Suffolk Journal of Trial and Appellate Advocacy

Volume 23 | Issue 1 Article 8

1-1-2018

Forty Years After Enactment, Is the Foreign Corrupt Practices Act Necessary Legislation Or Global Overreach

Christopher J. Schlauch

Follow this and additional works at: https://dc.suffolk.edu/jtaa-suffolk

Part of the Litigation Commons

Recommended Citation
23 Suffolk J. Trial & App. Advoc. 139 (2017-2018)

This Notes is brought to you for free and open access by Digital Collections @ Suffolk. It has been accepted for inclusion in Suffolk Journal of Trial and Appellate Advocacy by an authorized editor of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.

FORTY YEARS AFTER ENACTMENT, IS THE FOREIGN CORRUPT PRACTICES ACT NECESSARY LEGISLATION OR GLOBAL OVERREACH?

I. INTRODUCTION

The Foreign Corrupt Practices Act ("FCPA") of 1977 is a legislative attempt to curtail corruption and bribery in international commerce.[1] As the global economy becomes increasingly integrated, businesses are less likely to be conducted in a uniform fashion.[2] In response to the integration, the United States Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") have been tasked with ensuring the integrity of the financial markets.[3] Former United States Attorney General Eric Holder notes that because America is the world's largest democracy with the world's strongest economy, it has a vested interest in combating bribery in

---

[1] *See* Crim. Div. of the U.S. Dep't of Just. & Enforcement Div. of U.S. Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* 2 (Nov. 14, 2012), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf (explaining history of FCPA).

[2] *See* JONATHAN M. KARPOFF, D. SCOTT LEE & GERALD S. MARTIN, FOREIGN BRIBERY: INCENTIVES AND ENFORCEMENT 4 (Apr. 7, 2017), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573222 (discussing impact of penalties for business corruption that vary by country). Without legislation to enforce penalties,

> [T]he revelation of bribery, by itself, has little long-term impact, as long as the bribery is not comingled with charges of financial fraud. Because non-fraud firms face relatively small costs even when they are caught bribing . . . the net benefits of their bribe-related projects are non-negative (as long as the firm avoids comingled fraud charges).

Id. at 4.

[3] *See* Lanny A. Breuer, Assistant Attorney General, U.S. Dep't of Just., Address at the 24th National Conference on the Foreign Corrupt Practices Act (Nov. 16, 2010) *available at* http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html (last updated Sept. 17, 2014) (explaining value of FCPA enforcement). The FCPA is necessary for businesses:

> FCPA enforcement is not bad for business; it is, instead, vital to ensuring the integrity of our markets. Our FCPA enforcement program serves not only to hold accountable those who corrupt foreign officials, but in doing so it also serves to make the international business climate more transparent and fair for everyone. FCPA enforcement both roots out foreign corruption and deters it from taking hold in the first place.

Id.

international business transactions.[4] Such corruption weakens economic development, undermines confidence in the marketplace, and distorts competition.[5] Enforcement of the FCPA is necessary to ensure confidence in financial and governmental institutions does not erode to levels last seen under President Nixon.[6]

Following the Watergate scandal, when trust in the government was at an all-time low, the SEC discovered that many public companies were making illegal campaign contributions to United States' officials.[7] Ensuing scandals involving payments by American companies to public officials in Japan, Italy, and Mexico led to political repercussions abroad and negatively impacted the American business community's reputation throughout the world.[8] More than 400 firms, including 117 Fortune 500 firms, subsequently disclosed illicit payments that exceeded $400 million.[9] To restore faith in the ethics of American businesses, Congress amended the Securities Exchange Act of 1934 and enacted the FCPA in 1977.[10]

The Carter administration was keen on improving American businesses' reputation worldwide, and in 1979, Philip B. Heymann, the Assistant Attorney General for DOJ's Criminal Division, laid out a guide for how companies should interpret the new legislation: "where a company has been making good faith efforts to monitor its employees, that will be relevant in our decision how to proceed . . . . The most efficient means of

---

[4] *See List of Countries by Projected GDP*, STATISTIC TIMES (Apr. 23, 2017), http://statisticstimes.com/economy/countries-by-projected-gdp.php (providing economic data on GDP).

[5] *See* Eric Holder, Attorney General, U.S. Dep't of Justice, Remarks at the Organisation for Economic Co-Operation and Development (May 31, 2010) *available at* https://www.justice.gov/opa/speech/attorney-general-holder-delivers-remarks-organisation-economic-co-operation-and (detailing economic effects of bribery on international business conduct).

[6] *See id.* (explaining how FCPA enforcement encourages confidence and competition in economic markets).

[7] *See* S. REP. NO. 105-277, at 1-2 (1998) (detailing historical contributions made to officials).

[8] *See id.* (noting business scandals involving various foreign countries and US companies); *see also* Peter Pae, *Ex-Lockheed Chief Told of Paying Bribes*, LA TIMES (Dec. 21, 2008), http://articles.latimes.com/2008/dec/21/local/me-kotchian21 ("A. Carl Kotchian, the former president of Lockheed Aircraft Corp, whose admission to paying millions of dollars in bribes to foreign government officials led to the imprisonment of Japan's prime minister and political upheaval in several countries in the 1970s. . . .").

[9] *See* A. Michael Stevens, *Asian Development Bank: Action to Identify Risks in the Bidding Process to Prevent Corruption*, FIGHTING CORRUPTION AND PROMOTING INTEGRITY IN PUBLIC PROCUREMENT 195, 196 (OECD Publishing 2005) (detailing extent of American business corruption in 1970s).

[10] *See* S. REP. NO. 105-277, at 1-2 (1998) (outlining legislative history of Securities Exchange Act and FCPA).

implementing the Foreign Corrupt Practices Act is voluntary compliance by the American business community."[11] Enforcement of the FCPA has largely mirrored these comments by Heymann.[12] The threat of prosecution for corruption has created dialogue among companies on the most effective ways to implement procedures to stay within the bounds of the law.[13] This Note examines the statutory framework of the FCPA as well as the manner in which the law has been enforced.

II. FACTS

The FCPA prohibits any issuer from making payments to foreign officials or foreign political parties to obtain or retain business.[14] Primarily, the FCPA relies on two main prongs to enforce this prohibition; the anti-bribery and accounting provisions.[15] The first prong identifies that giving or offering anything of value to foreign officials for the purposes of retaining or obtaining business is illegal.[16] The second prong of the FCPA arsenal is a powerful accounting provision; its "books and records" portion requires issuers,'[17] employees, and agents to maintain accurate accounting records that "fairly reflect the transactions and dispositions of the issuer."[18] In

[11] *See* Philip Urofsky, Hee Won Moon & Jennifer Rimm, *How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don't Break What Isn't Broken—The Fallacies of Reform*, 73 OHIO ST. L. J. 1145, 1147 (2012) (outlining government's approach to implementing FCPA).

[12] *See id.* (noting enforcement of FCPA has been largely consistent with Heymann's comments).

[13] *See id.* ("[T]he risk of government enforcement has spurred a public/private regime of 'soft' enforcement . . . . The corporate community's overall commitment to this internal compliance regime is the best measure of the FCPA's effectiveness.").

[14] *See* 15 U.S.C. § 78dd-2(a) (2010) (outlining prohibited foreign trade practices due to domestic concerns).

[15] *See* 15 U.S.C. § 78m(a) (2010) (detailing accounting provisions designed to operate in tandem with anti-bribery aspects of FCPA).

[16] *See* Crim. Div. of the U.S. Dep't of Just. & Enforcement Div. of U.S. Securities and Exchange Commission, *supra* note 1, at 10-11 (detailing coverage of anti-bribery provisions). The anti-bribery provision receives substantial latitude in the scope of its application and impacts all issuers, domestic concerns, and certain persons acting while in American territory. *Id.* This provision extends to any of the "[o]fficers, directors, employees, agents or stockholders" of issuers and domestic concerns. *Id.* at 11.

[17] *See id.* at 11 ("A company is an 'issuer' under the FCPA if it has a class of securities registered under Section 12 of the Exchange Act or is required to file . . . reports with SEC under Section 15(d) of the Exchange Act.")

[18] *See* 15 U.S.C. § 78m-(b)(2)(A) (outlining books and records provisions of statute). *See generally* Crim. Div. of the U.S. Dep't of Just. & Enforcement Div. of U.S. Securities and Exchange Commission, *supra* note 1, at 38 (detailing accounting provisions of FCPA).

tandem with the books and records provision, the accounting prong of the FCPA also requires that issuers:

> [D]evise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—(i) transactions are executed in accordance with management's . . . authorization; (ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences.[19]

The accounting prong is particularly potent because an improper record or defective control mechanism constitutes a violation of the statute even in the absence of a bribe.[20] Moreover, the statute allows prosecutors to sidestep the bribery provision altogether by utilizing the accounting provision to charge bribery violations.[21] This is a highly viable option, especially when the bribery provision elements cannot be fully proven, or as a part of a compromise towards settlement and avoidance of criminal liability.[22] Given the expansive avenues of liability through this second prong, companies are more likely to find themselves facing an accounting charge rather than a bribery enforcement action.[23]

---

[19] 15 U.S.C. § 78m-(b)(2)(B)(i)-(iv) (discussing books, records, and internal accounting prong). The Department of Justice has restated the "internal control" requirement by mandating issuers must "devise and maintain a system of internal accounting controls sufficient" to assure management's control, authority, and responsibility over the firm's assets. *See* 15 U.S.C. § 78m-(b)(2)(B).

[20] *See* Daniel J. Grimm, *Traversing the Minefield: Joint Ventures and the Foreign Corrupt Practices Act*, 9 VA. L. & BUS. REV. 91, 95 (2014) ("[T]he FCPA's expansive books and records and internal control provisions can ensnare a corporate issuer despite the absence of an improper payment or the involvement of a foreign official.").

[21] *See 2016 Mid-Year FCPA Update*, GIBSON, DUNN & CLUTCHER LLP (July 5, 2016) http://www.gibsondunn.com/publications/Pages/2016-Mid-Year-FCPA-Update.aspx (providing overview of FCPA structure).

[22] *See id.* (explaining broad reach of accounting provision).

[23] *See* JONATHAN M. KARPOFF, D. SCOTT LEE & GERALD S. MARTIN, THE ECONOMICS OF FOREIGN BRIBERY: EVIDENCE FROM FCPA ACTIONS 6 (Jan. 23, 2014), http://www.fmaconferences.org/Tokyo/Papers/JonathanKarpoff.pdf (noting the provisions do not always work in concert).

A potential violation invites thorough scrutiny by government agencies, along with substantial penalties.[24] As both the DOJ and SEC enforce the FCPA, prosecutors enjoy a powerful selection of criminal and civil penalties.[25] The DOJ controls all criminal enforcement of the FCPA along with certain civil enforcement powers, while the SEC prosecutes civil lawsuits regarding issuers for both anti-bribery and accounting violations.[26] Specifically, "most enforcement of the accounting provisions has been through civil actions filed by the SEC."[27]

Non-compliance with the FCPA often results in significant financial ramifications for companies and stockholders.[28] For instance, stockholders will see a company's share value erode when faced with even the prospect of a FCPA investigation.[29] A study using econometrics to analyze the effects on share price from news that a firm is being investigated for FCPA bribery violations found that it "triggers a significant reduction in share value. The loss. . . . is much larger when the bribery violation is comingled with

---

[24] *See id.* at 16 (detailing severity of penalties).

[25] *See id.* at 2 (outlining multitude of prosecutorial options for penalties for FCPA violations).

[26] *See* Mike Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 IND. L. REV. 389, 395-96 (2010) (discussing different areas of enforcement between DOJ and SEC). Issuers can face a multitude of enforcement actions for improper payments:

> Because improper payments that violate the FCPA's antibribery provisions are also often disguised or inaccurately recorded on the company's books and records, many FCPA enforcement actions against Issuers include parallel DOJ and SEC enforcement actions for both antibribery violations and books and records violations. Further, internal control violations are often also pursued in connection with antibribery and books and records violations on the theory that effective internal controls would have prevented the improper payments and improper recording of the payments. Thus, as to Issuers, the FCPA is often a three-headed monster when improper payments are made.

Id. at 396.

[27] *See* Sarah Bartle, Chris Chamberlain & Brian Wohlberg, *Foreign Corrupt Practices Act*, 51 AM. CRIM. L. REV. 1265, 1269-73 (2014) (providing overview of accounting provision enforcement actions brought by SEC and DOJ).

[28] *See* 63 PRICE WATERHOUSE COOPER, FOREIGN CORRUPT PRACTICES ACT: WHAT YOU DON'T KNOW COULD COST YOU, at 3-4 (2011), http://www.pwc.com/us/en/private-company-services/publications/assets/gyb-63-foreign-corrupt-practices-act.pdf (describing FCPA's impact on public and private companies).

[29] *See* Tomi Kilgore, *Cognizant's potential FCPA violations makes stock 'univestable' to many investors—analyst,* MARKET WATCH (Sept. 30, 2016, 3:47 PM), http://www.marketwatch.com/story/cognizants-potential-fcpa-violations-makes-stock-univestable-to-many-investors—analyst-2016-09-30 ("While the stock's valuation remains 'attractive,' given the information technology consulting company's fundamental strength, 'we also recognize that the stock is likely "uninvestable" to many investors now due to the combination of near-term factors that serve as an overhang. . . .' The stock had tumbled 21% year to date.").

financial fraud charges."[30] According to the study, share values plummet by an average of 33.06% upon public disclosure of FCPA enforcement actions involving fraud charges.[31] The adverse impact on shareholders is exacerbated by the fact that nearly three out of four bribery actions include books and records as well as internal provisions' violations.[32] When faced with the prospect of their investment going into a tailspin, shareholders often call for legal recourse against management and the board of directors for failing to comply with the FCPA and inviting potentially crippling liability.[33]

Under the Obama administration, anti-bribery enforcement was a priority for United States law enforcement agencies, with a substantial increase in actions since 2007.[34] In fact, on April 6, 2016, the DOJ launched a one-year pilot program that provided incentives to companies that cooperated and self-reported FCPA violations.[35] The three main requirements of the program are: (i) voluntary self-disclosure of all FCPA violations, (ii) full cooperation with the DOJ, and (iii) timely and appropriate

---

[30] *See* Karpoff ET AL., *supra* note 23, at 17 (detailing adverse impact of contemporaneous violations on return values).

[31] *See id.* (outlining empirical framework for study).

[32] *See id.* at 14 ("[V]iolations of the FCPA's books and records . . . and internal controls . . . provisions are included in 110 and 102 of the 143 bribery-related actions, respectively.").

[33] *See* Howard B. Epstein & Theodore A. Keyes, *Are Private Companies' Liability Risks Adequately Insure?*, 251 NEW YORK L. J. (Mar. 4 2014), https://www.srz.com/images/content/6/8/v2/68768/New-York-Law-Journal-Are-Private-Companies-Liability-Risks-Adequ.pdf ("The Towers Watson survey confirms that surveyed directors and officers have expressed increased concern over regulatory claims, with 83 percent of respondents ranking regulatory claims as a top three risk of concern.").

[34] *See* Marc Alain Bohn & Michael Skopets, *Uptick in FCPA Enforcement Suggests 2015 Drop Was Outlier*, LAW360 (May 18, 2016, 11:25 AM), http://www.law360.com/articles/795489/uptick-in-fcpa-enforcement-suggests-2015-drop-was-outlier?article_related_content=1 ("After a relative slowdown in 2015, the pace of enforcement activity under the Foreign Corrupt Practices Act has increased sharply in 2016, resulting in a record 15 first-quarter enforcement actions and 17 year to date.").

[35] *See* Andrew Weissman, U.S. Dep't. of Just., Criminal Division, *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance* (Apr. 5, 2016), https://www.justice.gov/archives/opa/blog-entry/file/838386/download (providing details of Pilot Program). The Pilot Program's objectives are:

> We aim to accomplish this goal of greater accountability . . . [by] adding additional agents and prosecutors to investigate criminal activity, and enhancing our cooperation with foreign law enforcement authorities where possible. And we also aim to accomplish the same goal by providing greater transparency about what we require from companies seeking mitigation credit for voluntarily self-disclosing misconduct, fully cooperating with an investigation, and remediating, and what sort of credit those companies can receive if they do so consistent with these requirements.

Id. at 2.

mediation efforts.[36] If a company follows these three conditions, the Fraud Section's FCPA Unit "may accord up to a 50% reduction off the bottom end of the Sentencing Guidelines fine range, if a fine is sought; and. . . . generally should not require appointment of a monitor."[37] Furthermore, the Fraud Unit "will consider a declination of prosecution."[38]

With newfound emphasis on enforcement actions and increased resources, the SEC brought more FCPA enforcement actions in the first six months of 2016 than in any full year since 2011.[39] China, in particular, has become a frequent target of FCPA enforcement.[40] As the economy becomes more interconnected and globalized, a transformation in the manner in which business is conducted is inevitable.[41] While highly sophisticated entities can mitigate the change by retaining a bevy of counselors with expertise in such matters, smaller corporations and plaintiffs with more modest resources may

---

[36] *See id.* at 4-8 (providing in-depth review of three main requirements to FCPA attorneys on compliance with pilot program).

[37] *See id.* at 8-9 (footnote omitted) (outlining options of Fraud Section's FCPA Unit for prosecuting violations).

[38] *See id.* at 9 (detailing mitigating factors FCPA Unit faces when considering declining prosecutorial action). The FCPA Unit must decide when a criminal resolution would be warranted:

> Of course, in considering whether declination may be warranted, Fraud Section prosecutors must also take into account countervailing interests, including the seriousness of the offense: in cases where, for example, there has been involvement by executive management of the company in the FCPA misconduct, a significant profit to the company from the misconduct in relation to the company's size and wealth, a history of non-compliance by the company, or a prior resolution by the company with the Department within the past five years, a criminal resolution likely would be warranted.

Id.

[39] *See 2016 Year-End FCPA Update*, GIBSON, DUNN & CLUTCHER LLP (Jan. 3, 2017), http://www.gibsondunn.com/publications/Pages/2016-Year-End-FCPA-Update.aspx (providing overview of increased enforcement actions under FCPA in 2016). 2016 was an active year for the DOJ and SEC:

> The 53 FCPA enforcement actions filed by DOJ and the SEC in 2016 trails only 2010 . . . for the most enforcement actions in the 39-year history of the statute. The SEC, in particular, set an agency record with 32 FCPA enforcement actions. But it is not just that there were many FCPA enforcement actions in 2016; it is that there were many significant FCPA enforcement actions, including five with corporate financial penalties eclipsing the $100 million mark.

Id.

[40] *See id.* (detailing Chinese companies' involvement in roughly half of the new enforcement actions).

[41] *See id.* (noting new FCPA actions in various countries throughout the world).

find themselves short-changed.[42] The FCPA is an effort to even the playing field by removing some unfair advantages held by large corporations, while also blending global business standards.[43]

This Note begins by examining the possibility of private right of action for injured individuals, attempting to explicate the FCPA's necessity by demonstrating a general lack of protection for shareholders.[44] Next, it will explore the impact of globalization on economics, delving more deeply into American business relations with China.[45] In conclusion, the author will attempt to predict potential enforcement of the FCPA under President Donald Trump's guidance.[46]

III. PRIVATE RIGHTS OF ACTION AND THE FCPA

Unfortunately for shareholders and other private plaintiffs, courts have specifically ruled out a private right of action in the FCPA.[47] Commentators point to both the United Nations Convention against Corruption and the Council of Europe's Civil Law Convention on Corruption as providing a clearer private right of action for injuries resulting

---

[42] *See* Rick Suttle, *The Advantages of a Large Business*, HOUS. CHRONICLE, http://smallbusiness.chron.com/advantages-large-business-21007.html (last visited Oct. 12, 2017) (detailing four major advantages of large businesses).

[43] *See* Thomas R. Fox, *FCPA Enforcement: What Does it Mean for Non-US Companies?* LEXISNEXIS (Sept. 2012) https://www.lexisnexis.com/risk/intl/en/resources/whitepaper/FCPA-Enforcement.pdf (explaining how FCPA acts to promote fairness among large and small corporations). The FCPA has a broad scope of international enforcement:

> The FCPA is enforcement against all US based companies, wherever they operate across the globe; against all US citizens anywhere in the world; against all foreign subsidiaries of US companies across the globe; against any foreign company which has a US subsidiary or which does business in the US; against any company which has transactions which go through the US banking system; and finally against any foreign citizen who works for any of the above entities.

Id. at 3.

[44] *See infra* Part III.

[45] *See infra* Part IV.

[46] *See infra* Parts V-VI.

[47] *See* Republic of Iraq v. ABB AG, 768 F.3d 145, 171 (2d Cir. 2014) ("We conclude that there is no private right of action under the anti-bribery provisions of the FCPA . . . .").

from bribery and other corruption.[48] The courts, however, are vehement: there is no implied private action in the FCPA.[49]

The seminal case of *Lamb v. Phillip Morris*[50] established that the FCPA does not include a private right of action.[51] In *Lamb*, American tobacco manufacturers alleged that the defendant tobacco purchasers promised donations to several foreign nations in exchange for price controls, tax deductions, and other benefits related to the importation of foreign tobacco.[52] The plaintiffs contended this constituted an illegal restraint on trade and claimed these donations violated the FCPA.[53] Affirming the lower court's dismissal of the FCPA claim, the Sixth Circuit rejected any notion that a private action can be brought under the FCPA, stating that such an action "would directly contravene the carefully tailored FCPA scheme presently in place."[54] The court concluded that Congress did not intend a private right of action, despite a reference to it in a House report and an early

---

[48] *See The United Nations Convention against Corruption*, GAN BUS. ANTI-CORRUPTION PORTAL, http://www.business-anti-corruption.com/anti-corruption-legislation/united-nations-convention-against-corruption (last visited Jan. 25, 2017) (providing overview of United Nations' legislation to combat global business corruption). Nearly thirty years after the United States enacted the FCPA, the United Nations created similar legislation:

> The United Nations Convention against Corruption (UNCAC) is the most comprehensive anti-corruption convention, entering into force in December 2005. It covers a wide-range of corruption offences, including domestic and foreign bribery, embezzlement, trading in influence and money laundering. The UNCAC provisions obligate State Parties to take a number of public and private anti-corruption measures [including]: . . . . Prevention. . . . Criminalisation. . . . International Recovery. . . . [and] Asset Recovery.

Id.

[49] *See Republic of Iraq*, 768 F.3d at 170 (holding Congress did not intend to provide implied right of private action in FCPA). The Supreme Court did not find an implied right of private action in the FCPA:

> The *Cort v. Ash* factors also do not support recognition of a private right. The statute's prohibitions focus on the regulated entities; the FCPA contains no language expressing solicitude for those who might be victimized by acts of bribery, or for any particular class of persons. "Statutes that focus on the person regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons."

Id. (quoting Alexander v. Sandoval, 532 U.S. 275, 289 (2001)).

[50] Lamb v. Phillip Morris, 915 F.2d 1024 (6th Cir. 1990).

[51] *See id.* at 1029 (concluding FCPA did not include private cause of action).

[52] *See id.* at 1025 (providing background of case).

[53] *See id.* (outlining facts alleged in plaintiff's complaint).

[54] *See id.* at 1029 (describing Sixth Circuit's interpretation of private cause of action and FCPA).

Senate version of the act.[55] The court reasoned that allowing a private cause of action under the FCPA would undermine the law's preference for compliance by permitting a surge in private FCPA prosecutions.[56] However, due to the high cost of a FCPA violation, shareholders and other private plaintiffs have continued to seek redress through other, more indirect legal actions.[57]

The most common alternative remedy for private plaintiffs confronted with corrupt business practices is a collateral derivative action.[58] In a collateral derivative action, shareholders sue the board of directors and executive officers on behalf of the corporation, as both the injury and remedy accrue to the corporation instead of the shareholders.[59] As a threshold matter in derivative actions, the plaintiff must satisfy the demand doctrine by having a plaintiff shareholder ask the board of directors to file suit on behalf of the corporation.[60] The rationale underlying the demand doctrine is the decision to bring a lawsuit on behalf of a corporation primarily resides with the board of directors.[61] Upon demand, the board can, and frequently does, decide that a lawsuit is not in the best interests of the corporation.[62] Critically, this

---

[55] *See Lamb*, 915 F.2d at 1029-30 (detailing legislative history and lack of congressional intent to allow private cause of action).

[56] *See id.* (explaining rejection of FCPA and private cause of action).

[57] *See* Republic of Iraq v. ABB AG, 768 F.3d 145, 170 (2d Cir. 2014) ("The Republic argues that *Lamb* erred in its analysis of the legislative history of the FCPA and that that history suggests that the reason Congress did not expressly provide for a private right of action was to avoid creating a 'negative inference' . . . .").

[58] *See* Jessica Erickson, *Corporate Misconduct and the Perfect Storm of Shareholder Litigation*, 84 NOTRE DAME L. REV. 75, 81-83 (2008) (discussing private shareholder litigation options).

[59] *See* Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 353-55 (Del. 1988) (holding shareholders benefit indirectly due to their share of ownership).

[60] *See* FED. R. CIV. P. 23.1(b)(3)(A)-(B) (stating derivative actions must be plead with particularity); *see also* DEL. CH. CT. R. 23.1(a) *available at* https://courts.delaware.gov/rules/pdf/ChanceryRuleSet_blackline-version7-18-17.pdf ("The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort.").

[61] *See* Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A., 34 A.3d 1074, 1082 (Del. 2011) (stating demand requirement "allocates, as between directors and shareholders, the authority to sue on behalf of the corporation.").

[62] *See* Grimes v. Donald, 673 A.2d 1207, 1216-17 (Del. 1996) (outlining purpose of demand requirement). The demand requirement is important:

> The demand requirement serves a salutary purpose. First, by requiring exhaustion of intracorporate remedies, the demand requirement invokes a species of alternative dispute resolution procedure which might avoid litigation altogether. Second, if litigation is beneficial, the corporation can control the proceedings. Third, if demand is excused or wrongfully refused, the stockholder will normally control the proceedings.

decision not to bring suit is a business decision, which normally is protected from judicial scrutiny due to the highly deferential nature of the business judgment rule.[63] This presents the plaintiff shareholders with an almost insurmountable barrier to overcome, effectively shutting down most derivative suits.[64]

In derivative suits, the alternative for plaintiffs to make the demand and face the business judgment rule is to plead that the demand is instead futile.[65] Pleading futility requires the plaintiff show that the majority of current directors have a substantial personal stake in the issue and could not have properly exercised their business judgment.[66] Typically, under the test articulated in *Aronson v. Lewis*, the plaintiff must challenge a specific decision or action by the board of directors in order to establish director malfeasance.[67] This creates reasonable doubt that their decision should be sheltered under the business judgment rule because the directors no longer

---

> The jurisprudence of *Aronson* and its progeny is designed to create a balanced environment which will: (1) on the one hand, deter costly, baseless suits by creating a screening mechanism to eliminate claims where there is only a suspicion expressed solely in conclusory terms; and (2) on the other hand, permit suit by a stockholder who is able to articulate particularized facts showing that there is a reasonable doubt either that (a) a majority of the board is independent for purposes of responding to the demand, or (b) the underlying transaction is protected by the business judgment rule.

Id.

[63] *See* Julian Velasco, *Fiduciary Duties and Fiduciary Outs*, 21 GEO. MASON L. REV. 157, 178-80 (2013) (outlining difficulties faced by private plaintiffs in a collateral derivative actions).

[64] *See id.* at 178 (demonstrating high standard plaintiffs faced when attempting to prosecute directors' breach of fiduciary duty). "The drafters of fiduciary outs may . . . assume that, because directors generally will be found to have breached their fiduciary duties only upon a finding of gross negligence, unfair self-dealing, or intentional misconduct, they cannot be required to avoid their obligations pursuant to a fiduciary out except under such circumstances." *Id.*

[65] *See id.* at 180 (outlining alternative option for plaintiffs to circumvent business judgment rule).

[66] *See* Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984) (detailing two main requirements court must make in directors' breach of fiduciary duty cases). The requirements set forth that:

> [T]he Court of Chancery must make two inquiries, one into the independence and disinterestedness of the directors and the other into the substantive nature of the challenged transaction and the board's approval thereof. As to the latter inquiry the court does not assume that the transaction is a wrong to the corporation requiring corrective steps by the board.

Id.

[67] *See id.* at 808 (providing overview of *Aronson* test to establish board of directors were not disinterested); *see also* Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2006) (narrowing the scope of the *Aronson* test).

appear disinterested and independent.[68] Alternatively, and perhaps more relevant to the FCPA, if a plaintiff claims that liability should flow from the inaction of directors, courts rely on a test which examines whether directors could have responded to the demand using independent business judgment.[69]

The central premise of a derivative suit is a director inaction claim first articulated through *In re Caremark Int'l Inc.*[70] Under *Caremark*, the court determined that a claim is rooted in the theory that the directors harmed the corporation by breaching their oversight duties.[71] In this seminal case, the plaintiffs alleged that the company's "directors breached their duty of care by failing adequately [sic] to supervise the conduct of Caremark employees.... thereby exposing [the company] to fines and liability."[72] While the *Caremark* standard initially appeared to be an ideal vehicle for FCPA derivative litigation, the Delaware Supreme Court limited the scope of *Caremark* by holding that directors would be liable only if they have completely failed to implement any reporting and controls systems, or willfully failed to monitor the systems.[73] As a result of these high pleading

---

[68] *See Aronson*, 473 A.2d at 811 (outlining business judgment rule standard). The business judgement rule states that:

> The business judgment rule is an acknowledgment of the managerial prerogatives of Delaware directors under Section 141(a). It is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.

Id. at 812 (citation omitted).

[69] *See* Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993) (discussing whether board could consider merits of demand). The *Rales* court stated that:

> [A] court must determine whether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand. If the derivative plaintiff satisfies this burden, then demand will be excused as futile.

Id. (footnote omitted).

[70] 698 A.2d 959, 966-67 (Del. Ch. 1996) (outlining principles governing settlements of derivative claims).

[71] *See id.* at 967 (summarizing directors' duties to monitor corporate operations).

[72] *See id.* at 964 (detailing claims facing board of directors alleged in shareholder lawsuit).

[73] *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (articulating differences between *Caremark* and *Stone* for director liability). The court stated:

> We hold that *Caremark* articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition

standards, a large proportion of derivative suits are dismissed, with only a few reaching settlement agreements.[74]

A second option for a private action under the FCPA is a securities fraud class action suit.[75] These suits specifically target disclosures that the company makes around the time of the FCPA violation.[76] FCPA derived securities class actions advance the theory that deficient internal accounting systems and misleading statements artificially inflate share prices.[77] This

---

> of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.

Id.

[74] *See* Erickson, *supra* note 58, at 113-16 (outlining shareholder difficulties when filing derivative suit).

[75] *See* Svetlana Starykh & Stefan Boettrich, *Recent Trends in Securities Class Action Litigation: 2015 Full-Year Review*, NERA ECONOMIC CONSULTING 16 (Jan. 25, 2016), http://www.nera.com/content/dam/nera/publications/2016/2015_Securities_Trends_Report_NERA.pdf (discussing growth in federal securities class action filings).

[76] *See* Cori A. Lable & Carly Baratt, *Courts Continue to Dismiss Shareholder Suits Based on FCPA Violations*, ROPES & GRAY (Apr. 1, 2015), https://www.ropesgray.com/newsroom/alerts/2015/April/Courts-Continue-to-Dismiss-Shareholder-Suits-Based-on-FCPA-Violations.aspx (discussing procedural hurdles making it difficult for FCPA-based shareholder lawsuits to succeed). Recognizing the difficulties with FCPA violations by stating that

> The most significant hurdle for plaintiffs has been the demand requirement imposed by many states, including Delaware and New York, at the motion to dismiss stage. The demand requirement obliges a plaintiff to ask the board to bring a suit on behalf of the corporation before filing a derivative suit itself or, alternatively, to plead with particularity facts showing a demand would have been futile. Because such derivative suits typically are filed without first making a demand on the board, plaintiffs have been forced to argue – to little avail – demand futility.

Id. at 2.

[77] *See 2009 Year-End FCPA Update*, GIBSON DUNN & CRUTCHER LLP (Jan. 4, 2010), http://www.gibsondunn.com/publications/Pages/2009Year-EndFCPAUpdate.aspx (discussing lawsuit filed against Siemens AG). A lawsuit was filed alleging that

> Siemens committed securities fraud by knowingly misleading and defrauding investors through statements and representations that the company would remain highly profitable after it was compelled to discontinue violations of the FCPA. According to the complaint, Siemens's officers knew that the company's profitability was dependent on illegal bribes, but nevertheless told investors in late 2007 and early 2008 that it would continue to meet publicly announced revenue and earnings projections. These alleged misrepresentations artificially inflated Siemens's stock price, causing "billions of dollars in damages" to shareholders.

effectively grounds the claim in Section 10(b) of the Exchange Act.[78] Specifically, SEC Rule 10(b)(5) prohibits entities, in connection with a security transaction from: (i) employing schemes or devices to defraud; (ii) making material misstatements or omitting the same; and (iii) engaging in an act or course of business which would operate as a fraud or deceit upon any person.[79] This places the defendant company in a difficult predicament by forcing the company to disclose and record improper payments to preclude elevating an FCPA books and records violation to the level of securities fraud.[80]

Although courts have upheld an implied private right of action under Rule 10(b)(5), the right has been substantially confined through the Private Securities Litigation Reform Act of 1995 ("PSLRA").[81] The PSLRA enhances the pleading threshold in securities class actions, requiring that plaintiffs plead with particularity and a "strong inference" of scienter.[82] Nonetheless, plaintiffs have enjoyed a fair amount of success in these types of suits, often settling for amounts far exceeding the fines imposed by the DOJ and SEC.[83] While the court should consider a myriad of factors,

---

Id. See also Bartle ET AL., *supra* note 27, at 1287 ("plaintiffs have sought recovery on a securities fraud theory by arguing directors misrepresented information about the corporation's FCPA violations, settlements with [agencies] or quality of . . . . internal controls.").

[78] *See* Starykh & Boettrich, *supra* note 75, at 5 (noting Section 10(b)(5) class actions alleging insider sales dropped precipitously from 2005 to 2015).

[79] *See* 17 C.F.R. § 240.10b-5 (2017) (examining limits of security transactions).

[80] *See* Crim. Div. of the U.S. Dep't of Just. & Enforcement Div. of U.S. Securities and Exchange Commission, *supra* note 1, at 41 (explaining not all elements of anti-bribery violation need to be met to hold company liable). Forcing companies to disclose improper payments has broad consequences:

> Good internal controls can prevent not only FCPA violations, but also other illegal or unethical conduct by the company, its subsidiaries, and its employees. DOJ and SEC have repeatedly brought FCPA cases that also involved other types of misconduct, such as financial fraud, commercial bribery, export controls violations, and embezzlement or self-dealing by company employees.

Id. (footnotes omitted).

[81] *See* Amy Deen Westbrook, *Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations*, 73 OHIO ST. L.J. 1217, 1242 (2012) ("Enacted to curb frivolous class action lawsuits, the PSLRA imposes additional pleading requirements on securities class action lawsuits, requiring that claims that defendants made false statements be pleaded with particularity . . . .").

[82] *See* 15 U.S.C. § 78u-4(b)(2)(A) (2017) (requiring plaintiffs to use facts giving strong inference suggesting accused acted with requisite mindset).

[83] *See* Westbrook, *supra* note 81, at 1246-48 (describing various settlements exceeding DOJ and SEC penalties).

typically timing, financial capabilities, and operations of the company play the most pivotal role in these suits.[84]

IV. FCPA IN CHINA

Having established the difficulty individual shareholders face when dealing with options to bring private actions, it is important to examine how and why the FCPA protects them in an increasingly globalized economy.[85] With the rise of the Chinese economy, particularly over the past twenty-five years, corporations face newfound difficulties in negotiations that have traditionally been conducted in a Western-style manner.[86] Differences in negotiation styles can lead to poor communication and misunderstanding,

---

[84] *See 2011 Mid-Year FCPA Update*, GIBSON DUNN & CRUTCHER LLP (July 11, 2011), http://gibsondunn.com/publications/Documents/2011Mid-YearFCPAUpdate.pdf (stating frequent FCPA violations are result of poor internal accounting controls). Beyond the derivative suit and securities fraud class action, private plaintiffs have also launched a host of claims in tort, employment, antitrust, and even under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). *Id.* at 13. This Note will not explore these areas in detail, as the suits are highly fact-specific and have been far less successful compared to derivative actions and securities fraud actions. *Id.*

[85] *See* Crim. Div. of the U.S. Dep't of Just. & Enforcement Div. of U.S. Securities and Exchange Commission, *supra* note 1, at 56 (articulating importance of corporate compliance program protections in global marketplace). Financial ramifications for violations are costly:

> For violations of the anti-bribery provisions, corporations and other business entities are subject to a civil penalty of up to $16,000 per violation .... For violations of the accounting provisions, SEC may obtain a civil penalty not to exceed the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from $7,500 to $150,000 for an individual and $75,000 to $725,000 for a company.

Id. at 69.

[86] *See* Richard Herd & Sean Dougherty, *China's Economy: A Remarkable Transformation*, OECD OBSERVER (Sept. 2005), http://oecdobserver.org/news/archivestory.php/aid/1685/China_92s_economy:_A_remarkable_transformation.html (expounding on economic challenges presented by China's expansion). The economic challenges China faces can be explained by

> The pace of economic change in China has been extremely rapid since the start of economic reforms just over 25 years ago. According to official statistics, economic growth has averaged 9.5% over the past two decades and seems likely to continue at that pace for some time. National income has been doubling every eight years. Such an increase in output represents one of the most sustained and rapid economic transformations seen in the world economy in the past 50 years.

Id.

which causes substandard results for both parties.[87] "Negotiators from individualist, egalitarian, and low-context-communications cultures, such as the United States, use direct, confrontational styles, whereas negotiators from collectivist, hierarchical, and high-context-communications cultures, such as China, prefer to use indirect negotiation styles that avoid confrontation."[88]

In addition to difficulties arising from various negotiation styles, a component of many nations' cultures involves bribing public officials in order to successfully operate a business.[89] According to Transparency International, over two-thirds of the 176 countries measured fell below the midpoint of the 2016 Corruption Perception Index.[90] The United States main economic rival, China, scored below the median score, ranking seventy-

---

[87] *See* Raymond Sham, *Negotiation Styles: Chinese vs American*, RAYMOND SHAM, PC (July 14, 2010, 11:13 PM), http://www.rslawpc.com/law-blog/negotiation-styles-chinese-vs-american (distinguishing between negotiation styles in China and U.S.). It is important to understand that

> China has a long and rich history that has shaped the minds, values, and beliefs of its people. Face, which refers to a person's reputation, is a crucial factor in Chinese negotiating style. The importance of *guan-xi* is founded on the collectivist feature of Chinese culture, where the welfare of the group is valued higher than the welfare of the individual. Further, hierarchy is strictly followed. Moreover, the Chinese think in terms of the whole, so will address all issues in the negotiation simultaneously with no apparent order, and seemingly not resolving anything. All this consumes a tremendous amount of time to conclude negotiations with the Chinese. Finally, after signing the contract, the Chinese will demand more than is stated in the contract.

Id.

[88] *See* DANIEL C.K. CHOW & THOMAS J, SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS 10-11 (3d ed. 2015) (discussing differences in negotiation styles between China and United States). There is a contrast between cultures:

> Individualist cultures place the interests of the individual above those of the collective; hierarchical cultures, unlike egalitarian cultures, emphasize differentiated social status and deference to social superiors and associate social power with social exchanges; negotiators from low-context communications cultures emphasize direct, explicit exchanges, whereas those from high-context-communications cultures emphasize indirect exchanges that must be understood against a complex and unstated background of social values.

Id.

[89] *See* Richard Levick, *New Data: Bribery is Often an 'Unspoken Rule' in China*, FORBES (Jan. 21, 2015, 9:10 AM), http://www.forbes.com/sites/richardlevick/2015/01/21/new-data-bribery-is-often-an-unspoken-rule-in-china ("Companies report the leading reason corrupt payments are offered as 'competitive pressure.'").

[90] *See Corruption Perceptions Index 2016*, TRANSPARENCY INTERNATIONAL (Jan. 25, 2017), http://www.transparency.org/news/feature/corruption_perceptions_index_2016 (examining global average scores for public sector corruption).

ninth.[91] Moreover, nearly *thirty-five* percent of companies operating in China state that they have to either bribe officials or provide gifts just to operate.[92] Sixty-one percent of firms within China think that corruption is a significant problem.[93] The FCPA aims to level the playing field by punishing these practices.[94]

Since the Qing Dynasty in China, "Red Hat" businessmen have been closely connected with government officials, often blurring the lines between entrepreneurs and politicians with familial ties to secure favorable governmental backing.[95] Consequently, many of these Red Hat officials may be considered "foreign officials" under the FCPA, which increases the risks for American companies doing business in China.[96] The risks are the highest

---

91 *See id.* (noting United States ranked 18th out of 176 nations).

92 *See* Craig Charney & Shehzad Qazi, *Corruption in China: What Companies Need to Know*, CHARNEY RESEARCH 1, 1-2 (Jan. 2015), http://www.charneyresearch.com/wp-content/uploads/2015/01/White-Paper-Corruption-in-China-FINAL-v10.pdf ("Across sectors, real estate and construction (41%) is the worst hit. More than one-third of the executives in manufacturing (36%), services (35%) and retail (34%) companies also report the need to make payoffs or gifts.").

93 *See id.* at 3 ("Local-level officials, who enjoy the power and regulatory control to help or make life hell for business in their domains, are also the main beneficiaries of corruption. Of the execs who said business had to bribe to operate, most (79%) said such payments and gifts were made to local government officials.").

94 *See id.* (describing systemic problems facing Chinese economy).

95 *See* Neil Gough & Michael Forsythe, *Former Chief of JPMorgan China Unit is Arrested*, NEW YORK TIMES (May 21, 2014, 2:23 AM), https://dealbook.nytimes.com/2014/05/21/former-top-china-jpmorgan-banker-said-to-be-arrested-in-hong-kong/?_r=1 (highlighting recent deals between employees related to executives in Chinese business). The details of the investigation indicate that

> Mr. Fang, 48, who left JPMorgan in March, has been a focus of a federal bribery investigation in the United States into whether the bank's "Sons and Daughters" hiring program violated the Foreign Corrupt Practices Act. . . . Mr. Fang was one of several JPMorgan executives whose emails on hiring practices were given to the United States authorities by the bank. In one of them, he wrote, "You all know I have always been a big believer of the Sons and Daughters program — it almost has a linear relationship" with winning jobs to advise Chinese companies.

Id.

96 *See* Eugene T. Chen & Michael J. Shepard, *Who Is a 'Foreign Official' in China: The FCPA After Noriega and Carson Cases*, BNA BLOOMBERG (May 18, 2012), https://www.bna.com/foreign-official-in-china/ (identifying foreign official qualification in China). The authors describe how to determine a foreign official by stating that

> In analyzing whether an official in China would qualify as a foreign official under the FCPA, it is necessary to first determine the type of enterprise with which the individual is associated. This determination will inform the level of government ownership and control over the enterprise and hence whether the official is likely to be covered by the FCPA.

when dealing with state-owned industries such as oil, steel, and telecommunications because "the state has the power to appoint the directors and principals, as well as to approve material decisions such as mergers, divisions and dissolutions, recapitalization, and the issuance of corporate bonds."[97] While the Chinese government did issue an initial notice in 2015 denouncing Red Hat intermediaries, American companies should continue to monitor the government's next steps to issue further guidelines to clearly define the presently blurred lines of who can be deemed a "foreign official."[98]

Troublesome enforcement issues that brand owners have encountered include demands by authorities for entertainment in the form of lavish banquets and payment of "case fees."[99] These payments–in some instances tens of thousands of dollars or more–to Chinese officials are often passed off as "miscellaneous costs" to the corporate headquarters.[100] While the FCPA does allow for facilitating payments, these grease payments are to help accelerate "routine governmental action," such as processing papers and issuing permits. [101] It is important to note the language of the FCPA makes clear a facilitation payment is not an affirmative defense but an exception to the general FCPA interdiction against bribery and corruption.[102] Although

---

Id.

[97] *See* Yihong Zhang, *Compliance Alert: Finding and Dealing with 'Red Hats' in China*, THE FCPA BLOG (Oct. 4, 2016), http://www.fcpablog.com/blog/2016/10/4/compliance-alert-finding-and-dealing-with-red-hats-in-china.html#sthash.kAiXoDT5.dpuf (discussing importance of due diligence in determining "foreign officials"). *See also* U.S. DEP'T OF JUST., *Six Former Executives of California Valve Company Charged in $46 million Foreign Bribery Conspiracy*, (Apr. 8, 2009), https://www.justice.gov/opa/pr/six-former-executives-california-valve-company-charged-46-million-foreign-bribery-conspiracy ("In the period from 2003 through 2007, the defendants caused the valve company to pay approximately $4.9 million in bribes, in violation of the Foreign Corrupt Practices Act (FCPA), to officials of foreign state-owned companies.").

[98] *See* Zhang, *supra* note 97 (discussing vital role of Red Hats in Chinese society). ("[I]n order to accurately assess the risks under the FCPA in this situation, companies need to wait for China to issue more specific guidelines.").

[99] *See* Daniel Chow, *China Under the Foreign Corrupt Practices Act,* 2012 WIS. L. REV. 573, 595 (2012) ("It is well known that private investigation firms often make payments to induce PRC officials to conduct raids and seizures. These payments are sometimes referred to as 'case fees' and are often demanded by PRC officials.").

[100] *See id.* ("These case fees are sometimes justified as compensating the authorities because they claim to have limited budgets.").

[101] *See* 15 U.S.C. § 78dd-1(b) (2017) (noting exception for routine governmental action). *See also* Thomas R. Fox, *When Does a Grease Payment Become a Bribe Under the FCPA?,* FCPA COMPLIANCE & ETHICS (Feb. 2, 2011), http://fcpacompliancereport.com/2011/02/when-does-a-grease-payment-become-a-bribe-under-the-fcpa (addressing test for when grease payments transition to bribes).

[102] *See* 15 U.S.C. § 78dd-1(b) (2017) (stating facilitation payment is exception and not affirmative defense); *see also When a Payment Becomes a Bribe*, MORGAN & MORGAN (last visited

no specific monetary limit is listed in the FCPA statute, the frequency and amount of payments are taken into account by the DOJ, magnifying the need for proper accounting.[103]

V. FUTURE FCPA ENFORCEMENT

As Donald Trump has been elected as the 45th United States President, there is reason to be skeptical about FCPA enforcement going forward.[104] In an interview in 2012, President Trump said "this country is absolutely crazy" to prosecute alleged FCPA violations in places like China.[105] Furthermore, Trump stated that the FCPA is a "horrible law and it should be changed" because it creates a "huge disadvantage" for American businesses.[106] Along those same lines, the recent executive order signed by President Trump designed to significantly reduce regulations could be seen

---

Sept. 8, 2017), http://www.secwhistleblowerprogram.org/whistleblower-fraud/bribes-vs-payments (explaining distinction between payments and bribes).

[103] *See* Fox, *supra* note 101 (identifying factors for when facilitation payments become bribes). It is difficult to determine when facilitation payments become bribes:

> There is no outer limit but there is some line where the perception shifts. If a facilitating payment is over $100 you are arguing from a point of weakness. The presumption of good faith is against you. You might be able to persuade the government at an amount over $100. But anything over this amount and the government may well make further inquiries. So for instance, the DOJ might say that all facilitation payments should be accumulated together and this would be a pattern and practice of bribery.

Id. See also U.S. SEC. AND EXCH. COMM'N, *SEC Charges BHP Billiton with Violating FCPA at Olympic Games* (May 20, 2015), https://www.sec.gov/news/pressrelease/2015-93.html (providing example of FCPA violation due to insufficient accounting). The FCPA violation here is described as

> An SEC investigation found that BHP Billiton failed to devise and maintain sufficient internal controls over its global hospitality program connected to the company's sponsorship of the 2008 Summer Olympic Games in Beijing . . . . "Although BHP Billiton put some internal controls in place around its Olympic hospitality program, the company failed to provide adequate training to its employees and did not implement procedures to ensure meaningful preparation, review, and approval of the invitations."

Id. The instance is noteworthy for its focus on purely internal documents unrelated to any alleged bribery or financial reporting problem, not to mention the $25 million penalty. *Id.*

[104] *See* Mike Koehler, *The Donald Goes Off and Conflates the Issues*, FCPA PROFESSOR (May 17, 2012), http://fcpaprofessor.com/the-donald-goes-off-and-conflates-the-issues/ (summarizing President Trump's negative outlook on FCPA).

[105] *See id.* (quoting President Trump regarding his disfavor of FCPA enforcement).

[106] *See* Mike Koehler, *Donald Trump: The FCPA Is a "Horrible Law and It Should Be Changed,"* FCPA PROFESSOR (Aug. 6, 2015), http://fcpaprofessor.com/donald-trump-the-fcpa-is-a-horrible-law-and-it-should-be-changed/ (outlining President Trump's issues with FCPA).

as a precursor for reducing government activity and intervention with regards to the FCPA.[107]

President Trump's nomination for chair of the SEC–one of the nation's top financial regulating institutions and enforcer of the FCPA–Jay Clayton, also wants to ease what he considers to be unnecessary regulations that deter investors and American companies.[108] In December 2011, Clayton chaired the Committee on International Business Transactions that investigated the possibility of minimizing the consequences of the FCPA on American business.[109] The committee concluded that enforcement of the

---

[107] *See* Exec. Order No. 13,771, 82 Fed. Reg. 9339, 9339 (Jan. 30, 2017) (addressing President Trump's plan to prevent executive agencies from creating more regulations). The Executive Order states: "[I]t is important that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process." *Id. See also* Jacob Pramuk, *Trump Tells Business Leaders He Wants to Cut Regulations by 75% or 'Maybe More'*, CNBC (Jan. 23, 2017, 11:10 AM), https://www.cnbc.com/2017/01/23/trump-tells-business-leaders-he-wants-to-cut-regulations-by-75-percent-or-maybe-more.html (detailing President Trump's top priority to "cut regulation massively" by 75% or more).

[108] *See* Chris Flood, *'Bonfire of Regulations' Feared Under New SEC Boss*, FINANCIAL TIMES (Feb. 3, 2017), https://www.ft.com/content/9ef7ccee-de5a-11e6-86ac-f253db7791c6 (providing background information about new SEC chairman). The new SEC position is described as:

> Opponents of the new president believe Mr. Clayton's appointment could lead to the SEC adopting a less aggressive approach to pursuing and prosecuting financial wrongdoing . . . . "On the one hand, the Democrats, led by Senator Warren, want the SEC to push for the completion of Ms. White's regulatory agenda. But Republicans on the other side of the aisle will push for a bonfire of regulations. Nobody really knows where this will go," said Mr. Baris [chairman of the investment management practice at Morrison & Foerster].

Id.

[109] *See* COMMITTEE ON INTERNATIONAL BUSINESS TRANSACTIONS, *The FCPA and Its Impact on International Business Transactions – Should Anything Be Done to Minimize the Consequences of the U.S.'s Unique Position on Combating Offshore Corruption?* NEW YORK CITY BAR ASSOCIATION 23 (Dec. 2011), http://www2.nycbar.org/pdf/report/uploads/FCPAImpactonInternationalBusinessTransactions.pdf (summarizing committee meeting to reevaluate FCPA enforcement). The committee summarized its position:

> Our position is that (1) the competitive landscape of the 21st century global economy warrants the reevaluation of the United States' strategy in fighting foreign corruption, (2) the current anti-bribery regime—which tends to place disproportionate burdens on U.S. regulated companies in international transactions and incentivizes other countries to take a "lighter touch" —is causing lasting harm to the competitiveness of U.S. regulated companies and the U.S. capital markets and (3) even putting aside the disproportionate costs borne by U.S. regulated companies, the continued unilateral and zealous enforcement of the FCPA by the United States may not be the most effective means to combat corruption globally—in fact, in some circumstances it may *exacerbate* the problem of overseas corruption.

FCPA is not the most effective strategy to fight foreign corruption and may outweigh the benefit of global business for the United States.

As Clayton transitions from the private sector to a public servant, forecasting Clayton's actions may not be as straightforward as simply expecting him to follow his 2011 paper.[110] For example, Mary Jo White, Clayton's predecessor as SEC chair, was a zealous advocate for her corporate clients against the SEC and DOJ before spearheading a record-breaking year of FCPA enforcement in 2016.[111] Furthermore, since the release of Clayton's paper in 2011, the United Kingdom has begun to vigorously enforce the U.K. Bribery Act–in its nascent stage of development in 2011–against global violators.[112] Moreover, even countries such as China, India, and Brazil "have introduced, enacted, or amended anti-bribery and anti-corruption laws of their own."[113]

Perhaps the strongest evidence of Clayton's current view of the FCPA was discovered when he responded to questions from the U.S. Banking Committee during his confirmation hearing.[114] Clayton stated the FCPA was a "powerful and effective" tool to combat bribery and

---

Id. at 23.

[110] *See* Daniel R. Alonso, *How Clayton's SEC is Likely to View the FCPA*, THE FCPA BLOG (Jan. 19, 2017, 8:52 AM), http://www.fcpablog.com/blog/2017/1/19/daniel-r-alonso-how-claytons-sec-is-likely-to-view-the-fcpa.html (predicting SEC's role in FCPA enforcement during Trump administration).

[111] *See* Richard L. Cassin, *The 2016 FCPA Enforcement Index*, THE FCPA BLOG (Jan. 3, 2017, 8:08 AM), http://www.fcpablog.com/blog/2017/1/3/the-2016-fcpa-enforcement-index.html (describing large settlements in 2016 due to FCPA enforcement). 2016 was a record-breaking year for the FCPA:

> [2016] was the biggest enforcement year in FCPA history. Both the number of enforcement actions and the overall amounts paid to resolve them were records. Four blockbuster FCPA settlements in 2016—Teva Pharmaceutical at $519 million, Odebrecht / Braskem at $419.8 million, Och-Ziff at $412 million, and VimpelCom at $397.6 million—landed on our list of the ten biggest FCPA cases of all time.

Id.

[112] *See* Alonso, *supra* note 110 (noting bribery conviction in China and Brazil against large pharmaceutical company); *see also* Hester Plumridge & Laurie Burkitt, *GlaxoSmithKline Found Guilty of Bribery in China*, WALL ST. J. (Sept. 19, 2014), https://www.wsj.com/articles/glaxosmithkline-found-guilty-of-bribery-in-china-1411114817 (noting largest corporate fine levied in China at $500 million).

[113] *See* Alonso, *supra* note 110 (outlining new anti-bribery legislation in other large, non-Western countries).

[114] *See* Andrew Ramonas, *SEC Chairman Won't Abandon Anti-Bribery Law*, BNA BLOOMBERG (Apr. 4, 2017), https://www.bna.com/sec-chairman-nominee-n57982086171/ (detailing Clayton's responses to Senate Banking Committee regarding FCPA).

corruption.[115] Furthermore, he stated that he looks "forward to working with my fellow Commissioners, Enforcement Division staff, and other authorities in the U.S. and abroad to coordinate enforcement of the FCPA and other anti-corruption laws."[116]

While Clayton favors continuing enforcement, as of September 1, 2017, the Trump administration has only brought three FCPA enforcement actions.[117] There are a variety of explanations for the decline in prosecutions, with the strongest being the renewal of the Pilot Program has encouraged companies to voluntarily self-disclose FCPA violations to the DOJ.[118] However, the Pilot Program is only enforced by the DOJ, and does not explain SEC inaction.[119]

If the Trump administration intends to pursue this path of FCPA enforcement, taxpayer costs will be reduced by bringing fewer lawsuits because companies will be incentivized to invest time and money in compliance procedures designed to weed out corruption.[120] Moreover, the

---

[115] *See* COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS: NOMINATION OF JAY CLAYTON, 115th Cong. (Mar. 23, 2017), http://src.bna.com/nBm (responding to question inquiring about specific plan for enforcement of FCPA). "Bribery and corruption have no place in society. Moreover, they often go hand-in-hand with many other societal ills, including inequality and poverty, and have anti-competitive effects, including disadvantaging honest businesses. Accordingly, combating corruption is an important governmental mission." *Id.* at 9.

[116] *See id.* (explaining plan to enforce FCPA).

[117] *See* Steven M. Witzel & Arthur Kutoroff, *FCPA Standstill,* N.Y.L.J. (Sept. 6, 2017), http://www.newyorklawjournal.com/id=1202797372471/FCPA-Standstill (contrasting with Obama Administration which brought 24 FCPA actions by September 1, 2016).

[118] *See id.* (mentioning two incidents and response by Pilot Program enforced by DOJ). The Pilot Program could explain the decline in prosecutions:

> Since the inauguration of President Trump, the DOJ has announced two additional declinations under the Pilot Program. First, in June 2017, the DOJ closed its investigation into Linde North America energy companies that bribed government officials at a company affiliated with the Republic of Georgia. Second, also in June 2017, the DOJ closed its investigation into CDM Smith, a construction and engineering firm that bribed government officials in India. The embrace of the Pilot Program, in contrast to aggressive FCPA enforcement proceedings, allows for an increased emphasis and symbiosis on cooperation between the DOJ and self-reporting companies.

Id.

[119] *See id.* (discussing decline in prosecutions aligns with Trump administration's pro-business stance).

[120] *See id.* (positing future enforcement will be easier due to vigor of prior enforcement actions); *see also* Marc Alain Bohn & James G. Tillen, *Evaluating FCPA Pilot Program: Declinations on the Rise*, LAW 360 (Apr. 10, 2017), https://www.law360.com/articles/905127/evaluating-fcpa-pilot-program-declinations-on-the-rise (commenting on lack of DOJ's public disclosure of declination decisions). Noting a lack of declination decisions by stating:

SEC Whistleblower Program incentivizes citizens to step forward and produce evidence leading to an enforcement action by providing a financial reward that is unlikely to decline in value.[121] Nonetheless, the DOJ and SEC must continue to bring enforcement proceedings or risk losing its credibility and reverse decades of progress created by the FCPA.[122]

Congress could possibly amend the FCPA, as the U.S. Chamber of Commerce has advocated for "(1) greater clarity regarding the scope and coverage of the law; and (2) institutionalizing credit to be given to companies that maintain well-functioning compliance programs."[123] Indeed, Congress could introduce an affirmative defense for effective anti-corruption compliance measures by suggesting a company provide evidence of effective procedures to prevent bribery and charge the individual employee rather than the corporation.[124] This defense would mirror the provisions found in the U.K. Bribery Act.[125] While the FCPA and its British counterpart differ in

---

> In support of this statement, we have identified 15 instances since April 5, 2016, in which the DOJ has reportedly closed an FCPA investigation without enforcement in addition to the five publicly disclosed declinations previously mentioned. The lack of information surrounding the closure of these investigations, however, can make it difficult to compare how they might differ factually from matters the DOJ has either decided to pursue or publicly declined to prosecute. For instance, while the closure of an FCPA investigation could be in recognition of a company's self-reporting, cooperation and/or remediation, it might also reflect insufficient evidence, the absence of jurisdiction, or a lack of actionable misconduct from a criminal perspective.

Id.

[121] *See* Jason Zuckerman, *SEC Awards for Disclosures of Foreign Bribery or FCPA Violations*, THE NAT'L L. REV. (Mar. 3, 2017), https://www.natlawreview.com/article/sec-awards-disclosures-foreign-bribery-or-fcpa-violations (describing incentive to businesses through SEC Whistleblower Program). "Under the SEC Whistleblower Program, the SEC Whistleblower Office will issue awards to whistleblowers who provide original information that leads to enforcement actions with sanctions in excess of $1 million. A whistleblower is eligible to receive an award of between 10-30 percent of the total sanctions imposed." *Id.*

[122] *See* Witzel & Kutoroff, *supra* note 117 (noting decline in bribery and corruption not immediate but gradual).

[123] *See* Gregory Husisian, *Foreign Corrupt Practices Act and New Trump Administration: Your Top Ten Questions Answered*, THE NAT'L L. REV. (May 10, 2017), https://www.natlawreview.com/article/foreign-corrupt-practices-act-and-new-trump-administration-your-top-ten-questions (discussing realistic options for modifying FCPA through congressional action).

[124] *See* Mike Koehler, *Amendments To Simplify The FCPA For U.S. Businesses*, FCPA PROFESSOR (Sept. 24, 2012), http://fcpaprofessor.com/amendments-to-simplify-the-fcpa-for-u-s-businesses/ (noting six changes that would reduce confusion about FCPA).

[125] *See* Bribery Act, 2010, c. 23 § 7(1)(a)(b) (U.K.) https://www.legislation.gov.uk/ukpga/2010/23/pdfs/ukpga_20100023_en.pdf (providing penalties for failure of commercial organizations to prevent bribery). Penalties for failure of commercial organization to prevent bribery include:

many ways, the mere existence of anti-bribery legislation in both modernized economies serves as a much stronger deterrent against white collar crime.[126]

VI. CONCLUSION

As the number of countries who have passed anti-bribery legislation continues to grow, it has become increasingly clear that the FCPA was created ahead of its time. Enacted during a turbulent period of American history to restore both public and global faith in the United States' ability to maintain its central position in the world's economy, the FCPA revolutionized conduct in international business. At its inception, many countries, including China and Russia, were not members of the World Trade Organization ("WTO"), which caused wide variety in country-to-country dealings. However, the WTO standardized pricing and tariffs across a multitude of industries, resulting in a greater demand for uniformity in business relations throughout the world.

While reducing the nefarious aspects of corporate transactions, properly managed companies will benefit throughout the world, particularly in countries like the United States and in Western Europe where the business

---

> A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—(a) to obtain or retain business for C, or (b) to obtain or retain an advantage in the conduct of business for C. (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

Id. *See also* *The Bribery Act*, TRANSPARENCY INTERNATIONAL UK, http://www.transparency.org.uk/our-work/business-integrity/bribery-act/ (last visited Sept. 28, 2017) (summarizing positive effects of Bribery Act in United Kingdom). The Bribery Act in the United Kingdom has been described as:

> The Bribery Act is legislation of great significance for companies incorporated in or carrying on business in the UK. It presents heightened liability risks for companies, directors and individuals. To avoid corporate liability for bribery, companies must make sure that they have strong, up-to-date and effective anti-bribery policies and systems.

Id.

[126] *See* Gordon Belch, *An Analysis of the Efficacy of the Bribery Act 2010*, 5 ABERDEEN STUDENT L. REV. 134, 146 (2014) (summarizing United Kingdom's approach to combat white collar crime). The United Kingdom's approach has been described as:

> The UKBA 2010 does indeed have enormous potential, but its practical effects have yet to be exemplified. It is plainly apparent that the UK is taking rigorous action against corruption by implementing a zero-tolerance approach on white-collar crime, however Parliament's aspiration of ending bribery in the UK will take time.

Id.

regulations are more stringent. Although FCPA enforcement varies between presidential administrations, the overall merits of this legislation continue to prosper. Different cultures have particular ways of conducting business, and the mere passage of legislation will not cause back room dealings and illicit practices to vanish overnight. Indeed, "[i]n the absence of global harmonization of anti-bribery and corruption law and its enforcement, the landscape will remain confused and uneven. One man's bribe is another man's gift."[127] The FCPA has helped combat global corruption and has made consistent strides over its forty years of existence to maintain the business practices and reputation of American companies, which ultimately allows the United States to lead by example in international affairs.

Christopher J. Schlauch

[127] *See* Dan Hyde, *Bribery Act: 'facilitation payments,'* LAW SOC'Y GAZETTE (June 13, 2013), https://www.lawgazette.co.uk/practice-points/bribery-act-facilitation-payments/71372.article (articulating need for anti-bribery law enforcement).