Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations

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I. INTRODUCTION

In April 2012, the *New York Times* reported that Wal-Mart Stores, Inc.'s (Wal-Mart) largest foreign subsidiary, Wal-Mart de México, had engaged in a "campaign of bribery" in Mexico and that, in 2005, Wal-Mart had investigated and then covered up over $24 million in bribes paid to speed up building permits there.[1] The bribes and cover-up could amount to violations of the U.S. Foreign Corrupt Practices Act (FCPA),[2] and the *Times* reported that the company had begun a new investigation and informed the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC).[3] Within weeks, Wal-Mart shareholders had filed a dozen lawsuits against the company alleging that Wal-Mart had made misleading disclosures and that the company directors and officers had breached their fiduciary duties, exposing the company to FCPA liability.[4]

A recent surge in government enforcement of the FCPA[5] has increased opportunities for private plaintiffs to bring collateral civil actions. In response to FCPA investigations, shareholders now routinely file derivative suits, securities fraud class actions, or both. Collateral shareholder lawsuits may allege, for example, that the directors violated their fiduciary duties by failing to oversee the company and avoid or detect the FCPA violation or that the company misled shareholders by not disclosing the conditions that led to the violation. To date, FCPA-based shareholder litigation has enjoyed limited success, with many actions dismissed at early stages of the lawsuits. [6] Nevertheless, a number of the suits have been settled, some for amounts exceeding the government penalties paid by the company for the FCPA violations.

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[1] David Barstow, *Vast Mexico Bribery Case Hushed up by Wal-Mart After Top-Level Struggle*, N.Y. TIMES, Apr. 22, 2012, at A1.

[2] Foreign Corrupt Practices Act (FCPA) of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.).

[3] Barstow, *supra* note 1, at A1 (reporting that Wal-Mart had informed the DOJ that it had begun an internal investigation into possible violations of the FCPA and discussed the matter in a filing with the SEC).

[4] Wal-Mart Stores, Inc., Quarterly Report (Form 10-Q), at 29 (June 1, 2012).

[5] For a discussion of the surge in FCPA enforcement, see Amy Deen Westbrook, *Enthusiastic Enforcement, Informal Legislation: The Unruly Expansion of the Foreign Corrupt Practices Act*, 45 GA. L. REV. 489, 522–55 (2011).

[6] *See infra* Part IV.

Shareholder litigation based on company behavior that violates the FCPA is significant for several reasons. In the FCPA context, the threat of private litigation increases the impact of an FCPA violation by increasing a company's liability. Moreover, parallel shareholder litigation may also subtly expand FCPA liability by functioning as an FCPA private right of action.

FCPA-related shareholder lawsuits may also be of more general doctrinal significance. Allegations that directors failed to fulfill their fiduciary duties of oversight may constitute "*Caremark* claims,"[7] which inform the fundamental duties of corporate managers. Similarly, shareholder allegations of inaccurate books and records and inadequate accounting controls may be brought as securities fraud class action suits based on the company's misleading disclosure. Both corporation and securities law cases, in the FCPA context, may disturb the uneasy allocation of state and federal regulation of business associations.

This Article examines recent shareholder litigation based on company behavior that violates the FCPA. Part II introduces the FCPA and the current surge in its enforcement. Part III examines the increase in shareholder actions based on FCPA violations. Parts IV and V analyze shareholder derivative and securities fraud class action lawsuits, respectively, in terms of what shareholders are alleging and how their suits are faring. Part VI draws preliminary conclusions about the legal consequences of increased collateral shareholder litigation based on FCPA violations.

II. THE FCPA: ENFORCEMENT AND EXPENSE

A. *Recent FCPA Enforcement: Wider and Deeper*

The FCPA was passed in 1977 to address corruption in international business transactions.[8] Generally, the FCPA prohibits the bribery of foreign officials in order to obtain or retain business.[9] The FCPA's anti-bribery provisions apply to a variety of actors: U.S. persons and corporations, companies with publicly-traded securities in the United States (issuers), and anyone who happens to be in U.S. territory.[10] The FCPA's accounting provisions require issuers to keep accurate books and records and to devise and maintain a system of internal accounting controls that provides reasonable assurances that their transactions and assets are properly maintained.[11]

[7] This phrase describes cases structurally similar to *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996), which are discussed below in Part IV.A.

[8] Lamb v. Phillip Morris Inc., 915 F.2d 1024, 1028 (6th Cir. 1990).

[9] *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (2006).

[10] *See* 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a) (2006).

[11] 15 U.S.C. § 78m(b) (2006).

FCPA enforcement was anemic for three decades. Between 1977 and 2007, there were a total of approximately 105 actions,[12] with generally low fines.[13] Since 2007, however, enforcement has increased.[14] In the last five years, DOJ and the SEC have brought over 230 enforcement actions,[15] with more investigations pending. At the same time, fines have increased.[16] In 2007, the government settled an FCPA action against Baker Hughes Inc. (Baker Hughes) for the then-record-breaking total of $44 million.[17] That record has been broken over a dozen times since then.

DOJ and SEC FCPA enforcement in 2011 included actions and penalties totaling more than $508 million.[18] 2011 actually represented a slight decrease in total penalties from prior years: in 2010, twenty-three companies paid a total of $1.8 billion; in 2009, eleven companies paid a total of $644 million; and in 2008, eleven companies paid a total of $890 million.[19]

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[12] SHEARMAN & STERLING LLP, FCPA DIGEST: CASES AND REVIEW RELEASES RELATING TO BRIBES TO FOREIGN OFFICIALS UNDER THE FOREIGN CORRUPT PRACTICES ACT OF 1977 (Jan. 3, 2012), *available at* http://www.shearman.com/files/Publication/bb1a7bff-ad52-4cf9-88b9-9d99e001dd5f/Presentation/PublicationAttachment/590a9fc7-2617-41fc-9aef-04727f927e07/FCPA-Digest-Jan2012.pdf; *FCPA and Related Enforcement Actions*, U.S. DEP'T OF JUST., http://www.justice.gov/criminal/fraud/fcpa/cases/2012.html (last visited June 4, 2012); *SEC Enforcement Actions: FCPA Cases*, U.S. SEC. & EXCH. COMM'N, http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml (last modified May 8, 2012).

[13] SHEARMAN & STERLING LLP, *supra* note 12.

[14] *See* Jonathan M. Karpoff, D. Scott Lee & Gerald S. Martin, The Impact of Anti-Bribery Enforcement Action on Targeted Firms 1 (Feb. 27, 2012) (unpublished article), *available at* http://ssrn.com/abstract=1573222 (noting that of the 115 anti-bribery enforcement actions against publicly-traded companies between 1977 and 2011, over 57% of them were between 2007 and 2011). The reasons for this increased enforcement are significant but beyond the scope of this Article. *See* Westbrook, *supra* note 5, at 510–21, 530–48.

[15] Gibson Dunn, *2011 Year-End FCPA Update* (Jan. 3, 2012), *available at* http://www.gibsondunn.com/publications/Documents/2011YearEndFCPAUpdate.pdf.

[16] SHEARMAN & STERLING LLP, *supra* note 12.

[17] Press Release, U.S. Dep't of Justice, Baker Hughes Subsidiary Pleads Guilty to Bribing Kazakh Official and Agrees to Pay $11 Million Criminal Fine as Part of Largest Combined Sanction Ever Imposed in FCPA Case (Apr. 26, 2007), *available at* http://www.justice.gov/opa/pr/2007/April/07_crm_296.html.

[18] Richard L. Cassin, *2011 Enforcement Index*, FCPA BLOG (Jan. 2, 2012, 7:18 AM), http://www.fcpablog.com/blog/2012/1/2/2011-enforcement-index.html (listing actions against Aon Corporation, Armor Holdings Inc., Ball Corporation, Bridgestone Corporation, Comverse Technology Inc., Diageo plc, IBM, JGC Corporation, Johnson & Johnson, Lindsey Manufacturing, Magyar Telecom (and majority owner Deutsche Telekom, Maxwell Technologies Inc., Rockwell Automation Inc., Tenaris, Tyson Foods Inc., and Watts Water Technologies, Inc.).

[19] Richard L. Cassin, *Corporate Enforcement Since 2006*, FCPA BLOG (Jan. 3, 2012, 7:28 AM), http://www.fcpablog.com/blog/2012/1/3/corporate-enforcement-since-2006.html. Estimates of total penalties vary slightly but the trend is clear. *See* SHEARMAN & STERLING LLP, *supra* note 12, at viii; ARNOLD & PORTER LLP, FCPA & GLOBAL ANTI-CORRUPTION

Currently, the "top ten" actions[20] in terms of total penalties paid by companies to DOJ and the SEC[21] are:

1. Siemens AG: $800 million (2008);[22]
2. Kellogg Brown & Root LLC / Halliburton Co.: $579 million (2009);[23]
3. BAE Systems PLC: $400 million (2010);[24]
4. Snamprogetti Netherlands B.V. / ENI, S.p.A: $365 million (2010);[25]
5. Technip S.A.: $338 million (2010);[26]

INSIGHTS 4 (Winter 2012), *available at* http://www.arnoldporter.com/resources/documents/FCPA%20Newsletter%202_14.pdf.

[20] Richard L. Cassin, *With Magyar in New Top Ten, It's 90% Non-U.S.*, FCPA BLOG (Dec. 29, 2011, 1:28 PM), http://www.fcpablog.com/blog/2011/12/29/with-magyar-in-new-top-ten-its-90-non-us.html (noting that nine-tenths of the top penalties were paid by non-U.S. companies). Wal-Mart shareholders have alleged that the FCPA investigations may result in billions of dollars of liability for the company. Verified Shareholder Derivative Complaint at para. 10, Cal. State Teachers' Ret. Sys. *ex rel.* Wal-Mart Stores, Inc. v. Alvarez, No. 7490, 2012 WL 1557306 (Del. Ch. May 3, 2012) [hereinafter Wal-Mart Complaint] (referring to "scorched-earth investigations").

[21] If the "top ten" list counted individuals, it would include Jeffrey Tesler, a former consultant to Kellogg, Brown, & Root Inc. and its joint venture partners, who pleaded guilty in March 2011 to conspiring to violate and to violating the FCPA and agreed to forfeit $149 million. Press Release, U.S. Dep't of Justice, UK Solicitor Pleads Guilty for Role in Bribing Nigerian Government Officials as Part of KBR Joint Venture Scheme (Mar. 11, 2011), *available at* http://www.justice.gov/opa/pr/2011/March/11-crm-313.html. The surge in FCPA enforcement against individuals is another interesting development, but beyond the scope of this Article.

[22] Press Release, U.S. 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), *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Siemens AG for Engaging in Worldwide Bribery (Dec. 15, 2008), *available at* http://www.sec.gov/news/press/2008/2008-294.htm.

[23] Press Release, U.S. Dep't of Justice, Kellogg Brown & Root LLC Pleads Guilty to Foreign Bribery Charges and Agrees to Pay $402 Million Criminal Fine (Feb. 11, 2009), *available at* http://www.justice.gov/opa/pr/2009/February/09-crm-112.html; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges KBR and Halliburton for FCPA Violations (Feb. 11, 2009), *available at* http://www.sec.gov/news/press/2009/2009-23.htm.

[24] Press Release, U.S. Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010), *available at* http://www.justice.gov/opa/pr/2010/March/10-crm-209.html [hereinafter BAE Press Release].

[25] Press Release, U.S. Dep't of Justice, Snamprogetti Netherlands B.V. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (July 7, 2010), *available at* http://www.justice.gov/opa/pr/2010/July/10-crm-780.html; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Italian Company and Dutch Subsidiary in Scheme Bribing Nigerian Officials with Carloads of Cash (July 7, 2010), *available at* http://www.sec.gov/news/press/2010/2010-119.htm.

[26] Press Release, U.S. Dep't of Justice, Technip S.A. Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay $240 Million Criminal Penalty (June 28, 2010), *available at* http://www.justice.gov/opa/pr/2010/June/10-crm-751.html; Press

6. JGC Corporation: $218.8 million (2011);[27]
7. Daimler AG: $185 million (2010);[28]
8. Alcatel-Lucent: $137 million (2010);[29]
9. Magyar Telekom / Deutsche Telekom: $95 million (2011);[30] and
10. Panalpina: $81.8 million (2010).[31]

Not surprisingly, many of these companies have also been subject to collateral shareholder litigation based on their FCPA violations.

B. *FCPA Violations Are Expensive*

The "top ten" list above is a warning for companies, but a list of the "top fifty" fines might be even more sobering because of the large number of companies caught in the FCPA net. Moreover, fines may not be the only cost assessed by the government. The SEC and DOJ are now employing additional tools such as deferred prosecution and non-prosecution agreements.[32] Ongoing

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Release, U.S. Sec. & Exch. Comm'n, SEC Charges Technip with FCPA Violations (June 28, 2010), *available at* http://www.sec.gov/news/press/2010/2010-110.htm.

[27] Press Release, U.S. Dep't of Justice, JGC Corporation Resolves Foreign Corrupt Practices Act Investigation and Agrees to Pay a $218.8 Million Criminal Penalty (Apr. 6, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-431.html.

[28] Press Release, U.S. Dep't of Justice, Daimler AG and Three Subsidiaries Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay $93.6 Million in Criminal Penalties (Apr. 1, 2010), *available at* http://www.justice.gov/opa/pr/2010/April/10-crm-360.html; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Daimler AG with Global Bribery (Apr. 1, 2010), *available at* http://www.sec.gov/news/press/2010/2010-51.htm.

[29] Press Release, U.S. Dep't of Justice, Alcatel-Lucent S.A. and Three Subsidiaries Agree to Pay $92 Million to Resolve Foreign Corrupt Practices Act Investigation (Dec. 27, 2010), *available at* http://www.justice.gov/opa/pr/2010/December/10-crm-1481.html; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Alcatel-Lucent with FCPA Violations (Dec. 27, 2010), *available at* http://www.sec.gov/news/press/2010/2010-258.htm.

[30] Press Release, U.S. Dep't of Justice, Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly $64 Million in Combined Criminal Penalties (Dec. 29, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-crm-1714.html; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Magyar Telekom and Former Executives with Bribing Officials in Macedonia and Montenegro (Dec. 29, 2011), *available at* http://www.sec.gov/news/press/2011/2011-279.htm.

[31] Press Release, U.S. Dep't of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (Nov. 4, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html; Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Seven Oil Services and Freight Forwarding Companies for Widespread Bribery of Customs Officials (Nov. 4, 2010), *available at* http://www.sec.gov/news/press/2010/2010-214.htm.

[32] *See, e.g.*, Deferred Prosecution Agreement, United States v. Bizjet Int'l Sales & Support, Inc., No. 12CR-61CVE (N.D. Okla. Mar. 14, 2012), *available at* https://www.traceinternational2.org/compendium/file.asp?id=1733. An FCPA conviction may also result in debarment, or in a company being ineligible for export licenses or not allowed to

responsibilities, such as hiring a compliance monitor and establishing a new compliance program, are also expensive.[33]

Even suspicion of violating the FCPA can be expensive. A company may incur substantial expenses to conduct an internal investigation before or concurrent with a government investigation. In *In re Avon Products Inc. Shareholder Derivative Litigation*, the plaintiffs alleged in their complaint that Avon Products Inc. (Avon) had already incurred $114 million in costs in connection with its FCPA investigation in 2009 and 2010 and expected to incur an additional $96 million in 2011.[34] These expenses did not include any financial penalty that may be assessed by DOJ or the SEC.[35] Nor did the over $200 million total include the cost of any new compliance measures that Avon may have to establish.

An FCPA investigation imposes indirect costs on a company, too. Perhaps in recognition of the direct costs likely to be borne by the company, the disclosure of an FCPA investigation may drive down a company's share price. Some estimates put the mean one-day share price drop in reaction to the initial revelation of bribery at a publicly-traded company, at least when the bribery is accompanied by misreporting or fraud in the company's financial statements, at -3.11% of share value, with a mean loss of -8.98% of share value cumulated

participate in securities business and conduct business with government agencies. Mark P. Goodman, Daniel J. Fetterman & Bruce E. Yannett, Defending Clients in Foreign Corrupt Practices Act Investigations, *in* DANIEL J. FETTERMAN & MARK P. GOODMAN, DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS § 9.17 (2011) (describing other effects of an FCPA conviction).

[33] Sarah Johnson, *After the Settlement, He'll Be Watching You*, CFO.COM (July 11, 2011), http://www.cfo.com/article.cfm/14586152 (explaining that Innospec expected the cost of hiring Kevin Abikoff as a monitor, required as part of its FCPA settlement, to be about $3.9 million); Client Memorandum from Willkie Farr & Gallagher LLP, Imposition of Compliance Monitors in FCPA Settlements Is Down, but Recent Court Ruling Increases the Risk of Public Access to Monitor Reports (Apr. 20, 2012), http://www.willkie.com/files/tbl_s29Publications%5CFileUpload5686%5C4063%5CImposition_of_Compliance_Monitors.pdf (discussing John Ashcroft's 2008 estimate that eighteen months of his work as a monitor would cost between $28 million and $52 million). In March 2008, the DOJ issued the Memorandum on the Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, known as the Morford Memo, to clarify the use of monitors. Memorandum from the U.S. Dep't of Justice, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations (Mar. 7, 2008), www.justice.gov/dag/readingroom/dag-030708.pdf.

[34] Verified Consolidated Shareholder Derivative Complaint at para. 6, *In re* Avon Prods., Inc. S'holder Derivative Litig., No. 1:10-cv-05560-KBF (S.D.N.Y. May 16, 2011) [hereinafter Avon Consolidated Complaint]. The 2009 and 2010 costs were disclosed in Avon's 2010 Form 10-K filing with the SEC. Avon Products Inc., Annual Report (Form 10-K, p. 29) (Feb. 24, 2011). Avon's 2011 Form 10-K filing disclosed $93.3 million in FCPA-related expenses. Avon Products Inc., Annual Report (Form 10-K), at 27 (Feb. 29, 2012).

[35] The government investigation of Avon is ongoing. Joe Palazzolo & Emily Glazer, *Foreign Bribe Case at Avon Presented to Grand Jury*, WALL ST. J., Feb. 13, 2012, at A1 (reporting that federal prosecutors presented evidence to a grand jury regarding improper payments by Avon in China).

over all key announcements about the bribery and the related enforcement action.[36] In their consolidated shareholder derivative complaint, Avon shareholders noted that, following an April 13, 2010 report in the *Wall Street Journal* revealing that Avon had suspended four executives in an investigation of bribery in the company's China operations,[37] Avon shares fell 8%.[38] In its May 3, 2012 shareholder derivative complaint, the California State Teachers' Retirement System alleged that Wal-Mart stock lost 8% of its value in the three trading days following the *Times* article.[39]

III. INCREASE IN COLLATERAL ACTIONS

A. *An FCPA Private Right of Action?*

The de facto emergence of private actions in the FCPA context is somewhat surprising. The FCPA is enforced by DOJ and the SEC; the statute does not provide for a private right of action.[40] In 1990, the Sixth Circuit affirmed the government's exclusive right to enforce the FCPA.[41] In *Lamb v. Phillip Morris*, U.S. tobacco growers alleged that Phillip Morris, Inc. and B.A.T. Industries PLC were purchasing foreign tobacco at below-market prices thanks to their foreign payments in violation of the FCPA.[42] Because the purchase of non-U.S. tobacco necessarily reduced the amount of U.S. tobacco the defendants purchased, Lamb and several fellow growers filed suit under U.S. antitrust laws and later added an FCPA claim.[43]

In reviewing and affirming a lower court's dismissal of the FCPA claim, the Sixth Circuit rejected the argument that an implied private right of action exists

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[36] *See* Karpoff et al., *supra* note 14, at 3.

[37] Ellen Byron, *Avon Suspends Executives in Inquiry*, WALL ST. J., Apr. 13, 2010, at B1.

[38] Avon Consolidated Complaint, *supra* note 34, at para. 8–9 (noting that Avon shares closed at $31.99 per share after the *Wall Street Journal* article was published on April 13, 2010, down from their $34.76 close on April 12, 2010).

[39] Wal-Mart Complaint, *supra* note 20, at para. 112 (referring to David Barstow's April 21, 2012 article). Wal-Mart's share price decrease has been estimated to have cost the company $17.27 billion in market capitalization, translating into a loss of almost $720 in value for each dollar in bribes that Wal-Mart had paid. Nigam Arora, *Mexican Bribery Gave Me a Chance to Make Money in Wal-Mart*, FORBES.COM (May 17, 2012, 12:44 PM), http://www.forbes.com/sites/greatspeculations/2012/05/17/mexican-bribery-gave-me-a-chance-to-make-money-in-wal-mart/3/. Wal-Mart also faces a investigation by the U.S. House of Representatives. *See House Democrats Launch Probe into Wal-Mart's Alleged FCPA Violations*, 44 Sec. Reg. & L. Rep. 859 (BNA) (Apr. 30, 2012).

[40] There have been attempts to expand the field of persons eligible to sue companies for FCPA violations. *See, e.g.*, Foreign Business Bribery Prohibition Act of 2011, H.R. 3531, 112th Cong. § 2 (2011) (authorizing U.S. companies to sue certain foreign entities that gained business by violating the FCPA).

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

[42] *Id.* at 1025 (holding that the FCPA did not create a private right of action).

[43] *Id.*

under the FCPA.[44] The court's reasoning included, *inter alia*, an examination of Congress's intent in passing the FCPA. The court found that, although there was a reference to a private right of action in a House report and an early Senate version of the act, because the conference report accompanying the final legislative compromise did not mention such a right, Congress did not intend one.[45] The court also decided that a private right of action under the FCPA would be inconsistent with the "legislative scheme."[46] The court explained that the FCPA prefers compliance (pre-violation measures) over prosecution (post-violation enforcement) and a private right of action would introduce plaintiffs primarily interested in the latter.[47]

An earlier Northern District of California decision, *Lewis v. Sporck*,[48] came to a similar conclusion regarding the accounting and books and records provisions of the FCPA. In a shareholder derivative action on behalf of National Semiconductor Corporation (NSC), Lewis claimed that NSC managers violated the FCPA accounting provisions in connection with falsification of testing data and theft of trade secrets.[49] The court dismissed the FCPA books and records claim, agreeing with NSC that no private right of action exists under the provisions.[50]

The court did not consider the House report that had mentioned a private right of action because, at the time the report was drafted, the FCPA legislation had included only the anti-bribery provisions and not the accounting provisions.[51] After examining the legislative history, the court found that "[t]he purpose of Section 13(b)(2) . . . was to deter bribery of foreign officials by American corporations,"[52] and the inclusion of accounting provisions was to discourage companies from making illegal payments and to offer investors and the corporation the benefit of accurate bookkeeping.[53] The court recognized that the SEC had broadened the scope of Section 13(b)(2) to include "all egregious violations of standard accounting principles," but reasoned that letting "private plaintiffs sue under this section whenever a standard accounting principle is violated . . . would broaden the coverage of this statute far beyond any limit

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44 *Id.* at 1030.

45 *Id.* at 1029. The court acknowledged the 1977 House report that, in one place, stated "[t]he committee intends that courts shall recognize a private cause of action based on this legislation . . . on behalf of persons who suffer injury as a result of prohibited corporate bribery." *Id.* (quoting H.R. Rep. No. 95-640, at 10 (1977)) (internal quotation marks omitted).

46 *Lamb*, 915 F.2d at 1029.

47 *Id.* at 1029–30.

48 Lewis *ex rel.* Nat'l Semiconductor Corp. v. Sporck, 612 F. Supp. 1316 (N.D. Cal. 1985).

49 *Id.* at 1320–21.

50 *Id.* at 1333–34.

51 *Id.* at 1330.

52 *Id.* at 1332–33 (citing S. Rep. No. 95-114, at 3–4 (1997), *reprinted in* 1977 U.S.C.C.A.N 4098, 4101–02).

53 *Id.* at 1333.

conceived of by Congress [because] . . . [p]rivate plaintiffs, unlike the SEC, are not limited by any notion that they are to act in the public interest."[54]

Finally, the court considered whether the cause of action was one traditionally relegated to state law, so that it would be inappropriate to infer an action based solely on federal law.[55] The court concluded that Lewis's claims were compensable under state law as breaches of fiduciary duty.[56] Thus, *Lewis* acknowledged the legal development at issue in this Article: shareholders are unhappy about the cost of FCPA violations and are seeking redress through collateral means.

B. *Shareholder Suits Based on FCPA Violations*

1. *Types of Suits*

Historically the number of collateral civil suits based on FCPA liability, like the number of FCPA cases, was small.[57] The recent surge in FCPA enforcement has sparked a parallel increase in shareholder litigation based on the facts of those FCPA cases.[58]

FCPA-related shareholder suits come in two flavors: derivative actions and securities fraud class actions.[59] In a derivative action, shareholders file suit against some or all of the board of directors or executive officers on behalf of the corporation itself. The theory is that a corporation harmed by its managers will not sue because the managers control the corporation. Therefore, in a derivative action, a shareholder files suit on behalf of the corporation: the corporation is suffering the wrong, and any remedy obtained will belong to the corporation.

The other type of shareholder suit that may be filed in response to news of an FCPA violation is a securities fraud suit. Often filed as class actions, such suits may allege violations of the Exchange Act § 10(b)[60] by the corporation for failing to disclose (or disclosing in a misleading manner) its FCPA-violating activity or an internal, SEC, or DOJ investigation into it. Many of these suits allege that the company's misrepresentations or omissions artificially inflated a company's share price. The recovery in a securities fraud class action accrues to the shareholders.

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[54] *Lewis*, 612 F. Supp. at 1333.

[55] *Id.* at 1327 (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)).

[56] *Id.* at 1333.

[57] SHEARMAN & STERLING LLP, *supra* note 12.

[58] Although precise numbers of suits are not available, the recent increase has been the subject of substantial comment. *See, e.g.*, *The Rise in Litigation from FCPA Enforcement*, FOLEY & LARDNER LLP (Feb. 9, 2009), http://www.foley.com/the-rise-in-litigation-from-fcpa-enforcement-02-09-2009/.

[59] It is relevant to note that both types of suits are largely lawyer-driven, calling into question the actual level of shareholder motivation.

[60] Exchange Act § 10(b), 15 U.S.C. § 78j(b) (2006); *see also infra* Part V.A.

Companies confronting shareholder litigation may face either, or both, types of suits.[61] In addition, defendant companies are likely to find multiple suits, which may or may not be consolidated, brought against them.[62]

2. *Predicates*

Some of the collateral suits are triggered by disclosure of FCPA settlements with the SEC and DOJ. For example, derivative actions against Tidewater Inc.,[63] Halliburton Co.,[64] Baker Hughes,[65] and Johnson & Johnson[66] followed announcements of substantial penalties to be paid by the companies. Other shareholder suits are triggered earlier, by the announcement of a government FCPA investigation. For example, securities fraud actions were filed against Siemens AG,[67] Invision Technologies, Inc. (Invision),[68] Titan, Inc.,[69] and

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[61] Faro Technologies, Inc. and SciClone, for example, have faced both kinds of shareholder suits. *See* Class Action Complaint at para. 1, Johnson v. Faro Techs., Inc., No. 6:06-cv-00057-ACC-DAB (M.D. Fla. Jan. 12, 2006); Verified Shareholder Derivative Complaint at para. 1, Alverson v. Caldwell, No. 6:08-cv-00045-ACC-DAB (M.D. Fla. Jan. 10, 2008) [hereinafter Faro Derivative Complaint]; Class Action Complaint at para. 1, Karner v. SciClone Pharms., Inc., No. 5:10-cv-03991-JW, 2010 WL 4638276 (N.D. Cal. Sept. 7, 2010) [hereinafter SciClone Class Action Complaint]; Verified Shareholder Derivative Complaint at para. 1, Constr. Indus. & Laborers Joint Pension Trust *ex rel.* SciClone Pharm., Inc. v. Saxe, No. CIV-499030 (Cal. Super. Ct. Sept. 22, 2010) [hereinafter SciClone Derivative].

[62] Parker Drilling Company faced multiple derivative suits. *See* Verified Shareholder Derivative Complaint at para. 1, Maresca *ex rel.* Parker Drilling Co. v. Parker, No. 4:10-cv-03066 (S.D. Tex. Aug. 25, 2010) [hereinafter Maresca Parker Complaint]; Freuler *ex rel.* Parker Drilling Co. v. Parker, 803 F. Supp. 2d 630, 630–31 (S.D. Tex. 2011). Avon faced several derivative actions, which were consolidated by the court. *See generally* Avon Consolidated Complaint, *supra* note 34.

[63] Verified Shareholder Derivative Complaint at para. 1, Strong *ex rel.* Tidewater Inc. v. Taylor, No. 2:11-cv-00392-JTM-ALC (E.D. La. Feb. 16, 2011) [hereinafter Tidewater Complaint].

[64] Plaintiff's Original Petition, Policemen & Firemen Ret. Sys. of Detroit *ex rel.* Halliburton Co. v. Cornelison, No. 2009-29987, 2009 WL 145562 (Harris Cnty. Dist. Ct. Tex. May 14, 2009).

[65] Verified Shareholder Derivative Complaint at para. 1, Midwestern Teamsters Pension Trust Fund *ex rel.* Baker Hughes Inc. v. Deaton, No. 4:08-cv-01809 (S.D. Tex. June 6, 2008) [hereinafter Baker Hughes Complaint].

[66] Verified Shareholder Derivative Complaint at para. 1, Wollman *ex rel.* Johnson & Johnson v. Coleman, No. 3:11-cv-02511-MLC-TJB (D.N.J. May 2, 2011) [hereinafter J&J Complaint].

[67] Class Action Complaint for Violations of the Federal Securities Laws at para. 1, Johnson v. Siemens AG, No. 1:09-cv-05310-JG-RER (E.D.N.Y. Dec. 4, 2009) [hereinafter Siemens Complaint].

[68] Class Action Complaint at para. 1, Engelken v. Invision Techs., Inc., No. 3:04-cv-03181-MJJ (N.D. Cal. Aug. 4, 2004).

[69] Consolidated Complaint for Violation of the Federal Securities Laws at para. 1, *In re* Titan, Inc. Sec. Litig., No. 3:04-cv-00676-LAB-NLS (S.D. Cal. Sept. 17, 2004).

Immucor Inc.[70] after disclosure of a government FCPA investigation. In the case of SciClone Pharmaceuticals, Inc. (SciClone), shareholders filed a derivative suit four days after the company disclosed the FCPA investigation in its Form 10-Q filing.[71] Avon, BAE Systems, Las Vegas Sands, and Parker Drilling Company (Parker Drilling) are all litigating shareholder actions while simultaneously negotiating with the government regarding the bribery allegations.

In fact, in some cases, suits are filed based on illegal payments or inadequate controls—things that might be expected to draw DOJ or SEC FCPA scrutiny in the future. As mentioned, in April 2012, following the *New York Times* story disclosing bribery by Wal-Mart de México, shareholders filed suit arguing that the behavior alleged in Mexico would violate the FCPA and would draw costly enforcement against the company.[72] *Blum ex rel. Dow Chemical Company v. Liveris et al. and The Dow Chemical Co.*, the first of several complaints against Dow Chemical Company that were later consolidated, did not even discuss the FCPA.[73] The basis of the complaint was a breach of fiduciary duties in connection with bribery related to a Kuwaiti joint venture, which had triggered an investigation by the National Assembly of Kuwait.[74]

IV. SHAREHOLDER DERIVATIVE SUITS

Shareholder derivative suits in the FCPA context are not new,[75] but they are growing in scope and number.[76] Two dozen FCPA-related shareholder suits were filed in 2010 alone.[77] The majority of the recent shareholder derivative suits filed in the wake of FCPA actions have been dismissed, a handful have settled, and none have been fully litigated on the merits.

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70 Consolidated Class Action Complaint at para. 1, *In re* Immucor, Inc. Sec. Litig., No. 1:05-cv-02276-WSD (N.D. Ga. Feb. 2, 2006).

71 *See* SciClone Class Action Complaint, *supra* note 61.

72 Wal-Mart Stores, Inc., Quarterly Report, *supra* note 4.

73 *See generally* Verified Shareholder Derivative Complaint, Blum *ex rel.* Dow Chem. Co. v. Liveris, No. 4349-CC (Del. Ch. Feb. 9, 2009) [hereinafter Dow Complaint].

74 Memorandum Opinion at 1, *In re* Dow Chem. Co. Derivative Litig., No. 4349-CC (Del. Ch. Jan. 11, 2010) (the derivative action against Dow was dismissed in January 2010).

75 *See, e.g.*, Burt *ex rel.* McDonnell Douglas Corp. v. Danforth, 742 F. Supp. 1043, 1048–49 (E.D. Mo. 1990) (excusing pre-suit demand under Maryland law in an action based in part on allegations of FCPA violations because plaintiffs suggested a situation where the board could have to sue itself for engaging in illegal activity).

76 Memorandum in Support of Defendants' Motion to Dismiss at 1, Strong *ex rel.* Tidewater Inc. v. Taylor, No. 11-392-HGB, 2011 WL 7638286 (E.D. La. Sept. 1, 2011) [hereinafter Tidewater Memorandum] (describing shareholder derivative suits filed after a public company's settlement of FCPA charges as a "growing trend").

77 Brian Grow, *Bribery Investigations Spark Shareholder Suits*, REUTERS (Nov. 1, 2010) http://www.reuters.com/article/2010/11/01/us-bribery-lawsuits-idUSTRE6A04CO 20101101. Only thirty-seven suits were filed between 2006 and 2010. *Id.*

The pleading requirements for shareholder derivative suits are stringent and include making a pre-suit "demand" on the board that it sue to enforce the corporation's rights. In practice and as discussed below, few suits survive the defendant's motion to dismiss.

A. *Procedural Difficulties Bringing Shareholder Derivative Suits*

In a shareholder derivative action, the merits of which are governed by the law of the state in which the corporation is organized, the cause of action (alleged harm) and the recovery belong to the corporation.[78] As the Supreme Court explained in 1991, derivative suits were devised "to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'"[79]

Two fundamental difficulties arise with allowing shareholders to sue on behalf of their corporations. First, since "directors, rather than shareholders, manage the business and affairs of the corporation,"[80] the decision to bring a lawsuit ordinarily rests with directors (or management acting under their authority), not shareholders. Most business decisions are protected from shareholder suits, and thus judicial scrutiny, by the business judgment rule.[81]

Second, shareholders (and their lawyers) may bring suit with claims of questionable merit in the hopes of extracting a settlement from the company's directors in exchange for going away. A settlement may include governance or management changes and a monetary component paid by management (or more likely the company's directors' and officers' insurance carrier) to the company.[82] Significantly, attorneys' fees and expenses are often paid as part of such a settlement.[83] Some suits may not be in the interests of the company and

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[78] Freuler *ex rel.* Parker Drilling Co. v. Parker, 803 F. Supp. 2d 630, 636 (S.D. Tex. 2011). The shareholders (through their attorneys) sue the corporation on its own behalf, and some or all of the directors. *Id.* at 635–40. The shareholder plaintiff must plead futility of a demand for a majority of the director defendants, with individual allegations for each director. *Id.*

[79] Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 95 (1991) (quoting Cohen v. Beneficial Loan Corp., 337 U.S. 541, 548 (1949)).

[80] *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 120 (Del. Ch. 2009). Delaware General Corporation Law §141(a) articulates the cardinal precept of corporation law: "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors." DEL. CODE ANN. tit. 8, §141(a) (2011).

[81] The business judgment rule is a rebuttable presumption that director decisions regarding the operation and management of the company are informed, in good faith, and in the honest belief that the action taken was in the best interests of the company. Rales v. Blasband, 634 A.2d 927, 932–33 (Del. 1993); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

[82] Michael Klausner and Jason Hegland, *How Protective Is D&O Insurance in Securities Class Actions?—Part I*, 23 PROF. LIABILITY UNDERWRITING SOC. J. 1 (Feb. 2010).

[83] ALAN PALMITER & FRANK PARTNOY, CORPORATIONS: A CONTEMPORARY APPROACH 537–40 (2010).

may distract company management from its primary obligation: running the company.

Confronting both these difficulties, the challenge for the law has been to devise rules that allow meritorious cases (against "faithless directors and managers") to go forward, while discouraging cases without merit, in which unfortunate companies are "held up" by second-guessing shareholders and their lawyers.[84] Stringent pleading requirements may serve this purpose. Plaintiffs must either make a pre-suit "demand" on the company board, i.e., request that the board sue to enforce the corporation's rights, or demonstrate that the demand requirement should be excused.[85] That is, a shareholder who wishes a company to pursue its legal rights against its management (for not detecting or preventing violations of the FCPA) must demand that the company do so, and if the company does not sue, must show that this decision was wrong in the face of the business judgment rule. Alternatively, the shareholder may maintain that the management is so conflicted that there was no need to ask. If a pre-suit demand is not made, then plaintiffs must plead with particularity facts showing that a demand would have been futile.[86]

The substantive standards used to evaluate the particularity of the pleading in a shareholder derivative action come from state law.[87] Under the corporation law of many states, directors are entitled to the presumption that they were faithful to their fiduciary duties.[88] In Delaware, for example, in order to determine whether a demand on the board should be excused as futile, courts often use the test established in *Aronson v. Lewis*: "[W]hether, under the particularized facts alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."[89] A pre-suit demand may be excused as futile if a majority of the current directors have such

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[84] *See Kamen*, 500 U.S. at 95.

[85] FED. R. CIV. P. 23.1(b)(3) (requiring plaintiffs to "state with particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority . . . and (B) the reasons for not obtaining the action or not making the effort"). Cognate state rules provide the procedural requirement. *Aronson* is an example of a case concerning the substance of the requirement. *Aronson*, 473 A.2d at 808; *see also Rales*, 634 A.2d at 932; *In re Citigroup*, 964 A.2d at 120.

[86] *In re Citigroup*, 964 A.2d at 120.

[87] Harper Woods Emps. Ret. Sys. *ex rel.* BAE Sys. PLC v. Olver, No. 07-1646, at 7 (D.D.C. Sept. 11, 2008) [hereinafter BAE Opinion] (under the Internal Affairs Doctrine, the substantive law governing a corporation's internal affairs such as relations between the corporation's directors and shareholders comes from state in which the corporation is established). To decide if an FCPA shareholder derivative action should proceed, therefore, a court looks to Delaware, or New York or Texas or even UK law. Not surprisingly, many of the FCPA-based shareholder derivative actions involve corporations incorporated in Delaware, so an analysis of the standards will begin with Delaware law. *Id.* at 7–8.

[88] Beam *ex rel.* Martha Stewart Living Omnimedia v. Stewart, 845 A.2d 1040, 1048 (Del. 2004) (making this point under Delaware law).

[89] *Aronson*, 473 A.2d at 814.

a personal interest in the matter that they could not make a proper business judgment if a demand were made.[90]

Sometimes, however, as in FCPA cases, there is no single, particular "challenged transaction"—no conscious decision by directors to act or refrain from acting. Many states, including Delaware, distinguish between two types of allegations: ones related to a particular transaction or board decision, and ones not related to a particular board action, but rather to ongoing oversight or monitoring of the corporation's affairs. In cases of such board inaction, the shareholder derivative complaint must "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."[91]

The standard for considering allegations of managers' failure to oversee the affairs of the corporation was set forth in *In re Caremark Int'l Inc. Derivative Litigation* (*Caremark*).[92] In *Caremark,* the Delaware Chancery Court considered a proposed settlement of a shareholder derivative action arising out of Caremark's $250 million in liabilities incurred because of a U.S. government investigation of Caremark employees' violations of health care laws.[93] The *Caremark* opinion articulated the standard for breach of the board's duty to exercise appropriate attention or oversight to be an "unconsidered failure of the board to act in circumstances in which due attention would, arguably, have prevented the loss."[94]

In *Stone ex rel. AmSouth Bancorporation v. Ritter* (Stone), the Delaware Supreme Court approved and clarified the necessary conditions for director oversight liability.[95] In *Stone*, shareholders of AmSouth Bank's parent company filed a derivative action after AmSouth Bank incurred large fines for anti-money laundering law violations.[96] In affirming the Court of Chancery's dismissal of the Stones' complaint for failure to make a demand, the Delaware Supreme Court said that, under *Caremark,* the necessary preconditions for director oversight liability are:

a. "the directors utterly failed to implement any reporting or information system or controls; *or*

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[90] *Id.* at 814–15.

[91] Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993) (emphasis added); *see also In re Citigroup*, 964 A.2d at 120 (stating that "plaintiffs complain of board inaction and do not challenge a specific decision of the board, there is no 'challenged transaction' and the ordinary *Aronson* analysis does not apply").

[92] In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

[93] *Id.*

[94] *Id.*

[95] Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

[96] *Id.* at 364.

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."[97]

In sum, shareholders filing suit in a derivative action related to the company's FCPA violations, in overcoming the pre-suit demand requirement, will likely have to demonstrate that the majority of the company's board was either: (1) not independent and disinterested (through particularized allegations of fact regarding each director); or (2) faced "a substantial likelihood of personal liability" due to their virtually complete failure to oversee the company.[98] These procedural requirements make it very difficult for shareholders to bring derivative suits holding directors and managers responsible for a company's FCPA liabilities.

B. *What Harms Do FCPA-Based Derivative Suits Allege?*

In the FCPA context, shareholder derivative actions allege that the directors, executive officers, or both breached their fiduciary duties by not preventing the company's FCPA violations. As discussed below, in some cases, shareholders have argued that a "conscious disregard" of directors' duty to monitor resulted in their failure to detect or prevent the FCPA violations. In other cases, however, shareholders have alleged more direct facilitation of or profiting from the company's violations.[99]

Unsurprisingly, many of the complaints construe fiduciary duty broadly. In the wake of allegations that BAE Systems PLC made improper payments to a Saudi official in connection with the sale of military aircraft, the plaintiff

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[97] *Id.* at 370. The *Caremark* court had acknowledged that such a claim, alleging "breach of [directors'] duty of attention or care in connection with the ongoing operation of the corporation's business . . . is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Caremark*, 698 A.2d at 967.

[98] *See* Tidewater Memorandum, *supra* note 76, at 7–11. The demand standard imposed may vary based on whether or not the company is incorporated in Delaware and whether or not suit is brought in Delaware courts. *Id.* at 7. Of the thirteen companies that were the object of FCPA-related derivative suits analyzed for this Article, eight are incorporated in Delaware. Once consolidated, only two of the actions were heard in Delaware courts. Two others were heard in other state courts. The remainder were heard in federal courts in a variety of circuits (in D.C., Florida, Texas, New York, Louisiana, Nevada, New Jersey and California). The author has analyzed these cases and tabulated these totals in an informal, unpublished survey. *See* Statistics Relating to Where Suits Are Brought (Aug. 26, 2012) (on file with author). The debate over whether derivative cases are brought in state or federal court is both rich and contentious, and this Article is not intended to make a fully argued contribution to that conversation. *See* sources cited *infra* notes 214–17.

[99] *See, e.g.*, Consolidated Verified Shareholder Derivative Complaint at para. 30, Moradi *ex rel.* Las Vegas Sands Corp. v. Adelson, No. 2:11-cv-00490-MMD-RJJ (D. Nev. Nov. 21, 2011) (alleging that defendant director Adelson, Chairman of the Board and CEO of the company, "purposefully directed the Company to violate the FCPA . . . by encouraging Sands employees to improperly induce senior Macau government officials").

shareholders in *City of Harper Woods Retirement System ex rel. BAE Systems PLC v. Olver* alleged that the board and some of the company's officers and directors engaged in:

> intentional, reckless and/or negligent breaches of their fiduciary duties of care, control and candor, involving illegal, improper and/or *ultra vires* conduct, including causing BAE to violate the laws of the United States and international business conduct codes and conventions relating to honest trade and business practices by making, or permitting to be made, improper and/or illegal bribes, kickbacks and other payments.[100]

In May 2011, just a month after Johnson & Johnson shareholders learned of the company's widespread scheme to bribe doctors in Europe and pay kickbacks in Iraq[101] and the fact that those payments had led to a nearly $70 million settlement with the SEC and DOJ, the shareholders filed a derivative action.[102] The suit alleged that the Johnson & Johnson directors, who were responsible for causing the company to implement the FCPA, consciously failed to act and were therefore liable to the company for their breach of fiduciary duty:[103]

> The directors of a corporation are responsible for managing its affairs. They owe the corporation an unremitting duty of loyalty and, therefore, must fulfill those functions lawfully and in accordance with the statutes, rules and regulations applicable to its business. When faced with a known duty to act, such as in the case of requiring the corporation to comply with federal laws, directors who fail to cause the corporation to act breach their duty of loyalty and may be held liable to the corporation for damages.[104]

In *Murray White ex rel. Avon Products, Inc. v. Andrew Jung*, the plaintiffs alleged that because Avon operated in countries with a "higher than normal risk of corruption, Avon's directors and officers had a fiduciary duty to install and administer an FCPA compliance program with controls and accounting systems sufficient to detect, deter, and ultimately prevent the improper payments that appear to be at the heart of the FCPA-related investigations" that were being conducted by the government.[105] The plaintiff shareholders later alleged that "[a]s a direct result of Defendant's [directors'] fiduciary failures to implement

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[100] Verified Shareholder Derivative Complaint at para. 1, City of Harper Woods Emps. Ret. Sys. *ex rel.* BAE Sys. PLC v. Olver, No. 1:07-cv-01646 (D.D.C. Sept. 19, 2007) [hereinafter BAE Complaint].

[101] *See* J&J Complaint, *supra* note 66, at para. 7.

[102] *Id.* at para. 3.

[103] *Id.* at para. 19.

[104] *Id.* at para. 41.

[105] Verified Shareholder Derivative Complaint at para. 26, White *ex rel.* Avon Prods., Inc. v. Jung, No. 1:10-cv-05560-RMB (S.D.N.Y. July 21, 2010) [hereinafter White Avon Complaint].

FCPA-compliant internal controls systems, Avon has been exposed to enormous damages and injuries."[106] In that later consolidated complaint, the *In re Avon Products, Inc. Shareholder Derivative Litigation* plaintiffs asserted:

> The directors of a New York corporation are responsible for the oversight of its business and affairs. Because of this, directors owe the corporation an unremitting duty of loyalty, a duty which included a strict obligation to conduct the corporation's business in accordance with federal statutes, including the FCPA, which directly and materially impact its business and affairs.[107]

There are also often additional claims in the suits: some allege unjust enrichment,[108] abuse of control,[109] gross mismanagement,[110] or waste.[111]

C. *How Are FCPA-Based Shareholder Derivative Suits Faring?*

1. *The Pre-suit Demand Requirement*

As discussed above, in order to establish demand futility in a derivative suit, shareholders suing for management's failure to prevent or management's contribution to FCPA liability "must show with particularized facts that the directors *knew* they were not discharging their fiduciary obligations or that the directors demonstrated a *conscious* disregard for their responsibilities such as failing to act in the face of a known duty to act."[112] In a world in which large companies doing business internationally generally have FCPA compliance programs, demonstrating that directors are so disengaged may present an insurmountable barrier to plaintiff shareholders.[113] For example, the FCPA-related derivative actions filed against BAE Systems, Baker Hughes, Dow, and Parker Drilling were all dismissed for failing to make a pre-suit demand or, alternatively, to demonstrate director failure or interest that would render such demand futile.[114]

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[106] Avon Consolidated Complaint, *supra* note 34, at para. 3.

[107] *Id.* at para. 4.

[108] *See, e.g.*, Tidewater Complaint, *supra* note 63, at paras. 158–62.

[109] White Avon Complaint, *supra* note 105, at paras. 62–65.

[110] *See, e.g.*, Verified Shareholder Derivative Complaint at paras. 89–93, Freuler *ex rel.* Parker Drilling Co. v. Parker, No. 4:10-cv-3148, 2010 WL 3478894 (S.D. Tex., Aug. 31, 2010).

[111] BAE Complaint, *supra* note 100, at paras. 153–56.

[112] Freuler *ex rel.* Parker Drilling Co. v. Parker, 803 F.Supp. 630, 640 (S.D. Tex. 2011).

[113] Of the 13 recent FCPA-related derivative actions analyzed for this Article, five have been dismissed, five have a motion to dismiss pending, one is newly filed, and two have settled. *See* Statistics Relating to Where Suits Are Brought, *supra* note 98.

[114] Baker Hughes, Dow, and Parker Drilling are Delaware corporations. *See generally Department of State: Division of Corporations*, ST. DEL., https://delecorp.delaware.gov/tin/

In May 2009, the U.S. District Court for the Southern District of Texas considered a shareholder derivative action filed by shareholders of Baker Hughes, following the company's (at the time) record-breaking $44 million settlement with the SEC for FCPA bribery charges connected with its operations in Nigeria.[115] In *Midwestern Teamsters Pension Trust Fund ex rel. Baker Hughes Inc. v. Deaton*,[116] shareholders alleged that the Baker Hughes board of directors failed to implement internal controls to ensure compliance with the FCPA despite being subject to a 2001 Cease and Desist Order imposed by the SEC for prior violations of the FCPA.[117]

The shareholders alleged that a demand on the board would have been futile because a majority of the directors were not disinterested and not independent.[118] The shareholders based their allegations on, for example, the fact that the board had not filed suit against anyone involved in the alleged bribery, the fact that the directors would have to sue themselves to obtain a remedy for the company, the characterization of the directors' conduct as "egregious,"[119] and apparent "entangling financial alliances, interests, and dependencies" among the board members.[120] The court, however, disagreed and recommended that the action be dismissed because the plaintiffs "failed to allege particularized facts that show that a majority of the current Baker Hughes Board is 'interested' in this litigation, or lacks the independence necessary to consider a demand."[121]

The court in the *BAE Systems* derivative action came to much the same conclusion. In *BAE Systems*, shareholders sued in response to a series of payments made by the company to Prince Bandar bin Sultan of Saudi Arabia in connection with a program through which the United Kingdom sold war planes to the Kingdom of Saudi Arabia.[122] The payments that were the subject of the shareholder derivative suit ultimately led to FCPA liability, and BAE Systems paid a $400 million criminal fine to DOJ,[123] as well as a $79 million civil settlement with the Department of State for alleged violations of the Arms

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GINameSearch.jsp?frmFileNumber= (last visited Aug. 14, 2012). BAE Systems PLC is organized in the United Kingdom, which has even stricter standing and demand requirements. *Companies Index*, GBR, http://www.globalbusinessregister.co.uk/CompanyDetails.aspx?country=GB&companyName=BAE+SYSTEMS+PLC&companyCode=01470151 (last visited Aug. 14, 2012).

115 Baker Hughes Complaint, *supra* note 65, at paras. 1, 6.

116 Midwestern Teamsters Pension Trust Fund *ex rel.* Baker Hughes Inc. v. Deaton, No. 4:08-cv-01809, slip op. at 4, 2009 WL 6799492, at *6 (S.D. Tex. 2009).

117 Baker Hughes Complaint, *supra* note 65, at paras. 3, 12.

118 *Id.* at para. 194(d).

119 *Baker Hughes*, 2009 WL 6799492, at *5, *8.

120 *Id.* at *9.

121 *Id.* at *10.

122 BAE Opinion, *supra* note 87, at 3.

123 BAE Press Release, *supra* note 24.

Export Control Act and the International Traffic in Arms Regulations.[124] The plaintiffs, holders of 3500 BAE Systems American Depository Receipts (ADRs), alleged breach of fiduciary duties and waste of corporate assets by a number of current and former BAE Systems directors.[125] Nevertheless, applying the Internal Affairs Doctrine, the U.S. District Court for the District of Columbia ruled in December 2009 that the BAE Systems derivative action was governed by UK law[126] and that under UK law, shareholders were prevented from bringing derivative actions "except in limited instances."[127] Because the shareholder plaintiffs did not show both that the defendants had engaged in fraudulent conduct involving self-dealing and that the defendants had controlled general shareholder meetings,[128] shareholder plaintiffs could not invoke an exception to the rule that the proper plaintiff in an action to remedy a wrong done to a corporation is the corporation itself.[129] The action was therefore dismissed.[130]

In January 2010, the Delaware Chancery Court dismissed with prejudice the shareholder derivative complaint against Dow that had been based on bribery in connection with a joint venture in Kuwait.[131] The court found that the plaintiff shareholders had not met their burden of demonstrating that a demand on the Dow board would have been futile; i.e., they did not demonstrate that a majority of the directors had such a personal stake in the proposed litigation that they would not have been able to make a proper business judgment in response to a demand.[132] In particular, with respect to the plaintiff shareholders' allegations of breach of fiduciary duty for failing to detect and prevent the alleged bribery in Kuwait, the court explained that, under *Citigroup*, a pre-suit demand is "excused based on a possibility of personal director liability only in the rare case when a plaintiff is able to show director conduct that is 'so egregious on its face that board approval cannot meet the test of business judgment, and a substantial likelihood of director liability therefore exists.'"[133] In the *Dow* case, the court found that the plaintiffs had not shown that the directors had knowledge of the bribery, or had any reason to suspect such conduct, and so could not "consciously disregard" their duty to supervise against bribery.[134]

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124 Press Release, U.S. Dep't of State, BAE Systems PLC Enters Civil Settlement of Alleged Violations of the AECA and ITAR and Agrees to Civil Penalty of $79 Million (May 17, 2011), *available at* http://www.state.gov/r/pa/prs/ps/2011/05/163530.htm (calling the BAE Systems PLC settlement the largest civil penalty in State Department history).

125 BAE Opinion, *supra* note 86, at 7–10.

126 *Id.*

127 *Id.* at 11.

128 *Id.* at 17–20.

129 *Id.* at 12.

130 *Id.* at 22.

131 *In re* Dow Chem. Co. Derivative Litig., No. 4349-CC, slip op. at 39 (Del. Ch. Jan. 11, 2010).

132 *Id.* at 22–24.

133 *Id.* at 31.

134 *Id.* at 34–35.

Furthermore, the court ruled that the plaintiffs also "failed to allege facts suggesting that the Dow board 'utterly failed' to supervise insiders, or that any director acted with anything other than good faith."[135] Without such showings, the plaintiffs did not allege facts that established a substantial likelihood of director liability for oversight failures, and their *Caremark* claims were dismissed.[136]

A similarly thorough discussion of the standard required to excuse a pre-suit demand on the board of directors in the context of an FCPA anti-bribery claim was offered by the U.S. District Court for the Southern District of Texas in *Freuler ex rel. Parker Drilling Co. v. Parker* (Parker Drilling).[137] In *Parker Drilling*, the plaintiff alleged that the director defendants caused the company "to operate in Kazakhstan and Nigeria, where corruption and bribery were rampant," knew of the probability that company representatives were paying bribes to government officials but still authorized the improper payments, and failed to establish and maintain internal controls to ensure compliance with the FCPA and other laws.[138] The plaintiff also alleged that the directors caused or permitted the company to file false and misleading statements with the SEC that did not reflect the amount and purpose of the payments made in violation of the FCPA.[139]

The plaintiff did not make a demand on the Parker Drilling board, however, and the court agreed with the defendants that the plaintiff did not make the required showing that the board could not make a decision fairly and independently in the best interests of the company.[140] The *Parker Drilling* court, rejecting the shareholder plaintiffs' argument that the directors had "entangling financial alliances and interests and dependencies,"[141] noted "Delaware courts have made clear that a plaintiff showing that demand would be futile must do more [than] conclusorily assert entangling alliances."[142] Similarly, the *Parker Drilling* court required a specific, individualized showing when plaintiffs alleged that members of the board benefited from the alleged wrongdoing enough to produce interest or to render them incapable of exercising independent, objective judgment in deciding whether to bring an action.[143] The court explained: "to establish oversight liability a plaintiff must show with particularized facts that the directors *knew* they were not discharging their fiduciary obligations or that the directors demonstrated a *conscious*

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135 *Id.* at 35.
136 *Id.*
137 Freuler *ex rel.* Parker Drilling Co. v. Parker, 803 F. Supp. 2d 630 (S.D. Tex. 2011).
138 *Id.* at 641.
139 *Id.*
140 *Id.* at 651.
141 *Id.* at 646.
142 *Parker Drilling*, 803 F. Supp. 2d at 646 (citing Beam *ex rel.* Stewart v. Stewart, 845 A.2d 1040, 1050 (Del. 2004) ("To render a director unable to consider demand, a relationship must be of a bias-producing nature.").
143 *Id.* at 636–37.

disregard for their responsibilities such as failing to act in the face of a known duty to act."[144] The court also clarified:

> [W]hile to excuse demand, a derivative action plaintiff need only raise a reasonable doubt about the board's ability to impartially consider the demand, where the plaintiff alleges the board cannot because it faces potential liability, the plaintiff needs to show "a substantially likelihood of personal liability exists since the mere threat of liability is insufficient."[145]

Parker Drilling also pointed out that the existence of illegal behavior by the corporation does not necessarily mean that internal controls were deficient and the board must have known so.[146] Both the *Parker Drilling* and *Baker Hughes* opinions also noted *Caremark*'s position that no rationally designed system of information can avoid all wrongdoing.[147]

Parker Drilling cited the 2009 *Baker Hughes* decision dismissing the FCPA-related shareholder derivative claims as the court dismissed the action for failing to satisfy the particularity requirement in pleading that demand was excused because plaintiffs did not describe how each individual board member benefitted from the FCPA violations or identify the particular benefits in each case: "Because Plaintiffs have failed to state particularized facts to support their allegations, they have not shown that demand is futile."[148]

Courts evaluating FCPA-related shareholder derivative suits have also considered the impact of pre-suit demands made in other "sibling" suits. In their derivative action on behalf of Johnson & Johnson in connection with the settlement that the company reached with the government for FCPA violations, the shareholders did not make a demand on the board and argued *inter alia* that a demand would be futile based on the experience of other shareholders who had made a demand. The demand in the other "sibling" suit had led to the establishment of a Special Litigation Committee by the board, which the committee ultimately decided not to sue.

In its Memorandum in Support of its Motion to Dismiss the Consolidated Complaint, the company argued that a demand must be made by the suing shareholders, and if those shareholders decide that demand is futile, they cannot rely on the demands made by other shareholders to bolster their case.[149]

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[144] *Id.* at 640. This language was also cited by the *Baker Hughes* judge in dismissing that claim. Midwestern Teamsters Pension Trust Fund *ex rel.* Baker Hughes Inc. v. Deaton, No. 4:08-cv-01809, 2009 WL 6799492, at *6 (S.D. Tex. May 7, 2009).

[145] *Id.* at 640 (internal citation omitted).

[146] *Id.*

[147] *Id.*; *Baker Hughes*, 2009 WL 6799492, at *6.

[148] *Parker Drilling*, 803 F. Supp. 2d at 647 n.25.

[149] Johnson & Johnson Memorandum in Support of Its Motion to Dismiss the Consolidated Complaint at 19, Wollman *ex rel.* Johnson & Johnson v. Coleman, No. 3:11-CV-02511-FLW-DEA (D.N.J. Oct. 28, 2011) (arguing that the board's response to one derivative plaintiff cannot form the basis for an assertion of demand futility by another). At the time of this writing, the status of that motion is unclear. On January 26, 2012, the court

Some shareholder suits, faced with a likely motion to dismiss and the difficulty of demonstrating demand futility, may decide to go ahead and make a demand on the board of directors. In the case of Avon, for example, the information about additional non-compliance at the company, and the widening DOJ and SEC investigations, led the plaintiffs to seek voluntary dismissal of their derivative complaint in order to make a demand. In February 2012, the plaintiffs told the court: "In light of the continuing revelations, and the probability that the investigation is unlikely to end anytime soon, Plaintiffs believe that the most efficient way to proceed is to voluntarily dismiss the action in order to make a demand upon the Avon Board of Directors."[150] Matters at Avon Products, Inc. have since been in flux: on April 9, 2012, the company announced that it was replacing its CEO, Andrea Jung;[151] later that month the company received an unsolicited takeover bid from Coty, Inc., but on May 15, 2012, Coty announced it was withdrawing its offer.[152]

2. *Settlement*

A handful of the FCPA-related shareholder derivative suits have settled. In April 2009 Faro Technologies, Inc. (Faro), a Florida company which makes portable computer-aided measuring equipment, settled a shareholder derivative suit alleging *Caremark* claims, i.e., that Faro directors and officers breached their fiduciary duties by not properly overseeing the company's affairs,[153] which included improper payments to Chinese government officials.[154] Interestingly, the plaintiff in the Faro derivative action did make a demand on the board, which established a Special Litigation Committee to consider his allegations. However, before the committee made its recommendation, the company settled the derivative action, noting the contemporaneous FCPA-related securities fraud class action suit that had survived a motion to dismiss

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administratively terminated Johnson & Johnson's motion to dismiss "for purposes of managing the Court's docket. The motion shall be re-listed upon Plaintiffs' filing of their opposition brief." *See* Docket Entry, Wollman *ex rel.* Johnson & Johnson v. Coleman, No. 3:11-cv-02511-FLW-DEA (D.N.J.). Other suits, including those against Hewlett Packard, Tidewater, and Las Vegas Sands are currently pending decisions on the defendants' motions to dismiss.

150 Plaintiffs' Motion to Voluntarily Dismiss Action at para. 16, *In re* Avon Prods., Inc. S'holder Derivative Litig., No. 1:10-cv-05560-KBF (S.D.N.Y. Feb. 13, 2012).

151 Press Release, Avon Prods., Inc., Avon to Separate Roles of Chairman and CEO (Dec. 13, 2011), *available at* http://media.avoncompany.com/index.php?s=10922&item=96618.

152 *Avon Shares Slide after Coty Withdraws Takeover Offer*, REUTERS, May 15, 2012, *available at* http://www.reuters.com/article/2012/05/15/us-avon-shares-idUSBRE84D0G020120515 (reporting that Coty, Inc. withdrew its $10.7 billion bid because Avon had missed its deadline to begin discussions).

153 Faro Derivative Complaint, *supra* note 61, at para. 13.

154 *Id.* at paras. 48–50, 73–76.

and settled.[155] The derivative action settlement required Faro to adopt specific corporate governance policies for the next three years, including a strict definition of independent directors, an increase in their responsibilities and role on the board, as well as officer and director stock ownership requirements.[156]

The October 3, 2011, settlement between SciClone Pharmaceuticals, Inc. (SciClone), a Delaware company, and its shareholders was even more detailed. *In re SciClone Pharmaceuticals, Inc. Shareholder Derivative Litigation* alleged that the board failed to cause SciClone to implement internal controls and systems.[157] The SciClone settlement included over ten pages of detailed corporate governance policies that the company was to implement to assure future compliance with the FCPA and similar anti-corruption laws, including requirements relating to:

- Consequences to employees for FCPA violations or other criminal misconduct,
- Establishment of a compliance coordinator,
- A compliance program and code,
- Internal controls and compliance functions,
- The use of foreign agents and distributors,
- Employee compliance training,
- Clawback requirements in the event of restatement, and
- A whistleblower program.[158]

The SciClone settlement requirements were unusual because they were so specific. For example, the settlement dictated guidelines for gifts, honoraria, travel and charitable donations,[159] language about SciClone's commitment to corporate citizenship,[160] and the required due diligence for hiring foreign agents.[161]

The SciClone and Faro settlements,exceptions to the pattern of dismissals of FCPA-related shareholder derivative suits, suggest that such suits have the potential to impact corporate governance requirements, at times substituting the parties' corporate governance agendas for the judgment of the board.

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[155] Stipulation of Settlement at 2–3, Alverson *ex rel.* Faro Techs., Inc. v. Caldwell, No. 6:08-cv-00045-ACC-DAB (M.D. Fla. Jan. 21, 2009) [hereinafter Faro Settlement].

[156] *Id.* at 9–14.

[157] Stipulation of Settlement, *In re* SciClone Pharm., Inc. S'holder Derivative Litig., No. CIV 499030 (Cal. Super. Ct. San Mateo Cnty. Sept. 22, 2010). Significantly, there does not seem to have been a motion to dismiss filed by the company in the SciClone case.

[158] *Id.* at 4–18.

[159] *Id.* at para. 2.1 III.A.4.

[160] *Id.* at para. 2.1 III.B.1.

[161] *Id.* at para. 2.1 V.A.

V. SECURITIES FRAUD CLASS ACTION LAWSUITS

In addition to shareholder derivative suits, FCPA investigations also spawn corollary class action securities fraud suits. Unlike derivative suits, securities fraud suits enforce duties owed by the corporation directly to its shareholders. They are frequently based on allegations of misrepresentations or omissions of material facts related to the FCPA violation, which misrepresentations or omissions allegedly misled shareholders into purchasing or selling their shares, or otherwise suffering a loss.

A. *Securities Fraud Class Action Structure*

Grounded in the anti-fraud provisions of the Exchange Act,[162] FCPA-related securities fraud class action suits focus on the disclosure that a company made before, during, and after an FCPA violation and investigation. In many suits, the underlying claim is based on Exchange Act Section 10(b), which prohibits the employment of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors . . . ."[163] SEC Rule 10b-5, promulgated under Exchange Act Section 10(b), makes it unlawful for any person, directly or indirectly:

> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage 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.[164]

Courts have implied a private right of action pursuant to Rule 10b-5.[165] In order to sustain a 10b-5 action, a shareholder must show a misstatement or omission of a material fact, made with scienter, on which the plaintiff relied and suffered a loss as a result.

As with shareholder derivative actions, motions to dismiss are frequently dispositive of securities fraud actions. In addition to general pleading requirements, securities fraud suits are subject to the provisions of the Private

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162 Of course, the FCPA itself is also part of the Exchange Act.

163 Exchange Act § 10(b), 15 U.S.C. § 78j(b) (2006).

164 Exchange Act § 10(b), 17 C.F.R. § 240.10b-5 (2011).

165 Herman & MacLean v. Huddleston, 459 U.S. 375, 380 (1983) (acknowledging the Rule 10b-5 private right of action as "beyond peradventure"); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) (in which Justice Rehnquist discussed the implied private right of action, calling it a "judicial oak which has grown from little more than a legislative acorn"); Kardon v. Nat'l Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946) (first recognizing a private right of action).

Securities Litigation Reform Act of 1995 (the PSLRA).[166] Enacted to curb frivolous class action lawsuits,[167] the PSLRA imposes additional pleading requirements on securities class action lawsuits, requiring that claims that defendants made false statements be pleaded with particularity and that plaintiffs' pleadings create a "strong inference" of scienter.[168]

In demonstrating falsity, plaintiffs must specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement is made "on information and belief," the complaint must state with particularity all the facts on which that belief is formed.[169] Showing scienter often proves to be an even greater hurdle. Plaintiffs are required to state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind. Scienter may be very hard to show in the pleading (i.e., pre-discovery) phase.

B. *What Harms Do FCPA-Based Shareholder Class Action Suits Allege?*

FCPA-related securities fraud class actions often allege defective internal accounting controls and false or misleading statements about business operations that inflate share prices. For example, in their class action complaint against Siemens AG, holders of Siemens ADRs alleged that the company had made a long list of "materially false or misleading statements about Siemens' business, prospects and operations" during DOJ, SEC, and German regulators' investigations of its global operations, which "had the cause and effect of creating in the market an unrealistically positive assessment of Siemens, . . . thus causing the Company's securities to be overvalued and artificially inflated at all relevant times."[170]

In their class action securities fraud suit against Faro, plaintiff shareholders alleged that the company had "deliberately misrepresented information regarding FARO's financial performance and its systems of internal controls in order to increase and maintain the Company's stock price . . . [including] reporting of sales that were the product of violations of the Foreign Corrupt Practices Act . . . ."[171]

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[166] Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.). This is in addition to the high standards imposed by *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–59 (2007).

[167] H.R. REP. NO. 104-369, at 41 (1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730 (suggesting that Congress passed the PSLRA to curb abusive practices committed in private securities litigation).

[168] 15 U.S.C. § 78u-4(b)(2) (2006).

[169] *Id.* § 78u-4(b)(1).

[170] Siemens Complaint, *supra* note 67, at para. 86.

[171] Consolidated Second Amended Class Action Complaint at para. 3, *In re* Faro Techs., Inc. Sec. Litig., No. 6:08-cv-1818-ACC-DAB (M.D. Fla. Feb. 22, 2007) [hereinafter Faro Amended Class Action Complaint].

Similarly, in their suit against freight forwarder Panalpina World Transport (Holding) Ltd. (Panalpina), the institutional investor shareholder plaintiffs alleged that "[d]efendants concealed that Panalpina's important operations in Nigeria depended on bribes to customs agents in Nigeria, violating the U.S. Foreign Corrupt Practices Act . . . and . . . [t]he inflated profit margins from Panalpina's Nigerian business . . . masked the true profitability of Panalpina's other operations."[172]

FCPA-related securities law class actions generally allege a failure of and misrepresentations regarding the company's internal accounting controls and therefore the inadequacy of the company's required disclosure. Some complaints are based solely on violations of the accounting or books and records provisions of the FCPA. For example, shareholders of Nature's Sunshine Products, Inc. (Nature's Sunshine), which makes nutritional and personal care products, alleged that: "(a) the Company lacked requisite internal controls . . . ; and (b) the Company's financial statements were materially misstated due to its failure to properly account for foreign transactions."[173]

In effect, FCPA violations may be seen by securities fraud plaintiffs (and the plaintiffs' bar) as almost automatic Rule 10b-5 violations. Unless the company was disclosing the improper payments and/or accounting for them properly, it is difficult to imagine an FCPA books and records violation that could *not* be fashioned into a securities fraud suit.

Many shareholder class actions have targeted companies that have settled DOJ and SEC FCPA charges at considerable cost. For example, *Christine Johnson ex rel. All Others Similarly Situated vs. Siemens AG*, was filed on December 4, 2009,[174] a year after the company's $800 million settlement with DOJ and the SEC was announced.

Other suits, however, are filed long before settlement of the government's charges. The plaintiff shareholders in *In re China North East Petroleum Holdings Ltd. Securities Litigation* alleged that China North East Petroleum Holdings Limited (China North), which engages in the exploration and production of crude oil in China, made a variety of misrepresentations and accounting overstatements.[175] Among other allegations, the plaintiff shareholders claimed that China North "[m]isrepresented the state of the Company's internal controls" and that the CEO and his mother "illicitly transferred funds from Company bank accounts to their own accounts, and

[172] Complaint at para. 4, Deccan Value Advisors Fund L.P. v. Panalpina World Transp. (Holding) Ltd., No. 5:09-cv-00080 (S.D. Tex. July 23, 2009) [hereinafter Panalpina Complaint].

[173] Class Action Complaint for Violation of the Federal Securities Laws at para. 9, Hyman v. Nature's Sunshine Prods., Inc., No. 2:06-cv-00267-TS-SA (D. Utah Apr. 3, 2006) [hereinafter Nature's Sunshine Complaint].

[174] Siemens Complaint, *supra* note 67.

[175] Consolidated Class Action Complaint at para. 4, *In re* China Ne. Petroleum Holdings Ltd. Sec. Litig., 819 F. Supp. 2d 351 (S.D.N.Y. Jan. 14, 2011) (No. 1:10-cv-04577-MGC).

utilized such funds to pay 'business expenses', in possible violations of the Foreign Corrupt Practices Act . . . ."[176]

Similarly, in the Panalpina class action, shareholders alleged that although DOJ and SEC investigations were not concluded, "the Company has . . . essentially conceded its violations of the FCPA, publicly reporting, for example, that 'Panalpina has certain indications that, in the past, violations of the FCPA may have occurred.'"[177] Just the specter of FCPA liability may be seen as grounds for suit.

In such actions, the shareholders alleged that news of the FCPA issue led to a share price drop. For example, in the securities fraud action filed against SciClone, the shareholders alleged that on the day after the company disclosed a DOJ/SEC FCPA investigation, "SciClone shares declined approximately 30% on heavier than usual volume."[178] In their complaint against Faro, shareholders claimed: "when the market learned the truth about these prior misrepresentations, it punished [the company's] stock price."[179]

C. *How Are FCPA-Based Shareholder Class Action Suits Faring?*

As noted, securities fraud class action suits in the FCPA context are often decided on motions to dismiss. For such motions, the dispositive factor may be the plaintiffs' ability to plead scienter with particularity. For example, the suit against Siemens AG was dismissed on March 31, 2011, for failure to allege facts giving rise to a strong inference of scienter as required under the PSLRA.[180]

The doctrine of "collective scienter," adopted in some but not all circuits,[181] is especially relevant to class action securities fraud suits founded on FCPA violations. Collective scienter means that a company's state of mind for purposes of establishing a strong inference of scienter at the pleading stage can be inferred from the collective knowledge of the company's employees and directors and does not require the plaintiffs to name the particular individuals who concocted and disseminated the fraud.[182]

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[176] *Id.*

[177] Panalpina Complaint, *supra* note 172, at para. 4.

[178] SciClone Class Action Complaint, *supra* note 61, at para. 31.

[179] Faro Amended Class Action Complaint, *supra* note 171, at para. 4.

[180] Memorandum and Order, Johnson v. Siemens AG, No. 1:09-cv-05310-JG-RER (E.D.N.Y. Mar. 31, 2011).

[181] The Second and Seventh circuits accept collective scienter. The Fifth and Ninth circuits reject it. Glazer Capital Mgmt., LP v. Magistri, 549 F.3d 736, 743–44 (9th Cir. 2008).

[182] Makor Issues & Rights, Ltd. v. Tellabs, Inc., 513 F.3d 702, 710 (7th Cir. 2008) (Seventh Circuit decision following the Supreme Court decision in Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007), which vacated and remanded the Seventh Circuit's 2006 decision in Makor Issues & Rights, Ltd. v. Tellabs, Inc., 437 F.3d 588 (2006)).

In 2007, the Ninth Circuit reversed the dismissal of an FCPA-related securities fraud class action against Syncor International, a provider of high technology health care services.[183] Syncor and several of its officers were sued by shareholders for mischaracterizing the reason for Syncor's strong overseas earnings: the company did not disclose that the earnings relied on illegal payments that were being made.[184] The court ruled that the plaintiffs had pleaded facts showing that certain Syncor directors were aware of the FCPA violations, for example by citing information from witnesses who claimed that officers were present at meetings where the illegal payments were openly discussed.[185] The Syncor litigation settled in 2008 for $15,500,000.[186]

However, in 2008 the Ninth Circuit considered an appeal of the dismissal of a class action securities fraud suit against Invision Technologies Inc. (Invision), a company that makes CT-based detection products used by the aviation industry to screen baggage.[187] The lead plaintiffs, Glazer Capital Management, LP, alleged that Invision corporate officers made misstatements in a merger agreement with General Electric that was attached to the company's Form 10-K filing.[188] According to the plaintiff shareholders, the merger agreement included representations by Invision that it was, for example, "in compliance in all material respects with the provisions of Section 13(b) of the Exchange Act"[189] (which includes part of the FCPA), but in fact Invision had violated the FCPA by making unlawful payments to government officials in the Philippines, Thailand, and China.[190]

The Ninth Circuit dismissed the plaintiffs' suit for failing to show scienter. The court ruled that the representations that the company made in its merger contract with General Electric were standard and did not show the required state of mind. In particular, the court declined to allow the plaintiffs to rely on Invision's collective knowledge of the false statements, thus rejecting the doctrine of collective scienter (in this case, at least)[191] at the pleading stage.

Other FCPA cases have been dismissed on different grounds. In *In re China North East Petroleum Holdings Ltd. Securities Litigation*, for example, the court dismissed the class action suit because the lead plaintiff had not suffered

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[183] Milton Arbitrage Partners, LLC v. Syncor Int'l Corp. (*In re* Syncor Int'l Corp. Sec. Litig.), 239 F. App'x 318, 320 (9th Cir. 2007).

[184] *Id.*

[185] *Id.* at 321.

[186] Class Action Amended Stipulation and Agreement of Settlement at para. 3.1, *In re* Syncor Int'l Corp. Sec. Litig., No. CV-02-8560ABC(RMCx) (C.D. Cal. Dec. 1, 2008) (providing for payment by Cardinal Health, which had acquired Syncor, or Syncor's insurers). DOJ and SEC penalties totaled $2.5 million.

[187] Brief of Plaintiffs–Appellants at 6, *In re* Invision Techs., Inc. Sec. Litig. Glazer Capital Mgmt. v. Magistri, No. 06-16899, 2007 WL 894949 (9th Cir. Jan. 31, 2007) .

[188] *Id.* at 9.

[189] *Id.*

[190] *Id.* at 11.

[191] The court did not clearly rule whether scienter may be pled under a collective theory in other circumstances. *Id.*

any economic loss due to the fact that it held the company's stock, after the company's corrective disclosure, when the stock price was above the plaintiff's purchase price (thereby forgoing a chance to sell at a profit).[192]

More striking than the dismissals, however, are the settlements.[193] A number of FCPA-related securities fraud suits have settled for amounts in excess of the penalty assessed by DOJ and/or SEC. In 2007, for example, Immucor, Inc., a Georgia corporation that manufactures and sells reagents and systems that detect and identify certain properties of cell and serum components of human blood prior to transfusion, settled a class action lawsuit related to its FCPA settlement with the SEC. The SEC investigation centered on payments made by the company's Italian subsidiary to individuals associated with government medical facilities.[194] The plaintiffs' complaint survived a motion to dismiss on October 4, 2006, and, following mediation, the action was settled.[195] On September 26, 2007, the court granted final approval of a settlement pursuant to which Immucor agreed to pay $2.5 million to the plaintiff class.[196] The next day, Immucor settled the SEC investigation, consenting to the entry of an order that it cease and desist from any further FCPA violations.[197] The SEC did not impose any monetary penalty against the company, although the company's president and (former) CEO agreed to a $30,000 civil penalty and the entry of a cease and desist order against him.[198]

A class action securities fraud suit against Willbros Group, Inc. (Willbros), an independent contractor serving the oil, gas, and power industries, settled in February 2007 for $10.5 million.[199] Willbros shareholders alleged that the

[192] *In re* China Ne. Petroleum Holdings Ltd. Sec. Litig., 819 F. Supp. 2d 351, 352–53 (S.D.N.Y. 2011).

[193] Of the twelve recent FCPA-related securities fraud class action suits filed by shareholders, five have been dismissed, seven have been settled, and one is at a very early stage.

[194] Consolidated Class Action Complaint at para. 8, *In re* Immucor Inc. Sec. Litig., No. 1:05-cv-02276-WSD (N.D. Ga. Feb. 2, 2006).

[195] Stipulation of Settlement at 2, *In re* Immucor, Inc. Sec. Litig., No. 1:05-cv-02276-WSD (N.D. Ga. May 14, 2007).

[196] Order and Final Judgment, *In re* Immucor Inc. Sec. Litig., No. 1:05-cv-02276-WSD (N.D. Ga. Sept. 26, 2007). The court approved the $2.5 million settlement presented in the Stipulation of Settlement, *supra* note 196. For more details about the settlement terms, see Lead Plaintiffs' Memorandum of Law in Support of Final Approval of Class Action Settlement and Plan of Allocation of Settlement Proceeds, *In re* Immucor, Inc. Sec. Litig., No. 1:05-cv-2276-WSD (N.D. Ga. Sept. 12, 2007).

[197] Order Instituting Cease-and-Desist Proceedings, Making Findings, and Imposing a Cease-and Desist Order Pursuant to Section 21C of the Securities Exchange Act of 1934, *In re* Immucor, Inc. & Gioacchino de Chirico, Exchange Act Release No. 56,558 (Sept. 27, 2007).

[198] Press Release, Immucor Inc., Immucor Settles SEC Investigation: Court Approves Class Action Settlement (Sept. 28, 2007), *available at* http://investor.immucor.com/releasedetail.cfm?ReleaseID=396439.

[199] Final Judgment and Order of Dismissal with Prejudice, *In re* Willbros Group, Inc. Sec. Litig., No. 05-CV-1778 (S.D. Tex. Feb. 15, 2007). The court dismissed the suit, and

company and certain of its officers and directors made false and misleading statements that artificially inflated the value of the company's stock[200] and misled shareholders about company operations that triggered SEC and DOJ investigations into fraud at the company, including illegal and illicit bribery of foreign government officials in Bolivia, Nigeria, and Ecuador.[201] The SEC and DOJ investigations eventually resulted in Willbros agreeing to pay $32 million in penalties and disgorgement, although several Willbros executives faced additional charges.[202]

In 2008, Faro settled a class action securities fraud suit brought by its shareholders over the company's alleged misrepresentations regarding sales that were the result of FCPA violations and its failure to implement adequate internal controls.[203] Faro had settled the SEC/DOJ charges for $2.95 million.[204] Faro settled the securities fraud class action for $6.875 million.

In 2010, Nature's Sunshine settled a securities fraud class action alleging that the company and three of its chief executives made materially false and misleading statements regarding the company's business and financial results, as a result of which the company's stock traded at artificially high prices.[205] The suit survived a motion to dismiss in May 2007[206] and settled in September 2009

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approved the settlement proposed by the parties. *See* Stipulation of Settlement, *In re* Willbros Group, Inc. Sec. Litig., No. 4:05-cv-01778 (S.D. Tex. Nov. 13, 2006).

[200] [Corrected] Consolidated Amended Class Action Complaint at para. 59, *In re* Willbros Group, Inc. Sec. Litig., No. 05-CV-1778, 2006 WL 1443279 (S.D. Tex. Apr. 26, 2006).

[201] *Id.* at paras. 115, 120, 129, 140, 148, 156, 163, 169, 179, 189, 199, 215, 230, 241, and 251 (discussing the misleading statements about illegal and illicit bribery in Bolivia, Nigeria and Ecuador) and paras. 12, 104, 105, and 260 (discussing the resulting SEC and DOJ investigations).

[202] Press Release, U.S. 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.justice.gov/opa/pr/2008/May/08_crm_417.html (discussing the DOJ settlement); Willbros Group, Inc., SEC Litig. Release No. 20,571, Accounting & Auditing Enforcement Release No. 2826 (May 14, 2008), http://www.sec.gov/litigation/litreleases/2008/lr20571.htm (outlining the SEC settlement); Press Release, U.S. Dep't of Justice, Former Willbros Int'l Exec. and Consultant Charged in $6 Million Foreign Bribery Case (Dec. 19, 2008), *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1137.html (discussing charges against James Tillery and Paul Novak).

[203] Consolidated Second Amended Class Action Complaint at para. 3, *In re* Faro Technologies Inc. Sec. Litig., No. 6:05-cv-01810-ACC-DAB (M.D. Fla. Feb. 22, 2007).

[204] Press Release, U.S. Dep't of Justice, Faro Technologies Inc. Agrees to Pay $1.1 Million Penalty and Enter Non-Prosecution Agreement for FCPA Violations (June 5, 2008), *available at* http://www.justice.gov/opa/pr/2008/June/08-crm-505.html.

[205] Nature's Sunshine Complaint, *supra* note 173, at para. 3.

[206] Memorandum Decision and Order Denying Motion to Dismiss, *In re* Nature's Sunshine Prods. Sec. Litig., No. 2:06-cv-00267-TS-CA (D. Utah May 21, 2007).

for $6 million.[207] Nature's Sunshine had settled the government charges for $600,000.[208]

In general, securities fraud class action suits in the FCPA context seem to be more successful than derivative actions.[209]

VI. CONCLUSION

Collateral shareholder litigation increases a company's potential liability for FCPA violations. The more FCPA enforcement expands, the more opportunities there are for follow-on suits. This much is clear.

Whether such expansion is a positive development is much less clear.[210] These collateral suits raise numerous normative and empirical questions. At this juncture, however, it seems safe to say that collateral shareholder litigation based on FCPA violations has at least three important consequences.

A. *Shareholder Suits May Effectively Constitute a Private Right of Action Under the FCPA*

FCPA-based shareholder litigation may have the same impact as a private right of action.[211] As discussed above, the number and impact of collateral suits is significant. As with statutes that expressly or impliedly establish private rights of action, violation of the FCPA imposes substantial costs (disincentives) on companies, and at least potentially provides injured parties with a remedy.

The emergence of a de facto private right of action may be a negative development. As discussed above in Part III.A, courts have held that Congress did not intend to create a private right of action. If an FCPA violation, or even a suspicion of such a violation, constitutes a basis for litigation, and plaintiffs

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[207] Stipulation of Settlement, *In re* Nature's Sunshine Prods. Sec. Litig., No. 2:06cv00267-TS (D. Utah Sept. 14, 2009). The court approved the settlement on February 10, 2010. Order and Final Judgment, *In re* Nature's Sunshine Prods. Sec. Litig., No. 2:06cv00267-TS (D. Utah Feb. 10, 2010).

[208] Nature's Sunshine Products Inc., SEC Litig. Release No. 21162 (July 31, 2009).

[209] Panalpina also settled the shareholders' class action suit against it in 2010, though the amount of the settlement was not disclosed. Notice of Voluntary Dismissal with Prejudice Pursuant to Rule 41(a)(1)(A)(i), Deccan Value Advisors Fund L.P. v. Panalpina World Transp. (Holding) Ltd., No. 5:09-cv-00080 (S.D. Tex. Sept. 3, 2010).

[210] *Can We Sue Our Way to Prosperity?: Litigation's Effect on America's Global Competitiveness: Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 112th Cong. (2011) (statement of John H. Beisner, on behalf of the U.S. Chamber Inst. for Legal Reform, highlighting FCPA-related litigation as an area of substantial litigation abuse), *available at* http://judiciary.house.gov/hearings/pdf/Beisner05242011.pdf.

[211] The derivative suits, in particular, do not represent the first time that shareholders have sought to use state fiduciary law to obtain relief based on a federal statute that does not provide federal relief for shareholders. *See* ALAN R. PALMITER, CORPORATIONS: EXAMPLES & EXPLANATIONS 236 (6th ed. 2009) (discussing *Miller v. AT&T*, 507 F.2d 759 (3d Cir. 1974) as an example of the pitfalls of using corporate law to enforce non-corporate norms).

may extract a settlement by surviving a motion to dismiss, one may expect abusive litigation. The only real winner may be the plaintiffs' bar.

In addition, it is not clear that a company will comply *more* because of potential shareholder litigation than it would when confronted with the prospect of only government FCPA enforcement.[212] Are additional FCPA compliance and investigation measures a benefit, or a financial cost, to shareholders?

On the other hand, increased FCPA-based shareholder litigation may be a positive development. It is unlikely that, in the 1970s, the drafters of the FCPA envisioned the explosion in global trade and the necessity for fair competition in global markets, i.e., the global importance of the FCPA.[213] Nor is Congress likely to have foreseen penalties in the hundreds of millions of dollars for FCPA violations, or the resulting battering of a company's share value. These collateral shareholder suits are confined to the largest FCPA defendants—publicly-traded companies—and securities law may be an appropriate mechanism for shareholders to obtain compensation for costly, improper behavior by the company and its managers.

B. *Shareholder Derivative Suits May Heighten the Need for Compliance Programs*

Many of the FCPA-related shareholder actions review the adequacy of a company's internal controls in light of the alleged or established FCPA violation. The mere fact of a violation does not necessarily mean that the company's internal controls were inadequate[214] but does result in scrutiny of a company's corporate governance and compliance procedures.

Caremark considered the question of compliance programs and the board's duty to oversee or monitor a company's operations. *Caremark* held that a board should establish an information and reporting system "reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's

[212] In fact, the suits may actually hinder FCPA by distracting management when it is trying to resolve DOJ and/or SEC actions.

[213] The FCPA's prohibition on bribery of *foreign* public officials was unique to the United States for nearly twenty years. It was not until after the adoption of the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) in 1997 that other countries began to implement similar measures. Organization for Economic Cooperation & Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 112 Stat. 3302, 37 I.L.M. 1, *available at* http://www.oecd.org/dataoecd/4/18/38028044.pdf.

[214] Desimone v. Barrows, 924 A.2d 908, 940 (Del. Ch. 2007) ("Delaware courts routinely reject the conclusory allegation that because illegal behavior occurred, internal controls must have been deficient, and the board must have known so.").

compliance with law and its business performance."[215] Today, in an atmosphere of enhanced compliance efforts, plaintiffs may allege that the absence of such procedures represents the kind of "conscious disregard" that signals a breach of fiduciary duty.

In some cases, plaintiffs may argue that the fact that repeated infractions took place in spite of controls indicates that the board deliberately ignored the stated company standards. For example, in the Hewlett Packard action, the plaintiff shareholders detailed the extensive reporting and compliance procedures adopted by Hewlett Packard in its effort to prevent employee misconduct and bring that misconduct to the board's attention. The plaintiffs pointed to failure of directors to prevent misconduct given these procedures as evidence of directors' breach of their fiduciary duties.[216]

Those same measures, however, were identified by the defendant directors as evidence of internal controls, of a "reporting or information system or control" like the ones in *Caremark* and *Stone*.[217] In their motion to dismiss, the defendant directors argued that in *Stone* the Delaware court had established that "[i]n the absence of red flags, good faith in the context of oversight must be measured by the directors' actions to 'assure a reasonable information and reporting system exists' and not by second-guessing after the occurrence of employee conduct that results in an unintended adverse outcome."[218] They also relied on the magistrate's opinion (accepted by the court) in *Baker Hughes*, which found that *Caremark* claims based on FCPA violations could not be asserted when the company had a well-developed program in place to prevent FCPA violations.

In *Dow*, the Delaware Chancery Court noted that a company's compliance system may make a *Caremark* claim difficult. In a footnote to its recommendation that the shareholder derivative action be dismissed for failure to make a demand, the court stated:

> The Dow board has set up policies to prevent improper dealing with third parties. In particular, Dow's Code of Ethics expressly prohibits any unethical

[215] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996). *Caremark* narrowed the holding in *Graham v. Allis–Chalmers Manufacturing Co.*, which had ruled that "absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists." Graham v. Allis–Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. Ch. 1963).

[216] Verified Shareholder Derivative Complaint at paras. 7–8, Saginaw Police & Fire Pension Fund *ex rel.* Hewlett–Packard Co. v. Andreesen, No. 5:10-cv-04720-PVT (N.D. Cal. Oct. 19, 2010).

[217] Director Defendants' Notice of Motion and (A) Motion to Dismiss Plaintiff's Verified Shareholder Complaint and (B) Joinder in Support of Nominal Defendant Hewlett–Packard Co.'s Motion to Dismiss at 13, Saginaw Police & Fire Pension Fund *ex rel.* Hewlett–Packard Co. v. Andreesen, No. 5:10-CV-04720-EJD (N.D. Cal. Aug. 15, 2011) (arguing that a *Caremark* claim could not withstand a motion to dismiss where the board had policies and procedures in place regarding compliance).

[218] Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 373 (Del. 2006).

> payments to third parties . . . [P]laintiffs implicitly acknowledge Dow's "corporate governance procedures." . . . Plaintiffs cannot simultaneously argue that the Dow board "utterly failed" to meet its oversight duties yet had "corporate governance procedures" in place without alleging that the board deliberately failed to monitor its ethics policy or its internal procedures.[219]

C. *Procedural Hurdles May Make Federal Securities Law More Attractive to Plaintiffs than State Corporate Law*

As discussed above in Part IV, plaintiffs in a shareholders' derivative suit must either make a pre-suit demand on the board that the company seek legal redress (a demand likely to be denied and very difficult to review in light of the business judgment rule) or plead with particularity the futility of making such a demand. This requirement is exceedingly difficult for plaintiff shareholders to fulfill. Because the hurdles to success in a state-law-governed shareholder derivative action are so high, FCPA-based shareholder litigation may tend toward securities fraud class actions.[220]

It is not clear that such a tendency would be a positive development. In the wake or the course of an SEC or a DOJ FCPA prosecution, is the crux of a shareholder complaint really whether the company disclosed its bribes in its Form 10-K filings? If that is going to be the required standard, then companies will always be "guilty."

The more productive question is whether the company managers acted responsibly. Treating corporate governance as a matter of securities law (disclosure) may obscure the real question: "Was management's supervision inadequate?"

Thus, FCPA-based shareholder litigation may contribute to the increasing federalization of corporate law.[221] With the enactment of the Sarbanes-Oxley Act of 2002[222] and the 2010 Dodd-Frank Wall Street Reform and Consumer

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[219] *In re* Dow Chem. Co. Derivative Litig., No. 4349-CC, slip op. at 35 n.85 (Del. Ch. Jan. 11, 2010).

[220] The possibility of state corporate governance standards migrating to determination under federal (securities law) rules has been the subject of excellent scholarship. *See generally, e.g.*, Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57 (2009) (analyzing Delaware's corporate law preeminence, and state and federal competition); Robert B. Thompson, *Delaware's Disclosure: Moving the Line of Federal-State Corporate Regulation*, 2009 U. ILL. L. REV. 167 (reviewing Delaware's dominance in the market for incorporations and federal corporate governance regulation); Robert B. Thompson, *Federal Corporate Law: Torts and Fiduciary Duty*, 31 J. CORP. L. 877 (2006) (examining federal law as it relates to corporate governance as an alternative to state fiduciary duty-based remedies).

[221] Of course, the legal predicate of the shareholder litigation discussed here is the FCPA, part of the federal securities laws.

[222] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 and 18 U.S.C. (2008)).

Protection Act,[223] more and more matters traditionally governed by state corporate law are subject to federal regulation.[224] Because the procedural obstacles to shareholder derivative actions, which are governed by state law, may cause plaintiffs to bring their complaints as Rule 10b-5 federal securities law violations, collateral FCPA-based shareholder litigation may push more corporate governance questions to determination under the federal securities laws.

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[223] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841 (2010).

[224] *E.g.*, executive compensation, internal accounting controls, hiring of auditors, etc.