPA related derivative actions become more common.”).


251 See Kenneth B. Davis, Jr., The Forgotten Derivative Suit, 61 VAND. L. REV. 387, 411-12 (2008) (reviewing research showing that derivative litigation rarely results in trial victories for plaintiffs or monetary recoveries by them).


253 698 A.2d 959 (Del. Ch. 1996).
or systemic failure of the board to exercise oversight -- was approved by the Delaware Supreme Court in Stone v. Ritter. Stone made clear that a showing of bad faith is a predicate condition for Caremark liability. Such liability may be imposed only if (a) the directors utterly failed to implement any reporting or information system or controls, or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations, thus disabling themselves from being informed of risks or problems requiring their attention. This duty, which excludes liability for a negligent or inattentive approach to monitoring, applies equally to officers and directors.

Post-Caremark, federal and state courts, both within and outside Delaware, have recognized a cause of action against directors for their failure to exercise oversight. Such claims are quite common. A 2010 study of 141 derivative suits filed against public companies found that more than 90 percent of them involved Caremark claims or related allegations that defendants failed to exercise proper oversight over the affairs of the company. While Caremark provides a theory of liability even as to directors or officers who were not directly involved in bribery proscribed by the FCPA, an oversight claim “is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.” One commentator concluded in 2009: “Caremark duties are so hard to violate that there has been only one instance—an unpublished opinion—in which a Delaware court held directors liable for a breach of the oversight duty.”

A 2010 decision from the Delaware Chancery Court confirms just how difficult it is for plaintiffs in shareholder derivative actions alleging FCPA violations to prevail on a Caremark

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254 Caremark, 698 A.2d at 971.
255 911 A.2d 362 (Del. 2006). Prior to Stone, the Delaware Supreme Court had cited Caremark approvingly, but had not specifically held that it was Delaware law. Hillary A. Sale, Monitoring Caremark’s Good Faith, 32 Del. J. Corp. L. 719, 730 (2007).
In *In re Dow Chemical Co. Deriv. Litig.*, plaintiffs alleged that, as a result of Dow Chemical Co.’s well-publicized settlement of an FCPA enforcement action in 2007 regarding its pesticide business in India, its directors and officers should have been on notice of potential bribery related to a failed joint venture between Dow and Kuwait’s Petrochemicals Industries Company, but failed to detect and prevent such bribery. The Delaware trial court dismissed derivative claims based on the foregoing allegations, holding that plaintiffs had failed to satisfy their obligation to demonstrate pre-suit demand futility. In footnote 85 the court noted the compliance program implemented by the Dow board prohibiting unethical payments to third parties. The court concluded that because the program was in place, and plaintiffs did not allege that the board of directors deliberately failed to monitor the program, plaintiffs could not properly plead that the board failed in its oversight duties. The court stated: “Plaintiffs cannot simultaneously argue that the Dow Board ‘utterly failed’ to meet its oversight duties yet had ‘corporate governance procedures’ in place without alleging that the board deliberately failed to monitor its ethics policy or its internal procedures.”

Because most large companies are incorporated in Delaware, Delaware law applies to most derivative actions, including those suits filed in federal and state courts outside Delaware. Moreover, courts commonly look to Delaware for guidance on corporate law even if Delaware law is not applicable. Accordingly, *Dow* may operate to bar derivative claims based on FCPA violations and a *Caremark* theory in many cases where the corporation had a compliance program in place.

The inability of plaintiffs to establish a *Caremark* claim is not the only obstacle to a successful shareholder derivative action premised on underlying FCPA violations. Plaintiffs also face major procedural hurdles. As noted *supra*, in Delaware and most other states derivative plaintiffs are required to allege either that the board of directors wrongfully refused their demand

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264 In Delaware and most other states a derivative plaintiff must allege either (1) that the board of directors wrongfully refused its demand that the corporation bring suit, or (2) that the pre-suit demand on the board to take action would have been futile. Jessica Erickson, Corporate Governance in the Courtroom: An Empirical Analysis, 51 WM. & MARY L. REV. 1749, 1770, 1781-82 (2010) (“Nearly all states require derivative plaintiffs to make a presuit demand upon the corporation. Many states, however, waive this requirement if the derivative plaintiff alleges with particularity that the demand would have been futile, typically because a majority of the board could not have considered the demand in an impartial manner.”). For *Caremark* claims, Delaware courts are required to determine whether the derivative complaint creates a reasonable doubt that, as of the date of filing, the board of directors would have properly exercised its independent and disinterested business judgment in responding to a demand. Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993). A derivative plaintiff may raise a reasonable doubt by demonstrating that the directors’ failure to monitor has subjected them to a substantial threat of personal liability. In re Citigroup Inc. Shareholder Deriv. Litig., 964 A.2d 106, 121 (Del. Ch. 2009).

265 No. 4349-CC, 2010 WL 66769, at *49 n.85.


267 See Mullen v. Acad. Life Ins. Co., 705 F.2d 971, 973 n.3 (8th Cir. 1983) (“[C]ourts of other states commonly look to Delaware law . . . for aid in fashioning rules of corporate law.”).
that the corporation bring suit, or that pre-suit demand on the board to take action would have been futile. Similarly, shareholder-plaintiffs may not sue in federal court unless they first make a demand on the board. In one study of federal and Delaware state cases, 13.7 percent of derivative actions were dismissed because plaintiffs failed to make a pre-suit demand.

A potentially even higher procedural hurdle is presented by the widespread use of Special Litigation Committees (SLCs). All 50 states allow the plaintiff corporation in a derivative action to appoint an SLC (a committee of independent directors) to review the allegations in a derivative complaint and determine, using its business judgment, whether litigation is in the best interests of the corporation. The authority of the board to appoint an SLC to investigate derivative claims derives from the principle of corporate law that directors, rather than shareholders, manage the corporation’s affairs.

If the SLC determines that derivative litigation is not in the corporation’s best interests, it will recommend that the court stay or dismiss the action. If the SLC determines that derivative litigation is in the corporation’s best interests, it will typically recommend that the SLC take control of the lawsuit and pursue it. Historically, SLCs have exercised their business judgment to move to dismiss derivative complaints.

The Delaware Supreme Court has established a unique procedure for determining whether an SLC’s motion to dismiss should be granted. Pursuant to this procedure, the court first inquires into the independence and good faith of the SLC and the bases supporting its conclusions. The corporation has the burden of proving that its SLC was independent, carried out its investigation in good faith, and reached a reasonable conclusion. If the court is satisfied with the SLC’s conduct under this first step, it then may apply its own independent

272 Jonathan A. Shapiro & Elizabeth Rushforth, Recent Trends in Shareholder Derivative Litigation, LAW360 (Jan. 19, 2010), http://www.law360.com. Accord Jessica Erickson, Corporate Governance in the Courtroom: An Empirical Analysis, 51 WM. & MARY L. REV. 1749, 1784 (2010) (study of 41 SLCs finds that they recommended dismissing claims against one or more defendants in all 17 cases in which the SLC issued a report and recommendation). A different study of 106 SLCs formed to manage derivative litigation reached a somewhat different conclusion. See Minor Myers, The Decisions of the Corporate Special Litigation Committees: An Empirical Investigation, 84 IND. L.J. 1309, 1332 (2009) (“Contrary to the predominant view in legal scholarship, SLCs do not invariably move to dismiss litigation. Instead, approximately forty percent of the time SLCs either settled claims or pursued them against one or more defendants.”).
business judgment and determine if the motion to dismiss should be granted. Subject to the court’s independent business judgment, this process grants a properly formed SLC a “tremendous amount of leeway” to decide whether a derivative action should be maintained. Not surprisingly, such motions are usually (but not always) granted and derivative suits almost never proceed to trial.

The pre-suit demand requirement and the widespread use of SLCs pose significant procedural obstacles for shareholder plaintiffs suing in derivative actions on a Caremark theory of failed oversight. A number of derivative actions alleging FCPA violations have been dismissed for failure to clear these and other procedural hurdles.

E. Tortious Interference/Unfair Competition

Examples of state tort laws being used as a basis for FCPA-related civil suits are rare but do exist. In some parallel FCPA civil cases plaintiffs have asserted claims for (1) tortious interference with prospective contractual relations (or, as the tort is identified in some states,

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277 See Ann M. Scarlett, Confusion and Unpredictability in Shareholder Derivative Litigation: The Delaware Courts’ Response to Recent Corporate Scandals, 60 FLA. L. REV. 589, 598-99 ((2008) (noting that courts rely on the SLC’s recommendation and grant the motion to dismiss in the vast majority of cases); Jessica Erickson, Corporate Governance in the Courtroom: An Empirical Analysis, 51 WM. & MARY L. REV. 1749, 1787 (2010) (finding that courts granted motions to dismiss derivative action in five of six cases in which they ruled on such a motion, from a sample of 17 cases in which an SLC issued a report and recommendation).
279 See Bernard Black et al., Outside Director Liability, 58 STAN. L. REV. 1055, 1155 (2006) (identifying only six derivative suits against outside directors of public companies that had gone to trial during the period 1985 to 2000).
tortious interference with prospective economic advantage), (2) tortious interference with a contract, and/or (3) unfair competition. Such claims have had a mixed record of success.

The elements of the tortious interference torts vary widely from state to state. Many courts apply the five elements set forth in the Restatement (Second) of Torts: (1) a valid contract (or prospective contractual relations), (2) knowledge of the contract by the interfering party, (3) intentional and improper inducement to breach the contract, (4) actual breach, and (5) damages. The Restatement also identifies seven factors to help courts determine whether an inducement has been improper. States differ with regard to the burden of proving an improper and intentional interference.

In Rotec v. Mitsubishi Corporation, the Ninth Circuit considered a claim of intentional interference with economic advantage arising out of allegations by plaintiff Rotec that defendants, including Mitsubishi Corporation, had paid bribes to a Chinese bid evaluation committee to obtain a contract for which Rotec was competing. The Ninth Circuit, applying Oregon law, affirmed summary judgment for defendants on this claim. The Ninth Circuit agreed with the district court that plaintiff failed to demonstrate causation between the allegedly improper interference and damage to the economic relationship. In Korea Supply Company v. Lockheed Martin Corporation, the California Supreme Court considered state law claims of interference with prospective economic advantage and unfair competition stemming from allegations by plaintiff that defendant had offered, through an agent, bribes and sexual favors to Korean military officials in order to obtain a contract for which plaintiff was competing, in violation of the FCPA. With respect to the former claim, the court noted that California law adheres to a narrower interpretation of what conduct is improper under this tort than does the Restatement, but still found that plaintiff had stated a claim for interference with prospective economic advantage. With respect to the latter claim, the court held that, while California’s unfair competition law was broad enough to encompass an FCPA violation, plaintiff had no right

283 See, e.g., RSM Production Corp. v. Fridman, No. 06 Civ. 11512(DLC), 2007 WL 2295897 (S.D.N.Y. Aug. 10, 2007) (plaintiff asserts claims for tortious interference with contract and tortious interference with prospective business relations based on alleged FCPA violations).
285 Restatement (Second) of Torts § 767.
286 The seven factors are: (a) the nature of the actor’s conduct, (b) the actor’s motive, (c) the interests of the other with which the actor’s conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor’s conduct to the interference, and (g) the relations between the parties. Restatement (Second) of Torts § 767.
287 Jesse Max Creed, Note, Integrating Preliminary Agreements into the Interference Torts, 110 Colum. L. Rev. 1253, 1258-59 (2010).
288 348 F.3d 1116 (9th Cir. 2003).
289 Rotec, 348 F.3d at 1122-23.
291 Korea Supply Company, 29 Cal. 4th at 1161.
292 Korea Supply Company, 29 Cal. 4th at 1166.
to recover non-restitutionary disgorgement of profits from defendant. Other FCPA-inspired cases alleging tortious interference or unfair competition have experienced similar mixed results.

VII. An Express Private Right of Action Under the FCPA

In summary, collateral litigation is not a viable alternative to recognition of a private right of action under the FCPA. The most common kinds of collateral claims all face daunting barriers to success. The most effective solution to this problem is amendment of the FCPA to create an express private right.

A. H.R. 2152

In April 2009 Rep. Ed Perlmutter introduced in Congress H.R. 2152 – the Foreign Business Bribery Prohibition Act of 2009. Under the proposed legislation any “foreign concern” (defined to mean any person other than an issuer, domestic concern or U.S. person) that violates the FCPA’s anti-bribery provisions would be liable to any issuer, domestic concern or U.S. person for damages caused by the FCPA violation. In order to recover damages, a plaintiff would be required to prove that (a) the foreign concern violated the FCPA’s anti-bribery provisions and (b) the violation prevented the plaintiff from obtaining or retaining business and assisted the foreign concern in obtaining or retaining business. Damages would be the higher of the total amount of the contract or agreement that the foreign concern gained in obtaining or retaining the business or the total amount of the contract or agreement that the plaintiff failed to gain. Successful plaintiffs would be awarded treble damages, attorneys’ fees, and costs.

Because H.R. 2152 implicated issues under the jurisdiction of both the House Judiciary Committee and the House Energy and Commerce Committee, portions of it were assigned to each committee in April 2009. However, neither committee conducted hearings specifically considering the bill and it was never reported out. There was no further activity in Congress specifically related to the FCPA until November 2010 and June 2011 when Senate and House subcommittees held hearings on enforcement of the statute.

H.R. 2152 was well-intentioned but seriously deficient. The primary problem with the proposed legislation was that it provided no private right of action to sue U.S. companies or their employees. The class of potential defendants under the bill was limited to foreign persons and businesses unaffiliated with U.S. stock exchanges which corruptly use instrumentalities of interstate commerce within the United States in furtherance of their bribes. This is far too

293 Korea Supply Company, 29 Cal. 4th at 1152.
restrictive. If the FCPA is to be amended to provide a private right of action, then the amendment should include the right to sue U.S. companies and their employees. H.R. 2152 should be modified to include such a right, and then be enacted as modified.

B. Creation of an Express Private Right of Action
Under the FCPA Would Yield Numerous Advantages

At least four distinct advantages would flow from amendment of the FCPA to provide a broad private right of action. First, victims of FCPA violations would be compensated, consistent with one of the primary objectives of the civil justice system.297 It is frequently remarked by the DOJ and many others that bribery is not a victimless crime. For example, the DOJ so noted when it announced the first-ever conviction of a company for FCPA violations in May 2011.298 In most FCPA cases there is more than one victim. The pool typically includes competitors, shareholders, and government agencies or instrumentalities. While bribery is not a victimless crime, victims of FCPA violations receive no compensation. The proceeds from all fines, penalties, and disgorgements imposed by the DOJ and SEC in FCPA enforcement actions go directly to the United States Treasury.299 None of the money is used to compensate victims.300

297 See Adam S. Zimmerman & David M. Jaros, The Criminal Class Action, 159 U. PA. L. REV. 1385, 1393 (2011) (“[W]hile the criminal justice system pursues different goals than the civil system, both share an interest in principled, efficient, and fair compensation.”); Adam S. Zimmerman, Distributing Justice, 86 N.Y.U. L. REV. 500, 503 (2011) (“For years, private lawsuits in the United States have been the primary tool used to ensure that culpable parties pay damages to those they harm.”).
In stark contrast, victims in other kinds of federal criminal cases typically receive restitution. The FCPA also presents a stark contrast to broader securities regulation. Section 308 of the Sarbanes-Oxley Act of 2002 (Fair Funds Act) authorizes the SEC to distribute civil penalties and disgorgement to investors who are victims of securities law violations. Since the Fair Funds Act became law, SEC-based compensation has increased dramatically. The SEC distributed more than $8.6 billion to investors under the Fair Funds Act by 2010. Amendment of the FCPA to provide a private right of action would finally provide the opportunity for compensation to victims of foreign bribery that victims in other kinds of cases already enjoy.

Second, amendment of the FCPA to provide a broad private right of action would increase deterrence of foreign bribery, consistent with another primary objective of the civil justice system. The FCPA currently functions as a limited deterrent to foreign bribery. The best concrete evidence of this conclusion is the increasing number of companies which self-disclose FCPA violations. But FCPA enforcement by the DOJ and SEC remains limited, and so does the deterrent effect. The effect could be significantly enhanced if a private right of action is created. Private enforcement could enhance deterrence by imposing economic and reputational damage on companies, and spurring them to design and implement stronger and

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306 Edward C. O’Callaghan, Stepped-Up FCPA Enforcement Efforts Mean New Challenges for Multinational Clients, ASPATORE *1 (July 2010) (noting that recent increase in FCPA compliance is explained by more effective enforcement and international cooperation in investigations).

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more effective compliance programs. In this regard private plaintiffs could operate as private attorneys general, particularly if the FCPA is amended, as in H.R. 2152, to provide treble damages, attorneys’ fees, and costs. While the private attorney general concept is often invoked and often derided, it retains validity. Private enforcement can be an effective supplement to federal enforcement of public interest statutes, and the FCPA can be classified as such a statute.

Third, amendment of the FCPA to recognize a private right of action would be consistent with several international conventions that endorse such an approach. The United Nations Convention on Corruption (UN Convention), which was adopted in 2003 by the UN General Assembly, entered into force in December 2005, and had 152 parties by May 2011, includes a number of provisions that are very similar to those set forth in the FCPA. The provisions are so similar that the DOJ testified before Congress that the UN Convention effectively requires all ratifying parties to adopt an FCPA of their own. The UN Convention is significant in this context because it expressly provides for a private right of action for victims of corruption.

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310 Black’s Law Dictionary defines the phrase “private attorney general” in these terms: “The “private attorney general” concept holds that a successful private party plaintiff is entitled to recovery of his legal expenses, including attorneys fees, if he has advanced the policy inherent in public interest legislation on behalf of a significant class of persons.” BLACK’S LAW DICTIONARY 129 (9th ed. 2009).

311 See William B. Rubenstein, On What a ‘Private Attorney General ‘ is – and Why it Matters, 57 VAND. L. REV. 2129, 2130 (2004) (“[O]n average, during the past fifteen years, every single workday, somewhere in the United States, some judge has written a legal opinion or some scholar has penned an article invoking the private attorney general concept.”).

312 See, e.g., Alexandra D. Lahav, Two Views of the ClassAction, 79 FORDHAM L. REV. 1939, 1951-53 (2011) (outlining four major criticisms of the private attorney general concept); Michael Waterstone, A New Vision of Public Enforcement, 92 MINN. L. REV. 434, 446 (2007) (observing that commentators have “soured on the private attorney general.”)

313 See, e.g., Geraldine Scott Moohr, The Balance Among Corporate Criminal Liability, Private Civil Suits, and Regulatory Enforcement, 46 AM. CRIM. L. REV. 1459, 1470 (2009) (“The idea that individuals can act as private attorneys general to enforce the law is generally accepted, and Congress has authorized private civil suits to achieve the community interest in redressing harm and deterring unlawful conduct. The private attorney general concept recognizes that in pursuing remedial actions, private plaintiffs also represent the public interest. Private suits supplement public enforcement by adding more eyes to the task of monitoring business conduct, and the public interest is furthered when private civil suits expose business misconduct.”).


Article 35 requires that parties take such measures as may be necessary to ensure that entities or persons who have suffered damages as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.\footnote{United Nations Convention Against Corruption, Art. 35. This provision does not restrict the right of each State to determine the circumstances under which it will make its courts available. Philippa Webb, The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?, 8 J. INT’L ECON. L. 191, 215 (2005).}

The UN Convention, to which the U.S. is a party,\footnote{The United States maintained a reservation against Article 35 when it ratified the UN Convention. Homer E. Moyer, Jr. Overview, GETTING THE DEAL THROUGH: ANTI-CORRUPTION REGULATION IN 46 JURISDICTIONS WORLDWIDE 8 (2010), http://www.millerchevalier.com/portalresource/lookup/poid/Z1tOI9NPioLTYnMQZ56TfzcRVPmQiLS5wC3Em1Bd1/document.name=/GettingtheDealThrough2010.pdf. The DOJ explained the reservation in Congressional testimony: “Under U.S. law, private parties damaged by corruption already have private rights of action under various theories, e.g., fraud claims, tort claims, contract claims, antitrust theories, shareholder class actions or derivative suits. The U.S. is therefore already in compliance with Article 35. The Secretary of State recommends this declaration, however, to clarify that none of the provisions, including Article 35, creates an independent private right of action that could open U.S. courts to civil lawsuits that would not otherwise lie under U.S. law. The Justice Department fully supports such a declaration.” Statement of Bruce Swartz, Deputy Assistant Attorney General, before the Comm. on Foreign Relations of the United States Senate Concerning the United Nations Convention Against Corruption at 5, June 21, 2006, http://www.globalsecurity.org/military/library/congress/2006_hr/060621-swartz.pdf. For all of the reasons set forth supra, the private rights of action identified by the DOJ are seriously inadequate.} is not the only international convention endorsing a private right of action to sue for damages stemming from bribery and other forms of corruption. In 2003 the Council of Europe adopted the Civil Law Convention on Corruption.\footnote{Civil Law Convention on Corruption (C.E.T.S. No. 174), Nov. 4, 1999, http://conventions.coe.int/treaty/en/treaties/html/174.htm.} This latter convention, which had been ratified by 34 countries by February 2011,\footnote{Civil Law Convention on Corruption (C.E.T.S. No. 174), Nov. 4, 1999, http://conventions.coe.int/treaty/en/treaties/html/174.htm.} obliges signatories to adopt measures that would grant to persons who suffered damages stemming from corruption the right to obtain compensation. Signatories are required to create a private right of action against persons who commit corrupt acts.

Alignment of the FCPA with the enforcement regimes of parties to the UN Convention and the Civil Law Convention on Corruption would be beneficial, because it would help to maximize consistent application of anti-bribery laws across borders.

A fourth key advantage flowing from amendment of the FCPA to create a private right of action is that private litigation will finally provide essential judicial review and interpretation of the statute. The FCPA was enacted 35 years ago but there is very little case law addressing many of the statute’s most important elements.\footnote{See United States v. Kozeny, 493 F. Supp. 2d 693, 697 (S.D.N.Y. 2007) (noting the “surprisingly few decisions throughout the country on the FCPA over the course of the last thirty years”). But cf. Steptoe & Johnson LLP, “State-Owned Enterprises” Under the FCPA (June 3, 2011), http://www.steptoe.com/publications-newsletter-}
attributable to the fact that most FCPA prosecutions are resolved by DPAs or NPAs. Between 2004 and 2010 DPAs and NPAs were used in 30 of the 39 criminal enforcement actions completed by the DOJ against companies under the FCPA. As noted supra, courts only rarely review DPAs and never review NPAs. Because there are so few FCPA criminal trials and virtually no review of DPAs/NPAs, there is very little judicial precedent under the FCPA. As noted by Professor Mike Koehler, the result is that “the FCPA means what the enforcement agencies say it means.”

The absence of precedent is disadvantageous because companies receive no judicial guidance concerning the parameters of permissible conduct. While it has been argued that uncertainty optimizes deterrence, it has two specific negative consequences. First, uncertainty increases transaction costs that invariably result from companies’ efforts to decipher a statute that has been largely immune from judicial interpretation and review. Private FCPA enforcement will reduce those transaction costs, because a body of FCPA case law will develop. Moreover, private FCPA litigation will not necessarily result in an off-setting increase in transaction costs, because the collateral litigation that currently takes place in the form of securities fraud class actions and shareholder derivative actions likely will abate if the FCPA is amended to provide a private right of action. Second, uncertainty likely discourages foreign investment because businesses cannot accurately gauge the compliance risks they face.

209.html (noting five recent federal cases addressing long-disputed issue of whether FCPA applies to bribes paid to officers or state-owned enterprises).


327 See Mike Koehler, The Foreign Corrupt Practices Act in the Ultimate Year of its Decade of Resurgence, 43 IND. L. REV. 389, 421 (2010) (“[I]f Congress enacts H.R. 2152, it could inject a plaintiff’s component into the FCPA bar, and result in much needed substantive FCPA case law.”).

The creation of judicial precedent will reduce uncertainty and risk and accordingly promote investment.

C. Creation of an Express Private Right of Action Under 
the FCPA Would Result in No Significant Disadvantages

Amendment of the FCPA to provide a broad private right of action might be criticized on several grounds that can be rebutted. First, the FCPA already creates an uneven playing field, and amendment to permit U.S. companies to be sued by private plaintiffs would render the situation much worse. The argument is that the U.S., alone among major nations in the world, enforces foreign anti-bribery legislation, and this places U.S. companies at a strong competitive disadvantage\(^\text{329}\) that will intensify. Second, ending the monopoly on exclusive public enforcement of the FCPA raises the risk of over-deterrence.\(^\text{330}\) The argument is that imposing a significant risk of civil liability in the form of private rights of action may have the following adverse effects: (a) companies will be much less likely to self-report FCPA violations to the DOJ or SEC, knowing that such self-reporting will be utilized against them in subsequent private litigation; and (b) companies will make an unreasonably large investment in precautionary compliance measures whose costs outweigh their benefits.

The first argument can be rebutted as follows. First, as noted, the DOJ and SEC aggressively enforce the FCPA against foreign concerns, so the playing field is much more even than critics have contended.\(^\text{331}\) As noted supra, eleven of the 21 corporations charged with companies sometimes forego deals they would otherwise do, take a pass on contemplated projects or withdraw from ongoing projects or ventures.

\(^\text{329}\) See, e.g., Andrew Weissmann, Written Testimony, U.S. Senate Comm. on the Judiciary, Subcomm. on Crime and Drugs, Examining Enforcement of the Foreign Corrupt Practices Act, at 3 (Nov. 30, 2010), http://judiciary.senate.gov/pdf/10-11-30%20Weissmann%20Testimony.pdf ("[T]he FCPA has made U.S. businesses less competitive than their foreign counterparts who do not have significant FCPA exposure."). A report released in October 2010 by the U.S. Chamber Institute for Legal Reform asserted that a 1999 report by the Congressional Research Service (CRS) "estimated that the FCPA's anti-bribery provisions have cost up to $1 billion annually in lost U.S. export trade." See U.S. Chamber Institute for Legal Reform, Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act 6 (Oct. 2010), http://www.instituteforlegalreform.com/images/stories/documents/pdf/research/restoringbalance_fcpa.pdf. This is incorrect. The CRS report made no such estimate. Instead, the CRS report stated, without citation: "Some critics of the [FCPA] have contended that these provisions have cost up to $1,000,000,000 annually in lost United States export trade." Michael V. Seitzinger, Cong. Res. Serv., RL 30079, Foreign Corrupt Practices Act (Mar. 3, 1999), http://stuff.mit.edu/afs/sipb/contrib/wikileaks-crs/wikileaks-crs-reports/RL30079.pdf.


\(^\text{331}\) See Roundtable: Compliance and Litigation Issues as Foreign Corrupt Practices Act Enforcement is on the Rise, 18 METROPOLITAN CORPORATE COUNSEL, AT 1 (Nov. 2010), http://www.metrocorpncounsel.com/pdf/2010/November/01.pdf ("Insofar as the DOJ and SEC have been very aggressive and proactive in enforcing [the FCPA] against non-U.S. persons, it could be said that they are helping to create a level playing field for U.S. companies competing around the world.") (quoting Edward L. Rubinoff, Partner, Akin Gump Strauss Hauer & Feld LLP).
FCPA violations in 2010 were foreign and these 11 companies accounted for 94 percent of the FCPA penalties imposed on corporations that year. In addition, by April 2011, eight of the ten largest FCPA penalties of all-time, each of which was $70 million or more, had been levied on foreign companies.

Second, there is little or no empirical evidence to support the contention that FCPA enforcement has resulted in economic harm to the United States. A 2000 study of U.S. exports to 22 selected countries concluded that, while enforcement of the FCPA has fluctuated, “there is no evidence that its enforcement has impeded the growth of U.S. trade. In fact, trade with countries previously considered ‘bribe prone’ has outpaced the growth of trade with non-bribe-prone countries, despite [the] FCPA.” More recently, during the course of a June 2011 Congressional hearing on the FCPA, no testifying witness was able to identify U.S. companies ceding markets to foreign competitors because of the FCPA.

Third, since the FCPA was enacted international enforcement of anti-bribery laws has increased and new international anti-corruption conventions have been adopted. When the FCPA was enacted in 1977 it was the only statute of its kind anywhere in the world, and until the 1990s bribes paid to foreign officials were permitted deductions on company tax returns in various European nations. The current situation is very different. Thirty-five years after the FCPA was enacted more than 100 countries have laws similar to the FCPA that criminalize bribery of government officials. Most such laws have been enacted since 2000. In 2011 Russia (one of the most corrupt countries in the world) and China both enacted new laws

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332 Macleans A. Geo-JaJa & Garth L. Mangum, The Foreign Corrupt Practices Act’s Consequences for U.S. Trade: The Nigerian Example, 24 J. BUS. ETHICS 245, 245 (2000). The study concluded: “FCPA enforcement has had no severe negative effects on U.S. exports, either in terms of total trade with each country or in the sales and provision of individual products.” Id. at 252.

333 See FCPA Professor, House Hearing – Overview and Observations, June 14, 2011, http://fcpaprofessor.blogspot.com/2011/06/house-hearing-overview-and-observations.html. See also Daniel Pines, Comment, Amending the Foreign Corrupt Practices Act to Include a Private Right of Action, 82 CALIF. L. REV. 185, 225 (1994) (noting that “the claim that U.S. companies have lost exports because of the FCPA ‘is often made and never substantiated.’”).


338 In 2011 Russia ranked 154 out of 178 countries in Transparency International’s most recent Corruption Perceptions Index and 22 out of 22 countries in that organization’s most recent Bribe Payers Index. Bruce E. Yannett & Steven S. Michaels, A Plug for New Russian Anti-Bribery Proposals, LAW360, May 5, 2011, http://www.law360.com/articles/243601/print?section=competition. But Russia was invited to join the OECD Convention in May 2011 after Russian President Dmitry Medvedev signed legislation that criminalized foreign
criminalizing public overseas bribery. Other countries, including Canada, have begun to enforce their long-dormant anti-bribery laws.\footnote{340}

In addition, on July 1, 2011, the United Kingdom’s sweeping Bribery Act of 2010 entered into force.\footnote{341} The United Kingdom’s new law, which replaced an antiquated mix of common law and statutes dating back to the 19th century, is even stronger than the FCPA in a number of key respects.\footnote{342} For example, the new U.K. law, unlike the FCPA, (a) creates a strict liability corporate offense for failure to prevent bribery by third-parties, such as commercial agents (subject to an affirmative defense if the company can show it had “adequate procedures” in place to prevent bribery), (b) criminalizes commercial bribery, (c) prohibits facilitation or


“grease” payments, and (d) does not link jurisdiction to territorial or nationality principles (and thus has a broader jurisdictional scope than does the FCPA).  

Most of these new foreign anti-bribery laws are reinforced or even mandated by international conventions. The OECD Convention, adopted in 1997, is a prime example. This convention had 38 parties in 2011 (34 of which were OECD member states) and each has criminalized foreign bribery, pursuant to the convention’s requirements. Many corporations with international business are based, in whole or in part, in OECD countries and, therefore, subject to such anti-bribery laws. The 38 parties to the OECD Convention are involved in two-thirds of international trade and three-quarters of international investment. Transparency International reported in 2011 that enforcement of the OECD Convention has experienced steady progress since its adoption. By 2011 there was active enforcement in seven countries (representing 30 percent of world exports) and moderate enforcement in nine countries (representing 20 percent of world exports).

Another example of an international convention is the Inter-American Convention Against Corruption (IACAC), which entered into force in March 1997 and has 28 signatories, including the United States. Pursuant to this convention numerous Latin American countries, including those with the largest economies (Argentina, Mexico, Brazil, and Chile) have amended their laws to criminalize the bribery of foreign public officials.

The foregoing developments further negate the argument that U.S. companies cannot compete because the rules of competition are stacked against them. The unmistakable trend of international anti-bribery enforcement has helped level the playing field for U.S. companies.

engaged in business abroad. Increased extraterritorial enforcement of the FCPA by the DOJ and SEC likely will translate to even greater enforcement by other countries of their own laws. FCPA extraterritorial enforcement reduces the economic advantage gained by OECD Convention and IACAC Convention signatories who fail to enforce their own anti-bribery laws.

The second argument, about over-deterrence, also can be rebutted. The first prong of the argument -- that companies will be disinclined to self-report -- has two weaknesses. First, companies currently self-report knowing full well that their disclosures might be used against them in subsequent class action and derivative litigation. There is little reason to assume this situation will change simply because the litigation transitions to direct FCPA lawsuits. Second, companies will retain an incentive to self-report because they receive cooperation credit for doing so from the DOJ and SEC. Both agencies have announced an official policy of favorable treatment for voluntary disclosure of FCPA violations. Again, there is no reason to assume this policy will change if the FCPA is amended to provide a private right of action. If self-reporting does decline in the aftermath of an amended FCPA, the DOJ and SEC can counteract that effect by increasing the limited credit they currently provide for cooperation.

The second prong of the over-deterrence argument is that companies will wildly overspend on superfluous compliance programs. The basic flaw in this argument is that today, 35 years after the FCPA was enacted, many U.S. and European companies still lack effective compliance programs or fail to enforce their programs. A 2011 report by auditing firm KPMG found that only 78 percent of U.S. companies had implemented an anti-bribery and corruption compliance program, down from 85 percent in 2008.

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350 See George J. Terwilliger, Transnational Practice in Preventing and Addressing Corruption Cases, ASPATORE *1, *4 (Dec. 2010) ("[T]he playing field is finally becoming more level."); TRACE, Global Enforcement Report 2010, at 2 (2010), https://www.traceinternational.org/compendium/GlobalEnforcementReport9.20.10.pdf ("By any calculation, international anti-bribery enforcement is increasing worldwide, as more countries move slowly from enacting anti-bribery laws to initiating actions to identify and prosecute the individuals and companies who break them."). Still, U.S. anti-bribery efforts dominate. During the period 2000 to 2009 the United States pursued three foreign bribery enforcement actions for every one enforcement action pursued by all other countries combined. Id. During the period 1977 to June 2010, 22 countries pursued 515 foreign bribery enforcement actions and the United States undertook more than 75 percent of them. Id.


352 See Stephen G. Huggard & Joshua W. Gardner, Another Reason to Fear the Foreign Corrupt Practices Act – The Private Tag-Along Suit, 2 (No. 10) BLOOMBERG LAW REPORTS – CLASS ACTIONS (2009) ("There is every reason to believe even more companies will be the subject of investigations, or will self-disclose their FCPA violations. . . . [M]any companies now voluntarily disclose their FCPA violations to regulators in an effort to reduce the resulting fines.").


Most companies with compliance programs do a poor job of implementation. A 2011 report by auditing firm Ernst & Young found that even though most European companies appear to require annual compliance training, fewer than 25 percent of surveyed employees, and less than one-third of surveyed members of boards of directors, stated that they personally had received compliance training. United States companies also fare poorly with regard to implementation. A 2009 survey of global public companies and large private entities with more than $5 billion in revenue and more than 10,000 employees found that, contrary to compliance best practices, fewer than half of all respondents required their compliance and ethics officers to report either directly or indirectly to the audit committee of the board of directors. Another recent survey, by the law firm of Haynes and Boone, discovered significant deficiencies in the compliance programs of 40 Fortune 500 oil and gas companies. Only five of the companies had separate, stand-alone publicly available FCPA policies. Of the 31 corporate codes of conduct that included some discussion of the FCPA, only 15 mentioned facilitating payments, only 14 defined “foreign official,” and only 11 mentioned the FCPA’s accounting requirements.

Compliance deficiencies can have harsh consequences with respect to both federal charging decisions and sentencing. From 1996 to 2009, only three companies convicted of violating federal law received sentencing credit under the Federal Sentencing Guidelines for


356 See Elizabeth Spahn, International Bribery: The Moral Imperialism Critiques, 18 MINN. J. INT’L L. 155, 212-13 (2009) (“[F]or every MNC which takes compliance seriously . . . there are others only too happy to let compliance slide with a wink and a nod. Too many MNCs still have lovely compliance policies on paper, but no effective internal corporate enforcement controls which might interfere with profits.”).


358 See Ryan D. McConnell, Katharine Southard & Charlotte Simon, What Does Effective FCPA Compliance Look Like?, CORPORATE COUNSEL (Apr. 18, 2011), http://www.haynesboone.com/what_does_effective_fcpa_compliance_look_like/. These findings are especially significant because oil and gas companies, which operate in bribe-prone regions such as West Africa and work closely with state-owned companies around the world, often have the highest risk of FCPA liability. Id.

359 See Aaron G. Murphy, FOREIGN CORRUPT PRACTICES ACT: A PRACTICAL RESOURCE FOR MANAGERS AND EXECUTIVES 197-207 (2011).

360 The Federal Sentencing Guidelines, which appear in the Federal Sentencing Guidelines Manual and were most recently revised in November 2010, set forth an elaborate framework for determining the recommended penalty for every violation of every federal criminal law. They generally take into account various aggravating and mitigating factors that can increase or reduce the recommended sentence. Chapter 8 concerns “Sentencing of Organizations.” It provides, inter alia, that the presence of an effective compliance and ethics program at the time of the offense is a mitigating factor which can deduct three points from an organization’s culpability score. That score acts as a multiplier for a base criminal fine – low culpability scores can reduce a criminal fine by up to 95 percent, while a high score can double an organization’s potential fine. See U.S. Sentencing Comm’n, FEDERAL SENTENCING GUIDELINES MANUAL § 8C2.5(f), at 518 (2010), http://www.ussc.gov/Guidelines/2010_guidelines/index.cfm. Section 8B2.1(b) of the Guidelines outlines seven
having an effective compliance program. The rest either had no program or an ineffective one.\textsuperscript{361} Given this situation, the risk of compliance overspending is minimal. Indeed, the converse is true -- many companies should take compliance more seriously. The DOJ and SEC certainly think so. Over 90 percent of the DPAs and NPAs entered into in 2010 contained compliance features.\textsuperscript{362} In addition, many of the DOJ’s recent decisions to conclude formal or informal FCPA investigations without bringing enforcement actions were based, at least in part, on the maintenance of sound compliance programs by the investigated companies.\textsuperscript{363}

**Conclusion**

Federal courts have uniformly held that there is no implied private right of action under the FCPA. Most such decisions have relied on a 1990 decision by the Sixth Circuit that is seriously flawed. Careful examination of the Sixth Circuit’s analysis reveals that, contrary to the court’s conclusion, a strong argument can be made that a private right of action should be implied. But even if the Sixth Circuit is correct, an even stronger argument can be made that Congress should amend the FCPA to create an express private right of action. Such an amendment would produce a number of significant benefits. These benefits include compensation of the victims of foreign bribery, enhanced deterrence of foreign bribery, alignment of U.S. foreign anti-bribery policy with international conventions, and long-denied judicial review of the FCPA’s key provisions. A private right of action under the FCPA should be recognized for all of these reasons.


\textsuperscript{363} See James G. Tillen & Marc Alain Bohn, Declinations During the FCPA Boom, 2 (No. 8) BLOOMBERG LAW REPORTS – CORPORATE COUNSEL (Aug. 2011), http://www.millerchevalier.com/Publications/PublishedArticles?find=62402. The authors’ review identified at least 25 formal declinations by the DOJ and/or SEC involving 20 companies (nearly all of them publicly-listed) during the period 2008-11. Id.