

ARTICLE

THE SARBANES-OXLEY ACT AND THE CULTURE OF BRIBERY: EXPANDING THE SCOPE OF PRIVATE WHISTLEBLOWER SUITS TO OVERSEAS EMPLOYEES

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*This Article makes a case for using a private right of action to protect overseas employees from retaliation by their employers for reporting or opposing the bribery of foreign officials. After surveying public enforcement efforts, voluntary corporate initiatives, and existing private causes of action that may be predicated on FCPA violations, the Article finds that they all have their shortcomings and recommends several legal and legislative solutions. First, a private cause of action for retaliation should be implied under the FCPA. Second, section 806 of the Sarbanes-Oxley Act of 2002 should be read to protect whistleblowers who disclose FCPA violations by publicly held U.S. companies. Third, the territorial scope of section 806 should be expanded to cover employees working overseas. The Article takes issue with the First Circuit's decision in *Carnero v. Boston Scientific Corp.*, which declined to extend section 806 whistleblower protection to a foreign employee of a foreign subsidiary of a publicly held U.S. company. The Article then explores two alternative approaches to extraterritoriality suggested in the Southern District of New York court's recent decision in *O'Mahony v. Accenture Ltd.* to support prescriptive jurisdiction in such cases: the "conduct" and "effects" tests. Alternatively, it argues section 806 and the administrative complaint procedures from AIR21 it incorporates by reference should be amended to provide specific procedures for employees overseas to bring whistleblower complaints. Finally, the Article endorses the Foreign Business Bribery Prohibition Act of 2008, H.R. 6188, which is expected to be reintroduced by Congressman Ed Perlmutter in the 111th Congress, to authorize private suits for treble damages against foreign concerns whose bribery costs American businesses and their employees.*

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I. INTRODUCTION

We live in turbulent economic times, and one of the greatest barriers to a global recovery is corruption. Corruption undermines confidence in government, diverts public resources, and distorts trade.¹ It not only tarnishes the reputation of the company or the industry involved, but it also slows overall economic development, which severely affects the poor.² According to Transparency International’s 2008 Corruption Perception Index, of the 180 countries scored, the most corrupt states are impoverished countries such as Somalia, Myanmar, Iraq, Haiti, and Afghanistan.³ According to one estimate, a country’s improvement in the Corruption Perception Index ranking by even one point (on a ten point scale) “increases capital inflows by 0.5 per cent of a country’s gross domestic product and average incomes by as much as 4 percent.”⁴ However, corruption in developing countries is largely attributable to bribery money from multinationals headquartered in the United States, Great Britain, and other more industrialized countries.⁵ Thus, to punish all responsible parties, wealthier countries must be held mutually accountable in the fight against corruption.

International corruption can be divided roughly into three categories: (1) petty corruption of bribery among low-level and mid-level officials; (2) grand corruption at senior ranks; and (3) a major scandal—corruption on such a scale that it has a macroeconomic impact.⁶ While petty bribery may not directly involve substantial amounts of money, it involves a far greater num-

¹ See JENNIFER ZERK, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY*, 288 (Cambridge Univ. Press 2006).

² See *Exporting Corruption: How Rich Country Export Credit Agencies Facilitate Corruption in the Global South, An Interview with the Corner House*, *MULTINATIONAL MONITOR*, May/June 2006, at 34.

³ Press Kit, Transparency Int’l, *Persistently High Corruption in Low-Income Countries Amounts to an “Ongoing Humanitarian Disaster”* 7 (Sept. 23, 2008), available at <http://www.transparency.org/content/download/36589/575262>.

⁴ *Id.* at 2.

⁵ See Eric M. Pedersen, *The Foreign Corrupt Practices Act and Its Application to U.S. Business Operations in China*, 7 *J. INT’L BUS. & L.* 13, 26 (2008); Ashish S. Joshi, *Britain’s Fight Against the ‘SilverLance’: A Radical Overhaul of the U.K.’s Bribery Laws*, *NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS CHAMPION*, Feb. 2009, at 38–40.

⁶ See William Minter, *Kenya: Corruption Fight Stalling*, *AFRICAFOCUS BULLETIN*, Feb. 11, 2005, <http://www.africafocus.org/docs05/ken0502.php> (referring to the third category as “looting” scams).

ber of transactions and persons than the other two categories combined. In Russia, for example, forty to sixty percent of the \$240–300 billion in annual corruption dollars is generated from kickbacks.⁷ It is estimated that small business owners in Russia spend six percent of their earnings on bribes.⁸

Petty bribery is often rationalized as a necessary supplement to the salaries of underpaid low-level and mid-level government officials in less developed countries. Cumulatively, however, such bribery encourages officials to divert public spending away from legitimate development areas, such as health and education, to other areas where bribery is more common or lucrative, such as defense contracts.⁹

Moreover, small, repetitive bribery of foreign officials by local employees cultivates a mindset of entitlement and breeds tolerance for graft. For example, opinion polls in Russia reveal that the majority of Russians—especially the younger generation—no longer consider bribery a crime.¹⁰ Thus, it is responsible for creating a culture of bribery perpetuating other, more nefarious forms of corruption.¹¹

However, this culture of bribery is not limited to any particular country or even group of countries. Worldwide, bribery is the Achilles heel of corporations. Imagine you are the distribution manager for the subsidiary of a U.S. company that has just established a presence in India. As efforts to ramp up operations begin, you learn that, in order to meet commitment times, your drivers will have to make informal payments at police checkpoints on all roads in and out of Mumbai. You suspect that these monies will go directly into the pockets of the local officials. After some research, you discover that this petty bribery is prohibited by both the U.S. Foreign Corrupt Practices Act (“FCPA”) and local law.¹² You inform senior management, but they tell you that this type of arrangement is just the way that business gets done in

⁷ See Novye Izvestia, *The Crisis Has Not Reduced the Bribes and Kickbacks Market*, RUSSIAN BUS. MONITOR, Mar. 20, 2009, available at 2009 WLNR 5280701.

⁸ See *id.* Indem, a think-tank that monitors corruption, estimates eighty percent of all Russian business pay bribes, and the average business bribe has risen from \$10,000 to \$130,000. See *A Survey of Russia: Grease My Palm*, THE ECONOMIST, Nov. 29, 2008, at 92.

⁹ See EUR. NETWORK AGAINST ARMS TRADE RESEARCH GROUP, FINANCING MISERY WITH PUBLIC MONEY 4 (2007), available at <http://www.caat.org.uk/issues/Financing-misery-ENAAT.pdf>. According to the American Chamber of Commerce, fifty percent of all bribes paid worldwide between 1994 and 1999 related to trade in arms. *Id.* at 6.

¹⁰ *A Survey of Russia: Grease My Palm*, ECONOMIST, Nov. 29, 2008, at 92.

¹¹ See Marie M. Dalton, *Efficiency v. Morality: The Codification of Cultural Norms in the Foreign Corrupt Practices Act*, 2 N.Y.U. J. L. & BUS. 583 (2006).

¹² 15 U.S.C. § 78dd-1 (2006). For a discussion of the possible application of the FCPA’s “facilitating payment” exception, 15 U.S.C. §§ 78dd-1–3 (2006), to this scenario see *infra* Part II(C)(2)(a). The Indian Penal Code, Act No. 45 of 1860; INDIA PEN. CODE (1860), ch. IX, §§ 161–165Z, repealed and incorporated into the Prevention of Corruption Act, No. 49 of 1988; INDIA PEN. CODE (1860), v. §§ 171B, 171E and 213 prohibit public servants from receiving “gratifications” that are not legal remunerations. The payor can, theoretically, be charged as an aider or abettor of the crime. These laws do not appear to require corrupt intent and do not include an express exception for facilitating payments. However, there are no prosecutions on record for such payments. Recently, the Octroi tax system was partially automated to help prevent inspectors from demanding these informal payments when collecting the tax.

India. Despite their efforts to placate you, you are not convinced and instruct your drivers not to pay the officers. As a direct result, your company's goods are delayed at the checkpoints. When your employer learns what happened, instead of being rewarded for your conscientiousness, you are immediately terminated.

Once the culture of bribery has crept into the overseas operations of a multinational, as in the above scenario, the threat of retaliation for doing the right thing is very real. Is there is a legal remedy in U.S. courts for the kind of wrong you have suffered? Should there be? Does it matter if the company is publicly or privately held? Does it matter if you are a non-U.S. citizen or an American citizen working exclusively overseas? Is there still liability if the company you worked for is actually a foreign subsidiary of a U.S. company? These are some of the questions this Article attempts to answer as it explores the kinds of legal remedies available to private parties opposed to transnational bribery.

Unless overseas employees refuse to give in to pressure to pay bribes, there is little that can be done *ex ante* to stop it. However, overseas employees can face dire consequences for acting unilaterally against bribery. Therefore, it is imperative that adequate legal remedies exist to protect them from retaliation by U.S. issuers of publicly traded securities and their subsidiaries, domestic and foreign.

Part II provides a broader context for this discussion by comparing the roles that public and private international law play in combating bribery of foreign public officials in international business transactions. To date, the FCPA has been enforced primarily by the U.S. Department of Justice ("DOJ") and the U.S. Securities and Exchange Commission ("SEC").¹³ There have also been multiple voluntary corporate initiatives and international conventions focused on preventing bribery. However, there are several practical reasons why private attorneys general must engage in transnational litigation to supplement these efforts to combat the culture of bribery that pervades international business transactions. Support for the privatization of FCPA compliance efforts can be found in the strong American tradition of the private enforcement of public law and in a recent international treaty mandating that national laws grant individuals and entities a private right of action for damages resulting from transnational bribery.

Part III of this Article determines the extent to which U.S. courts are currently willing to allow private stakeholders, and even competitors, to hold multinationals accountable for engaging in foreign corrupt practices. There is no express right of action under the FCPA; however, this section argues that a private cause of action should be implied under the FCPA for the limited purpose of preventing retaliation against employees reporting or re-

See Brihanmumbai Mahanagarpalika Octroi Software System, <http://octroi.mcgm.gov.in/BOSS/>.

¹³ See *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1028 n.11 (6th Cir. 1990).

fusing to commit FCPA violations. Employment law is the one area where the Supreme Court has continued to recognize implied actions, and implied retaliation claims in particular were the subject of the two most recent cases where it has done so.¹⁴

This section then explores existing private causes of action that can be predicated on FCPA violations and concludes that the most popular theories are inapposite to most FCPA violations. Commentators have suggested that existing statutes and common law provide adequate legal remedies for injured persons and entities.¹⁵ However, these existing private rights of action do little to encourage compliance with the FCPA in the workplace overseas. Instead, they force claims to be pigeon-holed in complicated, non-bribery terms such as racketeering, antitrust violations, or securities fraud, which most employees do not have standing to bring and require a showing of more than a simple violation of the Act. Additionally, state law claims for tortious interference and wrongful discharge fall short because their legal elements vary greatly from state to state, and domestic law may not apply at all when the incident occurs overseas.

Part IV argues that section 806 of the Sarbanes-Oxley Act of 2002 (“SOX”) should be used to protect disclosure of FCPA violations.¹⁶ The plain language of this whistleblower provision, as well as two reported federal court decisions,¹⁷ support former employees located in the United States who file suit after being discharged for complaining about FCPA violations.

It is furthered argued that section 806 should cover all employees of companies subject to SOX regardless of whether they work in the United States or overseas. However, the territorial scope of section 806 is still being debated in the courts. The argument first disagrees with the First Circuit’s refusal in *Carnero v. Boston Scientific Corp.* to extend section 806 whistleblower protection to a foreign employee of a foreign subsidiary of a publicly held U.S. company.¹⁸ The Article attributes the outcome to the court’s failure, in determining whether Congress intended to extend the reach of section 806 extraterritorially, to envision the possibility of a whistleblower case predicated on a FCPA violation. The argument then takes

¹⁴ See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008).

¹⁵ See, e.g., Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, in *THE FOREIGN CORRUPT PRACTICES ACT, 2008: COPING WITH HEIGHTENED ENFORCEMENT RISKS* 711, 767 (Practising Law Institute 2008); Kenneth B. Reisenfeld, *Report to the House of Delegates: Recommendation*, 2005 A.B.A. SEC. OF INT’L L. 9-12, available at <http://www.abanet.org/leadership/2005/annual/summaryofrecommendations/110.doc> (concluding no new U.S. legislation is necessary to comply with an international convention mandating a private right of action for damages resulting from transnational bribery).

¹⁶ SOX § 806, 18 U.S.C. § 1514A (2006); 29 C.F.R. § 1980.101 (2005) (implementing SOX § 806).

¹⁷ See *Day v. Staples, Inc.*, 555 F.3d 42 (1st Cir. 2009); *Haddad v. ITT Industries, Inc.*, No. 1:05-CV-370-TLS, 2007 WL 141949 (N.D. Ind. Jan. 12, 2007).

¹⁸ 433 F.3d 1, 18, n.17 (1st Cir. 2006), *cert. denied*, 548 U.S. 906 (2008).

issue with the *Carnero* decision's reliance on a "balancing" approach to extraterritoriality and builds upon two alternative approaches to extraterritoriality suggested in the Southern District of New York court's recent decision in *O'Mahony v. Accenture Ltd.*¹⁹

Alternatively, the Article proposes that Congress amend section 806 to make clear its intent to cover not only disclosures of fraud but disclosures of any FCPA violations by both U.S. and non-U.S. employees working within the United States and overseas. The Article further recommends SOX and the administrative complaint procedures from AIR21 it incorporates by reference be amended to provide specific procedures for employees overseas to bring a whistleblower complaint. Finally, in order to reach foreign corporations not subject to SOX, the Article supports a bill introduced in the 110th Congress to amend the FCPA to authorize a private right of action against "foreign concerns."²⁰ Similar legislation is expected to be introduced during the 111th Congress, and when it is, this Article suggests that the bill be amended to allow compensation not only for damages to American businesses, but also for damages to their employees.

II. PUBLIC PROSECUTIONS VERSUS PRIVATE TRANSNATIONAL LITIGATION

Since the early 1990s, most efforts to fight corruption have focused on public international law. There are several anti-corruption conventions that reflect binding agreements between states from all regions of the world to prohibit acts of corruption.²¹ These conventions are implemented by each national authority and enforced primarily through public enforcement actions.²² However, public prosecutors face limits in their ability to curtail the foreign corrupt practices of multinationals due to inherent enforcement, political, and jurisdictional difficulties. These difficulties cause the prosecutors to focus only on the most egregious violations and to prosecute only a select number of companies and high-level corporate executives. Petty bribery by low-level employees continues largely unabated unless and until it reaches a critical mass.²³

To fill this enforcement vacuum, advocates have recently focused on the ability of private international law to hold multinationals accountable for breaches of anti-bribery laws.²⁴ The U.N. Convention Against Corruption ("UNCAC") now mandates that countries enact laws permitting private civil

¹⁹ 537 F. Supp. 2d 506 (S.D.N.Y. 2008).

²⁰ Foreign Business Bribery Prohibition Act of 2008, H.R. 6188, 110th Cong. (2008).

²¹ See discussion of international efforts *infra* Part II(D)(1).

²² See Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982).

²³ See discussion of continuing problem of bribery *infra* Part I(C).

²⁴ See JENNIFER ZERK, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY* (Cambridge Univ. Press 2006) (describing private international law as the legal framework governing how national courts should approach private disputes in which there is a "foreign element").

suits to help enforce its anti-bribery laws.²⁵ Private lawsuits can potentially overcome the political and enforcement limitations of existing regulatory efforts of national governments that have so far prevented them from addressing low-level bribery. As countries comply with the UNCAC private action mandate, we can expect the amount of private litigation based on transnational bribery to continue to grow. As it does, international efforts to cooperate in the prevention, investigation, and prosecution of transnational bribery will also have to evolve to overcome many of the remaining jurisdictional issues. In the interim, U.S. courts must decide whether and to what extent to give private attorneys general the opportunity to fight transnational corruption using existing—and possibly even new—private rights of action.

A. *Background of the FCPA*

The process of globalization has led more and more U.S. companies to do business in other countries, requiring them to comply with a myriad of global business regulations. Faced with these challenges, their overseas employees have been increasingly tempted to engage in foreign corruption.²⁶ Bribery and kickbacks to obtain unfair business advantages, for example, are widespread.²⁷ Some employees find themselves in countries with systemic corruption problems and feel they have no choice but to comply. Others work for companies that strategically take advantage of known corrupt practices in certain countries to avoid complying with costly regulations or to bypass inefficient governmental bureaucracy. However, at its core, bribery is an age-old vice stemming from greed and corruption. Every community has the potential to fall victim to a culture of bribery, and the global trade community is no different, except the victimization occurs on a larger scale.

1. *“Watergate” Roots of the FCPA*

The United States was the first country to take foreign bribery seriously.²⁸ It was forced to deal with the issue after the political fiasco of Watergate. The scandal began with the arrest of five men caught by police breaking and entering into the Democratic National Committee Headquarters at the Watergate hotel complex in Washington, D.C. on June 17, 1972. Subsequent investigations by the Senate and the Watergate Special Prosecu-

²⁵ U.N. Convention Against Corruption, G.A. Res. 58/4, U.N. Doc. A/RES/58/422 (Dec. 11, 2003), available at http://www.unodc.org/pdf/corruption/publications_unodc_convention-e.pdf.

²⁶ See Philip M. Nichols, *Colloquy: Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 *YALE J. INT'L L.* 257, 272–73 (1999).

²⁷ For a discussion of the latest figures on the continuing problem of bribery, see *infra* Section II(C).

²⁸ See Robert C. Blume, J. Taylor McConkie, *Navigating the Foreign Corrupt Practices Act: The Increasing Cost of Overseas Bribery*, 36 *COLO. LAW.* 91 (Aug. 2007) (“The FCPA was the first anti-bribery statute of its kind in the world.”).

tor Archibald Cox revealed that the burglary had been financed by the illegal use of corporate funds given to President Nixon's reelection campaign.²⁹ This finding became the driving force behind a number of investigations by the U.S. Securities and Exchange Commission. Relying on the SEC's promise to refrain from taking enforcement action, more than 400 publicly traded companies, including 117 of the Fortune 500, voluntarily acknowledged making questionable overseas payments or outright bribes amounting to over \$300 million to obtain contracts from foreign governments.³⁰ In response, Congress enacted the FCPA, and it was signed into law on December 17, 1977.³¹

2. *Two Major Sections of the FCPA*

The FCPA contains two distinct sections: the anti-bribery provisions, and the recordkeeping and internal controls provisions.³² The anti-bribery provisions prohibit all U.S. companies, individuals, and other "domestic concerns" from paying, offering, or promising anything of value to a foreign government official to gain any unfair business advantage.³³ This prohibition against bribery is written broadly to prevent doing so either directly or indirectly through a local foreign agent or third-party intermediary.³⁴

The FCPA's recordkeeping and internal controls provisions require issuers of publicly traded securities to keep records that accurately and fairly reflect the transactions of the corporation in reasonable detail and to maintain a system of internal accounting controls.³⁵ These provisions are intended primarily to prevent the use of slush funds and other off-the-book accounts

²⁹ See Philip Mattera, *The New Business Watergate: Prosecution of International Corporate Bribery is on the Rise*, CORPORATE RESEARCH E-LETTER No. 68, Dec. 17, 2007, <http://www.corp-research.org/archives/nov-dec07.htm>.

³⁰ See *United States v. O'Grady*, 742 F.2d 682, 701 (2d Cir. 1984).

³¹ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at scattered sections of 15 U.S.C. (2006)). For the legislative history of the FCPA, see S. REP. NO. 95-114, (1977), as reprinted in 1977 U.S.C.C.A.N. 4098; H.R. REP. NO. 95-831, (1977) (Conf. Rep.), as reprinted in 1977 U.S.C.C.A.N. 4121.

³² The FCPA's anti-bribery provisions are codified at 15 U.S.C. §§ 78a, 78dd-1, 78dd-2, 78dd-3 (2006), and its recordkeeping provisions are codified at 15 U.S.C. §§ 78ff, 78m (2006).

³³ *Id.* Section 78dd-2(h)(1) of the Securities Exchange Act of 1934 currently defines "domestic concern" as:

(A) any individual who is a citizen, national, or resident of the United States; and (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principle place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

15 U.S.C. § 78-d(h)(1) (2006).

³⁴ 15 U.S.C. § 78dd-2(g)(2) (2006).

³⁵ 15 U.S.C. § 78m(b)(2) (2006). The accounting provisions require covered persons to: (1) make and keep books, records, and accounts which in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and (2) devise and maintain a system of internal controls sufficient to provide reasonable assurances that:

- I. Transactions are executed in accordance with management's general or specific authorization.

to finance foreign bribery.³⁶ However, the SEC also has used them more broadly to protect the general integrity and transparency of the financial information presented by public companies to shareholders and potential investors.³⁷ These dual purposes of the FCPA support a private cause of action under SOX not only for shareholder fraud but also for accounting fraud in general.³⁸

B. Increased Public Enforcement

Enforcement authority under the FCPA is divided between the SEC and the DOJ. They are the only two bodies expressly given authority to bring suit under the FCPA.³⁹ The SEC has investigative, injunctive, and civil enforcement powers over companies registered with the SEC and over those acting on their behalf.⁴⁰ If it believes there is enough evidence for a criminal action, the SEC must refer the matter to the DOJ. According to the U.S. Attorneys' Manual, the DOJ is responsible for the criminal investigation and prosecution of all willful violations of either section of the Act and has civil enforcement powers with respect to those companies not subject to SEC jurisdiction.⁴¹

For several years after the Act's enactment, the U.S. government initiated relatively few FCPA enforcement actions. Between 1978 and 2000, the SEC and the DOJ together averaged only three FCPA prosecutions per year.⁴² The few cases that went to trial resulted in minimal or no penalties.⁴³

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- II. Transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and to maintain accountability for assets.
 - III. Access to assets is permitted only in accordance with management's general or specific authorization.
 - IV. The recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

Id.

³⁶ See 122 CONG. REC. 18,603–18,605 (1976) (letter from Sec'y Richardson to Sen. Proxmire (D-Wis.)). The letter, made part of the record, contains several references to the problem of American companies using off-the-books "slush" funds. *Id.*

³⁷ See Kathleen A. Lacey & Barbara Crutchfield George, *Expansion of SEC Authority into Internal Corporate Governance: The Accounting Provisions of the Foreign Corrupt Practices Act (A Twentieth Century Review)*, 7 J. TRANSNAT'L L. & POL'Y 119 (1998).

³⁸ See discussion at Part IV.

³⁹ H.R. REP. NO. 95-640, at 9 (1977), available at <http://www.usdoj.gov/criminal/fraud/fcpa/history/1977/houseprt.html>.

⁴⁰ See 15 U.S.C. § 78u (2006).

⁴¹ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-47.110, -47.130 (2000), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/47mcrim.htm. The 2008 Siemens case, discussed *infra* text accompanying notes 52-58, is the first time the DOJ has ever charged a company with a criminal violation of the internal controls provisions.

⁴² See Priya Cheria Huskins, *FCPA Prosecutions: Liability Trend to Watch*, 60 STAN. L. REV. 1447, 1449 (2008) (citing Eugene R. Erbstoesser et al., *The FCPA and Analogous Foreign Anti-Bribery Laws—Overview, Recent Developments, and Acquisition Due Diligence*, 2 CAPITAL MARKETS L.J. 381, 386 (2007)).

In the last half of this decade, however, the DOJ and SEC have increased the number of FCPA proceedings brought against both corporations and individuals. Between 2003 and 2007, the average number of new DOJ prosecutions was nearly three times the average number in the preceding five years.⁴⁴ In 2003, there were two DOJ but no SEC enforcement actions related to the FCPA.⁴⁵ In 2004, the combined number of DOJ and SEC formal proceedings increased to five.⁴⁶ In 2005, 2006, and 2007, the totals were twelve, fifteen, and thirty-eight respectively.⁴⁷ In 2008, the DOJ and SEC brought a total of thirty-three enforcement actions for the year (sixty percent against individuals), and 2009 is well on its way to being another banner year; the DOJ recently confirmed that there are approximately one hundred companies subject to an open FCPA investigation.⁴⁸

The dollar amount of civil and criminal penalties also has risen to unprecedented levels. In July 2004, Titan Corporation, for example, was assessed \$28.5 million consisting of \$13 million in civil penalties and \$15.5 million in disgorgement of profits.⁴⁹ This record was then broken by a \$44 million settlement with Baker Hughes, Inc. announced in April 2007.⁵⁰ In May 2008, Willbros Group, Inc. barely missed setting a new penalty record when it agreed to pay the SEC \$10.3 million in disgorgement plus prejudgment interest and enter into a deferred prosecution agreement with the DOJ, which required them to pay \$22 million and retain a costly independent compliance monitor for three years.⁵¹

However, these cases were recently eclipsed by two massive settlements. The first settlement was reached in December 2008 by the DOJ, the SEC, and German authorities with the German electronics and engineering conglomerate Siemens AG, along with its subsidiaries in Argentina, Bangladesh, and Venezuela.⁵² The criminal fines, penalties, and disgorgement of

⁴³ See *id.*

⁴⁴ See SHEARMAN & STERLING LLP, RECENT TRENDS AND PATTERNS IN FCPA ENFORCEMENT 3 (2008), available at http://www.shearman.com/files/upload/FCPA_Trends.pdf. There was a similar trend in the number of investigations. *Id.* at 2.

⁴⁵ See GIBSON DUNN & CRUTCHER LLP, 2007 YEAR-END FCPA UPDATE (2008), available at <http://www.gibsondunn.com/publications/pages/2007Year-EndFCPAUpdate.aspx>.

⁴⁶ See GIBSON DUNN & CRUTCHER LLP, 2008 YEAR-END FCPA UPDATE (2009), available at <http://www.gibsondunn.com/Publications/Pages/2008Year-EndFCPAUpdate.aspx>.

⁴⁷ See *id.*

⁴⁸ See *id.* See also Huskins, *supra* note 42, at 1449.

⁴⁹ See TITAN CORP., QUARTERLY REPORT (FORM 10-Q), at 16 n.8 (Nov. 1, 2004), available at <http://www.secinfo.com/dVut2.11Z1e.htm>.

⁵⁰ See Press Release, Sec. Exch. Comm'n, SEC Charges Baker Hughes with Foreign Bribery and with Violating 2001 Commission Cease-and-Desist Order (Apr. 26, 2007), available at <http://www.sec.gov/news/press/2007/2007-77.htm>.

⁵¹ See Press Release, Dep't of Justice, Willbros Group Inc. Enters Deferred Prosecution Agreement and Agrees to Pay \$22 Million Penalty for FCPA Violations (May 14, 2008), available at http://www.usdoj.gov/opa/pr/2008/May/08_crm_417.html.

⁵² See Press Release, Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay \$450 Million in Combined Criminal Fines (Dec. 15, 2008) [hereinafter Siemens Press Release], available at <http://www.usdoj.gov/opa/pr/2008/December/08-crm-1105.html>.

profits totaled more than \$1.6 billion and constitute the largest settlement in the history of the FCPA.⁵³ The DOJ imposed a criminal penalty of \$448.5 million on Siemens AG and \$500,000 on each of the named subsidiaries.⁵⁴ The SEC required Siemens AG to disgorge more than \$350 million in ill-gotten profits to settle a related civil complaint.⁵⁵ At the same time, the German authorities obtained \$569 million in fines and disgorgement of profits to resolve their ongoing investigation of Siemens' operating groups.⁵⁶ This amount was in addition to the initial \$287 million Siemens AG paid German authorities in October 2007 as disgorgement of profits that ignited the firestorm of prosecutions of Siemens by other countries.⁵⁷ These figures do not include the \$1.2 billion Siemens reportedly spent on attorneys' fees and other consultants leading up to the settlement, or the future costs of special settlement terms, such as retaining a compliance monitor for the next four years.⁵⁸

A second record settlement was reached in February of this year. Kellogg, Brown & Root, Inc. ("KBR") and Halliburton Co. agreed to pay a \$402 million fine to the DOJ as well as \$177 million in disgorgement to the SEC to resolve allegations that a KBR subsidiary bribed Nigerian officials over a ten year period. This constitutes the largest combined FCPA settlement ever paid by a U.S. company.⁵⁹

1. 1988 and 1998 Amendments

Several factors account for this upward trend. First, the FCPA was amended in 1988 and again in 1998.⁶⁰ The 1988 Amendments narrowed the 1977 exemption for duties by officials that were "essentially ministerial or clerical" to an exemption for "grease" or "facilitating" payments made to "expedite or to secure the performance of a routine governmental action."⁶¹ These amendments also raised the penalties for violating the Act. A new

⁵³ See *id.* Previously, the highest penalty against a foreign issuer was \$21 million obtained in the *Statoil* case. See *Statoil Asa*, Report of a Foreign Private Issuer (Form 6-K) (Oct. 30, 2006), available at <http://www.secinfo.com/dr6tj.vas.htm>.

⁵⁴ Siemens Press Release, *supra* note 52.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Jason E. Prince, *A Rose by Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions*, *ADVOCATE* (Idaho), Apr. 2009, at 20, 21.

⁵⁹ See Press Release, Sec. Exch. Comm'n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009) [hereinafter KBR Press Release], available at <http://www.sec.gov/news/press/2009/2009-23.htm>.

⁶⁰ *Omnibus Trade and Competitiveness Act of 1988*, Pub. L. No. 100-418, § 5003, 102 Stat. 1107 (codified at 15 U.S.C. §§ 78m(b), 78dd-1, 78dd-2 (2006)); *International Anti-Bribery and Fair Competition Act of 1998*, Pub. L. No. 105-366, 112 Stat. 3302 (codified at 15 U.S.C. §§ 78dd-1, 78dd-2, 78ff, 78dd-3 (2006)) [hereinafter collectively "1998 Amendments"].

⁶¹ 15 U.S.C. §§ 78dd-1(b), -2(b), -3(b) (2006).

civil fine of up to \$10,000 was introduced as a possible sanction.⁶² In addition, the maximum criminal penalty for an individual was increased from \$10,000 to \$100,000 and/or imprisonment up to five years, while the maximum criminal fine for a U.S. corporation was increased from \$1 million to \$2 million.⁶³ A second wave of amendments in 1998 brought the anti-bribery provisions into conformity with the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “OECD Convention”).⁶⁴ The 1998 Amendments extended the FCPA’s jurisdictional reach to non-U.S. persons acting within the United States as well as to U.S. persons acting outside the United States.⁶⁵ Today, the FCPA’s anti-bribery provisions apply not only to all U.S. individuals and U.S. companies anywhere in the world, but also to any foreign company listed on a U.S. stock exchange or otherwise required to file periodic reports with the SEC, any person acting on behalf of any such entity, and any foreign company or alien acting within the United States or its territories.⁶⁶ Consequently, many of the recent enforcement actions brought by the DOJ and the SEC have involved foreign companies and non-U.S. subsidiaries and distributors.⁶⁷ These actions would not have been possible without the FCPA’s broadened extraterritorial reach.

2. *Corporate Fraud Task Force*

Second, the rise in FCPA enforcement is due in large part to the corporate accounting scandals of 2001. Companies such as Adelphia, Enron, WorldCom, and Tyco were found to have engaged in corporate fraud amounting to billions of dollars.⁶⁸ These scandals were not isolated incidents

⁶² 15 U.S.C. §§ 78dd-2(g)(1)(B), 78ff(c)(1)(B) (2006).

⁶³ 15 U.S.C. §§ 78dd-2(g)(2)(A), 78ff(c)(2)(A) (2006) (individuals); 15 U.S.C. §§ 78dd-2(g)(1)(A), 78ff(c)(1)(A) (2006) (corporations). Moreover, now under the Alternative Fines Act, these fines may be up to \$250,000 per violation for individuals, or up to twice the gross gain or loss. See 18 U.S.C. § 3571(a), (d) (2006). For a discussion of subsequent penalty increases, see *infra* notes 72–74 and accompanying text.

⁶⁴ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, *opened for signature* Dec. 18, 1997, 37 I.L.M. 4.

⁶⁵ 15 U.S.C. §§ 78dd-1(g), 78dd-2(i), 78dd-3 (2006). The 1998 Amendments eliminated the requirement that employees or agents of domestic concerns must otherwise be subject to the jurisdiction of the United States in order to be subject to criminal penalties. See *id.* §§ 78dd-1(g), 78dd-2(i). In addition, the 1998 Amendments broadened the prohibited purposes of any payments made to a foreign official to include “securing any improper advantage.” See *id.* §§ 78dd-1(a)(1)(A)(iii), -1(a)(2)(A)(iii), -1(a)(3)(A)(iii), 78dd-2(a)(1)(A)(iii), -2(a)(2)(A)(iii), -2(a)(3)(A)(iii). The 1998 Amendments also expanded the scope of the term “foreign official” to include any officer or employee of a “public international organization.” See *id.* §§ 78dd-1(f)(1), 78dd-2(h)(2).

⁶⁶ H.R. REP. NO. 105-802, at 19-20 (1998).

⁶⁷ See discussion of jurisdictional difficulties *infra* Part II(C)(3).

⁶⁸ See Bethany McLean & Peter Elkind, *SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON* (Portfolio Hardcover 2003); Linda Chatman Thomson & Donna Norman, *Sarbanes Oxley Turns Six: An Enforcement Perspective*, 3 J. BUS. & TECH. L. 393, 394 n.2 (2008).

but rather were a consequence of the legal framework in which all U.S. companies operated.⁶⁹ In response, the President formed the Corporate Fraud Task Force in July 2002.⁷⁰ Drawing on the resources of nine federal law enforcement agencies, the task force was designed to restore investor confidence by prodding U.S. Attorneys' Offices to aggressively prosecute corporate fraud.⁷¹

In 2007, on the task force's fifth anniversary, then Attorney General Alberto R. Gonzales praised it as a huge success. He credited the task force with obtaining more than 1200 convictions, including 214 corporate chief executives or presidents, and hundreds of millions of dollars in fines and restitution to investors.⁷² The DOJ's Asset Forfeiture and Money Laundering Section reportedly obtained more than \$1 billion in fraud-related forfeitures for distribution to investors.⁷³

3. *The Sarbanes-Oxley Act*

Third, the dramatic increase in enforcement efforts can be attributed also to the passage of the Sarbanes-Oxley Act of 2002 by Congress.⁷⁴ Although SOX did not amend the FCPA in any respect, it did amend both civil and criminal securities laws to add provisions relating to disclosures and internal controls and significantly raised the stakes for non-compliance with the FCPA. For example, section 404 of SOX requires that companies and their gatekeepers to tighten their internal controls.⁷⁵ SOX's implementing regulations require companies to: (1) establish and maintain an adequate system of internal controls and procedures for financial reporting; and (2) assess annually the effectiveness of those controls and procedures.⁷⁶

In addition, section 302 requires chief officers to assure the public that their companies' accounts are accurate and that all payments are accurately

⁶⁹ See STAFF OF S. COMM. ON GOVERNMENTAL AFFAIRS, 107TH CONG., FINANCIAL OVERSIGHT OF ENRON: THE SEC AND PRIVATE-SECTOR WATCHDOGS, 29-40 (2002), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/enron/100802enronsec.pdf>.

⁷⁰ Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002), available at <http://www.usdoj.gov/dag/cftf/execorder.htm>.

⁷¹ See Daphne Eviatar, *What's Behind the Drop in Corporate Fraud Indictments?*, AMERICAN LAWYER, Nov. 1, 2007, <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=900005494709>.

⁷² Alberto R. Gonzales, Att'y Gen., Prepared Remarks at the Corporate Fraud Task Force 5th Anniversary Event (July 17, 2007), available at http://www.usdoj.gov/archive/ag/speeches/2007/ag_speech_070717.html.

⁷³ See Press Release, Dep't of Justice, Fact Sheet: President's Corporate Fraud Task Force Marks Five Years of Ensuring Corporate Integrity (July 17, 2007), available at http://www.usdoj.gov/opa/pr/2007/July/07_odag_507.html.

⁷⁴ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

⁷⁵ SOX § 404, 15 U.S.C. § 7262 (2006).

⁷⁶ See Final Rule: Management's Report on Internal Control Over Financial Reporting and Certification of Disclosure in Exchange Act Periodic Reports, Exchange Act Release No. 33-8238, Investment Company Act Release No. 34-47986, 68 Fed. Reg. 36636-01 (Jun. 18, 2003).

recorded.⁷⁷ Both the chief executive officer (“CEO”) and the chief financial officer (“CFO”) must certify in each quarterly and annual report that: (1) they have reviewed the financial report; (2) based on their knowledge, the report does not contain any untrue statement of a material fact or any material omissions; (3) to the best of their knowledge, the financial statements and other financial information included in the report are complete and accurately reflect the current financial status of the company; and (4) they are aware of their responsibility for, and have taken certain actions and made certain disclosures with respect to, the issuer’s internal controls.⁷⁸ Thus, senior executives of companies now have a significant personal stake in knowing whether their firms are complying with SOX. CEOs and CFOs who willfully certify reports knowing that they do not comport with section 302 are personally subject to fines of up to \$5 million and up to twenty years in prison.⁷⁹ Since the enactment of SOX, the SEC has initiated over fifty enforcement actions involving CEO and CFO certifications.⁸⁰

Section 1106 of SOX also significantly enhances the maximum criminal penalties for a willful violation of the FCPA accounting provisions, which constitutes a felony under § 32(a) of the Securities Exchange Act.⁸¹ For individuals, SOX increased the maximum fines to \$5 million and extended the maximum jail term to twenty years.⁸² For corporations, SOX increased the maximum fines to \$25 million.⁸³ These criminal penalties may apply to any employer, regardless of whether the employer is publicly traded or privately held, and may apply to individual managers as well as to corporate employers.⁸⁴

These SOX provisions have enhanced the importance of the FCPA’s accounting provisions. According to a poll conducted by Deloitte in April 2008, thirty-two percent of companies are increasing internal controls to prevent FCPA violations.⁸⁵ A subsequent Deloitte survey found fifty-five percent of companies have made their anti-corruption program more restrictive over the past five years.⁸⁶ Typical measures include establishing FCPA reporting procedures and conducting internal investigations of potential FCPA

⁷⁷ SOX § 302, 15 U.S.C. § 7241 (2006).

⁷⁸ See Final Rule: Certification of Disclosure in Companies’ Quarterly and Annual Reports, Exchange Act Release No. 33-8124, Investment Company Act Release No. 34-46427, 67 Fed. Reg. 57276-01 (Sept. 9, 2002).

⁷⁹ 18 U.S.C. § 1350(c)(2) (2006).

⁸⁰ See Thomson & Norman, *supra* note 68, at 412, n.149.

⁸¹ SOX § 1106, 15 U.S.C. § 78ff(a) (2006); Securities Exchange Act of 1934 § 32, 15 U.S.C. § 78 (2006).

⁸² SOX § 1106, 15 U.S.C. § 78ff(a) (2006).

⁸³ *Id.*

⁸⁴ See Daniel P. Westman, *The Significance of the Sarbanes-Oxley Whistleblower Provisions*, 21 LAB. LAW. 141, 144 (2005).

⁸⁵ See Press Release, Deloitte LLP, Deloitte Poll: Less Than One-Third of Companies Are Increasing Internal Controls to Prevent FCPA Violations (Apr. 17, 2008), available at http://www.deloitte.com/dtt/press_release/0,1014,cid%253D202074,00.html.

⁸⁶ See Press Release, Deloitte LLP, Fortifying Anti-Corruption in Today’s Corporation: Survey Conducted by the Economist Intelligence Unit on Behalf of Deloitte (Feb. 2, 2009),

violations.⁸⁷ Companies also recognize the need for more targeted FCPA training for employees responsible for financial recordkeeping or interacting with foreign officials, whether based in the United States or overseas.⁸⁸ However, experts have observed that in-house legal, audit, and ethics compliance teams rarely have the resources and language capabilities to conduct the necessary due diligence.⁸⁹

Finally, SOX has brought to light much of the information on which the current wave of FCPA prosecutions is based. Prior to the passage of SOX, companies were likely to investigate potential violations and take appropriate remedial action, but they would not disclose the incidents to authorities. In 2003, however, the DOJ and SEC began using SOX to pressure publicly held companies to voluntarily disclose violations in hopes of gaining leniency.⁹⁰ Companies who do not cooperate fully are threatened with harsher penalties if their misconduct is later discovered.⁹¹ Unsurprisingly, voluntary disclosures have skyrocketed, fueling a dramatic increase in FCPA investigations and enforcement proceedings. According to one estimate, in 2002 only twenty-eight percent of the investigations resulted from self-reporting; in 2004 that number increased to sixty-nine percent.⁹²

C. *The Continuing Problem of Bribery*

Despite renewed scrutiny from regulators, bribery continues to be a significant problem in most of the world, including in important emerging economies like India and China. For example, in 2005 the Washington Post interviewed sales agents, executives, and distributors of nine U.S. multinationals who admitted that their firms routinely win business in China by paying extravagant entertainment, travel, and lodging expenses to foreign officials.⁹³ Bribe payments are not publicly recorded, so it is virtually impos-

available at http://www.deloitte.com/dtt/cda/doc/content/ch_en_anti_corruption_survey_report_290109%25281%2529.pdf.

⁸⁷ See generally Thuy-Nga T. Vo, *Lifting the Curse of the SOX Through Employee Assessments of the Internal Control Environment*, 56 U. KAN. L. REV. 1, 4–5 (2007); José Armando Fanjul, *Corporate Corruption in Latin America: Acceptance, Bribery, Compliance, Denial, Economics and the Foreign Corrupt Practices Act*, 26 PENN ST. INT'L L. REV. 735, 745 (2008); Mike Koehler, *The Unique FCPA Compliance Challenges of Doing Business in China*, 25 WIS. INT'L L.J. 397, 410, 433–34 (2007).

⁸⁸ See Deloitte, *Fortifying Anti-Corruption*, *supra* note 86, at 42 (finding fifty-five percent of respondents felt more employee training was needed).

⁸⁹ See *id.*

⁹⁰ Timothy W. Schmidt, Note, *Sweetening the Deal: Strengthening Transnational Bribery Laws Through Standard International Corporate Auditing Guidelines*, 93 MINN. L. REV. 1120, 1133 (2009).

⁹¹ *Id.* at 1134.

⁹² R. CHRISTOPHER COOK, JONES DAY, *THE LEGAL OBLIGATION TO MAINTAIN ACCURATE BOOKS AND RECORDS IN U.S. AND NON-U.S. OPERATIONS* 5 (2006), available at http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=3210.

⁹³ Peter S. Goodman, *Common in China, Kickbacks Create Trouble for U.S. Companies at Home*, WASH. POST, Aug. 22, 2005, at A01.

sible to put a dollar figure on the cost of corruption.⁹⁴ However, according to ongoing research by the World Bank, the total value of bribes paid each year rose between 1994 and 2004 from \$50 billion to over \$1 trillion.⁹⁵ Some commentators blame increased privatization and deregulation.⁹⁶ Others argue increased access to the global market has also increased competition among multinationals, resulting in continued corruption in a number of industry sectors.⁹⁷ However, the more likely culprit is the culture of bribery itself. This culture is perpetuated by several features of the current legal landscape that when combined allow a certain level of “legal” corruption.

1. *Limited Resources*

One reason corruption continues is because the SEC and the DOJ have limited resources to regulate the ever-growing number of multinationals. Even with increased budgets and increased cooperation with other countries, they are still only able to bring proceedings against a small fraction of the companies subject to the FCPA. The DOJ, for example, brought criminal prosecutions against twenty-four corporations between 2003 and 2007.⁹⁸ There were sixteen DOJ prosecutions in 2008.⁹⁹ Put in context, however, this amounts to a little more than one quarter of a percent of the approximately 15,000 publicly held companies in the United States and even a smaller fraction of their foreign subsidiaries.¹⁰⁰ Thus, the DOJ and SEC have only reached the low hanging fruit of this deeply rooted problem.

Furthermore, the number of corporate fraud prosecutions declined in the waning years of the Bush administration.¹⁰¹ Over the last five years of the George W. Bush Administration, the DOJ experienced an eighteen percent

⁹⁴ See Transparency International, Frequently Asked Questions About Corruption, http://www.transparency.org/news_room/faq/corruption_faq#faqcorr4 (last visited Feb. 20, 2009).

⁹⁵ Press Release, World Bank, The Costs of Corruption (Aug. 8, 2004), available at <http://go.worldbank.org/LJA29GHA80>.

⁹⁶ See Bernard Black et al., *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000).

⁹⁷ See Thomas A. Leitko & David Kowalewski, *Industry Structure and Organizational Deviance: Multinational Corporations and Questionable Foreign Payments*, 9 CRIME, L. & SOC. CHANGE 127 (1985).

⁹⁸ See Shearman & Sterling LLP, *supra* note 44, at 3.

⁹⁹ See CHRISTOPHER MYERS, HOLLAND & KNIGHT, COMPLIANCE SERVICES ALERT, FCPA ENFORCEMENT UNDER THE OBAMA ADMINISTRATION: SIEMENS CASE SETS NEW PRECEDENT (2009), available at <http://www.hklaw.com/id24660/publicationid2578/returnid31/contentid53964/>.

¹⁰⁰ See Mergent Online, U.S. Company Data, available at <http://www.mergentonline.com/noticesCM.asp?contentscode=About>. The successor to Moody's Manual of Industrial and Miscellaneous Securities, this database lists 15,000 U.S. public companies (active and inactive) primarily from the NYSE, AMEX and NASDAQ exchanges. *Id.*

¹⁰¹ See Eviatar, *supra* note 71 (“[O]ur analysis shows 357 indictments in major corporate fraud cases between 2002 and 2005. But only 14 indictments were identified by the DOJ as significant corporate fraud cases in 2006. There have been only 12 major corporate fraud cases indicted so far in 2007.”).

decrease in the prosecution of white-collar crimes.¹⁰² Some commentators blame the decrease on a 2003 memorandum issued by then Deputy Attorney General Larry D. Thompson (the “Thompson Memo”).¹⁰³ The DOJ policy outlined in the Thompson Memo made it possible for corporate entities to avoid prosecution altogether in certain circumstances.¹⁰⁴ However, the decrease may also be linked to the decline in the number of federal prosecutors devoted to corporate crime investigations in U.S. Attorneys’ offices.¹⁰⁵ Yet the number of FCPA-specific investigations over the last two years appears to have been unaffected.¹⁰⁶ This may be due to the DOJ creating in 2007 a five-member FBI team dedicated to examining additional possible violations of the Act.¹⁰⁷

Regardless, corporate fraud prosecutions are expected to increase dramatically under the Obama Administration due to the prominent role corruption played in causing the global economic crisis.¹⁰⁸ President Barack Obama has emphasized the need for transparency in government.¹⁰⁹ Additionally, Attorney General Eric H. Holder has a strong background in white-collar crime investigations.¹¹⁰ However, if the number of mortgage fraud prosecutions increases as expected, it is unknown how long the FCPA would be allowed to consume the lion’s share of the DOJ and SEC’s limited resources.¹¹¹ On the other hand, the prospect of substantial fines and general

¹⁰² See Solomon Moore, *Push on Immigration Crimes Is Said to Shift Focus*, N.Y. TIMES, Jan. 12, 2009, at A1.

¹⁰³ Memorandum from Larry D. Thompson, Deputy Att’y Gen., to Heads of Dep’t Components, U.S. Att’ys (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf. The Thompson Memo lays out nine factors that prosecutors should consider in deciding whether or not to criminally prosecute a corporation. These factors include: (1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing within the corporation; (3) the corporation’s history of similar conduct; (4) the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate including, if necessary, the waiver of attorney-client and work product protection; (5) the existence and adequacy of the corporation’s compliance program; (6) the corporation’s remedial actions; (7) collateral consequences; (8) the adequacy of the prosecution of individuals; and (9) the adequacy of remedies such as civil or regulatory enforcement actions. *Id.*

¹⁰⁴ See Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159 (2008).

¹⁰⁵ See Eviatar, *supra* note 71 (stating the DOJ’s criminal fraud section lost two of its fifty-four attorneys between 2002 and 2007; however, the number of SEC accountants, lawyers and economists has risen by more than 1000 during the same time period).

¹⁰⁶ See *infra* notes 44–48 and accompanying text.

¹⁰⁷ See Nelson D. Schwartz & Lowell Bergman, *Payload: Taking Aim at Corporate Bribery*, N.Y. TIMES, Nov. 25, 2007, at B1.

¹⁰⁸ See Lauren J. Resnick & Brian K. Esser, *Enforcement of Anti-Corruption Act in Current Economic Times*, N.Y.L.J., Mar. 11, 2009, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202428953320#1>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV., JUSTICE DEPARTMENT NOW TRACKING CRIMINAL MORTGAGE FRAUD CASES (2008), available at <http://trac.syr.edu/tracreports/crim/200/> (suggesting an impending increase in mortgage fraud prosecutions).

anti-corruption publicity under the FCPA virtually ensures it will play a part in recovery efforts.

2. *Lack of Regulatory Guidance*

Despite the dramatic increase in the number of FCPA prosecutions over the last few years, the DOJ and SEC still have provided very little regulatory guidance. The vast majority of federal prosecutions have resulted in out-of-court settlements rather than trials. For example, in its study of the hundreds of corporate fraud convictions obtained by the Corporate Fraud Task Force during its first five years in existence, *The American Lawyer* found that seventy-six percent came through plea deals.¹¹² A similar study found that sixty-two percent of DOJ cases charging individual criminal defendants with foreign bribery schemes in violation of the FCPA were resolved by guilty pleas.¹¹³ Early settlement means similarly situated individuals and corporate defendants never get the opportunity to see if a court agrees with the regulators' reading of the statute. In addition, deferred prosecution agreements, nonprosecution agreements, and guilty pleas do not create binding precedent like a decision in a court of law.¹¹⁴ As a result, firms are free to conclude, rightly or wrongly, that the agencies are bluffing, overreaching, or both.

In addition, most of the prosecutions that have gone to trial have focused only on the most atrocious cases. This is understandable given the limited resources of the DOJ and SEC. However, as a practical matter, it gives the courts fewer opportunities to clarify the vaguer portions of the Act. Over time these unanswered questions risk undermining the legitimacy of the policies behind the FCPA.

To make matters worse, it has been over three decades since the FCPA's enactment, and the DOJ still has not implemented any regulations. In March 2008, the DOJ issued new internal guidelines on the selection and handling of independent compliance monitors.¹¹⁵ However, the only general compliance guidance that has been issued for the public is the Lay Person's Guide to the FCPA.¹¹⁶ To be fair, there is a longstanding DOJ procedure, codified as part of the Act by the 1988 Amendments, whereby any U.S. business can request an "opinion" from the DOJ to obtain the necessary legal clarification on FCPA matters.¹¹⁷ However, the DOJ review procedure does not con-

¹¹² Eviatar, *supra* note 71.

¹¹³ See GIBSON DUNN & CRUTCHER LLP, 2008 MID-YEAR FCPA UPDATE (2008), available at <http://www.gibsondunn.com/Publications/Pages/2008Mid-YearFCPAUpdate.aspx>.

¹¹⁴ See Erik Paulson, *Imposing Limits on Prosecutorial Discretion in Corporate Prosecution Agreements*, 82 N.Y.U. L. REV. 1434, 1460-62 (2007).

¹¹⁵ See Memorandum from Craig S. Morford, Acting Deputy Att'y Gen. to Heads of Dep't Components (Mar. 7, 2008), available at <http://www.usdoj.gov/dag/morford-useofmonitor-smemo-03072008.pdf>.

¹¹⁶ See U.S. Dep't of Justice, Lay Person's Guide to the FCPA, <http://www.usdoj.gov/criminal/fraud/docs/dojdocb.html> (last visited Apr. 16, 2009).

¹¹⁷ 15 U.S.C. §§ 78dd-1(e), -2(f) (2006). A "rebuttable presumption" is created by a favorable DOJ opinion that such conduct is legal under the FCPA. *Id.* §§ 78dd-1(e).

stitute legally binding precedent, and the opinions are often so narrowly tailored that they provide little general guidance. In addition, a requesting company must provide complete documentation of the problem.¹¹⁸ Given the aggressive tone of the DOJ prosecutors, and given the poor track record of self-reporting companies getting credit for coming forward, many companies have been understandably reluctant to turn over the records required to use these procedures and to run the risk of being the regulators' next target for enforcement. Since its inception, the DOJ has issued only fifty such opinions, including three in 2007 and three in 2008.¹¹⁹

a. Facilitating Payments Exception

Consequently, many long-standing ambiguities in the statute have yet to be resolved. The most notorious example is perhaps the "facilitating payment" exception in the Act.¹²⁰ The FCPA allows a small payment to a low-level foreign government official "to expedite or to secure the performance of a routine governmental action" to which the payor is already entitled.¹²¹ The statute gives several concrete examples of what is permissible, such as payments for "providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country."¹²²

However, it is still unclear whether informal payments at police checkpoints qualify as a facilitating payment. One issue is whether the payments are being made for a permissible purpose in potentially mixed motive situations.¹²³ Another issue is whether the payments exceed the permissible amount. Facilitating payments must be small, but the DOJ and SEC have consistently refused to set a clear dollar limit.¹²⁴ If a company voluntarily

¹¹⁸ Foreign Corrupt Practices Act Opinion Procedure, 28 C.F.R. §§ 80.3, 80.6, 80.7 (2009).

¹¹⁹ See U.S. Dep't of Justice, Opinion Procedure Releases, <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/> (last visited Apr. 16, 2009); U.S. Dep't of Justice, Review Procedure Releases, <http://www.usdoj.gov/criminal/fraud/fcpa/review/> (last visited Apr. 16, 2009). One of the most recent releases, Opinion Procedure Release No. 08-02, contains the most detailed guidance from the DOJ to date regarding successor liability in the context of mergers and acquisitions and sets forth the DOJ's expectations regarding post-closing diligence and remediation. U.S. Dep't of Justice, Opinion Procedure Release 08-02, <http://www.usdoj.gov/criminal/fraud/fcpa/opinion/2008/0802.html> (last visited Apr. 16, 2009).

¹²⁰ See 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b) (2006).

¹²¹ See *id.*

¹²² See *id.* §§ 78dd-1(f)(3). Other statutorily-enumerated examples include: (1) obtaining permits, licenses, or other official documents to do business; (2) processing governmental papers such as visas; (3) providing phone service, power, or water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or (4) "action of a similar nature." *Id.*

¹²³ See generally Rebecca Koch, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance*, 28 B.C. INT'L & COMP. L. REV. 379 (2005).

¹²⁴ U.S. DEP'T OF STATE, BATTLING INTERNATIONAL BRIBERY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION B83 (2004), available at <http://www.state.gov/documents/organization/36668.pdf>.

discloses a payment, the DOJ has complete discretion to determine whether it falls within the exception.¹²⁵ However, at least one DOJ official has publicly stated he had “never seen a lawful facilitating payment” and further contended that repetitive payments to the same customs official or group of officials are too substantial in the aggregate to qualify for the exception.¹²⁶ Finally, it is unclear whether and to what extent each facilitating payments must be documented.

In contrast, most other countries do not make an exception for facilitating payments and conclude that such payments only exacerbate the culture of bribery.¹²⁷ Nearly every country today has some sort of anti-bribery law which facilitating payments invariably violate.¹²⁸ In fact, the exception is not even provided for in the U.S. statute governing domestic bribery.¹²⁹ Thus, these payments must be made under the table. Consequently, a foreign official easily can ratchet up the amount of the facilitating payment or demand additional payments for illicit purposes. Nevertheless, there are no current plans to take the facilitating payments exception out of the U.S. statute. Ambiguities such as these give the agencies maximum leverage to prosecute their cases but wreak havoc on corporate compliance programs.

b. Gifts and Hospitality Expenses

Another example of ambiguity is that the FCPA does not specify the procedures that businesses must use to maintain their records; rather, it requires issuers to keep records in “reasonable detail.”¹³⁰ In 1988, the FCPA was amended to define “reasonable detail” to mean “such level of detail . . . as would satisfy prudent officials in the conduct of their own affairs.”¹³¹ However, this did not clarify much. Some companies take this “prudent man” standard to mean every disbursement from petty cash to a foreign official must be documented to reflect the name of the recipient and business purpose; most do not.¹³²

At the same time, the 1988 Amendments also created an affirmative defense to FCPA prosecutions if the payment is a “reasonable and bona fide expenditure” directly related to “(A) the promotion, demonstration, or explanation of products or services; or (B) the execution or performance of a

¹²⁵ *See id.*

¹²⁶ Mark Mendelsohn, Criminal Fraud Section Deputy Chief, Dep’t of Justice, Address at the 2005 TRACE Member Forum (Oct. 2005). *See also* GIBSON DUNN & CRUTCHER LLP, *supra* note 46 (reporting that Mendelsohn advised those attending a 2008 FCPA conference that simply because the statute contains the exception does not mean that the DOJ encourages such payments as a good business practice).

¹²⁷ *See* Alexandra Wrage & Matthew Vega, *Small Bribes Buy Big Problems*, ACC DOCKET, Sept. 2007, at 102.

¹²⁸ *See id.*

¹²⁹ *See* 18 U.S.C. § 201 (2006).

¹³⁰ Securities Exchange Act, § 13(b)(2)(A), 15 U.S.C. § 78m(b)(2)(A) (2006).

¹³¹ Securities Exchange Act, § 13(b)(7), 15 U.S.C. § 78m(b)(7) (2006).

¹³² *See* Cook, *supra* note 92, at 3.

contract with a foreign government.”¹³³ Many companies offer small gifts to foreign officials as good-will gestures or tokens of their appreciation. It is also customary for companies to show foreign officials hospitality during a formal or informal visit. Companies have tried a variety of ways to keep these gifts and hospitality expenses within the boundaries of this amorphous affirmative defense. One company, for example, recognizes that offering a light breakfast or refreshments to customs officials to expedite their inspection of shipments may constitute facilitating payments if the officials are engaged in routine governmental action and document it as they would cash payments.¹³⁴ However, most of the time, there is no quid pro quo intended by acts of hospitality; therefore, companies generally categorize meals, refreshments and other business courtesies as reasonable business expenses.¹³⁵ However, by its terms, the FCPA’s “reasonable business expense” defense only applies when the company promotes, demonstrates or explains its products or services.¹³⁶ If there is no formal business presentation and it is merely a routine visit or pure entertainment, a company is hard pressed to pigeon-hole the expense. Most likely, “gifts and hospitality” constitute a third, unwritten exception to the FCPA anti-bribery provisions not yet officially recognized by the DOJ or SEC.

The other problem is that corporate hospitality can quickly go well beyond coffee and donuts. Such expenses typically include travel, lodging, business meals, gifts with the company logo, and local entertainment. However, hosting a high-ranking dignitary or head of state with a large entourage can cost a company tens of thousands of dollars. To curb abuses, in recent years, the DOJ has targeted certain expenses for investigation and/or prosecution, such as use of the corporate jet or side trips to Disney World.¹³⁷ However, such seemingly random enforcement efforts do little to define the parameters for in-house compliance teams.

To make matters worse, local laws are all over the board when it comes to gifts and hospitality expenses. In Japan, for example, a bribe can include anything of value since the Government Employees’ Logic Law was enacted in April 2000.¹³⁸ Taking a government official out for a simple golf outing or even for a meal is now probably a violation of the law and associated regula-

¹³³ 15 U.S.C. §§ 78dd-1(c)(2), 78dd-3(c)(2), 78dd-3(c)(2) (2006).

¹³⁴ See generally FEDEx, CODE OF BUSINESS CONDUCT & ETHICS, at 13 (2007), available at <http://ir.fedex.com/downloads/code.pdf>.

¹³⁵ See, e.g., LOCKHEED MARTIN, CODE OF ETHICS & BUSINESS CONDUCT, at 17–21, available at <http://www.lockheedmartin.com/data/assets/corporate/documents/ethics/setting-the-standard.pdf>.

¹³⁶ 15 U.S.C. §§ 78dd-1(c)(2), 78dd-3(c)(2), 78dd-3(c)(2) (2006).

¹³⁷ See, e.g., Press Release, Dep’t of Justice, Lucent Technologies Inc. Agrees to Pay \$1 Million Fine to Resolve FCPA Allegations (Dec. 21, 2007), available at http://www.usdoj.gov/opa/pr/2007/December/07_crm_1028.html (alleging Lucent paid for 315 trips for Chinese government officials involving primarily sightseeing, entertainment, and leisure, including trips to Disneyland and the Grand Canyon).

¹³⁸ See Jim Bullings, The Curse of Corruption: Anti-corruption Law in the Asia Pacific Region (Sept. 17, 2008) (unpublished manuscript, on file with Harvard Law School library).

tions.¹³⁹ However, giving expensive gifts for different occasions, such as certain holidays, birthdays, and weddings, are an expected part of Japanese business culture.¹⁴⁰ Balancing these conflicting legal and cultural rules can be challenging, especially for companies doing business in several countries.

3. *Jurisdictional and Sovereignty Difficulties*

The extent to which the United States can effectively regulate transnational bribery is also limited by jurisdictional and sovereignty concerns.¹⁴¹ Section 401 of the Restatement (Third) divides jurisdiction into three categories: jurisdiction to adjudicate, jurisdiction to prescribe, and jurisdiction to enforce.¹⁴²

All three categories pose unique challenges with respect to the FCPA.¹⁴³ Jurisdiction to adjudicate deals with the authority of U.S. courts to subject persons to its judicial process, whether in civil or criminal proceedings. This choice of forum issue is particularly problematic for FCPA actions because foreign subsidiaries, agents, and employees overseas are the most likely facilitators of bribery overseas. There is general consensus that the same jurisdictional principles and due process concerns applied to domestic defendants in the United States should be applied to foreign defendants.¹⁴⁴ This means for in personam jurisdiction, or jurisdiction to adjudicate, the defendant must have “minimum contacts” with the forum state.¹⁴⁵ The minimum contacts must satisfy both the jurisdictional statutes and constitutional due process “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”¹⁴⁶

The constitutional standard is generally satisfied where the defendant purposefully avails itself of the forum state or where the defendant should otherwise reasonably anticipate the possibility of defending a suit in the forum.¹⁴⁷ U.S. companies and U.S. issuers are usually found to have done so

¹³⁹ *See id.*

¹⁴⁰ *See generally* C. Raj Kumar, *Corruption in Japan—Institutionalizing the Right to Information, Transparency, and the Right to Corruption-Free Governance*, 10 *NEW ENG. J. INT’L & COMP. L.* 1 (2004).

¹⁴¹ *See* U.S. CONST. art. III, § 2 (requiring minimal diversity); 28 U.S.C. § 1332(a) (2005) (requiring complete diversity); *Strawbridge v. Curtiss*, 7 U.S. 267 (1806). *See generally* H. Lowell Brown, *The Extraterritorial Reach of the U.S. Government’s Campaign Against International Bribery*, 22 *HASTINGS INT’L & COMP. L. REV.* 407, 463–64 (1999).

¹⁴² *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 401 (1987).

¹⁴³ Brown, *supra* note 141 at 418–69.

¹⁴⁴ *See In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999) (requiring both subject matter jurisdiction and in personam jurisdiction over foreign defendants).

¹⁴⁵ *See Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 421 (1987).

¹⁴⁶ *Int’l Shoe Co.*, 326 U.S. at 316.

¹⁴⁷ *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297–98 (1980) (suggesting that selling into the stream of commerce would have supported jurisdiction over the out-of-state manufacturer “serv[ing], directly or indirectly, the market for its product in the other state” if the consumer in the case had been injured where she bought the vehicle opposed to where she took it).

when they incorporate in the United States or when their principal place of business is here and they enjoy the benefits and protections of U.S. laws. However, the Supreme Court is still sharply divided over the extent to which a foreign corporation or subsidiary without any ties to the United States other than the fact that it placed its goods in the “stream of commerce” satisfies purposeful availment—particularly in the international context.¹⁴⁸

Even assuming the constitutional standard can be met in a FCPA action, a statutory basis for jurisdiction must also be established. This so-called jurisdiction to prescribe deals with the authority of the United States to make its laws applicable to particular persons or activities.¹⁴⁹ Given that the FCPA involves bribery overseas, the question arises which nation’s laws should be binding on the activities or persons involved. Congress and the regulators have addressed this choice of law problem utilizing three of the four bases for prescriptive jurisdiction set out in section 402: nationality, conduct, or location within a nation’s territory and effects within its territory.¹⁵⁰

The anti-bribery provisions of the FCPA, as amended, set forth different jurisdictional principles for different categories of covered persons.¹⁵¹ First, U.S. companies and U.S. citizens working abroad for either a U.S. or non-U.S. company are covered on the basis of the nationality principle.¹⁵² Foreign corporations registered in the United States are also subject to suit in the United States on that basis.¹⁵³ The 2008 criminal internal controls charges the DOJ brought against the German conglomerate Siemens AG, for example, were predicated on the fact that Siemens AG was listed on a U.S. stock exchange.¹⁵⁴

However, foreign companies that are not currently U.S. issuers and their officers, directors, employees, agents, and stockholders who are foreign nationals and not residents in the United States, are covered only if they engaged in prohibited conduct while on U.S. soil or using some instrumentality of interstate commerce.¹⁵⁵ This is based on the jurisdictional principle known as territoriality. For example, the SEC appears to have based jurisdiction for its complaint against Siemens AG not only on the fact that Siemens issued securities in the United States, but also on Siemens’ use of correspon-

¹⁴⁸ See *Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 114 (1987) (holding “unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders”).

¹⁴⁹ *Id.*

¹⁵⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987).

¹⁵¹ 15 U.S.C. §§ 78dd-1(g), 78dd-2(i), 78dd-3 (2006).

¹⁵² See *id.* §§ 78dd-1(g), 78dd-2(i).

¹⁵³ See *id.* §§ 78dd-1, -2. “Domestic concerns” include not only U.S. citizens, nationals and residents, and any type of business entity organized under U.S. law, but also permanent resident aliens (i.e., “green card” holders), companies with their principal places of business in the United States but organized elsewhere, and officers, directors, stockholders, employees, and agents of covered entities regardless of their nationalities. See *id.* § 78dd-2(h)(1).

¹⁵⁴ See Siemens Press Release, *supra* note 52.

¹⁵⁵ See 15 U.S.C. § 78dd-3 (2006).

dent bank accounts in the United States to make certain corrupt payments.¹⁵⁶ Similarly, the DOJ's criminal bribery charges against the foreign subsidiaries of Siemens AG—Siemens Argentina, Siemens Bangladesh, and Siemens Venezuela—expressly alleged the corrupt payments intended for high-ranking foreign officials were made to or from purported business consultants using U.S. bank accounts.¹⁵⁷

Despite the huge settlements in the Siemens cases, these two jurisdictional principles can limit the DOJ's and SEC's ability to effectively enforce the FCPA's anti-bribery laws against "foreign concerns," including subsidiaries of U.S. parent companies or their foreign officers, employees, agents, or other third-party intermediaries.¹⁵⁸ When the FCPA was first passed, congressional amendments to apply the FCPA directly to foreign subsidiaries of U.S. companies were rejected because of concerns about "the inherent jurisdictional, enforcement, and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill."¹⁵⁹

To get around these jurisdictional limits, the DOJ and SEC have employed an unpopular regulatory tactic: holding a U.S. parent company directly liable for the acts of foreign subsidiaries (or joint ventures) acting outside the United States to the extent the parent company has authorized, directed, or committed an act "in furtherance of" bribery activity.¹⁶⁰ The Act explicitly sets forth common law agency principles and implicitly makes generalized assumptions about the parent-subsidiary relationship to obtain jurisdiction over the parent, or principal, in an FCPA matter.¹⁶¹

In 2004, the SEC relied on this reading of the Act to force Schering-Plough to pay a \$500,000 civil penalty for failing to properly record or prevent a payment that its Polish subsidiary made to a charitable foundation headed by a Polish governmental official.¹⁶² The SEC alleged that the subsidiary's books and records did not accurately reflect the charitable payments and that Schering-Plough's internal controls were inadequate to prevent or detect the payments in question.¹⁶³

In 2005, the SEC brought a similar enforcement action against Monsanto Company for the misconduct of its Indonesian subsidiary.¹⁶⁴ The SEC

¹⁵⁶ See Press Release, Sec. Exch. Comm'n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008) (including copy of SEC complaint), available at <http://sec.gov/news/press/2008/2008-294.htm>.

¹⁵⁷ See Siemens Press Release, *supra* note 52.

¹⁵⁸ See *Dooley v. United Tech. Corp.*, 803 F. Supp. 428, 439 (D.D.C. 1992) (holding foreign subsidiaries are not covered by the FCPA).

¹⁵⁹ H.R. REP. NO. 94-831, at 14 (1977) (Conf. Rep.).

¹⁶⁰ See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2006).

¹⁶¹ *Id.* (stating that entities "acting on behalf of [the] issuer" can be liable).

¹⁶² See *SEC v. Schering-Plough Corp.*, Litig. Release No. 18,740, 82 SEC Docket 3732 (June 9, 2004).

¹⁶³ *Id.*

¹⁶⁴ *SEC v. Monsanto Co.*, Litig. Release No. 19,023, 84 SEC Docket 2284 (Jan. 6, 2005). See also *SEC v. Int'l Bus. Machines Corp.*, Litigation Release No. 16,839, 73 SEC Docket

and DOJ have also shown a willingness to pursue claims against foreign subsidiaries with or without the parent companies. For example, in *United States v. Syncor Taiwan, Inc.*¹⁶⁵ the SEC continued to prosecute the foreign subsidiaries even after the parent companies were allowed to enter into a deferred prosecution agreement.

Regulators also use a vicarious liability provision in the FCPA to hold U.S. companies liable for knowing about corrupt payments by a third-party foreign intermediary.¹⁶⁶ To be held liable, the U.S. company must be “aware that such person is engaging in such conduct, that such circumstances exists, or that such result is substantially certain to occur; or . . . such person has a firm belief that such circumstances exists or that such result is substantially certain to occur.”¹⁶⁷ Sales agents and similar representatives are the most common wrongdoers triggering this liability. In March 2005, for example, Titan Corporation settled an SEC enforcement action for \$28.5 million based in part on improperly recorded illicit payments to sales agents in Africa and the company’s failure to implement an FCPA policy or compliance program throughout its global operations.¹⁶⁸ This risk of liability also extends to distributors.¹⁶⁹

The 1988 Amendments changed the scienter requirement for vicarious liability from a more general “reason to know” standard to the “knowing” standard.¹⁷⁰ The change was intended to prevent companies from adopting a head-in-the-sand approach to the activities of their foreign agents by engaging in “willful blindness.”¹⁷¹ Although the standard is still somewhat ambiguous, a person is deemed to “know” that a payment to a third party will be used to bribe a foreign official, even where the company does not have actual knowledge of a payment, if the person is aware of applicable “red

3049 (Dec. 21, 200) (although the parent had no knowledge of and did not participate in the allegedly improper transaction, it was forced to pay a \$300,000 civil penalty for failing to ensure that its wholly-owned Argentinean subsidiary accurately maintained its books and records).

¹⁶⁵ No. 02-CR-1244-ALL (C.D. Cal., filed Dec. 4, 2002); *SEC v. Syncor Int’l Corp.*, Litig. Release No. 17,887, 2002 WL 31757645 (Dec. 10, 2002) (Syncor Taiwan, a foreign subsidiary, paid the SEC a \$2 million fine to settle a criminal FCPA charge).

¹⁶⁶ 15 U.S.C. § 78dd-1(f)(2) (2006).

¹⁶⁷ *Id.*

¹⁶⁸ *SEC v. Titan Corp.*, Litig. Release No. 19,107, 84 SEC Docket 3413 (Mar. 1, 2005). The company had a presence in more than sixty countries where it employed more than 120 agents and consultants. *Id.*

¹⁶⁹ *See, e.g.*, *GE InVision Inc.*, Litig. Release No. 51,199 (Feb. 14, 2005); *SEC v. GE InVision Inc.*, Litig. Release No. 19,078 (Feb. 14, 2005) (charging GE InVision, Inc. with making an improper payment to Thai customs officials to land a multi-million dollar airport screening equipment deal through its distributor in China); *United States v. DPC (Tianjin) Co.*, No. CR 05-482 (C.D. Cal., filed May 20, 2005); *In re Diagnostic Prods. Corp.*, SEC Admin. Proc. File No. 3-11933 (May 20, 2005) (held liable for commission payments made both directly and indirectly through distributors to physicians and lab personnel in Chinese state-owned hospitals).

¹⁷⁰ 15 U.S.C. §§ 78dd-1(a)(3), -2(a)(3) (1977) (amended 1988).

¹⁷¹ H.R. REP. NO. 100-576, at 920 (1988) (Conf. Rep.).

flags”¹⁷² or is aware of “a high probability of the existence of such circumstance.”¹⁷³

Finally, the SEC and DOJ have taken the boundaries of personal jurisdiction to the limit by invoking the “effects” test to prosecute third-party intermediaries directly, without the requisite territorial nexus. The Supreme Court first embraced the “effects” test in *Calder v. Jones*, holding that jurisdiction was proper when a defendant acting outside a state caused harm within a state.¹⁷⁴ This “effects” test was then applied extraterritorially by the Supreme Court in *Hartford Fire Insurance Co. v. California* to the Sherman Act if the foreign conduct “was meant to produce and did in fact produce some substantial effect in the United States.”¹⁷⁵ In the 2007 case against Baker Hughes, Inc. and Roy Fearnley, the SEC and DOJ brought a joint enforcement action against the company’s accountant, the Indonesian affiliate of KPMG, and one of its named partners, for allegedly facilitating the bribe paid to an Indonesian tax official.¹⁷⁶ The regulators apparently based jurisdiction on the fact that the defendants’ actions were intended to cause an “effect” in the United States.¹⁷⁷ However, there are practical limits on the use of the “effects” test; namely, it is unlikely to apply in petty bribery situations where there is little economic impact or where the effect cannot be traced back to the United States.

Finally, even if a court has jurisdiction to adjudicate, the United States must be careful not to take any enforcement action that would violate an-

¹⁷² See U.S. Dep’t of Justice, Lay Person’s Guide to the FCPA, *supra* note 116. DOJ has identified several factors as “red flags” warranting further investigation to rule out any possible FCPA violations including: (1) a history of corruption in the country in question; (2) unusually high commissions or unusual payment patterns or financial arrangements; (3) the agent or venture partner is related to a government official or the agent’s company is owned in part by a government official or his family, or has been recommended by an official; (4) a refusal by the venture partner or representative to certify that they will not make payments or cause the principal to violate the FCPA; (5) the agent or venture partner has an apparent lack of qualifications or resources to perform the work agreed upon; or (6) there is a lack of transparency in accounting and expense records, or the agent or venture partner has requested that the company prepare false invoices or any other type of false documentation. *Id.*

¹⁷³ 15 U.S.C. § 78dd-2(h)(3) (2006). To limit the risk of vicarious liability, most multinationals have begun conducting due diligence investigations before using any foreign intermediaries. As a practical matter, it is very difficult to obtain useful information to distinguish good and bad foreign agents. Companies are advised to check with their local U.S. embassies. Alternatively, local law firms and international investigation firms can provide comprehensive background checks on foreign agents, but the costs of these services are often prohibitive. One recent solution to the problem has been the creation of TRACE International, which certifies third-party intermediaries for its member companies. See Trace International, Inc., <http://www.traceinternational.org> (last visited Mar. 1, 2009).

¹⁷⁴ 465 U.S. 783, 789 (1984).

¹⁷⁵ 509 U.S. 764, 796 (1993) (citing *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986); *United States v. Aluminum Co. of America*, 148 F.2d 416, 444 (2d Cir. 1945)) (applying the Sherman Act to foreign companies acting abroad “if they were intended to affect imports and did affect them”).

¹⁷⁶ SEC v. Baker Hughes, Inc. and Roy Fearnley, No. H-07-1408 (S.D. Tex., filed Apr. 26, 2007); SEC v. Baker Hughes Inc., Litig. Release No. 20,094, 90 SEC Docket 1369 (Apr. 26, 2007).

¹⁷⁷ See *id.*

other state's sovereignty. Therefore, jurisdiction to enforce deals with the authority of the United States to enforce its laws on a person residing in another country. For example, absent a bilateral or multilateral agreement, it would violate international law for the United States to send its agent into another country's territory in order to arrest a person convicted of criminal offence in the United States.¹⁷⁸ Recent efforts to create a Hague Convention obligation to enforce a judgment entered in another country have failed.¹⁷⁹

On the other hand, the application of U.S. regulatory policies to events or persons overseas is only problematic when there is a direct clash between sovereigns because of differing governmental policies.¹⁸⁰ Fortunately, nearly every country has a national policy prohibiting bribery, so FCPA policy is unlikely to countervene another country's policies.¹⁸¹ Furthermore, there are numerous international agreements obligating countries to assist in the cross-border prosecution of cases.¹⁸²

Absent the benefit of a treaty, a U.S. judgment will be governed by a foreign court's general rules of recognition and enforcement. Normally, this means that a new action must be brought on the judgment in order to obtain recognition, with the resulting local judgment of recognition being the one for which enforcement is sought.¹⁸³ Otherwise, the judgment is generally only enforceable to the extent the foreign defendant owns assets in the United States.

D. *Alternative Approaches to Preventing Transnational Bribery*

There have been several alternative approaches to the United States' transnational regulatory efforts to combat foreign bribery at all levels. For instance, there has been a ten year campaign to internationalize the policies behind the FCPA, which has been quite successful.¹⁸⁴ On the opposite end of the public-private continuum, individual corporations have voluntarily adopted a code of business ethics and are committed to monitoring their own compliance.¹⁸⁵ Finally, the approach that has the most potential for attacking transnational bribery, especially smaller bribes, is the recent explosion of private civil litigation predicated on FCPA violations.

¹⁷⁸ See generally Maier, *supra* note 22, at 296.

¹⁷⁹ See Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 LAW & CONTEMP. PROBS. 109, 127 n.115 (2007).

¹⁸⁰ RESTATEMENT (SECOND) OF CONFLICTS OF LAWS (1971); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (1987).

¹⁸¹ Wrage & Vega, *supra* note 127.

¹⁸² For a discussion of these international agreements, see *supra* notes 187-91 and accompanying text.

¹⁸³ See generally Linda Silberman, *Transnational Litigation: Is There a "Field"?* A Tribute to Hal Maier, 39 VAND. J. TRANSNAT'L L. 1427, 1435 (2006).

¹⁸⁴ See *supra* notes 174-177 and accompanying text.

¹⁸⁵ See discussion of voluntary codes of business conduct *infra* Part II(D)(2).

1. *International Efforts*

This Article advocates using SOX extraterritorially to further U.S. anti-bribery law abroad. However, this should not be construed as a chauvinistic attempt to enable the United States to police the world. On the contrary, this approach is consistent with the numerous international conventions and other instruments prohibiting transnational bribery. Although the conventions set out general international standards, each member state is expected to unilaterally legislate and enforce its own national anti-bribery laws.¹⁸⁶ The first multilateral effort to establish guidelines for combating bribery was the Inter-American Convention Against Corruption, adopted by the Organization of the American States (the “OAS Convention”).¹⁸⁷ Since then there have been several other conventions or instruments evidencing a global standard prohibiting bribery, including the OECD Convention,¹⁸⁸ several EU conventions,¹⁸⁹ the African Union Corruption Convention,¹⁹⁰ and most recently, the UNCAC.¹⁹¹

The UNCAC is the most comprehensive convention to date, with 140 signatories.¹⁹² Unlike the FCPA, the UNCAC does not explicitly provide an exception for facilitating payments.¹⁹³ It obligates state parties to implement

¹⁸⁶ The issue of whether the fight against corruption should be based on national policy enforced in national courts or a multilateral global policy enforced in some international forum is beyond the scope of this Article. Although global harmonization of anti-bribery policies are essential from an efficiency and compliance standpoint, this Article assumes that aggressive unilateral enforcement of national anti-bribery laws such as the FCPA best achieves that goal.

¹⁸⁷ Inter-American Convention Against Corruption, *opened for signature* Mar. 29, 1996, 35 I.L.M. 724. To date, there are thirty-four signatories to this convention. See OAS, Anti-corruption Portal of the Americas, Signatories, *available at* <http://www.oas.org/juridico/english/Sigs/b-58.html>.

¹⁸⁸ Convention on Combating Bribery, *supra* note 64.

¹⁸⁹ Criminal Law Convention on Corruption, *opened for signature* Jan. 27, 1999, Europ. T.S. No. 173; Civil Law Convention on Corruption, *opened for signature* Nov. 4, 1999, Europ. T.S. No. 174. To date, the Criminal Law Convention on Corruption has forty-nine signatories. See Transparency International Website, http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/coe_criminal_law__1. (last visited Apr. 2, 2009). The Civil Law Convention on Corruption has forty-two signatories. See Transparency International Website, http://www.transparency.org/global_priorities/international_conventions/conventions_instruments/coe_civil_law. (last visited Apr. 2, 2009). Finally, forty-six member states have joined the Group of States Against Corruption (“GRECO”), which focuses on capacity building. See Council of Europe, GRECO Members States, http://www.coe.int/t/dghl/monitoring/greco/general/members_en.asp (last visited Apr. 2, 2009).

¹⁹⁰ African Union Convention on Prevention and Combating Corruption, *opened for signature* July 11, 2003, 43 I.L.M. 5, *available at* http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf. For a comparative analysis of the African Union Convention, see generally Thomas R. Snider & Won Kidane, *Combating Corruption Through Int’l Law In Africa: A Comparative Analysis*, 40 CORNELL INT’L L.J. 691 (2007).

¹⁹¹ U.N. Convention Against Corruption, *supra* note 25.

¹⁹² U.N. Office on Drugs & Crime, Signatories to the U.N. Convention Against Corruption, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Mar. 13, 2009).

¹⁹³ See STUART H. DEMING, AM. BAR ASS’N, INTERNATIONAL PRACTITIONER’S DESKBOOK SERIES: THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS, at 118

a detailed set of measures to prevent, detect, and sanction corruption, including a private right of action.¹⁹⁴ Subtitled “Compensation for Damage,” Article 35 states, “Each State Party shall take such measures as may be necessary, in accordance with the principles of its domestic law, 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.”¹⁹⁵

The UNCAC also sets forth a framework for international cooperation in investigating and prosecuting cross-border cases.¹⁹⁶ Article 38 of the UNCAC states, “Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences.”¹⁹⁷ Because of such concerted efforts, the number of parallel foreign actions and investigations are increasing. In the case of Siemens, there was unprecedented coordination between U.S. and German authorities. Because most countries do not have the resources, however, foreign enforcement actions have been limited to only the most high-profile cases. The corruption at Siemens, for example, entailed more than \$1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East, and the Americas.¹⁹⁸ It tainted major projects, including the Iraqi Oil-for-Food Programme, the construction of a new Venezuelan rail system, and the production of a national identification card in Argentina.¹⁹⁹ Even in such extreme cases, public prosecutors tend to suffer from “bandwagon syndrome” whereby they prefer to wait and see if other countries have initial success before prosecuting a potential defendant. For example, it was only after Germany initiated its enforcement action, which received a tremendous amount of media coverage, that other countries including the United States, Bangladesh, China, Greece, Hungary, Indonesia, Israel, Italy, Liechtenstein, Ni-

(2005). However, the Commentaries of the OECD Convention do carve out an exception for small facilitation payments. *Id.* at 391. Likewise, the Juridical Committee Report accompanying the OAS Convention implies party states may be able to exclude facilitating payments from their implementing legislation. *Id.* at 103.

¹⁹⁴ *Id.*

¹⁹⁵ U.N. Convention Against Corruption, *supra* note 25.

¹⁹⁶ See Wrage & Vega, *supra* note 127.

¹⁹⁷ U.N. Convention Against Corruption, *supra* note 25, at art. 38 (“Cooperation between national authorities”). The official position of the United States, however, is that its existing laws satisfy the mandate. See Report of the U.N. Office of Drugs & Crime, Ad Hoc Comm. for the Negotiation of a Convention Against Corruption, *Addendum, Interpretative Notes for the Official Record (travaux préparatoires)*, n.38, U.N. Doc. A/58/422/Add.1 (Oct. 7, 2003) (stating countries are free to “determine the circumstances under which it will make its courts available in such cases”).

¹⁹⁸ See Siemens Press Release, *supra* note 52.

¹⁹⁹ See Siemens AG Lawyers View \$800 Million Fine as a Victory, <http://legaltimes.typepad.com/blt/2008/12/siemens-ag-lawyers-view-800-million-fine-as-a-victory-.html> (Dec. 16, 2008, 11:01 EST).

geria, Norway, Russia, and Switzerland began investigating Siemens.²⁰⁰ Some countries, such as Venezuela, did not begin their investigations of Siemens AG until after the large settlements extracted by German and U.S. authorities were announced.²⁰¹

Similarly, parallel investigations of several major companies implicated in the defunct U.N. Iraq Oil-for-Food Programme are being actively conducted by the United States, the United Kingdom's Serious Fraud Office ("SFO"), Australia, Denmark, India, France, Sweden, and South Africa.²⁰² Italy has initiated preliminary court proceedings against a number of the companies involved and their employees, while Switzerland has already imposed \$17 million in fines against eight unnamed companies.²⁰³

Even with widely accepted international anti-bribery standards in place, concurrent enforcement of various national laws is still needed in countries where bribery laws exist but are not being enforced. This helps prevent multinationals from forum shopping and ensures that they adopt a greatest common denominator approach to compliance.

2. *Voluntary Codes of Business Conduct*

Difficulties enforcing the FCPA, especially at lower echelons, are not unique to the regulation of bribery. The inability of regulators in the United States and elsewhere to solve social problems associated with globalization has triggered a groundswell of support for voluntary corporate efforts, in lieu of or in addition to mandatory measures. Dubbed "corporate social responsibility" ("CSR"), this international movement covers a wide range of moral issues arising from commercial activities including child labor, environmental, and consumer safety issues.²⁰⁴

At its core, CSR requires the corporation to support the fundamental concept of being a good corporate citizen and to voluntarily adopt high ethical standards. Most multinationals today acknowledge the need to address ethical issues such as foreign bribery in their corporate policies and procedures. Although CSR is not mandated by law, section 406 of SOX requires issuers to disclose whether they have codes of ethics applicable to senior financial officers.²⁰⁵ This has resulted in a proliferation of codes of conduct with specific FCPA compliance provisions. This trend was no doubt also

²⁰⁰ See *Shearman & Sterling LLP*, *supra* note 44.

²⁰¹ See Associated Press, *Venezuelan Lawmakers to Investigate Siemens Bribes*, INT'L BUS. TIMES, Dec. 19, 2008, <http://www.ibtimes.com/articles/20081219/venezuelan-lawmakers-to-investigate-siemens-bribes.htm>.

²⁰² See GIBSON DUNN & CRUTCHER LLP, *supra* note 46.

²⁰³ *Id.* See also GIBSON DUNN & CRUTCHER LLP, *supra* note 113.

²⁰⁴ See generally Zerk, *supra* note 24.

²⁰⁵ 15 U.S.C. § 7264(a) (2006). Cf. NYSE EURONEXT, Listed Company Manual § 303A (2009), available at http://www.nyse.com/Frameset.html?nyseref=http%3A//www.nyse.com/regulation/nyse/1182508124422.html&displayPage=/lcm/lcm_section.html; NASDAQ OMX GROUP, INC., NASDAQ Stock Market Rules § 4350(m), IM-4350-7 (2009), available at <http://nasdaq.cchwallstreet.com> (requiring companies that wish to maintain their listings on these

encouraged by the Federal Sentencing Guidelines for Corporations which offer companies who implement an “effective compliance program” a way to mitigate any penalties or avoid liability altogether for violations of the Act.²⁰⁶

The fear of negative publicity is also a significant factor in a company’s decision to adopt a policy prohibiting bribery. In-house ethics training often boils the Code of Business Conduct policy down to what is known as the “Newspaper Test,” which asks, “if what you are considering doing was accurately reported on the front page of tomorrow’s newspaper, would you be embarrassed?” If the answer is “yes,” then employees are told, “don’t do it.” Yet, in the hectic pace of day-to-day operations, fear of embarrassment tomorrow is easily ignored, especially where there is a preexisting culture of bribery. This problem is exacerbated by the fact that many companies have failed to extend ethics training to their overseas personnel because of the decentralization of the workforce, language barriers, the lack of reliable technical infrastructure, and the prevalence of independent contractors or agents rather than employees.²⁰⁷

From a moral standpoint, corporate ethics training may be the only long-term solution to the culture of bribery problem in international commerce. However, it is difficult to assess the effectiveness of these self-policing measures in their own right. For example, if push-back is coming from the top rather than the bottom of the employment ranks, written policies will be almost meaningless unless the entry level employee who refuses to violate these policies or the law has some legal recourse. In some states, written company policies, such as a code of business conduct, may be the basis for a lawsuit for breach of implied contract.²⁰⁸ However, many states allow employers to avoid liability for breach of contract by using prominent disclaimers stating that the policies should not be construed as constituting an employment contract.²⁰⁹

3. *Private Civil Litigation*

When it comes to liability for foreign corruption, most of the attention has been focused on prosecutions by the DOJ or SEC. However, recently there has been a sharp increase in the number of private lawsuits based on

exchanges to implement codes of ethics that protect from retaliation employees who report alleged violations).

²⁰⁶ U.S. SENTENCING GUIDELINES MANUAL § 8F1.1 cmt. (2004). Even though the guidelines are no longer mandatory after the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), prosecutors and companies both continue to rely on them to set the standard.

²⁰⁷ See *SEC v. David M. Pillor*, Litig. Release No. 19,803, 88 SEC Docket 2206 (Aug. 15, 2006).

²⁰⁸ See, e.g., *Harper v. Winston County*, 892 So. 2d 346, 351 (Ala. 2004) (citing *Hoffman-LaRoche, Inc. v. Campbell*, 512 So. 2d 725, 728 (Ala. 1987)).

²⁰⁹ See *id.*

FCPA violations.²¹⁰ Given the limited resources of U.S. agencies to regulate multinationals effectively and the unwillingness or inability of their foreign counterparts to do so, there is a legitimate role for private attorneys general to play in convincing multinationals that it makes good business sense to be ethical. The real driving force to get companies to act ethically at the grass-roots level will not come from regulations or corporate policy statements alone. The greater impetus may, in fact, come from private litigants.

There are a number of situations in which a private litigant may suffer damages as a result of another person or entity bribing or attempting to bribe foreign officials. For example, investors might claim they suffered financial losses as a result of a business artificially inflating its stock price with revenues obtained with bribes. A competitor might lose foreign business opportunities that it would otherwise have obtained because another company paid bribes to foreign government officials. Finally, employees or contractors could be terminated for refusing to participate in, or to cover up, illegal bribery of foreign officials at even the lowest ranks, as depicted in the introduction to this Article.

Impact litigation has historically played an important role in furthering public policy in areas such as civil rights, criminal justice, environmental protection, and consumer rights, particularly when aimed at structural reform.²¹¹ Most of the laws in these areas are enforced not only by agencies but also by the courts at the request of private parties or public interest lawyers.²¹² Although today's federal courts are arguably less receptive to being change agents than they were in the 1960s and 1970s, other international forums will address the most pressing moral issues facing the global community if U.S. courts fail to do so.

One international forum gaining experience with bribery allegations is the World Bank's International Center for Settlement of Investment Disputes ("ICSID"). The first ICSID case, *Holiday Inns v. Morocco*, involved allegations that an investment in a joint venture to build and operate hotels was procured by bribery.²¹³ In 2003, the German company JV Batista alleged government extortion in its contract dispute over the construction of the new Ninoy Aquino International Airport terminal in the Philippines.²¹⁴ More recently, ICSID announced in the matter of *World Duty Free v. Republic of Kenya* its first arbitral decision based on a finding of a payment of a cash

²¹⁰ Prince, *supra* note 58, at 22-24 (analyzing the most noteworthy examples of FCPA suits and concluding "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.").

²¹¹ See Owen M. Fiss, *The Supreme Court 1987 Term, Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

²¹² See Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 253 (1976).

²¹³ ICSID (W.Bank) Case No. ARB/72/1 (Jan. 13, 1972).

²¹⁴ Fraport AG Frankfurt Airport Servs. Worldwide v. Republic of the Philippines, ICSID (W. Bank) Case No. ARB/03/25 (Oct. 9, 2003).

bribe to a head of state.²¹⁵ The investor brought the proceeding after his contract to run duty free shops at Nairobi and Mombasa airports was canceled.²¹⁶ The contract was deemed unenforceable and the case was dismissed after he admitted gaining his contract by bribing then-President Moi.²¹⁷

Thus, it seems likely that private international law will continue to significantly affect public anti-bribery policies. The question is: what role will the U.S. courts have in deciding the outcome of such private litigation? Plaintiffs in U.S. courts enjoy the right to broad discovery tools including e-discovery under the 2006 amendments to the Federal Rules of Civil Procedure, which would help in gathering evidence in transnational litigation.²¹⁸ In addition, most foreign employees lack the financial means to sustain civil litigation against either locally incorporated or U.S. incorporated multinational components. This means that the “American Rule”—losers do not pay winners’ attorneys’ fees in the absence of specific legislation to the contrary—and the availability of contingency fees here especially attractive.²¹⁹ Other pro-plaintiff characteristics of the U.S. legal system include the possibility of bringing a class action under Federal Rule of Civil Procedure 23²²⁰ as well as the possibility of demanding a trial by a jury.²²¹ Plaintiffs also prefer the lower burden of proof in U.S. civil cases. Finally, U.S. law is easier to research in the event a foreign plaintiff needs a local court to recognize and enforce a U.S. judgment.²²²

Whether plaintiffs—foreign or domestic—can avail themselves of the advantages found in the U.S. legal system depends on the availability of a viable legal remedy. This is a fundamental threshold issue because there are some wrongs for which federal law does not provide a private remedy, sometimes referred to by courts as *damnum absque injuria*.²²³ However, private rights to recover damages for violations of U.S. regulations have been provided in several different areas of the law.²²⁴ Where Congress has provided rights-creating language, it is axiomatic that the primary purpose is to

²¹⁵ World Duty Free Co. v. Kenya, ICSID (W. Bank) Case No. ARB/00/7 (Oct. 4, 2006).

²¹⁶ *Id.*

²¹⁷ See Press Release, Freshfields Bruckhaus Deringer LLP, Freshfields Arbitration Team Wins Bribe Case for Republic of Kenya (Oct. 23, 2006), available at <http://www.freshfields.com/news/mediareleases/mediarelease.asp?id=1019>.

²¹⁸ See FED. R. CIV. P. 16(b)(3)(B)(iii), 26(a)(1)(A)(ii), 26(b)(2)(B), 26(f), 34(a)(1)(A), 34(b)(2)(D), 34(b)(2)(E)(ii), 45(a)(1)(C) & (D).

²¹⁹ See Ralph U. Whitten, *U.S. Conflict of Laws Doctrine and Forum-Shopping, International and Domestic*, 37 TEX. INT'L L.J. 559, 562 n.12 (2002).

²²⁰ FED. R. CIV. P. 23.

²²¹ FED. R. CIV. P. 38.

²²² See Louise Ellen Tietz, *Both Sides of the Coin*, 10 ROGER WILLIAMS U.L. REV. 1 (2004).

²²³ See BLACK'S LAW DICTIONARY 398 (8th ed. 2004) (defining *damnum absque injuria* as “[l]oss or harm that is incurred from something other than a wrongful act and occasions no legal remedy”).

²²⁴ See, e.g., Clean Water Act, 42 U.S.C. § 7604 (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (2006); Clayton Act, 15 U.S.C. § 15a (2006); False Claims Act, 31 U.S.C. § 3230 (2006); Consumer Privacy Act, 5 U.S.C. § 552a (2006).

permit or encourage persons to serve as surrogates for government prosecutors by bringing private suits for violations.²²⁵ Even when a citizen-prosecutor is seeking a private recovery, public policy is advanced. The next Part explores the extent to which private lawsuits have been used by stakeholders and competitors alike to hold multinationals accountable in U.S. courts for FCPA violations.

III. USING EXISTING PRIVATE RIGHTS OF ACTION

This Part addresses the claims and remedies that may be pursued by a private individual or entity who alleges damages due to acts of bribery or other violations of the FCPA. When the FCPA was first passed, the United States kept tight control over the evolution of anti-bribery law by refusing to create a private right of action under the FCPA.²²⁶ This was understandable because the FCPA was in its infancy, and the United States was the only country with such a law on the books. However, anti-bribery laws have now gained worldwide acceptance, as reflected in numerous international agreements and domestic laws modeled after the FCPA.²²⁷ Consequently, the judiciary has increasingly found ways to allow private attorneys general to enforce it.

Private rights of action can be found one of two ways. First, courts can recognize an implied private right of action under the FCPA. All of the courts that have considered this approach so far have rejected it.²²⁸ However, it may be time to revisit this issue. Two recent Supreme Court decisions implying a private right of action under two other federal statutes that protect employees against retaliation provide support for the argument that a private retaliation claim may be implied under the FCPA as well.²²⁹ Second, courts can allow alleged FCPA violations to be used as a predicate for a civil action under other existing laws. While a number of cases have been brought using various federal and state legal theories, these private lawsuits have done little to advance FCPA law for a number of different reasons. Both of these approaches are explored more fully below.

A. *An Implied Private Right of Action Under the FCPA*

The first place to look for a private remedy under the FCPA is between the lines. The Supreme Court has stated federal courts must “adjust their

²²⁵ See *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (distinguishing the private right of action to enforce Title VII of the Civil Rights Act of 1964 from the disparate-impact regulations promulgated under Title VI, which the Court held did not grant a private right of action to enforce).

²²⁶ See *infra* notes 232, 242 and accompanying text.

²²⁷ See discussion of international efforts, *supra* Part II, Section D(1).

²²⁸ See *infra* notes 232, 242, and accompanying text.

²²⁹ See *infra* notes 260-261 and accompanying text.

remedies so as to grant the necessary relief where federally secured rights are invaded.”²³⁰ With respect to implying a right under the FCPA, however, only two appellate courts have addressed the issue, and both concluded the requirements could not be met.²³¹

The Sixth Circuit decision in *Lamb v. Phillip Morris, Inc.* involved a suit brought by Kentucky tobacco farmers against Philip Morris.²³² The suit alleged that bribery in the form of charitable contributions made at the request of government officials in Venezuela and five other countries by the defendant’s foreign subsidiaries resulted in the artificial depression of tobacco prices to the detriment of American tobacco farmers.²³³ The court relied heavily on the four-part test set forth by the Supreme Court in *Cort v. Ash* to determine whether a private right of action might be implied.²³⁴ The Sixth Circuit held that none of the *Cort* factors supported a private right of action theory under either the language or legislative history of the FCPA.²³⁵

Similarly, the Fifth Circuit in *McClean v. International Harvester Co.* held the FCPA does not contain nor imply any private cause of action for an employee made a scapegoat by its employer.²³⁶ This case involved a former vice-president of International Harvester Company who believed the company falsely implicated him in the company’s bribery scheme when it negotiated a plea bargain with the DOJ to settle its FCPA criminal case.²³⁷ He refused to plead guilty and was ultimately acquitted of all charges, but he had to spend over \$158,000 in legal fees to clear his name.²³⁸ Among other claims, McClean argued that scapegoating was prohibited by an amendment to the FCPA that provides that an employee may not be convicted of a particular criminal offense unless his corporate employer is also convicted.²³⁹ The Fifth Circuit declined to imply any private right under the amendment finding that “scapegoating has not been recognized as a cause of action in any jurisdiction.”²⁴⁰

²³⁰ J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

²³¹ *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990); *McLean v. Int’l Harvester Co.*, 817 F.2d 1214 (5th Cir. 1987).

²³² 915 F.2d at 1025.

²³³ *Id.*

²³⁴ *Id.* at 1028 (citing *Cort v. Ash*, 422 U.S. 66, 78 (1975)). The four *Cort* factors which are to be considered are: (1) whether the plaintiff is “one of the class for whose special benefit the statute was enacted”; (2) whether the legislative history indicates an intent to create or deny an action; (3) whether creation of a private right would be consistent with the underlying purposes of the legislation; and (4) whether “the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law.” *Id.*

²³⁵ *Id.* at 1029.

²³⁶ *McLean*, 817 F.2d at 1219.

²³⁷ *Id.*

²³⁸ *See id.*

²³⁹ *See id.* (citing 15 U.S.C. § 78ff(c)(3) (2002)).

²⁴⁰ *Id.* at 1220.

Lower federal courts also have determined uniformly that the anti-bribery provisions of the FCPA do not imply a private right of action.²⁴¹ For example, the defendants in *Citicorp International Trading Co. v. Western Oil & Refining Co., Inc.* filed a counterclaim in a breach of contract case alleging that Citicorp's personnel violated the FCPA by attempting to bribe a foreign official in order to buy time for Citicorp to comply with its duties under the agreement.²⁴² The court concluded, however, that under such circumstances the counterclaim was inadequate.²⁴³ The court was not convinced that the FCPA was meant to protect a business from the backlash of having its own attempted bribe of a foreign official rejected.²⁴⁴ Likewise, no federal court has found an implied private right of action under the FCPA's record-keeping provisions.²⁴⁵ Early on, the SEC advocated an implied private right of action, but that position was quickly abandoned.²⁴⁶

Today, the four factor test for determining an implied right of action has been reduced by the Supreme Court to a single factor: the determination of congressional intent.²⁴⁷ Proponents on either side of the FCPA private action

²⁴¹ See *Castellanos v. Pfizer, Inc.*, No. 07-60646-CIV, 2008 WL 2323876 (S.D. Fla. May 29, 2008) (holding Ecuadorian plaintiffs had no private right of action under the FCPA against Pfizer); *Scientific Drilling Int'l, Inc. v. Gyrodata Corp.*, Nos. 99-1077, 99-1084, 1999 WL 674511 (Fed. Cir. Aug. 30, 1999) (upheld dismissal of FCPA counterclaim stating "Fifth Circuit would likely follow the Sixth Circuit's decision in *Lamb*"); *J.S. Serv. Ctr. Corp. v. Gen. Elec. Technical Serv. Co.*, 937 F. Supp. 216 (S.D.N.Y. 1996) (applying the four-part *Cort* test declining to infer a private right of action under the FCPA); *Citicorp Int'l Trading Co. v. W. Oil & Refining Co.*, 771 F. Supp. 600 (S.D.N.Y. 1991) (concluding an evaluation of the *Cort* factors leads to the conclusion that no private right of action exists under the FCPA). *But see* *Instituto Nacional de Comercializacion Agricola (INDECA) v. Cont'l Ill. Nat'l Bank & Trust*, 576 F. Supp. 985, 990 n.4 (N.D. Ill. 1983) (admitting no case law upholds Continental's ability to base a defense on the FCPA, but refusing to strike the defense at the threshold pleading stage); *Howes v. Atkins*, 668 F. Supp. 1021 (E.D. Ky. 1987) (private civil action for attorneys' fees associated with the settlement of a shareholder derivative suit which included a private right of action under the FCPA).

²⁴² 771 F. Supp. 600, 605 (S.D.N.Y. 1991).

²⁴³ *Id.* at 607.

²⁴⁴ *Id.* at 606.

²⁴⁵ See *Shields ex rel. Sundstrand Corp. v. Erickson*, 710 F. Supp. 686, 688 (N.D. Ill. 1989) (no private right under the FCPA provisions requiring adequate financial and accounting controls); *Eisenberger v. Spectex Indus., Inc.*, 644 F. Supp. 48, 50-51 (E.D.N.Y. 1986) (same); *Lewis ex rel. Nat'l Semiconductor Corp. v. Sporck*, 612 F. Supp. 1316, 1332-33 (N.D. Cal. 1985) (same); *Maher v. Zapata Corp.*, 490 F. Supp. 348 (S.D. Tex. 1980) (deciding derivative suit on grounds of breach of fiduciary duty and expressly declining to address shareholder's claim that corporate officials failed to maintain accounting records as required under the FCPA).

²⁴⁶ See Opinion of SEC Office of the General Counsel on the Existence of a Private Right of Action Under the Foreign Corrupt Practices Act of 1977, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,071, at 80,806 (Sept. 6, 1976); *Notification of Enactment of Foreign Corrupt Practices Act of 1977*, Exchange Act Release No. 14,478, [1937-1982 Accounting Series Releases Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 72,264 (Feb. 16, 1978).

²⁴⁷ See *Touche Ross & Co. v. Remington*, 442 U.S. 560, 575 (1979) (holding "the central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action"); *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15 (1979) (holding "what must ultimately be determined is whether Congress intended to create the private remedy asserted"). See also *Thompson v. Thompson*, 484 U.S. 174, 189-90

debate have pointed to various parts of the legislative history to support their position. During the 95th Congress (which enacted the FCPA), the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce stated in its report “[t]he Committee intends that the courts shall recognize a private cause of action based on this legislation”²⁴⁸ Further support for the implication of a private right of action can be found in statements made by SEC Chairman Harold M. Williams, who testified before the Committee that “this legislation would furnish the Commission and private plaintiffs . . . with potent new tools to employ against those who commit corporate bribery.”²⁴⁹

On the other hand, after the deliberations of the Conference Committee, Sen. John Tower (R-Tex.) and Rep. Samuel Devine (R-Ohio) stated that the Conference Committee did not intend for the courts to imply a remedy for private plaintiffs.²⁵⁰ Opposed to the bill from the outset, their statements were not included in the Conference Committee report; however, several courts have used their statements to draw a negative inference against implied private FCPA actions.²⁵¹

The original draft of the Senate’s version of the FCPA included an express provision allowing private actions, which were subsequently deleted.²⁵² The provision’s removal would seem to suggest that Congress did not intend to make private suits possible. However, the likely reason Congress deleted the language was to avoid undermining the implied rights of action that had already been inferred by courts under the Securities Exchange Act.²⁵³ By remaining silent on the issue, Congress wrongly assumed federal courts would continue to liberally apply the implication doctrine.

Given this legislative history, at least one commentator has made a strong argument that the *Lamb* court got it wrong and should have recognized an implied right of action under the FCPA.²⁵⁴ This question, however,

(1988) (Scalia, J., concurring) (stating “it could not be plainer that we effectively overruled the *Cort v. Ash* analysis”).

²⁴⁸ H.R. REP. NO. 95-640, at 8–10 (1977) (stating that “[t]he 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”).

²⁴⁹ *Id.*

²⁵⁰ 123 CONG. REC. 38,602 (1977).

²⁵¹ See *Scientific Drilling Int’l, Inc. v. Gyrodata Corp.*, Nos. 99-1077, 99-1084, 1999 WL 674511, at *3 (Fed. Cir. Aug. 30, 1999); *Lewis ex rel. Nat’l Semiconductor Corp. v. Sporck*, 612 F. Supp. 1316, 1331 (N.D. Cal. 1985).

²⁵² See S. 3379, 94th Cong. § 10 (1976); 122 CONG. REC. 12,605, 12,607 (1976). However, the Senate Committee eventually deleted the provision. See S. REP. NO. 1031, at 12–13 (1976).

²⁵³ H.R. REP. NO. 95-640, at 8–10 (1977) (referring to “implied private actions brought under the securities laws generally”). See also 123 CONG. REC. 38,602 (1977) (Sen. Tower stating “The House report states it is expected that the courts will recognize implied private right of action under the criminalization sections of the bill”).

²⁵⁴ See Brett Witter, *Lamb v. Phillip Morris Inc.*, 915 F.2d 1024 (6th Cir. 1990): *The Sixth Circuit Gets Sheepish on Foreign Corrupt Practices Act Enforcement*, 5 TRANSNAT’L LAW. 533, 556 (1992). But see Raymond J. Dowd, Note, *Civil RICO Misread: The Judicial Repeal*

remains largely academic. The Supreme Court denied certiorari in *Lamb*, and since then the federal courts have only become less and less likely to infer a private right of action from a statute.²⁵⁵ Over the last fifteen years, the few commentators arguing in favor of a private FCPA right have uniformly concluded the statute should be amended to expressly include a limited private right of action.²⁵⁶ Similarly, Congress no longer relies on judges to legislate by fiat. Instead, Congress includes specific language granting it. For example, when Congress passed SOX, it included an express private right of action.²⁵⁷

There is, however, one possible area where the Supreme Court might still be willing to recognize an implied right of action under the FCPA: in cases of retaliation against employees. In 2005, the Court held in *Jackson v. Birmingham Board of Education* that the private right of action for sex discrimination implied by Title IX encompasses retaliation claims.²⁵⁸ Recently, the Court has handed down two more decisions upholding a private right of action based on retaliation for making a discrimination claim, even though the remedy is not specifically mentioned in the text of a statute. In *CBOCS West, Inc. v. Humphries*, the Court confirmed that retaliation claims are available under section 1981 of the Civil Rights Act of 1866, which includes no express provision barring race discrimination in the making and enforcing of contracts.²⁵⁹ Similarly, in *Gomez-Perez v. Potter*, the Court affirmed that the retaliation claim is part and parcel of federal employees' anti-discrimination rights under the Age Discrimination in Employment Act ("ADEA") even though the ADEA is silent on retaliation.²⁶⁰

Based on these precedents, it may be possible to infer a limited private right of action from the FCPA at least for the narrow purpose of protecting employees from retaliation for reporting or refusing to cooperate with their

of the 1988 Amendments to the Foreign Corrupt Practices Act, 14 *FORDHAM INT'L L.J.* 946, 947-57 (1990-91) (arguing no implied private cause of action exists under the FCPA).

²⁵⁵ See Susan Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 *NOTRE DAME L. REV.* 861 (1996) (noting the Supreme Court found no implied action in nine out of the eleven cases appearing before it between its 1975 *Cort* decision and its 1988 *Thompson* decision).

²⁵⁶ See Daniel Pines, Comment, *Amending the Foreign Corrupt Practices Act to Include a Private Right of Action*, 82 *CAL. L. REV.* 185, 187 n.8-10 (1994) (urging Congress to amend the FCPA to allow a restricted private right of action for businesses only); Carrington, *supra* note 179 (suggesting the FCPA or the False Claims Act be amended to authorize *qui tam* proceedings on behalf of the United States or foreign governments defrauded by acts of transnational bribery, or alternatively, a transnational forum be created in which the private enforcement of international corruption law could occur). *But see* Mary Siegel, *The Implication Doctrine and the Foreign Corrupt Practices Act*, 79 *COLUM. L. REV.* 1085, 1114 (1979) (arguing the Act's purpose is to deter bribery, not to compensate those injured by the prohibited payments); William L. Larson, *Effective Enforcement of the Foreign Corrupt Practices Act*, 32 *STAN. L. REV.* 561 (1980) (arguing a private right of action should not be enacted but we should wait for a multilateral treaty against foreign bribery).

²⁵⁷ SOX § 806, 18 U.S.C. § 1514A (2006).

²⁵⁸ 544 U.S. 167 (2005).

²⁵⁹ 128 S. Ct. 1951 (2008).

²⁶⁰ 128 S. Ct. 1931 (2008).

employers' bribery schemes. The Supreme Court's twin retaliation cases can be read to stand for the proposition that congressional intent can be implied not only from text, legislative history, and circumstances giving rise to a particular statute, but also from the "total context" of circumstances such as subsequent acts of Congress.²⁶¹ If so, subsequent congressional legislation passed in the wake of Enron, including SOX, suggests Congress did intend to provide a legal remedy for employees wrongfully discharged for refusing to engage in such corruption.²⁶² The Sixth Circuit decision in *Lamb* would be distinguishable on the ground that it was decided in the context of commercial rather than employment litigation.

Strategically, plaintiffs refusing to violate the anti-bribery provisions of the FCPA stand a better chance of obtaining an implied right to sue than those terminated over a disagreement concerning the recordkeeping provisions of the FCPA for a couple of reasons. First, the Supreme Court appears to make a distinction between cases involving the underlying right and cases involving procedural requirements.²⁶³ Second, the Court is more likely to find that a right is implied by a provision that is retrospective rather than just forward-looking.²⁶⁴

B. Current Legal Theories of Liability Predicated on FCPA Violations

Despite the current lack of any judicial recognition of a private right of action under the FCPA, two-thirds of published court decisions mentioning the FCPA involve cases brought by private parties.²⁶⁵ The three most predominant areas in which private parties have held multinationals liable for their complicity in the bribery of foreign officials are commercial, securities, and tort litigation.²⁶⁶

At least one practitioner has suggested that "existing grounds for civil liability are being invoked regularly in cases involving allegations of corruption, making it unnecessary [to establish a new private right of action]."²⁶⁷

²⁶¹ *Id.* at 1941–42.

²⁶² For a discussion of SOX's legislative history, see *infra* Part IV, Section D(2).

²⁶³ See *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

²⁶⁴ See *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979) (holding no implied private federal claim under section 17(a) of the Securities Exchange Act because it is "forward looking, not retrospective" requiring broker-dealers and others to keep such records and file such reports as the Commission may prescribe).

²⁶⁵ These findings are based on a search of published federal and state court decisions in the Westlaw database "ALLCASES" conducted on April 20, 2009. One hundred twenty-five private lawsuits predicated on alleged violations of the FCPA were identified. Bribery cases not alleging FCPA violations were not included. A list of these cases is on file with the author.

²⁶⁶ Although not the focus of this article, there is a fourth category involving suits brought by foreign sovereigns. See, e.g., *Castellanos v. Pfizer, Inc.*, No. 07-60646-CIV, 2008 WL 2323876 (S.D. Fla. May 29, 2008) (Ecuadorian patent court judge brought suit in part for defamation after being accused of accepting bribes).

²⁶⁷ Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, in THE FOREIGN CORRUPT PRACTICES ACT, 2008: COPING WITH HEIGHTENED ENFORCEMENT RISKS 711, 767 (Practising Law Institute 2008).

However, this assessment ignores various disincentives for bringing a lawsuit under the existing grounds for civil liability unless it involves substantial damages.²⁶⁸ If a legitimate purpose of civil litigation is to advance FCPA policy prohibiting all bribery, big and small, then existing private rights of action may not be sufficient.

Additionally, existing private rights of action have certainly not led federal courts to resolve many of the existing ambiguities in the FCPA surrounding more petty forms of bribery such as facilitating payments, gifts, and hospitality expenses. Claims under federal racketeering, antitrust, and securities laws require proving much more than a simple violation of the FCPA, such as a single incident of bribery or the failure to document a bribery payment. Faced with complicated causes of action, only the most straightforward or flagrant violations of the FCPA are discussed in court decisions, while the hazy portions of the statute are ignored.

Other state law claims, such as tortious interference or wrongful discharge, have more potential to clarify the Act. However, these claims generally end up in state courts, and the resulting hodgepodge of various state court interpretations is unhelpful to corporations trying to create one program to comply with the Act.²⁶⁹ Additionally, under the choice of law rules traditionally applied to conflicts arising in tort, state tort laws quickly give way to the foreign laws governing the location where the bribery occurred.²⁷⁰ However, when a claim is governed by a federal regulation, especially antitrust and securities laws, the Supreme Court has utilized a more unilateral conflicts methodology that applies the statute extraterritorially whenever doing so would advance the purpose of the statute.²⁷¹ Each of the three major areas of FCPA-based private litigation is considered in more detail below.²⁷²

1. *Commercial Litigation*

Business partners, competitors, their agents, and other third parties, such as law firms, have all brought commercial actions against American

²⁶⁸ Compare Daniel K. Tarullo, *The Limits of Institutional Design: Implementing the OECD Anti-Bribery Convention*, 44 VA. J. INT'L L. 665, 670–71 (2004) (expressing skepticism that lost profits are sufficient incentive for companies to sue competitors) with Ethan S. Burger & Mary S. Holland, *Why the Private Sector Is Likely to Lead the Next Stage in the Global Fight Against Corruption*, 30 FORDHAM INT'L L.J. 45, 62–63 (2006) (arguing companies have sufficient incentives to sue and are doing so).

²⁶⁹ Unless the parties are completely diverse or the claims are considered supplemental to a federal claim, federal courts do not have jurisdiction to hear these claims. See 28 U.S.C. § 1332 (2006) (diversity jurisdiction); 28 U.S.C. § 1367 (2006) (supplemental jurisdiction); *Rasul v. Bush*, 542 U.S. 466, 489 (2003) (citation omitted).

²⁷⁰ See Lea Brilmayer, *The Extraterritorial Application of American Law: A Methodological and Constitutional Appraisal*, 50 LAW & CONTEMP. PROBS. 11 (1987).

²⁷¹ *Id.* at 17–18.

²⁷² This analysis should not be construed to mean there is no viable way to currently bring an FCPA-inspired civil action; rather existing causes of action are merely ill-suited for advancing FCPA policy to one degree or another.

companies for damages predicated on alleged bribery.²⁷³ Several of these commercial cases were brought under either the Racketeer Influenced and Corrupt Organizations Act (“RICO”)²⁷⁴ or the federal antitrust laws (the Sherman Act, the Robinson-Patman Act, and the Clayton Act).²⁷⁵ Each explicitly allows a private right of action for violations,²⁷⁶ and injured persons may sue for treble damages, costs of filing the lawsuit, and reasonable attorneys’ fees.²⁷⁷

Initially, courts dismissed these commercial suits under the act of state doctrine.²⁷⁸ Emanating from concepts of sovereign immunity, comity, and constitutional separation of powers, this doctrine is intended to prevent the judicial branch from hindering the political branch’s pursuit of foreign relations.²⁷⁹ In 1990, however, the Supreme Court allowed claims under RICO, the Robinson-Patman Act, and state racketeering law predicated on violations of the FCPA to go forward.²⁸⁰ The plaintiffs claimed they were unsuccessful in winning a government contract only because the defendants paid a bribe to a Nigerian government official amounting to a twenty-percent commission to secure the contract.²⁸¹ The Court held that FCPA claims against non-governmental entities are not prohibited just because they “may embarrass a foreign government” or “require imputing to foreign officials an unlawful motivation (the obtaining of bribes) in performance of . . . an official act.”²⁸²

²⁷³ The FCPA also been used as a counterclaim or defense to enforcement of a contract. *See, e.g.,* Instituto Nacional de Comercializacion Agricola (INDECA) v. Cont’l Ill. Nat’l Bank & Trust, 567 F. Supp. 985, 989 (N.D. Ill. 1983).

²⁷⁴ 18 U.S.C. §§ 1961–68 (2006). Although Congress enacted RICO in 1970 primarily to combat “organized crime,” the Supreme Court held it was intentionally drafted broadly enough to encompass a wide range of enterprise activity, both legitimate and illegitimate. *Nat’l Org. of Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994).

²⁷⁵ 15 U.S.C. §§ 1, 3, 13–15 (2006). *See also* Franklin A. Gevurtz, *Using the Antitrust Laws to Combat Overseas Bribery by Foreign Companies: A Step to Even the Odds in International Trade*, 27 VA. J. INT’L L. 211 (1987).

²⁷⁶ 15 U.S.C. § 15 (2006) (antitrust claims); 18 U.S.C. § 1964 (2006) (RICO claims); *Humana, Inc. v. Forsyth*, 525 U.S. 299, 313 (1999) (RICO claims); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 728 (1975) (antitrust claims). The Court has also found that Congress wanted “private attorneys general” to use RICO to obtain the relief that the DOJ and SEC, given their limited resources, cannot be expected to provide. *See Rotella v. Wood*, 528 U.S. 549, 557–58 (2000); *Pfizer, Inc. v. India*, 434 U.S. 308, 313–14 (1978). Similarly, the Court has held that the federal antitrust laws were “meant to bring to bear the pressure of ‘private attorneys general’ on a serious national problem for which public prosecutorial resources are deemed inadequate” *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 151 (1987).

²⁷⁷ 15 U.S.C. § 15 (antitrust claims); 18 U.S.C. § 1964(c) (2006) (RICO claims). Under federal antitrust laws private parties may also seek injunctive relief in appropriate cases. 15 U.S.C. § 26 (2006).

²⁷⁸ *See, e.g.,* *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 407 (9th Cir. 1983).

²⁷⁹ *See generally* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

²⁸⁰ *W.S. Kirkpatrick & Co. v. Env’tl. Tectronics Corp.*, 493 U.S. 400 (1990).

²⁸¹ *Id.* at 401–02.

²⁸² *Id.* at 405–06. *But see* *Kensington Int’l Ltd. v. Itoua*, 505 F.3d 147 (2d Cir. 2007) (holding an oil company immune from RICO suit as a foreign state under FSIA); *Astoria*

However, for several possible reasons, the threat of commercial suits has only had a limited impact on bribery as a whole. First, business partners and competitors are reluctant to draw unwanted attention to their industry by bringing an FCPA suit. Many bribes overseas are facilitated by local agents, and especially in smaller markets, competitors often use the same local agents. Second, many companies who are eager to bring suit against U.S. companies for FCPA violations are foreign entities not subject to U.S. laws themselves.²⁸³ Third, these businesses are not typically injured until after the bribery scheme has been successful. Thus, at best, these suits act as a deterrent to keep a company from doing it next time, and even then only to the extent the risk of litigation cannot be factored into the cost of doing business. Finally, as described below, the most significant impediment to the effectiveness of commercial litigation in combating transnational bribery is that the substantive scope of the existing causes of actions is too broad to focus judicial attention on the more mundane violations of the FCPA.

a. Civil RICO Action

A number of plaintiffs, including business partners, competitors, and even their agents, have brought suit under RICO predicated on the defendant's bribery of foreign officials.²⁸⁴ For example, in *National Group for Communications & Computers Ltd. v. Lucent Technologies, Inc.*, a foreign subcontractor National Group for Communications & Computers Ltd. ("NGC") brought a civil RICO claim against Lucent.²⁸⁵ NGC's subcontract was allegedly canceled when it refused to continue to cooperate in an elaborate bribery scheme, which included an "up front" six percent kickback on all earnings.²⁸⁶ Claiming damages in excess of \$75 million, NGC also alleged that Lucent provided a Saudi official and his family free use of a private jet for multiple trips from Saudi Arabia to the United States and Europe,

Entm't, Inc. v. Edwards, 159 F. Supp. 2d 303, 325 (E.D. La. 2001) (holding under the Noerr-Pennington doctrine "parties who petition, lobby, or bribe the government for government action favorable to them cannot be prosecuted under the antitrust laws").

²⁸³ Unless other countries provide comparable legal remedies against foreign companies, allowing these non-complying foreign competitors to bring private actions against U.S. companies only worsens the unlevel playing field the FCPA was heavily criticized for creating in the first place. For a discussion of early criticism of the 1977 Act, see Beverly Earle, *The United States Foreign Corrupt Practices Act and the OECD Anti-Bribery Recommendation: When Moral Suasion Won't Work, Try the Money Argument*, 14 DICK. J. INT'L L. 207, 207 (1996). Concerns over an unlevel playing field led to the introduction of the Foreign Business Bribery Prohibition Act of 2008, H.R. 6188, 110th Cong. (2008). For further discussion of this bill see *infra* notes 526–528 and accompanying text.

²⁸⁴ See, e.g., *Dooley v. United Techs. Corp.*, 803 F. Supp. 428, 437–40 (D.D.C. 1992); *Env'tl. Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1066–67 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990); *Williams v. Hall*, 683 F. Supp. 639 (E.D. Ky. 1988).

²⁸⁵ *Nat'l Group for Commc'ns. & Computers, Ltd. v. Lucent Techs. Inc.*, 420 F. Supp. 2d 253, 265 (S.D.N.Y. 2006). The court dismissed the case, finding that the competitor failed to adequately allege a RICO enterprise because it failed to "show some proof of ongoing association and a shared purpose." *Id.*

²⁸⁶ *Id.* at 259.

paid for their hotel accommodations and medical expenses, and made a \$2 million charitable contribution to a Seattle hospital at the Saudi official's insistence, and that some of these expenses were billed to NGC's account.²⁸⁷

However, relying on bribery to assert a civil RICO claim can be tricky. The American Bar Association ("ABA") has concluded that "situations do exist . . . where the conduct in question may be subject to criminal liability under the FCPA but not to civil liability under RICO."²⁸⁸ For example, a few courts have held that plaintiffs lack standing to sue under section 1962(c) of RICO where the injury is the result of wrongful termination and not caused by predicate RICO acts.²⁸⁹ These decisions are consistent with the fact that bribery per se is not one of the predicate acts enumerated in RICO.²⁹⁰ Other courts, however, have found that allegations of an ongoing bribery scheme accomplished through telephone calls, e-mails, and visits to the United States can constitute mail fraud, wire fraud, or Travel Act violations, which are RICO predicate acts.²⁹¹

To establish a violation of section 1962(d), a plaintiff must establish as to each defendant: (1) the commission of two or more predicate acts, (2) constituting a "pattern," (3) of "racketeering activity," (4) directly or indirectly participated in, (5) by an "enterprise," (6) affecting interstate or foreign commerce.²⁹² In a simple small bribery scenario, the plaintiff may not be able to demonstrate he or she was injured by a "pattern of racketeering activity." To demonstrate a "pattern," a plaintiff must show at least two predicate acts of racketeering activity within a ten year period.²⁹³ Proving an isolated act of bribery of a foreign official may not be enough.²⁹⁴ The Supreme Court has held that the predicate acts must be continuous and interrelated, although the Court has recognized that evidence establishing the two elements will often overlap.²⁹⁵ Currently, there is a split among the circuits

²⁸⁷ *Id.* at 260.

²⁸⁸ Reisenfeld, *supra* note 15, at 18 n.110. *See also* Dowd, *supra* note 254 (arguing that civil RICO should never provide a remedy for a party claiming injury due to the commercial bribery of a foreign official).

²⁸⁹ Reddy v. Litton Indus., Inc., 912 F.2d 291 (9th Cir. 1990); Nodine v. Textron, Inc., 819 F.2d 347 (1st Cir. 1987).

²⁹⁰ *See* 18 U.S.C. § 1961(1)(B) (2006).

²⁹¹ *See, e.g.*, Travel Act, 18 U.S.C. § 1952(a)(3) (2006); United States v. Young & Rubicam, Inc., 741 F. Supp. 334 (D. Conn. 1990).

²⁹² 18 U.S.C. § 1962(d) (2006).

²⁹³ *Id.* at § 1961.

²⁹⁴ *See* H.J., Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 237–38 (1989) (holding two acts may not be sufficient to establish RICO violation). *But see* Envtl. Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1063–64 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990) (holding that single bribery scheme involving multiple payments is violation of civil RICO).

²⁹⁵ *H.J. Inc.*, 492 U.S. at 239 (finding that allegations of numerous bribes at different times over the course of at least a six-year period with the objective of causing the commissioners to approve unfair and unreasonable rates for the company were sufficient).

on whether a single bribery scheme can satisfy this “continuity plus relationship” test.²⁹⁶

Additionally, a plaintiff may be unable to establish a RICO enterprise. The RICO statute defines “enterprise” as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”²⁹⁷ RICO claims based on a bribery scheme typically allege an “association-in-fact,” which requires evidence of “a group of persons associated together for a common purpose of engaging in a course of conduct.”²⁹⁸ However, courts have wide discretion in deciding whether a plaintiff has made this more difficult showing. The court in *Lucent*, for example, concluded the competitor failed to adequately allege a RICO enterprise because it failed to “show some proof of ongoing association and a shared purpose.”²⁹⁹ The *Lucent* court found the plaintiff’s allegations of extortion, bribery, and money laundering by all seventeen defendants covered too wide a range to establish the requisite “joint venture” and “common purpose.”³⁰⁰

The Private Securities Litigation Reform Act of 1995 (“PSLRA”) also, indirectly, limits the use of civil RICO actions to bring private actions for FCPA violations. As discussed earlier, the civil RICO provision generally allows treble damages and attorneys’ fees.³⁰¹ However, Congress decided that exposing a securities fraud defendant to treble damages was unfair, and passed the PSLRA, which amended RICO to provide 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 [RICO].”³⁰² The courts generally have interpreted the phrase “in connection with the purchase or sale of securities” broadly.³⁰³ This has eliminated RICO liability for most securities fraud claims, except those premised on securities violations where criminal convictions have been entered.³⁰⁴ It has also eliminated the pleading of mail fraud, wire fraud, and securities fraud as predicate acts

²⁹⁶ Amy Franklin et al., *Racketeer Influenced and Corrupt Organizations*, 45 AM. CRIM. L. REV. 871, 878–879 n.60 (2008).

²⁹⁷ 18 U.S.C. § 1961(4) (2006).

²⁹⁸ See *First Capital Asset Mgmt. v. Satinwood, Inc.*, 385 F.3d 159, 173 (2d Cir. 2004) (citing *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

²⁹⁹ *Nat’l Group for Comm’ns. & Computers, Ltd.*, 420 F. Supp. 2d at 265.

³⁰⁰ *Id.* The court also dismissed NGC’s section 1962(d) claims because the complaint failed to set forth a substantive RICO violation or sufficient facts to suggest how each defendant, through words or action, “conspired” or “agreed” with one another. *Id. But see United States v. Mokol*, 957 F.2d 1410, 1417 (7th Cir. 1992) (non-FCPA case holding for purposes of RICO, former deputy sheriff was “associated with” amusement company because owner of company paid bribes to deputy).

³⁰¹ 18 U.S.C. § 1964(c) (2006).

³⁰² Pub. L. No. 104-67, 109 Stat. 737, 758 (1995) (codified at 18 U.S.C. § 1964(c) (2006)).

³⁰³ See, e.g., *Sec. Exch. Comm’n v. Zandford*, 535 U.S. 813, 819 (2002) (citation omitted).

³⁰⁴ See generally Todd A. Noteboom & Michael A.G. Korengold, *Nunc Pro Tunc: The Application of the Private Securities Litigation Reform Act of 1995 to Pending Civil RICO Claims Based on Securities Fraud*, 23 WM. MITCHELL L. REV. 565, 572–73 (1997).

under civil RICO if the offenses would also be actionable as securities fraud.³⁰⁵ In so doing, Congress may have precluded the availability of a civil RICO cause of action in cases involving bribery of foreign officials where the bribery has some relationship to the purchase or sale of securities.³⁰⁶

b. Antitrust Cases

The oldest reported FCPA antitrust case, *Sage Int'l, Ltd. v. Cadillac Gage Co.*, dates back to 1981.³⁰⁷ Plaintiffs alleged the defendant conspired with foreign and domestic sales agents to facilitate illegal kickbacks and sued under antitrust laws for the loss of income caused by defendant's efforts to exclude plaintiffs from the armored car market in over fifteen countries.³⁰⁸ Since the *Sage* decision, various antitrust claims have been brought in commercial litigation predicated on violations of the FCPA.³⁰⁹

However, antitrust claims, like RICO claims, are also complex and difficult to prove.³¹⁰ A claim under section 1 of the Sherman Act requires an allegation of a "substantial" effect or potential effect on interstate commerce.³¹¹ There is a split among the circuits over whether any aspect of the defendant's business can satisfy the requirements of a claim under the Sherman Act, or just the challenged business activity.³¹² Either way, there must be an actual or potential "market wide impact."³¹³ Since the FCPA has no de minimus exception, many FCPA violations would fail to have a direct "market wide impact." In order to be actionable, the courts would have to take into consideration the large potential penalties associated with FCPA violations.

Even where there is substantial bribery of foreign officials overseas, such cases are still subject to dismissal for lack of subject matter jurisdiction if the effect was not produced "in the United States."³¹⁴ The court in *Boyd v. AWB Ltd.*, for example, held that the global drop in wheat prices caused by the U.N. Oil-for-Food Programme scandal involving bribery of Iraqi officials was not the kind of "direct causation" required to prove a substantial

³⁰⁵ See *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 930 F. Supp. 68, 77 (S.D.N.Y. 1996); H.R. REP. NO. 104-369, at 47 (1995).

³⁰⁶ For a discussion of securities litigation predicated on FCPA violations, see *supra* Part III(B)(2).

³⁰⁷ 534 F. Supp. 896 (E.D. Mich. 1981).

³⁰⁸ *Id.* at 898.

³⁰⁹ See, e.g., *Petroleos Mexicanos v. Crawford Enter., Inc.*, 826 F.2d 392 (5th Cir. 1987); *Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404 (9th Cir. 1983).

³¹⁰ See, e.g., *Fed. Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470 (1952) (criticizing the Robinson-Patman Act as "complicated and vague in itself and even more so in its context. Indeed, the Court of Appeals seems to have thought it almost beyond understanding").

³¹¹ See 15 U.S.C. § 1 (2006); Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (2006) (codifying Supreme Court's "effects" test for antitrust cases); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 233 (1980).

³¹² See *Nelson v. Monroe Reg'l Med. Ctr.*, 925 F.2d 1555, 1556 (7th Cir. 1991).

³¹³ *Summit Health Ltd. v. Pinhas*, 500 U.S. 322, 332 (1991).

³¹⁴ *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236, 242 (S.D.N.Y. 2008).

effect in the United States; therefore, the Sherman Act count was dismissed.³¹⁵ The court also dismissed claims under the Clayton Act on similar jurisdictional grounds because “nothing in the complaint remotely suggests the [bribery] transactions between AWB and the Iraqi government involved the purchase or sale of any wheat or other commodity that was bound ‘for consumption, use, or resale within the United States.’”³¹⁶

Similarly, the courts are split over whether simple bribery is covered by section 2(c) of the Robinson-Patman Act in the first instance.³¹⁷ Section 2(c) has been used to bring actions based on alleged commercial bribery, kickbacks, and the like.³¹⁸ Some courts, however, require a showing of the sort of “dummy brokerage” conduct the provision was originally enacted to cover, and straightforward bribery does not satisfy this requirement.³¹⁹ Additionally, the Supreme Court in *Credit Suisse Securities (USA) LLC v. Billing* upheld the dismissal of an antitrust class action brought by investors against underwriters allegedly violating the commercial bribery provisions of the Robinson-Patman Act on the ground that federal securities law impliedly precluded it.³²⁰

Finally, there is a strict “antitrust injury” requirement.³²¹ Section 2(c) technically does not require a showing of injury to competition in order to establish a violation.³²² However, section 4 of the Clayton Act requires a private plaintiff to establish the existence of actual injury from the FCPA violation at issue in order to recover damages. For example, although the *Boyd* court found that the jurisdictional reach of the Robinson-Patman Act was satisfied where the bribery was paid using a U.S. bank facility, it held the plaintiffs did not have standing because they could not demonstrate an “antitrust injury” and therefore, were not “efficient enforcers of antitrust law.”³²³ In the end, the focus of any antitrust action arising out of FCPA

³¹⁵ *Id.* at 244.

³¹⁶ *Id.* at 247.

³¹⁷ See generally, Keller W. Allen & Meriweather D. Williams, *Commercial Bribery, Antitrust Injury and Section 2(c) of the Robinson-Patman Anti-Discrimination Act*, 26 GONZ. L. REV. 167 (1990/1991).

³¹⁸ See, e.g., *McCullough v. Zimmer, Inc.*, No. 08cv1123, 2009 WL 775402, at *2 (W.D. Pa. 2009). Section 2(c) prohibits a party to a sales transaction from granting to or receiving from the other party 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.” 15 U.S.C. § 15(c) (2006).

³¹⁹ See *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001); *Bridges v. MacLean-Stevens Studios, Inc.*, 201 F.3d 6 (1st Cir. 2000).

³²⁰ 551 U.S. 264, 278 (2007) (mentioning the PSLRA, but basing its decision squarely on a “clear repugnancy” between the securities law and the antitrust complaint).

³²¹ See David Mills, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371 (2008).

³²² See *id.* at 1412 n.148.

³²³ *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236, 250 (S.D.N.Y. 2008). In contrast, the court dismissed the RICO claim, holding that even though use of the bank constituted “conduct” in the United States they could not show it was the “direct” cause of their injury (i.e., the drop in domestic wheat prices). *Id.* at 253.

violations is less about the particular FCPA violation and more about establishing competitive harm.³²⁴

2. Securities Litigation

Another use of civil litigation to regulate corporate ethics that has received a lot of notoriety is the filing of securities fraud class actions (“SF-CAs”) under section 10(b) of the Securities Exchange Act of 1934 (“1934 Act”) and SEC Rule 10b-5.³²⁵ A FCPA violation has been alleged in at least fifty of the SFCA complaints filed in the United States since January 1, 2006.³²⁶ Additionally, a few FCPA-based cases have been brought as derivative actions under state corporate law.³²⁷ The Private Securities Litigation Reform Act of 1995 (“PSLRA”) does not prohibit these individual (non-class) securities fraud cases in state courts, but the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”) amended the PSLRA to add a discovery stay provision to prevent a plaintiff from using such state court actions to evade a federal court’s discovery stay pending a decision on a motion to dismiss in a parallel federal SFCA.³²⁸ Finally, employees whose pensions include company shares have also found some success bringing Employment Retirement Income Security Act (“ERISA”) class actions for securities fraud involving FCPA violations.³²⁹

Despite their proliferation, SFCAs, shareholder derivative suits, and ERISA class actions have done little to further FCPA policy. Shareholders are imperfectly suited for enforcing anti-bribery laws, because they view SFCAs as beneficial enforcement devices only if the economic benefit from

³²⁴ See *McCullough v. Zimmer, Inc.*, No. 08cv1123, 2009 WL 775402, at *10 (W.D. Pa. 2009) (“Plaintiffs must, but do not, ‘allege . . . harm, not just to a single competitor, but to the competitive process.’” (quoting *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998))).

³²⁵ 15 U.S.C. § 78j(b) (2006); 17 C.F.R. § 240.10b-5 (2006). Section 10(b) prohibits the following types of behavior: (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 were made, not misleading”; or (3) “engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.” *Id.*

³²⁶ Stanford Law School, Stanford Securities Class Action Clearinghouse, <http://securities.stanford.edu/> (last visited Mar. 13, 2009). The fifty cases include only those in which the complaint specifically mentions the FCPA, and does not include any cases making references to bribery in general. Special thanks to Juan Carlos-Sanchez at Stanford University for conducting this search on July 28, 2008. Forty-six published federal and state court decisions in private-party FCPA litigation mention the 1934 Act. Based on the search discussed at *supra* note 265.

³²⁷ See, e.g., *Haw. Structured Ironworkers Pension Trust Fund ex rel. Alcoa, Inc. v. Belda*, No. 08-0614, 2008 WL 2705548 (W.D. Pa. 2008); *In re Syncor Int’l Corp. S’holders Litig.*, 857 A.2d 994 (Del. Ch. 2004); *Rosengarten v. Buckley*, 613 F. Supp. 1493 (D. Md. 1985) (applying Maryland state law).

³²⁸ 15 U.S.C. § 78u-4(b)(3)(B) (PSLRA); 15 U.S.C. § 78u-4(b)(3)(D) (SLUSA). See generally *City of Austin Policy Ret. Sys. v. ITT Eds. Servs.*, No. 1:04CV0380-DFH-TAB, 2005 WL 280345, at *3 (S.D. Ind. Feb. 2, 2005).

³²⁹ See *In re Syncor ERISA Litig.*, 516 F.3d 1095 (9th Cir. 2008).

the deterrence they produce is greater than the deadweight losses imposed by the cost of the litigation itself.³³⁰ Without something more at stake, such as one's career, the cost of not stopping the bribery will seldom outweigh the litigation costs on the typical investor's scales. Investors also fear bad publicity surrounding such litigation will only make matters worse. Finally, the fact that shareholders are not harmed unless or until the bribery either backfires or the company gets caught by regulators means shareholders do not complain about successful bribery schemes. In fact, most of the FCPA-based securities suits are filed only after the SEC or DOJ commenced enforcement actions.³³¹

Even assuming shareholders are viable "private attorneys general" to enforce certain corporate abuses, allegations of securities fraud can only indirectly address violations by directors, officers, or employees of transnational regulations such as the FCPA. While contemporaneous or subsequent misstatements or omissions to investors relating to the bribery may be actionable, the actual bribery itself is not actionable.³³² Thus, in the typical 10b-5 case, plaintiffs' attorneys must frame the complaint in disclosure terms, pointing to misstatements in or omissions from the company's securities filings, press releases, or analyst conference calls relating to the circumstances of bribery. This pigeon-holing is further complicated by the PSLRA's strict pleading requirements and discovery restraints.³³³

Another major reason SFCAs do not provide an effective remedy for foreign bribery is the heightened scienter requirement. The only individuals with actual knowledge of bribery overseas, especially smaller bribes, are often low-level foreign employees and agents. The PSLRA, however, mandates a showing of facts raising a "strong inference" that the defendant—typically the corporation and high-level employees—acted with the required state of mind, or scienter, when making the misstatements.³³⁴ The courts are split as to whether a court can impute scienter to a corporation based on the

³³⁰ See Marilyn F. Johnson et al., *In re Silicon Graphics Inc.: Shareholder Wealth Effects Resulting from the Interpretation of the Private Securities Litigation Reform Act's Pleading Standard*, 73 S. CAL. L. REV. 773, 777 (2000).

³³¹ See *In re Faro Techs. Sec. Litig.*, 534 F. Supp. 2d 1248 (M.D. Fla. 2007); *In re Im-mucor Inc. Sec. Litig.*, No. 1:05-CV-2276-WSD, 2006 WL 3000133 (N.D. Ga. 2006); *In re Invision Techs., Inc. Sec. Litig.*, No. C04-03181 MJJ, 2006 WL 538752 (N.D. Cal. 2006); *In re Syncor Intern. Corp. Sec. Litig.*, 327 F. Supp. 2d 1149 (C.D. Cal. 2004); *PR Diamonds, Inc. v. Chandler*, 91 Fed. App'x 418, (6th Cir. 2004); *In re Infonet Servs. Corp. Sec. Litig.*, 310 F. Supp. 2d 1080 (C.D. Cal. 2003).

³³² See 15 U.S.C. § 78u-4(b)(1) (2006).

³³³ In response to a flood of SFCAs in the 1980s and early 1990s, Congress passed the PSLRA, which imposed more stringent pleading requirements and prevented the inappropriate use of discovery to prop up frivolous claims. 15 U.S.C. § 78u-4(b)(3)(B) (2006). In 1998, Congress passed the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") which amended the PSLRA to fill in a few remaining legal loopholes. 15 U.S.C. § 78u-4(b)(3)(D) (2006).

³³⁴ A "strong inference" in the 10(b) context means "strong in light of other explanations" and "at least as compelling as any opposing inference one would draw from the facts alleged." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2510 (2007).

knowledge of a corporate officer or employee even if that official is not the person making the false statement.³³⁵ If “collective scienter” is not available, plaintiffs will be hard pressed in cases involving employees overseas bribing low ranking foreign officials to plead sufficient facts to support the strong inference of scienter required by the PSLRA. Such exclusive focus on the knowledge of bribery by top corporate officials is contrary to FCPA policy, which holds a corporation liable for the unlawful actions of every employee and agent.³³⁶ Executives would be able to keep many low-level bribery violations under the SFCA radar by simply adopting a “don’t ask, don’t tell” policy.

To date, plaintiffs in only three published decisions have survived the defendants’ motions to dismiss or motions for summary judgment.³³⁷

3. Tort Litigation

Of all the existing legal theories predicated on FCPA violations, tort claims are by far the most promising for imposing liability for bribery. Many states have recognized bribery as a form of tortious interference with a competitor’s prospective economic rights.³³⁸ Several states have also recognized federal FCPA policy as a basis for invoking the public policy exception to the at-will employment doctrine for wrongful discharge.³³⁹ This typically in-

³³⁵ Compare *Ind. Elec. Workers’ Pension Trust Fund IBEW v. Shaw*, 537 F.3d 527 (5th Cir. 2008) (determining scienter by looking at the state of mind of individual corporate officials making or issuing the statements, rather than the collective knowledge of all the corporation’s officers and employees), and *In re Invision Techs., Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 93,674, at 98,017 (N.D. Cal. 2006) (same) with *In re Take-Two Interactive Secs. Litig.*, 551 F. Supp. 2d 247 (S.D.N.Y. 2008) (concluding proof of corporation’s collective knowledge and intent is sufficient), and *In re Faro Techs. Secs. Litig.*, 534 F. Supp. 2d at 1262 (applying “collective knowledge” only to “high level employee[s], consistent with generally accepted agency principles”).

³³⁶ See O. Thomas Johnson, Jr., *The Foreign Corrupt Practices Act*, in INTERNATIONAL PRACTITIONER’S DESKBOOK SERIES: INTERNATIONAL LAWYER’S DESKBOOK 259 (Lucinda A. Low, Patrick M. Norton, & Daniel M. Drory eds., 2d ed. 2002). Similarly, FCPA recordkeeping violations are also unlikely to satisfy the heightened scienter requirement. See, e.g., *PR Diamond*, 91 F. App’x at 431 (finding that the alleged FCPA recordkeeping violations did not resemble the pervasive and egregious manipulation found to support a strong inference of scienter in other cases).

³³⁷ *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1096 (9th Cir. 2008) (alleging Syncor, as the Plan Administrator, and its board members breached their fiduciary duties to the Plan and its participants in violation of ERISA §§ 404(a)(1)(A)–(D) and 405 by investing in Syncor’s stock while it was engaged in an international bribery scheme); *In re Faro Techs. Secs. Litig.*, 534 F. Supp. 2d at 1262 (alleging violations of Rule 10b-5 by including sales in China and the Asia/Pacific region achieved through unlawful bribes, which overstated revenues, and failing to disclose their lack of internal controls to prevent FCPA violations); *In re Immucor Inc. Sec. Litig.*, No. 1:05-CV-2276-WSD, 2006 WL 3000133, at *2 (N.D. Ga. Oct. 4, 2006) (alleging violations of Rule 10b-5 by understating the scope and gravity of potential FCPA violations by its Italian subsidiary). On July 14, 2008, *In re Faro Techs.* was settled subject to court approval for \$6.875 million. See Stanford Law School, Securities Class Action Clearinghouse Website, http://securities.stanford.edu/1035/FARO05_01/.

³³⁸ See *infra* note 346 and accompanying text.

³³⁹ See *infra* note 356 and accompanying text.

volves former employees who have sued for wrongful termination, alleging that they were fired for reporting bribery or refusing to violate the FCPA.

The difficulty with tort claims based on overseas bribery of foreign officials is threefold. First, there is a choice of law problem. Unlike some federal laws, tort law has a more limited extraterritorial reach. In those states following the Restatement (Second) of Conflict of Laws, for example, the four-factor “most significant relationship” test governs a tort case.³⁴⁰ Under this test, although there are multiple factors considered, the principal location of the defendant’s conduct is given the greatest weight in tortious interference cases.³⁴¹ Consequently, courts have refused to apply American tort law in several cases predicated on FCPA violations and instead have held that foreign law governs whether or not it provides any legal remedy.³⁴²

Second, even assuming it could be applied extraterritorially, the substantive elements of the applicable tort vary widely from state to state. In some states there is no state-based legal remedy at all.³⁴³ In the remaining states, imposing potentially inconsistent standards on companies operating overseas only hinders corporate compliance with the FCPA.

Third, most jurisdictions allow recovery only for intentional interferences.³⁴⁴ Thus, a plaintiff would have the daunting burden to prove not only a violation of the FCPA but also defendant’s knowledge that its actions would interfere with the plaintiff’s economic relations.³⁴⁵ These problems are discussed further below in the context of both tortious interference and wrongful discharge claims predicated on FCPA violations.

a. Tortious Interference

Bribery has been used as the basis for claims of tortious interference with prospective contractual relations, or as it is called in some states, tortious interference with prospective economic advantage.³⁴⁶ For example, in

³⁴⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 145–146 (1971). The most significant relationship test is comprised of the following four factors: (1) the place the injury occurred; (2) the place the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation, and place of business of the parties; and (4) the place where the parties’ relationship is centered. *Id.*

³⁴¹ *Id.* at § 145, cmt. f.

³⁴² *See, e.g.,* Integral Res. (PVT) Ltd. v. Istil Group, Inc., 155 F. App’x 69 (3d Cir. 2005); Castellanos v. Pfizer, Inc., No. 07-60646-CIV, 2008 WL 2323876 (S.D. Fla. May 29, 2008). More aggressive extraterritorial application of state law to conduct occurring wholly outside the state’s borders would raise serious federalism and Commerce Clause concerns. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568–74 (1996).

³⁴³ *See infra* notes 360–364 and accompanying text.

³⁴⁴ WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 130 (4th ed. 1971).

³⁴⁵ RESTATEMENT (SECOND) OF TORTS § 766B (1979).

³⁴⁶ *See, e.g.,* Rotec Indus., Inc. v. Mitsubishi Corp., 163 F. Supp. 2d 1268 (D. Or. 2001); Korea Supply Co. v. Lockheed Martin Corp., 63 P.3d 937 (Cal. 2003). Under the Restatement (Second) of Torts, the elements are usually stated as follows: (1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant’s knowledge of the relationship; (3) intentionally wrongful acts on the part of the defendant designed to disrupt the relationship; (4) actual disruptions of the

2007, the plaintiff in *RSM Production Corp. v. Fridman* brought a diversity action for tortious interference with prospective business relations against a New York resident and board member of a Russian oil company that allegedly had a “scheme to interfere” with RSM’s “exclusive contract” with Grenada by paying Grenada’s Minister of Agriculture bribes and promising more bribes in the future.³⁴⁷ The court declined to dismiss the case on *forum non conveniens* grounds.³⁴⁸

The employees, agents of competitors, and other third parties have also attempted to bring FCPA-based claims for tortious interference.³⁴⁹ For example, in *Korea Supply Co. v. Lockheed Martin Corp.*, the broker of an unsuccessful bidder on a Korean military contract asserted claims under the tort of interference with prospective advantage and California’s unfair competition law for damages resulting from the loss of a fifteen percent commission, amounting to \$30 million.³⁵⁰ The plaintiff claimed indirect injuries from the defendant and its agent offering bribes and sexual favors to key Korean officials reviewing the bids, and the California Supreme Court held that the suit was allowable.³⁵¹ However, other courts, including the U.S. Supreme Court, have held that parties with remote, indirect, or derivative injuries may not recover.³⁵²

b. *Wrongful Discharge*

Under the doctrine of “employment-at-will,” in the absence of a contract or a statutorily conferred right, an employee is presumptively terminable at any time, with or without cause.³⁵³ In most states, however, there is an exception to the employment-at-will doctrine when the discharge is contrary to a clear mandate of public policy.³⁵⁴ To exercise this right, an employee must bring a claim for wrongful discharge in violation of a public policy cognizable under that state’s laws.³⁵⁵

relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant. RESTATEMENT (SECOND) OF TORTS § 766B (1979).

³⁴⁷ No. 06 Civ. 11512 (DLC), 2007 WL 2295897 (S.D.N.Y. Aug. 10, 2007).

³⁴⁸ *Id.* at *8. The court eventually dismissed the tortious interference claims because they were time-barred under the applicable statute of limitations under Colorado law. *RSM Production Corp. v. Fridman*, No. 06 Civ., 11512 (DLC), 2007 WL 2295944, at *1 (S.D.N.Y. Aug. 10, 2007).

³⁴⁹ See Alex Long, *The Disconnect Between At-Will Employment and Tortious Interference with Business Relations: Rethinking Tortious Interference Claims in the Employment Context*, 33 ARIZ. ST. L.J. 491 (2001).

³⁵⁰ 63 P.3d at 937.

³⁵¹ *Id.* at 940.

³⁵² See *id.* at 967 (Chin, J., concurring in part and dissenting in part) (citing *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476–477 (1982)).

³⁵³ See, e.g., *Hoffman-La Roche, Inc. v. Campbell*, 512 So. 2d 725, 728 (Ala. 1987).

³⁵⁴ Peter J. Strelitz et al., *Employment-At-Will: Has the Death Knell Officially Sounded?* 17 INT’L HR J. 3 (2008) (concluding that every state has adopted a statutory or common law public policy exception to the employment-at-will doctrine except Maine).

³⁵⁵ See *id.*

Several courts have held that discharge for refusing to violate the FCPA is contrary to the clear mandate of state public policy.³⁵⁶ For example, the New Jersey Supreme Court in *D'Agostino v. Johnson & Johnson, Inc.* held that discharge for refusing to violate the FCPA, even though it is a federal law, can constitute discharge contrary to the clear mandate of state public policy.³⁵⁷ The court held that even though the FCPA was a federal law, it was of sufficient public interest to New Jersey citizens because their health and welfare could be affected by violations of the FCPA, to support a wrongful discharge claim under state law.³⁵⁸ Courts in two other states, Washington and Maryland, have also expressly adopted the FCPA policies as state policies.³⁵⁹

However, the availability of wrongful discharge claims for reporting or refusing to participate in illegal activity varies widely among the states. Maine does not recognize a public policy exception at all.³⁶⁰ Alabama has only applied a narrow statutory exception related to the filing of a workers' compensation claim.³⁶¹ Other states, such as Illinois, do not permit the public policy exception to be based on the FCPA.³⁶²

States have enacted whistleblower laws to protect employees reporting employers' unlawful activities; however, the scope of these protections varies greatly as well. The whistleblower laws usually only protect employees who raise concerns regarding specific dangers to public health or safety.³⁶³ They also do not normally protect employees who "refuse to cooperate," but otherwise never report the violation to the proper authorities.³⁶⁴ Thus, state laws fail to promote FCPA policy consistently across state lines much less the global market.

³⁵⁶ See, e.g., *D'Agostino v. Johnson & Johnson, Inc.*, 628 A.2d 305 (N.J. 1993); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984).

³⁵⁷ 628 A.2d at 305 (alleging termination for refusing to bribe Swiss officials).

³⁵⁸ *Id.*

³⁵⁹ *Thompson*, 685 P.2d at 1089–90 (alleging termination for instituting an accurate accounting program in compliance with the FCPA); *Adler v. Am. Standard Corp.*, 538 F. Supp. 572, 577–78 (D. Md. 1982), *aff'd and rev'd on appeal on other grounds*, 830 F.2d 1303 (4th Cir. 1987) (alleging termination for discovery of alleged bribes of Mexican officials in violation of the FCPA).

³⁶⁰ See *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97 (Me. 1984).

³⁶¹ See *Williams v. Killough*, 474 So. 2d 680 (Ala. 1985).

³⁶² See *Pratt v. Caterpillar Tractor Co.*, 500 N.E.2d 1001 (Ill. App. Ct. 1986), *appeal denied*, 506 N.E.2d 959 (Ill. 1987) (finding that the FCPA "cannot be said to enunciate a clearly mandated public policy of this State"). Illinois has recognized other federal statutes as embodying public policy. See, e.g., *Wheeler v. Caterpillar Tractor Co.*, 485 N.E.2d 372, 377 (Ill. 1985) (adopting the Energy Reorganization Act retaliatory discharge provision as state public policy); *Johnson v. World Color Press, Inc.*, 498 N.E.2d 575 (Ill. App. Ct. 1986) *appeal denied*, 505 N.E.2d 353 (Ill. 1987) (adopting federal securities laws as a mandate of state public policy).

³⁶³ See *Westman*, *supra* note 84, at 141.

³⁶⁴ See, e.g., *Vasquez v. El Paso County Cmty. Coll. Dist.*, 177 F. App'x 422 (5th Cir. 2006) (holding that the employee's failure to report what he claimed was a whistle blowing activity to a law enforcement authority defeated his claim under the Texas Whistleblower Act). See also *Kulch v. Structural Fibers, Inc.*, 677 N.E.2d 309 (Ohio 1997).

IV. USING SOX AS A BASIS FOR TRANSNATIONAL EMPLOYMENT LITIGATION

The previous Part establishes that tort laws not only vary from state to state, but also that claims predicated on state laws are too unpredictable and have limited extraterritorial application because of courts' reliance on the "most significant relationship" test, which results in courts' application of foreign law. It further demonstrates that while some federal laws, such as antitrust laws, RICO, and securities laws, benefit from extraterritoriality, they are too complicated to enforce the most common violations of the FCPA. These laws also rely too much on competitors and investors who make poor "private attorneys general" to bring suits predicated on FCPA violations. These conclusions weigh in favor of continued reliance on public prosecutions.

However, there is one potential area of private international law still left untapped: namely, transnational employment litigation based on SOX's whistleblower provisions. When Congress passed SOX, it essentially recruited employees in the fight against corporate corruption. The discussion below explores how SOX can be used by employees subjected to retaliation for opposing transnational bribery. The biggest obstacle to bringing these claims is the fact that U.S. courts have been reluctant to apply SOX outside the United States. Since most violations of the FCPA occur at least in part overseas, it is essential that this problem be solved.

A. *SOX Whistleblower Provisions*

If the FCPA figuratively authorized the United States to declare war against foreign corruption, then the SOX whistleblower provisions were meant to recruit employees as the rank-and-file troops. Prior to SOX, public enforcement efforts focused mainly on enlisting corporate boards of directors, executives, and outside auditors to oversee corporate compliance with anti-bribery laws. Similarly, most "tag-along" private lawsuits also focused on the bottom line, being driven primarily by investors, competitors, and other business partners. However, it is extremely difficult for these stakeholders to monitor the day-to-day activities of a multinational. A successful compliance program depends on information from low-level employees in the field who observe the daily operations firsthand. The most common source of reports of corruption is the employee.³⁶⁵ These are the real "gatekeepers" for combating foreign bribery. However, unless they can defend themselves or are otherwise adequately protected, these front-line troops cannot be expected to put up much of a fight.

³⁶⁵ See ASS'N OF CERTIFIED FRAUD EXAMINERS, 2008 REPORT TO THE NATION ON OCCUPATIONAL FRAUD & ABUSE 4 (2008) (finding that the most common fraud scheme was corruption, at 27%, and the most common source of reports was employee tips, at 42.6%).

In recognition of their important role in fighting corruption, Congress included many provisions in SOX that provide protections for whistleblowers. Section 301 requires audit committees to establish whistleblower procedures allowing employees to report anonymously concerns about questionable accounting or auditing.³⁶⁶ Committees must also establish procedures for reviewing and retaining any such reports.³⁶⁷ Many companies have contracted with independent hotline companies to receive these and other employee, customer, and other third-party complaints.³⁶⁸

Section 1107 of SOX gives the DOJ jurisdiction to impose criminal penalties on companies or individuals that knowingly and willfully retaliate against whistleblowers.³⁶⁹ This provision is broader than previous laws, covering employees who raise concerns about any federal criminal statute.³⁷⁰ However, this provision is triggered only after an “official proceeding” has been commenced, or the information is tendered directly to a law enforcement officer.³⁷¹ More importantly, it leaves the protection of employees to the discretion of the prosecutor. The inadequacy of this approach is evidenced by the fact that there is no record of any criminal prosecutions being brought under section 1107 to date.³⁷²

Section 806 of SOX goes a step further.³⁷³ For the first time ever, section 806 grants whistleblowers, broadly defined as “any employee,” the right to bring a private civil action if they are retaliated against for their efforts to report violations of any securities laws or SEC regulations.³⁷⁴ This whistleblower protection helps further FCPA policy by protecting employees who raise concerns not only about financial fraud, but violations of *any* securities law or SEC regulation.³⁷⁵ In addition, SEC regulations have interpreted SOX to hold not only corporations but also individuals liable for retaliating against a whistleblower.³⁷⁶ The FCPA amended the 1934 Act, and numerous SEC regulations were promulgated to implement the FCPA.³⁷⁷ Thus, SOX is well suited for combating foreign corruption in international business transactions generally.

³⁶⁶ SOX § 301, 15 U.S.C. § 78j-1(m)(4)(B) (2006).

³⁶⁷ *Id.* at § 78j-1(m)(4)(A).

³⁶⁸ See Thomson & Norman, *supra* note 68, at 398 n.34.

³⁶⁹ SOX § 1107, 18 U.S.C. § 1513 (2006).

³⁷⁰ SOX § 1107, 18 U.S.C. § 1513(e) (covering employees who raise concerns about violation of any federal criminal statute, not simply laws limited to financial fraud).

³⁷¹ SOX § 1107, 18 U.S.C. § 1513(a).

³⁷² See Westman, *supra* note 84, at 147.

³⁷³ SOX § 806, 18 U.S.C. § 1514A (2006); 29 C.F.R. § 1980.101 (2006) (implementing SOX § 806).

³⁷⁴ *Id.* at § 1514A(a)(2).

³⁷⁵ SOX § 806, 18 U.S.C. § 1514A(a)(1).

³⁷⁶ See 29 C.F.R. § 1980.101 (2006).

³⁷⁷ See 15 U.S.C. §§ 78m, 78dd-1 (2006).

B. Using Section 806 to Enforce the FCPA

To date there have been only two reported section 806 court decisions predicated in whole or in part on the disclosure of alleged FCPA violations: *Haddad v. ITT Industries, Inc.*³⁷⁸ and, most recently, *Day v. Staples, Inc.*³⁷⁹ *Haddad* involved an alleged scheme to pay bribes to Kuwaiti officials in return for a contract to purchase military communications equipment manufactured by the defendant. Haddad, a domestic employee, allegedly reported his concerns that the defendant was violating federal law to in-house counsel, and he cooperated in an internal investigation. He was suspended a week later, given the lowest possible rating on his performance review, and kept on “inactive status” indefinitely. In response, the plaintiff sought other employment and filed a SOX whistleblower claim with the DOJ. In the interim, the plaintiff obtained a second job, but the defendant allegedly interfered and the plaintiff was terminated without explanation. Haddad was kept on “inactive status” with the defendant until his administrative complaint was dismissed without prejudice a year later. The federal court refused to dismiss the complaint, finding that the plaintiff had pled facts showing he engaged in protected activity prior to adverse employment action by reporting information about the Kuwait bribery scheme to his supervisors and that his claims were not barred by the statute of limitations.³⁸⁰

The other case, *Staples*, is the first appellate court decision addressing the FCPA as a predicate of a SOX whistleblower suit. The case was brought by Day, a former employee employed in the United States, against Staples, the world’s largest office supply retail store chain, under section 806 and various state laws. Day alleged he was fired for reporting fraud, including alleged violations of the FCPA’s books and recordkeeping provisions.³⁸¹ Although the lower court found the plaintiff’s concerns were stated with adequate particularity, it granted defendant’s motion for summary judgment because plaintiff had no reasonable belief there had been accounting fraud.³⁸² The First Circuit, as a matter of first impression, established criteria for evaluating such claims, which are discussed below, and affirmed the decision.³⁸³

1. The Content of Protected “Disclosures”

In order to be protected by section 806, an employee’s complaint must “definitively and specifically” relate to one of the six enumerated categories of misconduct found in section 806: (1) mail fraud (under 18 U.S.C. § 1341); (2) wire fraud (under 18 U.S.C. § 1343); (3) bank fraud (under 18

³⁷⁸ No. 1:05-CV-370-TLS, 2007 WL 141949 (N.D. Ind. Jan. 12, 2007).

³⁷⁹ 555 F.3d 42 (1st Cir. 2009).

³⁸⁰ *Haddad*, 2007 WL 141949.

³⁸¹ *Staples*, 555 F.3d at 55 n.12.

³⁸² *Id.* at 51.

³⁸³ *Id.* at 45.

U.S.C. § 1344); (4) securities fraud (under 18 U.S.C. § 1348); (5) any rule or regulation of the SEC; or (6) any provision of federal law relating to fraud against shareholders.³⁸⁴

Several of the other categories set forth in section 806 may also be implicated by FCPA violations. To the extent the bribery involved the use of the mail or other instrumentalities of commerce, for example, the employee would be protected under one of the first two categories if he or she reasonably believed that the conduct constituted a violation of section 1341 (mail fraud) or section 1343 (wire fraud). Similarly, reports of bribery payments made through a U.S. bank would be covered under the fourth clause as a violation of section 1344. The accounting provisions of the FCPA and the anti-bribery provisions applying to issuers were both amendments to the 1934 Act, falling into the fifth category of covered misconduct.³⁸⁵ Furthermore, SEC regulations were promulgated under the FCPA to govern accounting practices of issuers.³⁸⁶ Violations of the FCPA are also potentially covered under the sixth catch-all category of “any provision of Federal law relating to fraud against shareholders.”³⁸⁷ Unfortunately, this would involve careful consideration of what was disclosed to investors and when, and such an inquiry would risk overshadowing the bribery analysis like it does in a section 10(b) action.³⁸⁸

To complicate matters, however, a conflict exists among the various federal courts that have addressed the issue as to whether alleged violations under categories one through five must also include allegations of fraud against shareholders like category six.³⁸⁹ The Department of Labor, as re-

³⁸⁴ 18 U.S.C. § 1514A(a)(1) (2006). *See also* 29 C.F.R. § 1980.101 (2005); *Welch v. Chao*, 536 F.3d 269, 274-79 (4th Cir. 2008) (affirming the ARB’s holding that the employee did not engage in protected activity, but stating “we do not suggest that a whistleblower must identify specific statutory provisions or regulations when complaining”); *Harvey v. Home Depot USA, Inc.*, ARB 04-114, 2006 WL 3246905, at *11 (Dep’t of Labor June 2, 2006) (“An employee’s complaint must be directly related to the listed categories.”).

³⁸⁵ 15 U.S.C. § 78dd-1 (2006) (anti-bribery provisions); 15 U.S.C. § 78m (2006) (accounting provisions).

³⁸⁶ 17 C.F.R. §§ 240.13b2-1 and 240.13b2-2 (2008).

³⁸⁷ 18 U.S.C. § 1514A(a)(1) (2006).

³⁸⁸ *See supra* Part III(B)(4).

³⁸⁹ *Compare* *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008) (holding that the language “any rule or regulation of the SEC” implicitly refers to regulations prohibiting fraud), *and* *Bishop v. PCS Admin.*, [2006 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,882, at 90,578 (N.D. Ill. 2006) (finding that the phrase “relating to fraud against shareholders” must be read as applying to all violations enumerated under section 806), *with* *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009) (stating “the first and third categories share a common denominator: that the conduct involves ‘fraud,’ and many of the second category claims (violations of SEC rules or regulations) will also involve fraud” but implying that they may not necessarily involve fraud), *and* *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1376-78 (N.D. Ga. 2004) (holding even though plaintiff did not specifically allege accounting or securities fraud “allegations detail[ing] violations of the company’s internal accounting controls in favor of preferential treatment based on personal relationships” could be found by a reasonable jury to be protected “given the broad remedial purpose behind Sarbanes-Oxley”).

flected in several Administrative Review Board decisions, has also struggled with approaching this issue consistently.³⁹⁰

General principles of statutory construction weigh against reading section 806 as providing whistleblower protection only to employees who provide information concerning fraud against shareholders. Relying on the “doctrine of the last antecedent,” the courts in *O’Mahony v. Accenture, Ltd.* and *Reyna v. ConAgra Foods, Inc.* concluded the phrase “relating to fraud against shareholders” must be read to modify only the last antecedent, which is “any provision of Federal law.”³⁹¹ Furthermore, there is no evidence or “indicia of meaning” that Congress intended the phrase “relating to fraud against shareholders” to limit all the preceding phrases.³⁹² Instead, “the law was intentionally written to sweep broadly, protecting any employee of a publicly traded company who takes reasonable action to try to protect investors and the market.”³⁹³ Investors and the market benefit from protection not only from fraud but from any violation of applicable securities regulations. According to Senator Leahy, who helped craft the provision, “the law was designed to protect people like Sherron Watkins from Enron” who Enron fired “for reporting accounting irregularities.”³⁹⁴ Therefore, a section 806 claim was intended to be brought by an employee based on even the most minor violations of the FCPA’s accounting and recordkeeping provisions if disclosure of the violations resulted in retaliation.

Unfortunately, the First Circuit in *Staples* declined to rule on whether the FCPA falls within the scope of section 806.³⁹⁵ Explicitly assuming argu-

³⁹⁰ Compare *Wengender v. Robert Half Int’l Inc.*, No. 2005-SOX-59, 2006 WL 3246887, at *11 (Dep’t of Labor Mar. 30, 2006) (recommended decision) (“SOX does not apply to . . . general allegations of fraud Rather, applicability of SOX is limited to specifically enumerated laws or regulations related to fraud against shareholders.”), and *Marshall v. Northrup*, 2005-SOX-0008, 2005 WL 4889013, *2 (Dep’t of Labor June 22, 2005) (“Protected activity is defined under SOX as reporting an employer’s conduct which the employee reasonably believes constitutes a violation of the laws and regulations related to fraud against shareholders.”), and *Platone v. FLYi, Inc.*, No. 2003-SOX-27, 2006 WL 3246910, at *7 (Dep’t of Labor Sept. 29, 2006) (requiring the reported conduct ‘be adverse to investors’ interests’), with *Walton v. Nova Info.*, No. 2006-SOX-18, 2006 WL 3246908 (Dep’t of Labor Sept. 29, 2006) (final decision) (rejecting the argument that a report of a violation or rule or regulation of the SEC must relate to fraud against shareholders). See also Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 138 (2007) (discussing other ARB decisions contradicting the language and intent of the FCAP).

³⁹¹ *O’Mahony v. Accenture, Ltd.*, 537 F. Supp. 2d 506, 516 (S.D.N.Y. 2008); *Reyna v. ConAgra Foods, Inc.*, 506 F. Supp. 2d 1363, 1381 (M.D. Ga. 2007). Under the doctrine of the last antecedent, relative and qualifying words, phrases, and clauses (here, the relative clause “relating to fraud against shareholders”) are to be applied to the words or phrase immediately preceding them (here, “any provision of Federal law”) and are not to be construed as extending to or including others more remote (here, “section 1341 (mail fraud), 1343 (wire fraud)”). *O’Mahony*, 537 F. Supp. 2d at 516.

³⁹² *O’Mahony*, 537 F. Supp. 2d at 517.

³⁹³ 149 Cong. Rec. 2121 (2003).

³⁹⁴ *Id.*

³⁹⁵ *Staples*, 555 F.3d at 57 n.15.

endo that it does, the court nevertheless concluded the plaintiff's contention that Staples inaccurately reported increased revenues lacked any merit.³⁹⁶

2. *Types of "Protected Activity"*

Section 806 protects lawful acts by an employee to provide information or otherwise assist in any investigation by a federal regulatory or law enforcement agency, member of Congress, or congressional committee.³⁹⁷ It further protects employees who file, testify, participate in, or otherwise assist in any proceeding related to an alleged violation of corporate fraud laws or regulations.³⁹⁸ In order to provide a legal remedy for scenarios like the one described at the outset of this Article, section 806 also provides civil protection for an employee who provides information to "a person with managerial authority within the publicly traded corporation."³⁹⁹

It is essential that section 806 protect internal reports to management. Most multinationals have adopted "open door" policies that funnel all employee complaints to an internal hotline or to a member of management. Even where laws specifically require employees to "immediately" report violations to the appropriate government agency, however, employee training programs often stress the need to go through corporate headquarters or a member of management first. Given this strict "chain-of-command" culture present in many corporations and given the ambiguous nature of the FCPA discussed earlier, most employees will be reluctant to go directly to the U.S. government.⁴⁰⁰ Moreover, employees overseas, where most foreign corruption is likely to occur, do not have ready access to federal agencies.

Additionally, section 806 protects "conscientious objectors" who stand up to management and voice their opposition to foreign bribery schemes before the illegal acts are actually carried out.⁴⁰¹ At least one court has held an employee is protected for refusal to cooperate in future SOX violations so long as the only contingency is whether or not the employee will cooperate.⁴⁰²

³⁹⁶ *Id.* The court did couch the issue in terms of "shareholder fraud" but only because of inartful pleading by the plaintiff whose Complaint alleged the defendant "defrauded Staples shareholders." *Id.* at 45.

³⁹⁷ SOX § 806, 18 U.S.C. § 1514A (2006).

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ 149 CONG. REC. 2121 (2003) (As Sen. Leahy explained, "there is a severe penalty for breaking the corporate code of silence").

⁴⁰¹ *Id.*

⁴⁰² *Walton v. Nova Info. Sys.*, No. 3:06-CV-292, 2008 WL 1751525 (E.D. Tenn. Apr. 11, 2008).

C. Advantages of Section 806

Private lawsuits brought under section 806 can complement the DOJ and SEC's high-profile enforcement activities as well as existing private causes of action. Unlike prosecutors who must pick and choose which cases to pursue, employees are more likely to take issue with a wide range of violations of the anti-bribery laws if any one of them costs them their jobs. And unlike private suits by competitors or shareholders, employees are unlikely to be put off by fears of tarnishing the reputation of the company or bringing the unwanted attention of regulators to bear on the industry. More importantly, employees will not be required to prove some grand racketeering scheme or complicated antitrust violation. Discrete employment-related disputes will give courts more manageable opportunities to provide much needed clarification on a number of ambiguous FCPA provisions.

In contrast, one of the real pitfalls of public enforcement efforts is its tendency to overreach. For example, in 2002 a former employee brought suit against Baker Hughes claiming he was fired for refusing to bribe Nigerian officials.⁴⁰³ Baker Hughes conducted an internal investigation and voluntarily reported the allegations to the DOJ the same year. However, the DOJ was not satisfied with the company's response. Instead, they launched an inquiry that lasted more than four years and spiraled out to more than twelve countries.⁴⁰⁴ Baker Hughes spent approximately \$50 million on lawyers and forensic accountants keeping up with the DOJ's demands.⁴⁰⁵ When the matter was finally concluded in 2007, Baker Hughes had pled guilty to three felony counts, entered into a two year deferred prosecution agreement, and paid a total of \$44 million in penalties and disgorgement of profits.⁴⁰⁶ Regulators would likely defend their actions by arguing such "black hole" investigations are necessary to ensure full compliance. This was, after all, not Baker Hughes' first offense.⁴⁰⁷ However, a scorched earth policy may only encourage a code of silence among corporate front-line managers who are reluctant to subject their companies to such heavy-handed tactics by regulators.

Section 806 provides a better alternative. Employee-plaintiffs can eat the elephant one bite at a time through private civil actions restricted by strict pleading and standing requirements.⁴⁰⁸ In fact, there are several unique

⁴⁰³ Sue Reisinger, *Why Are More Companies Self-Reporting Overseas Bribes?* CORPORATE COUNSEL, Jul. 16, 2007, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1184231196297>.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ Every complaint must provide "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). See generally Charles B. Campbell, A "Plausible" Showing After *Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1 (2008).

aspects to section 806 that enhance the role of transnational employment litigation in combating corruption in this more surgical way.

1. *Reinstatement*

First, section 806 allows for the immediate reinstatement of whistleblowing employees.⁴⁰⁹ Even before an evidentiary hearing on the merits before a Department of Labor (“DOL”) administrative law judge, an employee may be reinstated after an investigation by Occupational Safety and Health Administration (“OSHA”) investigators.⁴¹⁰ If employees have to wait until the end of a lawsuit to get their jobs back, for all practical purposes they have already lost. Litigation can drag on for months or even years. By prohibiting employers from transferring or discharging a “troublemaker,” the conscientious objector is not only spared further injury but he or she can continue to monitor the situation firsthand and theoretically prevent any further bribery.

In stark contrast, the DOJ and SEC have often insisted as part of a deferred prosecution agreement that companies agree to pay for the services of outside compliance monitors with unlimited budgets to look over their shoulders typically for three years after settlement.⁴¹¹ These monitors can charge several million dollars per year for their services.⁴¹² In fact, the costs of corporate monitorships have become so excessive they have prompted congressional hearings.⁴¹³ Since plaintiff-employees would be reinstated, they would be able to monitor corporations’ conduct at a substantially lower cost. This could potentially reduce the number of cases in which an independent compliance monitor would be needed to ensure future compliance. In those cases where additional monitoring is necessary, however, SOX expressly authorizes federal courts to grant “any equitable relief that may be appropriate or necessary for the benefit of investors.”⁴¹⁴

⁴⁰⁹ SOX § 806, 18 U.S.C. § 1514A(c)(2)(A) (2006).

⁴¹⁰ SOX § 806, 18 U.S.C. § 1514A(b)(2)(A) (2006).

⁴¹¹ Koehler, *supra* note 87, at 415 n.80; Shearman & Sterling LLP, *supra* note 44, at 3 (stating that monitors were appointed for terms of three years in eight of the fourteen companies that have agreed to one as part of a settlement agreement).

⁴¹² See Schnitzer Steel Indus., Inc., Exchange Act Release No. 54,606, 89 SEC Docket 302 (Oct. 16, 2006) (requiring the appointment of a consultant to review compliance with FCPA and other applicable international anti-bribery laws).

⁴¹³ *Deferred Prosecution and Corporate Settlement Agreements: Hearing on H.R. 6492 Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Rep. John Conyers, Jr. (D-Mich.), Chairman, H. Comm. on the Judiciary).

⁴¹⁴ SOX § 305(b), 15 U.S.C. § 78u(d)(5) (2006). It is unclear whether only the SEC can request such additional relief or whether plaintiffs may also invoke this provision.

2. Administrative Prerequisites

Another major criticism of private suits is that they will result in a multitude of nuisance suits that would clog up the federal courts. However, SOX is uniquely equipped to solve that problem as well. Similar to the way in which the EEOC handles Title VII claims, SOX requires that most employees go through an administrative complaint procedure before filing a civil action under section 806.⁴¹⁵ An employee must file a complaint with DOL, which will conduct an investigation.⁴¹⁶ A DOL administrative law judge then hears the evidence from the investigation and renders a decision.⁴¹⁷ If the DOL does not issue a final decision within 180 days of the filing of the complaint, the claimant can bring a *de novo* action in the appropriate district court unless there is a showing of bad faith.⁴¹⁸

Since copies of all complaints must be provided to the SEC, section 806 suits may occasionally trigger public enforcement actions.⁴¹⁹ In addition, if prosecutors want to weigh in on legal issues raised in a particular case, the regulations allow the SEC to participate as *amicus curiae*.⁴²⁰ So far, the SEC does not appear to have acted as a “friend of the court” in any section 806 cases.⁴²¹

3. Reasonable Belief Standard

Whistleblower suits have distinct advantages over private shareholder litigation as well. Companies often defend themselves in class action securities fraud cases by alleging that the misinformation did not satisfy the “materiality” standard under federal securities law.⁴²² However, under section 806, employees need only “reasonably believe” that they are reporting violations of securities fraud statutes or SEC rules.⁴²³

Of course, not every case will meet this standard, which is both objective and subjective.⁴²⁴ For example, in *Walton v. Nova Information Systems*,

⁴¹⁵ SOX § 806(b), 18 U.S.C. § 1514A(b)(1)(A) (2006).

⁴¹⁶ *Id.* § 806(b).

⁴¹⁷ See Thomson & Norman, *supra* note 68, at 400 n.46 (citing 14 GUY P. LANDER, U.S. SECURITIES LAW FOR FINANCIAL TRANSACTIONS § 6:168 (2d ed. 2007)).

⁴¹⁸ SOX § 806(b), 18 U.S.C. § 1514A(b)(1)(B).

⁴¹⁹ See 29 C.F.R. § 1980.104(a) (2008).

⁴²⁰ See *id.* § 1080.108(b).

⁴²¹ Westman, *supra* note 84, at 149.

⁴²² See, e.g., *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 119 (2d Cir. 1982). See generally *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988) (adopting the probability/magnitude test for materiality).

⁴²³ SOX § 806, 18 U.S.C. § 1514A (2006). See *Welch v. Chao*, 536 F.3d 269, 277 (4th Cir. 2008) (holding section 806 does not require an actual violation; a reasonable but mistaken belief is enough). Under the civil remedy, an employee must prove his or her reasonable belief by a preponderance of the evidence. 18 U.S.C. § 1514A(a)(1) (2006). Under the criminal provisions of section 1107, employees are protected for reporting “truthful information,” whether or not the information proves a violation of law. 18 U.S.C. § 1513 (2006).

⁴²⁴ *Day v. Staples, Inc.*, 555 F.3d 42, 55 (1st Cir. 2009).

a federal court in Tennessee considered whether a whistleblower had successfully established a retaliatory discharge claim under common law.⁴²⁵ The plaintiff e-mailed her employer, complaining that certain documents were in “non-compliance” with section 404 of SOX. The court concluded this whistleblowing was not vague, but she still failed to satisfy the “reasonable belief” standard because her complaints were “too speculative for a reasonable belief of violation of securities law.”⁴²⁶ At best, the plaintiff had only complained of “potential violations of the cited statutes if the security standards were not met *and* the required disclosures and reports were not made by management, with which the plaintiff admits she was not involved nor had familiarity.”⁴²⁷

4. *Burdens of Proof*

Finally, defendants in SOX whistleblower cases are subject to a more stringent burden of proof than in most employment litigation. In most employment cases, there is a burden-shifting framework where, once the plaintiff has established a prima facie case by a “preponderance of the evidence”, the defendant must “articulate” a legitimate, non-discriminatory reason for the discharge to avoid liability.⁴²⁸ Under the SOX whistleblower provisions, however, the defendant must prove that he or she did not retaliate against the plaintiff by “clear and convincing” evidence, usually meaning evidence producing “a firm belief or conviction.”⁴²⁹ This is a heavier burden than the “more likely than not” standard typically seen in employment cases.

D. *Extraterritorial Reach of Section 806*

There is one other unsettled issue that may make a considerable difference in the ability of section 806 to combat foreign bribery, namely, determining the territorial scope of section 806. Unless it applies to workers abroad, section 806 will be significantly limited in its ability to further FCPA policy. Although the plaintiffs reporting FCPA violations in *Haddad* and *Staples* happened to work here in the United States,⁴³⁰ many whistleblowers will likely be persons working overseas for a U.S. company or its foreign subsidiary, joint venture, contractor, or other third-party intermediary.

At present, the only appellate court to have addressed the issue of whether an employee overseas can bring any action under section 806 is the

⁴²⁵ No. 3:06-CV-292, 2008 WL 1751525 (E.D. Tenn. Apr. 11, 2008).

⁴²⁶ *Id.* at *9.

⁴²⁷ *Id.*

⁴²⁸ 49 U.S.C. § 42121 (b)(2)(B)(i)–(ii) (2006).

⁴²⁹ SOX § 806, 18 U.S.C. § 1514A (2006).

⁴³⁰ *Day*, 555 F.3d at 45 (Day worked as an entry level analyst in Staples’s Reverse Logistics Department located in Framington, MA); *Haddad*, 2007 WL 141949, at *2 (Haddad was the program manager for ITT’s Kuwait office from 1995 until he was transferred to the Ft. Wayne, Indiana office in 2001).

First Circuit.⁴³¹ The plaintiff in *Carnero v. Boston Scientific Corp.* was an Argentinean citizen who brought an action against the U.S. parent company of his foreign employer, alleging that he was discharged for disclosing his employer's allegedly fraudulent accounting practices unrelated to the FCPA.⁴³² The First Circuit ruled that SOX did not have extraterritorial application to extend protection to foreign employees working abroad for foreign companies.⁴³³ The DOL has similarly refused to apply SOX to employees in foreign jurisdictions in all but one case.⁴³⁴

According to dicta in a recent Fifth Circuit opinion, DOL interpretations of section 806 are entitled to *Chevron* deference.⁴³⁵ This principle of administrative law would give the DOL express authority to correct the territorial gap left by Congress in section 806 by regulations which would be binding unless shown to be procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.⁴³⁶ To date, however, the DOL has declined to clarify this issue in its regulations, despite requests from the private sector, on the ground that the purpose of the regulations is procedural and not to interpret the statute.⁴³⁷

Even though the facts in *Carnero* and the DOL administrative rulings do not directly address the FCPA, they are still unfortunate decisions be-

⁴³¹ *Carnero v. Boston Scientific Corp.*, 433 F.3d 1 (1st Cir. 2006), *cert. denied*, 548 U.S. 906 (2006). *But see* O'Mahony v. Accenture Ltd., 537 F. Supp. 2d 506 (S.D.N.Y. 2008) (holding SOX does apply to a U.S. employee/Irish national of a foreign corporation where the misconduct occurred in the United States). For other articles discussing the *Carnero* decision see Donald C. Dowling, Jr., *Sarbanes-Oxley Whistleblower Hotlines Across Europe: Directions Through the Maze*, 42 INT'L LAW. 1 (2008); Allison Garrett, *Corporation as Sovereign*, 60 MAINE L. REV. 129, 156, n. 183 (2008); Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1775-76 (2007); Beverly H. Earle & Gerald A. Madek, *The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change*, 44 AM. BUS. L.J. 1, 44-46 (2007); David A. Cohn, Note, *Carnero v. Boston Scientific Corporation: An Analysis*, 6 J. INT'L BUS. & L. 203 (2007) (arguing *Carnero* was wrongly decided); Caryn R. Nutt, Comment, *Carnero v. Boston Scientific Corporation: Interpreting the Extraterritorial Effect of the Civil Whistleblower Protection of the Sarbanes-Oxley Act*, 41 U.S.F. L. REV. 201 (2006).

⁴³² 433 F.3d at 2. (Carnero had been a resident of both Argentina and Brazil).

⁴³³ *Id.*

⁴³⁴ *See, e.g.*, *Ede v. The Swatch Group Ltd.*, No. 04-SOX-68/69, 2007 DOLSOX LEXIS 51 (Dep't of Labor June 27, 2007) (agreeing with the *Carnero* opinion and affirming ALJ decision that SOX does not apply extraterritorially to employees working exclusively outside the United States for the foreign subsidiary of a covered entity); *Beck v. Citigroup, Inc.*, No. 2006-SOX-00003, 2006 WL 3246814 (Dep't of Labor Aug. 1, 2006) (SOX section 806 does not reach German national working in Germany for Citigroup Global Markets Deutschland AG & Co. KGaA); *O'Mahony v. Accenture, Ltd.*, 2005-SOX-00072, 2006 WL 3246890 (Dep't of Labor Jan. 20, 2006) (holding "as a matter of statutory construction, the whistleblower provision of the Act applies only to employees who work within the United States," but this decision was later overturned as discussed below later overturned as discussed below); *Concone v. Capital One Fin. Corp.*, No. 2005-SOX-006, 2004 WL 5030305 (Dep't of Labor Dec. 3, 2004) (similar holding). *But see* *Penesso v. LLC Int'l Inc.*, No. 2005-SOX-16, 2005 WL 4889018 (Dep't of Labor Mar. 4, 2005) (holding section 806 does apply where claimant is a U.S. citizen and much of the protected activity takes place in the United States).

⁴³⁵ *Getman v. Admin. Review Bd.*, 265 F. App'x 317 (5th Cir. 2008).

⁴³⁶ *See id.*

⁴³⁷ 29 C.F.R. § 1980 (2008).

cause foreign laws do not effectively protect whistleblowers. Only a handful of countries have passed legislation to protect whistleblowers.⁴³⁸ Most of these foreign laws only protect testifying or serving as a witness; few recognize disclosure of information as protected activity.⁴³⁹ For example, interim regulations were finally enacted in India in April 2004.⁴⁴⁰ However, the Public Interest Disclosure Act only applies to whistleblowers who are public employees and has stiff penalties if complaints are found to have been made in bad faith.⁴⁴¹ False, reckless, or malicious disclosures are subject to imprisonment up to three years and a fine of up to 50,000 rupees.⁴⁴² Without access to U.S. courts, whistleblowers, regardless of their citizenship, that work for U.S. companies or their foreign subsidiaries in India or similar developing countries will be without any appropriate legal remedy.

Additionally, in determining whether Congress intended SOX to apply extraterritorially, the courts and DOL failed to anticipate the possibility of a section 806 case predicated on the FCPA. Thus, their reasoning does not allow for the logical implications of a connection between SOX and an extraterritorial statute like the FCPA. Since section 806 necessarily encompasses the FCPA, it demonstrates a clear intent on the part of Congress to extend section 806 extraterritorially, at least for protecting employees disclosing FCPA violations.

Finally, these earlier decisions have applied the wrong conflict of laws principles. The *Carnero* court, for example, assumed it had to choose between applying U.S. or foreign law.⁴⁴³ However, nothing in international law prohibits concurrent prescriptive jurisdiction.⁴⁴⁴ The court should have held section 806 applies wherever it would further the purposes of the statute, even extraterritorially. As discussed below, there are two alternative approaches to extraterritoriality that would permit section 806 suits by any employee—foreign or domestic—whenever the underlying FCPA violations involve either conduct or effects in the United States.

⁴³⁸ See generally WIN VANDEKERCKHOVE, WHISTLEBLOWING AND ORGANIZATIONAL SOCIAL RESPONSIBILITY (2006).

⁴³⁹ See *id.*

⁴⁴⁰ Central Vigilance Commission, Resolution on Public Interest Disclosures & Protection of Informer, Office Order No. 33/5/2004, May 17, 2004 (India), available at http://www.cvc.nic.in/004vgl26_1.PDF.

⁴⁴¹ *Id.*

⁴⁴² Text of the Public Interest Disclosure (Protection of Informers) Bill (2002), § 16, at 11, available at <http://lawcommissionofindia.nic.in/reports/179rpt2.pdf>. 50,000 rupees is about \$1,000. *Exchange Rates*, WALL STREET JOURNAL, Apr. 17, 2009, http://online.wsj.com/mdc/public/page/2_3021-forex.html.

⁴⁴³ *Carnero*, 433 F.3d at 18.

⁴⁴⁴ See Phillip McConaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 STAN. J. INT'L L. 255, 267–268 (1999) ("International law contemplates that national jurisdiction to prescribe law regulating a cross-border transaction will often be concurrent and overlap and not be mutually exclusive.").

1. *Presumption Against Extraterritoriality*

Congress has frequently exercised its power to legislate beyond the territorial boundaries of the United States.⁴⁴⁵ However, it is presumed not to have done so unless “a contrary intent appears.”⁴⁴⁶ In 1991, this principle, generally referred to as the “presumption against extraterritoriality,” was reaffirmed by the Supreme Court in *EEOC v. Arabian American Oil Co* (“*Aramco*”).⁴⁴⁷ Under *Aramco* and its progeny, when a case involves conduct overseas, a court must first determine whether jurisdiction on any basis is available.⁴⁴⁸ The most frequently invoked bases include territoriality, nationality, and the effects principle.⁴⁴⁹ If exercising jurisdiction is possible, then the court is required to perform analysis under the presumption to determine if doing so is wise.⁴⁵⁰ This analysis is conducted by two different methods. The court can look at the statute to see if there is a clear statement of congressional intent to apply it extraterritorially.⁴⁵¹ Alternatively, courts can find intent by examining legislative history or through the use of other interpretive means.⁴⁵² The latter framework is applied to section 806 below.

2. *Congressional Intent*

While section 806 does not contain any express language, there is plenty of language throughout SOX indicating Congress intended the Act to apply extraterritorially. For example, the term “issuers” is defined as companies that register securities under section 12 of the 1934 Act, file reports under section 15(d), or file or have filed a registration statement that has not yet become effective and that has not been withdrawn under the 1933 Act.⁴⁵³ Both U.S. public companies and foreign companies with publicly traded stock in the United States are covered under this definition. Currently, the number of non-U.S. companies listed on a U.S. stock exchange stands at nearly 1300, many of which became listed in connection with the issuance of

⁴⁴⁵ See, e.g., Sherman Anti-Trust Act, 15 U.S.C. §§ 1–7 (2006); Lanham Trade-Mark Act, 15 U.S.C. § 1051-1141n (2006).

⁴⁴⁶ See *Equal Employment Opportunity Comm’n v. Arabian Am. Oil Co.*, 499 U.S. 244, 284–85 (1991).

⁴⁴⁷ *Id.* See also *Mendonca v. Tidewater, Inc.*, No. Civ.A. 00-2284, 2001 WL 283091, at *7 (E.D. La. Mar. 4, 2001).

⁴⁴⁸ *Arabian Am. Oil Co.*, 499 U.S. at 284–85.

⁴⁴⁹ See *id.* The universality and security or protection principle are also recognized exceptions. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 402 (1971).

⁴⁵⁰ See *id.*

⁴⁵¹ See *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

⁴⁵² See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 177 (1993) (holding that the court is to examine “all available evidence” of congressional intent in determining whether a statute applies abroad).

⁴⁵³ SOX § 2(a)(7), 15 U.S.C. § 7201(7) (2006).

American Depository Receipts (“ADRs”).⁴⁵⁴ Therefore, only if a foreign issuer is exempt from SEC filing requirements will it be excluded from coverage under SOX’s whistleblower provision.

In implementing the Act, the SEC felt compelled by the language of the statute to issue regulations covering foreign companies.⁴⁵⁵ This generated a great deal of international criticism accusing the United States of infringing on the sovereignty of other nations by acting as a global corporate regulator.⁴⁵⁶ Initially, the SEC defended its actions by pointing out that foreign companies voluntarily subject themselves to SEC regulations by choosing to list their stock on U.S. capital markets and, if they do not want to comply, they are free to de-list.⁴⁵⁷ In January 2003, however, the SEC amended its position to allow certain exemptions to the auditing committee rules for foreign-based firms that operate under different types of corporate governance systems.⁴⁵⁸ However, even with these accommodations, SOX and its regulations continue to operate extraterritorially.

The legislative history of section 806 shows Congress was primarily focused on providing federal protection to private corporate whistleblowers, in light of the “patchwork and vagaries of current state [whistleblower protection] laws.”⁴⁵⁹ Although there is no discussion of section 806 applying overseas, the clear intent of Congress was to provide uniform protection of employees regardless of their location because “companies with a corporate culture that punishes whistleblowers for being ‘disloyal’ and ‘litigation risks’ often transcend state lines.”⁴⁶⁰ Nevertheless, the court in *Carnero* read Congress’s criticisms of “state courts” and “state laws” in the legislative history completely out of context. As a result, the court wrongly concluded Congress was only concerned about protecting “corporate employees in the various states.”⁴⁶¹ The court in *Carnero* then insisted that the “silence” of section 806’s text combined with this “states-only” language precluded extending that particular provision to a foreign employee of a foreign subsidiary of a covered entity.⁴⁶²

However, that argument proves too much. By that same reasoning, section 301, which is also silent on its territorial scope, would also not apply

⁴⁵⁴ Roughly thirty percent (470) of the NYSE is currently made up of non-U.S. companies. In 2001, there were more than 1600 ADR programs for companies from over sixty countries. See Low, *supra* note 267, at 761 n.5.

⁴⁵⁵ See Certification of Disclosure in Companies’ Quarterly and Annual Reports, 67 Fed. Reg. 41,877, 41,882 (June 20, 2002).

⁴⁵⁶ See generally Jennifer K. Coalson, Note, *The Sarbanes-Oxley Act of 2002: Are Stricter Internal Controls Constricting International Companies?*, 36 GA. J. INT’L & COMP. L. 647 (2008).

⁴⁵⁷ See Standards Relating to Listed Company Audit Committees, 68 Fed. Reg. 2638, 2638–64 (Jan. 17, 2003).

⁴⁵⁸ *Id.*

⁴⁵⁹ S. REP. NO. 107-146, at 10 (2002).

⁴⁶⁰ 122 CONG. REC. 14,450 (2002).

⁴⁶¹ *Carnero*, 433 F.3d at 11–12.

⁴⁶² *Id.* at 14–15.

overseas.⁴⁶³ This would mean that audit committees would not be required to extend their anonymous complaint hotlines to all employees.⁴⁶⁴ This would run counter to the U.S. Sentencing Guidelines, which state that the “organization shall take reasonable steps to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization’s employees and agents may report . . . potential or actual criminal conduct without fear of retaliation.”⁴⁶⁵ The twisted logic of the *Carnero* decision creates the very sort of “legal loopholes” whereby good employees fall through the cracks that SOX was enacted to address in the first place.

Furthermore, the First Circuit failed to consider the possibility of a section 806 whistleblower case predicated on the FCPA. As discussed earlier, the plain language of section 806 states that it applies to the disclosure of a violation of any one of six specific categories, including “any rule or regulation of the Securities and Exchange Commission.”⁴⁶⁶ To the extent any such rules or regulations are extraterritorial in scope, section 806 logically must be as well, in order to fully execute its mandate. Several rules adopted by the SEC are specifically directed at violations of the FCPA, which are primarily extraterritorial in nature. For example, Rule 13b2-1 provides that “[n]o person shall, directly or indirectly, falsify or cause to be falsified, any book, record or account subject to [the FCPA accounting provisions].”⁴⁶⁷ The rule is specifically aimed at recordkeeping failures related to overseas conduct (i.e., transnational bribery), and applies to both the issuer itself and “any person who, in fact, does cause corporate books and records to be falsified.”⁴⁶⁸ If a bookkeeper overseas were to be retaliated against for disclosing a covered entity’s violation of this particular rule, then it would seem section 806 should be applied extraterritorially to prevent the company from thwarting the goals of the FCPA.

⁴⁶³ SOX § 301, 15 U.S.C. § 78j-1(m)(4) (2006).

⁴⁶⁴ *Id.* Commentators have argued the conflict between foreign laws and other sections of SOX, such as section 301, weighs against extraterritorial application, raising France as their chief concern. However, the Commission Nationale de l’Informatique et des Libertés (“CNIL”) has issued guidance explaining that SOX whistleblower programs do not necessarily violate French law, “provided the rights of individuals directly or indirectly incriminated through them are guaranteed with regard to personal data protection rules.” CNIL, GUIDELINE DOCUMENT ADOPTED BY THE “COMMISSION NATIONALE DE L’INFORMATIQUE ET DES LIBERTÉS” (CNIL) ON 10 NOVEMBER 2005 FOR THE IMPLEMENTATION OF WHISTLEBLOWING SYSTEMS 1 (2005), available at <http://www.cnil.fr/fileadmin/documents/uk/CNIL-recommandations-whistleblowing-VA.pdf>.

⁴⁶⁵ *U.S. Sentencing Guidelines Manual* § 8B2.1(b)(5)(C) (2007).

⁴⁶⁶ 18 U.S.C. § 1514A(a)(2) (2006).

⁴⁶⁷ Promotion of the Reliability of Financial Information and Prevention of the Concealment of Questionable or Illegal Corporate Payments and Practices, Exchange Act Release No. 15,570, 44 Fed. Reg. 10,964, 10,968 (Feb. 23, 1979).

⁴⁶⁸ *Id.*

3. *Carnero v. Boston Scientific Corp.’s “Balancing Approach” to Extraterritoriality*

The *Carnero* decision can also be challenged at a more fundamental level. When the text of a statute is silent, courts are to be guided not only by legislative history but also by international choice of law principles in deciding the extraterritorial reach of a federal regulatory statute.⁴⁶⁹ However, the *Carnero* court wrongly assumed it had to adopt a “balancing” approach in its conflict of laws analysis. Under this approach, the *Carnero* court found that, if Congress intended section 806 to apply extraterritorially, there would have been some indication in the legislative history of Congress balancing its goals against that of a foreign sovereignty.⁴⁷⁰ For example, the court points to “the well-established principle of sovereignty . . . that no nation has the right to impose its labor standards on another country.”⁴⁷¹

On the one hand, the court’s use of the “balancing” approach is understandable. It is, after all, well entrenched in American conflicts theory. In particular, the Restatement (Second) of Conflict of Laws employs comparative interest balancing.⁴⁷² Under its “most significant relationship” test, which is commonly used to resolve conflicts in tort law, a comparative assessment must be conducted with the law of only one state being selected in the end.⁴⁷³

A similar balancing approach was eventually adopted in the Restatement (Third) of Foreign Relations Law.⁴⁷⁴ Section 403 states that even when one of the four bases for jurisdiction listed in section 402 exists, such as conduct, effects, or nationality, a nation may not exercise prescriptive jurisdiction if it would be “unreasonable” to do so.⁴⁷⁵ Section 403 also provides several factors to be weighed in that determination.⁴⁷⁶

However, nothing in the Restatement (Third) of Foreign Relations Law prohibits concurrent jurisdiction. On the contrary, subsection (3) of section 403 contemplates situations in which it would not be unreasonable for two states to exercise prescriptive jurisdiction.⁴⁷⁷ Moreover, nothing in the U.S. Constitution or in international law prohibits multiple nations from applying their laws to the same event.⁴⁷⁸ In fact, Congress has passed laws that affect

⁴⁶⁹ See William S. Dodge, *Extraterritoriality and Conflicts-of-Law Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L. J. 101 (1998).

⁴⁷⁰ *Carnero*, 433 F.3d at 18.

⁴⁷¹ *Id.* (citing S. REP. NO. 98-467, at 27-28 (1984), reprinted in 1984 U.S.C.C.A.N. 2974, 3000-01).

⁴⁷² RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 145 (1971).

⁴⁷³ See Lea Brilmayer, CONFLICT OF LAWS 77 (2d ed. 1995).

⁴⁷⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

⁴⁷⁵ *Id.* at § 403(1).

⁴⁷⁶ *Id.* at § 403(2).

⁴⁷⁷ *Id.* at § 403(3).

⁴⁷⁸ *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 952 (D.C. Cir. 1984) (“There is no principle of international law which abolishes concurrent jurisdiction.”).

employment relationships extraterritorially without resolving every potential conflict with another nation's laws.⁴⁷⁹

Moreover, it is unfortunate that the *Carnero* court assumed concurrent jurisdiction was something to be avoided. On the contrary, the aggressive unilateral application of SOX whistleblower provisions extraterritorially has several advantages,⁴⁸⁰ including preventing multinationals from shopping around for the countries with the least protections. Furthermore, Congress should not be required *ex ante* to harmonize its laws internationally before it can expect its courts to enforce its regulatory statutes. The global harmonization process can take years, and is best accomplished through the national legislative process and diplomacy, not through the courts. In the interim, therefore, the courts should unilaterally enforce U.S. anti-bribery policy.

4. O'Mahony v. Accenture Ltd.'s Alternative Approaches to Extraterritoriality

There are at least two scenarios in which the *Carnero* court's decision need not be followed. The first situation is when part or all of the conduct giving rise to a case occurs within the United States.⁴⁸¹ Though rigidly territorial, this "conduct" test would afford some protection to the extent there is some connection to the United States.⁴⁸² The second circumstance is when the adverse effects of conduct abroad are felt within the United States.⁴⁸³ This "effects" test reflects a presumption in favor of extraterritorial application when U.S. interests are affected in antitrust and securities cases.⁴⁸⁴ If either one of these exceptions is applicable, the court is precluded from proceeding with further statutory analysis under the presumption against extraterritoriality.

These exceptions are virtually identical to the regulatory tactics used by the DOJ and SEC to bring enforcement actions under the FCPA, discussed in Part II of this Article. They are controversial and imperfect, but either would permit section 806 actions to be brought by foreign employees disclosing transnational bribery.

Both the "conduct" and "effects" tests were recently discussed in the context of a SOX whistleblower claim by the federal court of the Southern

⁴⁷⁹ See securities and antitrust cases listed in *infra* notes 508–509.

⁴⁸⁰ See Dodge, *supra* note 470 (discussing the advantages of a unilateral conflicts approach generally).

⁴⁸¹ See *Robinson v. TCI/US W. Cable Commc'ns Inc.*, 117 F.3d 900, 905 (5th Cir. 1997) (holding that extraterritorial jurisdiction over a U.K. corporation in a minority shareholder suit alleging securities fraud, RICO violations, and related state law claims may be established by either the "conduct" test or the "effects" test).

⁴⁸² See Russell J. Weintraub, *The Extraterritorial Application of Antitrust and Securities Laws: An Inquiry into the Utility of a "Choice-of-Law" Approach*, 70 TEX. L. REV. 1799, 1804 (1992).

⁴⁸³ *Robinson*, 117 F.3d at 905.

⁴⁸⁴ See Weintraub, *supra* note 483, at 1804; Brilmayer, *supra* note 270, at 11, 16.

District of New York in *O'Mahony v. Accenture Ltd.*⁴⁸⁵ The plaintiff, O'Mahony, was a non-U.S. citizen (an Irish national) working in France for a French company.⁴⁸⁶ She worked in France while a partner at Accenture LLP, a U.S. subsidiary of Accenture Ltd., and later became a partner at Accenture's French subsidiary.⁴⁸⁷ She was allegedly demoted after objecting to her employer's engagement in French tax fraud and reporting the matter to the U.S. parent company.⁴⁸⁸

The DOL dismissed her charge on the ground that the elements of her complaint occurred in France, and that SOX's whistleblower protections did not apply extraterritorially.⁴⁸⁹ However, the federal district court took exception to the presumption against extraterritoriality and reversed the DOL's dismissal.⁴⁹⁰

a. The "Conduct" Test

The court's approach in *O'Mahony* to the question of whether section 806 applied extraterritorially focused on where the employment decisions were made, rather than where the plaintiff was employed.⁴⁹¹ The presumption against extraterritoriality is rooted in the notion that Congress legislates according to the expectation that its statutes will regulate conduct that occurs within its territory.⁴⁹² This underlying territoriality principle would exempt actions from the presumption altogether when the complainant's employment relationship has a more substantial nexus with the United States.⁴⁹³ The court in *Carnero* alluded to this principle when it stated "that if [the plaintiff's] whistleblowing had occurred in this country relative to similar alleged domestic misconduct by domestic subsidiaries, [the plaintiff] might well have a potential claim under [section 806]."⁴⁹⁴ The *Carnero* decision also left this door open in a footnote suggesting the possibility that U.S. citizens on temporary work assignment abroad may be able to bring a section 806 claim.⁴⁹⁵

However, the federal circuits are not entirely settled on the extent to which this approach can be applied. The Second, Fifth, and D.C. Circuits require the alleged U.S. conduct to be both a substantial part and the direct

⁴⁸⁵ 537 F. Supp. 2d 506, 510–15 (S.D.N.Y. 2008). One commentator discussing this decision has concluded that *Carnero* is still the current controlling law. Dowling, *supra* note 431.

⁴⁸⁶ *O'Mahony*, 537 F. Supp. 2d at 517–18.

⁴⁸⁷ *Id.* at 507–08. Accenture Ltd. is a Bermuda company, listed on the New York Stock Exchange. *Id.* at 507.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at 508–09.

⁴⁹⁰ *Id.* at 513.

⁴⁹¹ *Id.*

⁴⁹² See *Robinson*, 117 F.3d at 905.

⁴⁹³ Weintraub, *supra* note 483, at 1804.

⁴⁹⁴ *Carnero*, 433 F.3d at 6.

⁴⁹⁵ *Id.* at 18, n.17.

cause of the plaintiff's injury.⁴⁹⁶ However, the Third, Eighth, and Ninth Circuits only require the domestic conduct to be "significant" and not necessarily a direct cause.⁴⁹⁷

Nevertheless, in most bribery cases the territorial approach can be easily invoked. With today's technology the bribery scheme can be hatched in the United States and instantly communicated or electronically funded anywhere in the world. For example, even though Carnero worked in France, if the plaintiff could have produced evidence that the U.S. parent company of his foreign employer had directed his termination by e-mail or somehow otherwise controlled his employment, the case might have survived.⁴⁹⁸ In such a case, the whistleblower would need to name the U.S. parent company as one of the defendants.⁴⁹⁹

This is why the DOL concluded in *Pennesso v. LLC International Inc.* that SOX protected a U.S. citizen employed by an Italian subsidiary of a U.S. company.⁵⁰⁰ The administrative law judge found that because much of the protected activity and at least one retaliatory action occurred in the United States, SOX applied to the employees in foreign jurisdictions.⁵⁰¹

To the extent the retaliatory decisions were directed or ratified in the United States, the "conduct" test would even extend prescriptive jurisdiction to foreign employees of American companies. This was precisely the issue in *O'Mahony*.

The district court distinguished *Carnero* on the grounds that O'Mahony worked for a U.S. subsidiary for a time (albeit overseas), and that the alleged tax fraud and retaliation were directed by the defendant's executives in the United States. Therefore, the district court held, the presumption against extraterritoriality did not apply.⁵⁰²

Based on *O'Mahony's* interpretation of SOX's jurisdiction, the scope of SOX's extraterritorial application may be judicially expanded using this more territorial approach to conflicts to cover similar FCPA-based

⁴⁹⁶ *Robinson*, 117 F.3d at 906; *Zoelsch v. Arthur Anderson & Co.*, 824 F.2d 27, 31–32 (D.C. Cir. 1987); *Psimenos v. E.F. Hutton & Co., Inc.*, 722 F.2d 1041, 1045–46 (2d Cir. 1983).

⁴⁹⁷ See *Butte Mining PLC v. Smith*, 76 F.3d 287, 29091 (9th Cir. 1996); *Continental Grain (Australia) Pty. Ltd. v. Pacific Oil-seeds, Inc.*, 592 F.2d 409, 420–21 (8th Cir. 1979); *Sec. Exch. Comm'n v. Kasser*, 548 F.2d 109, 114 (3d Cir. 1977).

⁴⁹⁸ See *Carnero*, 433 F.3d at 2 (noting that the district court found that Carnero "had no contact with the defendant in Massachusetts" and that defendant did not "in any way direct or control" his employment).

⁴⁹⁹ See *Rao v. Daimler Chrysler Corp.*, No. 06-13723, 2007 WL 1424220 (E.D. Mich. May 14, 2007) (dismissing a section 806 claim against a subsidiary for failure to name the U.S. parent company as a defendant).

⁵⁰⁰ No. 2005-SOX-16, 2005 WL 4889018 (Dep't of Labor Mar. 4, 2005).

⁵⁰¹ *Id.* See also *Ward v. W & H Voortman, Ltd.*, 685 F. Supp. 231, 232 (M.D. Ala. 1988) (holding that a foreign corporation doing business in the United States is subject to section 806). Cf. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1336–37 (2d Cir. 1972) (holding that section 10(b) of the 1934 Act applied to a foreigner engaged in substantial fraudulent acts in the United States, even though the securities transactions were executed entirely in England); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 208 (2d Cir. 1968) (same).

⁵⁰² *O'Mahony*, 537 F. Supp. 2d at 511.

whistleblower cases brought by U.S. and non-U.S. citizens. Allowing aliens access to American courts is not without statutory precedent. In fact, the first such statute, the Alien Tort Claims Act of 1789 (ATCA), may provide an arguable basis for universal jurisdiction of any foreign plaintiff or defendant, even when the bribery takes place entirely overseas.⁵⁰³

b. The “Effects” Test

Although not relying on it in reaching its decision, the *O’Mahony* court suggested that SOX’s whistleblower provisions may be applied to disclosures by employees overseas under the “effects” test for resolving to conflict of laws.⁵⁰⁴ The “effects” principle has actually been around since the first Restatement of Conflicts.⁵⁰⁵ It posits that Congress is properly concerned with protecting Americans even if the conduct occurs outside the United States.⁵⁰⁶

Several jurisdictions have recognized the “effects” principle as an alternative to the presumption against extraterritoriality, particularly in anti-trust and securities cases.⁵⁰⁷ In particular, the “effects” approach was applied by the Supreme Court in *Hartford Fire Ins. Co. v. California*.⁵⁰⁸ In *Hartford*, a number of private parties as well as states filed suit under the Sherman Act against four domestic primary insurers and several foreign reinsurers located in London and elsewhere.⁵⁰⁹ The defendants were alleged to have conspired to make certain kinds of environmental insurance coverage unavailable in the United States. A majority of the Court concluded “it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.”⁵¹⁰ Thus, the presumption against extraterritoriality has been rejected

⁵⁰³ 28 U.S.C. § 1350 (2006); *see also* *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (holding “aiding and abetting” a violation of customary international law actionable under the Alien Torts Claims Act, based in large part on UNCAC’s prohibition of “aiding and abetting”).

⁵⁰⁴ 537 F. Supp. 2d. at 512 (deciding not to apply the effects test because *O’Mahony* did not allege that the wrongful conduct had a substantial adverse effect in the United States or on U.S. citizens).

⁵⁰⁵ RESTATEMENT (FIRST) OF CONFLICT OF LAW § 65 (1935).

⁵⁰⁶ *See id.*

⁵⁰⁷ *See* *United States v. Bowman*, 260 U.S. 94, 98 (1922) (presumption against extraterritoriality held not to limit a federal criminal statute, the terms of which were violated by U.S. citizens when they conspired abroad to defraud a domestic company partly owned by the U.S. government); *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir. 1968) (civil antifraud provisions of the Exchange Act given extraterritorial application to protect American investors who purchase foreign securities on American exchanges and to protect the domestic securities market from the effects of improper foreign transactions in American securities); *Robinson*, 117 F.3d at 905 (applying both the conduct and effects tests); *Env’tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531–33 (D.C. Cir. 1993) (same). *But see* *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1096–97 (9th Cir. 1994) (rejecting the use of the effects test to overcome the presumption against extraterritorial application of U.S. copyright laws).

⁵⁰⁸ 509 U.S. 764, 796 (1993).

⁵⁰⁹ *Id.* at 764.

⁵¹⁰ *Id.* at 795–96.

in cases where there are significant and foreseeable effects in the United States.⁵¹¹

Unfortunately, the *Carnero* court expressly declined to apply *Hartford* to SOX under its “balancing” approach to conflicts issues. The First Circuit assumed Congress was required to make provisions to balance U.S. and foreign interests.⁵¹² Fearing potential “problems with sovereignty and the like,” the court notes that Congress in passing section 806 “made no provision for possible problems arising when that agency seeks to regulate employment relationships in foreign nations.”⁵¹³ The court then proceeded to point to “jurisdiction to adjudicate” concerns regarding venue and the limited ability for the DOL to conduct investigations abroad.⁵¹⁴ However, under the “effects” approach these issues are distinct from the question of prescriptive jurisdiction. Using a more unilateral approach the court should have determined whether concurrent jurisdiction existed without regard to any potential conflict with foreign law. As the Court in *Hartford* put it, “[a]n American court cannot refuse to enforce a law that its political branches have already determined is desirable and necessary.”⁵¹⁵

At first glance, the “effects” exception would appear difficult to satisfy in a SOX whistleblower suit. After all, the *O’Mahony* decision appears to indicate that an employee overseas being terminated or otherwise retaliated against is not enough. However, that case did not raise any FCPA concerns, and the ever-present potential for large monetary penalties for nearly any FCPA violation provides the basis for a strong counter argument. From this vantage point a culture of bribery always poses a substantial risk to investors and the market. Hence, the “effects” exception is likely to be satisfied in any SOX whistleblower case predicated on the FCPA.

While American employees working overseas would be able to bring claims on this basis, at least one court has held that a foreign plaintiff does not have standing to base a securities case on the effect of the foreign conduct on U.S. investors or U.S. securities markets.⁵¹⁶

5. Remaining Comity Concerns

Even if there was substantial conduct or effects in the United States, a court may still dismiss a suit on comity grounds.⁵¹⁷ The international princi-

⁵¹¹ *Id.* at 798–99. See also Brilmayer, *supra* note 270, at 11, 16.

⁵¹² 433 F.3d at 8–9.

⁵¹³ *Id.* at 9.

⁵¹⁴ *Id.*

⁵¹⁵ *Id.* at 949.

⁵¹⁶ *McNamara v. Bre-X Minerals Ltd.*, 32 F. Supp. 2d 920 (E.D. Tex. 1999) (holding that Canadians did not have standing to base a securities fraud suit on the effect of the fraud in the United States).

⁵¹⁷ See Brad Levy, *Pretty New Sox, but Plenty of Holes: An Analysis of the Government’s Inability to Apply Section 806 of the Sarbanes-Oxley Act of 2002 Extraterritorially*, 40 *TEX. TECH L. REV.* 225 (2007) (refusing to apply section 806 extraterritorially because of differences between the United States and other countries’ approach to whistleblower protection and

ple of comity is set forth in the Restatement (Second) of Conflict of Laws and the Restatement of Foreign Relations Law. However, the comment to sections 403 of the Restatement (Third) of Foreign Relations Law make clear this is not a risk “where a person subject to regulation by two states can comply with the laws of both.”⁵¹⁸

If the extraterritorial application of section 806 were limited to FCPA violations it would be unlikely to create a true conflict. The anti-bribery focus of such transnational litigation would minimize the differences between U.S. and foreign whistleblower laws. In fact, an international mandate under the UNCAC for countries to provide a national private right of action for damages as a result of transnational bribery and to cooperate in investigations and prosecutions already exists for this particular category of whistleblower complaints.⁵¹⁹ Furthermore, these international anti-bribery efforts are continuing to gain momentum.⁵²⁰ It is highly unlikely that foreign law would permit, much less require, the bribery act. Therefore, FCPA-based section 806 claims are uniquely viable.

6. *Congressional Amendment*

Alternatively, the scope of SOX could be explicitly expanded by Congress through amendments to SOX like those made to the U.S. employment discrimination statutes. In response to the *Aramco* decision, Congress amended Title VII as well as the ADEA and the Americans with Disabilities Act (“ADA”) to provide expressly that they apply, in certain limited circumstances, to overseas conduct committed by a U.S.-owned or -controlled company, so long as the alleged discrimination is directed at a U.S. citizen.⁵²¹ However, these extraterritorial provisions do not extend to “foreign nationals working abroad for American companies or their subsidiaries.”⁵²² Since SOX is undeniably intended to cover transnational bribery, it should be extended more broadly than these statutes to cover both U.S. and non-U.S. employees overseas in order to effectively combat FCPA violations.

In addition, section 806 and the administrative complaint procedures from the Wendell H. Ford Aviation Investment and Reform Act for the 21st

the unlikelihood of any international compacts on the subject; proposing instead that SOX be amended to become more lax and less costly).

⁵¹⁸ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403, cmt. e (1987).

⁵¹⁹ See U.N. Convention Against Corruption, *supra* note 25.

⁵²⁰ See discussion of international efforts *supra* Part II(D)(1).

⁵²¹ See 29 U.S.C. § 623(f)(1), (h) (2006); 42 U.S.C. § 2000e-1(b), (c) (2006); 42 U.S.C. § 12112(c) (2006). See generally Michelle Shender, *Claims By Non-Citizens Under the Americans With Disabilities Act: Proper Extraterritorial Application in Torrico v. International Business Machines?*, 17 PACE INT’L L. REV. 131, 137 (2005).

⁵²² *Iskandar v. Am. Univ. of Beirut*, No. 98-6616, 1999 WL 595651, at *2 (S.D.N.Y. Aug. 9, 1999). See also *Hu v. Skadden, Arps, Slate, Meagher & Flom LLP*, 76 F. Supp. 2d 476, 478 (S.D.N.Y. 1999) (holding that protection of ADEA did not extend to a foreign citizen); *Iwata v. Stryker Corp.*, 59 F. Supp. 2d 600 (N.D. Tex. 1999) (same holding with regard to a former, non-U.S. employee, who had lived and carried out his duties in Japan, while employed with a Japanese subsidiary of an American corporation, in context of Title VII or ADEA).

Century (AIR21) it incorporates by reference should be amended to provide specific procedures for employees overseas to bring a whistleblower complaint.⁵²³ And, consistent with the most recent whistleblower law passed by Congress, the right to a jury trial should be added to section 806 as well.⁵²⁴

Expanding the territorial scope of SOX to cover claims predicated on the FCPA would not necessarily violate international law limitations on extraterritoriality. On the contrary, it would fulfill the United States' commitments under international conventions such as the UNCAC, mandating a national law granting individuals and entities private rights of action for damages resulting from transnational bribery.

Of course, despite the best-intended judicial and legislative efforts to extend the territorial scope of SOX, legal gaps will likely remain. In particular, employees of foreign companies not covered by SOX would remain unprotected. However, legislation was introduced in the 110th Congress to address a closely related gap in the FCPA by providing a remedy against "foreign concerns," including foreign companies and foreign subsidiaries of U.S. corporations.⁵²⁵ Introduced on June 4, 2008, the Foreign Business Bribery Prohibition Act of 2008 would expand the reach of the FCPA by allowing private persons and entities to obtain damages of three times the amount of any gain a foreign concern obtained through the FCPA violation or three times any loss incurred by an American business due to the foreign concern's violation of the FCPA.⁵²⁶ Rep. Ed Perlmutter (D-Colo.) intends to reintroduce the bill after Congress reconvenes on April 21, 2009.⁵²⁷

One potential weakness of H.R. 6188, however, was that it exclusively focused on damages to American business. In order to solicit the help of employees overseas, the real "gatekeepers" of international business transactions, the new bill should clearly provide for damages to whistleblowers as well.⁵²⁸ By extending a private right of action to employees who are harmed by transnational bribery, the law will actually protect the integrity and stability of American business abroad.

V. CONCLUSION

Private lawsuits have an important role to play in helping the DOJ and the SEC enforce the FCPA's prohibition of transnational bribery of foreign

⁵²³ SOX § 806(b), 18 U.S.C. § 1514A(b)(1)(A) (2006); 49 U.S.C. § 41715(a) (2000) (AIR21).

⁵²⁴ See Consumer Product Safety Improvement Act of 2008, Pub. L. 110-314, 122 Stat. 3016 (2008) (codified as amended in scattered sections of 15 U.S.C.A.).

⁵²⁵ Foreign Business Bribery Prohibition Act of 2008, H.R. 6188, 110th Cong. (2008).

⁵²⁶ *Id.* § 2(f).

⁵²⁷ E-mail from Matt Henken, Legislative Director for Rep. Ed Perlmutter (Apr. 9, 2009, 3:26PM EST) (on file with author).

⁵²⁸ Foreign Business Bribery Prohibition Act of 2008, H.R. 6188, 110th Cong. § 2(f) (2008). Sponsored by Rep. Ed Perlmutter (D-Colo.), the bill was sent to the House Judiciary and Energy and Commerce committees for further consideration.

public officials by U.S. companies. Private rights of action predicated on violations of the FCPA can be brought under the civil RICO statute, federal antitrust laws, section 10(b) of the 1934 Act, SEC Rule 10b-5, and as a shareholder derivative action or tort claim. However, most of these causes of action are too complicated to provide an effective remedy for the more typical petty corruption scenarios such as bribery and kickbacks to low- or mid-level foreign officials. In addition, the real conscience of a multinational is not found in its competitors, investors, or business partners; it is found in its employees. The “private attorneys general” best able to prevent violations of the Act are employees overseas facing the moral choices inherent in global commerce on an almost daily basis. Section 806 of the Sarbanes-Oxley Act of 2002 was drafted broadly enough to protect all employees willing to “do the right thing” and oppose transnational bribery. With only a couple of exceptions, the case law so far has failed to make the connection between SOX and the FCPA. To remove all doubt, Congress should amend SOX to make the extraterritorial reach of its whistleblower provision clear, as it did for Title VII and other federal equal employment opportunity laws. Congress should also amend the FCPA to allow a similar private right of action against foreign concerns or courts should interpret it as having one. The resulting transnational employment litigation would not only help enforce the FCPA but it would also improve corporate compliance with the FCPA by clarifying various longstanding ambiguities in the Act on a case-by-case basis.

